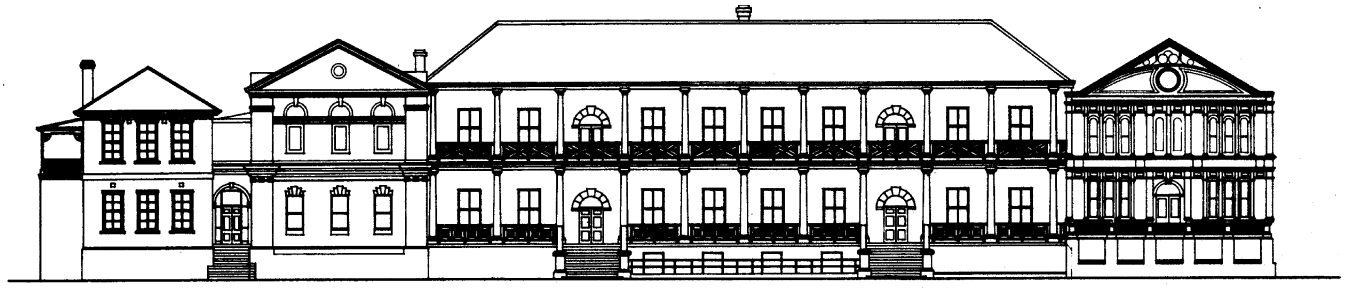
Parliament of New South Wales

JOINT SELECT COMMITTEE ON THE QUALITY OF BUILDINGS

REPORT UPON THE QUALITY OF BUILDINGS



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TERMS OF REFERENCE

(1) (a) The Committee inquire generally into the quality of buildings in NSW to determine whether there are enough checks and balances existing to ensure consumers are guaranteed that their new homes are safe, properly certified and built to satisfactory standards.

(b) The Committee inquire into and report on the certification process created under the Environmental Planning and Assessment Act 1979 and in operation since July 1998, including, but not limited to:

(i) What changes if any, need to be made to tighten the certification process;

(ii) What sort of qualifications experience and conduct is expected of the people who certify buildings and how should their certification be monitored; and

(iii) Whether there is enough regulatory power in the certification system to deal with buildings that do not comply with the approval codes and standards.

(c) The Committee shall also inquire into:

(i) The adequacy of disciplinary procedures available in the certification process;

(ii)The adequacy of current minimum building standards, particularly in regard to waterproofing, thermal and noise insulation in meeting environmental and cost performance expectations in the community; and

(iii)The extent to which matters such as inappropriate building standards and shortfalls in the current certification system have resulted in increased pressures on the Home Warranty Insurance Scheme.

(d) The Committee inquire into and report on the builders' licensing scheme as established under the Home Building Act 1989, including, but not limited to:

(i) The qualifications, experience and conduct required for the licensing of the people who build our residential buildings;

(ii) The adequacy of the checks and balances in the builders' licensing scheme; and

(iii) The role of the Department of Fair Trading and the Consumer, Trader and Tenancy Tribunal in dispute resolution under the Act.

CHAIRMAN'S FOREWORD

This Inquiry into the Quality of Buildings has been conducted against the background that homeowners, individuals and groups from all sectors of the building industry have expressed concerns about the current state of home building in New south Wales. Complaints from a variety of sources have indicated that the current system is inefficient, not coordinated and has resulted in hardships for home buyers as well as for building practitioners.

The Committee has received over 200 submissions from all those involved in the property market and has taken substantial evidence from individual homeowners, based on their own experiences. This forms the basis for the case studies detailed in the Report and puts a human face to the issues addressed.

The building regulation system should rely on three core pillars. These are responsibility, accountability and liability. Adherence to these pillars should be a major priority in regulating one of the most costly and significant financial products in the market, namely a house. Yet, there is more consumer protection afforded in the purchase of other consumer items, such as a defective motor vehicle, where greater standards of responsibility, accountability and public liability apply to rectification and redress.

The greatest form of consumer protection is prevention and getting the right outcome at the beginning. For most people, there are only minor inconveniences. However, as the case studies documented in the Report demonstrate, this Inquiry highlights examples of system failure with drastic and sometimes catastrophic impacts on people's property values, peace of mind and even their own safety. The overwhelming message is that the building regime is complex, messy and poorly understood by building practitioners as well as consumers. The lack of consistent definitions about what constitutes quality from the point of view of Building Codes, the certification process and the general lack of professional rigour in the system, disadvantages potential home buyers and leads to a reduction in consumer confidence.

The complicated avenues for consumer complaints and dispute resolution further erodes consumer confidence and undermines the building industry generally. When problems occur under the current arrangements, consumers and building practitioners become involved in a protracted and difficult process of resolving their differences. The lack of streamlined procedures for quick resolution contributes to costs and further aggravation for all. It is therefore in the interests of both consumers and good builders to ensure that bad practitioners are driven out of the market and do not continue to challenge claims and manipulate the dispute process.

The Committee has made over 50 recommendations to improve the system and current arrangements and to provide greater consumer protection. It is essential that everyone involved in the building process is clear about their professional and personal responsibilities, that there are transparent checks and balances in the system, and that there is the ability to solve problems, as they arise, in the most efficient and fair manner possible.

While recognising that there are many components involved in getting the system to work seamlessly, the major recommendations made in this Report should simplify the overall operation of the industry and ensure that the various players communicate more effectively.

David Campbell MP
Chairman

EXECUTIVE SUMMARY

Homes are the basis upon which most people establish their lives. They provide the environment for financial, physical and psychological security and development. They are one of the anchors of our contemporary way of life.

For the majority of individuals and families, the purchase of a home is the most significant financial decision they will undertake. The complexity of constructing homes means that consumers are unable to determine the safety and quality of their purchase without some guidance. For these reasons, the purchase and building of home must be treated differently from any other product.

When problems occur in home building, the impact extends in many directions. Where the problems relate to actual structural integrity and safety, the consequences can be life threatening. In most cases, financial costs for rectification, dispute resolution, rehousing and/or sale costs will be incurred. In some cases these costs may lead to significant debt and even bankruptcy for both consumers and builders. There are also human costs from problem buildings that affect employment, relationships, general health and wellbeing of individuals and families.

The NSW home building industry has been subject to substantial legislative change and market expansion over the last decade. Concerns have arisen that the combined impact of these two changes has been to reduce the quality of home building.

This inquiry has broadly examined the home building industry in NSW, identifying its current strengths and weaknesses and capacity to deliver a quality product. The Committee's view is that the quality of buildings produced is fundamentally linked to the quality of the home building process underpinning it. As such, the Committee has examined the quality of each element of the building process including licensing, standards, consumer information, approval and planning processes, and dispute management and resolution.

Consumers, the building industry, State agencies and Councils have put forward a multitude of building quality issues to the Committee, and highlighted problems that occur at various stages of the building process.

Ultimately the objectives identified by the Committee for home building process in NSW are:

- The building of quality homes which are safe and good value;
- Satisfied customers;
- A viable industry for building practitioners; and
- Effective dispute resolution for all parties.

The Committee believes that the recommendations in this report will assist the industry reach these objectives through:

1. consolidating building regulatory functions within Government;
2. increasing the accountability of industry participants;
3. improving industry education and consumer awareness;
4. improving the planning and certification process; and
5. making the system more pro-active to prevent problems and disputes systems more effective and timely, when problems do occur.

Whilst acknowledging that many consumers have a positive experience of home building, both the industry and consumers have told the Committee that quality improvement of the industry and the regulatory framework is essential. Consolidation of regulatory operations, early identification of potential problems, and increased accountability of building practitioners is required.

The recommendations proposed involve specific changes within the current NSW building process as well as changes in the roles and activities of industry participants including Government agencies, Councils, builders and building practitioners, and consumers.

The Committee firstly recommends a significant restructure of regulatory arrangements to create a single entity primarily responsible for the home building industry in NSW- the **Home Building Compliance Commission.** The Commission will be responsible to the Minister for Fair Trading and its performance will be audited after two years of operation.

The Commission will relieve the Department of Fair Trading of its current responsibilities for builders' licensing, compliance, and investigations, and consumer assistance for home building. It will also take over the role of PlanningNSW in the accreditation of private certifiers.

The Commission will undertake licensing, supervision, disciplining and auditing of builders and other building practitioners, including building designers, architects, engineers and both private and Council certifiers. It will also serve as the single front desk for consumers with home building problems and empower assessors to deliberate building disputes on-site, identifying defects and making orders to rectify work.

In the area of licensing, the Committee is keen to improve current standards of continuing professional development for all building practitioners and has recommended that license renewals be contingent on demonstrated competencies and knowledge of the Building Code of Australia, current awareness of legislative changes and business management skills as well as meeting financial soundness and insurance requirements. It is important that building practitioners are familiar with the latest developments in knowledge and technology, not only to deliver quality products, but also to maintain professional reputations and encourage new entrants into the industry.

The Committee has also identified several issues concerning the **Building Code of Australia** which require action. These include raising the current minimum standards for noise transmission, revising the Code for waterproofing standards and examining the alternative solutions provisions. In order to improve general knowledge of the Building Codes, the Committee has recommended that consumer access should be improved and that a consumer information booklet be prepared indicating acceptable standards and tolerances for building work capturing both interpretation of Building Codes and quality benchmarks.

As a means to improve the consumer safety net for many prospective property owners, the Committee has made a series of recommendations to improve access to essential consumer information and to provide centralised advice and advocacy services. The Committee has recommended the establishment of a **Home Building Advice and Advocacy Centre** to assist consumers in navigating around the fragmented and complex nature of contracts, building codes, licensing arrangements and dispute processes regulated by a range of different instrumentalities. The Centre will be established as a non-government organisation, funded by the Commission to provide independent advice.

Another component of the consumer safety net regime is the Committee's recommendation to provide a standard home building contract for potential purchasers. This should assist consumers and builders in determining the specific details of the house to be built and agreeing to documented and realistic specifications as to what is being paid for, thus providing better consumer protection guarantees.

Implicit in these recommendations is recognition that in any contractual arrangement between two parties, namely purchasers and providers, be they builders or developers, there are mutual obligations and responsibilities. However, there is a need to overcome the current information and knowledge imbalance between intending property owners and the industry.

The Committee also recommends that the **Principal Certifying Authority (PCA)** for a building should be appointed by the property owner, rather than the builder. Moreover, the Committee considers that the role of the PCA should be clarified in legislation to better delineate the role of Local Councils and the issuing of the appropriate certificates. The Committee also recommends that the PCA undertake mandatory critical stage inspections to ensure that the finished product reflects the development consent.

In its examination of the role of Local Councils, the Committee has made a series of recommendations to improve the ability of Councils to intervene where the building work fails to comply with consents given such as immediate 'stop work' orders.

Another major area of concern to the Committee is that of complaints processing and dispute resolution. Here, the Committee has recommended, among other things, that the process be streamlined and synchronised, and that current duplication be eliminated between the Department of Fair Trading and the recently established **Consumer, Trader and Tenancy Tribunal.** The Commission should ensure that dispute processes are better managed, by replacing the current Building Conciliation Service under the Tribunal, with a single government front desk for license complaints and building disputes within the Commission. The Commission will have dedicated resources to ensure building practitioners comply with their statutory and contractual obligations.

In order to ensure that the Consumer Trader and Tenancy Tribunal will achieve the objectives set for it by the Government, the Committee has recommended that the review of the Act scheduled before 2005, should include a performance audit of the Tribunal's home building disputes activities.

The last part of the Report deals with multi-unit dwellings, where consumers purchase an apartment from a developer, who for the purposes of registering a strata scheme, is the original owner. The Committee documents the potentially serious consequences of not being adequately informed about the impacts of such an arrangement and makes a series of recommendations to provide vital information at the point of sale.

As well as making recommendations to improve the effectiveness and efficiency of the current system, the Committee wants to ensure, as far as practicable, that all players are working towards a common goal. That is, a quality product. A central theme running through all the Committee's recommendations is the provision of more information and improved communication between everyone involved. These recommendations should increase the knowledge base for all concerned and minimise the potentially devastating financial and personal impacts on consumers and industry alike.

LIST OF RECOMMENDATIONS

Chapter One – Building Quality and the Home Building Process in NSW (Recommendations 1 – 4)

The Home Building Compliance Commission

RECOMMENDATION 1
The Committee recommends that:

- A **Home Building Compliance Commission** (hereafter the Commission) be established forthwith to oversight home building regulation in New South Wales. The Commission is to be separate from the Department of Fair Trading and responsible directly to the Minister for Fair Trading.
- The Commission's functions are to include:
  i) builder and other practitioner licensing, disciplining and auditing, including private certifier registration and auditing;
  ii) industry practitioner licensing;
  iii) establishing and maintaining industry-wide registries;
  iv) establishing a front desk for consumer building complaints and disputes;
  v) policy advice and development;
  vi) liaising with industry players; and,
  vii) maintaining high level of practitioner skills and qualifications.

RECOMMENDATION 2
The Committee recommends that a performance audit of the Commission be undertaken by the NSW Audit Office after two years of operation.

RECOMMENDATION 3
The Committee recommends that a **Home Building Advice and Advocacy** Centre (hereafter the Centre) be established, as a non government organisation to provide one-stop advice on home building disputes, funded by the Commission. The Centre will :

- have a consumer education role,
- provide access to licensed building consultants; and
- be able to charge on a fee-for-service basis for advocacy and specific legal advice.

RECOMMENDATION 4
The Committee recommends that formal information exchange protocols be developed between:

- Local Councils and the Department of Fair Trading and the Consumer, Trader and Tenancy Tribunal (hereafter the Tribunal) regarding Council orders against building practitioners;
- NSW Police and Department of Fair Trading and the Tribunal on breaches of the Home Building Act and potential fraudulent and other criminal activity;
- PlanningNSW and Department of Fair Trading and the Tribunal on audit results revealing problems with builders and certifiers; and
- the parties to these protocols will be revised with the establishment of the Commission.

Chapter Two – Builders Licensing and Regulation of Building Practitioners (Recommendations 5 – 17)

Reform of the practitioners licensing regime

RECOMMENDATION 5
The Committee recommends the Commission revise:
- the names of licences into 'plain English' titles; and
- the categories of licenses to align with building types ie low, medium and high rise buildings.

RECOMMENDATION 6
The Committee recommends that the Commission assess the effectiveness of recent licensing reforms with particular reference to concerns about:
- perceptions of a relaxation of entry requirements for licensed builders;
- the appropriate ratio of supervisors to the volume of work undertaken by a building company or firm; and
- the misuse of owner-builder permits.

RECOMMENDATION 7
The Committee recommends that the Commission, as the new licensing body, should require continuing professional development for licensing renewal which includes knowledge of the Building Code of Australia and business skills training. The Commission should also provide updated information on building regulations and requirements to licensees.

RECOMMENDATION 8
The Committee recommends that checks for financial soundness also be part of licensing criteria for builders.

RECOMMENDATION 9
The Committee recommends that the system of license offences and penalties be revised to include:
- use of warnings limited to minor licence breaches and inadvertent errors;
- application of on the spot penalties;
- increased use of licence suspensions/cancellations for repeated serious breaches; and
- scaled penalties to apply in relation to business turnover.

RECOMMENDATION 10
The Committee recommends that a vigorous investigations unit be established in the Commission. It should be staffed by industry experts and be resourced to be pro-active and responsive to complaints and to conduct prompt investigations.

RECOMMENDATION 11
The Committee recommends that the Government consider looking at models and undertake detailed consultations with the community with a view to determining the need to implement greater regulatory control of building standards in the non-residential building sector.

RECOMMENDATION 12
The Committee recommends that expansion of the building license regime should occur with:

- licensing regime for other building practitioners in the home building industry to include builders, subcontractors, certifiers, building consultants and engineers.
- private certifiers and local council certifiers to be subject to the same licensing and audit regime.
- licensing of builders and accredited certifiers be undertaken by the one administrative body.
- licensing conditions of all building practitioners be extended to include:

i) continuing professional education requirement for license renewal;
ii) professional indemnity insurance (except for builders who are required to have Home Warranty Insurance); and
iii) licensees subject to disciplinary, penalties and audit regime.

RECOMMENDATION 13
The Committee recommends that certain new powers and offences be created within the building practitioners licensing regime including:

- powers to Director-General of Planning to suspend accredited certifiers and ultimately powers to the Commissioner to suspend all relevant licenses; and
- fines or suspension/removal of the accreditation or license for breaches of relevant Acts and regulations, unsatisfactory professional conduct, or serious defective work.

RECOMMENDATION 14
The Committee recommends that the Commission undertakes both complaints based auditing and random auditing of all licensees.

RECOMMENDATION 15
The Committee recommends that the building practitioner registry be made available online forthwith and that historical offences and breaches be added to the current database.

RECOMMENDATION 16
The Committee recommends that the Commission :

- establishes a process for regular industry skills audits to identify new industry needs and address the potential decline in new entrants to the industry;
- examines the adequacy of current training strategies to meet identified training needs; and,
- develops “structured skills enhancement training” programs for unskilled workers already in the home building industry, in addition to traineeships. These should be identified and implemented jointly through government and industry initiatives.

RECOMMENDATION 17
The Committee recommends that the Commission targets specialist areas in the industry, where there is a high incidence of defect notification, such as waterproofing, tiling, and concreting, for specific training initiatives. This should be done in consultation with peak industry bodies representing contractors in the specialist trade.

Chapter Three – Building Codes and Standards (Recommendations 18 – 28)

Understanding and knowledge of the Building Code of Australia

Recommendation 18
The Committee recommends that sections of the Building Code of Australia (the Building Code), relating to residential buildings, be drafted in "plain English" format to be more user friendly for builders and consumers.

Recommendation 19
The Committee recommends that consumer access to the Building Code should be improved by the Australian Building Codes Board, and in NSW, the Code should be accessible through the Commission, the Advice and Advocacy Centre, and with copies available in Local Council Libraries.

Recommendation 20
The Committee recommends that a **consumer information booklet** be prepared by the Commission. The booklet should outline acceptable standards, tolerances and performance required of builders by the Commission with reference to:

- the Building Code of Australia where applicable;
- and where the Code is silent, outline acceptable quality or "look and feel" standards as interpreted by Commission and the Tribunal.

The booklet can be used as a starting point by consumers to identify if they should pursue their building problem with the Commission and the Tribunal.

The booklet should be a mandatory attachment to all home building contracts.

Alternative Solution issues

Recommendation 21
The Committee recommends that the application of the Building Code of Australia in NSW be refined to clearly prescribe "Performance Requirements" with measurable and objective criteria for certain elements in Class 1A buildings (freestanding homes) to reduce disputes and uncertainty in home building matters.

Recommendation 22
The Committee recommends that PlanningNSW coordinate examination of the:

- issues raised by the NSW Fire Brigades about ambiguities in the Building Code relating to fire issues;
- referrals of fire engineered alternative solutions to the NSW Fire Brigades; and,
- the extent to which the NSW Fire Brigades recommendations in relation to fire engineered alternative solutions should be adopted.

Recommendation 23
The Committee recommends that a Government expert panel be established within PlanningNSW to look at 'alternative solutions' under the Building Code. The panel would:

- determine standard methodologies for verification of alternative solutions;
- examine alternative solutions as referred to it by Councils and make recommendations about their suitability;
- examine all fire engineered alternative solutions which would automatically be referred by Councils. The panel would include the NSW Fire Brigades for this purpose; and
- collate information about alternative solution designs to develop a body of knowledge and precedents.

Recommendation 24
The Committee recommends that the powers of Councils to put in place requirements higher than those prescribed by the Building Code should be retained at this time.

Recommendation 25
The Committee recommends that Planning NSW annually survey the Building Code variations imposed by Councils, assess their appropriateness, and identify trends to feed into revisions of the Building Code.

General Building Code issues

Recommendation 26
The Committee recommends that minimum sound insulation requirements of the Building Code be increased and that consideration be given in the current review process to the costs and benefits of requiring in-situ testing of "deemed to satisfy" sound solutions for Class 2 to 10 dwellings.

Recommendation 27
The Committee recommends that building industry look closely at adopting a voluntary "star rating" system to encourage standards above the Building Code for sound insulation.

Recommendation 28
The Committee recommends that the Commission examine appropriateness and scope of Australian Standards referred to the Building Code to address the high incidence of waterproofing problems in new home building.

Chapter Four - Consumer Advice and Information (Recommendations 29 - 32)

RECOMMENDATION 29

The Committee recommends that the Home Building Advice and Advocacy Centre, identified in Recommendation 3, be staffed by officers with expertise in residential home building construction, building contract obligations and consumer protection. The Centre should:

- offer comprehensive building information to potential homebuyers; and
- provide advice on all aspects of house construction and purchase, including contract negotiations, insurance, conciliation and complaints and dispute resolution procedures.

In delivering the service, the Centre should:

- produce independent consumer information and advice in a consolidated format;
- cover all aspects of the building industry in the form of a guide book, a video, and web site that are regularly updated; and
- conduct consumer training sessions on a regular basis.

RECOMMENDATION 30

The Committee recommends that the building system information available to consumers be enhanced specifically by:

- providing information concerning builders licensing, home building contracts, complaint forms, Building Codes information and other relevant documentation free, on-line and from the Centre;
- a rating system based on performance to assist consumers in identifying better performing builders.

RECOMMENDATION 31

The Committee recommends that:

- that a “Guide to Choosing a Principal Certifying Authority” be developed and be a mandatory attachment to all Council DA forms; and
- that a “Guide to Off the Plan and Strata Unit Purchases” be developed and become a mandatory attachment to sale of unit contracts.

RECOMMENDATION 32
The Committee recommends that the Commission design and establish by regulation:

- a number of standard conditions of home building contract, which cannot be excluded or modified, covering matters common to most residential building contracts and stipulating that:

i) the construction quality of the building works are to conform with the Building Code of Australia specifications or relevant Australian Standards;
ii) the design plans must be attached to the contract;
iii) variations to the design plans must still conform with Building Code requirements or satisfy the development consent conditions;
iv) variations to the design plans must be agreed to in writing by all parties to the contract;
v) the Conveyancing Act be amended to require that the Home Warranty Insurance policy must be attached to the contract; and
vi) the final payment (of 5 per cent of contract price) be withheld until the issuing of the Occupation Certificate at settlement.

- that these conditions be included in a model contract created by the Commission;
- that the Commission be given powers to accredit contracts used by other agencies or industry bodies which include these standard conditions; and
- penalties be imposed on authors who make false claims that their contract has been accredited by the Commission.

Chapter Five – Planning, Certification and Council Issues (Recommendations 33 - 47)

RECOMMENDATION 33
The Committee recommends that the Principal Certifying Authority (PCA) should be appointed by the property owner rather than the builder. When the property owner is a developer, the appointment and activities of the principal certifying authority will be monitored through a "close relationships" auditing system undertaken by the Commission.

RECOMMENDATION 34
The Committee recommends that the role of the private certifier be clarified in the legislation as proposed by PlanningNSW to ensure:

- the identification of the public interest role of the PCA;
- the Councils role and responsibilities in relation to building projects; and
- the PCA's role in issuing the Construction Certificate and Occupation Certificate.

RECOMMENDATION 35
The Committee recommends that mandatory critical stage inspections be required to be undertaken by the PCA (council or private accredited certifier). The mandatory stages will vary for different domestic building types but should include as a minimum:

- prior to placing a footing;
- on completion of the framework;
- prior to placing a reinforced concrete structure;
- on completion of waterproofing activity; and
- on completion of building work.

RECOMMENDATION 36
The Committee recommends that on site inspections of critical stages be undertaken by the PCA.

RECOMMENDATION 37
The Committee recommends that
- on-site display of builder and PCA contact details be required under legislation; and
- the PCA be required under legislation to notify adjoining and/or affected property owners in writing of their appointment, their contact details, their role in the building process, and appropriate complaint procedures.

RECOMMENDATION 38
The Committee recommends that complaints management of both Council certifiers and private certifiers be undertaken by the Commission.

RECOMMENDATION 39
The Committee recommends that a review of the effectiveness of the Complying Development Consent regime be undertaken by the Commission, in conjunction with PlanningNSW.

RECOMMENDATION 40
The Committee recommends that the term "not inconsistent with" in Construction Certificates should be defined by reference to "significant" and "non significant" variations permitted by Section 96 amendments. Significant variations should require a Section 96 amendment and by default, indicate that a variation is inconsistent with the Development Consent.

RECOMMENDATION 41
The Committee recommends that Occupation Certificates include the requirement that the building be generally consistent with the Development Consent and the Construction Certificate.

RECOMMENDATION 42
The Committee recommends that Occupation Certificates also be required for Class 1A buildings (freestanding homes) with an exemption from this requirement for buildings constructed by holders of owner- builder permits.

RECOMMENDATION 43
The Committee recommends that provisions should allow for an Interim Occupation Certificate in particular circumstances, provided key BCA compliance relating to health, safety and amenity, is not outstanding.

RECOMMENDATION 44
The Committee recommends that an accredited certifier (Council or Private) cannot issue a Strata Subdivision Certificate until an Occupation Certificate has been issued.

RECOMMENDATION 45
The Committee recommends that:
- Councils be given powers for immediate 'stop work' orders and appropriate penalties be introduced where work fails to comply with the relevant development consent or when a relevant consent does not exist; and
- increased penalty provisions be considered for Council's to enforce compliance with Council's annual fire safety statement regimes to minimise risk to residents and to avoid protracted delays associated with progressing Court action.

RECOMMENDATION 46
The Committee recommends that Council's Development Application policies should not permit discounts for using the Councils as the nominated PCA.

RECOMMENDATION 47
The Committee recommends that Councils should inform property owners of the Council's role of archivist of the Development Application and associated certificates from the PCA after a development is complete, and make provisions for that information to be readily provided to property owners on request.

Chapter Six – Dispute Resolution (Recommendations 48 - 51)

Recommendation 48
The Committee recommends that streamlined dispute management by the Commission consists of:

- a single front desk for consumer building problems, replacing the Building Conciliation Service of the Tribunal, to coordinate licence complaints and dispute management;
- automatic on site determinations and orders be given by Commission assessors regarding defective work, prior to any dispute proceeding to the Tribunal (this does not preclude parties settling prior to hearing);
- common definitions of defective work to be used by the Commission and Tribunal; and
- the assessments/ reports of the Commission have standing in the Tribunal and be recognised as independent.

Recommendation 49
The Committee recommends that:

- the Tribunal establish a panel of accredited building experts, who will jointly report to parties to a dispute.
- the legislation provide that only one report from an accredited expert may be jointly filed by the parties in the Tribunal proceedings without leave.
- the legislation provide that the parties shall be jointly responsible for the costs of such a report in the Tribunal, subject to any later costs order.

Recommendation 50
The Committee recommends that the review of the Act establishing the Tribunal, include a performance audit of its home building dispute activities to identify if those objectives are being achieved, its resourcing adequate and its staffing appropriate. Specifically the performance audit should examine:

- reduction of legalistic operations
- effective caseload management
- preferred jurisdiction arrangements
- decision consistency and appropriateness
- adjournment frequency
- management of cases caught between legislative amendments

Recommendation 51
The Committee recommends that the Consumer Trader and Tenancy Tribunal be required to refer its decisions regarding builders and other practitioners to the license/ audit unit of the Home Building Compliance Commission.

Chapter Seven - Strata Issues (Recommendations 52 - 55)

RECOMMENDATION 52
The Committee Recommends that an information document setting out planning requirements and information about the Strata Schemes Management Act, including:

- the potential exercising of priority voting rights by mortgagees;
- an estimate of strata fees payable; and
- a draft budget to substantiate the estimated strata fees

be attached to the sale contract for strata title developments, to assist the purchaser in making more informed decisions.
This document should also specify the rights of individual purchasers and describe the process of seeking legal redress for any problems with building defects and home warranty insurance.

RECOMMENDATION 53
The Committee recommends that any management contract entered into in the initial period must be registered in the by-laws of the strata scheme. All management contracts should be subject to annual reviews with agreed performance measures, renewable for a maximum of 5 years

RECOMMENDATION 54
The Committee recommends that there must be greater disclosure provisions in relation to linkages between the contractual parties, ie the developer/owner and/or strata/building manager and the contractors hired to provide services and to specify competitive tendering processes for work contracted.

RECOMMENDATION 55
The Committee recommends consideration be given to a differential system of “corporate governance” for larger complex strata developments, implemented under the Strata Schemes Management Act, to impose greater emphasis on the owners corporation’s duty to ensure asset protection.

CHAPTER 1 Building Quality and the Home Building Process in NSW

1.1 INTRODUCTION

On 13 March 2002, the Minister for Planning, the Hon Dr Andrew Refshauge MP, moved in Parliament the setting up of the Joint Select Committee on the Quality of Buildings. The Committee was to report by 19 July 2002, on the terms of reference determined by the Parliament.

Broadly the Committee on the Quality of Buildings was asked to determine:

> *whether there are enough checks and balances existing to ensure consumers are guaranteed that their new homes are safe, properly certified, and built to satisfactory standards.*

The Parliament established the Committee because of a perception in the community that there were significant problems with new residential construction.

The Committee has consulted as widely as possible. It received over two hundred submissions, held 9 days of hearings, taking evidence from 76 witnesses. It has amassed a considerable body of material. Approximately 240 submissions were received from the full range of stakeholders – property owners (25%), building practitioners(25%), Councils (20%), industry bodies and regulatory organisations (23%). [See Appendicies 2 and 3]

All the individuals and organisations that have contributed to the Inquiry have provided considerable experience, knowledge or insight into aspects of the home building industry. There was surprising unanimity on a range of problems and possible solutions.

In finding solutions to the problems put before it, the Committee has not, and could not, be part of the dispute resolution process. It cannot adjudicate on individual cases. That is not to undervalue in any way the individual cases brought to the Committee's attention. They have put a human face on the problems confronting consumers. They have been vital in helping the Committee understand the problems that have occurred and to get a picture of the overall weaknesses in the system, in order to develop recommendations.

The Committee's approach in dealing with its terms of reference has been to review generally, the operation of the home building industry in New South Wales. That is, the report takes an overall look at the process that is intended to deliver quality residences in New South Wales. In so doing, it has addressed the specific elements identified in its terms of reference, those being:

- the private certification process,
- minimum building standards,
- builder and other practitioner licensing, and
- the roles of the Department of Fair Trading and the Consumer, Trader and Tenancy Tribunal.

It is impossible to review these issues separately from the role of local Councils and, accordingly, the Committee has included reference to Councils as needed.

In the remainder of this Chapter, the Committee provides an overview of the home building industry process, identifying systemic problems and making recommendations to improve the system as a whole. These recommendations provide a general framework for the future regulation of home building in New South Wales. The chapters that follow look in more detail at specific aspects of the system, making recommendations accordingly.

1.2 WHY IS THE HOME BUILDING INDUSTRY UNIQUE?

From a consumer point of view, the home building industry displays some unique features.

Dwellings are the basis upon which most people establish their lives. They provide the environment for financial, physical and psychological security and development. They are one of the anchors of our contemporary way of life.

For the vast majority of individuals, the purchase of a new dwelling is the most significant and critical financial decision they will make. It can be a unique and daunting experience in which consumers find themselves in a weak and vulnerable position. As Ms Hole from the Law Society said, "these matters usually involve consumers in the single most important transaction they ever make".[1]

The complexity of constructing dwellings means that consumers are unable to determine the safety and quality of their purchase without some, indeed considerable, guidance. Yet, they find themselves in a "once in a lifetime" situation with players who deal with the issues on a daily basis. This can put the consumer in a powerless situation, swept along by currents over which they have no control.

As one submission described, the customers "are relatively inexperienced in technical and contracting matters, and to some extent, rely on service quality to fill the gap in their understanding".[2] In a similar vein, Councilor Sartor told the Committee a free market system is premised on equal knowledge but, in this system ".. the consumer does not have a clue…. This is where the market system falls down". [3]

Happily, most people survive the process without significant problems. The professional advice and support they engage, enable them to make reasonably informed decisions that serve them well.

For some, though, things go wrong and when they do the unique nature of this industry almost guarantees that the resulting problems generate major consequences. Consumers end up with a dwelling they regard as inferior, often of unacceptable quality. It can even be unsuitable for occupation.

And when things go wrong, it seems that the consumer pays the price. Many consumers who have told their story to this Committee, have had their lives devastated.

[1] Transcript of Evidence 23 May p54
[2] Submission No. 160 p2
[3] Transcript of Evidence 24 May p7

As the Committee learnt time and again through case studies provided in submissions and at public hearings, when things do go wrong, the impacts extend in many directions. Where the problems relate to actual structural integrity and safety, the consequences can be life threatening. Financial costs to obtain rectification, dispute resolution, rehousing and/or sale costs can mount. In some cases, these costs may lead to significant debt and even bankruptcy. The human costs of problems such as impact on employment, relationships and general health and wellbeing of individuals and families are also a major concern.

The importance, therefore, of a building industry that always delivers quality residential buildings to the reasonable expectations of consumers cannot be underestimated, a point acknowledged by the Housing Industry Association:

> ***Mr PYERS:****….. The decision to purchase a home is the most important financial commitment that any individual can make. This is why disputes between builders and their clients are indeed some of the most emotive disputes that one can find. HIA views any perception or report that there are dodgy or shonky builders or that building standards are inadequate very seriously, as this leads to an erosion in the all important consumer confidence in the industry. If consumers doubt the capacity of the builder to do a proper and workmanlike job or think that their new house for which they have mortgaged their lives will fall down because building standards are not good enough, then they will not have confidence in the housing industry.*[4]

The Committee is not arguing that in all cases the consumer is right. Consumers can make poor or ill informed decisions and, while the catalyst for this Inquiry has been consumer problems, the Committee is of the view that the best outcome in home building will occur when the home building process works fairly and in the interests of all participants.

Given the major consequences for individuals when things go wrong and the power imbalances in the process, governments should and do have a major role in the home building industry.

1.3 WHAT DOES "QUALITY" IN HOME BUILDING MEAN?

There are certain community expectations of the home building industry. These expectations can be summarised in the single descriptor – "quality". However, the term "quality" proves to be elusive and, in the context of home building, means many different things.

According to the Department of Fair Trading (Mr Schmidt), "there is no definition of quality.[5] Mr O'Connor, the Director-General of the Department, discussed "quality" at public hearings. He told the Committee:

> ***Mr O'CONNOR****: ….The words "building quality" may, depending on the circumstances in which they are used, have different meanings. The quality of work to be performed under a building contract will usually be specified in the contract and specifications. The level of quality may be dependent on the cost of the work. The question of quality might arise in relation to the minimum acceptable standards for the design and construction of buildings set by the Building Code of Australia.*

[4] Transcript of Evidence 24 May p7
[5] Transcript of Evidence 10 May p58

> *When people talk about the quality of buildings, they may also be talking about the workmanship. Complaints about building work can range from minor aesthetic problems to serious defects, involving major structural failure. Disputes often centre on whether work has been performed in a good and workmanlike manner. Under the Home Building Act, the contract is deemed to contain statutory warranties in relation to the work.*

Significantly he told the Committee that:

> *[T]he term "quality" appears only twice in the Home Building Act - once in relation to kit homes and once in relation to exhibition homes, and even then "quality" is only used in relation to the quality of materials. The term is not used at all in the regulations".*[6]

The Chairperson of the Consumer, Trader and Tenancy Tribunal, Ms Chopping, informed the Committee that "quality" issues formed a major proportion of the Tribunal's activities:

> ***Ms CHOPPING**: ….If we look at the context of those categories of disputes that come in, if we then add to that the fact that almost 80 per cent of those disputes are for less than $10,000, from the files that I have looked at, it is quality issues.*

While Ms Chopping did not define "quality" in this situation, the implication seems to be that it is the "quality" of workmanship which is in dispute. Mr Schmidt went on, however, to try to clarify this:

> ***Mr SCHMIDT**: If I could again add a point there - this was mentioned in the earlier discussions when Ms Chopping was not present - it depends what you mean by quality there, because quality might be that the consumer believes that the work was not done in accordance with the specification set out, but it may be a whole spectrum of things from how do the tiles match.*
>
> ***Mr COLLIER**: I think we can all play with what quality means, but fundamentally they are going there because they are upset, they have not got what they have paid for. It is as simple as that.*[7]

Mr Donaldson from the Building Code of Australia explained to the Committee that "quality" actually had a number of applications. The views of the representative of the Building Code on "quality" are quite important in the context of the Inquiry because there is an expectation among consumers that the Code will deliver "quality" in a generic sense.:

> ***Mr DONALDSON:** ….The building code cannot be expected to deliver quality construction, in terms of the way in which a tradesman works. It does not address that issue; that is a totally separate element.*
>
> ***ACTING-CHAIR:** Do you say that the building code cannot be expected to deliver quality construction?*
>
> ***Mr DONALDSON:** If I said that, what I mean is quality workmanship…. The building code is only part of the story.*[8]

This issue of "quality" was also raised by the Building Designers Association. Its representative posed the following questions to Committee Members:

> ***Mr WIEGMANN:** … I do not know whether the word "quality" has been clearly defined. Are we talking about just waterproofing and acoustic performance? Are we talking about the longevity of a building? Is a project home supposed to last only 20, 50 or 80 years? Are we talking about whether the architraves and skirting are to be fixed to a certain quality or is just fixing them to the wall any old way good enough? When I first looked at*

[6] Transcript of Evidence 10 May pp1,2
[7] Transcript of Evidence 10 May pp1,2
[8] Transcript of Evidence 20 May p51

> *this I wondered what you meant by quality of buildings. How far do you want to go with that?*[9]

Perhaps the best summary of the issue came from the representative of the Building and Construction Council of New South Wales who observed:

> ***Dr TYLER:*** *…Looking at the issues a bit more broadly, we believe the concept of quality is subjective. The expectations of client, designer and builder may be quite different, and sometimes price is the determining factor. Quality is not defined in the Building Code of Australia or the regulations. Building contracts avoid the issue, because they are customarily drafted by the contractor to serve his own interests with little input from the client. Building certifiers, whether council staff or private certifiers, are concerned with compliance with regulations and are neither expected nor trained to measure quality aspects.*[10]

Professor Jeary put it pithily to the Committee, "*I would comment that quality [of buildings] is a moving target*".[11]

There is certainly an expectation amongst consumers, that certification is a safeguard against poor quality workmanship. However, Mr Juradowitch from Ku-Ring-Gai Council advised that the inspection process does not guarantee workmanship:

> ***Mr JURADOWITCH:*** *….I think there is a misconception that building inspections are going to guarantee you good quality buildings and that is just not the case. It will not pick up faulty workmanship.*[12]

In its submission the Inquiry, Marrickville Municipal Council addressed the notion of "quality". It noted that "a structurally sound building does not necessarily mean that a building has achieved an acceptable standard of quality and finish".[13] The Council argues that "standards of quality need to be written into the building regulations" and that "a system needs to be developed to build quality into a building at every stage". The Council recommends that "an occupation certificate should have a reference to quality" with enforcement through a series of certificates which would establish a complete list of licensed contractors on the job (with all relevant details, including insurance etc).

There is no doubt in the Committee's mind that the nebulous nature of "quality" has been an ongoing problem in home building. The issue here is that the notion of "quality" is not clearly defined nor articulated and, accordingly, is the cause of considerable confusion and indeed dispute. Clearly, "quality" has at least two meanings or applications in the context of home building. The first relates to the quality to be delivered by building codes and standards – a minimum safety and structural integrity that applies to all construction and the second relates to quality of workmanship and products.

The two applications are theoretically independent of each other, one being imposed through mutually agreed State government regulations, and the other through a contract, dependent very much on the cost of the project. However, some of the "quality" determined by regulation (the Codes) relate to amenity. Things such as waterproofing and noise attenuation, if they are deficient, are regarded by consumers as poor workmanship and a matter for the contract. This is a recipe for confusion.

[9] Transcript of Evidence 20 May p108
[10] Transcript of Evidence 6 May pp30/1
[11] Transcript of Evidence 23 May p70
[12] Transcript of Evidence 6 May p62
[13] Submission No 205 p11

It is probably fair to say that of these two "quality" elements, the quality of workmanship is pre-eminent for the consumer. This is because consumers expect the "quality" delivered by the BCA (at least the safety standards) to be not negotiable. They should occur as a matter of course in any construction. As will be shown in this report, this does not always happen. Having justifiable expectations that "quality" of standards are prescribed, consumers are generally more focused on the "quality" of workmanship and finish. Accordingly, it is not surprising that Ms Chopping, of the Tribunal, reports that 80 per cent of disputes relate to this.

The Committee believes that to create a quality home building industry, one that meets the realistic expectations of the community, the current confusion over quality needs to be cleared up. (It makes a number of recommendations later in this report to provide improved mechanisms for the delivery of the quality workmanship and codes and standards).

More importantly, however, if the home building process is to consistently produce good quality dwellings, "quality" must be an ingredient in all elements of the process, these being:

- the quality of the building practitioners
- the quality of home building as prescribed in codes and standards
- the quality of home building as prescribed in contracts
- the quality of information systems for consumers and participants
- the quality of the planning process and certification systems for home building
- the quality of the dispute management system for home building

There will probably never be total agreement within the community on a definition of quality. Lifting the performance across the industry – the regulatory framework, consumer awareness, industry skills and service standards - will create an environment where quality residences will be consistently delivered. This is the aim of the report.

1.4 WHAT ARE THE PROCESSES CURRENTLY IN PLACE TO DELIVER RESIDENTIAL BUILDINGS?

There are three elements to consider here, namely:

- the **players** in the process;
- the **process** itself; and
- the **characteristics** specific to this industry.

Before looking at the specifics of the process, the Committee briefly outlines the main players in the home building system as it currently operates in New South Wales.

1.4.1 The Players

Planning NSW (formerly DUAP) sets the planning framework for all buildings at various levels through the regulations, the system of environmental planning and the operation of the Building Code as well as other overarching requirements that interlace with Local Government planning activities and priorities. The Department is the supervising agency for

the private certification regulatory regime where the Minister authorises professional bodies to accredit private certifiers and the Director-General currently has a role in auditing the work of accredited certifiers.

Local Councils are involved in all the key stages of building. Councils set the framework for local development through local environment plans and development control plans. They provide consent for most of development applications. They deal with key certification stages of buildings (construction and occupation), where they processes the certification documents. Councils can also be the principal certifying authority (PCA) on projects.

Private Accredited Certifiers have, since amendments to the Environmental Planning and Assessment Act in 1998, been able to certify building works, formerly the sole responsibility of local Councils. Certifiers have different categories of accreditation which define the type of certification work to be carried out. Accredited certifiers must take out professional indemnity insurance. They are accredited annually by an accreditation body accountable to the Director-General of PlanningNSW.

Australian Building Codes Board (ABCB) is a Commonwealth/ State and Territory funded body whose key role is to develop the Building Code of Australia (BCA) and promote regulatory reform in the building industry. The Code is adopted by reference in each State's relevant planning and building legislation. State government representation on the board is through Planning NSW. The BCA is the primary technical source of building regulation in Australia and is intended to reflect community expectations about design, construction and use of all new buildings. The BCA can operate by reference to various *Australian Standards*.

Department of Fair Trading, in addition to other consumer related activities, carries out various functions related to home building. It administers the Home Building Act, regulates home building/ renovation activities directly between consumers and builders such as setting out standard contracts. Under the Act, the Department issues and manages builders licensing, including disciplinary processes. The Home Building Act sets out the requirements for Home Warranty Insurance.

Consumer, Trader and Tenancy Tribunal (the Tribunal) handles disputes that have not been resolved by other means (eg mediation). Its activities include all consumer, commercial motor vehicle and home building disputes. The Tribunal was established in November 2001, after an independent review and takes over the jurisdiction of the former Fair Trading Tribunal. The Tribunal commenced operations in March 2002 and includes a new building dispute service – called the Building Conciliation Service (BCS).

The Consumers

The different ways in which consumers build and purchase homes impact on how the building process applies and what building rectification options are available. Consumers or home purchasers in NSW fall into four broad types:

- **Home buyer/ renovator** – this consumer will generally have a contract with a builder to construct or renovate their home.
- **A project home buyer** – this consumer will generally have a contract with a project builder or building company. Often combined house and land packages are sold.
- **Unit buyer** - this consumer will generally purchase an "off the plan" or newly built unit, having entered a contract for purchase from a developer.

- **An owner builder** –this consumer must register as an owner builder with the Department of Fair Trading and can organise their own construction and renovation, subject to various requirements.

Builders and Tradesmen – Home builders and some types of tradesmen are licensed by the Department of Fair Trading in NSW. The most senior builder is called a "building contractor", who is able to enter into a building contract with a consumer. The "building contractor" usually supervises the other tradesmen and manages a home building project. There are **approximately 150,000 builders** licensed in NSW.

Building Companies and Building Developers
Many builders operate under company structures. However, there are also medium and large firms which do large scale home building mostly free-standing homes. These are often referred to as project home builders, who offer set designs and sometimes house and land packages on development estates. These companies will often provide specific contracts to property owners which may include non standard arrangements and extended warranties.

Building developers is usually the name given to groups who are involved in multi -unit dwelling constructions. They will often sell "off the plan" dwellings to owners. Off the plan sales contracts are usually made between the consumer and the developer, who may be separate from the builder of the unit.

1.4.2 The Process

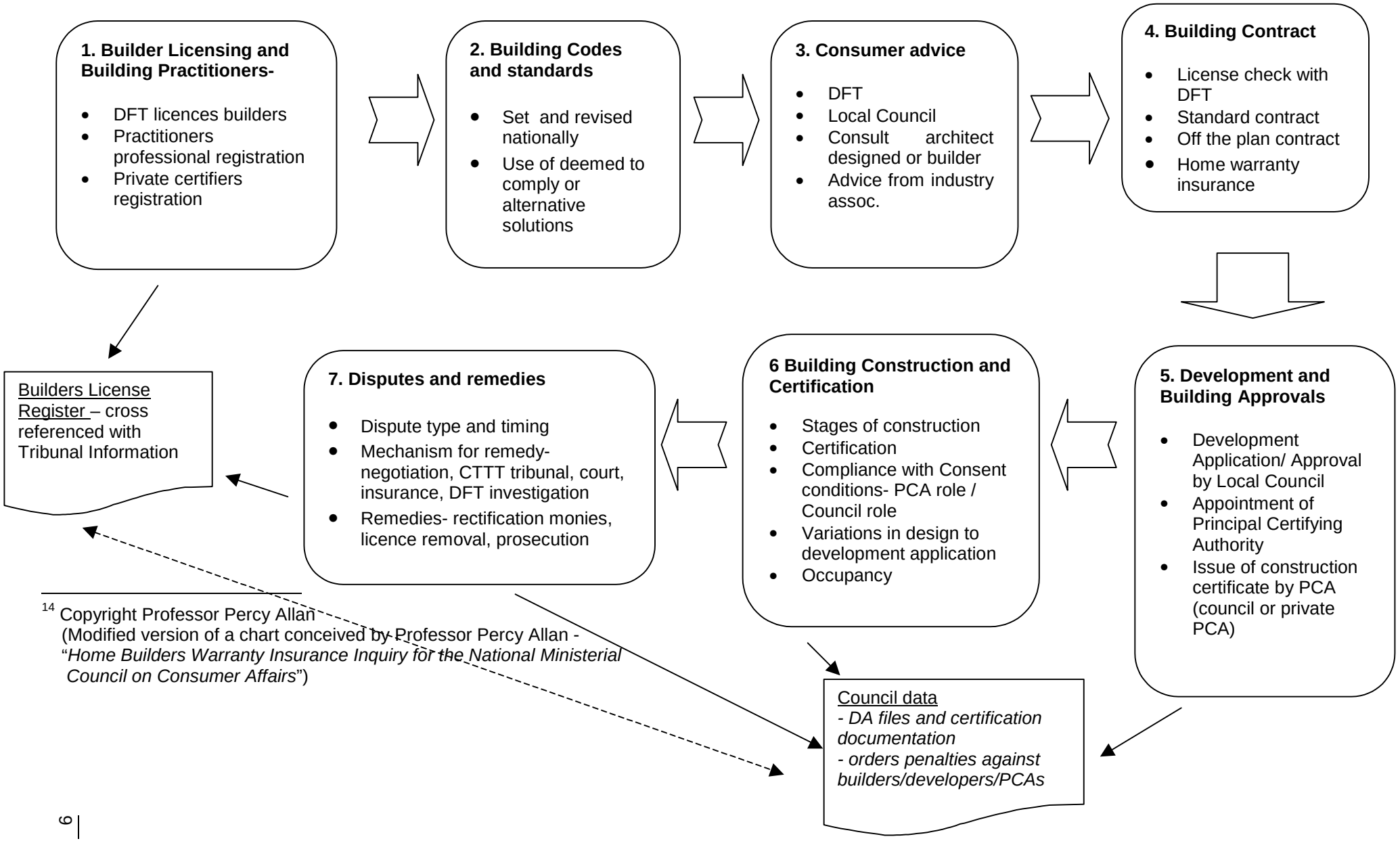
Figure 1 shows schematically the current home building process in New South Wales.

Seven discrete elements can be identified in this process. They are:
1. Builder Practitioner Regulation (Builder Licensing; Private Certifier Registration; Professional Registration)
2. Building Codes and Standards
3. Consumer Advice
4. Building Contract
5. Development and Construction Approvals
6. Building Construction and Certification
7. Disputes and Remedies

The discrete elements together provide the framework for the operation of the home building industry. Responsibility for the operation and regulation of these elements is spread over a number of organisations including:

- Planning NSW (Link to the Building Code of Australia, Private Certifier Regulation)
- Department of Fair Trading (Builder Licensing; Consumer Advice; Investigation of Problems)
- Councils (Approvals; Certification; Penalties; Records)
- Building Code of Australia (Codes and Standards)
- Industry Bodies (Accreditation; Membership Support; Consumer advice)

FIGURE 1 – THE CURRENT HOME BUILDING PROCESS IN NSW[14]



[14] Copyright Professor Percy Allan
(Modified version of a chart conceived by Professor Percy Allan - "*Home Builders Warranty Insurance Inquiry for the National Ministerial Council on Consumer Affairs*")

In 1998, reforms to the Environmental Planning and Assessment Act introduced the private certification model, creating a dual framework for the regulation of building construction. Certifiers were regulated by the Environmental Planning and Assessment Act, the responsibility of PlanningNSW, while builders were licensed and regulated under the Home Building Act, the responsibility of the Department of Fair Trading. Consumer action against builders could be carried out through the Department of Fair Trading, in the Consumer, Trader and Tenancy Tribunal but action against certifiers has to be taken by PlanningNSW through the Administrative Decisions Tribunal.

As will be discussed below, this framework has a number of problems and is not providing the sort of industry the community expects.

1.4.3 Industry Characteristics

It is also useful in this context to consider the following particular characteristics of the home building industry.

According to the Housing Industry Association, the housing industry in New South Wales contributes:

- 133,00 jobs, with a high multiplier effect
- 43,000 new homes each year, to the value of $6 billion
- improvements to the housing stock to the value of $4 billion each year[15]

There are about 150,000 building licence, permit and certificate holders in NSW. Of these, some 40,000 hold builders licences. According to the Department of Fair Trading, there are "fewer than 1900 [written] complaints received by the department each year [that] require an assessment for possible investigation".[16]

- **Unique Product**

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.

- **Features of the Market**

- knowledge imbalance – consumer is unable to check quality and is dependent on expert advice;
- financial imbalance – dispute resolution can be financially beyond the ordinary consumer;
- changing demands of consumers and patterns of living – urban concentration (higher density living) and "lifestyle" aspirations;
- frequently changing regulations, codes and standards for building;
- current problems with the insurance industry;

[15] Housing Industry Association Supplementary Submission
[16] Transcript of Evidence 10 May p3

- significant property boom over the last ten years.

- **Ongoing Reforms**

The industry has been the subject of significant change over the last few years:
- 3 past reviews (including a Royal Commission);
- two deregulations – 1997 insurance and 1998 private certification;
- BCA move to performance base in 1996 with revision every 6 months;
- 3 concurrent reviews – Royal Commission into HIH (Commonwealth), Royal Commission into the Building Industry (Commonwealth), and Legislative Council Inquiry into Home Warranty Insurance.

A number of witnesses described to the Committee how the building industry has changed in ways that can impact on the quality of the product:

Dr Tyler from Building and Construction Council:

> ***Dr TYLER:*** *Traditionally in the industry in Australia there were many family-owned companies, and we all know the names of those companies which had been around for, in some cases, 150 years. They tended to engage apprentices straight from school who worked through the company up to management positions. Those sorts of companies have largely been replaced by organisations of, say, management or financial people who see the building industry as a means of making good returns for their shareholders in minimising costs. The principals know little or nothing about building. It could be anything they are making, they can be widgets, they do not care, it is just a product. Therefore, they have eliminated some of the levels of supervision which traditionally existed because those family companies had a commitment, if you like, to quality as they saw it. That cultural change has had a big impact on the industry.*[17]

Dr Tyler described the implications of the demise of the Clerk of Works on building sites:

> ***Dr TYLER:*** *…..Once upon a time there used to be a person in the industry called a Clerk of Works who was generally from a trades background but who had done some additional diploma level work at TAFE and largely had a supervisory role. He knew enough about all the trades to be able to know if the bricklayer was doing it correctly or if the carpenter was putting in the doors the proper way. That occupation has virtually disappeared. There is a whole level of supervision that has just been removed from the industry for cost reasons.*[18]

One submission described the changes to the way builders operate:

> *Long gone is the friendly builder who arrives on site with his own carpenter, bricklayer, tiler, renderer and painter. The modern day builder may not have a single field worker. They are merely project managers who are supposed to co-ordinate the activities of various tradespeople on site in order to successful outcomes.*[19]

This change to more of a management role was confirmed by a builder at hearings:

> ***Mr WALTER:*** *… A lot of the industry has gone down the subcontracting track to the point where the bloke who signs the subcontracts sits behind the desk rather than being on site to supervise the men whom he employs to execute the work with no experience.*
>
> *The guys who are out on site generally do not understand whether they are working to the Building Code of Australia [BCA] or to Australian Standards. However, the blokes behind*

[17] Transcript of Evidence 6 May p35
[18] Transcript of Evidence 6 May p34
[19] Submission No 176

the desk are up to speed with all that. There is a big hole in relation to the quality of work at building sites today.[20]

Large building companies have emerged, to the consternation of some builders:

> ***Mr WALTER:*** *Not at all. This is where the larger companies ride roughshod. The smaller building companies are dead set running their business with their heart. The larger companies are run by managers or real estate agents who have no idea of the BCA or the Australian standards. They are just after the bottom line, profit. They have no idea what is going on with the jobs that they are building. And the trades that they employ they screw right to the floor.*[21]

A point agreed to by another builder at hearings:

> ***Mr ARMSTRONG:*** *…I do not like the way big builders are travelling—the Henleys. They are all there to knock out as many homes as you like as big as they can as cheap as they can, putting more and more pressure on our industry.*[22]

However, ill-founded consumer expectations can also affect perceptions of quality. For example, the recent trend to European-style apartment living has generated some problems, as the NSW Urban Task Force explained:

> ***Mr CARRIER:*** *…A lot of people who are moving into apartments nowadays are moving from large detached homes. It is the first time that they have moved into an apartment and they have to appreciate that apartment living is a little bit different from living on a quarter-acre block.*[23]

1.5 WHAT ARE SOME OF THE SPECIFIC PROBLEMS THAT ARE IMPACTING ON THE QUALITY OF RESIDENTIAL BUILDINGS?

The Committee has received considerable evidence and information of cases and examples of the failure to achieve "quality" in the residential market. The failure refers to both standards (for example, fire protection, waterproofing and structural) and to workmanship (or lack of it).

Of course, an inquiry such as this will naturally uncover the problems confronting the community. The Committee did not receive any submissions from consumers describing how all went well and according to plan. It has to be said then, for many who go through this process, there are no problems.

But this is not to undervalue the problems faced by those when things go wrong.

For some, the current operation of the home building industry fails to deliver reasonable community expectations. In the words of one witness, "A building designed as a high-quality project can materialise as a shoddy compromise".[24]

[20] Transcript of Evidence 24 May p54
[21] Transcript of Evidence May 24 p 67
[22] Transcript of Evidence 24 May p67
[23] Transcript of Evidence 6 May p108
[24] Transcript of Evidence 6 May p31

During this Inquiry, the Committee has heard, and indeed seen first-hand, the sorts of things that are contributing to poor quality buildings. They include:

- Buildings that do not meet building codes;
- Council and private certified residential dwellings that fail to meet Building Codes;
- Principal certifiers not properly performing their functions;
- Relationship between builders and certifiers not operating in the interests of the property owner;
- Dwellings that meet Building Codes but are not consistent with approved design;
- Dwellings that do not meet the Building Codes or are not consistent with the approved design that have been certified for occupation;
- Inadequate Building Codes that are seen as contributing to poor quality of dwellings, eg sound proofing, thermal and waterproofing standards;
- Poor quality fit outs and finishes that do not meet expectations or reflect the contract for sale (eg off-the-plan-purchases);
- Operation of unqualified builders;
- Unsatisfactory and unfair dispute resolution and outcomes and the overall performance of the Department of Fair Trading and the Consumer Trader and Tenancy Tribunal;
- Strata problems, particularly relating to contemporary developments in medium and high density urban lifestyles.

This list is not exhaustive but gives a flavour of the specific matters the Committee is seeking to address in the remainder of the report.

1.6 WHAT ARE THE STRUCTURAL CAUSES OF THESE PROBLEMS?

The Committee has identified a number of structural, systemic problems within the current home building process which are contributing to the types of problems identified above and which in turn are reducing the quality of buildings. These systemic issues are:

- Fragmentation of the Regulatory Regime
- Department of Fair Trading and the Tribunal
- Accountabilities and policing across the industry
- Imbalance between sections of the industry and consumers

A number of these issues are discussed in greater detail in the remainder of the report. Due to their systemic nature, however, the Committee has introduced them here in order to identify them and make recommendations accordingly. In this way the Committee deals with the "big picture" or macro aspects of the report before discussing the micro elements.

1.6.1 Fragmentation of the Regulatory Regime

An inspection of the current home building process (fig1) and the respective roles of organisations within that model, suggests to the Committee that the process is fragmented and lacking in coordination. For example, certifiers and building practitioners are regulated by different government agencies (Department of Fair Trading and PlanningNSW respectively); a range of organisations can provide consumer information and/or advice but there seems little coordination of the process.

The view that the regulatory framework is fragmented and lacking coordination, was supported by many in their contributions to the Inquiry. Professor Jeary put it succinctly when he said, "the legislation is a little bit messy".[25]

According to many, this fragmentation is adversely impacting on the performance of the industry.

The representatives of the Institute of Engineers Australia told the Committee that "the lack of a consolidated approach to legislation and recognised building industry accreditation schemes has led to confusion and we believe that has led to a drop in the quality of buildings in New South Wales".[26]

The representative from the Australian Institute of Building agreed:

> ***Mr LEWER:*** *The initial problems that we have in New South Wales are partly caused by fragmentation of the regulatory authorities .*[27]

Mr Malouf, from Blacktown City Council, identified the need "to reduce confusion with respect to responsibilities" in the industry, recommending a central body "focused on the building industry",[28] while Mr Meredith from the Master Builders Association of NSW advised that, "I think there needs to be greater cohesion between departments responsible for building and construction".[29]

The Building Designers Association was critical of the lack of focus of the regulatory regime:

> ***Mr WIEGMANN:*** *…. At the moment you have the Department Fair Trading with the Home Building Act, you have the Department of Public Works administering the Architects Act and you have Planning New South Wales in there doing planning issues, and local government as well. It is too spread out.* [30]

The Victorian Building Commissioner described for the Committee the possible problem in the enforcement of the Building Codes that can occur without a single system to regulate the process:

> ***Mr ARNEL:****…Currently, enforcement [of the Building Codes] is left to a range of groups. So there is no single system that can be implemented across the State and no central body to enforce it. In my view, that allows a range of interpretations to occur, similar to the council monopoly that operated in Victoria. The questions that the select committee might ask are: What legislative framework is required to enforce the codes? Who should be doing the enforcing. Another question may well be: Is a single system the best approach? A combination of the Building Act and the Building Regulations gave the then Victorian Building Control Commission, which was formed as part of the Act, the power to implement and enforce reforms that would provide Victoria's building industry with a new quality management system.*[31]

At public hearings, Mrs Onorati from the Building Action Reform Group (BARG) described the frustration that a convoluted regulatory regime can cause for consumers when she outlined a problem relating to private certification and Sutherland Council:

[25] Transcript of Evidence 23 May p70
[26] Transcript of Evidence 20 May p76
[27] Transcript of Evidence 6 May p42
[28] Transcript of Evidence 6 May p50
[29] Transcript of Evidence 10 May p 110
[30] Transcript of Evidence 20 May p109
[31] Transcript of Evidence 16 May p3

> ***Ms ONORATI:*** *….When ***** went to council to request a copy of the building application file she was told that it was not possible to provide her with these documents as they would be on the private certifier's file. Sutherland Shire Certification Service said that the only way to view this file was to subpoena it. Mr Peter Blatch (PCA office) explained to ***** that they were independent from Council. They advised ***** that they did not have to talk to her because the builder employed them.*
>
> *When ***** came to see me I could not believe this. I rang in the presence of ***** and spoke to Mr Jeff French, who confirmed that Sutherland Shire Certification Service was an independent certifier and that it was not allowed to speak with us because it was employed by the builder. (That is a bit too much.) I could not believe that this was true. We lodged a complaint against the independent certifiers to the Building Surveyors Allied Professional Accreditation Board. We did so because of all the terrible defects. The board rang ***** and advised her that Peter Blatch and the PCA were not registered with them and she should ring the urban planning department. ***** then spoke to Brett Whitworth, who I must say has been very helpful, and he advised her that the PCA is in fact the council. They are not independent and we should not have had to subpoena the file. They advised ***** to contact the local government investigation branch…..*
>
> *Can you believe this? I cannot.* [32]

The Department of Fair Trading, in responding to a question from the Committee on how the overall process might be changed to actually prevent problems, hinted at the complexity in the current arrangements:

> ***CHAIR:*** *Does anyone from the department or the Tribunal have any comment on any changes that might be made it to prevent issues getting to either the department or the Tribunal. At the end of the day it would be good if every builder built every building according to plan and standard. Should any of the processes be changed?*
>
> ***Mr SCHMIDT:*** *It is obviously a difficult issue to comment on a regime. We are in a funny situation in the department in that we are partly at the front end of the process because we license builders but then when they go off into the world to deal with local government, planning and other people, if a problem arises they come back to us. Some of the changes may be no more than a very simple administrative requirement that there be some formalised process in place with the relevant agencies—we have informal linkages between planning, the Tribunal, et cetera.*
>
> *It would seem that there would be merit in formalising that so that there is some formalised liaison arrangement in place so that when issues arise, not only are people aware that there is a particular problem but there is a holistic approach taken in looking at how each agency administers the legislation and whether there might be a better way of handling it.* [33]

It would seem that the only solution proffered by the Department to unravel this complexity, is to establish formal liaison between relevant agencies.

From the evidence garnered through the Inquiry, the Committee is convinced that the current system is fragmented and overly complex. This is a recipe for inefficiency. While it argues (below) for improved, formal liaisons along the lines suggested here by the Department, long-term solutions will only be found through comprehensive structural reform.

[32] Transcript of Evidence 23 May pp 14/5
[33] Transcript of Evidence 14 June pp13/4

1.6.2 Department of Fair Trading and the Tribunal

(See Chapter 6)

The Department of Fair Trading plays a major role in the Home Building Industry in New South Wales, through its administration of the Home Building Act.

Its mission is "to safeguard consumer rights and advise business on fair ethical practice". Its first corporate objective and outcome is "appropriate safeguards for consumers with minimal restrictions on business and traders", while its second is "maximum compliance with regulatory requirements". Its divisional objectives include:

- "provision of clear, accurate, information to consumers and traders
- effective compliance monitoring and enforcement
- reliable licensing/registration/certification information".

Among its strategies, there is stress on "proactive" approaches.

The Director-General advised the Committee that the "department's focus is on ensuring that building work is done with an appropriate level of competence and workmanship in accordance with requirements of the Act and the statutory warranties implied under the Act". Its role, he asserted, was "*to inform and educate consumers about their rights, to ensure that traders are aware of their obligations and to take action against licensees who are guilty of improper conduct*". [34]

Ultimately, the question for the Committee is: "Are these objectives being achieved?"

Mr O'Connor, the Director-General, expanded on the Department's role in hearings:

> ***Mr O'CONNOR:*** *…. [T]he focus of the Home Building Act and regulation is to be fair to both consumers and traders. The department's role is to be neutral in administering the legislation and licensing scheme to meet the objectives of the legislation. There appears to be a misconception that the department should inevitably take the side of the consumer against the builder and pilot each complaint through investigation and Tribunal proceedings, including the funding of the matter. This is patently not the role of the department.*
>
> *Another matter is the expectations of builders. Under the Home Building Act, the department has the function of issuing licenses and certificates to people and corporations that meet certain criteria. Once licensed, builders are expected to apply their knowledge, experience and abilities to the work they contract to undertake. They are further expected to supervise their staff and subcontractors to construct, renovate or otherwise work on residential premises to minimum nationally agreed standards. If relevant, the work is also expected to meet the conditions set by local councils in development approvals. It is the builder's responsibility to ensure that appropriate certificates are properly obtained to meet planning requirements.*[35]

There are certainly differing perceptions amongst stakeholder groups as to the role of the Department. A regular concern expressed by consumers with unresolved problems, was that they had been abandoned by the Department. They believed it was the Department's role to act in the interest of the consumer but that it was, in fact, acting in the interests of builders.

[34] Transcript of Evidence 10 May p2
[35] Transcript of Evidence 14 June pp6/7

Builders, on the other hand, saw the Department as pro-consumer, as representatives from the Master Builders Association explained to the Committee:

> ***Mr STOKOE**: I can say something about a perception. If you as a builder get a letter from the Department of Fair Trading and the second line of the letter has "New South Wales Consumer Protection Agency", now that is a fair role, it is a genuine role, that is a role Government quite rightly pursues, but if you are a builder, that is the other side of the coin, would you respond rapidly to that or would you respond to something that came from a building authority?*[36]

The Committee appreciates the Department's argument that its role is to create a climate which is fair to both consumer and traders and that it be seen to be even handed. However, it does not think that having both major stakeholder groups believing the Department is representing the interests of the other is, prima facie, evidence the Department is actually acting impartially. Rather, it suggests a climate where all parties are unhappy with the regulatory performance.

A number of witnesses raised concerns about a system reliant on resolving disputes rather than preventing them.

Mr Lewer told the Committee that the culture of the Department of Fair Training was complaint driven, rather than ensuring the quality of buildings.

> ***Mr LEWER:** …..They are not interested in quality of buildings per se; they are interested in solutions or resolution of disputes that are brought to fair trading, to the Tribunal, by consumers. This is looking at the back end of the contract.*[37]

Dr Tyler, from the Building and Construction Council of NSW agreed that the Department was complaint focused and suggested that this complaint focus might well be factor of the existing legislation. He observed that "the existing consumer protection legislation is complaint driven, aimed at rectifying faults rather than acting as an agent for improved performance in the first place".[38]

Professor Jeary from the University of Western Sydney, implied that the Department, within the current regulatory framework, lacked the drive to proactively take the necessary action to solve the problems within the system, as indicated by ongoing consumer concerns :

> ***Professor JEARY:** …. A number of these elements seem self-evident but vital. We should be continuing to strive for higher quality. There is energy and feedback coming from aggrieved consumers. But there is certainly energy lacking in the current regulatory arrangements.*[39]

Exacerbating this problem of over reliance on dispute resolution (rather than ensuring problem avoidance), is that, for those consumers with problems, the dispute resolution process has become a nightmare – a revolving door from which they cannot get out. They become caught between the Department and the Tribunal.

The Committee heard case study after case study that showed a dispute process typified by long delays, complexity, confusion and jurisdictional buck-passing. These case studies have

[36] Transcript of Evidence 10 may p118
[37] Transcript of Evidence 6 May pp 30,42
[38] Transcript of Evidence 6 May p30
[39] Transcript of Evidence 23 May p70

vividly highlighted extraordinary periods of time that people have had to endure unacceptable problems with their homes.

Mr Russo, appearing for BARG, summed up the problem in evidence. He told the Committee:

> ***Mr RUSSO:*** *….These delays cause massive financial hardship to consumers. Grace's exposition to you today cannot even be called the tip of the iceberg because every case is almost a repetition of the experience that she has gone through. Every case involves some sort of human tragedy that emerges out of it, whether it be the breakup of the marriage, the psychological impact on the children, financial problems, sickness or whatever. They are all the same. Again, the department appears to exacerbate that because its intervention skills are such that it does not help the consumer at all. It does not take any control of the dispute. It does not take the proactive position of dealing with the builder. As a consequence, consumers are basically left to fend for themselves in circumstances in which the department tries to insulate itself from the consumer.*[40]

The Committee provided the Department with opportunities to put its side of the case, to explain a number of these case studies from its perspective.

Mr O'Connor, from the Department of Fair Trading, acknowledged in hearings that "not all investigation matters have been dealt with as efficiently as one would prefer", although these "problems are in the minority". He went on to advise that it was important that due process took place, that "both sides of the story" had to be heard. He informed the Committee that recent reforms have been implemented that should improve the process:

> ***Mr O'CONNOR****:… I turn now to the issue of the length of some investigations and acknowledge that not all investigation matters have been dealt with as efficiently as one would prefer. However, I would also like the committee to recognise that many investigations are necessarily lengthy. The department cannot simply commence prosecution proceedings against a builder because a complaint has been lodged, but must get both sides of the story, often requiring expert opinions and reports. Since 10 August 2001 disciplinary action against a licensee is determined by the Director-General or the Director-General's delegates. Prior to this, disciplinary actions were heard in the Fair Trading Tribunal. New streamlined show cause procedures have been implemented within the department's Compliance and Standards Division. The changes mean that there is no need to file in the Registry, list the disciplinary matter for hearing and await determination by the Tribunal. Contractors are given a minimum of 14 days to respond to the notice to show cause and a determination is then made. As an example of the difference this has made to the time taken to finalise disciplinary action, matters before the Tribunal have taken up to a year or more to finalise. The matters finalised by way of internal disciplinary action take an average of three months. It is expected that this period will reduce even more as the procedures for internal disciplinary actions are refined. I would also emphasise that prosecution is not always the best option and that the Department will continue to assess each case according to the circumstances before deciding on any action.*[41]

It has to be noted that the Committee appreciates that the problem cases are in the minority. However, for this minority of consumers with problems, the situation can degenerate into a personal and family disaster.

[40] Transcript of Evidence 23 May p28
[41] Transcript of Evidence 14 June p6/11

The Committee is cognisant of the reforms referred to by the Director-General. However, the Committee's understanding of the current dispute arrangements is that they contain a major, systemic flaw, which it does not feel will be addressed by these reforms.

The flaw is that, when a consumer complains about a home building problem, two separate and uncoordinated processes are set in train – one by the Department and the other by the Tribunal.

According to the Department, it does not investigate contractual matters – these are matters for the Tribunal. It only investigates licence matters – "disciplinary actions", in the words of the Director-General. However, almost certainly, the first point of call for the consumer with a building problem will be the Department (the "safeguard of consumer rights"). Just as certain, almost all consumer complaints will be triggered by a perceived problem with a building contract. The Department will, therefore, refer the consumer to the Tribunal for action on this contractual matter. In the meantime, the Department will commence its own investigation of the builder from a licensing perspective for which it will need, in the words of the Director-General, to "get both sides of the story", which "often requires expert opinion and reports".

Thus two parallel investigations, which do not inform each other, will be under way. No wonder consumers become confused and frustrated.

To make matters worse, rather than reduce the disputes, this process ensures that almost all disputes are directed to the Tribunal, because most complaints from consumers will be contractual not licensing matters.

Mr Hanlon, the Director of Compliance and Standard with the Department of Fair Trading confirmed the operation of these dual systems in evidence. He told that Committee that:

> ***Mr HANLON:*** *…. Another issue that seems to confuse the matter—reference was made to it in our session this morning and also in the Director-General's comments—is whether the department should guide a matter through the Tribunal on behalf of a consumer when there is a contractual dispute. That is not our function; that is not what we are there for. If consumers have a dispute in respect of a contract, they go to the Tribunal or a court and take action in that way to get the contract performed or to get remedies under the contract. That is not our role; that is not what we do……*
>
> *There is a contractual dispute and there is compliance with the Act. Compliance with the Act is our responsibility and we take formal action, including prosecutions, disciplinary action and Supreme Court action—whatever is required. That is separate and distinct from the contractual dispute that the consumer and builder might have. They are two different things* [42]

The comments of the Director-General's on the need to obtain reports as part of the investigation process have already been noted. Mr Hanlon gave the Committee further insight into the "consultant report" battle that the current investigation process by the Department can generate, when he observed that, "in some of those instances if the building report is disputed we need a second report. If that is disputed, we have on occasion gone to the third report to try to address the issues."[43]

[42] Transcript of Evidence 14 June pp 20/1
[43] Transcript of Evidence 14 June p 20

This process quite simply represents an unnecessary administrative labyrinth for the consumer.

At the very least, a complaint driven culture should aim to give priority to mediation and simple forms of dispute resolution. However, this has not occurred in the past, according to a representative from the Master Builders Association who outlined his experiences in the Tribunal:

> ***Mr STOKOE**: …..I could just add this, the Tribunal has a duty under the Act to conciliate, to mediate, et cetera. In the 20 odd cases I have been involved in that has never happened once. In fact I asked for an adjournment once simply to go and do it myself, I mediated a dispute, it took an hour and a half. You have a great chance of resolving I would say in excess of 90 percent of the matters on the spot. Go to the site. Get someone independent of both parties and let the steam come from the collars, let them talk, let them get the emotion out of the way.*[44]

The Committee understands that recent reforms have placed a greater emphasis on simplified dispute resolution within the Tribunal. However, the Committee argues in Chapter Six that, as part of the restructuring of the functions of the Tribunal, the Building Conciliation Service be removed from the Tribunal.

In trying to understand what the Committee regards as an unsatisfactory arrangement, it noted the comments by made by the Victorian Building Commissioner regarding the scope of the Department's activities:

> ***Mr ARNEL:** ….In New South Wales there are not any statutory bodies and I understand it is the responsibility of the New South Wales Department of Consumer Affairs [DFT]. Under the department there are a host of other tasks to complete and it may not be adequately resourced to undertake the enforcement that the building standards and regulations require.*[45]

In explaining case studies to the Committee, the Department continued to advise the Committee that its investigations were "separate and distinct" from the Tribunal's contractual matters. Technically, this might be the case. But the Department was unable to see, or not prepared to concede, that these two parallel processes were cumbersome, repetitive and constitute a black hole for those consumers drawn into the system.

The evidence before the Committee has convinced it that the Department is not pro-active in pursuing and achieving its objectives. It is process driven and not outcomes focused. There are problems here that must be addressed.

1.6.3 Lack of effective accountabilities and policing across the industry

(See Chapter 2)

The Home Building regime, as it is currently regulated, does not ensure appropriate responsibility, accountability and liability. This is due to both the complexity of the regulatory framework and a failure to properly police the system to ensure that "shoddy" practitioners are permanently removed from the industry.

[44] Transcript of Evidence 10 May pp114/5
[45] Transcript of Evidence 16 May p5

The Committee heard time and again that builders performing below par were still operating. One reason for this was the lack of formal, co-ordinated exchange of information between agencies.

In order to properly regulate all building practitioners, ensuring proper accountabilities and the ability to police infractions, it is vital that all information relating to their activities, particularly breaches of obligations or unsatisfactory performance, be available to licensing authorities. At the moment, this does not occur, with local Councils, DFT, the Tribunal and PlanningNSW all collecting and holding separate information about a range of practitioners or their activities. Yet there is no central recording of the information and, therefore, more importantly, no effective, co-ordinated use of the information in policing the relatively small number of bad elements the industry.

This is particularly relevant to the Department of Fair Trading and the Tribunal. Reference has already been made to the problems in the current relationship between these two organisations. In addition to that, there is no comprehensive, formal exchange of information between the organisations so that the information gathered in one forum can be utilised in the other.

While the lack of information can reduce the regulator's ability to police the system, much of the case study evidence indicated that policing was simply not taking place. In the words of Mr Russo, representing BARG, "*the problem is that nobody is policing it. Nobody is forcing the system to comply*".[46]

It should be noted that the need to remove unsatisfactory builders from the industry is not just a consumer concern but a concern for the building industry itself. For example, Mr Walter, a builder appearing at public hearings, told the Committee that "If builders start doing any bad work I believe that they should be totally responsible for that work. Those builders should then be disciplined at a professional level".[47] As quoted above, the Housing Industry Association is concerned that the failure to remove "dodgy" builders from the industry impacts adversely on the reputation of the industry.

The Committee heard that licensing needs to be improved and strengthened to increase accountability.

> ***Mr LEWER:*** *… at the moment licensing really does not require anything rigorous for the applicant to provide.*[48]

This could be further strengthened by ensuring links among practitioners:

> ***Mr MALOUF:*** *…There should be that cascading of responsibility through the trades and through to the builder directly as well.* [49]

The lack of accountability of certifiers, particularly private certifiers, was also a consistent theme in evidence. While complaints were made that the "shonky" builders were not being dealt with, concerns were raised that private certifiers were not being held to account for their actions.

[46] Transcript of Evidence 23 May p28
[47] Transcript of Evidence 24 May p56
[48] Transcript of Evidence 6 May p39
[49] Transcript of Evidence 6 May p73

The 1998 reforms effectively created a new industry - the private certification industry. However, the private certifier is currently "out of the loop" as Ms Francis from North Sydney Council pointed out:

> ***Ms FRANCIS:****…the poor old owner is the one who suffers at the end of the day. They will say to me that the private certifier said that they could do it. I do not have a recourse against the private certifier. I cannot PIN [issue a penalty infringement notice to] the private certifier. As I understand the law I can only PIN the owner, the builder, the architect, not the private certifier. All I can do is reported him to his accreditation board. I have done that and I got no response. That is a hole…*[50]

It would seem that this industry has enjoyed the benefits of deregulation but does not appear to have shouldered a commensurate amount of responsibility and proper accountability.

There is also general (but not total) agreement that the private certifier is not working in the interest of the property owner, and ultimately the system, because the certifier has too close a financial relationship with the builder. As one witness stated, in the certification process "lie[s] the chance of a conflict of interest".[51] The Director-General of PlanningNSW acknowledged that there was at least a need to deal with the "perception" of a conflict, as well as the performance [52]

Representatives of the NSW Urban Task Force fully supported the move to private certifiers, citing a number of advantages to the new system. While they acknowledged that "there could be a perception of conflict of interest", they also pointed out that this situation was possible for "anybody appointed and paid for by any company in any checking capacity".[53]

Mr Gaal from Willoughby City Council, told the Committee that "the current system of private certification does not improve the quality of buildings in New South Wales and probably, in fact, results in lesser standards due to the motive of profit".[54]

The Director of Planning and Development Services from North Sydney Council, also argued that the operation of the certifier is having an impact on the building quality. He explained:

> ***Ms FRANCIS:*** *….However, there are a few circumstances where the quality of the private certifiers or the manner in which they created their business practices is causing problems. We found that the presumption that the private certifier would be acting in the public good and trying to improve the quality of buildings, which is one of the bases behind the original legislation, does not quite come through in practice.* [55]

Mr Robertson (EHASBA) made a point, repeated time and again, to the Committee: "The private certifier is not at arm's length from the developer. The private certifier has a direct and pecuniary relationship with the developer".[56]

There were many claims that the certifier's role needed to be more clearly defined in the legislation and the Committee is certainly in no doubt that private certifiers need to be brought more directly and accountably into the system.

[50] Transcript of Evidence 6 May p 56
[51] Transcript of Evidence 6 May p31
[52] Transcript of Evidence 6 May 23
[53] Transcript of Evidence 6 May p104
[54] Transcript of Evidence 6 May p 50
[55] Transcript of Evidence 6 May p47
[56] Transcript of Evidence 6 May p75

Council certifiers were also not without their critics.

The Director-General of Fair Trading acknowledged that his hands were tied with regard to certifiers, as they were not regulated by his Department:

> ***CHAIR:*** *… it would seem that I can conclude that the department—and I am sure you will challenge me if I am wrong—just does not want to know about the certification process and does not believe it has a role in prevention or sorting it out. Is that a reasonable conclusion?*
>
> ***Mr O'CONNOR:*** *No, I do not think so.*
>
> ***CHAIR:*** *Then set me straight, please.*
>
> ***Mr O'CONNOR:*** *Clearly, it is in everyone's interest that the processes that take place are correct and work well for both the builder and the consumer, but very often the department is called in after some of the earlier processes have gone wrong. The department does not control or look after a that particular piece of legislation; that is within the ambit of another department. We made the point earlier when we were talking about certifiers—* [57]

The Committee is satisfied that there is clear evidence, across the home building regime, of a need for improved accountability and policing.

1.6.4 Imbalance between sections of industry and consumers

(See Chapter 4)

One of the key factors in this system is the imbalance between the consumer and other participants. The imbalance relates to both knowledge and power.

Mr Russo told the Committee:

> ***Mr RUSSO:*** *….. There is inequality in bargaining power between the builder and a consumer and this allows the builder to be in a position where the longer he delays the more likely the consumer will succumb to his demands, sign off the contract and accept a substandard home and/or pay for the extras or additions that have been requested.*[58]

The Lord Mayor of Sydney, Councilor Sartor, pointed out to the Committee that the consumer's position in this arrangement was a significant problem:

> ***Mr SARTOR:*** *…the inherent problem is that the marketplace does not work for building regulation in the way that it works for buying milk. If the milk is no good or inferior, we, the consumers, will know about it and will not buy that milk any more. The problem with buildings… you do not have the normal market pressures and consumer sovereignty…. The inherent problem is that we have shifted to a market-based system without understanding the nature of the product. This is why we have a major problem—and it is a major problem.* [59]

The Director-General of the Department of Fair Trading acknowledges this problem, telling the Committee that "*it would be in everyone's interests to have consumer advocacy groups in the home building area*". [60]

[57] Transcript of Evidence 14 June pp 15/6
[58] Transcript of Evidence 23 May p28
[59] Transcript of Evidence 24 May pp2,3
[60] Transcript of Evidence 14 June p18

1.7 HOW ARE SYSTEMIC PROBLEMS TO BE RESOLVED?

The above discussion has identified four problems with the current regulatory regime that need to be addressed, if the objective of good quality homes for all is to be achieved.

Recent reforms to the Home Building Act do not address the fundamental weaknesses the Committee has outlined here (and detailed in other parts of this report). Rather it has found that, under the current processes and arrangements, there is:

- too much focus on dispute resolution and not enough on problem prevention;
- automatic referral of all matters to the Tribunal;
- a failure to remove unsatisfactory builders from the industry;
- an inability to give urgent attention to major problems;
- excessive time taken to commence and then complete investigations; and
- no system to assist consumers with problems navigate through this complex issue.

The Committee has come to the conclusion that quality buildings will only be consistently produced through a major effort to raise standards across the board. This needs to start with some strategic changes to the regulatory framework.

The Committee acknowledges that the current system, last changed in 1998, is "still a young system".[61] However, it is not convinced that the problems identified through this Inquiry will be resolved without immediate major intervention. It is not just simply a matter of waiting for the current reforms to bed down, for they do not go far enough. Rather, the Committee agrees with the sentiments of the Lord Mayor of Sydney, Mr Frank Sartor, expressed at public hearings:

> ***Mr SARTOR:*** *….We must correct the system quite substantially, not just tweak at the edges, while not returning to the monopoly system of local government that depended on the whim of the building inspector and his mood on the day of inspection. It seems to me that we need very dramatic and substantial change.*[62]

To achieve this will require some structural changes. The core elements of the changes recommended by the Committee are:

- a distinct government entity focused on home building issues, and
- an organisation specifically focused on consumer support.

1.7.1 The Home Building Compliance Commission

The General Manager of the Queensland Building Services Authority, described to the Committee the factors which drove significant structural change in Queensland:

> ***Mr JENNINGS****: … I suppose one of the issues why the Queensland Building Services Authority was formed was confusion or lack of understanding on building contracts, the information imbalance between consumers and contractors, unsatisfactory dispute resolution processes and poor standards and business practices with regards to some contractors. So it really created an environment for the authority to inform consumers and deal with ethical practices within the building and construction industry.*[63]

[61] Transcript of Evidence 6 May p18
[62] Transcript of Evidence 24 May p3
[63] Transcript of Evidence 10 May p88

This description could easily fit the current NSW situation.

In considering major change to the system, the views of the Victorian Building Commissioner, Mr Tony Arnel, were instructive and enlightening. In his opinion, four "key aspects" of reform had improved the "quality of buildings" in Victoria, as he detailed to the Committee:

> ***Mr ARNEL:*** *….Improvement in the quality of building practices in Victoria can, in my view, be attributed to four key aspects of the Victorian reforms. I will summarise them briefly. The first is what I characterise as "tight legislation", which provides the framework for a single agency or entity to act as a regulator and a leader in the industry. The second is an adequate task force that allows the agency to actively enforce the regulations, standards and codes. This task is made significantly easier if all building practitioners are required by law to be registered with a central agency—which is the third aspect. Lastly, the governing body must shoulder the responsibility of encouraging and providing continued professional development. These four elements, when combined, will provide a framework, and the process aims to increase significantly the quality of building practices within the industry. This will ultimately lead to what we are all after: an improvement in the quality of buildings.*[64]

This is a succinct and compelling rationale for reform based around a single entity, focused on creating what Mr Arnel described as "quality management control" in the building industry.

Mr Arnel's analysis eloquently sets out a direction suggested by many in submissions and evidence to the Committee and which the Committee has concluded is the way forward.

Willoughby Council has expressed it as follows:

> ***Mr GAAL (Willoughby Council)****: …the creation of a central body focused on the building industry that is involved in accreditation, investigation, prosecution and auditing and the removal of development and building controls administered by Planning New South Wales and transferring these to a central body. This would minimise confusion with respect to responsibilities and Planning New South Wales could focus on the strategic issues.*[65]

Mr Meredith, MBA NSW:

> ***The HON JOHN RYAN:*** *… Are you saying that there is a need to have a one-stop shop to deal with the lot?*
>
> ***Mr MEREDITH****: I am certainly supportive, especially after hearing the address by the manager of the Building Services Authority, of a building services authority. …. I think if the building industry heard the presentation by the general manager of the Building Services Authority we would have a massive exodus out of New South Wales of builders. It seems very attractive.* [66]

He later observed that many builders saw DFT as a pro-consumer agent that did not give them a fair go, implying the industry needed a more impartial referee:

> ***Mr MEREDITH****: I think getting back to this issue of this independent body, I understand that within the Department of Fair Trading there is indeed a building division, but I think that needs to stand alone in some way and be identified that it stands alone to overcome*

[64] Transcript of Evidence 16 May p10
[65] Transcript of Evidence 6 May p50
[66] Transcript of Evidence 10 May p110,119

> *that perception of the industry, especially when you have the Department of Fair Trading and their charter is consumer protection. It is a "them and us" situation.*[67]

Mr Wiegmann from the Building Designers Association, said that "there would be more co-ordination" if all in the powers were put in one organisation.[68]

And it is co-ordination that is the key. The President of the Local Government Association, Mr Peter Woods, stated his opposition to centralising approaches but acknowledged that "better co-ordination" was the "operative way" to go and with it, "better interaction, better consistency, equitable standards" [69]

Councilor Sartor argued that a centralised system would improve accountabilities across the industry:

> ***Mr SARTOR:*** *…Council believes that we really need a huge rethink on the system and we need to put in place some really well-resourced, centralised supervision and auditing process so that all the people involved within the building industry are responsible to that supervisor or auditing person. We have the engineers who do certification, we have the council who does certification, we have the individual trades that are involved in the system, and they should all be responsible to one body. You do not necessarily have to have council having sole responsibility; you can have a number of people who are responsible for it but you cannot have a system where a fragmentation of people are responsible for the system. For every section of the industry we should have a centralised place where they are responsible, a building commissioner or whatever, who can throw you out of business if you are not doing the right thing. Builders, certifiers, regulators, everybody can be responsible to one organisation.*[70]

Fragmentation and poor co-ordination need to be addressed and functions relating directly to home building need to brought together for better coordination, so that all elements, including certifiers, can be made accountable. The Committee believes uniqueness of this consumer product requires a specific regulatory focus and response.

As the Committee has already observed, it does not believe the Department of Fair Trading is performing an effective leadership role in the home building industry. Perhaps its charter is inappropriate, its culture is inadequate or it is simply stretched in carrying out its other "fair trading" functions. Regardless, the Committee does not see that it is the appropriate vehicle to implement the required changes.

The only way to give this paramount consumer item the focus it warrants is through a dedicated public sector unit, to be called the **Home Building Compliance Commission**. As home building is a unique consumer affairs issue, the Committee does not suggest simply copying the Victorian Building Commission arrangement, which is responsible for regulation of all building matters in Victoria. The Committee came to the conclusion that the Commission should stand alone as a portfolio responsibility of the Minister for Fair Trading.

This Commission would drive a cultural change in the regulation and administration of home building in New South Wales through pro-active dynamic leadership and expert staffing. The Commission must be energetic, positive and aggressive in pursuing all its objectives, the

[67] Transcript of Evidence 10 May p119
[68] Transcript of Evidence 20 May p110
[69] Transcript of Evidence 23 May p67
[70] Transcript of Evidence 24 May pp 24/5

primary one being to ensure continuing quality in all aspects of the home building industry. It has to be focused on outcomes, outcomes which reduce the level of disputation.

The Committee does not propose to centralise all industry functions in such a body, but it has recognised the need to bring a number of functions into a single location, to provide a more focused and effective government organisation solely responsible for co-ordinating and regulating the essential elements of the home building industry.

The Commission would need to establish and enforce appropriate responsibility, accountability and liability in the industry. This will be done by establishing suitable licensing, monitoring and policing regimes. There will be a focus on improving industry skills, qualifications and service obligations.

It will drive an improvement in the availability and quality of information on home building issues, disseminating information in the most effective way.

The Commission will be aiming to reduce disputes as a priority. However, better dispute resolution methods will be developed. The Committee has developed such a model elsewhere in this report.

A number of areas would not be the direct responsibility of the Commission, for example the Building Code of Australian and the Consumer Trader and Tenancy Tribunal. However, the BCA needs to be clearly explained and administered in the New South Wales context. Indeed, the Committee expects the Commission to be proactive in identifying problems with the BCA in the New South Wales home building context and advise the Government where change needs to occur. Action can then be taken through the appropriate forums.

There will need to be a more effective and functional relationship between the Commission and the Tribunal.

While it is important to let the system bed down, the nature and impact of this industry cannot allow it to just roll along. The Committee recommends that a Performance Audit be carried out after two years, by the Performance Branch of the Audit Office.

The Commission will also be better placed to monitor and improve the reforms the Government has already put in place.

Ultimately the objectives identified by the Committee for home building process in NSW are:

- The building of quality homes which are safe and good value;
- Satisfied customers;
- A viable industry for building practitioners;
- Effective dispute resolution for all parties.

RECOMMENDATION 1
The Committee recommends that:

- A **Home Building Compliance Commission** (hereafter the Commission) be established forthwith to oversight home building regulation in New South Wales. The Commission is to be separate from the Department of Fair Trading and responsible directly to the Minister for Fair Trading.
- The Commission's functions are to include:
  i) builder and other practitioner licensing, disciplining and auditing, including private certifier registration and auditing;
  ii) industry practitioner licensing;
  iii) establishing and maintaining industry-wide registries;
  iv) establishing a front desk for consumer building complaints and disputes;
  v) policy advice and development;
  vi) liaising with industry players; and,
  vii) maintaining high level of practitioner skills and qualifications

RECOMMENDATION 2
The Committee recommends that a performance audit of the Commission be undertaken by the NSW Audit Office after two years of operation.

1.7.2 Home Building Advice and Advocacy Centre

The Commission's role is to ensure the provision of quality residences through regulation of the home building industry. This is a function that seeks to balance operation and regulation of the industry for all participants and stakeholders for the good of the overall community. It is an impartial function.

As identified above, the Committee is very mindful of the weak position in which consumers can find themselves when disputes arise. There is clearly a need to establish a mechanism to provide information and advice to consumers, a one-stop advice centre on home building disputes, similar to the Tenant's Advice and Advocacy Service. The Committee has concluded that such a service should be established and that it be called the **Home Building Advice and Advocacy Centre**.

The Centre would be funded by the Commission. The Centre would look at consumer/builder problems on a case management basis, providing advice on courses of action such as negotiation, conciliation, insurance, Tribunal or Court action, complaints to DFT/Commission for investigation or other organisations. It would have a consumer education role, particularly with regard to explaining quality issues from a codes and standards perspective and quality of workmanship and affordability. For advocacy or specific legal advice, the Centre could charge on a fee-for-service basis.

RECOMMENDATION 3
The Committee recommends that a **Home Building Advice and Advocacy Centre** (hereafter the Centre) be established, as a non government organisation to provide one-stop advice on home building disputes, funded by the Commission. The Centre will :

- have a consumer education role,
- provide access to licensed building consultants; and
- be able to charge on a fee-for-service basis for advocacy and specific legal advice

In order to ensure complete accountability in the process, the Committee has identified a number of areas where information "loops" need to be fully closed. It is vital that information on the adverse performance of practitioners in one forum is made available to others. Ultimately, this information should be located in a central database with the Commission. In the meantime, formal protocols need to be developed to ensure information exchange.

RECOMMENDATION 4
The Committee recommends that formal information exchange protocols be developed between:

- Local Councils and the Department of Fair Trading and the Consumer, Trader and Tenancy Tribunal (hereafter the Tribunal) regarding Council orders against building practitioners;
- NSW Police and Department of Fair Trading and the Tribunal on breaches of the Home Building Act and potential fraudulent and other criminal activity;
- PlanningNSW and Department of Fair Trading and the Tribunal on audit results revealing problems with builders and certifiers; and
- the parties to these protocols will be revised with the establishment of the Home Building Compliance Commission.

These recommendations and those in the remainder of the report provide a framework for longer term stability in the industry and the means to fine tune some of the issues in the longer term. The Commission should familiarise itself with all the publicly available material from this Inquiry to inform itself of the background to this Inquiry.

In the following chapters, the Committee makes numerous recommendations on how to improve the various discrete elements in the home building process, for example, how to improve practitioner licensing, the operation of the BCA, consumer education and the certification process. However, these "micro" recommendations will only be fully effective if the systemic issues that the Committee has identified are dealt with.

1.8 STRUCTURE OF THE REPORT

The report is structured to both explain the current residential building process in NSW and to highlight issues raised in submissions and evidence, as they relate to both this process and the Committee's terms of reference.

The following chapters look at specific aspects the building process identified in part one, providing background, highlighting issues and including case studies and proposing recommendations for change.

Chapter 2 looks at the quality of builders and building practitioners
Chapter 3 looks at the quality of home building as defined in the Building Codes
Chapter 4 looks at the quality of information systems for consumers and participants
Chapter 5 looks at the quality of the planning and certifications systems
Chapter 6 looks at the quality of home building dispute management examining the roles and operations of the Tribunal and the building investigations unit.
Chapter 7 looks at the quality of home building strata management

CHAPTER 2 – Builder Licensing and Regulation of Building Practitioners

2.1 INTRODUCTION

The first element considered by the Committee is the quality of building practitioners. Section D (i & ii) of the Inquiry's Terms of Reference requires the Committee to examine the qualifications, experience and conduct required for the licensing of people who build our residential buildings, as well as the adequacy of the builders' licensing regime. This Chapter outlines and makes recommendations about the NSW builders licensing regime and the regulation of other practitioners in the building industry.

2.2 BACKGROUND

2.2.1 What is the builder licensing regime in NSW?

In general, building and trade licensing as it is known today, was introduced under the *Builders Licensing Act 1971*. It applies only to persons employed in the domestic/ home building industry. There are no requirements for licensing to operate in the commercial construction industry.

Licences are currently issued by the Department of Fair Trading under the *Home Building Act 1997*. There are approximately 155,000 licensed building operators in NSW, within 3 general licence classes. These are:

- Contractor Licence - 110,000 Contractors – allows holder to contract in own right, as a corporation, sole trader etc, and if issued to qualified individual will allow holder to supervise and carry out relevant work categories including specific trades.
- Qualified Supervisor Certificate - 40,000 Qualified Supervisors - is a supervision certificate over certain employee trade categories. However the certificate holder cannot contract in own right.
- Certificate of Registration - 5,500 Certificates of Registration - is only issued to employees working for a qualified supervisor or contractor.

2.2.2 What is the history of building licensing in NSW?

In 1971, licenses were issued by the Building Licensing Board. The requirement for consumers to have home warranty insurance for building work commenced in 1972 and was provided by a government insurance scheme.

Plumbers and electricians have been licensed by special industry boards, local government and electricity authorities since early last century.

Over the 1970-1980s the licensing regime was expanded. Between 1977 and 1990 builders applying for licences were required to hold a "prescribed" qualification. There were "full" licences issued to builders and "restricted" licences for trades contractors.

In 1987, the Building Services Corporation (BSC) was created. It amalgamated licensing functions of the Building Licensing Board and various other boards dealing with plumbers and electricians. The BSC also took on the role of education, advice, rectification orders, disputes, regulation of building contracts, insurance and the licensing and disciplining of builders.

In 1990, a new licensing scheme was introduced where a single category of licence was created for all contractors undertaking building work, trade work and specialist work (including electricians and plumbers). A certificate was issued to qualified supervisors who could supervise work on behalf of the licence holder. The legislation no longer prescribed the relevant qualifications, but gave the BSC the power to determine acceptable qualifications.

In 1993, the BSC was reviewed resulting in its abolition, and the creation of a consumer dispute resolution process (now the Consumer, Trader and Tenancy Tribunal or CTTT); privatisation of insurance home warranty insurance (commenced May 1997); and separation of licensing and consumer advice and education. Since then licences have been issued by the Department of Fair Trading.

In 1999, it was decided that licensing should be linked to the requirement for home warranty insurance. This link was created by the *Home Building Amendment Act 1999*. From November 1999, licence applicants in building and other works categories were required to submit evidence of their eligibility for insurance cover when applying for a licence. Applicants are still required to submit evidence of technical qualifications and experience.

In November 2000, the government announced a package of reforms, and following consultation, the *Home Building Legislation Amendment Act 2001* was assented to in July 2001. The package includes:

- Tightening up of the licensing system;
- Speeding up the disciplinary process with new powers for immediate suspension;
- Doubling penalties for non compliance with the Act;
- Making the insurance scheme fairer and more accountable;
- Establishing an early intervention dispute resolution system with the CTTT; and
- A cooling off period for building contracts.

The package has been introduced in four stages: August 2001, November 2001, January 2002, July 2002. In July 2002, the Department introduced new licence categories which reduced the number of categories from around 220 active categories to approximately 42.

An outstanding reform is Continuing Professional Development (CPD) for building industry practitioners. The Home Building Advisory Council, established in 1997, and consisting of Master Builders Associations, HIA , BARG, ACA, Royal Institute of Architects, and CMFEU, is currently examining a series of proposals for continuing professional development schemes for all licensees. The Minister is awaiting their proposals which will then be taken to Cabinet for consideration.

2.3 BUILDERS

2.3.1 How does the builders licensing scheme work?

The Department of Fair Trading has two areas dealing with builders licensing. The Builders Licensing Unit (issues three classes of builder licences plus Owner Builder Permits) and the Building Investigations Branch (which investigates and disciplines licensees). [Appendix 5] outlines greater details on licensing arrangements]

- **Contractor Licence**

This licence is renewed annually. The holder of this licence can be a corporation, partnership or sole trader. The holder of this licence is authorised to contract, sub contract and/ or advertise to carry out the work specified in the licence.

A Contractor Licence is needed to carry out**:**
- residential building work greater than $200 (in labour);
- specialist work (such as plumbing, electrical); and
- supply kit homes.

Requirements for Contractor Licence are:
- technical competence (demonstrated by formal qualifications (tertiary or TAFE) or determined by assessment of skills from the Western Sydney TAFE's Building Industry Skills Centre);
- practical experience (minimum of 2 years);and
- being a fit and proper person.

The Contractor Licence work is broken into three broad categories:
- building work;
- trade work; and
- specialist work.

There are sub-categories in each of these categories. A Contractor may have a variety of categories/ sub-categories of work nominated on their licence.

- **Qualified Supervisor Certificate**

This is issued to a person if they are a full-time employer of a Contractor Licence holder (or as a member of a partnership or director of a company). It gives the person the authority to carry out or supervise work noted on their certificate. The holder of a qualified supervisor certificate is not entitled to enter into contracts in their own right. Companies, partnerships, and unqualified individuals must employ a nominated qualified supervisor or have one as a director. A qualifier supervisors certificate is issued for 3 years for trade and specialist work, and 1 year for building work.

- **Certificate of Registration**

Only issued to employees working for a qualified supervisor or contractor. This certificate is issued for 3 years.

- **Owner Builder Permit**

This permit can be issued to a person for home building work undertaken on a property that they own. The owner builder supervises or undertakes work, organises the plans and

approvals, and manages the site. Approximately 18,500 owner builder permits were issued in 2000/01. The permit is issued for the life of the project.

2.3.2 Licence pre-requisites

Generally requirements for licences include a combination of:

- Qualifications – university or TAFE or specialist/ apprenticeship programs;
- Experience – practical experience or in some cases apprenticeship periods;
- Conduct – the Department takes into account criminal records, bankruptcy etc; and,
- Eligibility for Home Warranty Insurance (HWI) for contractor's licences (since Nov '99).

Qualifications can include tertiary degrees such as a Bachelor of Business to TAFE qualifications. The costs of these qualifications varies from hundreds to thousands of dollars.

Where applicants has no recognised qualifications, they can undergo a skills assessment though the Building Industry Skills Centre, which is part of Sydney TAFE. The assessment fee depends on the number of categories applied for and ranges from $140 to $440 per category.

Experience requirements are usually determined by apprenticeship or employment records and references from employers. Experience requirements vary for different categories of work and classes of licences.

Conduct checks undertaken by the Department now include consideration of bankruptcy and other criminal issues.

2.3.3 The application process

Licence applications can be lodged with Fair Trading Centres or the Home Building Licensing Branch of DFT.

The delegated licensing officer will either refuse or grant the licence following assessment of the supporting documentation including tertiary qualifications, practical experience, as verified by references, and other probity checks. Those applicants who do not hold recognised qualifications may be referred to the TAFE NSW Building Industry Skills Centre for skills assessment.

Where an application is refused, applicants have the right to request an internal review and then an appeal to the Administrative Decisions Tribunal (the ADT)

Table 2.1 Licence fees range between licence classes, sub-categories and type of trading entity:

Contractor Licence	New Application	Annual Renewal	Restoration
Individual (Builder)	$367	$251	$406
Individual (Specialist etc)	$154	$125	$202
Partnership (Builder)	$627	$285	$440
Partnership (Specialist etc)	$222	$188	$273
Corporation (Builder)	$752	$376	$541
Corporation (Specialist etc)	$251	$222	$305
Supervisor (Building)	$135	N/A	N/A
Supervisor (Specialist etc) (3yr)	$122	N/A	N/A
Certificate of Registration (3yr)	$ 81	N/A	N/A
Owner Builder	$100	N/A	N/A

The value of home building licensing fees collected during 2000/2001 was almost $19.44 million. Of this, $18.75 million was transferred into the NSW Government consolidated fund. Fees for owner-builder permits to the value of $688,000 were retained by the Department.

Since 1 January 2002, a 10% levy has been applied to home building licensing fees. The money will be applied by the Director-General, with the consent of the Minister, to meet the costs of operating the Building Conciliation Service[71] and the costs of administering the *Home Building Act* and any other Act prescribed by the regulations. It is projected that $713,000 will be collected from licensing fees during 2001/2002.

2.3.4 Licence renewal

The licence renewal process commences 6 weeks before licences expire. The licence holder is required to advise of any changes to details on the Renewal Application Form. Since November 1999, all applicants have been screened for HWI requirements. There is a 21 day window in which insurance details need to be provided, after which, the licence will be renewed with the condition "not for contracts requiring home warranty insurance" ie residential work over $5,000, (as of January 1, 2002, the amount has increased to $12,000).

Licences can be blocked when contact details are insufficient, adverse or excessive complaints have been recorded, Tribunal orders ignored, or where excessive insurance claims have been awarded against the licensee. A licence renewal may also be blocked in the case of an alert to an outstanding judgement debt.

2.3.5 Licence scrutiny

The Building Licensing Unit (BLU) examines licence applications, assesses compliance and holds an information database. In Committee hearings, the Director-General, Mr David O'Connor, outlined the Department's current information management system for licensing and outlined some additional improvements:

> ***Mr O'CONNOR:****: The department already holds a large amount of information in various databases relating to licensing, business names registration, complaints and inquiries, compliance inspections and other action. The department also has access to the national companies database, bankruptcy data, motor vehicles and drivers licence information, criminal histories and telephone subscriber information.*

[71] Part of the Consumer, Trader and Tenancy Tribunal (CTTT).

> *In the future, the New South Wales Government online licensing system will speed up and extend the security checks made on receipt of a builders licence application. The licensing system will automate a variety of third party validations, such as police and qualification checks. Pending the availability of this function, the department has extended its third party checks with regular notifications of insolvencies from the Insolvency and Trustee Service Australia. In addition, the department will have analytical software tools that will make use of the available data to highlight relationships between people and entities that are not obvious from current data sources.*
>
> *The department has received funding approval to acquire analytical software such as NetMap, which is used by the police, the Australian Securities and Investment Commission, the Tax Office, a number of large retail companies and a number of overseas agencies, including the FBI, New Scotland Yard and the United States Department of Treasury. The use of NetMap or other similar intelligence tools will enable the department to identify and plot linkages within the diverse range of information available to it. This capacity will be particularly useful in determining whether phoenix company activity or so-called rebirthing of businesses is occurring, as it will allow links of many different kinds to be identified*[72]*.*

BLU staff include *"half a dozen people in the licensing branch that maintain a close liaison with the investigations people"* [73]. The number of new licence applications or licence renewal applications rejected, was outlined by Mr Smith of the DFT:

> *The refusal rate would be about 1.5% at application usually based on lack of qualification. We do refuse licences because of previous conduct. In the current year from July [2001] to 30 April [2002] , there have been nearly 4000 applications withdrawn as a result of us questioning people as to their qualifications and experience, where they show a lack of willingness to be assessed*[74]

In addition, under new powers in operation since August 2001, the Department has cancelled 94 licences for bankruptcy, with 89 of these being cancelled when companies went into liquidation.

2.3.6 Licence obligations

Under Section 18B (a to f) of the *Home Building Act 1989*, licensees issuing home building contracts will automatically have "statutory warranties" attached. The warranties or implied guarantees are expressed as follows by the Director-General:

- *the work will be performed in a proper and workmanlike manner and in accordance with the plans and specifications;*
- *all material supplied by the contractor will be good and suitable for the purpose for which they are used and that unless otherwise stated in the contract, will be new;*
- *the work will be done in accordance with, or will comply with the Act, or any other law;*
- *the work will be done with due diligence and within the time specified in the contract, or if no time is stipulated, within a reasonable time;*
- *the work will to the extent of work conducted result in a dwelling that is reasonably fit for occupation; and*
- *the work or materials will be fit for purpose in circumstances where the consumer makes it known to contractor the particular purpose of the work or the result to be achieved.*[75]

[72] Transcript of evidence, 14 June 2002, p8
[73] Transcript of evidence, 10 May 2002, p6
[74] Transcript of evidence, 10 May 2002, p25
[75] Transcript of evidence, 10 May 2002, p2

Another key licence obligation is the requirement to obtain Home Warranty Insurance for each building contract undertaken by the licensee.

2.3.7 Building Investigations Branch

The Building Investigations Branch (hereafter the Investigations Branch) in the Department of Fair Trading is responsible for the enforcement of the Home Building Act, which includes disciplining and prosecuting licensees for breaches of the Act .

The Investigations Branch currently has 32 officers based in regional offices in Armidale, Dubbo, Newcastle and Wollongong, as well as the head office in Parramatta. Of these 32 officers, 11 have building or relevant technical qualifications. Prior to 2000-2001, there were only 15 Investigations Branch staff members. It is unclear how many of those were technically qualified.

The Investigations Branch can also utilise 36 general compliance officers from the general customer division of DFT to do preliminary licence compliance checks.

In 2001 there were 172,050 building related complaints[76] received by the Department of Fair Trading, in the form of telephone and over the counter enquires. In the same period, the Investigations Branch reported that its received 1435 written complaints about residential home building.

- **Main Offences under the Act[77]**
  - Operating without a licence
  - Operating without a contract
  - Operating outside licence (unqualified work)
  - Operating without home warranty insurance
  - Breach of statutory warranties in home building contract
  - Not using or failing to distribute a home building contract
  - Demanding deposits above the maximum set in the Act - $20, 000 or less than 10% - of the contract price

- **Main Responses under the Act**
  - Formal Caution
  - Penalty Notices – for minor breaches (fines ranging between $150 to $500)
  - Immediate licence suspension by the Director General of Fair Trading
  - Disciplinary action including reduction of licence functions, temporary cancellation, permanent cancellation.
  - Court Prosecution - for major breaches (enabling criminal prosecution and penalties up to $22,000)
  - Action in Supreme Court
  - Public warning in media by Minister for Fair Trading

- **Complaint action by the Department**
  In the Department's Annual Report of 2000-2001, these key actions of the Investigations Branch were reported :

[76] Provided by DFT on request of the committee
[77] List of offences and penalties in legislation, and compliance policy in Appendix 8

- Formal Caution – 1001 issued
- Penalty Notice - 3 issued to 3 defendants amounting to $800
- Immediate Suspension - 94 bankruptcy related cancellations under new powers since August 2001
- Disciplinary Action - proceedings brought against 4 contractors for improper conduct resulting in varying actions including putting restrictions on licences and temporary and permanent licence disqualifications; 10 licence suspensions
- Court Prosecutions – 32 defendants prosecuted for 128 breaches of the Act including licensed and non licenced contractors; with total fines and costs against contractors amounting to $146,107
- Action in Supreme Court – 1 building matter to the Supreme Court
- Public Warnings – The Minister made 3 public warnings

2.3.8 Public register of builders

Under the *Home Building Act 1989,* the Director-General maintains a public register of particulars of licensees and other information required by regulation. The consumer can get this information verbally by calling or visiting a Fair Trading Centre where a fee of $15 is charged for a hard copy of the information. There is no online access to this information.

With amendments added in January 2002, the public register now includes the following information for each licensee:

- Penalty notices issued against the licensees;
- Instances of non compliances with CTTT orders;
- Public Warnings and formal cautions issued to licensees
- Licence cancellation or suspension information; and
- Insurance Claims (since 1997).

With the recent amendments, it is anticipated that the register will become a useful record of a licensee's performance. However, it will not include any retrospective information – meaning that a full history of the licensee will not be available to consumers, only information from February 2002.

2.4 OTHER PRACTITIONERS

2.4.1 Who are the other practitioners in the home building industry and how are they regulated?

Private accredited certifiers in NSW are registered and regulated under a scheme managed by the Minister for Planning, in conjunction with authorised professional bodies who act as accreditation and disciplinary bodies in the first instance. Certain qualification criteria are applied for accreditation. Private accredited certifiers are audited by the Department of Planning. They are also required to have compulsory professional indemnity insurance.

Council certifiers are required to be licensed or registered in NSW. Council certifiers are employed by Council and are subject to the codes of conduct, scrutiny and complaint procedures generally applicable to Council employees under the *Local Government Act*. Qualification and experience requirements for certifiers employed by Councils are

determined at each Council's discretion. Insurance for Council certifiers is embedded within the Council's general insurance arrangements.

Architects are not licensed in NSW, but are registered under the *NSW Architects Act 1927*, within the portfolio of the Minister for Public Works, and supervised by a Board of Architects. The basic function of the Act is to protect the use of the title of 'architect' and make it an offence if someone uses the title of architect when they are not qualified. The penalty for the offence is up to $20,000. The Board also considers consumer complaints against architects and operates a disciplinary regime.

This Act is not considered to be a licence to practise because it only protects the use of the title. Furthermore, if a member is struck off the register of the Architects Act, it does not prevent business continuing as explained by Mr Jahn, National President of the Royal Institute of Architects:

> ***Mr JAHN:****… if you were struck off the register of the Architects Act, you can continue tomorrow to do exactly what you did the day before by calling yourself something else – a building designer, perhaps or an architecture technician or a technologist* [78]*.*

Most architects are members of voluntary professional organisations who have disciplinary procedures and impose professional standards and codes of conduct. Most architects have professional indemnity insurance, although it is not required under the NSW Act. It is understood that the NSW Board has proposed that legislation be amended to include[79]:

- *compulsory professional indemnity insurance for architectural practices to guarantee some protection for consumers;*
- *compulsory continuing professional education;*
- *a code of professional conduct to be observed by architects, with significant sanctions for proven case of misconduct.*

Building designers and draft persons are not licensed in NSW. There are a variety of voluntary organisations which have building designers as members, including the Building Designers Association of Australia (1350 members) and the Australian Academy of Design (300 members). Building designers qualifications vary, but can include formal qualifications such as architecture.

Engineers are not licensed in NSW. Many engineers are members of professional bodies such as the Institute of Engineers. Such bodies have training/qualifications required for membership, and impose codes of conduct and disciplinary regimes on their members. The National Engineers Register identifies the bulk of practising engineers. To be registered, an engineer does not have to be a member of the Institute but, as a condition of registration, a member of the Register must agree to comply with the codes of conduct and disciplinary regimes of the Institute.

During the mid 1990's, the NSW Branch of the Institute was given powers under the *Professional Standards Act* to establish a Professional Engineers Scheme which offered members professional indemnity insurance. However, this power and requirement was repealed in 1999.

[78] Transcript of Evidence, 20 May 2002, p104.
[79] Reported on the Board of Architects of NSW web site –www.boarch.nsw.gov.au

The Institute believes that the bulk of practicing engineers in NSW have professional indemnity insurance. It should be noted, however, that engineers working in the public sector or for Councils, may not have individual professional indemnity insurance.

The Institute is also an accreditation body under the PlanningNSW Certification Scheme. Around 124 engineers are certified under this scheme, which requires compulsory professional indemnity insurance and subjects certifiers to the PlanningNSW audit regime.

2.5 ARRANGEMENTS IN OTHER JURISDICTIONS.

2.5.1 How do NSW licensing arrangements compare to other States ?

Every State categorises and organises builders licensing in different ways. The names and definitions of categories of builders and practitioners varies from state to state, making it difficult to make 'like with like' comparisons.

The Committee has not been able to examine every State and Territory arrangement in detail, however the Committee did examine the Victorian and Queensland systems. (A detailed summary of these two systems is included in Appendix 6).

Victoria licenses all "builder practitioners" which they define to include:
- Domestic Builders
- Commercial Builders
- Demolishers
- Building inspectors (known as certifiers in NSW)
- Building surveyors
- Draft persons
- Engineers
- Quantity Surveyors
- Temporary Structure Erectors

Victorian system defines "building practitioners" to be the senior qualified operators in the respective disciplines. For example, not all engineers in Victoria would be registered as building practitioners, only those engaged in supervision or certification work. Building practitioners must have professional indemnity insurance and meet continuing professional development requirements.

Broadly speaking, the lesser classes of licences issued in NSW to builders/tradespersons are not issued in Victoria. The total number of registered practitioners in Victoria is only 20,000 compared to 155,000 licences in NSW.

Queensland currently has around 50,000 licensed contractors. The Queensland Building Services Authority (BSA) issues:
- builders licences;
- building designer licences; and
- trade contractor licence.

Queensland BSA also accredits certifiers within its Licensing Division. Investigation of complaints and auditing of accredited certifiers are managed within the Research and Review Section of the Queensland BSA.

2.6 ISSUES RAISED IN INQUIRY

2.6.1 Need to simplify licensing names and categories

The current titles given to people in the NSW home building industry are confusing to consumers. Currently the title 'contractor' can refer to a building work, trade work and specialist work. It has been argued that the title 'contractor' does not have immediate meaning to consumers compared to the licence titles used in Queensland "builder" and "trade contractor". Also, 'contractor' does not reflect the contemporary function of builders who often operate as site project managers with previous titles such as "foreman" or "clerk of works".

There is confusion over the meaning and functions of Qualified Supervisor Certificates and Certificates of Registration. People with these certificates are not able to contract with the public but may be contracted to a "contractor". While such operators could be considered by the public to be subcontractors, the Department maintains that it does not license subcontractors. Over 45,000 people have these certificates. It is unclear what the Department's distinction is between these certificate holders and what the public regards as subcontractors.

The Committee is aware that the DFT has rationalised licence categories from the extraordinary number of 220 to 42 as at July 2002. However, the nomenclature of recent times has added to confusion, particularly for consumers trying to identify whether the builder is working within the scope of their qualifications.

Suggestions were made in submissions about ways to further simplify licences. Firstly, given the rise in multi residential units it may be appropriate to scale licences in categories such as low rise, medium rise and unrestricted applications.

> ***Dr TYLER (Building and Construction Council of NSW):*** *You can start off as a cottage builder and after proving your competency at that for a certain period of time you can be allowed to build a three story building and then gradually work up to a high rise building. That perhaps avoids the problem ..where you can jump straight from being a cottage builder one day to a building a high rise the next day without any further training*[80]

A second proposal was the use of tiered licensing that distinguishes between novice and experienced builders[81].

RECOMMENDATION 5
The Committee recommends the Commission revise :
- the names of licences into 'plain English' titles; and
- the categories of licences to align with building types ie low, medium and high rise buildings.

[80] Transcript of evidence 6 May 2002, p44
[81] Submission No. 44.- Builder.

2.6.2 Need to raise the entry requirements for builders licensing

A general view put to the Committee from many different sectors is that the criteria for builders licensing is too open and that licences are too easy to get. NSW currently has the highest number of licensed practitioners in Australia with 155,000 licensees. The Department of Fair Trading reports a 1.5% rejection rate on initial applications for licences.

Comments received by the Committee, include that licences are too easy to obtain and the entry level too low:

> *Builder's licences have become easier to obtain and to a broader cross section of backgrounds, personally I have encountered builders who were journalists, brickies labourers, scaffolders and handyman.*[82]

> ***Mr HEARN (April Showers Waterproofing, Director):*** *… the licensing system is a joke.*
> ***The Hon. HELEN SHAM-HO:*** *That is the problem.*
> ***Mr HEARN:*** *Yes.*
> ***ACTING-CHAIR:*** *But why is it a joke?*
> ***Mr HEARN:*** *Because they can give up one licence one day and two or three weeks later get another one.*
> ***Mr VILES (April Showers Waterproofing, Director):*** *You can be Billy the brick cleaner one week and Wally the waterproofer the next.*
> ***Mr HEARN:*** *That applies to builders as well.*[83]

> *Licensing standards have been relaxed to such as extreme degree that new licensees cannot necessarily read drawings, set out accurately, conduct estimates, understand building sequencing or in some cases, write legibly*[84]

In particular, it appears that formal training is being too easily substituted for experience, which is less stringently monitored :

> ***Mr LEWER (Australian Institute of Building - NSW****) : Those people can get a licence because the requirements of fair trading are not such that they need to be able to show they have done three years apprenticeship and a journeyman year and that they have a ticket from TAFE or an independent authority. They do not have to do that. What they generally do is provide references from people they have worked with – you talk of about cronyism- and somebody has to say they have been doing this for five years …and bingo they get a licence*[85]*…*

Views were expressed by consumers, builders and Councils alike that there was a huge variation in the quality of licensed builders:

> *They range from craftsmen to predators who think they have a license to take money and get away with it.*[86]

> *Council's experience with licensed builders in the areas is that the quality has decreased over the last 20 years. The buoyancy in the building industry has resulted in more fluctuation in the quality of works carried out*[87]

Concerns expressed in submissions fall into three broad areas:

[82] Submission No.14 - Builder
[83] Transcript of evidence 20 May 2002, p.26
[84] Submission No.44 - Builder
[85] Transcript of evidence 6 May 2002, p.42
[86] Submission No. 20 - Consumer
[87] Submission No. 105 – Leichhardt Council

1. appropriateness of categories to qualifications;

   Unqualified people are gaining Contractors' licences without doing a trade certificate. If a labourer has worked in the building industry for a long period of time … they should apply for "recognised prior learning" in the trade course first. Once gaining their trade certificate, then they could apply for a Builders Contractor's license, not prior.[88].

2. the issue of licences to companies and partnerships; and

   The Department, when it issues a licence to a partnership or corporation requires that only one person be nominated and approved as its qualified supervisor, irrespective of the size of the contract, some of who have over 100 homes under construction at one time. Whilst a medium to large company would employ more than one person in the role overseeing construction, there is no regulatory control over this. [89]

3. owner builder permits.

   Owner Builder permits need a change of name, in Council's experience many people believe that the permit is a de -facto builders license which entitles them to build commercially for profit - witness the number of dual occupancies built and sold by owner/ builders. [90]

The Committee is aware that the DFT has made various reforms aimed at improving its ability to screen applicants with the intention of addressing concerns about "re-birthing" and individuals operating under multiple licences.

There have also been amendments to legislation to enable the Director-General to take disciplinary action where it is found that a building contractor does not have 'a sufficient number' of nominated supervisors working to ensure that the statutory warranties for residential building work are complied with. However, there is no indication of what 'a sufficient number' may be in terms of a ratio of supervisors to homes built by a building firm.

The Committee also notes that since July 2002, owner-builder permit applicants (for works greater than $12,000) must complete a TAFE NSW education course dealing with the obligations and restrictions for owner builders.

RECOMMENDATION 6
The Committee recommends that the Commission assess the effectiveness of recent licensing reforms with particular reference to concerns about:
- perceptions of a relaxation of entry requirements for licensed builders;
- the appropriate ratio of supervisors to the volume of work undertaken by a building company or firm; and
- the misuse of owner-builder permits.

2.6.3 Need for continuing professional development of builders

The evidence put to the Committee suggests that there is a view by both builders and consumers that there has been a decline in builder skills, and in turn, a resulting decline in the quality of builders and building.

[88] Submission No 92 - Builder
[89] Submission No. 169 - Builder
[90] Submission No.30 – Holroyd Council

A high proportion of building licence holders have not been trained correctly, and do not have adequate knowledge of the required building practices [91]

> *Licensed builders and tradesmen also need to have some sort of meaningful training program to keep up with the rapid change in the building industry. This training must be linked to their yearly licenses so that any builder not doing the training will not have their license renewed.*[92]

Under the current arrangements there is no obligation for a licensee to remain updated on current trends, new materials, codes and standards and legislative requirements.

There was overwhelming support from builders and their representative bodies for mandatory continuing professional development (CPD). A panel of builders who appeared at hearings also agreed that CPD would be valuable to the industry. As noted by the Newcastle Master Builders Association:

> *[The Association] recommends introduction of mandatory Continuing Professional Development for all licensed operatives in the industry. CPD should be targeted at the top 10 dispute issues with mandatory attendance at approved training courses being a condition of renewal of licence and pre-requisite for obtaining Home Warranty Insurance* [93]

The Department of Fair Trading has also indicated that a program for CPD has been in development for some time, but has yet to be introduced.

A further issue raised in terms of continuing professional development is the business skills training. The current system does not require that the licence holders have any business training. New tertiary courses and requirements for some licences may include business management components, but these do not apply to existing licensees.

Building today is a complex matter and builder's management skills are just as critical as their technical skills. Many submissions have argued that some basic business management knowledge should also be included in the CPD requirements, that covers issues like contract administration, client communication skills and cash flow management .

A key concern is declining knowledge of the Building Codes. Although most builder organisations have newsletters and updates on new issues, the majority of builders are not members of these organisations and therefore do not access this information.

Updated information used to be provided to all licensees in NSW through a magazine:

> *Since the Builder Licensing Board went to the Department of Fair Trading they have pushed up the fees and taken away the quarterly magazine we used to receive, this magazine kept all licensed trades up to date with changes in the industry and new products available on the market, the magazine was a useful tool in itself, I think it would be a good start if the magazine was reintroduced even if we had to pay for it* [94]

The MBA argued in hearings that the DFT as the licensing body, should provide this information as part of its return on fees collected:

> ***Mr MEREDITH**: I see the Department of Fair Trading as performing that function because they are the body that is licensing builders and trade contractors. I believe, and I put this*

[91] Submission No. 40 - Builder
[92] Submission No. 17-Certifier
[93] Submission No. 191
[94] Submission No. 14 - Builder

as my own personal opinion, that indeed they have got an implied responsibility. They are licensing builders and asking builders to undertake work in a workmanlike manner, and that is another issue, whatever that means, and it is not defined, but here we have a national code that requires building work to be built to a certain standard, yet the bulk of the industry has not been advised of those changes.

***The Hon. HELEN SHAM-HO**: Is it an indictment of the Department of Fair Trading that they are not upkeeping the information you are talking about of the changes and also the standards?*

***Mr MEREDITH**: I would not be that harsh on the department. I am just saying that I believe that that is a function that they should be performing because it makes sense. They are licensing builders, they are licensing contractors, they are the ideal body to be the conduit meting out that information to the licence holders.* [95]

Recommendation 7
The Committee recommends that the Commission, as the new licensing body, should require continuing professional development for licensing renewal which includes knowledge of the Building Code of Australia and business skills training. The Commission should also provide updated information on building regulations and requirements to licensees.

2.6.4 Need for checks for financial soundness

A further suggestion has been for some level of screening to take place on licensing application and renewal, where assessment is made of the financial soundness of the builder. The benefits of this would be to eliminate financially marginal operators, who are likely to go bankrupt, from entering the industry. There would also be flow on benefits to the home warranty insurance system, by precluding financially risky builders from practising in the building industry.

As noted in the submission from the NSW Master Builders Association:

> *… the Queensland licensing system establishes financial qualification and establishes turnover thresholds to control rapid growth of building businesses and was done in consultation with industry. It is defined and transparent and provides clear criteria for builders wishing to grow the business. Importantly financial criteria is linked to licensing at the front end and therefore all builders who have met the licensing criteria can purchase insurance*[96]

The Committee received a submission from an organisation called Corporate ScoreCard, a Financial Risk Rating Agency, which suggested that private industry is currently able to provide a service of screening or rating which could be appended or incorporated into pre-qualification licensing criteria[97].

The Committee has not determined the specific financial aspects which should be measured. However the Committee suggests the four main financial checks already used by the

[95] Transcript of Evidence – 10 May 2002, p118
[96] Submission No. 109 – Master Builders Association of NSW
[97] Submission No. 131 – Corporate Scorecard

Queensland Building Services Authority, noted in hearings, may be a reference point for the Commission to develop a financial checking system[98].

Recommendation 8
The Committee recommends that checks for financial soundness also be part of licensing criteria for builders.

2.6.5 Need for revised offences and stronger penalties for builders

A common view expressed to the Committee was that disciplining of builders is too lenient and policing of licences insufficient:

> *The Licensing Board [the Department of Fair Trading] seems to be a toothless tiger as the only action that they seem to take is after many complaints and structural failures.*[99]

The DFT rationale as compared with consumer expectations for disciplining of builders, was explored in hearings with the DFT's, Director of Compliance and Investigations, Mr Hanlon:

> ***The Hon. JOHN RYAN:*** *Wouldn't it be simpler just to fine the builder some money every time they completed a building without insurance, at least the equivalent of the insurance policy? It is a bit like a speeding ticket. People take the view if you do 20 kilometres over the speed limit you will get a $200 fine. If you do this as a builder, you complete an entire project, put a consumer at an enormous risk and you haven't covered them with an appropriate policy of insurance, shouldn't they be subject to at least a fine?*
>
> ***Mr HANLON:****: I don't disagree with you on that. I don't accept what you said earlier, that we would just caution them and walk away. I don't accept that that would be the case. In a case where there are cautions, it is because it is relatively minor and has been rectified.*
>
> ***The Hon. JOHN RYAN:*** *When is it relatively minor not to have a certificate of building insurance?*
>
> ***Mr HANLON****: When the work has been rectified and when there is no other history that the builder has.*
>
> ***The Hon. JOHN RYAN:*** *If we enforced the speeding code in the same way, every time a police officer booked a driver for doing 80 kilometres in a 50 zone, they would say, "Okay, I will drive at 50 in the future. Let me off the fine". What consumers have said to me is that they are a little tired when they see builders committing what appears to be an obvious breach of the law under the Home Building Act, they want to see some sort of penalty imposed on the builder over and above simply a warning letter, "Don't do it again", because they take the view that that builder did something to me that put me at enormous risk and therefore they ought to have some sort of sanction which makes sure that they do not do it again.* [100]

Whilst the Committee is aware that there have been recent reforms in the legislation relating to improving disciplinary procedure and raising penalties for offences, further improvement could be made to the system in areas of penalties; and better resourcing and measures to address delays in investigations and prosecutions would assist.

[98] Appendix 9 - Financial Requirements for Building Licensing in Queensland – Queensland Building Services Authority submission.
[99] Submission No. 14 - Builder
[100] Transcript of Evidence, 10 May 2002,p34

As noted previously, the Building Investigations Branch investigated over 1700 complaints made about home building in the year 2000-2001 and issued in the same year:

- 1001 cautions;
- 3 penalty notices to 3 defendants amounting to $800; and
- total fines and costs against contractors amounting to $146,107.

The DFT defended its propensity to issue cautions in many cases on the following basis:

> ***CHAIR:*** *But the fact that the home warranty insurance was not attached is the second incidence out of this very tight cross-section or sample of cases. Is a caution enough?*
>
> ***Mr HANLON:*** *For failing to attach it, rather than not having it, in the case of a first offence where there is no detriment to the consumer, and in circumstances in which the piece of paper is not attached but the incident existed and therefore the consumer was not at risk, in our view in the majority of those cases, it is appropriate. If there were any kind of aggravating factors or there was a history of persistent non-compliance, then we would take other action and there is a range of other action available to us. But you need to balance, in any individual matter, how much you do to somebody in respect to a relatively minor breach when no harm was done, when there are other matters that we also need to resource.*
>
> ***The Hon JOHN RYAN****: I think that is the kind of argument I would use with the police officer who just got me for 80 km in the 60km zone*[101]*…*

The Committee disagrees with the mitigation argument above of "no harm was done" by failing to comply with the Act. Builders who fail to provide a copy of a Home Warranty Insurance Certificate or fail to provide a copy of the contract, have breached the Act. They are failing to maintain proper work practices required by their license. Even when such breaches do not harm the consumer, enforcement of the Act is still required. Otherwise, there is no obligation for the licensee to maintain their professionalism and standards of service to the consumer.

- **Possible Approaches**

Reduced use of cautions

The Committee considers that the over-reliance on cautions in the system and an under use of penalty notices ($800 infringement revenue for a year), is not sending a strong enough message to builders. The Committee believes that cautions should be limited to very minor breaches and inadvertent errors only.

On-the-spot fines

The Committee feels that a system of on-the-spot penalties may be useful as a practical mechanism in place of cautions. Such fines would work in the same way as traffic infringement notices, with payment required unless the fined builder wishes to challenge. The Committee has not formed a view on the scale of these fines, at the very least the value should recover the costs of policing and issuing.

Repeat license offenders

Another concern raised in submissions was that builders with obvious compliance problems are not being removed from the system promptly, thereby remaining in the system to do unsatisfactory work, and then re-entering the system too quickly. The Department maintains

[101] Transcript of evidence, 14 June 2002, p31 in camera

that it is very concerned and has powers to act quickly in many cases. Mr Hanlon, Director of Compliance and Investigations from the Department noted in hearings that since powers for suspension of licences were created (just under two years ago) 16 builders have been suspended[102].

Aside from the Committee's surprise that the Department has only recently acquired powers to immediately suspend licences despite administering licensing of builders since1997, the severity of action imposed on builders who are frequently breaching the legislation, does not appear to match community expectations. The Committee suggests that a repeat offenders policy be implemented for significant breaches of the *Home Building Act* or other related legislation, rather than being left to the discretion of the Investigations Branch. This policy would send a strong message to rogue operators and hasten their removal from the system.

Under a repeat offender policy, the builder's operation should be examined comprehensively. This would include examination of serious breaches of the *Home Building Act,* as well as serious breaches of the development consent conditions under the EP&A Act. For example, a builder, who fails to contract without Home Warranty Insurance only once, but has a history of Council orders for breaching time constraints, pollution and excavation requirements of a development consent, should be considered unfit to retain a licence. Therefore, it is imperative that Council and private PCAs report their concerns and issues about builders to the Commission.

A repeat offender policy could be applied through a points system whereby certain breaches attract certain points. The points could be collated to trigger a review, audit or cancellation of licence and be noted on the public register.

Scaled penalties related to business turnover

Another issue is the scale of penalty that can be applied to breaches of the Act. The Committee notes that the maximum penalty for a serious breach of the *Home Building Act* that can be applied by the Courts is $22,000, which was increased from $11,000 in legislation this year. The Committee has heard evidence that even this new penalty is insufficient for the potential harm that can be done by poor builders.

A maximum penalty of $22,000 is not sufficient disincentive for large building operators that turn-over millions per annum. If financial penalties are set too low, then large operators may build the penalty into their cost-risk profile as a trade off against potential revenue, rather than look to changing their operations to comply with legislation. Even though additional orders might be put on operators which may appear onerous or costly, such as buying back the property, these orders can be offset by the operator by doing cost price rectification and then re-selling at a profit, particularly in areas where there is a booming housing market.

The Committee believes that a system of scaled penalties should provide an effective incentive for behavioural and operational change for large companies breaching the Act.

[102] Transcript of evidence 14 June 2002 p 24

RECOMMENDATION 9
The Committee recommends that the system of licence offences and penalties be revised to include:

- use of warnings limited to minor licence breaches and inadvertent errors;
- application of on the spot penalties;
- increased use of licence suspensions/cancellations for repeated serious breaches; and
- scaled penalties to apply in relation to business turnover.

2.6.6 Resourcing and timeliness of investigations

A large proportion of consumer submissions to the Committee refer to the failure by the Department of Fair Trading to deal with investigations promptly and satisfactorily.

A summary of problems with investigations contained in submissions was articulated in hearings by consumer representative group, the Building Action Review Group (BARG):

> ***Mr RUSSO:*** *….A large majority of the case studies that you have here in front of you have already lodged complaints with the Department of Fair Trading and some of them have taken up to three years and still there is no result; there is no explanation as to why the Department and its officers have taken as long as they have. There is no explanation as to why once reports have been prepared and the Department is appraised of the defects which are incumbent within a building, that the Department does not commence an immediate prosecution against the individual builder, take control of the matter and stop what Mrs Onorati would call the cancer and stop the consumer being the victim….*
>
> *….Delay is probably the most important issue for the department. You have heard and you can see in the cases that Irene has presented extraordinary periods of time that people have had to endure problems with their builders. There does not appear to be, even with the current legislation and the changes that have occurred, any real improvement in the ability to deal with disputes* [103]

Time initiating investigations
The Department of Fair Trading acknowledges that delays in some investigations have been unsatisfactory. One example was reported of an 11 month wait for an investigation, which the Department agrees was completely inappropriate.

The Department explanation of why such delays have occurred is not satisfactory to the Committee. The Department states that risk assessment and job allocation can take three or four months from when the complaint is made until an investigation commences. However when asked if this reflected inadequate staffing of the Branch, the Department said that this was standard and shaped by a prioritisation process looking at urgent and non urgent matters.

As noted in the background section the current staff of the branch is 32 with 11 building qualified officers who manage around 1700 complaints per annum. The Committee believes that such a staffing level is completely inadequate to manage the number of complaints in the system. A 3 month wait from complaint to commencement of investigation is intolerable, particularly given the potential severity and hardship that building problems involve. The

[103] Transcript of evidence 23 May 2002, p 26

Committee believes that staffing levels should increase to enable an investigation to commence within an average of 2 weeks of lodging a complaint.

Priority given to cases and interpretations of urgency

The Committee believes, having examined particular cases and visited sites, that the Investigations Branch's assessment of priority and urgent cases does not reflect either the Committee's nor the community expectations.

This issue is reflected in hearings between the Committee and the Department's, Director of Compliance and Standards :

> ***The Hon. JOHN RYAN:*** *Does not this fall into the category of being something that looks relatively urgent and it would be possible to carry out an investigation which would at least lead the Director-General to the conclusion whether he should use his powers to suspend the builder's licence and make it at least subject to conditions by now?*
>
> ***Mr HANLON****: No, this is not one of those relatively urgent matters I don't believe. We were discussing earlier the nature of the health and safety concerns that we might have. We do not believe that anybody is at risk in respect of the building.*
>
> ***The Hon. JOHN RYAN:*** *This is a building that is going to have to be pretty substantially demolished and rebuilt.*
>
> ***Ms MEGARRITY****: No, they do not believe that.*
>
> ***Mr HANLON****: No.*
>
> ***The Hon. JOHN RYAN:*** *Sorry, there is a tide of water that runs under this building to the point that it is necessary to install a swimming pool pump to keep a pool of water from aggregating underneath the house. You can actually see a warp in the floor boards that is quite significant. It has 16 piers instead of 32 underneath this floor section. Looking at the brickwork, it is quite apparent that the brickwork has various different quality problems in it.*
>
> ***Ms MEGARRITY****: The first floor sags.*
>
> ***The Hon. JOHN RYAN****: Yes. It is not the sort of building that - when I walked up the stairs that lead from the front door to the first level I nearly fell over myself simply because the stairs slope backwards. When you walk into the garage, because the garage has not been built long enough to accommodate an average sized vehicle, you practically poke your eye out on the runners. They are not the sort of building defects that strike me as being not obvious, and obviously because the garage is not long enough you are going to have to demolish the front of the house to fix it. I will perhaps say that if this is a building which has not attracted urgent and more attention, the only thing it can lead to is that you must not have sufficient resources to carry out the task that you have been given to do by the people of New South Wales.*
>
> ***Mr HANLON****: I cannot comment on that issue, sir, but in respect of the other matters, we have considered whether or not licence suspension is available to us under the Fair Trading Act. Based on the requirements of the Fair Trading Act to implement a licence suspension, my view is that there is not sufficient conduct to warrant licence suspension. It was considered but it is not appropriate in this matter…[.continued (p8)]*
>
> ***The Hon. JOHN RYAN:*** *What is going to happen to get you guys to respond to something that looks obvious and apparent? Six months -*
>
> ***Mr HANLON****: It is not fair to keep calling it obvious and apparent. There are disputes between the different building inspection reports that are in place.*

The Hon. JOHN RYAN: *Do you mean to tell me that there is some possibility that this building is going to pass muster as being an acceptable product for these people to have paid for? Are you telling me that there is a serious chance of that?*

Mr HANLON*: No, sir, nothing I said would indicate that that is what we think.*

The Hon. JOHN RYAN: *There is not a thing that would indicate that this building has got anything suitable about it at all. These people absolutely in short description have been ripped off by this builder. They have paid for a product that is absolutely, utterly and totally inadequate for the purpose for which it was intended. You cannot park your car in it; you cannot sleep in the building without fear that there is a tide of water rushing underneath you; there is rising damp all throughout the building that is going to ultimately destroy the building without any doubt at all; it is not possible to walk across the floor without tripping over. I have to say that there is not a chance that these people have paid a builder good money and got what they paid for, there is not a chance. There might be some debate about the details, but there is not a chance that this is not going to result in some pretty serious questions for this builder to answer.*

Mr HANLON*: One of the points you mentioned, sir, about the details is where we get our biggest challenge. We have to get the details right. We cannot say, "Blind Freddy can see that this house is no good. You are out of the industry". That is not acceptable. We need to come up to proof in these matters.*

The Hon. JOHN RYAN: *But Blind Freddy can at least see that this is a house that is in trouble, that there are consumers that are battling with this flood and somebody ought to be saying to this builder now "Fix the problem". I think the people of New South Wales expect us to design a legal framework which says that when this sort of thing happens a builder is forced, before he lays another brick anywhere else, to come back and rectify these people's problems. It looks to me that these people are going to drag on with these problems for another six months. They have been going on with it for more than 12 months now. How long is a reasonable period of time for people to put up with a house that is in that condition?*

Mr HANLON*: Sir, you misunderstand the six months. We will wrap up our disciplinary action, finalise our investigation and take disciplinary action in about six weeks, not six months. The total time elapsed would be six months, but we will finalise this matter within six weeks.*

The Hon. JOHN RYAN: *You have had it since September [2001], and apparently from a member of Parliament, and I know that most departments regard material that comes from the political sector with a slightly different level of urgency, given that it usually filters through a Minister's office first. It appears to me that it has been more than six months.*

Mr HANLON*: Sure, but the investigation -*

The Hon. JOHN RYAN: *In fact, it is nearly a year, is it not?*

Mr HANLON*: No, it is not.*

The Hon. JOHN RYAN: *Yes, it is.*

Mr HANLON*: I do not accept that.*

The Hon. JOHN RYAN: *Steve Jones, who is not insignificant in the department, is he, knew about it in September I think, certainly September. You are telling me it is not true. Our Committee believes that on 17 September, notwithstanding there was earlier contact with the Department of Fair Trading, but on 17 September 2001. Now, if you are finished in six weeks time, there is not going to be many more weeks to go until this thing passes the first anniversary of when it came to the attention of some of the most senior people in your department. So it is not six months, is it?*

> ***Mr HANLON*** *: The investigation commenced in January of this year, sir. The inspection was done in February of this year.*
>
> ***The Hon. JOHN RYAN****: So why did it take three or four months for the investigation to commence?*
>
> ***Mr HANLON****: Just part of risk assessment and resource allocation, getting somebody to attend to it.* [104]

The Committee believes that delays in investigations by the Department in home building create significant impacts on consumers which are totally avoidable by prompter responses. As described by Mr Russo, a representative of BARG:

> ***Mr RUSSO:*** *..There is inequality in bargaining power between the builder and a consumer and this allows the builder to be in a position where the longer he delays the more likely the consumer will succumb to his demands, sign off the contract and accept a substandard home and/or pay for the extras or additions that have been requested.*
>
> *These delays cause massive financial hardship to consumers…Every case involves some sort of human tragedy that emerges out of it, whether it be the breakup of the marriage, the psychological impact on the children, financial problems, sickness or whatever. They are all the same. Again, the department appears to exacerbate that because its intervention skills are such that it does not help the consumer at all. It does not take any control of the dispute. It does not take the pro-active position of dealing with the builder. As a consequence, consumers are basically left to fend for themselves in circumstances in which the department tries to insulate itself from the consumer.*[105]

The Committee believes that the Department is not taking effective consideration of the impact of its current approach to investigations. Problems with home building can range from minor to major. When problems are major, the ramifications of delayed investigation are much greater than with any other product problem. Responses to consumer complaints must be prompt in home building matters.

The Committee has also heard in submissions that there is a culture and attitude towards consumers in the Department, whereby the consumer is not given sufficient support or advice on how to pursue matters. This is examined in the Chapter 4 on Consumer Advice.

RECOMMENDATION 10
The Committee recommends that a vigorous investigations unit be established in the Commission. It should be staffed by industry experts and be resourced to be pro-active and responsive to complaints and to conduct prompt investigations.

2.6.7 Need for licensing of other practitioners

Various submissions have called for licensing to be extended to all building practitioners. The key elements of such licensing would be to impose compulsory continuing professional development, apply complaints management, disciplinary and audit processes, and mandate professional indemnity insurance.

The idea to expand licensing to other building practitioners, including architects, engineers draftspersons, and building surveyors has been in circulation for some time.

[104] Transcript of evidence, 19 June 2002, p6-9 in camera.
[105] Transcript of evidence 23 May 2002, p28

The Building and Construction Industry Council (BACC) and the Australian Institute of Building (AIB) highlighted a national Model Building Act developed in the early 1990's. This Model Act identified the following principles in home building and reasons for accreditation. As stated in a AIB proposed Building Bill for NSW, prepared in October 2000:

> *A system of building practitioner accreditation addresses the lack of information that frequently disadvantages consumers. As consumers are frequently non -repeat customers for these services they have difficulty assessing the product prior to purchase. By requiring that building practitioners , who design or contract to provide building ... work to owners to be accredited, owners will be better informed …*
>
> *…Typically consumers will be able to expect:*
> - *the practitioner meets the qualifications and competence requirements*
> - *he/she has a requisite level of experience*
> - *he/she has undertaken continuing professional development*
> - *he/she may be audited, and complaints investigation procedure is in place*
> - *he/she has the required insurance* [106]

The Building and Construction Council of NSW notes that its members have been involved in a NSW Working Group since May 2001, which has been preparing a proposal for accreditation for building practitioners in both domestic and commercial building areas. The working group includes key agencies and industry organisations. (The position paper on this issue is attached at Appendix 7).

The Committee notes that the target date for recommendations from the Working Party to Government is January 2003, with an implementation target of July 2004.

The Working Group notes that a stumbling block to the initiative, is its acceptance in the commercial sector, which is currently not required to use licensed practitioners at all. It is also possible that the commercial sector would oppose more red tape on the industry. Another concern is that the system would be best suited to implementation by a single group, rather than currently fragmented across various Ministerial portfolios in the NSW Government.

Whilst the committee has not taken direct evidence about the commercial building sector, there has been anecdotal comment that a system of licensing of builders and practitioners should include the commercial building sector. It has been put to the Committee that if standards in residential building have fallen due to lower levels of regulation, then it is likely standards in the commercial sector have also suffered through lack of regulation.

RECOMMENDATION 11
The Committee recommends that the Government consider looking at models and undertake detailed consultations with the community with a view to determining the need to implement greater regulatory control of building standards in the non-residential building sector.

The Committee consider that the proposal to implement licensing within the home building sector only, through a new Commission would enable the target date of the Government Working Group to be pushed forward. The Committee recommends the Government action these changes within the home building sector to be implemented. The Committee believes

[106] Submission No. 50 Australia Institute of Building – NSW

the licensing of home building practitioners will deliver better quality buildings by increasing their accountability:

> *The procedure of requiring all practitioners be accredited places more accountability on all practitioners, increases the insurance pool and provides the consumer with greater levels of recourse*[107]*.*

The three key component of the licensing regime will be:
- mandatory CPD for licence renewal;
- professional indemnity insurance requirements; and
- licensees subject to a discipline, penalties and auditing regime.

Housing all practitioner licensing within the one organisation will enable far more rigour and coordination of services, absent from the current system:

> ***Mr WEIGMANN (Building Designers Association)** : …If you have across the board accreditation not only the on-site practitioners but design practitioners certifiers and have them under one group you are going to have more control. At the moment you have the Department of Fair trading with the Home Building Act, you have the Department of Public Works administering the Architects Act and you have Planning NSW in there doing planning issues and local government as well. It is too spread out*[108]*.*

The Committee does note that in the current insurance climate, coverage is expensive and availability limited. The Committee feels that this issue can be managed by phasing in the professional indemnity insurance requirement to new practitioners as the Commission's activities commence.

- **Private certifiers**

An additional issue raised in relation to certifiers was the variation in criteria and categories applied by the various accreditation bodies, which results in inconsistencies between certifiers. It is argued in various submissions that each association should apply common criteria with respect to qualifications, competence and experience. The Committee sees that standardisation of these criteria should be undertaken as part of expansion of the licensing regime.

> ***Ms FRANCIS (North Sydney Council)**: There needs to be one independent multi-disciplinary accreditation body accrediting all accredited certifiers irrespective of their profession. We will then have a consistent approach to handling the end of the process rather than a building surveyors approach, a planners approach and a surveyors approach. We will have one approach as the basis upon which they are accredited.* [109]

- **Council certifiers**

The Committee has heard from many consumers and industry groups that Council certifiers should have the same qualifications as private certifiers. The President of the Local Government and Shires Association, whilst objecting to private certification in principle, also acknowledged that common qualifications between Councils and private certifiers would be desirable.

> ***CHAIR:** Similarly, again noting the principal position of the Associations, if there continues to be a dual system, a level of accreditation for, say, private certifiers and a level of continuing professional development for those people, should those same provisions*

[107] Submission No. 28 – Building Surveyor.
[108] Transcript of evidence 20 may 2002, p109
[109] Transcript of evidence 6 May 2002, p48

> *apply to building surveyors or certifiers who are employed by local government authorities?*
>
> ***Cr WOODS:*** *Yes. I think that does apply. In fact, Councils and the Associations are supportive of the ongoing professional development of staff in the upgrading of qualifications, release time, supporting costs for various courses, and short-term courses being provided by the training wing of the Associations and of professional organisations.*[110]

However the Environmental Health and Building Surveyors Association (ehabsa) argued that accreditation of Council certifiers should be a "*voluntary system for people within councils if they wish to be a part of it*" (Ms Hunt, President, ehabsa)[111].

The Committee is of the view that Council certifiers should have qualifications and experience on par with private certifiers, given they undertake the same role. The Committee believes that Councils need to raise the skills of their staff to improve certification consistency not only between Councils and private certifiers, but also amongst Councils.

> *If government is serious about raising the level of skill in those people carrying out building certification roles, then local councils building inspecting staff also should be appropriately qualified and experienced.*[112]

The Committee does note, however, that many current Council certifiers would not meet the formal tertiary requirements applied to private certifiers. Hence the Committee would not impose such qualifications requirements retrospectively. Instead new Council certifiers should have equivalent qualifications to new private certifiers.

The Committee does not dismiss the value of long term experience of many Council certifiers. However, the value of this experience is lessened unless supplemented with a sound knowledge of new building requirements. The Committee feels that to improve quality of Council certifiers consistency, CPD training should not be left to each Council's discretion. The Committee recommends that a standardised CPD course be developed and undertaken by all Council certifiers to improve skill levels.

Requiring CPD for existing Council certifiers should also address concerns about staffing in regional areas. However it is noted that some remote Councils anticipate difficulties in long term recruitment of new certifiers under such changes[113](Submission 150-Inverell Council).

An argument was put forward by the LGSA that external auditing of Council certifiers was not necessary:

> ***The Hon JOHN RYAN:*** *Having said that, and you have made the point, that the current private certification system should be better audited than it currently is. I agree with you that one person auditing is hopeless. It will not surprise you that a number of private certifiers have said that that auditing regime which ought to be applied to them ought also be applied to councils for exactly the same reason that BARG suggested, that sometimes there are problems with a council certification and it would not hurt to have the ruler put over some of the things that councils have done. Would you object to that auditing regime being extended to local government?*

[110] transcript of evidence 23 May 2002 p.64
[111] Transcript of evidence 6 May 2002 p.79
[112] Submission No.17
[113] Submission 150-Inverell Council

> ***Cr WOODS:*** *Yes, I would because I want to see the auditing regime conducted by local government itself. I do not want some crowd on the outside running around doing audits. I feel that we are quite capable in a political environment to do our own auditing. If the work is not up to scratch and we are getting complaints from our constituents, we should address those very clearly and get them sorted out. I do not want some crowd running around doing an audit when in fact the audit should be done by the council itself, and I believe is done by the council itself, because I do not think you find too many examples where there may be a litany of complaints and errors before there is intervention by the council wanting to know what is occurring, why it is occurring and whether in fact criticisms are justified*[114]*.*

This view contrasted with comments made by a former council employee now working as a building consultant:

> ***Mr HARRIMAN (BCA Logic)****: I would like to address some of the comments that Councillor Peter Woods made, particularly with problems. I worked in council for 12 years. Problems were there when I was at council. It is a matter of how they have been dealt with in the past three years that has differed. From my experience, when a problem was noted a senior technical person in council would try to fix it or sweep it under the carpet. Many, many councils have crunchy carpet. With private certifiers the same senior technical person is unlikely to try to fix it; they are likely just to complain about the certifier to the accreditation body. Therefore we have an industry full of rumour and innuendo at present and very few complaints are investigated and no practice notes or guidance come out of that.*[115]

The Committee notes that Council certifiers are subject to existing complaints mechanisms, internal auditing and investigation processes within Council. However, the Committee believes after hearing difficulties that consumers have also experienced in seeking Council assistance, that the Commission's certifier auditing process will be a more immediate and effective mechanism to examine Council certifier compliance. In addition as noted above, until a common body examines all complaints, it is difficult to gauge where the flaws are occurring and where improvements are needed.

External auditing by the Commission would not preclude consumers from pursuing the other mechanisms for Council scrutiny of Council certifiers, such as internal complaints systems, Councillor representation, the NSW Ombudsman and the Independent Commission Against Corruption (ICAC).

- **Designers, architects and engineers**

The Committee believes that building quality will not be improved simply through better skills and practices at the construction stage, but that improvements should start at the design stage with appropriate preparation of plans and specifications. The goal should be to identify potential problems before construction commences and that during the construction process, the builder must be able to recognise potential problems.

As one builder's submission states:

> *All architects and engineers should be held accountable for their drawings to ensure they are drawn in accordance with the current regulations. They are the ones with the qualifications - not the builder.*[116]

[114] Transcript of evidence – 23 May 2002 p68
[115] Transcript of evidence – 23 May 2002 p78
[116] Submission No.49

The Building Designers Association and the Institute of Engineers both support the introduction of accreditation/ licensing for their respective disciplines. The NSW Board of Architects similarly supports a registration system. All agree to the key features of mandatory CPD and professional indemnity insurance. As noted in the background section, most participants have relevant insurance coverage already.

- **Builders and Subcontractors**

As noted previously, the Committee recommends that CPD, business skills and financial soundness should all be part of the licensing process for builders to improve quality:

> *Until you have a situation where only skilled people with construction skills, business skills, and financial skills can set themselves up as builders then you will always have the current problems* [117]

The Committee believes that the builder licensing system would also benefit from policing of licensing through audits, as a pro-active way to maintain builders quality. The complaints investigation system, without complementary auditing, relies too heavily on consumers having to experience a problem, as explained in the submission by Camden Council:

> *There is an apparent need to audit the work of all builders on a regular basis. The reaction to complaints is not a satisfactory means of monitoring the success of the system and is often too late for the unfortunate homeowner or developer faced with an unsatisfactory product* [118]

There has been debate on whether subcontractors should be licensed. As noted, NSW already licenses far more levels of builders and tradespeople than other States. Whilst it is acknowledged that there are concerns about monitoring of sub-contractors, the Committee feels that in the interest of keeping things simple and building costs affordable, provided head sub-contractors are licensed and accountable, other operators need not be licensed.

A distinction is drawn between subcontractors who are not licensed at all and those pretending to be licensed when they are not. The Committee believes that this issue will be tackled by increasing the policing capacity of the Commission to identify illegal operators falsely claiming to be licensed. Further discussion of site supervision issues and subcontractors is covered in Chapter 5.

The Committee believes that the industry and consumers would benefit significantly if licensing was expanded to other building practitioners and made more rigorous. Licensing is the gateway to building activity and if this gate is effective then quality building is achievable. As noted by the Owners Corporation Network (OCN):

> ***Mr WOOD****: …The entire matter of defect rectification exists only because of poor substandard building practice. The substandard building practice can only exist for one or both of two reasons: the people involved in undertaking the work are not trained correctly and are therefore unaware that the work does not meet the minimum specification; the people involved in undertaking the work knowingly produce work that is not up to minimum standards. Remembering that these people have been licensed as being competent, trained professionals by a Government department, two people have responsibility - the trades people concerned to ensure that they know what they are doing and the licensing body to ensure that a standard of competency is maintained.*[119]

[117] Submission No.85
[118] Submission No 153 – Camden Council
[119] Transcript of Evidence 5 June 2002, p24

With the proposed changes, the Committee believes the net increase of licences would be around 5,000 ,which is not a significant increase within a system catering for 155,000 licensees. It is acknowledged that the additional practitioners will not simply be added to the system but will have to be accommodated by the creation of specialist assessment/ accreditation groups, which will require additional resources. New divisions for checks of financial, CPD and auditing functions will also require resources.

RECOMMENDATION 12
The Committee recommends that expansion of the building licensing regime should occur with:

- licensing regime for other building practitioners in the home building industry to include builders, subcontractors, certifiers, building consultants and engineers.
- private certifiers and local council certifiers to be subject to the same licensing and audit regime.
- licensing of builders and accredited certifiers be undertaken by the one administrative body.
- licensing conditions of all building practitioners be extended to include:

iv) continuing professional education requirement for license renewal;
v) professional indemnity insurance (except for builders who are required to have Home Warranty Insurance); and
vi) licensees subject to a disciplinary, penalties and audit regime.

2.6.8 New powers for practitioner licensing

As a consequence of licensing other practitioners, new powers and offences will need to be constructed to activate the system. The Committee has not examined the detail of such powers and offences but believes they should be based upon those applying to builders and accredited private certifiers.

A key anomaly is that there is no power given to the Director-General of Planning for the immediate suspension of accredited certifiers. The Director-General of Fair Trading has this power and the Committee believes the equivalent power should be given to the Director-General of Planning to apply to accredited certifiers. Ultimately, these powers will be held by the Commissioner and will apply to all licensed practitioners. Offences and penalties will need to be developed by the Commission based on the recommendations and concerns raised in this report. For example, it will be an offence for a principal certifying authority to fail to undertake a mandatory on-site critical inspection (see Chapter 5).

Offences that will need to be defined that fine or suspend/remove the relevant accreditation or license for :

- breaches of relevant Acts and regulations;
- unsatisfactory professional conduct; and
- serious defective work.

RECOMMENDATION 13
The Committee recommends that certain new powers and offences be created within the building practitioners licensing regime including:

- powers to the Director-General of PlanningNSW to suspend accredited certifiers and ultimately powers to the Commissioner to suspend all relevant licences; and
- fines or suspension/removal of the accreditation or licence for breaches of relevant Acts and regulations, unsatisfactory professional conduct, or serious defective work.

2.6.9 Need for complaints and auditing regime for all practitioners

Although many building practitioner groups support licensing/accreditation by government, these groups are in favour of a co-regulatory approach, whereby the Government accredits an existing institution to monitor compliance, investigate complaints, and carry out audits. This is the view of the Institute of Engineers, who argue that their expertise and professionalism should allow them to discipline their own profession.

The Committee feels that it is important to draw upon existing industry organisations to assess competency and qualifications and also to allow those organisations to look at complaints to some degree. However the Committee is concerned that members investigating their own members results in an inherent conflict of interest.

The Committee believes that a complaints service provided by an accreditation body will fall short both in terms of quality of management and motivation, as argued in a certifiers submission:

> *[Accreditation] schemes are run by volunteer labour and there for the level of investigation and rigour in complaints and assessments of accredited certifiers can be questioned. The use of volunteers means that there is a reasonably high turnover and therefore alack of consistency and a variance in the views and skills brought to the accreditation process…There is a reluctance for people to assess or to chastise their own, therefore many complaints are not treated with the rigour that they deserve*[120]*…*

Consequently, the Committee believes that the Commission should independently look after complaints management and auditing to prevent failures in "self regulation" like that seen in the private certifiers accreditation body BSAP, discussed in Chapter 5.

It would be expected that the Commission would refer an initial complaint for assessment to the relevant accreditation body for technical advice. However the Commission would be the initial complaint point or front desk for consumers. This would overcome the problems in the current system whereby, for example, the consumer may need to contact the Council, PlanningNSW and different accreditation bodies in order to determine what action they should take in relation to a complaint about a certifier.

The Committee recommends that the audit function of the Commission include audits of all building practitioners, including private and council certifiers, designers, engineers and builders. Through this process audits should reveal a of chain problems that link practitioners. For example, a certifier audit may reveal deficiencies with a builder or

[120] Submission No. 140 - Certifier

draftsman which can then be examined within the Commission, which licences all three practitioners.

Having all practitioners under the Commission provides the opportunity to cross reference information to better identify problems, as pointed out by Holroyd Council:

> *As Councils (and presumably certifiers) often have intimate knowledge and information regarding the conduct and quality of work of individual builders, when investigating suspect builders or indeed considering their re-licensing, this resource should be tapped*[121]*.*

It is also envisaged that random audits of licensees will occur in addition to complaint based audits.

RECOMMENDATION 14
The Committee recommends that the Commission undertake both complaints based auditing and random auditing of all licensees.

2.6.10 Need for accessible and meaningful registration database

Although the registration database will include more comprehensive data, it is not available online and has historical information limited to activities occurring after February 2002.

Online access has been a repeated request in many submissions

> *Registers of licence holders and conditions / constraints of those licences should be readily available to consumers and Councils alike, such as through the internet.*[122]

Both Queensland and Victoria already have their licensing databases available online. The Committee believes that having the history of the contractors disputes available to consumers will make contractors more sensitive and responsive to problems. Primarily this resource will assist consumers in making an informed decision when selecting a contractor. The Committee anticipates that similar licensing information on other building practitioners would be added to the registration database as these systems develop.

RECOMMENDATION 15
The Committee recommends that the building practitioner registry be made available online forthwith and that historical offences and breaches be added to the current database.

2.6.11 Need for better pre-entry education and training

One of the determinants of building quality is the skills base of workers and contractors employed in the building industry. The Committee has been told that the building trade is experiencing problems in attracting and recruiting suitable trained workers to ensure the delivery of quality products.

- **Quality of new entrants**

According to the Executive Director of the Building and Construction Council of New South Wales:

[121] Submission 30
[122] Submission 30

> *It concerns me that as Chairman of the Construction Industry Training Advisory Board that the problem is compounded because in some trades the majority of people who call themselves tradespeople have no trade qualifications at all. In some trades, for example, bricklaying and tiling, fewer than 20 per cent or virtually none have people in them who have apprenticeship training or anything else. They have learnt on the job or they have acquired skills by other means. Their skills tend, therefore, to be fairly limited, and that must have a bearing on quality.*[123]

When asked about the availability of formal training courses, the witness continued:

> *…the problem goes deeper than that…An apprenticeship is a four-year regime with fairly small wage levels in the early stages. The typical young man of 17 or 18 years, just leaving school…takes a short-term view, very often does one or two years of an apprenticeship and then feels he has enough skills…tells the employer that he is a tradesperson and gets a full wage.*[124]

The position regarding shortages of suitably qualified people in the building trade was echoed in the CFMEU submission to the Inquiry. According to the Union:

> *The building and construction industry is marked by critical shortages and poor skills development, the attrition of skills is not matched by new trained workers… (and) there is no discernable training culture.*[125]

The pressure on training courses was highlighted in the submission from the Newcastle Master Builders Association:

> *The TAFE system has been under constant criticism for not having its courses and teachers fully up to date with current practices, materials, codes and regulations. Herein lies the dilemma for the industry: If our young emerging builders cannot rely upon the TAFE system to adequately equip them in the manner expected by the DFT; nor can they rely upon the experienced training from older builders, where does the industry provide the necessary level of training expected by both consumers and government authorities*?[126]

- **Industry reputation**

Another contributing factor to low standards of workmanship and skills in the building industry was described by the Building and Construction Council as follows:

> *… I think the industry has a poor public image. The media constantly bombard us…with suggestions about the conditions in the industry and the poor quality of work, all sorts of illegal or unfair procedures that are alleged to take place…Once upon a time a building trade was regarded as a respectable occupation. Now it is regarded as a career of last resort and I think, therefore, we are attracting poor quality of people into the industry in the first place and it is just perpetuating the problem all the way down the line.*[127]

The Master Builders Association of New South Wales also reinforced this view by stating in their submission:

> *The stigma cast over the industry, in conjunction with low profit margins, increased liability and ever increasing regulation is driving many experienced builders from the industry, while creating substantial barriers for new entrants. A recent survey conducted by the*

[123] Transcript of evidence, 6 May 2002, p35
[124] Transcript of evidence, 6 May 2002, p35
[125] Submission 199. Attachment pp3-4
[126] Submission No 191 p11
[127] Transcript of evidence, 6 May 2002, p36

> *MBA identified that over 80% of builder respondents would not encourage a young person to enter the building industry.*[128]

Therefore, there is a need to create an environment where, not only are new entrants attracted into the industry, but are also provided with sufficient incentives to keep them there while learning and maintaining appropriate skills and standards. The Newcastle MBA has recommended to the Committee that there should be induction training for students at secondary schools to facilitate school to industry training and improved training for young people entering the industry.

The practicality of achieving these objectives involves both educational institutions and industry bodies, who must combine resources and commit themselves to raising the standards of training and skills generally. This includes training for existing unskilled workers in the home building industry.

According to the CFMEU submission, although the regulation and maintenance of training requirements is maintained by Construction Training Australia and by the Construction Industry Training Advisory Board in New South Wales, "*Training is 'ad hoc' in that it is left to individuals or companies to request the training*."[129] Furthermore, "*Comprehensive industry skills assessments are not undertaken on a regular basis as a means of identifying existing levels of skills or as a means of identifying future skills requirements*".[130]

- **Apprenticeships**

The Committee also heard from builders that apprenticeships have become less attractive to employers for several reasons:

> *Apprenticeships are also held-up with red tape. It is often hard for employers to obtain the incentive payments promised by government. Apprentices often leave employers after the employer has paid for all training yet the employer cannot obtain the financial incentive payment due to the apprentice not quite finishing the last few weeks of practical work.*[131]

There has been a decline in apprentices coming into the industry as noted by a representative of the New South Wales TAFE Commission :

> *There is a decline in apprentices coming into the industry. There has been discussion with the Government and TAFE New South Wales. A lot of effort has been going into it to try to reverse the trend so that we attract more apprentices to the industry…The construction industry is trying to attract the best people so it is looking at strategies to do that… It needs the cooperation of several agencies, especially employers.*[132]

According to the Assistant Director-General, State Training Services in the Department of Education various moves are in train to reverse this decline:

> *The revision of the (Apprenticeship and Traineeship) Act was intended to simplify the…system for participants-the employers, the apprentices and trainees and organisations…to ensure quality of training for apprentices and trainees.*[133]

The new legislative regime has, however, only been operating since 1 January 2002 and it is still too early to make an assessment of its impact on the industry generally.

[128] SubmissionNo. 190, p4 MBA
[129] Submission No. 199, p2 CFMEU
[130] Submission No. 199, p3
[131] Submission No. 92 Builder
[132] Transcript of evidence, 24 May 2002, p91
[133] Transcript of evidence, 24 May 2002, p86

Recommendation 16
The Committee recommends that the Commission :

- establish a process for regular industry skills audits to identify new industry needs and address the potential decline in new entrants to the industry;
- examine the adequacy of current training strategies to meet identified training needs, and
- develop "structured skills enhancement training" programs for unskilled workers already in the home building industry, in addition to traineeships. These should be identified and implemented jointly through government and industry initiatives.

- **Particular education needs**

A related issue highlighted in submissions, concerns inadequate training and prerequisite skills in specialist areas of building work, such as waterproofing, tiling and concreting.

A director of a waterproofing company told the Committee:

> *To be a waterproofer you need to go to a testing authority or TAFE for two days, pay an assessment fee of roughly $400 and walk out after three days with a waterproofer's licence, which allows you to do anything in the domestic field incorporating waterproofing…It is a joke…The only training is given by the manufacturers of the product and they are usually the ones that sponsor the courses. They provide their material to be used in the courses.*[134]

As well as raising the lack of properly conducted training courses for specialist areas of building work, the witness also referred to the inadequacy of the certification process and Building Codes, all contributing to poor standards of workmanship and resulting in many of the problems experienced by homeowners when they occupy newly constructed dwellings. These include leaks, flooding and rising damp.

Similar concerns have also been raised in submissions by the Australian Premixed Concrete Association and the Master Tilers, Slaters and Shinglers Association of New South Wales, where poor workmanship is attributed to inadequate licensing standards. Both organisations recommend stricter licensing provisions in these specialist areas of construction and the greater involvement of regulatory bodies to monitor performance against agreed standards.

> *The APMCA and other in the concrete industry are concerned at the high incidence if poor workmanship in concreting in residential construction…Currently licences are issued without requiring applicant to demonstrate their competency in concrete placing methods…In previous discussions with the Department of Fair Trading there has been an apparent lack of interest in our industry's efforts to require concreters to demonstrate competency in concrete placing techniques as a pre-requisite to issuing a license*[135]

Also the Master Tilers Slaters and Shinglers Association of NSW Inc maintain that:

> *The current builders licensing system allows builders who are non- qualified in roof tiling to carry out roof tiling and slating work*[136]

[134] Transcript of evidence, 20 May 2002, p19
[135] Submission No. 107
[136] Submission No. 103

Recommendation 17
The Committee recommends that the Commission targets specialist areas in the industry, where there is a high incidence of defect notification, such as waterproofing, tiling and concreting, for specific training initiatives. This should be done in consultation with peak industry bodies representing contractors in the specialist trade.

CHAPTER 3 Building Codes and Standards

3.1 INTRODUCTION

Section C of the Committee's terms of reference asks whether the current minimum building standards, particularly in regard to waterproofing, thermal and noise insulation, are "meeting environmental and cost performance expectations in the community". In addition to this specific reference, the building standards are intrinsically woven into the other building quality issues raised in the terms of reference, including consumer information and dispute management.

The current minimum building standards in NSW are set by the Building Code of Australia. However, these standards are not set in black and white terms as consumers might assume.

This Chapter looks at the quality of the measures used to set standards in home building. It outlines how the Building Code of Australia works and is applied in NSW. Recommendations are made about NSW application of the Code in relation to these issues.

3.2 BACKGROUND

3.2.1 What are building codes and what is the Building Code of Australia?

The idea of standardising the many state and local government building requirements into a common national building code began in the 1960's. In the early 1990's States and Territories agreed to apply a set of *national minimum acceptable standards*, which has become the Building Code of Australia (hereafter the Building Code or BCA).

The Building Code is a the technical information source for building regulation in the States and Territories. The Building Code is produced and maintained by the Australian Building Codes Board (ABCB) on behalf of the Commonwealth Government and each State and Territory government. The Board was established by an Inter-Governmental agreement in 1994 and includes representatives from Commonwealth, State and Territory governments, local governments and industry. A representative from PlanningNSW sits on the Board representing NSW.

The Building Code is a technical, rather than a legal document. All governments apply the Building Code by reference in their State or Territory legislation. However, each jurisdiction has varying systems for administering, implementing and enforcing the Building Code.

3.2.2 What is the purpose of the Building Code?

The goal of the Building Code is to enable the achievement and maintenance of acceptable standards of structural sufficiency, fire safety, health and amenity in the design, construction and use of buildings. It represents a suite of "minimum acceptable standards based on cost effective solutions".

The Building Code is focused on minimum acceptable standards required to preserve human safety in buildings. The Board clearly stated to the Committee that, despite consumer perceptions that the code may relate or reflect a quality benchmark, it is not the role of the Building Code to determine quality standards which are considered above the minimum set by the Building Code.

3.2.3 What is in the Building Code and how do you access it?

The Building Code comes in two volumes. Volume 1 generally covers buildings except free standing homes, which are covered in Volume 2. The Building Code also incorporates standards established by a body called Standards Australia. **Standards Australia** provides the construction industry with over 500 Standards that set out the technical specifications and procedures needed to build a residential or commercial property. Over 150 of these Standards are actually referenced in the Building Code[137]. To acquire both the Building Code and the Standards is very costly and physically would amount to thousands of pages.

The Board sells the Building Code as a commercial product to builders, the construction industry and regulatory authorities. The cost varies but the BCA96 printed version, including Volume 1, Housing Provisions and the Guide to the Building Code costs $300 up front and with annual renewal charge of $124, for amendment bulletins. To have a complete set of the Building Code, this purchase would have to be supplemented by purchases of the relevant Australian Standards cross referenced in the Building Code.

The Building Code and Australian Standards are not made available to the public unless they purchase them.

3.2.4 How is the Building Code of Australia revised?

Policy development of the Building Code is achieved through various consultative processes established under the Board. The Building Code is amended twice each year where required. Each amendment to the Building Code must be agreed to by all States and Territories.

With particular reference to the Committee's terms of reference, the following is noted:

- Currently the Building Code provisions on **noise insulation** standards are being reviewed by the Board. A consultation and Regulatory Impact Statement (RIS) process on this issue is underway.
- The Board also notes that the **waterproofing** provisions of the Building Code are scheduled for review in 2003-2004.
- The Building Code does not currently contain any provisions for **energy efficiency,** which encompasses thermal considerations, however, there is an initiative to create such provisions. Proposed reforms are currently out for public consultation.
- Given that each jurisdiction implements the Building Code differently, the Board has recently commenced a project to develop a consistent national administrative framework for building control.

[137] Submission 111

3.2.5 What is covered by the Building Code of Australia?

The Building Code contains technical provisions for the design and construction of buildings and other structures covering matters like structural integrity, fire safety, access and egress, safe movement, and health and amenity aspects like ventilation, damp and weatherproofing and sound insulation. The Building Code allows for variations in climate and geological and geographic conditions.

The Building Code covers both structural and non-structural items giving basic constraints where they relate to human health and safety. For example, the code has requirements for safety glass, sound insulation, natural lighting, pool fencing etc which would not be considered critical to the structural integrity of the building. (Appendix 10 – Contents of the Building Code).

The Building Code classifies buildings into 10 broad types based around the buildings use and needs of the occupants. The most relevant categories to this inquiry are **Class 1a – free standing homes**; **Class 2 – residential flat buildings**; and Class 10 a and b – garages, swimming pools etc (renovation related) items.

Table 3.1 Building Code classification of buildings

BCA Classification	Types of Buildings
Class 1a Class 1b	Free standing or attached (side by side) single dwellings and additions Small boarding houses, guest houses
Class 2	Residential flat buildings
Class 3	Residential portions of buildings – hotel motels hospitals
Class 4	Separate residences within a different building class eg caretaker flat
Class 5	Office/Commercial premises
Class 6	Retail/ Shop premises
Class 7	Warehouses and car parks
Class 8	Factories and car parks
Class 9a	Hospitals, nursing homes
Class 10a Class 10b	Garages, carports, sheds Swimming pool, fences, retaining walls

3.2.6 How does the Building Code of Australia work?

Historically, building codes outlined measurable aspects of a building such as ceiling height, or a floor or wall width, maximum distance to a fire escape, as well as prescribing appropriate building materials or building methods.

In 1996, the Building Code became **performance based** to allow for more flexibility and innovation in building practices by permitting the use of alternative materials, forms of construction or designs to the previous prescriptive requirements.

An explanation of the concept of performance based codes is illustrated in the following practice note issued by the Victorian Building Commission:

The basic concept of a performance based approach is to define the way of achieving a specified outcome without prescribing a particular method. For example, using an analogy, in some countries speed limits are set in legislation as performance statements such as "drivers must travel at safe speeds having regard to the road, weather and traffic conditions at the at the time and the vehicle itself".

Advisory signs might be placed along the roadside setting the recommended speed limits but ultimately it would be up to the driver to prove safety. The advantage of this system is that as cars, drivers, roads and technology improve, the system does not restrict or inhibit advances or innovation. The obvious disadvantage is the potential problem of differing interpretations or levels of "safe driving".

Using the Building Code of Australian 1996: Practice note 29 July 1997

Builders can now tailor building designs and explore innovative use of materials, and forms of construction, provided they still achieve the Performance Requirement set for each section of the Building Code. The Performance Requirements in the Building Code are generally expressed as qualitative statements and do not usually include prescribed measurements. The Building Code still retains a suite of prescriptive solutions under the Performance Requirement but these prescriptive solutions are only compulsory if that option is selected (see below).

Some examples of the Performance Requirements approach in the Building Code include:

Structure (Clause P2.1) (Housing Provisions Vol 2)
A building or structure including its material and components must be capable of sustaining at an acceptable level of safety and serviceability:

- *the most adverse combinations of loads (including combinations of loads that might result in a potential for progressive collapse);*
- *other actions; and*
- *to which it may reasonably be subjected.*

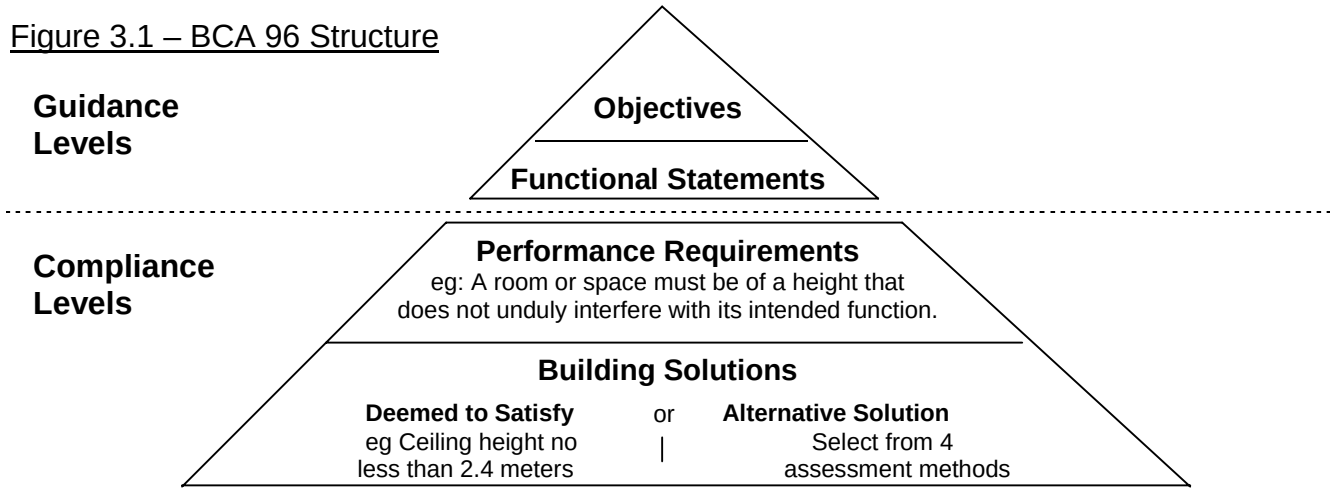
Dampness (Clause P2.2.3) (Housing Provisions Vol 2)
Moisture from the ground must be prevented from causing:

- *unhealthy or dangerous conditions, or loss of amenity for occupants; and*
- *undue dampness or deterioration of building elements.*

The structure of the Performance Based Building Code can be described as a pyramid (Figure 3.1) with Objectives at the top, then Functional Statements, then Performance Requirements. At the bottom of the pyramid are the Building Solutions which are the core of the Building Code. Achieving a Building Solutions and thereby complying with the Building Code can be approached through two paths:

1. **Deemed to Satisfy** - the "prescriptive" outcomes; or
2. **Alternative Solutions** – any alternative which meets the performance requirements

Figure 3.1 – BCA 96 Structure



Building practitioners are free to choose the Deemed to Satisfy method or an Alternative Solution method for any part of the Building Code. When they choose "deemed to satisfy', proof of compliance is relatively easy to determine, as this method usually has measurable components or refers to a prescriptive Australian Standard. An example of a "deemed to satisfy" provision, is: *Ceiling heights must be not less than 2.4 metres in a habitable room.*

When an "Alternative Solution" is chosen, the building practitioner can also choose what method they will provide to prove that their Alternative Solution works. The methods include:

- Verification methods such as laboratory testing
- Comparison with the "Deemed to Satisfy" solution
- Documentary evidence
- Expert opinion
- Or any combination of the above.

Under the performance system, the "deemed to satisfy" provision, which could be considered the measurable minimum standard, is not compulsory. The compulsory requirement is that either method meets the performance requirement, ie using the ceiling example: *A room or space must be of a height that does not unduly interfere with its intended function.* (Performance Requirement for room heights (Clause P2.4.2))

In conclusion, the effect of performance based codes is that building practitioners can, for any part or whole of a building, build outside the measurable requirements in the Building Code subject to a subjective or qualitative judgement about its impact on the occupant.

3.3 APPLICATION OF THE BUILDING CODE OF AUSTRALIA IN NSW

3.3.1 How is the Building Code applied in NSW?

PlanningNSW oversights and manages the application of the Building Code in NSW through its Building Codes Development and Reform Unit. The legal application of the Code in NSW is linked to the planning and approvals process, which is outlined in Chapter 5. The responsibility for Building Code compliance is generally assigned to whoever becomes the Principal Certifying Authority for a particular construction. This may be the relevant Council certifier (inspector) or a private accredited certifier.

To summarise, under this system the scrutiny of Building Code compliance should take place at several stages:

a) When the council issues a development consent for a building design following a development application (this is undertaken by the relevant council) ;
b) When an accredited certifier or the principal certifying authority (council or private) issues a construction certificate (Clause 130) or complying development certificate (Clause 145) at the commencement of construction.
c) When the principal certifying authority (council or private) monitors the commencement of the construction phase of a building through compliance certificates (Section 109C1(a)).

d) When the principal certifying authority (council or private) issues an occupation certificate. [138]

Stage C) is not essential (PCA's can determine what and if any compliance certificates are needed in a construction at their discretion). Therefore, other than stage A) all of the other Building Code compliance functions can be undertaken by the same person - the PCA (council or private). There is no third party confirmation of Building Code compliance required under this legislative framework.

3.3.2 How else does the Building Code of Australia apply in NSW?

Although the Building Code of Australia forms the basic minimum acceptable standard for home building in NSW, it is not well integrated into other aspects of the home building system, such as building practitioners legislation and dispute management legislation.

There is no assignment of responsibility for Building Code compliance to a **building designer or architect** with respect to the original design. The design stage may or may not contain all relevant details to determine if Building Code compliance is achieved. Some elements of the building will be defined or changed at later stages by the development consent, the construction certificate conditions, and by variations made by the builder when assessing compliance.

Councils in their role as consent authority for the development application will review the general design and specifications of the proposed building. Technically, under Clause 98 of the Regulations they have a statutory obligation to check Building Code compliance of the design. However, in reality the DA only contains the envelope description of the building – external height and general purpose etc. It does not usually contain detailed specifications to evaluate Building Code issues thoroughly, nor do Councils have the resources to scrutinise plans at this level. Effectively, Building Code compliance is not enforced at this time.

Through the "**conditions of consent**" imposed by the Council, amendments to plans that indirectly achieve Building Code compliance may be issued. Councils in NSW also have the option of imposing standards higher than the Building Code through conditions of consent that are applied to development consents. For example, the City of Sydney imposes higher

[138] The BCA is given legal effect via reference in the NSW Environmental Planning and Assessment Act 1997(EP&A Act) and regulations administered by PlanningNSW. The EP&A Act provides that a development consent is subject to the conditions prescribed in the regulations. Specifically Clause 98 of the regulation makes it a prescribed condition of the development consent that the work "*must be carried out in accordance with the requirements of the BCA"*.

Also, Clauses 130 (complying development certificates) and Clause 145 (construction certificates) of the regulations require that a certifying authority must not issue the respective certificate in relation to the proposed building works "*unless it is satisfied that the proposed building will comply with the BCA*".

Section 109C(1)(a)(iii) provides that compliance certificates can be issued to certify that: iii) *a specific building or proposed building has a specified classification identified in accordance with the BCA*.

Finally, there is the issue of the Occupation Certificate, Section 109H 2)(b) which states that a Occupation Certificate can only be authorised when the certifying authority is satisfied that "*the building is suitable for occupation or use in accordance with its classification under the Building Code of Australia*".

sound insulation requirements in its development consents, than required by the Building Code.

As noted the PCA, be it Council or private accredited certifier, does have an obligation when issuing the Construction Consent to ensure that the construction will comply with the Building Code . (However there is a loophole in the current arrangements and planning instruments which could mean that free standing homes have no strict test for Building Code compliance under planning instruments. This is because Occupation Certificates (OCs) are not currently required for Class 1A buildings (free standing homes). Consequently the Building Code compliance required by the Construction Certificate may not be validated if an OC is not issued. (This issue is expanded upon in Chapter 5).

The obligation for Building Code compliance in construction by the **builder** is not a requirement of the standard consumer/builder contract. There is no standard contract prescribed in legislation. However there are, as mentioned previously, a requirement for home building contracts have “statutory warranties". The warranties are described in the Act in the following language:

a) a warranty that the work will be performed in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract,

b) a warranty that all materials supplied by the holder or person will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new,

c) a warranty that the work will be done in accordance with, and will comply with, this Act or any other law;

d) a warranty that the work will be done with due diligence and within the time stipulated in the contract, or if no time is stipulated, within a reasonable time,

e) a warranty that, if the work consists of the construction of a dwelling, the making of alterations or additions to a dwelling or the repairing, renovation, decoration or protective treatment of a dwelling, the work will result, to the extent of the work conducted, in a dwelling that is reasonably fit for occupation as a dwelling

f) a warranty that the work and any materials used in doing the work will be reasonably fit for the specified purpose or result, if the person for whom the work is done expressly makes known to the holder of the licence or person required to hold a licence, or another person with express or apparent authority to enter into or vary contractual arrangements on behalf of the holder or person, the particular purpose for which the work is required or the result that the owner desires the work to achieve, so as to show that the owner relies on the holder's or person's skill and judgment.

There is no direct reference to the compliance with the Building Code in these documents which are used by the builder and consumer. As can be seen, the terms used to describe work in statutory warranties are quite different. It is understood that part c) of the warranty is implicitly linked to the code by its reference that the work will comply with the Home Building Act and other laws which would include the EP&A Act.

Building Code compliance is not a term necessarily used in **contracts between builders and their subcontractors**, unless the subcontractor is an accredited certifier and issues a Compliance Certificate for work. The Compliance Certificate states that the work complies with the Building Code.

Home Warranty Insurance agreements in NSW generally require builders to be responsible for building "defects". However, insurers do not automatically define "defects" as construction or workmanship that does not comply with Building Code at a minimum.

Until July 2002, the Government did not prescribe any definitions of defects to insurers and it was left to each insurer's discretion. Department of Fair Trading amendments have commenced in July 2002 which introduce common defect definitions which insurers must observe. These are in Clause 57AC of the Home Building Amendment (Insurance)Act 2002:

(1) For the purposes of section 103B (2) of the Act, **structural defect** *means any defect in a structural element of a building that is attributable to defective design, defective or faulty workmanship or defective materials (or any combination of these) and that:*

a) results in, or is likely to result in, the building or any part of the building being required by or under any law to be closed or prohibited from being used, or

b) prevents, or is likely to prevent, the ***continued practical use*** *of the building or any part of the building, or*

c) results in, or is likely to result in:
i) the ***destruction*** *of the building or any part of the building, or*
ii) ***physical damage*** *to the building or any part of the building, or*

d) results in, or is likely to result in, a ***threat of imminent collapse*** *that may reasonably be considered to cause destruction of the building or physical damage to the building or any part of the building.*

(2) In subclause (1), **structural element** *of a building means:*

a) any internal or external load-bearing component of the building that is essential to the stability of the building or any part of it, including things such as foundations, floors, walls, roofs, columns and beams, and

b) any component (including weatherproofing) that forms part of the external walls or roof of the building.

It is understood that the PlanningNSW Building Codes Unit was not consulted by the Department of Fair Trading about the drafting of this new clause.

The Tribunal and its predecessor based the determination of building defects on the evidence submitted, by having recourse to expert reports (including experts appointed by the Tribunal), by arranging expert consultations on site, and by having regard to the legislative requirements of various Acts administered by the Tribunal.

The Tribunal now also refers to "structural defects" in accordance with the new Clause 57(AC) amendment to the Home Building Regulation 1997.

The Tribunal is primarily looking at contractual disputes and therefore will examine issues of quality and specifications which will often be above the Building Code standards or not contained in the Building Code. However, the evidence put to the Tribunal is often presented in terms of compliance with the Building Code.

The Committee attempts to summarise this confusing system and plethora of terms relating to codes, standards and quality in the following table:

Table 3.2 BCA compliance systems and terms describing building defects:

Planning Instruments	**Statutory Warranties enforced by Tribunal/ DFT**	**Insurance Defects**
Development Consent - *BCA Compliance (not enforced)* Construction Certificate - *BCA compliance* Compliance Certificate - *BCA Compliance* Occupation Certificate – *compliance with Classification under BCA*	proper and workmanlike; good and suitable for purpose; complies with laws; reasonably fit for occupation as a dwelling; and reasonably fit for the specified purpose.	Structural defects resulting in building /building part: - closed or prohibited under any law - prevents continued practical use - results in destruction/ physical damage to building - threat of imminent collapse
Council or accredited certifier responsible for compliance	Builder responsible for compliance with warranties	Builder responsible for compliance with insurance

In effect the documents and processes of building design, building contracts, statutory warranties, insurance conditions and Tribunal procedures do not explicitly nor in *plain English* create a nexus to the Building Code. The only articulated reference to the Building Code is in the planning instruments, to which builders and consumers are not directly contractually involved.

Whilst the Committee appreciates that the objectives of the statutory warranties and insurance definitions are to encompass quality elements of construction that may not be contained in the Building Code, it is unclear why the Building Code is not used as a baseline reference or yardstick to determine clearly unsatisfactory work.

The ramifications of these varying terms for the dispute resolution process, on top of the impact of performance based codes on interpreting Building Code compliance, is examined in the Chapter 6.

3.4 ISSUES RAISED IN THE INQUIRY

3.4.1 Understanding and knowledge of the Building Code of Australia

The Committee has heard that there is consumer confusion as to the purpose of the Building Code and what it includes.

Most consumers assume that the Building Code has minimum standards which are measurable and relatively black and white. However, since the 1996 performance based code was introduced, minimum standards are expressed by Performance Requirements which are generally qualitative, subjective statements.

The Building Code is focused on human safety, health and amenity but most consumers assume it covers 'quality' as well. This confusion is not unwarranted because many of the elements relate to amenity, such as sound insulation which are considered quality issues by consumers. As noted by the Australian Institute of Building:

> *The Building Code of Australia addressed health safety and amenity of occupants of buildings and does not usually concern itself with finishes. Thus the general perception is that poor finishes equal poor standards* [139]

Most consumers assume that there are defined standards for quality workmanship in the code. Consumers find, however, that this not the case:

> *It is quite conceivable for a building to comply with the BCA, but for it to exhibit characteristics which a customer could reasonably consider a defect, for example:*
> - *Poor quality workmanship in the painting*
> - *Poor quality workmanship in the plaster work* [140]

Most consumers believe that codes and standards need to be expanded to include levels of quality of all work and not just minimum requirements in buildings. As noted by one consumer in describing their home renovations:

> *Our experience has demonstrated that the Building Codes and standards are not comprehensive enough. There is a huge void between the codes and standards and recognised minimum levels of quality in a building. A tiled stairway can be crooked out of square in many places, be uneven and dangerous and yet comply with the codes and standards… Except for the definite criteria on the range of treads and risers, the difference in sizes between steps the same stairwell is totally up to interpretation. There are also not criteria on the squareness of walls, evenness of steps…* [141]

The Committee has heard that for building practitioners, knowledge of the code is also variable:

> *Many builders or subcontractors are not aware of the requirements of the various Australia Standards but merely construct building work from known practices.. the end users such as builder have very little input or involvement with the requirements of the Building Code of Australia. Nevertheless they are the one required to implement it during the building process.* [142]

A key problem for building practitioners is that the Building Code is too frequently changed and amended.

> *The BCA in its current form is already a formidable document to follow and understand. It is destined to become more so as it is refined and revised* [143]

The BCA has amendments every six months while Standards Australia revises its standards on a 7 year cycle. The Housing Industry Association submission suggested that BCA amendments be reduced to every 12 months to allow the industry to catch up.

The Master Builders Association of NSW (MBA) argues that although builders and tradesmen who are members of the MBA and other associations may receive updates on the Code, these are only the minority of building licensees. Peter Meredith, Director of Housing of the MBA suggested in hearings that:

> *… the majority of builders out there are unaware of indeed what changes are taking place* [144]

[139] Submission 50
[140] Submission 39
[141] Submission 57
[142] Submission 54
[143] Submission 63

It is also noted that the Code is not written in a *plain English* format that can be easily understood by builders in the home building industry who may have varied education and language backgrounds. The overall view gathered by the Committee is that the Codes are too complicated and not written simply for end users.

> *The standard needs to be made clearer, in plain English so that it is easily understood by all and uniform so that even home owners know what they are going to get.* [145]

A further problem with the Code is that consumers cannot readily access it nor get affordable advice about it. As both the Code and Australian Standards are commercial products, public information is very limited. The Board web site does not give very extensive information. Standards Australia puts out a brochure on the top 25 building standards, but provides no other free information.

Councils do not have any documentation or handouts to consumers about building codes or have copies in local libraries for the public. PlanningNSW has a Building Codes Development and Reform Unit but does not offer a public advice service on the Building Codes.

When a consumer does suspect that work does not comply with the Code, they must rely on expert advice from building surveyors, certifiers, and Council inspectors. Consumers can receive different and conflicting opinions on Code compliance from these groups. The Board does not provide a public advice service to evaluate the validity of an expert opinion.

Submissions have recommended that the Building Codes be made more accessible to consumers through free Internet access and copies available in Local Council libraries. [146]

Recommendation 18
The Committee recommends that sections of the Building Code of Australia, relating to residential buildings, be drafted in "plain English" format to be more user friendly for builders and consumers.

Recommendation 19
The Committee recommends that consumer access to the Building Code should be improved by the Australian Building Codes Board, and in NSW, the Code should be accessible through the Commission, the Advice and Advocacy Centre, and with copies available in Local Council Libraries.

3.4.2 The effectiveness of "performance" based codes

Some submissions have argued that the "performance" structure, instead of giving flexibility to the industry, has created confusion and contributes to disputes, particularly in the home building area [147]. An insurer's submission to the Inquiry states that:

[144] Transcript of evidence , 10 May 2002, p117
[145] Submission 14
[146] Submission 106
[147] Submission 70 and Submission 102

> *Dexta does not support the move by legislators towards "performance" based building codes. Whilst it is argued that "performance" based codes will develop improvements in building practices, it may take some years for these practices to be found deficient, by which time they may be in widespread usage. Dexta is not opposed to changes in building practices but would prefer to see these introduced after careful evaluation by qualified bodies in a "prescriptive" building code. This gives us regulations that are clearly defined and not subject to dispute by individual contractors or homeowners, who do not have the necessary technical expertise… We believe that the building approval process for Class 1 dwellings should be based upon a prescriptive code and not left open to interpretation under the guise of performance based regulations.* [148]

Because the Performance Requirements in the Code are not quantitative statements, they will always be open to interpretation and subjective assessment by experts. Concerns about the Code and the need for expert interpretation is noted by Mr Sartor, the Lord Mayor of Sydney, in hearings

> ***Mr SARTOR:****… The problem with the Building Code of Australia [BCA] is that it is an extremely confused document…You cannot work out what it means...when you read the BCA – as I tried to do to understand it on a performance basis – it just states that it must be assess and it depends on the expert… You need experts, but you need to clearly understand what the standards are. I cannot get clear advice from all the professional people I have had access about what would be a performance based satisfactory resolution in certain buildings.*[149]

With a performance based Code, experts can legitimately disagree on whether an item is compliant or non compliant with the Code, leaving the consumer and builder with no firm evidence to end a dispute. This confusion is not confined to Alternative Solutions methods. As noted by Bathurst Council:

> *Council has experienced problems with varying interpretations of the Building Code of Australia…The problems have occurred not as a result of alternative building solutions but rather interpretation of the "deemed to satisfy" requirements…The private certifiers interpretation of the BCA was different to that of Council's….Variations in interpretations of BCA clauses can lead to uncertainties and the propensity for developers to "shop around" to find and interpretation of a particularly difficult clause of the BCA that suits its needs.* [150]

Councils argue that performance requirements need to be:

> *revisited and honed to be more precise…the deemed to satisfy provisions should be continued to be actively developed to such an extent that they should not need to be departed from unless there are exceptional circumstances*'. [151]
>
> *BCA(96) has in my opinion been promulgated in haste and both the new performance requirements and the new deemed to satisfy provisions are in desperate need of some maintenance to remove ambiguities that allow the intent of the BCA (96) to be abused by creative interpretations* [152]*…*

The performance based code has been agreed to by all governments and can generate significant benefits to industry and consumers over its predecessor the prescriptive "one way" code, as a number of submissions argued to the Committee. The Committee believes, however, that the new code needs to have some accompanying *plain English* documents to clarify and attempt to reduce confusion about its interpretation.

[148] Submission 54
[149] Transcript of evidence 24 May 2002 p-5-6
[150] Submission 94
[151] Submission 84
[152] Submission 102

Submissions have proposed that NSW look at developing a document like that used in Victoria called the "Guide to Standards and Tolerances"[153]. This guide is used by building inspectors and consumers in determining whether particular work is, or is not, defective. In doing so, this document is trying to bring uniformity in terms of the identification of defects and thereby reduce the broad scope of interpretation allowed under the Building Code.

The Victorian document simplifies Code requirements pertaining to common home building issues. It also outlines building quality benchmarks which may not be covered in the Code, but are considered appropriate by the Commission and Tribunal.

Submissions have argued that quality benchmarks which capture the "look and feel" of a home are needed as well as the Code. Where possible, benchmarks for quality should be described as these tend to attract much disagreement and dispute in the Tribunal area. As explained in a submission from two former Tribunal Members:

> *The present system of assessing the quality of building work is performance based. It encompasses degrees of quality, with the criteria for quality assessment being whether a given facet of a building will perform its function. In many cases, such as the structural adequacy of a slab, this is an adequate measure. In others, generally those with which a home-owner has to deal and live with on a day to day basis, quality involves matters of look and feel. There can be a vast measure of difference between a tiled floor that will perform its function and one that is aesthetically pleasing. Views about the look and feel of work are, however, subjective, and generate significant differences between experts and parties.*
>
> *Our experience is that these look and feel issues frequently arise in respect of fit-out and appearance. A performance based system of quality assessment, which does not adequately take account of aesthetic issues, while adhering to sound engineering principles, will never satisfy consumers. Such a system also encourages divergent expert opinion, with experts retained by builders usually adopting the, 'it performs its function' stance. Another consequence of such a system, in our opinion, is that it enables a culture whereby meeting minimum performance criteria is perceived by many as good enough. A residence which is built to meet minimum performance standards throughout is often a shoddy job.*
>
> *In our view, there is a merit in considering setting clear, base standards for those aspects of a residence concerned with its look and feel, as opposed to those matters concerned with structural integrity In our experience, the performance standards with respect to structural integrity are generally working satisfactorily.*
>
> *How 'look and feel' standards are to be fixed is problematical. A unambiguous adoption of the relevant Australian Standards is one approach with respect to what is an acceptable method of work, and what materials should be used. It would also be possible to prescribe by regulation minimum specifications for those facets of construction associated with the look and feel of a residence.*[154]

[153] Appendix 11
[154] Submission 233

Recommendation 20
The Committee recommends that a **consumer information booklet** be prepared by the Commission. The booklet should outline acceptable standards, tolerances and performance required of builders by the Commission with reference to:

- the Building Code of Australia where applicable;
- and where the Code is silent, outline acceptable quality or "look and feel" standards as interpreted by Commission and the Tribunal.

The booklet can be used as a starting point by consumers to identify if they should pursue their building problem with the Commission and the Tribunal.

The booklet should be a mandatory attachment to all home building contracts.

3.4.3 Alternative Solutions

Problems with the application of the Alternative Solutions mechanism in the Code has been raised in various submissions. It is argued that the Alternative Solution option gives too much flexibility in building options. This leads to confusion as to whether Building Code have been complied with, as noted by the Australian Institute of Building Surveyors:

> *The BCA lacks clarity, guidance and criteria against which to adjudge alternative solutions. The BCA deemed to satisfy provisions in some parts are ambiguous…the relevant performance requirements for a particular clause are not clearly defined. The links between clauses and performance requirements are not clearly defined.*[155]

The evaluation process for Alternative Solutions is also seen as too flexible in that builders/developers can 'shop around' for an expert opinion that suits their purpose. Resolving conflicting expert opinions about an Alternative Solution then becomes a battle between experts at considerable expense.

> *The Act or regulations do not prescribe a process for the preparation or assessment of alternative solutions. There is no method of measuring the effectiveness of an alternative solution. The level of documentation submitted with the approval for the Construction certificate to Council by the certifier is not outlined. Therefore in some instances, no evidence of alternative solutions is being submitted.*[156]

Adding to this problem is the fact that, in NSW, there may be no independent or informed scrutiny of Alternative Solutions. It is possible for the design and verification of an Alternative Solution to can be undertaken by the same practitioner. An Alternative Solution may be approved by the accredited certifier or PCA who may have no specialised knowledge to assess the solution. So Alternative Solutions which are certified, but turn out to be non - compliant, may not be discovered until after completion or when they fail.

BCA Logic, a building consultancy identified a range of problems with the Alternative Solution system:

- *there is no recognised methodology for the assessment design or approval of alternative solutions;*
- *it is up to the accredited certifier to determine how much information and documentation must be provided for each alternative solution therefore there is huge variance in the way alternative solutions are dealt with.*

[155] Submission 127
[156] Submission 127

- *there is no methodology of measuring whether an alternative solution is acceptable;*
- *it is not clearly evident whether or not the designer of the alternate solution can be the certifier or in the same company as the certifier.*
- *there is evidence that certifiers are acting outside their level of accreditation and approving alternative solution projects, there is also evidence that certifiers are not implementing the recommendations of the Fire Brigades on some serious issues such as the deletion of sprinklers* [157]

Councils noted their difficulties in the tracking and with the abuse of Alternative Solutions, arguing that:

> *consideration needs to be given to some of the verification methods currently incorporated into the BCA as some certifiers have found "loop holes" in them and are exploiting these opportunities to authorise/approve unsafe building solutions'.* [158]
>
> *It is considered that currently "alternative solutions" are being "written", or even approved without being written, in retrospect to cover matters which have already been done not in compliance with the deemed to satisfy provisions of the BCA*[159]

It is understood that Alternative Solutions are mainly used in complex buildings and multi-dwellings. The use of Alternative Solutions in free standing homes tends to be more in the non-structural features of the home, such as insulation alternatives.

It has been suggested to the Committee that it may be beneficial to restrict the Building Code to prescribe that "deemed to satisfy" solutions be used for certain elements of Class 1 dwellings (free standing homes) to reduce disputes and Alternative Solutions in some areas of home building. The Committee recommends that perhaps the most appropriate change would be to include "Performance Requirements" with measurable and objective criteria that should be applied for certain elements in freestanding homes.

Recommendation 21
The Committee recommends that the application of the Building Code of Australia in NSW be refined to clearly prescribe "Performance Requirements" with measurable and objective criteria for certain elements in Class 1A buildings (freestanding homes) to reduce disputes and uncertainty in home building matters.

- **Fire Engineered Alternative Solutions**

Many issues surrounding Alternative Solutions raised in submissions, relate to alternative fire engineering solutions in residential apartments.

A description of the workings of the current fire safety controls in the Code is made by Warrington Fire Safety Research:

> *Currently the BCA expresses performance requirements in qualitative terms, which require designers and certifiers to make a value judgement of acceptable community standards for amongst other things fire safety (ie in fields such as fire safety acceptable levels of risk are not specified and practitioners determine what is acceptable). This clearly increases the*

[157] Submission 140
[158] Submission 84
[159] Submission 98

> *responsibility the community is placing on designers and certifiers as well as the exposure of practitioners to influence by developers and the like to adopt lower standards*[160]

The Committee was told that incidences of poor fire compliance in buildings is increasing.

Fire safety principles rely upon an integration of multiple systems, such that where one system fails (such as sprinklers), another regime such as accessible fire stairs and minimum distances to exits will prevail to ensure safety. This principle is known as redundancy and is often referred to as the "belts and braces" approach.

It has been suggested in submissions that certifiers are designing Alternative Solutions for fire solutions that rely on one system as the dominant safety mechanism and remove complementary systems or reduce them to a lower standard. The Australian Institute of Building Surveyors illustrates this issue in relation to a residential building where sprinklers are automatically required and consequently, other systems have been modified :

- *Travel distance to an exit or point of choice of two exists of 20 metres or more, in lieu of 6 metres*
- *Use of solid core doors in lieu of fire doors*
- *Deletion of fire collars to PVC pipes*
- *Deletion of fire dampers to common exhaust shafts*
- *The sole justification [for these modifications] is the efficacy of the sprinkler systems*[161]

"BCA Logic" building consultancy describes the result of such modifications as follows:

> *At the present time Fire Safety Engineering is being used to produce cost savings to developers by removing the built in redundancies inherent within the BCA . That is the belts and braces are being removed from the building without any thought to community or Collateral Damage to building occupants and businesses*[162]

Practitioners, consumers and Councils all regard this as an extremely serious issue created in part by the performance based Code. Exacerbating this problem is that

- there is no prescribed process for preparation of Alternative Solution;
- the interpretation of the relevant clauses and performance requirements vary between certifiers;
- the levels of risk accepted by certifiers and designers varies greatly; and
- the levels of certifiers compliance to legislation such as referral to the Fire Brigade varies greatly.

The structure of the NSW certification system also contributes to this such that:

> *a private certifier and fire engineers can summarily propose and implement into a building a novel design that has not necessarily been the subject of any extensive or peer review*[163]

The issue of fire safety standards was raised in evidence by the Lord Mayor of Sydney, who in his appearance before the Committee said:

> ***Mr SARTOR**: The critical problem that we have discovered in some of our city buildings is the issue of fire isolation between apartments...The critical issue in fire isolation buildings…is to ensure that fire does not spread from one unit to another and, even more importantly, from one unit into common areas because smoke in the foyers can kill people...The problem with the*

[160] Submission No. 74
[161] Submission 127
[162] Submission 140
[163] Submission 149

> *Building Code of Australia is that it is an extremely confused document. The people who drafted it need psychiatric assessment.*[164]

In elaborating on the problems with the Code, the Lord Mayor offered the following example:

> ***Mr SARTOR:*** *A developer who lodged an application came to see us. He lodged an application based on a "deem to satisfy" approach, where the walls have to be sealed and whatever. We approved the application on that basis. Then we found, due to complaints, that there were problems. He then said, "We want to do a fire-engineered study and do it on a performance basis." So you can never actually hold them to account because they shift to a different standard within the BCA...Fire safety has to be a conservative test, which is why I would get rid of some of these performance solutions of the BCA and say "deem to satisfy" and that is what you do.*[165]

While this example illustrates general concerns about the adequacy of fire safety standards and the Code, the issue in large apartment buildings is obviously of greater significance because of the number of people living in the one complex.

A further issue raised is that the Code is only focused on safety of occupants and does not encompass other objectives, such as building preservation and environmental issues. This problem is described as follows:

> *One specific outcome of these new alternative solutions is the removal or omission of Passive Fire protection sub systems in our buildings. This in many cases removes very necessary "stop gap" measures which together with Active Fire Protection systems ensure our building stock is safe for the public and as equally important safe for our fire fighters. The developer's pressure for cheaper building and the BCA's minimum requirement dealing only with life safety and protection of adjoining building are the main causes for the removal of Passive Fire protection systems. The inherent disregard for property protection should be a concern to the building owners and the community at large but I am unsure that they really understand what is happening in the process.* [166]

The same misconception was discussed by the NSW Fire Brigades. As noted in the Brigades submission:

> *There appears to be a growing perception that the BCA is the only consideration for approval to be gained for building designs. Coupled with that is the popular belief that the BCA does not require property or environmental protection, merely life safety. Acts such as the Fire Brigades Act 1989, which obligates the Brigades to protect property and the environment, or environmental Acts and Regulations are ignored in building developments. Designing a building with the knowledge that it could well be lost to fire, even though it may achieve the evacuation of occupants, has wider implications on the community should that event happen. The Brigades believes this does not meet community standards or expectations* [167]

Currently the Code and the NSW Fire Brigades are linked, with nominated Performance Requirements being required to be submitted to the Brigade for comment and recommendation under Clause 144 of the EP&A Act. However, the Fire Brigades argue that further Performance Requirements relating to fire, should be sent to the Brigades for comment and recommendation, but are not currently nominated, including such issues as 'Maintenance of Structural Integrity during a Fire' and 'Avoidance of the Spread of Fire'.

[164] Transcript of evidence, 24 May 2002, p5
[165] Ibid, pp5-6, 15
[166] Submission 102
[167] Submission 170

A further comment from the NSW Fire Brigades is that the Code does not clearly articulate what it is trying to achieve by its Performance Requirements.

> *Confusion often arises as to whether a submission is required to be sent to the Brigades, as required under the EPA regulations. This lack of clarity also offers the opportunity to deliberately by-pass the Brigades by those who prefer not to have an alternative solution tested by us.*[168]

The Committee believes the following issues raised by the NSW Fire Brigades need to be resolved:

- the extent to which the Building Code cover all fire considerations including environmental concerns;
- the confusion over meaning of relevant fire related Performance Clauses; and
- those clauses which should be referred to the NSW Fire Brigades for comment and recommendations.

The Committee is also concerned that the Brigades' recommendations on an Alternative Solution may not be adopted by certifiers and developers. The Committee believes that improving the power of the Brigades to impose changes to an Alternative Solution about which they have concerns should be seriously considered.

Recommendation 22
The Committee recommends that PlanningNSW coordinate examination of the:

- issues raised by the NSW Fire Brigades about ambiguities in the Building Code relating to fire issues;
- referrals of fire engineered alternative solutions to the NSW Fire Brigades; and,
- the extent to which the NSW Fire Brigades recommendations in relation to fire engineered alternative solutions should be adopted.

- **Monitoring and Evaluation of Alternative Solutions**

Options to fix the problems about Alternative Solutions put forward in submissions include:

- to prescribe when "deemed to satisfy" methods for building must be used;
- to set out a standard methodology that must be undertaken if an Alternative Solution is being pursued; and
- to give the consenting authority the power to require / demand an independent assessment of an Alternative Solution.

The Committee has already recommended prescribing "deemed to satisfy" in some construction elements of free standing homes. It sees some merit in setting a common set of verification methods required for Alternative Solutions.

Other states have faced confusion about performance requirements and Alternative Solutions. For example, Victoria has a established a Board to assess the compliance of design of buildings to relevant legislation and can examine Alternative Solutions when questions are raised.

The Building Appeals Board within the Victoria Building Commission can hear applications for a determination that a particular design of a building or an element of a building complies

[168] Submission 170

with the relevant legislation. These applications are called referrals and the Board examines the design compliance with performance requirements of the BCA96.The Board operates to evaluate disputes about Code interpretation and acts as a third party opinion on Alternative Solutions.

Finally, it has been noted that the neither the ABCB, nor State or local governments have central registers which could be used as a database for buildings with alternative design solutions. Consequently, there is no accumulation of knowledge and precedents of failed and successful Alternative Solutions.

The Committee sees that there are two main options for increasing scrutiny of Alternative Solutions.

- **Peer review option**

This option involves Councils through their consent conditions requiring that an Alternative Solution proposed in a Development Application undergo an independent assessment. It could be mandated that all alternatives solutions must have a peer review or that the Council identify those Alternative Solutions requiring a peer review.

- **Government panel review option**

This option requires Councils through their consent conditions to require that an Alternative Solution proposed in a Development Application be submitted to a government panel for assessment. An advantage of this second proposal is that this would also allow for the compilation and tracking of Alternative Solutions.

The Committee believes that the appropriate option is for a government panel of experts to be established to look at Alternative Solutions in NSW. The Committee recommends that the consent authority have the power to require that an assessment of Alternative Solutions be undertaken, where appropriate. The assessment should be undertaken under the supervision of a standing panel of experts appointed by the Government. The panel should be under the Department of Planning as it is the link to Councils and also because of its general oversight of Building Code through the Department's Building Codes Unit.

Councils would have the option to submit an Alternative Solution proposed in a development application to the panel. In light of concerns about fire engineered Alternative Solutions, Councils should automatically refer these to the peer review or government panel assessment, which should include consultation with the NSW Fire Brigades. The panel could also have a representative/ expert from the NSW Fire Brigades for this purpose. With this arrangement, there is scope for the panel to look at Alternative Solutions in the commercial construction industry, which may also be desirable.

The panel would also create a database of alternatives solutions, with the aim of identifying common solutions and referring this information back to the Australian Building Codes Board. The panel would also consider standardising the verification methodology for Alternative Solutions.

Recommendation 23
The Committee recommends that a Government expert panel be established within PlanningNSW to look at 'alternative solutions' under the Building Code. The panel would:

- determine standard methodologies for verification of alternative solutions;
- examine alternative solutions as referred to it by Councils and make recommendations about their suitability;
- examine all fire engineered alternative solutions which would automatically be referred by Councils. The panel would include the NSW Fire Brigades for this purpose; and
- collate information about alternative solution designs to develop a body of knowledge and precedents.

- **Imposition of standards higher than Building Code by Councils**

A further variation in the Building Code framework, in addition to Alternative Solutions, is the capacity for Councils to require standards higher than the Code through the use of development consent conditions imposed on a project as noted in Section 3.3.2.

A particular example is the policy of the City of Sydney Council to require a higher sound insulation outcome than that currently required by the Code.

This arrangement is peculiar to NSW and apparently does not operate in other states.

The Australian Building Code Board and some developer submissions argued that this is a problem because it means that there is further variability in the Building Code between municipalities:

> ***Mr DONALDSON:*** *Where we have inconsistency is at the local and State level in terms of the way in which the building code is interpreted by building professionals, where some States have building regulation powers beyond the State jurisdiction. New South Wales is a good example of that. In the past we have provided evidence about our concerns about the proliferation of standards at local level. That is an issue in New South Wales.*[169]

However, the fact that Councils impose higher standards in some circumstances may indeed be a very good indicator of where the community believes the Building Codes are deficient or insufficient.

On this basis there may be value in allowing Councils, for the moment, to continue to have this discretion, provided it can be used to educate and inform people about the Code and its weaknesses.

The Committee therefore recommends that the Building Codes Unit of PlanningNSW monitor and assess Code variations imposed by Councils for their appropriateness and to identify community trends.

Recommendation 24
The Committee recommends that the powers of Councils to put in place requirements higher than those prescribed by the Building Code should be retained at this time.

[169] Transcript of evidence 20 May 2002 p74

Recommendation 25
The Committee recommends that PlanningNSW annually survey the Building Code variations imposed by Councils, assess their appropriateness, and identify trends to feed into revisions of the Building Code.

3.4.4 General application of the Building Code and specific code matters

The inter-governmental process for introducing amendments means that individual states are limited in how to make the Code more prescriptive where desirable. However, the Committee noted earlier in this Chapter, that better consumer access regarding the Code is needed as well as a *plain English* format for the Code. Also, the Committee has proposed in earlier recommendations that NSW consider limiting the application of the Alternative Solutions options to certain elements of home building free standing dwellings. The Committee feels that these concerns should be part of the national debate about the Code.

Despite the criticism about the performance based and Alternative Solutions structure in the Code, many industry participants, builders, councils and peak bodies have the view that the majority of the Code is adequate with the exception of three areas:
- noise insulation;
- waterproofing; and
- thermal issues.

- **Noise insulation**

The Code contains requirements for sound insulation of walls and floors separating residential occupancies. The purpose of the requirement is to safeguard occupants from illness or loss of amenity as a result of undue airborne and impact-generated sound being transmitted between occupancies and from common spaces.

The Code requirements do not extend to insulation from external noise sources such as motor vehicle traffic or aircraft.

The Australian Building Codes Board is reviewing the codes for noise insulation at the moment. In February 2002, a Regulatory Impact Statement was released and a program of industry consultation is underway.

The changes were proposed because of the increasing use of a range of domestic appliances with substantial noise-making potential and due to the increasing popularity of multi-unit dwellings in Australia. The changes would have the effect of bringing Australian regulatory standards in this area broadly into line with those in place in a number of Western countries. The current situation, by contrast, is one in which the Australian standards are generally less stringent than those adopted in most comparable countries.

The Committee heard that there were two outstanding concerns about sound insulation proposals:
- that the sound insulation was still poor and not adequate for high density living; and
- that the sound insulation industry is considering a program of star ratings to educate consumers about the importance of sound insulation and allow superior sound insulation to be a purchase feature of a home.

It was explained to the Committee that sound insulation was not keeping up with the demands placed upon it by high density living and modern lifestyles. Noise thresholds from appliances, such as stereos and changes such as polished floorboard in apartments increased sound thresholds.

Generally sound insulation requirements are developed in laboratory situations and then a set of "Deemed to Satisfy" construction options are prescribed to meet a certain sound insulation level. Therefore to ensure that a building meets the Code requirements for sound insulation, the construction can follow the deemed to satisfy process. A concern was expressed that in practice, even where a construction method was right, the actual on site sound insulation effect is less. There was the suggestion that "deemed to satisfy" constructions need to be tested, as well as Alternative Solutions, for sound insulation which are already tested on site.

> ***Dr BURGEMEISTER (Australian Acoustic Society):*** *…If you build a "deemed to satisfy", you can say that it has been tested in a laboratory and we have laboratory results which show that it meets the requirement, and we can build it. Nobody has to test it afterwards. In some ways that is very powerful because it means that you do not have the extra cost of doing tests. What it does not do is ensure that the builder builds it properly on-site. We have seen several cases where a wall has been very similar to a "deemed to satisfy wall" that has not performed well. Upon investigation—that has involved tearing down the outer layers of plaster on the wall, which is a very expensive exercise—we have found that there are holes through the perpends of the concrete that are holding up the bricks, or the mortar. You could get a knife and poke it from one side to the other through the wall—things like that—and that is not caught by the "deemed to satisfy" requirement. I guess that is why we are proposing a small number of tests—to make sure that we force the contractor to build them properly and also to show them how to build it. This is a very powerful way, with the tests right up front that Peter Knowland was talking about, to show the contractors the important things to do when building that wall so that they understand properly what the acoustic considerations are.*
>
> ***The Hon. JOHN RYAN:*** *Are you testing the alternative solutions or the cookbook method? If you do the cookbook version, do you need the test?*
>
> ***Dr BURGEMEISTER:*** *We think both. At the moment under the BCA you do not have to do either. Under the proposed BCA, you need to test only the alternative solution.*
>
> ***The Hon. JOHN RYAN:*** *When you say an in situ test, at what level would you need to test? Are you talking about an individual residential house or are you talking about a block of six units or a block of a hundred units, and at what stage?*
>
> ***Dr BURGEMEISTER:*** *It only applies to class 2 to 10 buildings which are only apartments and townhouses. It does not apply to the freestanding dwellings.*[170]

The Committee sees that the option of having in-situ testing, where necessary, to ensure compliance with minimum sound insulation requirements may be beneficial in the construction of multi-unit dwellings. However, without information on cost implications the Committee is hesitant to suggest that this be a requirement.

At the same time, the Committee has received many submissions about poor sound insulation which suggest that sound insulation thresholds should be increased.

[170] Transcript of evidence 20 May 2002.p.10

The Committee is aware that any proposal to change the noise insulation requirements in NSW should have regard for the work currently being undertaken nationally through the Australian Building Codes Board process.

Recommendation 26
The Committee recommends that minimum sound insulation requirements of the Building Code be increased and that consideration be given in the current review process to the costs and benefits of requiring in-situ testing of "deemed to satisfy" sound solutions for Class 2 to 10 dwellings.

The Committee was also briefed on a proposal from the Association of Australian Acoustic Consultants on a voluntary star rating system for superior sound insulation. The rating system would work by allowing a vendor to assign an acoustical rating to a property for sale thereby raising the consciousness of consumers about the acoustic quality of the apartment under consideration. The rating system would note the level of insulation that was achieved above the minimum prescribed by the Code. It is hoped that the "star rating" system would help to encourage higher standards in sound insulation without regulation.

Recommendation 27
The Committee recommends that the building industry look closely at adopting a voluntary "star rating" system to encourage standards above the Building Code for sound insulation.

- **Waterproofing**

The Australian Building Codes Board made the following observations about waterproofing:

> *The BCA contains requirements to prevent the penetration of water through roofs and walls that could cause unhealthy or dangerous conditions, loss of amenity for occupants and undue dampness or deterioration of building elements.*
>
> *To a large degree, the BCA relies on product manufacturing and installation details contained in relevant Australian Standards to achieve an adequate level of waterproofing of buildings. Most of these standards have been in place for many years and have proven to be effective in achieving the desired outcome. Experience indicates that most waterproofing failures are as a result of non-compliance or poor workmanship.*
>
> *In respect of weatherproofing of windows, the BCA references the Australian Standard for selection and installation of windows in buildings. This standard contains, among other things, testing requirements and performance criteria for weatherproofing of window assemblies. These requirements are aimed at reducing water leakage through windows*[171]*.*

The Committee heard evidence of a number of waterproofing failures in both unit complexes and individual homes. A submission from one industry operator has detailed what he believes to be the key source and cause of these problems:

> *The BCA has become performance orientated instead of prescriptive which has resulted in builders and designers installing flashings and waterproofing systems that do not work. The current revision of AS 3740 (the standard covering waterproofing in wet areas in domestic buildings) is fundamentally flawed due to omissions including:*
> - *No requirement for full floor waterproofing of bathrooms and other wet areas*
> - *No requirement to water proof the walls of a shower other than corner…*

[171] Submission 188

> *…There is no standard for the waterproofing of roofs, balconies, planter boxes and basement walls at present but the HIA WICA [Waterproofing Industry Council of Australia] committee … is compiling a new standard for these external areas. This process has been continuing during the last four years approximately and proving to be very frustrating experience. There is no standard that controls the quality of a product that can be used as a waterproofing membrane.*[172]

Similar views were articulated by industry members who also raised concerns about the quality and testing of waterproofing materials and adequacy of specific training of waterproofers (training issues were also noted in Chapter 2).

The Master Builders Association submission noted that water penetration was the top common defect and that various issues had to be considered in this area:

> *The treatment of wet areas is one critical construction stage where builders are reliant upon the quality of production and correct installation by the licensed installer. In other instances the builder is reliant upon the design to complement waterproofing measures and waterproofing systems specified by the architect or specifier. However any failure of such systems will be directed at the builder, rather than to the architect specifier or licensed installer. These other parties remain insulated to being accountable for their work and therefore there is little incentive to ensure best practice by all parties in the contractual claim*[173]*.*

The Committee recommends that the new Commission examine appropriateness and scope of Australian Standards referred to the Code to address high incidences of waterproofing problems in new home building.

Recommendation 28
The Committee recommends that the Commission examine appropriateness and scope of Australian Standards referred to the Building Code to address the high incidence of waterproofing problems in new home building.

- **Thermal insulation**

Examination of thermal insulation standards as part of the Inquiry's terms of reference is posed in the context of environmental and cost efficiency. The Committee interprets this reference as the examination of energy efficiency through thermal insulation.

The issue of energy efficiency is being reviewed at the moment by the Australian Building Codes Board. In March 2002, a RIS was released and industry consultation is underway. It is proposed that changes to the Code in respect of housing will occur on 1 January 2003. Energy efficiency measures for other buildings will follow some 12 months later.

The Ministerial Council on the Greenhouse announced on 24 March 1999 that it had reached agreement on a comprehensive strategy aimed at making homes and commercial buildings more energy efficient. This agreement featured a two pronged strategy:

- The introduction of mandatory minimum energy performance requirements through the Building Code of Australia (BCA), while

[172] Submission 26
[173] Submission 191

- encouraging voluntary best-practice initiatives. Industry supports this approach and, to foster the voluntary measures, has formed the Australian Building Energy Council (ABEC).

At present, the Code does not contain any energy efficiency measures. However, the Australian Capital Territory, South Australia and Victoria, through their Code appendices, require ceilings and walls of houses to be insulated, and the ACT and Victoria extend those measures to other residential buildings.

Industry has expressed its concern at the proliferation of "Energy Codes" at a local and regional level and is calling for the expedient development of mandatory measures in the Code. Any proposal to introduce changes to thermal insulation requirements in NSW should be developed having regard to the work currently being undertaken nationally through the ABCB process.

Given this work is at a preliminary stage, the Committee makes no recommendations at this time on thermal issues.

- **Safety Glass**

Another issue raised during the Inquiry concerns the use and testing of safety glass. This was first brought to the Committee's attention in relation to the disintegration of shower screens, causing injury. Such glass must conform to Australian Standard AS2208, which measures the manufactured strength and behaviour of the glass against a standard test. The Director of Compliance and Standards in the Department of Fair Trading told the Committee:

> *…the Standards Australia Technical Committee, with responsibility for safety glass, is reviewing the standard right now..the standard itself is being reviewed to ensure that it is an appropriate standard…That is one of the things that the technical committee is looking at and, depending on what change it makes, that will be reflected in what is required to be installed by builders under building contracts.* [174]

This matter was also referred to the Committee in the submission from the Building Action Review Group, resulting in disputation about the testing of a particular sample of glass and conflicting expert reports. While this individual case has still not been resolved, the Committee has concerns about the general question of safety glass used in the building industry and urges the Standards Australia Technical Committee to complete its review as a matter of priority and allay community concerns about standards applying to safety glass in the home.

[174] Transcript of evidence, 10 May 2002, p40

CHAPTER 4 Consumer Advice and Information

4.1 INTRODUCTION

The extent to which current arrangements and legislation governing the building industry inform, protect and provide quality products for consumers has been a consistent theme running through the Committee's investigations.

The first term of reference for the inquiry requires the Committee to "determine whether there are enough checks and balances existing to ensure consumers are guaranteed that their homes are safe, properly certified and built to satisfactory standards". Builders licensing standards, the Building Code of Australia, certification processes and disputes and remedies all have a bearing on the question of consumer protection, and are discussed in other chapters.

This Chapter examines the extent to which a consumer's decision to enter into an arrangement with a builder/developer to commission and/or purchase a home has been properly guided by adequate information and advice. One of the Committee's main concerns is to ensure informed choice, thereby assisting in achieving high quality outcomes with minimal inconvenience, distress, financial liability for property buyers and a reduction in the number of disputes.

4.2 BACKGROUND

4.2.1 What do consumers expect?

The Committee has been presented with varying views about the expectations of prospective property owners concerning the building process and the finished product. On the basis of the current fragmented nature of consumer advice, detailed in this Chapter, many consumers enter into building arrangements with the expectation that their interests are well protected.

According to the Director of Environmental Services at Sutherland Shire Council:

> *There is an expectation that the building will be built properly with good workmanship…There is a community expectation that someone will intervene on behalf of the property owner, whether they be the person who is having the house built for themselves or an adjoining property owner, that there will be somebody there who will be able to act on their own behalf. Most people feel disempowered by the system and they need to turn to someone. When they do that there is an expectation that there will be a speedy remedy.* [175]

The complexity of the building system involves many disparate elements, which all combine in a house project and where the notion of quality may depend on whose point of view you solicit. For example, many consumers are unaware of the purpose or operation of the building code regime and how it impacts on quality. According to the Executive Director of the Australian Building Codes Board:

> *What are consumers' expectations? I can only talk to you from the perspective of what the building code was set up to do. I think the building code, in terms of its performance since*

[175] Transcript of evidence, 24 May 2002, p22

> *1990, has delivered the sorts of outcomes that it was supposed to deliver. We do have a very good life safety record in buildings in this country.*[176]

The Manager of Technical Services of the same Board, expressed it in these terms:

> *Obviously, consumer expectations are very hard to regulate. If I pay $100 000 for a house I have different expectations to someone who pays $600 000 for a house. That is very difficult to encapsulate in regulations, but it is something that can be encapsulated in a contract between the person paying for the work and the person delivering the work in terms of quality provided.*[177]

The subjective nature of quality work was also referred to by an officer from the Department of Fair Trading, who said:

> *…it depends what you mean by quality there, because quality might be that the consumer believes that the work was not done in accordance with the specification set out, but it may be a whole spectrum of things from how do the tiles match.*[178]

An initiative by a private builder to educate customers and to try to give them a realistic appreciation of the building process has resulted in the production of a customer manual. This manual encourages customers "to slow their thinking and decision-making processes". According to the General Manager of Armstrong Homes:

> *…Too many people rush into it. They are headlocked by a builder and have a deposit ripped from them without really understanding what they are in for…We probably do the opposite to what a lot of builders do.*[179]

In addition, the customer manual makes the point that the cost of home building is influenced by market forces, to the extent that price is not necessarily an indicator of quality.

The purpose of the manual is to educate and ensure that customers have realistic expectations. It also illustrates the paucity of alternative, official sources of advice.

4.2.2 Who provides consumer advice?

The Department of Fair Trading (DFT) is the main source of advice and information about the building process for potential property owners in New South Wales. As previously described, the Department is responsible for regulating the building industry by licensing builders and tradespersons, reviewing such licenses and protecting consumers by ensuring appropriate contracts are entered into with builders who have adequate insurance to cover defective workmanship.

DFT issues consumer guides and advisory documents at their Fair Trading Centre locations and has some consumer material available on line. However, there has not been a focused approach to the provision of easily available and comprehensive consumer information to assist potential property owners navigate around the complexities of one of the most important transactions in their lives.

In fact, in giving evidence before the Committee at public hearings, DFT witnesses concentrated mainly on consumer complaint processes and did not appear to give equal weight to the provision of essential information at the commencement of the process of

[176] Transcript of evidence, 20 May 2002, p53
[177] Transcript of evidence, 20 May 2002, p55
[178] Transcript of evidence, 10 May 2002, p57
[179] Transcript of evidence, 24 May 2002, pp53,66

engaging a contractor to build a home or to emphasise improving performance in the industry generally.

This is in marked contrast to the Queensland Building Services Authority, which gives major emphasis to consumer information in its operations. In its submission to the Committee, the Building Services Authority stated:

> *The importance of equipping consumers with information and knowledge of the building process has until recently not been given the priority of focus it warrants by regulators or the industry. The regime of consumer protection by BSA is predicated on a belief that in the longer term, having consumers who can more effectively participate in the building process will facilitate a shift towards a co-regulatory regime.*[180]

In giving evidence to the Committee, the General Manager of the BSA said:

> *I suppose one of the issues why the Queensland Building Services Authority was formed was confusion or lack of understanding on building contracts, the information imbalance between consumers and contractor…it really created an environment for the authority to inform consumers and deal with ethical practices within the building and construction industry.*[181]

He further went on to describe the process in Queensland:

> *We equip consumers with information and knowledge about the building process. This is done through our web site and through a number of general consumer awareness seminars which are held for consumers before they start the building process. We provide an advisory service. We provide information material and educational programs for consumers. We recently released a CD-ROM of a consumers guide through the building process, which explains checking the license, ensuring that you have a contract in place, contract provisions, finance issues, checking on referees for the builder, that sort of process...That web site had about 4 million visitors to it last financial year. There are about 140 000 license searches…Consumers can come in and check to see if an individual is licensed, what he is licensed to do…disputes are recorded against particular licensees…(together with) directions issued.*[182]

The provision of preliminary information to consumers about the building industry in New South Wales is piecemeal, cumbersome and haphazard. As previously stated, the DFT does provide a “fair trading guide” to consumers at their Fair Trading Centre and basic information on their web site, but the system is neither proactive nor sufficiently consumer driven to give intending property owners a sense of an equal partnership or a comprehensive understanding of the process.

4.2.3 What are other sources of advice?

As previously described, local government councils are involved at various stages in the building process by approving development applications and issuing development consents. In addition, Councils have an archival role and collect all the certificates and documentation relating to a particular building project. Councils are therefore an important source of information for consumers and can provide this on request. Better utilisation of Council information resources should be promoted through Council libraries. This could include

[180] BSA submission, p2
[181] Transcript of evidence, 10 May 2002, p88
[182] Transcript of evidence, 10 May 2002, p89

information about Building Codes and standards and other relevant material and is dealt with in Chapter 3 of the report.

Local Councils, in submissions to the Committee, have expressed concerns about the lack of public education provided to future property owners about the certification arrangements and the current building inspection regime. A commonly expressed view is that:

> *It is the Council's experience that a number of future homeowners (ie, people having homes constructed) are not aware that the Council has no role to play in respect to building inspections where the Council is not the Principal Certifying Authority…to remedy this situation (there should be) a robust education process (eg, information in both electronic and hard copy) giving a plain English explanation of the building certification system and the roles of Private Certifiers and local consent authorities and a requirement for full and proper disclosure to these future homeowners during contractual negotiations of the building certification process they are agreeing to."*[183]

The process of building certification, which is currently a PlanningNSW function, has been covered elsewhere in the report, but the separation of responsibilities for different parts of the building system is another source of confusion for consumers. This is compounded by the complexity of the BCA regime and lack of adherence to specified building codes, which is also discussed in greater detail in Chapter 3. The end result is that many potential property owners enter into arrangements in a process which they do not fully understand, resulting in confusion, frustration and added costs.

Aggrieved consumers pursue remedial action in a variety of ways, often poorly advised, and become involved in the complaint and dispute resolution processes of the DFT, the CTTT and the judicial system. This is set out in Chapter 6 of the report. The common theme throughout this Inquiry, however, is the lack of appropriate and comprehensive information at an early stage to prevent later reliance on these costly and cumbersome remedies.

The lack of sources of advice and consumer disempowerment has resulted in the formation of the Building Action Review Group (BARG), which is a voluntary, non-funded organisation comprising dissatisfied consumers "who lost hundreds of thousands of dollars through arbitration on building disputes, without gaining the money needed to rectify their homes".[184]

BARG has been operating since 1998 and was formally incorporated in August 1990. It has a current financial membership of 150 people and assists in the provision of advice, information and support to consumers "due to the shortcomings in protecting consumers by the former Building Services Corporation, today re-named the Department of Fair Trading."[185]

Appearing before the Committee, the President of BARG quoted Professor Fels, the chairman of the ACCC in support of the case for the lack of consumer protection in the current system:

> *"Consumers have more protection in buying a $25 toaster than when they build their own home".*[186]

The BARG President continued*:*

[183] Wollondilly Shire Council submission, pp1-2
[184] BARG submission, p3
[185] BARG submission, p4
[186] Transcript of evidence, 23 May 2002, p4

> *…consumers are completely unaware of the legislated regulations, their entitlements, and what documents the builder should provide them. Builders do not give consumers critical documents, that is, the council approved architect and engineer plans and the council conditions of consent. Consumers are not aware of such conditions of consent imposed by the council. The system is rorted. Everyone knows this, but the regulatory authorities take no action.*[187] *…That is why consumers need an independent advisory service.*[188]

After providing extensive case documentation of systemic problems for consumers, BARG characterised the response of DFT to the presentation of issues as follows:

> *It is clear from the way in which consumers are dealt with by the Department that instead of the consumer going to the Department and saying "I have a problem, what can I do?" the position is that the Department says "You have a problem. Prove it to me." So what happens is that the consumer unknowingly starts to get some reports; they are then submitted to the Department; the Department says "They are not good enough" or "We don't like your consultant" or "We think your consultant is biased", or "The consultant is not independent", and of course the end result is, after the consumer has spent his $20 000 or $30 000 on experts, the Department will then appoint its experts to go and have a look at it. So that the system is reversed, so to speak.*[189]

At an individual level, a private submission to the Inquiry made the following statement:

> *It is vital that the government provides cheap and easy access to help those confronted by unscrupulous Developers/Builders to level the playing field… Please do not water down any resources made available to the public for dealing with valid complaints against those who are more powerful in the community. These must be strengthened rather than weakened…*[190]

4.2.4 How can home building advice and advocacy be improved?

The continuing work of BARG and the difficulty that consumers have in dealing with the intricacies of regulatory and administrative mechanisms in the building industry illustrate the need for the consolidation of government administration of home building. The establishment of a Home Building Compliance Commission and its responsibilities to consumers is set out in Chapter 1 of the report.

To address issues of information access and advocacy on behalf of consumers, the Committee recommends the creation of a Home Building Advice and Advocacy Centre, staffed by officers with expertise in residential home building construction and building contract obligations and focusing on consumer protection. While this has been referred to in Chapter 1, the specific charter of the Centre and its service obligations are detailed in recommendations at the end of this Chapter.

4.3 OTHER ISSUES RAISED IN THE INQUIRY

4.3.1 Home Building Contracts

Under the provisions of the Home Building Act 1989, any home building must be covered by a written contract between the licensed person building the house and the owner. The Act

[187] Transcript of evidence, 23 May 2002, p5
[188] Transcript of evidence, 23 May 2002, p21
[189] Transcript of evidence, 23 May 2002, p27
[190] Moors submission, p3

stipulates basic information to be included in the contract, such as the date, name and address of premises being built, the name and license number of the contractor, description of the work, relevant warranties and the contract price or warnings if the price is not quoted. However, a range of contracts may be used, including one designed by the contractor or one purchased from an industry association.

These existing contracts do not necessarily provide quality assurance for consumers. According to the Executive Director of the Building and Construction Council of New South Wales:

> *Quality is not defined in the Building Code of Australia or the regulations. Building contracts avoid the issue, because they are customarily drafted by the contractor to serve his own interests with little input from the client.*[191]

This sentiment is reinforced in a submission from two former Senior Members of the Fair Trading Tribunal, where they state:

> *At present there are a number of standard forms of building contract in common use in the industry. There are also a myriad of other contracts in use, some professionally drafted, others not…Some contracts can be claimed to be pro-builder, other pro-consumer. In every case it is necessary to read the entire contract and specifications (sometimes hundreds of pages, sometimes one) in order to understand the parties' obligations. For DFT staff and others involved in advising consumers and builders, this makes the giving of reliable advice nearly impossible.*[192]

As previously outlined, the Department of Fair Trading provides a basic consumer guide to the building process, where reference is made to the legal requirement for a written contract. The Department has also produced a range of home building contracts to cover minor works, likely to cost less than $5 000, renovations costing between $5 000 and $25 000 and for new homes and major alterations costing in excess of $25 000.

While these model contracts provide consumer protection information and highlight potential problem areas by providing cautionary advice in marginal notes, the Committee has concerns that this is still insufficient to ensure that consumers are informed and protected adequately. For example, in Clause 8 of the Home Building Contract for new homes, dealing with statutory warranties for alterations and additions over $25 000, reference is made to the requirement that the work must be performed in a proper and workmanlike manner, in accordance with plans and specifications and that the materials will be suitable for the purpose, in compliance with the Home Building Act, resulting in a dwelling reasonably fit for occupation.

According to the evidence presented by the Director-General of the Department of Fair Trading:

> *The department's focus is on ensuring that building work is done with an appropriate level of competence and workmanship in accordance with the requirements of the Act and the statutory warranties implied under the Act…While the Act imposes requirements on contractors, the Act imposes no function on the department in relation to the actual construction of work. The department plays no role in the development of building*

[191] Transcript of evidence, 5 May 2002, pp30-31
[192] Gurr&Molony, submission, p2

> *processes or the testing of building techniques or products, nor is it involved in the design of dwellings or building standards. It also plays no role in the certification process.*[193]

The above statement highlights one of the dilemmas for prospective property owners, in that information about essential components of the building process, such as the Building Code and standards applied to construction and the use of materials is not supplied to consumers in a comprehensive and intelligible way. While the Department's officials acknowledge that their "role is to inform and educate consumers about their rights, to ensure that traders are aware of their obligations and to take action against licensees who are guilty of improper conduct"[194], this does not extend to providing critical consumer information at the contract stage of the building process.

The Department describes its role as follows:

> *In the investigation of a complaint, the Department of Fair Trading looks at the terms of the building contract. It also relies on expert evidence as to compliance with the relevant building codes and accepted building industry practice. The department does not dictate to the industry the required standards of building work. The standard of work is a matter for the parties in their building contract and, if relevant, the development and building certification process. The department is to ensure that consumers receive workmanship and service which is in keeping with their building contract and the relevant building codes and industry practices. If the licensee can show that he or she performed the work in accordance with the contract, relevant standards or acceptable building practices, no action will be taken by the department.*[195]

The absence of a proactive consumer focus in the Department's operations has contributed, in part, to the large number of case studies received in submissions to the Committee's Inquiry. A consistent message is that the complex nature of the building regime and the lack of comprehensive consumer information and advice have resulted in major difficulties for some property owners, who feel that they have not been protected from unscrupulous contractors and have suffered unnecessary hardship and financial disadvantage because of systemic failure.

In the submission from the two former members of the FTT, already referred to earlier in this Chapter, a suggestion is made to legislate to provide a contract to deliver a number of standard conditions which cannot be excluded or modified, covering matters common to most residential buildings. Such conditions are claimed by the authors to:

- *increase the predictability of outcomes in litigation;*
- *greatly simplify processes of public education;*
- *enable those within the industry to develop a clear understanding of the basis upon which they contract, and their rights and obligations;*
- *enable those advising consumers to develop a clear understanding of residential building contracts; and*
- *provide another means of specifying quality standards.*[196]

A proposed remedy is to provide better consumer advice at the contract stage of negotiations and the drawing up of a more comprehensive standard building contract to provide better protection for consumers. Such a contract needs to be based on objective criteria and not designed to represent the interests of a particular industry group. The

[193] Transcript of evidence, 10 May 2002, p2
[194] Transcript of evidence, 10 May 2002, p2
[195] Transcript of evidence, 10 May 2002, p3
[196] Gurr & Molony, submission, p3

Department of Fair Trading has acknowledged that standardised contractual arrangements are desirable and that the power exists for its enforcement. For this reason, it should be produced by the Home Building Compliance Commission and also made available by the Home Building Advice and Advocacy Centre.

As a minimum, the standard contract should have links to the BCA, include a mandatory attached Home Warranty Insurance policy and an Occupation Certificate at settlement and stipulate that a 5 per cent final payment be withheld until the issuing of the Occupation Certificate. In addition, the Committee considers that the contract should contain standard variation forms, covering a range of variations, requiring the signature of both parties to the contract.

The question of contracting to purchase a strata unit off the plan has been dealt with in Chapter 7 of the report.

4.3.2 Home Warranty Insurance

Another major issue for consumers and an essential component of any comprehensive consumer protection regime is the provision of home warranty insurance. Prior to amendments to the Home Building Act introduced in 1997, the Department of Fair Trading provided home building insurance to all licensed contractors and builders. After 1997, all builders and contractors have to arrange to secure private home warranty insurance from approved insurance companies for residential building work valued over $5 000 (now increased to $12 000). Therefore, after a builder has been licensed and has entered into a contract with a property buyer, but before building can commence, builders home warranty insurance must be in place.

The current crisis in the insurance industry generally, and in home building insurance in particular, resulted in the withdrawal of companies prepared to offer such insurance in the building market. Since the passage of the Home Building Amendment (Insurance) Act in May this year, however, the Government has put in place reinsurance arrangements to enable three insurers to offer insurance to builders. This also now applies to high-rise apartment buildings.

The Amendment Act also contains a requirement that, as from 1 July 2002, applicants for owner-builder work in excess of $12 000 will be required to complete an education course approved by the Director-General of DFT and conducted by TAFE and the Sydney Building Information Centre. These courses are designed to provide owner-builders with information relating to the Home Building Act, insurance, taxation, building approval and other building related matters.

In order to examine the appropriateness of current schemes in providing consumer protection in a competitive market, the National Ministerial Council of Consumer Affairs has commissioned a private consultant to undertake a review of builders warranty assurance on a national basis. The results of this review have not been released to date but the Committee has received a confidential submission from the consultant, Professor Percy Allan and has taken in camera evidence from him about his preliminary findings.

Professor Percy Allan[197] has made the general observation that most State jurisdictions provide piecemeal consumer information about the building process in separate publications, a point already made in this Chapter. In discussing home warranty insurance, he makes the point that, even where insurance is marketed as being a first resort where problems occur, the reality is that most insurance is actually provided as a last resort, after consumers have exhausted other dispute resolution and litigation processes, with the exception of Queensland. This point is reinforced in the provisions of the Home Building Amendment (Insurance) Act. The reforms, which came into effect on 1 July 2002, have amended the home warranty insurance scheme to operate as "last resort" insurance.

Additionally, there is no public database on home building warranty insurance claims to provide consistent data about cases and there is no prudential oversight of builders warranty insurance by APRA. This situation does not assist consumers. Further gaps in the current system relate to the lack of appeals mechanisms for builders if their insurance applications are rejected.

One key reform to overcome some of the current problems in order to safeguard the interests of consumers and to make insurance more affordable for builders and sustainable for insurers would be to increase the availability of information about builders on the public record. A centralised register of builders and a rating system based on performance would assist consumers and insurers in distinguishing between good and bad builders and would greatly improve efficiencies. At the very least, consumers should have access to a centralised database detailing the contractor's history of disputes and home warranty insurance claims. A further check in the system would be to mandate license renewal when the insurance expires.

The Committee considers that a further safeguard in the system would be to legislate to ensure that insurance must be a vendor disclosure document to be provided in the contract for sale.

4.3.3 Information and Assistance

Consumers in the housing market in New South Wales are experiencing a range of problems caused by the lack of easily obtainable and comprehensive information and support. The Committee agrees with the approach adopted by the Queensland Building Services Authority, that consumers should be seen as equal partners in the home building industry and that this requires access to good advice and advocacy services. In Chapter 1, the Committee recommended the establishment by Government of a Home Building Advice and Advocacy Centre. It is now able to recommend on its role and functions.

[197] Professor Allan recently conducted an Australia-wide inquiry into Homebuilders Warranty Insurance for the National Ministerial Council on Consumer Affairs.

RECOMMENDATION 29

The Committee recommends that the Home Building Advice and Advocacy Centre, identified in Recommendation 3, be staffed by officers with expertise in residential home building construction, building contract obligations and consumer protection. The Centre should:

- offer comprehensive building information to potential property buyers; and
- provide advice on all aspects of house construction and purchase, including contract negotiations, insurance, conciliation and complaints and dispute resolution procedures.

In delivering the service, the Centre should:

- produce independent consumer information and advice in a consolidated format;
- cover all aspects of the building industry in the form of a guide book, a video, and web site that are regularly updated; and
- conduct consumer training sessions on a regular basis..

RECOMMENDATION 30

The Committee recommends that the building system information available to consumers be enhanced specifically by:

- providing information concerning builders licensing, home building contracts, complaint forms, Building Codes information and other relevant documentation free, on-line and from the Centre;
- a rating system based on performance to assist consumers in identifying better performing builders.

The Committee makes the following recommendations to increase the availability of information sources to consumers.

RECOMMENDATION 31

The Committee recommends that:

- that a “Guide to Choosing a Principal Certifying Authority” be developed and be a mandatory attachment to all Council DA forms; and
- that a “Guide to Off the Plan and Strata Unit Purchases” be developed and become a mandatory attachment to sale of unit contracts.

The dispute resolution and advocacy functions of the Home Building Advice and Advocacy Centre are spelt out in greater detail in Chapter 6 of the report, dealing with disputes and remedies. Therefore, as well as guiding the consumer through the initial steps in the commissioning and purchase of a new home, the Centre will be an important consumer protection watchdog to provide greater protection to all property owners at every stage of the building process. In this regard, it will also function as an independent arbitrator and may provide official reports on a cost recovery basis for consumers involved in litigation with builders.

The most important document for consumers in the home building process is the home building contract.

RECOMMENDATION 32

The Committee recommends that the Commission design and establish by regulation:

- a number of standard conditions of home building contract, which cannot be excluded or modified, covering matters common to most residential building contracts and stipulating that:

i) the construction quality of the building works are to conform with the Building Code of Australia specifications or relevant Australian Standards;
ii) the design plans must be attached to the contract;
iii) variations to the design plans must still conform with Building Code requirements or satisfy the development consent conditions;
iv) variations to the design plans must be agreed to in writing by all parties to the contract;
v) the Conveyancing Act be amended to require that the Home Warranty Insurance policy must be attached to the contract; and
vi) the final payment (of 5 per cent of contract price) be withheld until the issuing of the Occupation Certificate at settlement.

- that these conditions be included in a model contract created by the Commission;
- that the Commission be given powers to accredit contracts used by other agencies or industry bodies which include these standard conditions; and
- penalties be imposed on authors who make false claims that their contract has been accredited by the Commission.

It is evident from the material gathered by the Committee that many consumers and professionals working in the home building industry feel that the current system is not efficient or fair. Informed and supported consumers should form the basis of a strong and viable home building industry, ensure that risks and adverse outcomes are kept to a minimum and restore confidence in the system. The above recommendations to strengthen the consumer focus of the industry will assist these aims.

CHAPTER 5 Planning, Certification and Council Issues

5.1 INTRODUCTION

This Chapter looks at the quality of the planning and certification processes for home building and outlines the key stages and issues associated with building approval, construction and certification (or what has been historically called the inspection stage).

After the decision to build has been made by the consumer (or developer), the building process for multi-unit developments, individual homebuilding and renovation requires interface with the planning, certification, and Council regimes. Approximately 120,000 to 140,000 development applications are submitted to Councils in NSW each year.

5.1.1 What are the main planning and construction steps in domestic building?

Home building work of any significant value is subject to legal requirements that some form of inspection of construction work be undertaken. Until the 1990's, these activities had been undertaken by Council, who would approve the plans for a building and send out inspectors to check that work was being done in accordance with the plans and any other conditions imposed by the Council or required by government regulation. The rationale behind the scrutiny of plans and construction by Council has been to serve the public interest by ensuring the physical safety of individuals using the building and also to manage the impact of the development on the local community.

In the last decade, most States have introduced competition into the second activity of Council - the inspection process - by way of introducing private certifiers (or private building inspectors). This has been driven by a demand for greater contestability and a more transparent and accessible opportunity for broader participation in the marketplace and has, for the most part, also seen the redefinition of roles and activities in the building process.

In 1998, NSW introduced private certification and revised its approval instruments and processes.

5.1.2 What is the current planning, building and certification system in NSW?

The current NSW system has been in operation since July 1998, and is prescribed by the *Environmental Planning and Assessment Act 1979*, as amended by the *EP&A (Amendment) Act 1997* (hereafter the EP&A Act).

The 1997 amendments redefined the approvals and construction phases for building. Two distinct authorities were created to be responsible for each phase: the consent authority and the principal certifying authority or PCA.

- The **consent authority** is the title given to the Council when it undertakes its role to assess development applications and grant development consents.
- The **principal certifying authority** is the title given to who ever undertakes the certification role on a particular development. This role can be assumed either by a Council or by a private accredited certifier. The key caveat is that whilst the Council can

- be both the consent authority and the PCA for a development, private certifiers can only be the PCA. Councils retain an exclusive role as the consent authority for developments.

In addition to introducing the contestable role of PCA to private competition, there are various sub-layers of certification performed by private certifiers (issuing compliance certificates).

To summarise, the process of planning construction and certification in NSW consists of two stages, as follows:

The approval stage, usually comprising:

- Seeking Local Council approval for building plans and specifications through a development approval application or an alternative consent document such as a complying development consent. This is generally referred to as a **development approval**;
- Approval by Council with consent conditions and/or design modifications. This is generally referred to as a **development consent. Consent conditions** will outline such matters as sediment and erosion control, colours and materials of construction, site management (in particular times of work and waste management) and public safety;
- **Nomination of principal certifying authority (PCA)** by the development applicant as either council or private certifier to be the supervising officer responsible for regulatory compliance for the building; and,
- For project homes and unit “off the plan” developments, development approvals are organised and a certifier nominated by project home or developer prior to issue of contract.

The construction and inspection stage, usually comprising:

- Issue of **construction consent by the PCA** in accordance with the requirements set out in the development consent, which articulates the building specifications and building process such as excavation and times for work.;
- **Verification** by tradesmen for their component work such as waterproofing and **compliance certificates** from accredited certifiers such as an accredited engineer;
- Possible variations to design during construction using an amendment application to Council (Section 96 amendments);
- Possible variation or non-compliance with construction consent and subsequent enforcement roles and responsibilities of the PCA and Council in construction;
- Issue of an **occupation certificate** by the PCA, which indicates the building is suitable for occupation in accordance with the purpose of the building. Subdivision certificates may also be issued by the PCA; and
- **Lodgement** of certification documents on completion with the Local Council is required within 7 days of completion.

Table 1 below outlines the general stages in a building development in NSW.[198]

TABLE 5:1 – Summary of planning system

ENVIRONMENTAL PLANNING INSTRUMENTS Overarching plans such as State Environmental Plans (SEPPs), Regional Environmental Plans (REPs), Local Environmental Plans (LEPs), and Development Control Plans (DCPs). Developments fall into three general categories: 1) Prohibited development; 2) Development which does not require consent 3) Development which requires consent through a Development Application (DA).	- Preliminary inquiries with council. Determine if DA is required depending on zoning of site in LEP. Council issues a Section149 certificate showing relevant zoning (eg Residential 2A or Light Industrial). - Applicant identifies appropriate building classification (eg single dwelling/ duplex/ subdivision). - If the development is regarded as routine, ie consistent with the LEP and other plans, it can be issued with a complying development certificate (which can be issued by an accredited certifier). Otherwise a DA is required.
DEVELOPMENT APPLICATION **Approved by Council as the consent authority** *Applicants and opponents with rejected/amended developments may go to NSW Land and Environment Court to challenge the council decision.*	- **Development application** lodged as per the building classification. Public is notified and consulted if required. - Council considers impacts of proposal. - If satisfied, council gives **development consent** subject to conditions.
CONSTRUCTION CERTIFICATE **Issued by council or an accredited certifier**	- Council or accredited certifier checks plans and specifications comply with consent and standards, including Building Code of Australia. - If satisfied, will issue **construction certificate** and possibly fire safety schedule.
APPLICANT APPOINTS PRINCIPAL CERTIFYING AUTHORITY (PCA) and notifies Council	- Before works starts a **principal certifying authority is appointed** (council or private certifier. - Confirms what work to be done and fee. - Notifies council 2 days before work begins.
BUILDING WORK BEGINS	- Work begins in accordance with development consent, including any conditions. - A licensed builder is required to supervise the building process. The PCA's role is to oversee regulatory compliance. - **Verification** of individual components of the building may be provided by trades persons ie foundations or frame. The PCA has the discretion to determine whether these building elements require a **compliance certificate**, in addition to verification. Where this is the case, an accredited certifier who specialises in that element will certify that the work is consistent with design or code requirements.
OCCUPATION CERTIFICATE **Completion of works** The occupation certificate certifies that the building work is in accordance with its BCA classification (ie the appropriate BCA standards for that building).	- After works are concluded and fire safety certificate is provided, the PCA will issue an **occupation certificate.** - Copy of occupation certificate to Council. - **Subdivision certificates** may also be issued by PCA.

[198] Table derived from Planning NSW background paper on certification.

5.1.3 How is private certification regulated in NSW?

The activities of private certifiers in NSW are enabled under Parts 4A, 4B and 4C[199] of the *Environmental Planning and Assessment Act 1979*, as amended in 1997. The key aim of the amendments was to streamline the development process by lifting the process burden from Councils and introduce efficiency through competition in the certification industry. A second objective was to offer improved legal protection from negligent inspection and certification of building works.

As noted previously, the general purpose of private certification is to enable a choice of private or council provider for the certification of a development. There are currently around **330 private certifiers practising in NSW**. PlanningNSW suggests that private certifiers are now inspecting a third of all building in NSW, although the proportion of domestic buildings handled by private certifiers is anticipated to be less than a third.

Private certifiers are accredited by professional associations (known as accreditation bodies), approved by the NSW Minister for Planning under S109S of the Act. The four accreditation bodies (with an approximate number of accredited certifiers), currently authorised in NSW are:

- Professional Surveyors Occupational Association of NSW (6)
- Royal Australian Planning Institute - NSW Division (1)
- Building Surveyors and Allied Professional Accreditation Board - a division of the Australian Institute of Building Surveyors (198)
- Institute of Engineers, Australia (124)

As indicated by the accreditation bodies above, certifiers come from different disciplines and there are different categories of accreditation to match particular experience, qualifications, and types of certificates. Some certifiers may be accredited to be a principal certifying authority or to do subdivision work, or provide structural engineering certification. The types of accredited certifiers include: building surveyors, engineers, land surveyors, architects and town planners.

Under the NSW accreditation regime, there are some common requirements for accredited certifiers, including:

- particular qualifications and levels of experience;
- professional indemnity insurance; and
- continuing professional development and adhere to codes of conduct.

Accredited certifiers must demonstrate that they have professional indemnity insurance that meets regulatory requirements. These insurance policies must provide a specific “run off” period of 10 years to ensure funds are available.

Accredited certifiers can be held responsible for their actions through the liability they carry when providing services. Part 4C of the Act imposes proportionate liability on certifiers. This means that the certifier can be held liable for rectifying a building defect to the extent that they were responsible for the creation of the building defect. For example, an accredited certifier, by making a statement that a proposed building complies with a standard or that a

[199] Full extract of Part 4A, 4B and 4C of the Environmental Planning and Assessment Act 1979 in Appendix 13

building is suitable for occupation in accordance with its BCA classification, must be able to demonstrate that a reasonable standard of care was taken in making that statement.

There are four different situations under the EP&A Act in which an accredited certifier can be held responsible for a breach of the accreditation scheme or the process of certification:

Table 5:2 - Breaches of accreditation scheme

Unsatisfactory professional conduct	ADT max $33,00 + legal costs +max $20,000 compensation and loss of accreditation
Conflict of interest (S109ZG)	Maximum $22,000 fine for offence
Falsely representing a certifier (109ZH)	Maximum $33,000 fine for offence
Any breach of the Act	Maximum $1.1 million fine for offence

In the first instance, the accreditation body is responsible for investigating complaints about accredited certifiers (S109W). The Act also contains auditing provisions, whereby the Director-General of PlanningNSW has the power to appoint inspectors to investigate the activities of an accredited certifier.

When acting as PCA for a development, accredited certifiers can be held responsible as public officials and therefore ICAC and the Ombudsman can be involved in investigations of corrupt conduct. However, the accreditation bodies, unlike Councils or PlanningNSW, are not obligated to report complaints of corrupt conduct under current legislation.

5.1.4 What can private certifiers do?

Private certifiers can check that development proposals comply with regulations and required technical and building codes, and are empowered to issue various certificates required to complete a development, including:

- Complying development certificates (ss85,85A)
- Compliance certificates (s 109C (1) (a) (i-v))
- Construction certificates (s109C (1)(b))
- Occupation certificates (s109C (1) (c))
- Subdivision certificates (s109C(1) (d)

As noted previously, private certifiers have various levels of qualifications. The most qualified private certifier can act as a principal certifying authority. Less qualified or experienced certifiers may be accredited to do specialist work - subdivision or engineering, or to provide compliance certificates, but they are not deemed to have the qualifications or experience to undertake the role of PCA.

Conflict of interest provisions in the Act require that accredited certifiers issuing certificates can only do so if they are independent of the development. That is, they cannot be involved in the preparation of plans or specifications or in carrying out work on that aspect of the development. In addition, they cannot certify their own development or that of a related party and they cannot be associated with the Council of the area or have a pecuniary interest in the development.

When acting as the PCA, the intention of the legislation is that the accredited certifier effectively acts as the equivalent Council official in enforcing compliance with regulatory

requirements set out in the development consent, construction certificate and the occupation certificate. The Ombudsman and the Independent Commission Against Corruption indicate that private certifiers fall within the definitions of "public authorities" for the purposes of these organisations. Complaints can be made to either organisation.

In effect, on any particular development, the PCA may engage other accredited certifiers to issue compliance certificates for certain elements of work where the PCA deems it necessary to ensure that compliance has been achieved. Similarly, the PCA may also obtain verifications of component work provided by the installer of that work, such as tradespeople (See Box 1below).

BOX 5:1

Compliance certificates, verification and "self-certification"

Under Section 93 of the Local Government Act 1993, Councils can rely on appropriate qualified persons to give suitable documentary evidence that a part of a building has been constructed in accordance with the approvals and standards. Councils frequently rely on this verification mechanism for structural, hydraulic and mechanical engineering components of a development since it was introduced in the 1993 Act.

Since private certification, councils as PCA can continue to use Section 93 of the Act to gather verification documents which they may rely upon. The PCA, where a private certifier, also has the discretion to determine whether they may require verification documents to support their determinations of compliance.

Under either scenario, the person issuing the verification may be the same person who prepared the design or carried out the work. This type of verification has been therefore interpreted as "self-certification".

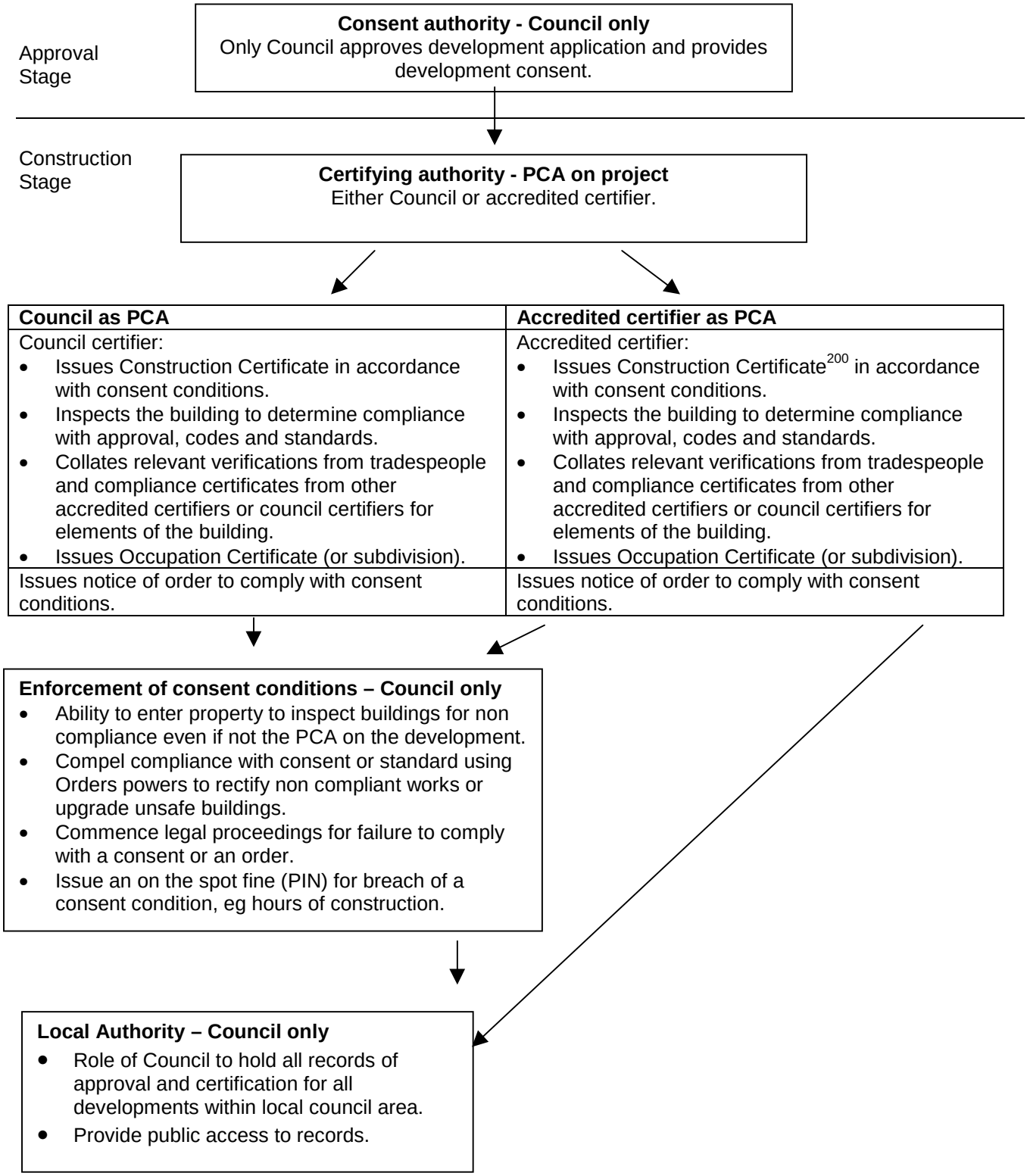
Compliance certificates under the EP&A Act are different from verification documents in that they have to be issued by an accredited certifier who will have appropriate qualifications and insurance. Furthermore the accredited certifier cannot certify their own work. A compliance certificate cannot be seen as "self certification" in the same way as the verification mechanisms might be interpreted.

The only anomaly between the PCA role undertaken by the Council and the PCA role undertaken by the private certifier, is that the private certifier is not empowered to enforce the provisions of the EP&A Act. This duty can only be carried out by the Council. Therefore, in relation to conditions of consent, whilst an accredited certifier can issue a notice of intention to serve an order, only Council is empowered to issue and enforce compliance with the order.

5.1.5 What is the role of the Council in certification since 1998?

As noted previously, there are various roles and paths open through the inspection process and three effective roles for Councils - consent authority, certifying authority and local authority. These are set out in the following diagram. The certifying authority role is contested by accredited certifiers.

Diagram 5:1



[200] The PCA is not necessarily the Accredited Certifier who issued the Construction Certificate. Technically the PCA is notified to Council at least 2 days before construction commences which may follow the issue of a CC by another Accredited Certifier. However the flow chart above represents the majority of cases, which is where the PCA prepares the CC.

5.2 RECENT DEVELOPMENTS

Since the commencement of this Inquiry in March 2002, the Government has made two decisions relating to the NSW certification system.

5.2.1 Removing authorisation of accreditation body by Minister

On 7 May 2002, the Minister for Planning withdrew authorisation of the Building Surveyors and Allied Professionals (BSAP) to operate an accreditation scheme for NSW certifiers. This decision followed concerns about the BSAP administration and management of complaints and disciplinary duties delegated to it by the Minister under the EP&A Act.

It was assessed that BSAP was failing to respond to complaints against its accredited certifiers in NSW. Evidence of long delays and non responses to complaints by BSAP, have been revealed through subsequent complaints from Councils and consumers to PlanningNSW. Failures to investigate and discipline certifiers also appears to have occurred, as well as failure of BSAP to report activities to the Minister.

The Director-General of PlanningNSW has responsibility for the accreditation scheme for an interim period and since taking over the function, has provided the following data:

- BSAP has 198 accredited certifiers in NSW
- Complaints made to BSAP include:
  - 30 complaints in 1999/2000 – with 16 outstanding
  - 41 complaints in 2001 – all outstanding
  - 8 complaints in 2002 - all outstanding
- A number of certifiers appear to been practising without valid accreditation
- Re-accreditation of certifiers was occurring without assessments of ongoing competence and professionalism

PlanningNSW's action plan in response to these issues includes:

- a moratorium on new accreditations and expiration of accreditation for 2 months
- reviewing the complaints held by BSAP and possible disciplinary actions
- setting up re-accreditation criteria
- identifying certifiers operating without valid accreditation and examining implications given this is a serious offence under the Act
- general review of the accreditation scheme.

5.2.2 Activation of auditing program by PlanningNSW

Certifiers are subject to auditing provisions in the Act (S109U), giving the Director-General of Planning the power to appoint inspectors to investigate the work of auditors.

However, although private certification commenced in July 1998, no auditing regime was introduced to accompany it at this time despite the available legislative framework.

A pilot auditing program commenced in late 2001, with one auditor appointed.

During the Inquiry, PlanningNSW announced the commencement of an auditing program to enable 4 current auditors to operate approximately 1400 audits/ investigations per year of the 330 private certifiers.

5.3 ISSUES RAISED IN THE INQUIRY

Section 1 B) of the Committee's terms of reference was to report on the certification process in order to:

- tighten the process;
- examine the qualifications and experience of people who certify buildings and monitor those people;
- ascertain whether there is enough regulatory power in the system to ensure compliance with codes and standards; and
- assess the adequacy of disciplinary procedures in the certification process.

The Committee sought general and specific views in relation to these matters by asking for comments on:

- the certification and building process;
- regulation, accreditation and conduct of private and council certifiers; and
- disciplinary and enforcement issues.

5.3.1 Views on certification and the introduction of accredited certifiers

The Committee heard a range of opinions about the impact and effectiveness of the current certification system. Not surprisingly, the Committee found comments from peak industry groups reflected their own role in the process.

- **Councils**

The Local Government and Shires Association (LGSA) and the Environmental Health and Building Surveyors Association (ehabsa), representing Council inspectors, argued that private certification was a failure, that transparency and accountability in the certification process had been removed.

> The Associations continue to oppose third party certification and believe that the planning approvals process should lie solely with Local Government[201]

> We believe that the concept of private certification was logically flawed from the very beginning. It was established through misconception(it wasn't really competition policy) it was justified by fantasy (it really was going to reduce costs and really hasn't removed regulation) … Our preferred option is to restore building and development control to its rightful place, in the hands of independent professional employees in Local government, where the interests of the community and consumers is best served[202]

Further, ehabsa maintained that:

> *There is no evidence that councils are failing in their responsibilities – the outcry is all about private certifiers*[203]

[201] LGSA Submission No. 159
[202] ehabsa Submission No. 32, p10
[203] ehabsa Submission No. 32, p10

Within individual Council submissions, views were mixed. A number argued that the current process of private certification does not function in practice, and that the responsibility should be returned to Council outright.

> Council's preferred model is to revert back to the previous approvals regime allowing no private certification of development[204]

> It is clear from the limited experience of Lithgow City council, with the use of accredited certifiers that they rarely get it right…[205]

Some Councils suggested reforms which argued *"not to roll back the availability of private certification per se*" but a move towards considerable intervention over the role of private certifiers. For example, Baulkham Hills Shire Council suggested as a preventative approach, that Council have powers to charge a fee to review Construction Certificates and Occupation Certificates issued by private certifiers[206].

Councils cited many problems and possible breaches of the Act by private certifiers such as:
- Accredited Certifiers appointing themselves as PCAs contrary to the Act
- Lack of compliance inspections by private PCAs
- Possible conflicts of interest
- Illegal or unapproved works
- Not lodging the 2 day Notice of Commencements ;
- Issuing Construction Certificates which are inconsistent with DC conditions ; or
- Failing to lodge Occupations Certificates and other documents with Council.

Some Councils believed certification to be poor, but considered this due to a combination of factors such as lack of guidance for Councils and private certifiers in the transition into private certification and the absence of effective complaints and auditing processes.

> *The general attitude towards accredited certifiers by this [council] organisation is that there are some good operators, some mediocre operators and some poor operators who constantly allow matters to slip or who are engaged by those builders or developers who know that the scrutiny may be less than the standards required by other certifiers or Council*[207]

There were also issues raised about inconsistencies in planning processes and approaches to construction by Council and private certifiers, and lack of enforcement directions and powers to enforce the new system. A number of Councils did not oppose private certification, provided reforms to the management of certifiers and the planning system could be achieved.

> ***Mr SARTOR****: We must correct the system quite substantially, just not tweak at the edges, while not returning to the monopoly system of local government that depended on the whim of the building inspector and his mood of the day of inspection*[208]

Councils also noted that "competition" between themselves and private certifiers introduced by deregulation had created a 'sloped' rather than a "level playing field":

> *…the former council monopoly on the approval, inspection, and certification services…has been deregulated to the extent that councils can operate in a competitive market with private accredited certifiers…Councils may also provide these services, but only in a*

[204] Submission No. 96 - Wingecarribee Shire Council
[205] Submission No. 31 – Lithgow City Council
[206] Submission No. 130 – Baulkham Hills Shire Council
[207] Submission No. 105- Leichhardt Council
[208] Transcript of Evidence 24 May p3

> *regulated environment where their costs and charges are subject to publicly scrutinised Management Plans under the Local Government Act 1993, as well as the particular scrutiny of the Independent Pricing and Regulatory Review Tribunal…Private accredited certifiers are not subject to the same public scrutiny and are in a position to randomly structure their fees around the promulgated local council fees, thereby commanding a distinct competitive advantage over councils.. the equity of a "level playing field does not exist for councils*[209]

Almost every Council raised the issue of policing and monitoring private PCA sites. As noted in Figure 5:1, the current legislation imposes the obligation of enforcement of development consent solely with the Council. Councils' issues were that they had to devote resources to this function without any recompense and that the powers they had were insufficient to stop non - compliance effectively.

> *Following the introduction of the legislation.. Council has received numerous complaints from the residents whose amenity has been severely disrupted by non compliance of approved working hours, sediment and erosion controls and traffic management where building sites are being maintained by PCA's… As a result, Council has had to inspect and monitor these sites on weekends and outside normal business hours to enforce compliance with conditions of development consent, a role which the private PCA's have abrogated and which Council has to incur the cost for the provision of this service.*[210]

Councils have argued that if they are to maintain the role of enforcing and investigating non-compliance of privately certified projects, then they should be entitled to recover costs for this regulatory role.

- **Private certifiers**

Private certifiers supported the continuation of private certification as an improvement on the previous system:

> *Our company believes that the current building certification system is much better than the previous system, where Council had a monopoly...private certifiers are much more thorough than Council building inspectors…*[211]

Some private certifiers conceded that the current arrangement needed significant adjustments, particularly with respect to the complaint management and auditing of accredited certifiers.

> *My perception.. is that the current system has the general framework in place to provide an effective certification process. There are however, as with many new systems, some finetuning to be completed…*[212]

A second point noted by private certifiers, was that many problem cases raised by consumers and in the media are, in fact, cases where the Council was the certifier: some cases pre-dating private certification; and other current cases, where the principal certifying authority was the Council.

Private certifiers also state that some Councils, due to their opposition to private certifiers, are obstructing and undermining the new arrangements by undercutting their services to outprice the new entrants and compromising quality services.

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209 Submission No. 52 Blacktown Council
210 Submission No. 18 – Hornsby Shire Council
211 Submission No. 9 – Certifier
212 Submission No. 43 – Certifier

> *I can only assume that the quality of buildings is not a priority to Wingecarribee Shire Council as is evident from their low inspection fee of $42 .50 per inspection. As a private certifier, I am aware that the costs of providing a quality inspection service and, unfortunately , a quality building inspection cannot be provided at $42.50. The unrealistic fee sets a very low standard for other PCA's operating …Wingecarribee Shire Council has structured many of its fees in an obstructive manner to compete against private certifiers .. I believe their artificially low fees are subsidised by:*
> - *rate payers funds; and*
> - *overcharging on development and drainage applications.*
>
> *This deliberative attempt to monopolise the approvals process makes it difficult for private certifiers to offer a competitive and quality service.*[213]

Other types of obstruction noted in submissions from certifiers include withholding information necessary to facilitate the approvals process, offering discounts on combined DA and CC issued by Councils, and Council imposed conditions of consent that are ultra vires or irrelevant, in order to delay a private PCA development [214]:

> *Wyong Council does not charge a construction certificate fee if they are doing the DA/CC, despite the fact that a regulation is in force requiring a DA fee of $115 to be charged on a $125 000 home, the DA fee was set at $457.50. Please note it appears that the DA is subsidising the CC in this instance.*[215]

- **Construction companies and developers**

Construction companies were supportive of private certification citing advantages:

> *…the system has for the first time ever introduced "certainty" in the issue of certificates… Unfortunately Councils could never offer any reliable timetable for processing applications and are the cause of considerable delay and cost increase / wastage built development…*[216]

Some companies did acknowledge that significant improvements needed to be made and that there was a general perception of conflict of interest that requires addressing.

Other groups, including the NSW Urban Taskforce which represents the majority of property developers, saw no concerns at all with the current system:

> *The NSW Urban Taskforce consider that the accreditation system is already highly regulated with defined disciplinary and enforcement processes which the Taskforce believes are effective and working well*[217]

- **Consumers**

Consumers raised various problems with certification. There were instances where private certifiers had failed to certify appropriately by failing to issue certificates or issuing certificates when there were defects or inconsistencies with the development consent.

However, consumers also raised issues where Council had similar failings whilst operating as the PCA on projects. In both instances, consumers described problems in trying to pursue these issues, whether they were complaining about a private or a Council certifier.

Similarly, it has been asserted in one consumer's submission that:

[213] Submission No. 19
[214] Submission No.87, 62, 125
[215] Submission No. 125
[216] Submission No. 62 Mirvac
[217] Submission No. 61

> *Both Private and Council Certifiers experience pressure from Builders/ Developers and it is not true that private certifiers are more corruptible or do a worse job than Council certifiers.*[218]

The most consistently expressed concern was the real or perceived conflict of interest for private certifiers employed by builders and developers.

A further issue raised by consumers was difficulties experienced by neighbours adjacent to building sites. The issue here was frequent failures of builders to comply with consent conditions that are supervised by private PCAs.

A final issue raised by consumers was the general accountability of PCAs. In particular, there was the concern about the failure of the PCA to actually examine any construction and rely on certificates and verifications. This, combined with the problem of no active auditing of PCAs, has brought serious concerns.

- **Impact of private certification**

The Committee sought to identify if the quality of buildings had been effected by private certification. Various groups could point to problem buildings that had been privately certified, while at the same time, many submissions illustrated problems preceding private certification or relating to Councils as the relevant certifier.

There is very little data available on which to make assessments. Proponents of private certification asserted that speed in approvals and construction was a benefit. However, speed which compromises quality is a focus of this Inquiry.

The uptake or use of private certification across Council areas is extremely variable. Looking at the percentage of construction certificates, the highest uptake is in the Sydney metropolitan area (North Sydney 90%), with lower uptakes in regional and rural areas (Wyong less than 10%).

It terms of complaints, the NSW Ombudsman reported that:

> *In the four years since the commencement of the ..certification scheme, this office has received a total of only four written complaints against private certifiers. All of these appear to have been made by complainant alleging the certifier has certified works on a neighbouring development that do not comply with the development consent. Invariably these complaints also raise the allegation that the consent authority has failed to enforce the conditions of its consent…You will note from our annual report(2000/2001) that.. this office dealt with 114 written and 275 oral complaints [about Councils] that raised enforcement issues ... it is impossible to tell how many of these related specifically to the certification process*[219]

The Independent Commission on Corruption (ICAC) reported that:

> *…when the private certification was introduced, the ICAC was given jurisdiction over the conduct of accredited certifiers. Since that time the ICAC has received very few complaints*

[218] Submission No. 147
[219] Submission No. 234

> *about the conduct of accredited certifiers. But we do not believe that the number of complaints we receive is an accurate guide to the level of corrupt conduct in that area.*[220]

Both organisations stated they had concerns about the poor responses of those disciplining private certifiers and that auditing arrangement generally applying to private certifiers were not sufficient.

The Committee did feel that, the rate of complaints about private certifiers, made to BSAP, was considerable, relative to the number of certifiers registered by this group. However, it is difficult to assess the ramifications of these complaints given they have not been investigated.

The Committee feels that in the absence of significant information of systemic problems, it would be inappropriate to conclude from the anecdotal evidence that private certification alone is a direct cause of all quality problems in the home building industry. As such, the Committee's view is that private certification should continue with the specific changes recommended in this report.

5.3.2 Appointment of PCA

The current legislative arrangements require the appointment of a PCA by the development applicant. Section 109E states that "*a person who proposes to carry out development involving building work…..may appoint the consent authority or an accredited certifier as the principal certifying authority for the development*."

In practical terms, for most consumers the appointment will be made by the builder on their behalf, or by the developer where there is no identifiable owner. In virtually all circumstances, the payment or employment of the PCA is made by the builder or developer. The cost of this employment arrangement is ultimately passed on to the consumer.

This practice raises a potential conflict of interest in that a PCA is working for a builder may feel pressured to certify construction to the detriment of the public and consumers interest, when it conflicts with the interests of the builder or developer.

For example, it is suggested that a private certifier is less likely to reject an inspection as this will cost the developer more and jeopardise the certifier winning repeat business from a client.

> *The current system of Builder/ developers appointing the same certifier, project after project, encouraged a conflict of interest particularly where certifiers could gain financial reward or through obtaining further certification work from a client by approving works that are substandard or do not comply with development consents*[221]*.*

The Committee found there is little data to indicate if this is the case, as rejection rates of private certifiers are not available. An anecdotal figure of a 20% rejection rate was offered by one certifier:

> At Essential Certifiers this year 11, 782 inspections have been carried out and 2322 have been refused and re-inspected = 19.7% . There is no charge for reinspection[222].

[220] Submission No. 196
[221] Submission No. 79 – Building surveyor
[222] Submission No. 125

There is no doubt that the potential for conflict of interest exists and the legislation acknowledges this in particular provisions to address conflict of interest. However, this conflict is not new to inspection arrangements and has been acknowledged in the sphere of Council certifiers. The Independent Commission Against Corruption (ICAC), in a report produced in June1998[223], specifically identified the corruption risks associated with Council inspectors, inherent in the function of certification. ICAC's submission to this Inquiry identifies that the corruption triggers in the private certification system are common to those involved with Council inspectors:

> In March 1999 we produced a document called Strategies for Preventing Corruption in Government Regulatory Functions…Many of the strategies we outline in our publication are directly relevant to managing corruption risk in the certification system[224]

Some Councils have suggested that a way around this problem would be for Councils to appoint the PCA themselves and that the PCA operate at set fees. The response from industry articulated by the NSW Urban Taskforce to this proposal was:

> *…[its] a retrograde step for the development industry as it would detrimentally affect risks for all parties. In addition developers would have no ability to negotiate lower consulting fees it they were not employing the certifiers themselves. Many developers already work on slim margins and they will simply be forced to pass these extra charges onto the consumer[225]*

Another alternative is for the homeowner to directly appoint the PCA. This way, the PCA client becomes the homeowner. Strictly speaking, the legislation already allows for this as the home owner can literally be interpreted as "the person who proposes to carry out development" . However, given industry practice to the contrary, the Committee believes that it is necessary that the homeowner be clearly nominated as the person who appoints the PCA.

The second advantage of this arrangement is the creation of a direct contractual link between the consumer and the certifier, if problems with work arise.

This proposal does not eliminate concerns about developers, who as the initial development owner, would also continue to appoint the PCA. Some submissions have suggested that in such cases, the Council should appoint the PCA or that PCAs should be rotated on jobs[226]. The Committee believes that an allocation arrangement would act to suppress business incentives, preventing good certifiers from growing their business.

The Committee believes that appropriate oversight of the potential conflicts of interest between certifiers and developers can be achieved by other means, in particular, a specific scrutiny program within the general certifier auditing program.

The Committee recommends that the certifier auditing process include a "*close relationship*" audit regime, where certifiers who have a significant repeat client or a client who is a significant income source for the certifier are identified and focused upon for targeted auditing within the general certifier audit program. The Committee would see the Commission developing appropriate thresholds or indicators of close relationships.

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[223] Accountable Health and Building Inspectors: Recommendations for Local government, A Corruption Prevention Project June 1998 ICAC.
[224] Submission No. 196
[225] Submission No. 61
[226] Submission No. 144 PlanningNSW

This specialist audit arrangement, combined with other measures outlined in this report combine to strike the right balance of regulatory control and business flexibility .The Committee believes this arrangement will address the concerns raised about developer and certifier relationships.

Recommendation 33
The Committee recommends that the Principal Certifying Authority (PCA) should be appointed by the property owner rather than the builder. When the property owner is a developer, the appointment and activities of the principal certifying authority will be monitored through a "close relationships" auditing system under the Commission.

5.3.3 Role of the PCA

Section 109E of the Act establishes the entity of the PCA who is required to be appointed by the development applicant. The form of the appointment is prescribed in Clause 135 of the Regulation. There is no general provision in the Act or Regulation which stipulates the expected roles or responsibilities of the PCAs.

However, as noted in Diagram 5:1, where the PCA is a private certifier, the PCA's powers are limited to imposing notices of orders and not to enforce compliance with such orders. Irrespective of whether the Council is the PCA or not, the current legislation restricts compliance enforcement powers solely to the Council.

It appears to the Committee that there is a great deal of confusion about the role of the PCA. In reality, PCAs and Councils are not operating in accordance with the legislation. It is unclear whether Councils have misunderstood their own role and the PCA role under the new legislation, or whether they feel that enforcing compliance on private PCA is inappropriate.

For example Councils have submitted the following to the Committee:

> *It is council's experience that a number of future home owners are not aware that the Council has no role to play in respect of building inspections where the Council is not the Principal Certifying Authority*[227]
>
> *Many PCA's believe that they are not required to monitor or enforce conditions of consent relating to public health and safety or amenity*[228]

The legislative provisions limit the capacity of PCAs to deal with non-compliance, leaving it to Councils. Councils feel that this arrangement is not equitable and drains Council resources without recompense. There are two options to address this anomaly: either Councils hand over identical enforcement powers to the private PCA, or Councils charge PCAs for enforcement costs.

The Committee believes that neither of these options are appropriate. The Council, as the consent authority, has a public obligation to enforce consent conditions. Councils have exclusive rights to process Development Applications and Consents and charge fees for these services. Councils also receive the lodgement fees for CDCs, CCs, and OCs, which are not available to the private PCA. In effect, the Committee sees that the charge for DA and

[227] Submission No. 66 Wollondilly Council
[228] Submission No. 52 Blacktown Council

Consent embodies a fee for enforcement services. The Committee also anticipates that the costs incurred by Councils to enforce compliance in development will decrease if reforms to improve and monitor all building practitioner behaviour in this report are adopted.

The Committee believes that the intent of the legislation is sound, but has not been communicated effectively. Common questions include:

- What stages in the construction process is the PCA responsible for?
- Who monitors the construction on and off the site?
- Who is responsible for ensuring all conditions of consent are satisfied?
- When does the PCA cease to be involved in a project and the Council take over?

This confusion is acknowledged by PlanningNSW, who propose that the role of the PCA be clarified as follows:

> *PCAs are to:*
> - *act in the public interest*
> - *before work commences:*
>   - *ensure a construction certificate has been issued and work has not commenced on site*
>   - *inform council or Planning NSW (if it is the consent authority) of their appointment as the PCA within 7 days of the appointment*
> - *while construction works occurs:*
>   - *monitor to ensure that the building works are being carried out so that the completed building will not be inconsistent with the development consent as well as being suitable for occupation in accordance with its BCA classification*
>   - *monitor the work to ensure compliance with the conditions of development consent that apply during the construction phases of the development*
>   - *disclose to council any breaches of development consent*
>   - *manage complaints made during the construction phase*
> - *before issuing an occupation certificate be satisfied that:*
>   - *all conditions of the development consent that must be completed during the construction phase and prior to the occupation phase have been met*
>   - *the building is suitable for occupation in accordance with its classification under the BCA*
>   - *the building is not inconsistent with the development consent*
>
> *In accordance with its responsibilities Councils are to:*
> - *support the PCA in enforcing consent conditions during the construction phase where a complaint arises about a breach*
> - *enforce all other conditions of consent*
> - *notify the PCA of the outcome of any decision made or action taken by the Council to enforce conditions of consent during the construction phase.*[229]

PlanningNSW intends that these roles should be defined through amendments to the EP&A Act. The Committee believes that these changes should address the concerns raised by Councils in combination with other recommendations in this Chapter.

The Committee has an additional concern about the merit of allowing a second certifier to create the CC separate to the certifier who is the PCA. As noted by Mosman Council:

[229] Submission 144

> *In the present regime it is possible that a DA for a project could be issued by Council; a CC issued by one private certifier and the site inspections and supervision undertaken by yet another certifier*[230]

The Committee sees there would be benefits in terms of continuity and accountability for the PCA to issue the CC and the OC on the same project. Even if the PCA contracts to another private certifier to actually do the CC, the PCA should be responsible for the oversight of the project in a continuous spectrum, parallel to the Council's role of "public official". More importantly, it would mean that the consumer only had one certification provider to deal with when compliance matters occurred. While this issue was not raised by the Department, the Committee believes that the role of the PCA should be extended in this capacity.

RECOMMENDATION 34
The Committee recommends that the role of the PCA be clarified in the legislation as proposed by PlanningNSW to ensure:

- the identification of the public interest role of the PCA;
- the Councils role and responsibilities in relation to building projects; and,
- the PCA's role in issuing the Construction Certificate and Occupation Certificate.

5.3.4 Mandatory component or 'critical phase' inspections

Under the Local Government Act 1919, it was compulsory for Councils to carry out key component inspections on a building. The Local Government Act of 1993 removed the compulsory requirement for Councils to carry out inspections of buildings.

The Committee has heard that most Councils still apply a basic regime of component inspections as a matter of course, although it is understood that some Councils stopped carrying out inspections primarily due to liability concerns [231]

Under the new EP&A Act, there is no requirement to carry out compulsory inspections by the PCA. The PCA is supposed to determine required inspections at their own discretion. There is no requirement that such inspections be directly supervised by the PCA on site.

The following concerns have been raised in submissions:

> *Council is concerned as to the increasing trend amongst PCAs to rely on the certification aspects/ components of construction rather than by physical inspection themselves; whilst there may be nothing wrong with the certificate itself, the lack of physical inspection of sites under their control by PCAs often leads to poor site management and maintenance, resulting in disharmony and nuisance site issues which if the site and work was properly overseen by the PCA (this is their role) would not have occurred.*[232]

There has been overwhelming endorsement in submissions for the introduction of mandatory inspections and that the PCA should inspect these stages on site.

Submissions vary about the stages of inspection required. The Committee is aware that different types of buildings will have different types of critical phases. At this time, the

[230] Submission No. 149
[231] Submission No. 140
[232] Submission No. 30

Committee has not determined what phases should be required but does suggest that the mandatory inspection phases used in Victoria should be required as a minimum :

- prior to placing a footing;
- on completion of the framework;
- prior to placing a reinforced concrete structure such as concrete; and
- on completion of building work.

Additionally, the Committee believes that due to the high incidence of defective work in waterproofing work (discussed in Chapter 3), that such an inspection should also be included in this system.

The Committee notes that requiring mandatory inspections will add to construction costs. However, the additional costs may not be significant given that many Councils currently undertake staged inspections and private PCAs already compete with this service. The Committee believes that the trade off of mandatory inspections costs, in the short term, will be improved quality of homes in the long term, for the benefit of consumers.

This recommendation does not preclude the need for additional inspections as determined by the PCA. The Committee recommends that the various proposals of critical stages suggested in submissions be collated and assessed by the Commission.

Recommendation 35
The Committee recommends that mandatory critical stage inspections be required to be undertaken by the PCA (council or private accredited certifier). The mandatory stages will vary for different domestic building types but should include as a minimum:

- prior to placing a footing;
- on completion of the framework;
- prior to placing a reinforced concrete structure;
- on completion of waterproofing work; and
- on completion of building work.

5.3.5 Verification or compliance certificates for critical stage inspections

Some submissions have argued that each critical stage inspection should have a compliance certificate issued by an accredited certifier. This proposal is in part a response to concerns about accepting verifications or ”self-certifications” for components of work.

A key point to note is that acceptance of verifications is not new to the private certification regime, but has been used by Councils for a significant time.

> ***Ms FRANCIS (North Sydney Council):*** *The business of granting a construction certificate or building approval and the taking of verification as you suggested from a third party, whether they are professionally qualified or whatever, is totally normal in the building process. It has been like that for eons. Councils have been taking such verifications from people they considered were appropriately qualified in that field—geotechnical engineers, construction engineers, builders, plumbers—with appropriate skills and experience whose qualifications were verified. So, that process is not unusual. Passing it on to the PCAs is just passing on the role that councils used to do to a greater or lesser extent depending on where the council was and what its liability and its risk factors were.*

> *It is up to the PCA, as it was up to the council, to decide to what extent it wants sign-offs at each stage. They may be willing to except a sign-off from someone whose skills and experience in that field are undoubtedly high, or it may want a sign-off from someone who is appropriately accredited so that they have proportional liability. At the end of the day, in terms of any liability claim that could be taken against a council in the past or in the future, or against the PCA, there is a eminent, reasonable side. Was it reasonable for someone to accept a certification from a third party, given the level of their skills and experience in that area? I do not think the circumstances have changed. The onus on the PCA is not that different from what it has always been on councils—and we have a choice.*[233]

The Committee also heard that it would be very impractical to issue Compliance Certificates on all buildings for critical stages because of the small number of specialist accredited certifiers available. This was explained in the submission from the Association of Consulting Structural Engineering of NSW :

> *Structural engineers do not normally act as a PCA for a project but do provide certificates relating to structural design and construction to the nominated PCA…Certificates currently issued by structural engineers are currently not in the form of the Compliance Certificate complying with the EPA Act for two reasons:*
>
> - *a firm of consulting structural engineers cannot generally issue such a certificate for a design carried out by that firm owing to conflict of interest provisions of the EPA Act. The same applies to construction for which the form carries out periodic inspections. In reality, the Act requires an independent Accredited Certifier issue the Compliance Certificate. This entails the developer paying twice for essentially the same services something developers do not seem keen to do.*
> - *PCAs are not requesting a Compliance Certificate, apparent being generally satisfied with a certificate which meets their preferred wording. Some PCAs issue their preferred wording for a structural certificate. The EPA Act allows the PCA to accept such a certificate* [234]

The Committee feels that the proposal to have compliance certificates for each critical stage is too binding on consumers. Given the Committee's recommendation that consumers employ certifiers in most instances, having each critical stage requiring a Compliance Certificate would add significant costs and time to the process, given the few specialist accredited certifiers available. In effect, each critical stage would have the person doing the stage, the supervising building contractor for the site, the accredited certifier to provide the Compliance Certificate and the PCA to collect it.

The Committee believes it is sufficient for the PCA to be on site for that critical stage inspection and determine if a verification or Compliance Certificate is required. By being on site, the PCA has the opportunity to take whatever actions are needed, if there are concerns about the persons undertaking the critical stage. In addition, they are be available to deal with other on site consent compliance matters such as checking licenses and plans. The Committee's main concern is that the PCA is not remote and simply a post box collecting pieces of paper at the end of the building process.

Recommendation 36
The Committee recommends that on-site inspections of critical stages be undertaken by the PCA.

[233] Transcript of Evidence 6 May p55
[234] Submission No. 104

5.3.6 Neighbour issues and requirements on the PCA

A number of comments made in submissions about the role of PCA, were in the context of neighbours trying to get PCAs to enforce compliance of consent conditions. The case study below is indicative of submissions received on this issue.

Case Study 1 – Neighbour issues – (Submission 24)

A 2 storey house is being built next to me. There have been a number of breaches of building regulations with regard to hours of work, containment of run off sand and water and the disposal of cement at the end of the day's work. On many occasions, I have had to request the Project manager :

- *to keep to the correct hours;*
- *prevent sand from running onto the public pavement where it creates a hazard for pedestrians(many elderly people walk up and down this street;*
- *instruct his workman to clean out the cement mixer on the property not wash it on the pavement…*

Each time of asking the Project Manager had remedied the situation on that day; but it has re-occurred and despite constant requests he seems unable to contain the sand, control his workman's activities or keep the working hours within the specified limits.

I have approached the accredited certifier, …, several times and he also seems quite helpless to find a solution, asking me what I think he should do and claiming that he has too many clients to police them all.

The only effective action was taken by Ryde Council when the matter was drawn to their attention. However, improvements that the Council asked for lasted only one day.

The Committee believes that clarification of the PCA's role to supervise compliance and the requirement for mandatory inspections will help address problems occurring with adjacent properties. However, there were some other simple suggestions that the Committee also feels could improve the situation, including:

- onsite display of builder and PCA details be required under legislation; and
- the PCA be required under legislation to notify in writing adjoining property owners of their appointment, their role in the building process and the complaint procedures available to adjoining residents.

The key part of that process is that complaints will be directed to the PCA in the first instance and, if there is a failure of the PCA to respond, be it Council or private, a complaint can be directed to the Commission.

Recommendation 37

The Committee recommends that

- onsite display of builder and PCA contact details be required under legislation; and
- the PCA be required under legislation to notify adjoining and/or affected property owners in writing of their appointment, their contact details, their role in the building process and appropriate complaint procedures.

5.3.7 Complaints and investigations

As noted in Section 5.2, the Government has recognised that there has been a failure of a key accreditation body, BSAP who accredits more than half of the NSW private accredited certifiers, to properly handle and investigate complaints.

A significant number of submissions raised this as a key problem since the commencement of private certification. Views were strongly expressed about poor BSAP processes. The Committee was told that complainants received either extremely delayed responses or no responses at all from this organisation, with regard to complaints lodged.

> *Between 26 April 2000 and 9 August 2001, this Council lodged 7 substantial complaints with BSAP… To date, only 2 complaints have been determined by BSAP (albeit in a manner considered to be unsatisfactory and ineffective) and no advice has been received that any of the remaining complaints have been resolved*[235]

The BSAP failure was made more acute by the fact that there was no auditing system effectively operating in NSW that complainants, both consumers and Councils, could utilise when BSAP problems became apparent.

PlanningNSW has now subsumed the role of this organisation and commenced analysis of the backlog of complaints, which stands at 65.

In the Chapter 2 on Builders Licensing, the Committee outlined some general principles about how accreditation bodies should be involved in complaints management.

Submissions have suggested that the role of complaints management should be a Government function and that placing this role with industry is inappropriate:

> *There is an essential conflict of interest in the body, which represents members, investigating complaints against and disciplining those members. This was a complaint which was made about the Law Society of NSW for many years and resulting in the appointment of a Legal Services Commissioner*[236]

A role for Government may be even more appropriate in the particular case of accredited certifiers, who have a duty as "public officials" under the legislation. It is a compelling argument that Government evaluate someone's behaviour if the behaviour is a delegation of government authority.

5.3.8 Auditing

As noted in Section 5.2, an audit system of private certifiers has recently been put in place by PlanningNSW. However, until the commencement of this Inquiry, there has been no audit system. Frustration over the absence of an audit system was repeatedly raised by submissions from all sectors, including private certifiers themselves.

The situation was compounded by the failures of the main accreditation body to respond to complaints and initiate investigations.

[235] Submission No. 52, p7
[236] Submission No. 23

The Committee feels the failure by Government to set up an audit system at the introduction of private certification is the single biggest contributor to the poor outcomes that have emerged in private certification to date. The Committee believes that perceptions of conflict of interest which have dogged private certification since its implementation would have been significantly reduced if a rigorous audit system had simultaneously accompanied the reforms. The inadequacy of the system was captured in the comment from, a unit owner, Mr Goddard[237]:

> ***Mr GODDARD:*** *The problems with the statutory amendments in 1998 was that somehow we forgot to introduce accreditation for certifiers. If we did have an accreditation process, we forgot to audit it. The other thing we forgot to do was provide adequate penalties for lying. There is not a penalty for providing a certification that something does not meet the minimum standard when it does not.*

The Committee believe that to restore confidence in the Private Certification system, the audit program must be designed to capture concerns about conflict of interest.The Committee recommends that "close relationship" audits of certifiers be undertaken.

Certifier audits must involve on site inspection and not a simply a check of the required paperwork. As noted in public hearings:

> ***The Hon. JOHN RYAN:*** *In the auditing process for the PCAs, which we understand at the moment consists of a single person in the Department of Planning, as it has been described to us it is largely a paper shuffling exercise where they look to see whether things have in fact been checked, certificates of compliance are attached and so on. Do you think there is a role in the auditing process to actually go out to the building site and check to see whether the actual construction matches the certificate?*
>
> ***Mr GERSBACH (Housing Industry Association):*** *Yes, I think that is a good suggestion. I think if there is indeed only one person who has been engaged by Planning it is probably a bandaid approach and probably has come too late.*[238]

Recommendation 38
The Committee recommends that complaints management of both Council certifiers and private certifiers be undertaken by the Commission.

5.3.9 Planning instruments

Some of the key changes suggested to the Committee about current planning certificates, are set out below:

- **Complying Development Certificates (CDC)**

Complying development was created in the 1998 EP&A Act reforms. A complying development certificate is effectively a combination of a development approval and construction certificate. The concept was that there could be a standardised set of approval criteria and prescribed consent conditions applied to common or "routine" types of development, for example carport or garage, that the Council could specify up front and which the Council or private certifier could issue approval for.

[237] Transcript of Evidence 5 June p8
[238] Transcript of Evidence 10 May p85

The purpose of Complying Development was to speed up simple developments. At the time of its introduction, the Minister for Planning stated that it was anticipated that between 60 and 80 per cent of approvals could utilise the CDC process.

State Environmental Planning Policy 60 for Exempt and Complying Development, enabled each Council to develop complying development certificate requirements.

The Committee has heard two conflicting concerns raised about CDCs. Firstly, certifiers are arguing that Councils are not releasing enough types of development which can be carried out using CDC such that there is very limited uptake of this streamlined option. Also certifiers argue that the discretion between Councils about what they allow to be undertaken under CDCs means that the system is inconsistent and too variable to be worthwhile, as noted by HIA in their submission :

> *…the absence of an across the board state government policy that declares certain development to be "complying" has meant that in effect very little complying development opportunity exists*[239]

Certifiers therefore propose that there be some standardisation of CDCs across Councils.

The second issue raised involves concerns by Councils that private certifiers are issuing CDCs to projects that should proceed through normal approval systems. Councils maintain that they are reluctant to broaden the scope of complying development while they have concerns that private certifiers cannot use the CDCs appropriately.[240]

The Department of Local Government have indicated in their last two annual reports, that in 2000–2001, 9095 complying development certificates were issued in total, with 2751 being issued by accredited certifiers, which represents around 30%. It should be noted that 70 out of 172 Councils issued no complying development certificates at all.

The Committee highlights these difficulties with the operation of the CDC system and recommends that the Commission and PlanningNSW examine this issue further.

Recommendation 39
The Committee recommends that a review of the effectiveness of the Complying Development Consent regime be undertaken by the Commission in conjunction with PlanningNSW.

- **Construction Certificates**

Two key elements of a construction certificate are that it must:
- comply with the development consent in terms of design and specifications and in terms of relevant BCA requirements (Clause 145 regulations); and
- comply with development consent conditions (Clause 146 Regulations).

Concerns have been raised that some certifiers are exercising too much discretion in their interpretation and determination of compliance with consent conditions and relying unduly on the term "*not inconsistent with*" , the phrase used in the regulations, to justify changes. Council concerns about this issue were expressed by the Lord Mayor of Sydney, Mr Sartor:

[239] Submission No. 128 p 7 HIA
[240] Submission No 145 Woollahra Council

> ***Mr SARTOR**:.. I think that the test that is now applied is too broad and that there needs to be a requirement on the issue of a construction certificate that it has got to be consistent with the consent. The words now are "not inconsistent with". It is diluted: it is meaningless. What it means is that certifiers can have discretion to basically change development consents. That it what is going on.*[241]

An example of the problems of interpretation of this phrase is illustrated in the Woollahra Municipal Council submission (see Appendix 12)[242] where a private certifier included an additional room in the Construction Certificate, which was not shown on the Development Consent and then argued that this was "*not inconsistent with*" the development consent. The same Council notes another example where an additional basement was included in a Construction Certificate which was not approved by Council.

Similarly, Blacktown Council cited an example where a development consent approved a two bedroom unit and the construction certificate showed a three bedroom unit, which appeared to be interpreted by the accredited certifier to be "not inconsistent with" the development consent[243].

Section 96 of the Act allows for amendments to the development consent by the applicant for minor errors, misdescription or miscalculation and other modifications.

A variety of concerns relate to this modification process including:

- PCAs arguing that their variation does not require a Section 96 amendment, arguing the variation is "not inconsistent with" the development consent in the first place; and
- PCAs applying for Section 96 amendments retrospectively, as noted by Parramatta Council:

> *In some cases applicants submit an application under 96 EP& A Act 1979 to modify the consent at completion of the project, thereby severely restricting the Council' ability to require changes that comply with the intent of the original consent. It is considered that the Act permits certifiers discretion not initially intended to vary development consents* [244]

It has been suggested that there be definitions of minor and major amendments and that administrative arrangement should replace the application process for minor amendments. As noted by Bankstown Council:

> *Minor amendment of development consent (such as a 100mm increase in the floor level and minor changes in window sizes and location) should be accommodated by simple administrative procedures rather than the present Section 96 amending applications, which must be lodged with Council. Current procedures are a significant cause of frustration and delay to both Council and industry practitioners*[245]*.*

Woollahra Council proposes the following definitions:

> Where the height scale bulk and external configuration of the building changes a Section 96 application must be submitted… Council does not want to receive Section 96 applications where internal changes occur unless the use of internal rooms change such that external changes are likely…. In simple terms if external impacts of the building upon

[241] Transcript of Evidence 24 May p41
[242] Submission No. 145 Supplementary
[243] Submission No. 52
[244] Submission No. 135
[245] Submission No. 139

> adjoining properties don't change or are in fact reduced then the CC should be able to be issued other than in strict compliance with the DA plans[246].

The Committee agrees that it is appropriate for the Construction Certificate to correlate with the Development Consent and that interpretations of variations should be conservative.
There is need to better define the phrase "not inconsistent with", which allows variations between the Development Consent and the Construction Certificate.

A way of achieving this is to better define what may be varied in a Section 96 amendment of the Construction Certificate into those items which require Council consideration and hence reference back to the development consent and those that do not. A better definition of the type of changes required will provide clearer boundaries for possible interpretations of CC from DC that a certifier can issue in the first instance.

The Committee recommends that the Construction Certificate should reflect, and not inconsistent with, the Development Consent.

Recommendation 40
The Committee recommends that the term "not inconsistent with" should be defined by reference to "significant" and "non significant" variations permitted by Section 96 amendments. Significant variations should require a Section 96 amendment and by default, indicate that a variation is considered inconsistent with the Development Consent.

- **Occupation Certificate reflecting the Development Consent**

The current function of an Occupation Certificate under the legislation (109H), is to identify that the *building is suitable for occupation or use in accordance with its classification under the BCA*. However, the certificate is not required to indicate if the building is consistent with the requirements of the construction certificate, the development consent and the original design (or even indicate if the final building varies from these documents).

The Committee has heard that there is a common community perception and expectation that an occupation certificate indicates that the building is complete, fit to occupy and effectively matches the original design proposal.

Various problems being experienced are due to the limitation of the current Occupation Certificate. The key factor is that outstanding issues relating to the development consent are not resolved at the occupation stage, giving rise to various disputes.

North Sydney Council described the issue:

> *At present the certificate is only required to state that the building is "fit for its purpose" in simple terms, a house, with four walls roof running water and power. On receipt of such a certificate an owner can occupy the building. But what if the building is a storey too high, or built in the wrong location on the site etc? How could a council then resolve the problem with an occupant it might have to evict*[247]

The Committee believes that continuity and consistency throughout the development and construction process is critical to improving quality in buildings. Linking the requirements of each planning instrument to its predecessor will help ensure that the building has been

[246] Submission No. 145
[247] Submission No. 71

delivered according to the plan, complies with the BCA and is effectively complete for the purposes of the consumer. These changes will give true meaning to the term “fit to occupy” that should be assumed by a document called an “ Occupation Certificate”.

Recommendation 41
The Committee recommends that Occupation Certificates include the requirement that the building be generally consistent with the Development Consent and the Construction Certificate.

- **Occupation Certificate for Class 1A buildings (free standing homes)**

As noted previously, there is an anomaly in current arrangements in that Class1A buildings (free standing homes) do not require an Occupation Certificate. The rationale for this arrangement, outlined by PlanningNSW, is that work on individual homes may not be fully completed particularly for owner builders, and that excluding people from living in their homes before it is in a state to have an occupation certificate is too onerous:

> ***Ms HOLLIDAY:*** *The reason it was originally left out—and we did think about this a lot—was that we thought, "How would we deal with owner builders?" For example, when I did renovations on my house, I put all my furniture into one room and my husband, my 18-month-old daughter and I moved into another room. We had no electricity, a toilet down the back of the garden, and we renovated the other side of the house while we were living there*
>
> *Strictly speaking, if you say I need an occupation certificate before I can do that, I could not have lived there, and at that time I could not have afforded to live anywhere else….*
>
> *We need to think very carefully about how we handle owner-builders and people who want to do what I was doing, which is basically living in a building site for three or four months while the home is renovated because that is what I could afford to do. If we can overcome some of those problems, I do not have a problem about an occupation certificate. But we specifically excluded it because we felt it was going to be very difficult to say to a person who owned a house, "Sorry, you can't move in until you have an occupation certificate."*[248]

There was a resounding call by the majority of submissions that Occupation Certificates for Class1 buildings be required. Whilst acknowledging the issue of owner builders raised by PlanningNSW, the Committee’s view is that benefits of an OC for free standing homes clearly outweigh the additional costs and possible inconvenience to occupants. In the long term, although it may mean a small cost and delay to occupation, consumers will have confidence that they are moving into a safe and complete home, built to standard and complying with the development consent.

The Committee therefore recommends that Occupation Certificates be issued for Class 1A buildings with an exemption made for buildings constructed by holders of owner builder permits. The Committee recommends that an offence and appropriate penalty for not obtaining an Occupation Certificate should be created.

Recommendation 42
The Committee recommends that Occupation Certificates also be required for Class 1A buildings (freestanding homes) with an exemption from this requirement for buildings constructed by holders of owner- builder permits.

[248] Transcript of Evidence 14 June p36

- **Interim Occupation Certificates**

Some submissions, while recommending an occupation certificate requirement for Class 1 dwellings, also argue that the capacity to issue an Interim Occupation Certificate should still be available in various circumstances. There are many cases where a home owner may wish to move into a home, even though some construction certificate issues may be outstanding – eg driveways.

It has been suggested that provisions should still permit the issuing of an Interim Occupation Certificate for single dwellings, to provide greater flexibility to the homeowner.

Allworth Constructions, who completed 700 homes last year using private certifiers, outlined that the issue would also provide benefits to certifiers and project home operators:

> *In many cases our contract does not cover all of the requirements of the Council's DA. Items such as retaining walls landscaping and driveways are the responsibility of the owner. Private certifiers are unable to "sign off" on the home until all these items are complete and the owner will sometimes take a long time to complete them due to financial and time constraints. We suggest private certifiers be able to issue an interim Certificate for the works covered by the contract only and the owner be free to complete the remaining works and have either the Council or a certifier (not necessarily the same one) issue the full certificate. Owners have no incentive currently to complete these remaining works with the exception they cannot sell their home without an occupation certificate.* [249]

The Committee recommends that provisions should allow for an Interim Occupation Certificate to be issued for Class 1 dwellings in particular circumstances, provided the key issues of BCA compliance (safety health and amenity) are not affected. Consumers should be made aware that this is an option for their particular dwelling in the building contract and that a final occupation certificate will need to be acquired by the homeowner where they intend to on-sell.

Building contracts should articulate that in circumstances where an Interim Occupation Certificate will be issued or likely to be issued, the 5 per cent final payment should to be linked to the issue of the Interim Occupation Certificate.

Recommendation 43
The Committee recommends that provisions should allow for an Interim Occupation Certificate in particular circumstances, provided key BCA compliance relating to health safety and amenity, is not outstanding.

- **Occupation Certificates and Subdivision Certificates**

PlanningNSW states that under the present provisions of the *Strata Schemes (Freehold Development Act)* and the *Strata Schemes (Leasehold Development) Act*, a building is required to have a Development Consent, an Occupation Certificate and a Strata Subdivision Certificate to enable the building to be subdivided [250].

However, under Part 4a of the EP&A Act, where accredited certifiers are given the capacity to issue a Strata Subdivision Certificate, it is not explicit that a Strata Subdivision Certificate is contingent on the issue of an Occupation Certificate. Given this problem, the Committee

[249] Submission No. 27
[250] Submission 144 Supplementary

recommends that the EP&A Act be amended such that the accredited certifier is restricted from issuing a Strata Subdivision Certificate until an Occupation Certificate has been issued.

Recommendation 44
The Committee recommends that an accredited certifier (Council or Private) cannot issue a Strata Subdivision Certificate until an Occupation Certificate has been issued.

5.3.10 Council powers and enforcement

The subsequent area of concern regarding the role of the PCA and the Councils is the concern put forward by Councils that their powers and options are limited and not effective in many areas of development management.

Currently, Councils have powers under the notice and orders regime in Section 121B of the Act and, since last year, powers under the penalty infringement process (PINs) in 127A of the Act. In addition, Councils have powers through prosecution with the Courts, although this is a long and costly process and not effective as an immediate solution.

Submissions from Councils called for two main powers:
- immediate "stop work" notices for various circumstance; and
- fines for non compliance with particular orders.

- **Stop work orders**

The issue of stop work orders was outlined when the Committee heard from a panel of Councils:

> ***Ms MEGARRITY:*** *What authority does council have in that situation when they are aware of something going wrong, be it their own certification process or a private certification process, to actually say, "Stop the work."*
> ***Mr BRASIER (Tumut Council):*** *…Councils have no power to issue a stop work order. It was taken away when this legislation was brought in 1998 or even 1993. Councils cannot order stop work on premises. You can order them to repair, you can order them not to carry out work that are in accordance with the conditions of consent. You can order someone to stop work. Then you get into the notice of intention to serve an order.*
> ***Ms MEGARRITY:*** *You can point out they are not meeting the conditions of consent during the process?*
> ***Mr BRASIER:*** *You can find out but you cannot do very much about it. If people want to stall you are stuck.*
> ***Mr DAINTRY (Woollahra Council):*** *I would direct the Committee's attention to our submission dated 23 April, page 8 under the heading Orders in relation to that last question. We respectfully submit that a stop work order is required. Clearly councils need that power.*[251]

Currently the power to order stop work (Section1 21B Order 8) is limited to circumstances where the activity is a life threatening hazard or a threat to public health and safety .

Councils have submitted that circumstances in which a "stop work" order can be given should be expanded for the following circumstances where work is occurring:
1. without a development consent where consent is required;
2. without a complying development certificate where it is required;

[251] Transcript of Evidence 24 May p39

3. without a construction certificate where it is required;
4. without a notice of commencement where it is required;
5. other than in compliance with the development consent;
6. other than in compliance with a complying development certificate;
7. other than in compliance with a construction certificate; and
8. other than in compliance with the Building Code of Australia.

Woollahra Council submitted that these powers should also be issued to accredited certifiers acting as PCAs.

A further suggested case for a stop work order was where damage is being caused or likely to be caused to neighbouring properties. For example, when it is apparent that activities like excavation, demolition or use of certain types of piling are likely to cause damage to neighbouring buildings, it is imperative to minimise the delay in stopping damage causing activities.

Councils also have the capacity to issue fines (PINs) ranging from $600 to $1500 against builders for offences such as breach of the development consent and other matters. However, Councils argue that in large construction projects these fines are not regarded as onerous. To get work to actually cease in the absence of expanded stop work powers, Councils argue they have few other options but to seek a Land and Environment Court injunction, which is costly to Council and lacks the immediacy of a stop work power:

> *[There is a] lack of will on the part of Governments (especially Councils) to prosecute or otherwise impose sanctions on unapproved building work, or to enforce building standards on major developers - partly for lack of funds to support legal action ; partly because planning instruments and regulatory powers under the Local Government Act are often too uncertain to ensure that legal action can succeed*[252]

While stop works powers can be expanded, there remains the issue that when orders are not complied with, Councils have to intervene to enforce an order through Court action. The City of Sydney Council noted that the current regime of fines and orders are generally inadequate to act as an effective deterrent and/ or incentive to comply:

> *Fines are too low, orders are to expensive to enforce and easily overturned for procedural irregularity and legal processes are used to delay determinations of non- compliance.* [253]

Two examples were given by the City of Sydney Council to illustrate the time delays involved in enforcing compliance due to 'loopholes' in the system. In one, an order to stop unauthorised works was cited to take over 349 days to get to the stage of contempt proceedings, and in another, unauthorised works under appeal was cited to have resulted in a period of over 550 days to achieve compliance.

A further stated concern was the non-compliance with Council requirements in relation to the annual fire safety statements (Form 15A) required by Councils from building owner/ owners corporation, under Clause 177 of the EPA Regulations. The Council proposes that late lodgement of the required annual fire safety statement attract a late lodgement fee as follows:

1. late by more than 7 days : $1000 late fee applies;
2. late by more than 14 days: $2000 late fee applies; and
3. every 7 days thereafter the late fee increases by $1000.

[252] Submission No. 4 – planner
[253] Supplementary Submission No. 201 p 6

The Council argues that this regime would not apply to developments of a value less than $2 million or a Class 1a single dwelling.

Although the penalty regime appears to be an appropriate disincentive relative to the risk to residents safety, the Committee notes that these fines would be imposed on the body corporate ie. the unit owners/ residents themselves rather than a developer.

The Committee agrees that there should be provision for further stop work orders to be given to Councils so that a proactive response to building problems can occur during construction. Furthermore, there appears to be a need to put in place fines for late fees for non-compliance with some Council orders, or requirements such as annual fire safety statements where there is a direct risk to human safety. The Committee has not examined these issues in detail and directs the Commission and PlanningNSW to consider appropriate options, taking account of legal and natural justice issues from the penalty regimes proposed.

Recommendation 45
The Committee recommends that:
- Councils be given powers for immediate 'stop work' orders and appropriate penalties be introduced where work fails to comply with the relevant development consent or when a relevant consent does not exist; and
- increased penalty provisions be considered for Council's to enforce compliance with Council's annual fire safety statement regimes to minimise risk to residents and to avoid protracted delays associated with progressing Court action.

It was brought to the Committee's attention that some Councils' pricing policies appear to cross subsidise the charges for development application and consent, with discounts to applicants who then use the Council as the PCA for the project. The Committee has not specifically investigated this matter to check its veracity. However, the Committee recommends that such a practice, if it is occurring, is inappropriate.

Recommendation 46
The Committee recommends that Council's Development Application policies should not permit discounts for using the Council as the nominated PCA.

5.3.11 Lodgement of planning instruments and certifications to Councils

As the consent authority, Council maintains records of the development application, the development consent and associated materials. Part 16 of the EP&A Regulations requires Councils to provide a perpetual register/ record of construction compliance and Occupation Certificates irrespective of whether the Council is the PCA. PCAs are required to submit the relevant information to Councils within 7 days of completion. Councils may charge a fee for this function.

The purpose of this requirement is to have all relevant documents about a development collated and accessible to any party for scrutiny. There is no legislative obligation for Councils to check or verify the accuracy or comprehensiveness of the information provided by the PCA. However, there is some need for Councils to check the veracity of the documents in order for Council to fulfil its responsibilities to remind building owners of their obligation to lodge annual Fire Safety Statements (Clause 175 regulation).

The Committee has heard about a variety of problems associated with these arrangement including:

- failures by PCAs to provide documents within the prescribed timeframe;
- PCAs providing incomplete sets of documents;
- Councils failing to provide full documents to consumers on request or in a timely fashion; and
- consumers assuming the Council is responsible and liable for the accuracy of the documents it holds.

The Committee believes that the failure of PCA to lodge forms is a concern and urges that this obligation be reinforced. It is envisaged that failures by PCAs to lodge forms will be discovered by audit, or through consumer or Council complaints and that the offence provisions of the Commission should include fines for PCAs who fail to lodge documents or lodge incomplete sets of documents.

As the consent authority, the Council's role as archivist of Development Application and associated materials is appropriate. The Committee believes that the Councils should inform the owners of this role and the availability of that information at the DA stage, as part of its mandatory information. This is also discussed in Chapter 4.

Recommendation 47
The Committee recommends that Councils should inform property owners of the Council's role of archivist of DA and associated certificates from the PCA after a development is complete, and make provisions for such information to be readily provided to property owners on request.

CHAPTER 6 Dispute Management

6.1 INTRODUCTION

This Chapter examines the quality of home building disputes management. Section d)iii) of the Inquiry's terms of reference requires the Committee to examine the role of the Department of Fair Trading and the Consumer, Trader and Tenancy Tribunal.

This Chapter makes recommendations about the Consumer Trader and Tenancy Tribunal (hereafter the Tribunal), the Department of Fair Trading (hereafter the DFT), and intended role of the Home Building Compliance Commission (hereafter the Commission).

6.2 BACKGROUND

6.2.1 What are the problems consumers have with home building?

For the most part, consumer problems concern actual physical building work. Other disputes which may arise could be that work is proceeding too slowly or costs have risen unfairly. Often disputes arise over payment of work. This is almost always connected to some problem with the work itself. For example, a consumer may refuse to make a progress payment on work they find unsatisfactory.

Consumers may regard work as inadequate in the following ways:

- it appears to be unsafe or substandard;
- it is not consistent with the plans or design in the contract;
- it does not match the description of works proposed in the contract or illustrated by a display home;
- the products or materials used in construction are not those expected or specified in the contract; and
- after completion the building has problems requiring rectification or insurance or compensation.

As noted in Chapter 3, all home building work must comply with the Building Code under legislation. In addition, there are statutory warranties and specifications made in contracts for homes which relate to quality and products, that a builder must comply with.

However in general, consumers do not distinguish their building problems in terms of meeting Codes, being included in a contract and, in many instances, their issues may be a combination of both matters. Furthermore, consumers may not be aware that their problems are also associated with the builder's failure to observe licensing conditions. For example, they may have had unsatisfactory work done by a builder who was not qualified in that work, or who failed to obtain mandatory home warranty insurance for the work.

6.2.2 Who do consumers approach about building problems?

As noted in Chapter 4, there are presently different mechanisms in place for consumers to deal with home building problems. These are primarily the Department of Fair Trading and,

the Consumer Trader and Tenancy Tribunal ,within which is the newly created Building Conciliation Service

6.2.3 What is the role of the DFT in building problems?

A first inquiry point for general consumer problems, including building matters, is the Department of Fair Trading. The Department is responsible for sorting and referring building problems to relevant areas : compliance problems to the Department and contractual problems to the Tribunal. Since February 2002, consumers may also approach the Building Conciliation Service within the Consumer Trader and Tenancy Tribunal.

As mentioned in Chapter 2 on Licensing, the Department has an Investigations Unit to examine complaints about builders in relation to breaches of their licence conditions and obligations under the Home Building Act.

> ***Mr O'CONNOR:*** *The Department's focus is on ensuring that building work is done with an appropriate level of competence and workmanship in accordance with the requirements of the Act and the statutory warranties implied under the Act*[254]*.*

These are known as compliance issues. A compliance problem may mean that the builder is in breach of the conditions of his licence such as operating without home warranty insurance. Another condition of his licence is compliance with statutory warranties, which are automatically part of a building contract. The warranties in the Act are described in Section 18B of the Home Building Act as follows:

*a) a warranty that the work will be performed in a **proper and workmanlike manner** and in accordance with the plans and specifications set out in the contract;*

*b) a warranty that all materials supplied by the holder or person will be **good and suitable for the purpose** for which they are used and that, unless otherwise stated in the contract, those materials will be new;*

*c) a warranty that the **work will be done in accordance with, and will comply with, this Act or any other law;***

*d) a warranty that the work will be done with **due diligence** and within the time stipulated in the contract, or if no time is stipulated, within a **reasonable time;***

*e) a warranty that, if the work consists of the construction of a dwelling, the making of alterations or additions to a dwelling or the repairing, renovation, decoration or protective treatment of a dwelling, the work will result, to the extent of the work conducted, in a dwelling that is **reasonably fit for occupation as a dwelling;***

*f) a warranty that the work and any materials used in doing the work will be **reasonably fit for the specified purpose** or result, if the person for whom the work is done expressly makes known to the holder of the licence or person required to hold a licence, or another person with express or apparent authority to enter into or vary contractual arrangements on behalf of the holder or person, the particular purpose for which the work is required or the result that the owner desires the work to achieve, so as to show that the owner relies on the holder's or person's skill and judgment.*

The licensee is regarded as guilty of "improper conduct" under their licence if they 'breach a statutory warranty' (Section 51 (1) (c)) or 'breach the contract to do any work that the licence authorises the holder to contract to do' (Section 51 (2) (a)) in the Act.

[254] Transcript of Evidence 10 May p2

The DFT Investigations Unit is empowered to affect the license activity of the builder. It can initiate action to restrict, suspend or cancel building licences and bring charges against the builder for breach of the Home Building Act.

However, the Department cannot order rectification work to be done by that builder of a home or order the builder to pay the consumer any monies. This applies even where the evidence used to prove the case for disciplining the builder, is the particular building problem of the consumer who made the complaint.

6.2.4 What is the role of the Consumer, Trader and Tenancy Tribunal in building problems?

The Tribunal was established under the *Consumer, Trader and Tenancy Tribunal Act 2001* and has been in operation since 25 February 2002. The Tribunal and its predecessor, the Fair Trading Tribunal, were established to provide contractual dispute resolution in regard to fair trading matters between consumers and other parties.

The rationale behind the Tribunal is to provide a simple, non-legalistic alternative to court action in certain consumer matters. The jurisdictional limit of the Tribunal in building matters is $500,000.

The recent changes to the Tribunal from the building perspective are:

- Inclusion of a Building Conciliation Service (BCS) as an early intervention process;
- Reduced processing times through the introduction of a combined notification of building dispute/ application for orders. A concurrent order for hearing in 6 weeks and conciliation for 4 weeks is instigated;
- Tribunal procedures tightened with procedural orders to avoid unnecessary adjournments or delay; for example, an order might be made where applicants must show cause why the matter should not be dismissed due to their failure to prosecute the application and comply with the Tribunal's directions.

The present arrangement is that the BCS deals with any home building dispute. The legislation requires all home building disputes to be considered for preliminary disputes resolution by the BCS before the dispute can be accepted for a formal hearing. Consumers must notify the BCS about their matter in writing and pay a lodgement fee of $55.

The BCS offers voluntary conciliation services for 4 weeks, where an agreement may be reached between the parties. If this is not successful, the dispute will then proceed to a hearing and a separate hearing fee will apply. The hearing date is automatically listed at 6 weeks from lodgement of the dispute with the BCS.

When a case is heard by a Tribunal Member, he or she has the capacity to order rectification by the builder and financial payments from either parties.

The main orders issued by the Tribunal are:

Table 6:1 - Main orders of the Tribunal

Orders under the Home Building Act 1989 (with *Home Building Legislation Amendment Act 2001*)	
Section 48 0	• To pay a specified sum of money • Not to pay a specified sum of money • To supply specified services • To deliver, return or replace specified goods • To obtain a combination of above remedies
Section 48 A (2)	Appeal against a decision of an insurer under a contract of insurance required to be entered into under this Act
Section 48 K (7)	To claim compensation for a loss arising from a breach of a statutory warranty
Orders under the Contracts Review Act 1980	
Section 11	to obtain relief in relation to an unjust contract for residential building work or specialist work

The Tribunal cannot make orders or rulings about the licence status or possible discipline action of the builder. However, where an order is made by the Tribunal and the builder does not comply, the Investigations Unit may then apply disciplinary procedures under the Home Building Act.

6.2.5 What difficulties have consumers had in dispute management?

As noted in Chapter 1, the purpose of this Inquiry has not been to intervene or resolve individual home building disputes. However, the Committee accepted submissions about specific disputes to illustrate the impacts of the current system and to work out how to ensure that the system will operate better in the future.

Submissions revealed several major problems with building dispute management in NSW including:

- confusion about what is a building defect and what constitutes a dispute;
- confusion about what action can be taken about a dispute;
- confusion and lack of coordination on matters which are subject to the Tribunal and investigation by the Department of Fair Trading;
- frustration in the conciliation process and immediacy of resolutions;
- frustration in delays and ultimate costs of the Tribunal proceedings concerns about hearing decision processes and rationale of the tribunal;
- frustration in the Tribunal regarding enforcement and compliance with Tribunal orders;
- concerns about making other building practitioners accountable in the dispute process;
- frustration in the Tribunal due to changes in legislation; and,
- concerns about the caseload and adequacy of staffing of the Tribunal for the future.

Understandably, the majority of submissions made to the Committee relate to disputes handled under historical legislative mechanisms and by the former Fair Trading Tribunal. The Committee was told that a variety of reforms, including the establishment of the new Tribunal, have been implemented aimed to prevent some disputes problems from recurring. However, there remain considerable concerns about systemic arrangements which the Committee has identified are not satisfactory and recommendations on these matters have been made in this Chapter.

6.3 ISSUES RAISED IN THE INQUIRY

6.3.1 Identifying defective work and a legitimate dispute

When a consumer has a problem with building work, the first task is to determine whether their problem is legitimate in terms of definitions of defective work in legislation or in their building contract.

As a starting point, the consumer has various references to turn to such as the Building Codes, their building contract and their insurance policy to obtain information on what constitutes a dispute. However, as noted in Chapter 3 on Codes and Chapter 4 on Consumer Advice, there are several problems with these three sources of information.

First, the Building Code is not a black and white document but a performance based document, which means that the consumer's basic benchmark for work may be quite variable. Second, the consumer's contract and insurance policy's descriptions of building work use terms which are subjective and not correlated directly to the Code. Third, the consumer's contract may have additional items and specifications which do not relate to any defined measures but are attached to an ambiguous notion of 'quality'.

The links to the Code and the language to define problems used in the statutory warranties under the building contract and future insurance policies are detailed in the Table 6.2, which is also set out in Chapter 3.

Table 6:2 - BCA compliance systems and terms describing building defects

Planning Instruments	**Statutory Warranties enforced by CTTT/ DFT**	**Insurance Defects**
Development Consent - *BCA Compliance (not enforced)* Construction Certificate - *BCA compliance* Compliance Certificate - *BCA Compliance* Occupation Certificate - *compliance with Classification under BCA*	proper and workmanlike; good and suitable for purpose; complies with laws; reasonably fit for occupation as a dwelling; and reasonable fit for the specified purpose.	Structural defects resulting in building /building part: - closed or prohibited under any law - prevents continued practical use - results in destruction/ physical damage to building - threat of imminent collapse
Council or accredited certifier responsible for compliance	Builder responsible for compliance with warranties	Builder responsible for compliance with insurance

In effect, the definitions of building problems or defective work in planning instruments, set out by the Department of Fair Trading, the Tribunal, and the insurers are not consistent. The varying terms used to describe problems creates a very subjective basis on which to attempt to identify a legitimate problem. It is, in fact, a recipe for disputes. The Committee believes that this is the fundamental issue that complicates the process for consumers in working out their building problem and courses of action.

A submission to the Committee from two former Members of the Tribunal articulated the problems of assessment under the current performance based Code and the absence of some measures of quality above the Code:

> *The present system of assessing the quality of building work is performance based. It encompasses degrees of quality, with the criteria for quality assessment being whether a given facet of a building will perform its function. In many cases, such as the structural adequacy of a slab, this is an adequate measure. In others, generally those with which a home-owner has to deal and live with on a day to day basis, quality involves matters of look and feel. There can be a vast measure of difference between a tiled floor that will perform its function and one that is aesthetically pleasing. Views about the look and feel of work are, however, subjective, and generate significant differences between experts and parties.*
>
> *Our experience is that these look and feel issues frequently arise in respect of fit-out and appearance. A performance based system of quality assessment, which does not adequately take account of aesthetic issues, while adhering to sound engineering principles, will never satisfy consumers. Such a system also encourages divergent expert opinion, with experts retained by builders usually adopting the, 'it performs its function' stance. Another consequence of such a system, in our opinion, is that it enables a culture whereby meeting minimum performance criteria is perceived by many as good enough. A residence which is built to meet minimum performance standards throughout is often a shoddy job.* [255]

The Committee understands that the Tribunal and the Department of Fair Trading are looking at compliance with quality issues that may be higher than the standard in the Code or absent from the Code but are prescribed in the contract or implied in statutory warranties. Not withstanding this issue, the Committee sees no disadvantage in prescribing the Code as a baseline minimum for compliance. In simple terms, work that fails to meet the Code is an uncontestable defect.

This argument is the rationale for including the phrase "*comply with the Building Code of Australia*" in the standard contract for home building and in the statutory warranties implied under the Act, which is discussed in Chapter 4. It should provide greater certainty about the obligations of builders to meet a basic standard.

The Committee has recommended, in Chapter 3 on Codes, that a way to assist consumers unravel the many terms in building documents is to produce a "Guide to Standards and Tolerances". The purpose of this document is to outline acceptable levels of performance required of home builders by the Commission and the Tribunal, with reference to:

- the Building Code of Australia where applicable; and
- where the Code is silent, outline acceptable quality and "workmanship" levels as interpreted by Commission and the Tribunal.

The document can be used as an initial starting point by consumers to identify if their building problem is likely to be considered defective by the Tribunal and the relevant Councils and Departments. The document would be a mandatory attachment to home building contracts.

An explanation of how the Victorian guide is used in disputes was outlined in hearings by a representative of Dexta Insurance. The Committee believes it may produce similar benefits for NSW consumers:

> ***Mr LOVETT:*** *Sir, we feel that the ambit of claims is very broad. We find that many items of claim, when they are assessed, are just not validated, I mean they are just not there, and what Victoria did was implement a Guide to Standards and Tolerances which put in*

[255] Submission No. 233

place a suite of acceptable standards and tolerances before it is established as being a defect.

The Hon. JOHN RYAN: *Could you explain with reference to some practical illustration?*

Mr LOVETT: *An example would be polished flooring, for instance. The allowable standard is that, if a polished floor is subject to direct sunlight and the boards shrink excessively in that area, it is not a defect associated with the builder's workmanship, it is more of a failure due to other circumstances beyond the builder's control. That document spells it out very clearly. By assessing a claim on that basis or if the industry used that document as a basis for dispute resolution, most disputes would be resolved. We find in Victoria it is very handy to have that guide in place.*

A similar issue would be nail-popping of ceilings where a builder has used green timber in the frame construction and general shrinkage of the timber results in nail popping of the ceilings. The guide allows for it, within the first twelve months after completion any popping of ceilings is a defect, but after that period it is not a defect. It takes a lot of the argument out of the claim or the dispute. There could be a whole range or suite of standards you could impose further, but they are very basic standards on basic issues. [256]

The Committee is concerned about the recent creation of the 'structural defects' definitions for home warranty insurance providers in amendments to the Home Building Act implemented in July 2002. The Committee notes that the Department of Fair Trading, who prepared the amendment, did not consult with the Building Codes Development and Reform Unit in PlanningNSW on developing these definitions and the definitions make no direct reference to the Building Code, nor do they use the same terms as the statutory warranties under the Act.

Only “structural defects” are defined under the amendment which leaves open the status of other defects, not only in terms of content but even their title. The Committee notes that Queensland Building Services Authority defines both structural and non-structural building items and even uses ‘plain English’ expressions to do it[257]:

CHAIR: *Have you consciously gone out of your way to write this in plain English? As I read some information we had off the web site, for example, it seemed to be in plain English. You are talking about cosmetic as opposed to non-structural. I mean "cosmetic" to me is easier to understand than "non-structural".*

Mr JENNINGS: *Yes, I suppose we try to explain it for the consumer in a language that is not technical. We do try and explain things on our web site and in our policies, you know, getting away from proper terminology used in the building and construction industry as much as possible.* [258]

The Committee believes that the definitions of ‘defects’ for insurers should be comprehensive and reconciled to include the common terms used in statutory warranties and the Building Code of Australia. The Commission and Tribunal should apply the same interpretation of the Code and statutory warranties and quality standards in their proceedings and decisions.

6.2.3 Overlap of Tribunal and Department of Fair Trading investigations

Consumer submissions have stated that they receive unclear advice about where to take their disputes and what options are before them. In some instances, consumers report

[256] Transcript of Evidence Dexta 10 May p123
[257] Appendix 14– Queensland Building Services Board Policy
[258] Transcript of Evidence 10 May p102

getting conflicting advice from the Department at different times about pursuing their matter. The Department has pointed out that this may occur because the Department's procedures and legislation may have altered while an issue is ongoing[259]:

> ***CHAIR:****…. I think the main issue here is that people basically got the run-around as they tried to determine whether they could make a complaint. They were sent to one office and were told, no, they could not fill out that form and someone else at the call centre said that although there is not a form any more, if they go somewhere someone might help them, and someone else said that they were not allowed to make a submission on this…*
>
> ***Mr O'CONNOR:*** *We are aware that there are some apparent discrepancies in the information provided by the department in relation to this particular matter. I might say, Mr Chairman, that, as you and the Committee are aware, there have been significant changes made in the past couple of years to the system of dealing with complaints. There have been a number of amendments to the legislation. We have had the collapse of HIH and, really, the primary focus of the customer service staff up until the Building Services Commission came in was to assist consumers in resolving disputes. That was their primary focus.*

However, the Committee feels that the consumer confusion is not simply because of recent procedural and legislative changes, but rather a consequence of having no single oversight to the system and a reluctance by both organisation to take on the consumer's problem any more than absolutely necessary. As noted in a submission:

> *The role of the Department of Fair Trading, Consumer Trader and Tenancy Tribunal is quite complex. From our dealings we have experienced difficulty in determining which department is responsible for handling of a particular matter. Each seems to be "passing the buck" to the other department, which proved more than frustrating to the consumer.* [260]

A graphic illustration of the overlap of activities is provided in the following case study provided by Case Study 2, which is indicative of the other submissions made to the Committee:

Case Study 2 : Submission No 193

This matter occurred during the transition from the Fair Trading Tribunal to the CTTT and involved defective renovation work and alleged substitution of materials by the builder, specifically a certain type of wooden floorboard.

On 5th of February 2002, I finally had a visit from an inspector from the Fair Trading Building Investigations Branch, they had explained to me on early contact that they we so extremely busy that's why it was taking some eleven months to have the case looked at. The department was a completely separate section to the Fair Trading Tribunal section. When the investigator did his first inspection he could see there were many defects, in fact the kitchen ceiling was leaking so profusely as it was raining. I had told him that I had also been waiting for some time to have any ruling from the Tribunal. I asked this investigator if he could give me an affidavit declaring some of the defects , he agreed and tendered a copy to me on the 26th February, I sent this affidavit off to the Fair Trading Tribunal as I believed that it would be a very fair independent opinion, and had addressed a number of defects . I also knew that a decision had not yet been made and I thought it was important that any information that had come to hand should be passed on to the tribunal member, and if needed be a further meeting should have taken place.

I might mention here that I never received acknowledgment back from the Tribunal concerning the late (and not received until after the hearing) submission from the builder. There was never any

[259] Transcript of Evidence 14 June p28
[260] Submission No.204 – Consumer

comment on the falsified wood samples and the false Statutory Declaration. Nor was there a comment on the affidavit put forward by a Department of Fair Trading Inspector and employee.[261]

… On 14 March 2002 orders were made… The orders actually showed that the member believed that the builder had not been truthful in a number of findings. It did however show that the member had completely allowed the late (and not received until after the hearing) builders submission. I found that completely unfair considering I have never been able to comment on the letter from the consultation which was contained in the late submission. The member totally ignored the evidence concerning the false Statutory Declaration or what action might be taken. The affidavit I had forwarded was completely ignored…[262]

I applied to the Tribunal for a rehearing, a very daunting thought indeed but one that I felt needed to be done. I pointed out to the Tribunal all the discrepancies in the last hearing and conference. I have also again pointed out that I do not think it is fair that the same builder is given the opportunity to come back into our home again. He had certainly been given every opportunity to have do so prior to the intervention of the Department of Fair Trading . This has been a very stressful and unpleasant experience and all I want is to have the work finished to the standard that I should be able to expect from a so called government licensed builder, this has put extra strain on our lives. I have also asked it the Tribunal could take into account the findings of Mr Mark Tuckwell .[263]

…. I find this a very odd arrangement that the two different arms of the same department cannot coordinate their findings and pool their resources. Instead it is left up to the consumer, in this case victim, to pay exorbitant fees to consultant and experts to try and present their case, and then find out that all the expenses paid out to put the case forward cannot be claimed back off the builder. This was an order made by the Tribunal that I was not entitled to claim the expenses and costs…[264]

…The Tribunal have now refused to grant me a rehearing… Mr Mark Tuckwell from the Department of Fair Trading Investigations Branch… has been investigating the building defects in our home. He has taken numerous photos and completed substantial reports. The building work in a number of areas is not to 'code and building standards'. He has also taken the time to visit the Tribunal to view the bogus wood sample (this took the Tribunal one week to find it). He seemed quite concerned by the treatment we have received. He has pointed out to me that the Tribunal is a totally separate entity to his own Department and therefore they are not interested or able to obtain all the information that Mr Tuckwell has gathered . … If the Tribunal were to take into account the reliable information gathered by the Investigations division it would have saved themselves and definitely myself a lot of expense and time…[265]

It seems to me quite ludicrous that two areas from the one department…cannot pool their resources and transfer information. It is not only a waste of taxpayers funds but it is very frustrating that one section of the Department have visited the site and are very aware of numerous defects, problems and poor workmanship, but another section, the Tribunal are not interested in knowing the facts and have chosen to ignore this information..[266]

The Department argues that the new process in the Building Conciliation Service, is intended to address building problems more holistically. Although the Service includes a liaison officer from the Department to look at licence compliance issues, the BCS and the Department maintain different roles.

> ***Mr HANLON:****…We now have an investigator who liaises everyday with the Building Conciliation Service to identify people who are in breach of the Home Building Act as well*

[261] Submission No.193 p5
[262] Submission No.193 p5
[263] Submission No.193 p6
[264] Submission No.193 p7
[265] Submission No.193 p7
[266] Submission No.193 p7

as subject to a contractual dispute before the tribunal. So, if they are uninsured or unlicensed or other misconduct is identified as part of the application, the department acts in respect of that misconduct. We do not try to fix the contractual dispute and the CTTT does not try to fix the non-compliance. We have two different lines of interest and authority to act. They remain relatively separate all the way through, because we have different interests in these matters. We pursue the builder in respect of any of the things where there is a breach of the Home Building Act.

***CHAIR:** Do any of you see some value in making it a case management process, so that things walk through a process that truncates the time and the frustration and saves government a fortune on the way through? So that in some way it brings the two arms of government together so there is case management from go to whoa in some of these things?*

***Mr HANLON:** That happens to a large extent now with the creation of the Building Conciliation Service and the presence there of the building investigator to identify areas of non-compliance. We have a system of that kind in place now but you have the fundamental difference which is truly fundamental and it takes you in two opposite directions when you are trying to resolve a dispute.* [267]

The Department also notes they find it is a constant difficultly to get consumers to understand the differences in the roles of the Department and the Tribunal because consumers expect, or assume, the issue can be resolved in one process:

***MR SCHMIDT**: If I could just add.. there has always been a group of matters which entail both the potential for a complaint in relation to a disciplinary matter and a potential hearing of a dispute between a builder and a consumer. In the past there may have been some difficulty for consumers in that they thought that when they were going to the department that we would also be doing the consumer contract dispute and if they went to the tribunal that it would somehow be doing the disciplinary process. In recent times a process has been put in place, not every inquiry that comes through the front door, not every complaint that comes through to the department are people told, "No, go to the tribunal". However, if there are matters which do involve a dispute, we will not try and extract the disciplinary complaint process necessarily at the Fair Trading Centre. We now have in place a system where a departmental officer from Mr Hanlon's area is placed in the tribunal and assists in identifying that component of the dispute. So I think for the matter to be brought to the Department, if there hasn't been a wholesale push of matters over which would not have gone there anyway, it is an attempt to - usually if there is a disciplinary matter involved and a conflict involved, it would have involved both the department and the tribunal anyway. It is trying to give people one point of contact as far as we possibly could.*

***The Hon. JOHN RYAN:** Sometimes there would be a category of complainants that would be happy to have you assist in disciplinary action in the hope that that would have assisted them in negotiating with the builder. Some of them go to the tribunal because you were dealing with their complaint as they saw it.*

***Mr SCHMIDT**: Certainly, and this has been one of the difficulties with this system again I think which the inquiry has shown in a range of areas, that people's expectations are that they will go to one Government agency and it will somehow cover the entire field of matters relating to their concern, and so yes, there would have been some people who had thought that they had made a complaint about a disciplinary related matter and somehow thought that just by doing that the contractual dispute would resolve itself. That may happen in some cases, but obviously if it has got to a dispute stage, it is far more likely that*

[267] Transcript of Evidence 14 June, p20 in camera

> *it might be resolved in the Building Conciliation Service process where you have got the independent provision of experts…*[268]

However, the Committee sees that the expectation to have building problems dealt with by the one body is quite a reasonable view for consumers to have. Rather than further educating the consumer about the different paths, perhaps the two paths should be combined, not just for simplicity but because there is a fundamental contradiction in the separation of matters as they currently stand.

Throughout the Inquiry the Committee has heard that there is a 'distinct', 'fundamental' and 'deliberate' difference between compliance and contractual matters. This, in turn, requires different paths of Department investigation and Tribunal consideration respectively:

> ***Mr HANLAN****: …Our line of interest is in respect of compliance with the Home Building Act and the conduct of the licensee. The tribunal's line of interest is in respect of the contractual disputes between the two parties. They are entirely separate issues*[269]*.*

However as noted in Section 6.2.3, the Department's role in enforcing licensees to comply with the Home Building Act, includes enforcing the provision that the licensee must observe the statutory warranties in contracts and indeed the contract itself. On this basis, the Investigation Unit, to respond to the complaint and prove its case to discipline the builder, will effectively have to investigate the performance of the contract. Furthermore if a contractual dispute proves the builder breached the contract then, prima facie, there is a ground for a disciplinary case of improper conduct against the builder.

The Investigations Branch may examine a licensing issue which is not related to a specific consumer complaint, such as a matter detected in a random licence check. However, in the vast majority of cases, a consumer complaint, which is the primary trigger for an investigation, will arise through a contractual dispute experienced with a builder. It is difficult to see the consumer's motivation to complain about a builder's activity that was strictly a licensing matter, but unrelated to their building problem.

The Department acknowledges that, in practice, the building contract is examined when complaints are examined:

> ***Mr O'CONNOR****: The department's role is to inform and educate consumers about their rights, to ensure that traders are aware of their obligations and to take action against licensees who are guilty of improper conduct. Grounds of complaint include that the licence holder breached the statutory warranties. Common complaints by consumers, councils or other persons are that work is defective, not in accordance with the plans and specifications or has taken too long.*
>
> *In the investigation of a complaint the Department of Fair Trading looks at the terms of the building contract. It also relies on expert evidence as to compliance with the relevant building codes and accepted building industry practice. The department does not dictate to the industry the required standards of building work… The department is to ensure that consumers receive workmanship and service which is in keeping with their building contract and the relevant building codes and industry practices. If the licensee can show that he or she performed the work in accordance with the contract, relevant standards or acceptable building practice, no action will be taken by the department*[270] *.*

[268] Transcript of Evidence 10 May p4
[269] Transcript of Evidence 14 June p33 in camera
[270] Transcript of Evidence 10 May p2-3

It appears, therefore, that both in legislation and in practice, the Investigations Unit must examine the substance of the 'contractual dispute' to adequately assess possible breaches of the Act and the conduct of the builder to determine disciplinary action. If the scope of the Investigations Unit includes assessment of whether the licensee has or has not performed work in accordance with the contract then this is effectively duplicating the task of the Tribunal in assessing a 'contractual dispute'.

The Tribunal's or the Investigations Branch's activity on a matter will essentially begin with the same physical building problem. The only difference is the way each organisation looks at the problem and the responses they are empowered to make: that is, the Department takes disciplinary action on the licensee, whilst the Tribunal orders rectification and monies paid.

The current building problem management process is illustrated in Diagram 6:1 overleaf.
The diagram highlights the dual nature of the complaints system, the duplication of evidence gathering and proving process, inconsistencies in time lines for submitting documents and the lack of co-ordination between the DFT and Tribunal.

Currently consumers can go to either the Department or the Building Conciliation Service with their building problem. They may be informed that they should proceed with the matter as a complaint and/or as a dispute with the Tribunal.

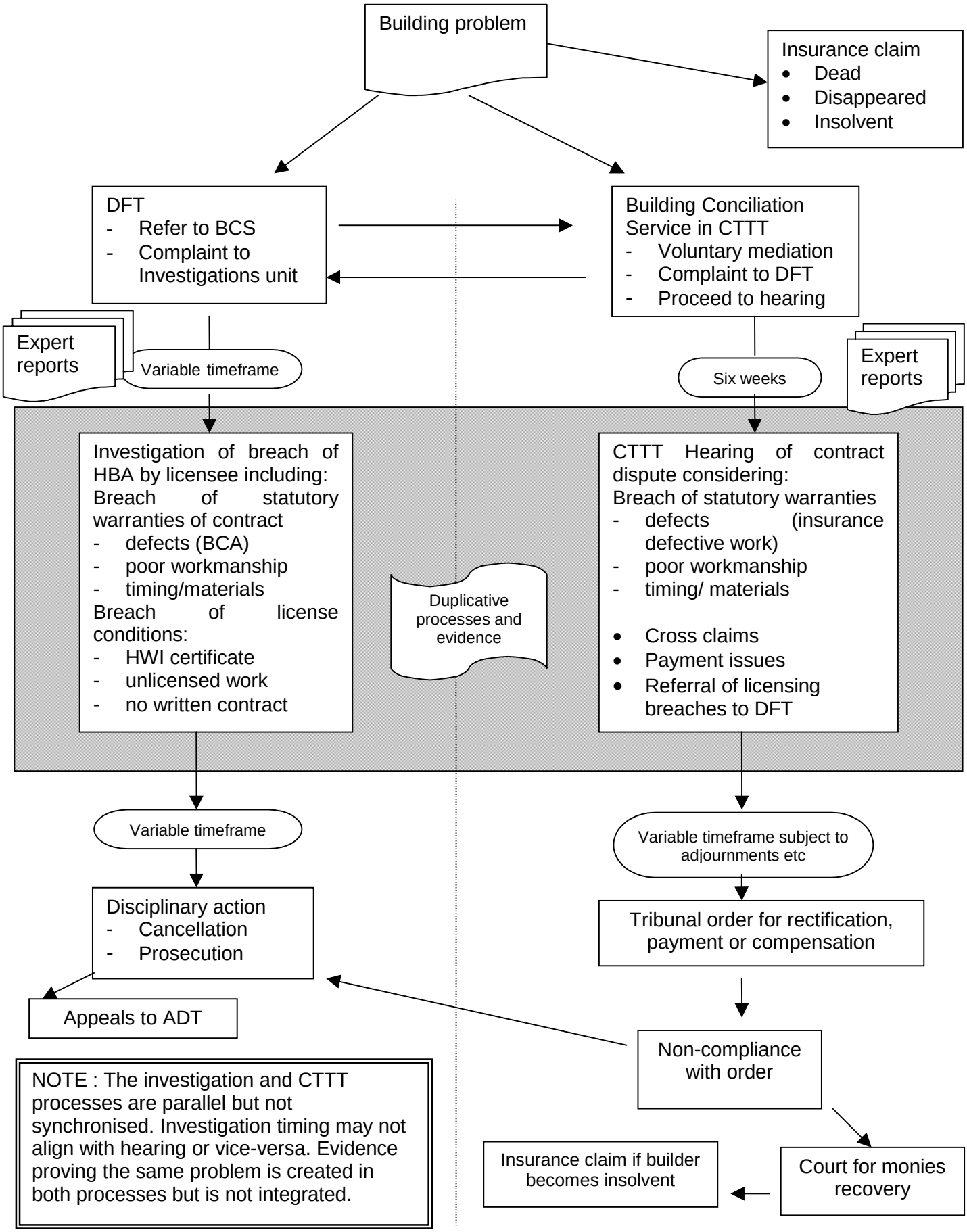
The Tribunal process has fixed time lines at the commencement of proceedings: 4 weeks of optional mediation, followed by a first hearing 6 weeks from initial lodgement.

As noted in Chapter 2, there is no timeframe for investigations, the Investigations Branch may not commence dealing with a complaint until 3 months after it is lodged with them or even longer.

If the dispute is not resolved through mediation by the BCS, the consumer and builder are both required to build a case of information and expert reports to bring to the Tribunal hearing. In fact, often expert reports and information have already been collated by both parties at some expense. The Investigations Unit will also ask for preliminary evidence from the consumer before they will pursue a complaint. On site inspections may be conducted by the Investigations Unit and, sometimes, by the Tribunal member.

The Investigations and Tribunal processes continue independently, without coordination of information and timing. In many Tribunal cases, given the limited number of members with building experience, members will call on experts to give independent evidence against the

Diagram 6:1 : Current Arrangements of DFT and CTTT for Building Problems



entrenched consumer's expert and builder's experts. This kind of activity is described in a submission by a former Tribunal member as the "phenomena of duelling experts" (Sub 233).

Submissions have raised various problems about the current process, which were explored in hearings by the Committee:

- **There is a duplication of resources and activities.**

As noted previously, since a complaint made by a consumer will almost always relate to specific work being performed, the Investigations Unit will inevitably have to examine compliance with the contract. The same consumer will probably also have grounds for a contractual dispute and will simultaneously initiate proceedings with the Tribunal.

In this way, the same matter becomes the focus for both the Investigations Unit and the Tribunal. However, under the current process, each group does a separate analysis which will include requiring reports to be prepared and possibly sending out investigators. With the introduction of the new Building Conciliation Service, an investigation team has been created which perpetuates this duplication:

> ***Ms CHOPPING:****…I have just been reminded of the role of the Building Conciliation Service. It is an independent expert engaged by the tribunal—not by the department, but by the tribunal. It goes out on site and participates with the parties in coming to a mediated settlement or in preparing a report.*[271]

- **Evidence collection in the investigations is not necessarily fed to the Tribunal**

Under the current arrangement, the onus is on the consumer or builder to supply the evidence generated by an investigation to the Tribunal.

> ***The Hon. HELEN SHAM-HO:*** *What is the use of a formal caution to the builder in the case of Mr and Mrs ****? You say that you recorded it and that there is important information that is available to the department. Will that formal caution be forwarded to the tribunal, Mr and Mrs*** went to the Fair Trading Tribunal? Will that formal caution and the engineering report assist them in the Tribunal's proceedings?*
>
> ***Mr HANLON:*** *We will struggle all the way through this to try to separate the two lines of interest that occur. Our line of interest is in respect of compliance with the Home Building Act and the conduct of the licensee. The tribunal's line of interest is in respect of contractual disputes between the two parties. They are entirely separate issues for most purposes*
>
> ***The Hon. HELEN SHAM-HO:*** *The tribunal would take into consideration all of the factors that are presented to it. You are in the same department—*
>
> ***Mr HANLON:*** *We are not in the same department. A misconception of that kind makes it difficult for us.*
>
> ***The Hon. HELEN SHAM-HO:*** *I understand the independence of the tribunal. Your finding is supposed to be independent and impartial. Your department is already conducting a review, so some work has been done. Why can we use not use that for the benefit of consumers in their campaign against builders?*
>
> ***Ms CHOPPING:*** *In an instance like that it would certainly be open to the consumer to submit evidence in tribunal proceedings and it would be taken into account. There is no*

[271] Transcript of Evidence 14 June in camera p 6

obligation on the department. The department is not a party to the proceedings. But the consumer could certainly submit the evidence. [272]

Supporting evidence for the consumer (and builder) may be contained in an investigation which is sufficient to end a Tribunal case or bring it to settlement, however this is not automatically fed into the Tribunal by the Department. In fact, the Department may restrict access to the investigation files. This was explained in the following exchange:

***CHAIR**: What is the legislative reason for not giving that same [investigation] information to the people who have put up the dollars and who have got the emotional interest?*

***Mr HANLON**: Well, they do not pay us, sir. They do not put up any dollars to our investigation. Our line of inquiry is entirely separate.*

***CHAIR**: They might have put up dollars for the building and they have got the emotional investment. What is the legislative reason that you do not give it to both parties? Let me put it that way.*

***Mr HANLON**: Certainly, sir. There is one legislative reason that might restrict it in these circumstances, and that is in respect of keeping confidential information that we obtain under mandatory process. If we serve notices to obtain information, we are required under the Fair Trading Act to keep that confidential. That might restrict us in some of these cases, not necessarily in this one, but it is a consideration. There are privacy implications as well, to the extent that the reason that we obtained information or made our inquiries was to determine compliance with the Act and to support our enforcement action, not for the purposes of a dispute between the parties. The third one is that it might tend to be bad practice to release that information to another party. We are seeking to obtain compliance with the Act, not to get redress specifically to the complainant in respect of the matter. For those reasons our investigations are generally kept confidential.*

***CHAIR**: Do you not see that there is some potential to diffuse the whole thing? These people know what is going on. In this case the [consumer] knows what is going on. They can see that someone has actually looked at it and perhaps concurs with them. You might actually dampen the whole thing down and give them some confidence. It seems that the processes - there is no proactivity in just trying to reassure people that there is someone looking out and looking into their problem*[273]*.*

The consequence of withholding crucial evidence can create inconsistent outcomes regarding the same building problem. Additionally, it imposes an unreasonable burden on the consumer to supply appropriate information already collected by the DFT.

- **Evidence from investigations when supplied to the Tribunal may not carry any weight**

  The Committee has heard that evidence from a Departmental investigation on the same matter that is in dispute, when given to the Tribunal, is not necessarily given consideration by the Tribunal.

  ***The Hon. HELEN SHAM-HO:…**Shouldn't a departmental report be more compelling, if I may put it that way, than any other evidence presented by the builder or the owner?*

  ***Ms CHOPPING:** If it is thought that a report from the Department of Fair Trading should carry more weight than other reports submitted by either experts, and the legislation is*

[272] Transcript of Evidence 14 June in camera p 33
[273] Transcript of Evidence 19 June 2002 p3 in camera

amended in that way, that will be fine. But at the moment, legally, it does not carry any more weight than other reports presented by other technical experts.

The Hon. HELEN SHAM-HO: *But the department has no vested interest, whereas the builder's report may be independent from another expert's or owner's report by another independent expert, but they have a vested interest because they get paid for it. The department is an independent, impartial third person. Would it not be more compelling? I do not think there is any requirement in our legislation to say that you must not follow the departmental report.*

Ms CHOPPING: *Of course, there is nothing like that, and I am not saying it is not taken into account. But there is no provision legally at the moment for the tribunal to give it more weight, for example, than other technical reports presented by other people of equal qualification. Reports that are prepared for the purpose of tribunal proceedings or court proceedings, and where someone is involved after the dispute has arisen, will always be regarded a little differently, for example, than a report that was prepared before the dispute arose. If you are asking for something to be prepared for a particular purpose in proceedings, it may not be quite as independent or objective as something prepared before people fell out and formal proceedings were commenced. If the department report falls into that category, something that is done early, before the tribunal proceedings are commenced, it would have that additional weight anyway.* [274]

- **The two processes are not synchronised**
  The two processes work along different time frames which can be problematic and inconsistent. For example, it has been possible that the Tribunal could order the builder to undertake rectification whilst the Investigations unit is considering removing the builders license.

  CHAIR: *… The question was how can the tribunal direct a builder who is uninsured or unlicensed to go back and do some rectification work, when probably the reason the builder is before the tribunal in the first place is that it did the wrong thing because it was unlicensed?*

  Ms CHOPPING: *With that particular issue, the builder would not be before the tribunal because it is unlicensed or uninsured, it would be before the tribunal because of a dispute about the quality of the work. We get disputes about quality of work whether or not the builders are unlicensed or not insured. David O'Connor has mentioned in this case that the builder is insured or licensed.*

  Mr O'CONNOR: *Subsequently became insured, yes.*

  Ms CHOPPING: *It is possible in this case that the parties agreed to it. I do not know, is the short answer, but there are a variety of possibilities.*

  The Hon. JOHN RYAN: *Excuse me, he is not entitled to be paid at all.*

  CHAIR: *Hang on. Do you think it is appropriate that the tribunal would make an order for an uninsured builder to go and do the rectification work? Is that appropriate, yes or no?*

  Ms CHOPPING: *It certainly raises various issues.*

  CHAIR: *I would take that to mean that you do not think it is appropriate.*

  Ms CHOPPING: *In an ideal world, no.*

[274] Transcript of Evidence Friday 14 June, p16 In camera

> ***CHAIR:*** *Now that this is all on the table, would it be your plan to go back and work with the members of the tribunal and come up with a process not to order an unlicensed or uninsured builder to go and do rectification work?*
>
> ***Ms CHOPPING:*** *In relation to the CTTT, that would happen, that is correct. This is in relation to the former Fair Trading Tribunal. In relation to the new tribunal, that is correct, it will not happen.*
>
> ***CHAIR:*** *Why will it not happen?*
>
> ***Ms CHOPPING:*** *Because it would be regarded as so inappropriate that the tribunal member would not make such an order. We now have a much closer working relationship with the department.*
>
> ***CHAIR:*** *What would be the change? If you have the same members doing the same work and one of them did it before, why would he not do it again?*
>
> ***Ms CHOPPING:*** *In relation to these types of matters, we have different members doing the work.* [275]

Delays with the Investigations Unit have been discussed in detail in Chapter 2. One consequence of the delay is illustrated above. This is compounded by the condensed time frames in some parts of the Tribunal process such as opportunity for re-hearings.

For example, a consumer may lose a case against a builder in the Tribunal because the consumer has not had the resources to provide effective evidence against a better resourced builder or some other procedural issue. However, subsequently the same building matter is investigated by the Department which determines that disciplinary action should take place.

The consumer may then wish to seek a re-hearing to have the new investigation information considered (provided they can get access to it from the Department). However, the re-hearing application may be rejected because time has run out. Re –hearings are discretionary and they must be applied for within 14 days after receipt of the original decision or a re-hearing decision. They are capped at matters involving less than $25,000, despite the Tribunal's jurisdiction to hear matters up to $500,000.

- **Committee's proposal to reconcile the Tribunal/ DFT overlaps**

The Committee has concluded that the current interpretation by the Department and the Tribunal of their respective responsibilities can actually frustrate and exacerbate building problems. There is a propensity to duplicate and elongate processes which adds no value. The "independence" of the two bodies serves little purpose but to allow complex cases to fall between the cracks. The Committee believes that the arms-length arrangement that has evolved is completely contrary to what these organisations were set up to achieve.

In light of the creation of a new Commission, the Committee recommends a new relationship between the investigations function of the Commission and the Tribunal processes. Under this recommended restructure each body remains separate but informs the other and is synchronised to allow efficiencies in process to be maximised. The proposal is outlined in Diagram 2.

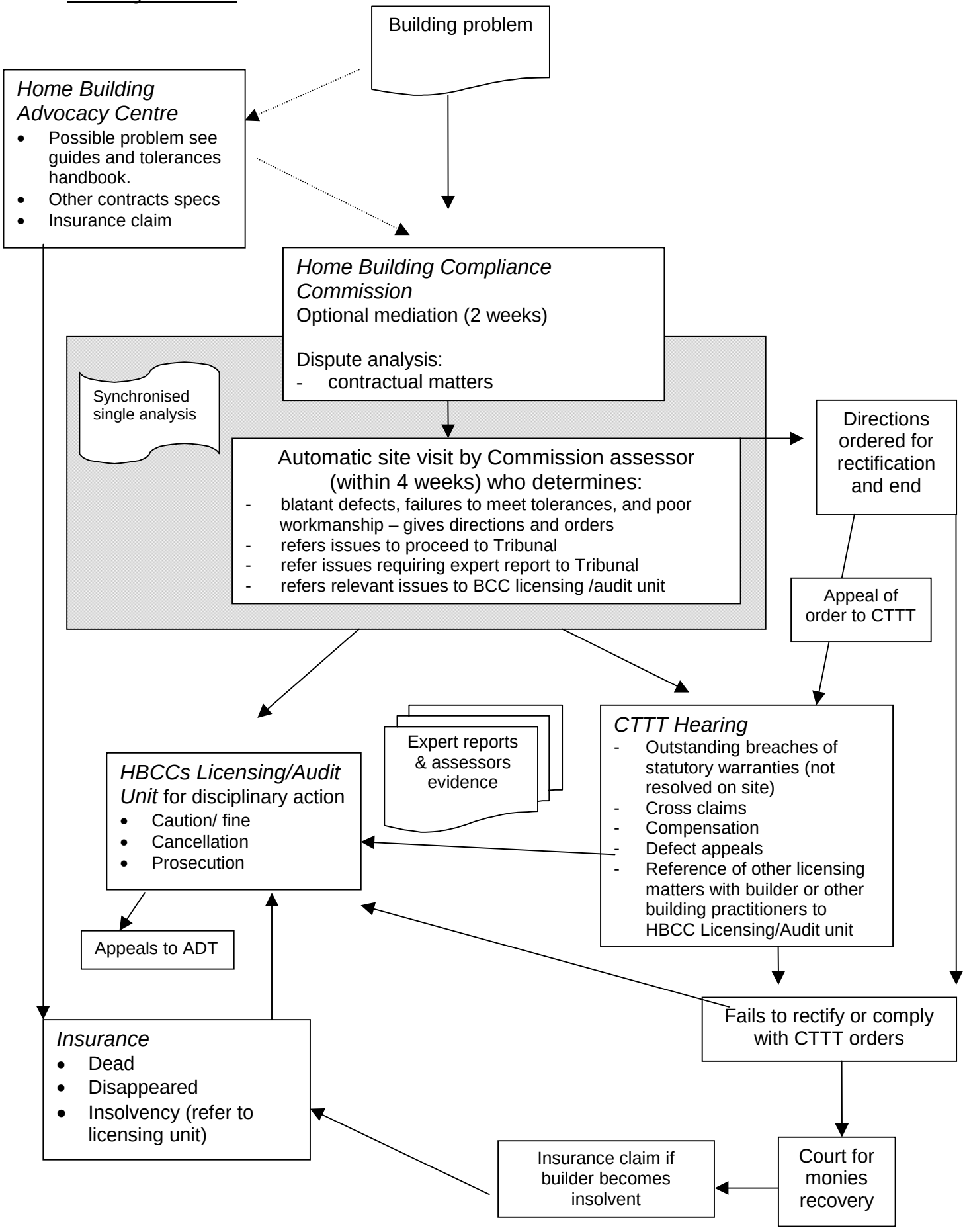
[275] Transcript of Evidence 14 June p18-19 in camera

In Chapters 1 and 4 the Committee has recommended that a Home Building Advice and Advocacy Centre be created. This would be a place consumers could go to find out if their problem is legitimate. The Centre would use the Guide to Standards and Tolerance and examine the building contract to advise the consumer if there is a legitimate issue. If so, they will refer the consumer to the Home Building Compliance Commission. Alternatively, a consumer may directly contract/ approach the Home Building Compliance Commission.

The Committee believes the Commission should be the single government “front desk for home building problems. When a problem arises, the Commission would replace the functions of the Building Conciliation Service and attempt to resolve a dispute in the first instance, say two weeks. The Commission would also identify if there is a possible licence breach entailed in the dispute which needs to be further examined by the Licensing/Audit Unit of the Commission.

Although the builder and consumer settle by agreement at this stage, the matter may reveal a license breach by the builder. This should still be pursued by the Commission. For example, a builder may settle and rectify work that is identified as inconsistent with the contract and the matter will not proceed to the Tribunal. However despite the correction of work, the case has revealed that the builder failed to meet the statutory warranty in the contract. As such, this should be recorded against his licensing activities and, depending on the seriousness of the matter, the builder should be cautioned or fined or penalised in some way. The fact that the dispute is resolved, should not always absolve the builder from disciplinary action. This is the incentive for the builder to get it right the first time.

DIAGRAM 6:2 :Proposed arrangements of Building Compliance Commission and CTTT for Building Problems



Where a dispute proceeds, instead of going to the Tribunal, the next step is for a Commission assessor to make a site visit to attempt to resolve the problem. This could be done within a short timeframe, say 4 weeks. The Commission assessor would be a person with building expertise and legislative powers who can go to a site and identify obvious defects and non compliance with the contract, and issue a directions for rectification. This is similar to the role of assessors in the Queensland Building Services Authority.

The assessor may not be able to determine all the issues on site, such as the integrity of a slab and may require expert reports to be prepared. Further there may be complex matters of cross claims and payment issues that should be resolved by the Tribunal. However the assessor has the powers to see that urgent obvious matters are dealt with promptly for both parties without a need to collate a great deal of external and costly reports at this initial stage. (*The inspection may not be necessary if both parties agree about the nature of the problem and the assessor then makes directions on how to resolve it).*

A basic description of how the Commission assessor would work, make expert determinations and directions orders on site was aptly described in hearings by Mr Stokoe, Legal and Contracts Manager of the NSW Master Builders Association

> ***Mr STOKOE****: There is actually one word I would like to add to my comment. What you should be looking for is expert determination, not just mediation, "Have a talk and see if you can agree on something". That is great, that is a first process, but if you can get the independent person to say, "I have heard both sides. I have seen the work. I can use my expertise to say that is good or bad. I know you have not reached agreement. You have agreed on A, B and C, but D, E and F and are still outstanding. My interim ruling is 1, 2 and 3. Builder do 1, 2 and 3", and the problem is gone. "I won't do it, Tribunal", then let the consumer go to the tribunal or make the builder respond to it, put a benchmark in through this process which is early, subjective, and say, okay, there is a preliminary decision. If they can live with it, the problem has gone, but give that person who is hearing it, the person who is determining it a chance to make a decision. It is not irrefutable, it is not that they can never be wrong, but give it a benchmark, give it some status, and when it goes to the tribunal, rather than have a bunch of consultants and lawyers come in, let that ruling have some standing, because once you have gone to the trouble of independently reviewing the work and saying, "Hey, look, I think this is what is wrong. Builder, you do A, B and C to fix it up", if he is fair dinkum he will do it, if he is genuine he should do it. If he is not going to do it, then he has got a problem with his long-term future I would have thought.*[276]

Where the builder or consumer disagrees with the assessor's directions, they can go to the Tribunal. However the report from the assessor will be a crucial document relied upon in the hearing. The consumer and builder may obtain further expert reports to give weight to their respective arguments.

The assessor will also direct matters to the Tribunal regarding items that cannot be determined on site or are complex. The Tribunal will then call upon expert reports and make further more detailed examinations of complex matters.

The benefit of this proposal is that the core problem is analysed early, by an independent party, without parties having to get expensive reports. The one analysis can be used for both license compliance and dispute resolution systems.

[276] Transcript of Evidence, 10 May p115

The Commission assessor will also be able to identify if there are other practitioners such as structural engineers, designers or Council and private certifiers, that may have contributed to the building problem and direct that an the Commissions Investigations/audit Unit examine their activities. These practitioners, who will now be licensed, can have their activities examined for possible breaches of their license conditions.

Checks and balances would exist to address appeals of decisions at various stages and ensure that that probity and scrutiny of assessor behaviour was maintained. Assessors as public officials would be subject to complaints through the Commission, or to the ICAC and the Ombudsman. The Commission would also have arrangements to monitor consistency and review of assessors decisions such as through a reference panel of government officials and peers.

Recommendation 48
The Committee recommends that streamlined dispute management by the Commission consists of:

- a single front desk for consumer building problems, replacing the Building Conciliation Service of the Tribunal, to coordinate license complaints and dispute management;
- automatic on site determinations and orders be given by Commission assessors regarding defective work, prior to any dispute proceeding to the Tribunal (this does not preclude parties settling prior to hearings);
- common definitions are used by the Commission and Tribunal of defective work;
- the assessments/ reports of the Commission have standing in the Tribunal and be recognised as independent.

6.3.3 The Consumer Trader and Tenancy Tribunal

Various issues have been raised about both the former and new Tribunal and the Building Conciliation Service.

Case Study 3 illustrates the general concerns about the legalistic functioning, the timing and resourcing of matters, and the problems with the decision rationale of the Tribunal.

Case Study 3 – Submission 136
Our case involves a project home builder and has been in the Tribunal since May 2000. Our opinion of the system is that it is very much levelled towards the builder. As it can be seen in the letters attached I have explained how we provided expert evidence in regards to the problems with our home but the Tribunal can dismiss expert evidence and rely on the opinion of the Tribunal Member. In regards to standards and the adhering to the standards we have up to 36mm mortar gaps in our brickwork – the AZ5300 is 10mm. The ratio in our sand and cement in out mortar is not to standard but the conclusion drawn by the Tribunal Member is that quote "the house won't fall down".

… at present we are faced with having to appeal to the Supreme Court to have our case re-heard because a hearing went ahead without us on 15 February 2002 and the Builder was granted and Order for us to pay $45,000. The only avenue for appeal is the Supreme Court and the cost of that to the average family is just too much. I believe the system wants us to give up and just put up with shoddy work. There is so much stress in these situations and the

cost involved in fighting to have the work completed to standard weighs heavily on marriages and financial hardship. I sought Legal Aid to assist us with our case in regards to the Supreme Court but was advised that Legal Aid is not available in building disputes.

All we wanted was to build a dream family home however we are now faced with selling the home to comply with an Order from the Tribunal because we cannot afford to fight anymore. Our family is distraught at how this situation has been handled.

- **Role of Building Conciliation Service**

Concerns have been raised about the workings of the BCS and the value of voluntary mediation. Submissions have argued that the voluntary mediation phase is ineffective, stretching out the timeframe for disputes. It is argued that by the time people make a notification about a dispute to the Tribunal they have already exhausted their negotiation options and want a more formal forum to make a decision:

> *There should be compulsory mediation between parties prior to a hearing before the Tribunal.*[277]
>
> *The arbitration process is a waste of time, it is run by builders for builders and is a delaying process used to wear down complainants. (Sub 34)*

Further it has been argued that the mediation should occur on site:

> *A minimum mediation or conciliation program should involve a direct interactive, step by step program for resolution of a dispute, not the mere simmering or time allowance for further conflict to develop.* [278]

The Tribunal Chairperson noted in hearings that members now have the capacity to go on site and make determinations with the assistance of an expert or building specialist employed by the BCS.

> ***Ms CHOPPING****:….The system that will be put in place over the coming weeks is that with building disputes that come from the BCS, if they are above a certain figure, and we have yet to determine what that figure will be, one of those new building specialists will actually sit with the other tribunal member, who may be more experienced in just conducting tribunal proceedings, as a panel of two, or if we needed to three, to make sure that the parties and the presiding tribunal member have access to that building expertise. I am very much aware that that has been an issue in previous times with the Fair Trading Tribunal and it is one of the reasons why we have taken that course.*
>
> *In terms of the appointment of assessors, arrangements are being made for placement of advertisements using the Public Works tender process, as was used before with the Building Conciliation Service, seeking expressions of interest from people who wish to be appointed as assessors in the building area in the new tribunal. So that will be increasingly available to parties should they wish to access it. However, I do not feel that with the access to these new members with their construction experience, that parties are being disadvantaged by not being able to access assessors at the moment.*
>
> ***Mr SCHMIDT****: And if I could just add a point of clarification for the Committee, obviously the tribunal works within the framework of the legislation as it is now. I know there is a point Mr Ryan was alluding to in earlier discussions in the sense can't we make the parties go out on site and have experts look at it, et cetera. The upfront building conciliation*

[277] Submission No. 54
[278] Submission No. 86

service is based on a voluntary approach. It does not attempt to force people to mediate the dispute. Similarly, with the appointment of assessors, it is based on the parties consenting to the assessors playing certain roles under the legislation, and again, that is one of those tensions - to what extent do you try and put in place a legislative framework which forces people down a particular path or give them that option? That may be a recommendation, that may be a consideration, but as far as the legislation operates now, there is a limit, as I understand it, to what the tribunal can do to bring the parties, prior to a hearing, to an alternate dispute resolution system if they are unwilling to do so.

Mr COLLIER: *Can't the tribunal itself, like any other court in this land, actually go out and have an on site inspection with the relevant persons?*

Ms CHOPPING: *Yes, and does so.*[279]

The process of mediation and use of on -site assessors remains voluntary under these new arrangements established by the Tribunal. However under the proposal put forward by the Committee, the assessor would be employed by the Commission and automatic on- site inspections would occur and directions would be given up front in the dispute process as noted in Section 6.3.2

- **The Tribunal - a simple non-legalistic alternative**

The objects of the Tribunal are outlined in its establishing Act Part 1(3). They include*:*

a) to establish a Consumer Trader and Tenancy Tribunal to determine disputes in relation to matters over which it has jurisdiction;
b) to ensure that the Tribunal is accessible, its proceedings are efficient and effective and its decisions are fair,
c) to enable proceedings to be determined in an information expeditious and inexpensive manner,
d) *to ensure the quality and consistency of the Tribunal's decision making*.

The submissions made to the Committee have indicated that the Tribunal and its predecessor have not been meeting these objectives. Submission cite extraordinary long cases taking years to resolve and costing thousands of dollars, hardly determinations that are "expeditious and inexpensive". Submissions have argued that they have been advised incorrectly and proceeded with actions outside jurisdiction, hardly "efficient and effective". Submissions have cited that their matters have been handled without due regard to evidence nor consistent with previous rulings, hardly "quality and consistency " in decision making.

In addition, the Tribunal can have multiple party proceedings. The parties commonly joining in proceedings were the insurers co-joined with builders, and possibly subcontractors. It is often the case that these co-joined parties will have legal representation and additional experts. This expands the capacity and complexity of the Tribunal process and moves away from a non -legalistic approach.

The Committee notes that the Government recognised the failings of the former Fair Trading Tribunal and that the introduction of the new Tribunal was designed to address many concerns that have arisen. While not wishing to frustrate the new Tribunal from improving the situation, the Committee believes that, based on issues raised in submissions, the new Tribunal should be closely scrutinised to ensure it actually delivers better outcomes.

[279] Transcript of Evidence 10 May p48

- **Caseload and staffing**

A key problem cited has been that many of the members dealing with building matters have legal rather than building backgrounds:

> ***Ms HOPWOOD:*** *Just one more question about the Consumer, Trader and Tenancy Tribunal: Would you like to give us your opinion about its function and apparent success, or just your opinion about the CTTT?*
>
> ***Mr STOKOE:*** *I have appeared approximately 20 times so far since it was the Fair Trading Tribunal and the CTTT. I am a lawyer and I have litigation background,…. Could I say that they are not proactive, they are reactive, as a generalisation. The concept of the tribunal now gladly adopting a "get in quickly" attitude - we wrote to the department and the submission was that that should be a compulsory up-front issue before you even go to the tribunal. Why should you have to lodge a form with the tribunal to have early intervention?*
>
> *Also, with the greatest respect, I have known several of the members in the tribunal through my legal history and, while they are great lawyers, we are talking usually about building work which may involve not just contract disputes, if contract disputes at all - that is a legal issue - but technical building works. I am a lawyer, and I think I am a pretty good lawyer, but don't ask me about technical building stuff, I haven't got a clue, yet you have the tribunal. The only advice I have been given about the tribunal hierarchy before the change to the CTTT was that, of 60-odd members, four had any specific building expertise or experience. That, to me was very scary. I am not the most political person in the world, so excuse my bluntness, but at a meeting with the tribunal - it was a very pro-active meeting - that issue was raised and, of the four, one was actually a project manager, does not build himself. I would like to see the place full of, for building disputes, real live builders. They obviously will not know the parties - if they do they would have to disqualify themselves - but it is full of lawyers and, being a lawyer myself, I will say it openly: They are not the best dispute resolvers in the world because they will not have the expertise* [280]

The Tribunal has 8 divisions including home building, residential parks, motor vehicles retirement villages, tenancy, general strata and community schemes and commercial. The Tribunal is expected to deal with around 65,000 to 70,000 cases in a year.

The Tribunal has approximately 60 members. The Chairperson of the Tribunal noted that there are now approximately a dozen new part- time members with particular experience in the building industry. There are also 8 case officers assigned to the Building Conciliation Unit. Building cases (based on the previous year's applications to the FTT) are expected to be around 5000. Since the establishment of the BCS, applications received by the Home Building Division have increased substantially. For the 2001/ 02 financial year to the date of cessation of the Fair Trading Tribunal, the monthly average number of applications was 282. In the first month of operations, the Tribunal has received 506 home building applications.

The Tribunal reported to the Committee that it had inherited a case load from the former Tribunal. The new BCS/CTTT early intervention processes should ensure that the new turnaround from lodgement to hearing will be reduced from 12 weeks to 6 weeks. The Committee is concerned that the Tribunal's staff numbers and expertise are insufficient to meet 500 claims per month and a performance target of six weeks "lodgement to hearing" turnaround.

[280] Transcript of Evidence 10 May p114

It has been suggested by two former Tribunal members that the increased Tribunal caseload may also be related to changes to the Tribunal's jurisdiction. As explained:

> *Evidence has been given to the Committee that the BCS has experienced an "unexpected" level of applications. This level was in fact anticipated by the Fair Trading Tribunal (and was notified in its submissions on the proposed legislative changes in February 2001) before the setting up of the BCS. The projections were based on the proposed legislative reforms which now make the Tribunal the "preferred jurisdiction" for building claims. As a consequence of those provisions, matters which were previously dealt with by the Local Court would be bound to come to the Tribunal, the majority of these being debt collection claims. The Tribunal presently does not have the facility to implement appropriate procedures such as default judgments for a large volume of debt collection claims. This would assist the Tribunal in streamlining its processes with respect to these applications.* [281]

Concerns about caseload, staffing and subsequent delays in the new Tribunal were raised not only by consumers but also builders - both the Newcastle and NSW Master Builders Associations noted in submissions:

> *Whilst acknowledging that the CTTT is in its early days the following comments relate to the NMBA's experience to date:*
>
> - *Lack of facilities*
> - *Lack of staffing*
> - *Lack of credit card facilities*
> - *Swamped with case loads*
> - *Procedures are unclear and inconsistent*
> - *Little consistency in the manner in which members conduct hearings (Sub 191 – Newcastle Master Builders Association)*
>
> *The MBA's Legal Department however reports that concerns still exist with the new CTTT, particularly in regards to the operation of the Registry. It is also reported that many of the previous members engaged by the former Building Disputes Tribunal (BDT) have been re-engaged by the CTTT. In summary it is suggested that the name may have changed however, the faces and many of the problems still remain. Complaints regarding the former BDT in respect of the backlog of matters can only be compounded under the CTTT by amendments of the Home Building Act last year.*[282]

The Committee believes that the Tribunal caseload needs to be closely monitored and causes of variations examined in detail.

- **Decision rationale of Tribunal**

Many consumers and builders submissions have identified problems with the decision rationale applied by the former and the current Tribunal.

It is argued that the Tribunal's decisions are inconsistent. A previous decision by the Tribunal is not a reliable indicator of a likely decision in a similar matter, unlike precedents in other legal forums.. A second argument is that, in its efforts to resolve matters quickly and at least cost, the Tribunal settles for the lowest common denominator arguing that the "building won't fall down" . This decision relieves the builder from meeting basic Code requirements and ignores the fact that the work is technically defective.

[281] Submission No. 233 p8
[282] Submission No. 190, Master Builders Association

As noted in Chapter 2, the Building Code of Australia is not referenced in the statutory warranties of the building contract. This ramifications of this were discussed in hearings:

> ***The Hon. JOHN RYAN:*** *Anyway, what regard does the tribunal have to the Building Code of Australia? I have dozens of consumers who also say to me they had a consultant's report that told them that the slab, the frame, the whatever, does not conform to the Building Code of Australia. They were absolutely sure they had a rock solid case to take to the tribunal. When they go to the tribunal, the tribunal then says, "Look, this is a matter of poor workmanship. It is either aesthetic and you just have to get used to wearing it" or "the building is not going to fall down. It is too expensive to ask the builder to rectify that work", and compromises are made and consumers tend to feel what happened to their case. They thought that they had a contract which said that something had to be delivered according to a certain standard. It is not delivered according to a certain standard and the tribunal uses the discretion to substitute something else, and frequently the consumer can spend a fortune getting to this point, and lose a fortune. I have got one - this matter was in fact dismissed by the discretion of the tribunal and they now face the costs of the builder, because they were regarded as being too particular about something as important as the slab. Is the tribunal able to regard the Building Code of Australia as an absolute definite requirement or is the law defective in that it does not allow them to do that?*
>
> ***Ms CHOPPING****: The tribunal member is required to take into account all relevant evidence that either party presents. Whichever party is seeking to rely on the building code would presumably submit that into evidence and highlight the particular points. It is not, if you like, set out in the CTTT legislation that all tribunal decisions are to be made according to the code, but having said that, the evidence from the other side to be able to, if you like, overcome the presumption would have to be pretty strong, and again not knowing the particular details of the particular cases you are referring to, it is -*
>
> ***The Hon. JOHN RYAN:*** *I might send you some.*
>
> ***Ms CHOPPING****: By all means. The other issue perhaps to bear in mind is that in these proceedings, some of which do take several days, vast amounts of evidence is presented, vast amounts of material, both written and verbal. The building code may be one part of that, a very important part, but one part of the overall context of dispute, including discussions that the parties may have had or that one party may give sworn evidence that they had, other building experts' reports, et cetera, and you may be interested to know that from discussions that I have had with builders as well, they have the view that - in fact exactly the same things that you say - that if they have a contract with a consumer and it is black and white and it is all set out and it is all in the contract, why doesn't the tribunal just go on the contract and how is it that consumers can end up being awarded thousands of dollars while the tribunal said …*[283]

The Committee believes that Tribunal judgements should detail defective works in accordance with definitions of defective work under the BCA or in the proposed Guides and Tolerances or as specified in the revised model building contract. This is not to say that the Tribunal has to order that a building be completely rectified to meet the Code or contract precisely. However, a statement is clearly made about the nature of the original problem. It is it identified to the builder and the consumer what the acceptable quality of the original work should have been, and if necessary can be used in disciplinary proceedings against the builder and other practitioners connected with the matter.

[283] Transcript of Evidence 10 May, p55-56

Secondly, the Committee believes that by having the Commission's assessors undertake an on-site inspection and give rectification orders about obvious defective work, the Tribunal's need for "vast amounts" of evidence, expert reports and material in cases will be substantially lessened.

As noted previously, the Committee believes that by having an on-site Commission assessors make directions, the number of disputes proceeding to the Tribunal will be reduced. However, complex and technical matters will still need Tribunal examination which may call upon further technical expertise. The Committee recommends that the Tribunal should modify its use of technical witnesses and expert reports. It has been proposed that where expert opinion is needed, the Tribunal should establish a standing panel of building experts. These experts would provide a report on the disputed matter to both parties which would be jointly filed. The cost of this report would be the shared by the parties.

The Committee believes this arrangement will help avoid the situation of "duelling experts", minimise report costs, and expedite cases.

Recommendation 49
The Committee recommends that:

- the Tribunal establish a panel of accredited building experts, who will report jointly to parties to a dispute;
- the legislation provide that only one report from an accredited expert may be jointly filed by the parties in the Tribunal proceedings without leave; and
- the legislation provide that the parties shall be jointly responsible for the costs of such a report in the Tribunal, subject to any later costs order.

- **Adjournments**

A particular concern about the Tribunal's legalistic approach is its application of adjournment processes. Submissions made to the Committee suggest that the Tribunal gives too many adjournments. It was explained by the Tribunal that such postponements were needed to ensure that each party was able to collect relevant evidence and build their cases.

> ***Ms CHOPPING** : …One of the most contentious aspects of disputed cases in the tribunal are adjournment requests, rather than the actual final orders. In any contested case where there is a large amount of money involved one party or the other at some stage is going to ask for an adjournment, whether it is an adjournment of the case conference, an adjournment of the hearing, an adjournment if you will in terms of a request for an extension of time…..*
>
> ***The Hon. HELEN SHAM-HO**: Do you have a rule like the courts that three times adjournment and you are out, you cannot have more than three times? That is a big problem, is it not?*
>
> ***Ms CHOPPING**: It is a problem in the sense that it is a problematic issue for the tribunal to deal with. Because we are a tribunal and not a court -*
>
> ***The Hon. HELEN SHAM-HO**: Can you revise your rules?*
>
> ***Ms CHOPPING**: We can but our legislative charter is to the extent practical to operate on an informal basis, if parties are not represented to provide them assistance.*
>
> ***The Hon. HELEN SHAM-HO**:… Why do you not have a guideline? It is up to you to decide the guidelines for the applicant or the attendees anyway. If you actually had a*

guideline of three adjournments, like in the legal system, then you would cure a lot of problems of delay.

***Ms CHOPPING**: Yes, and that would certainly be very straight forward and it would be quick and neat and solve a lot of administrative issues from that point of view. The issue that it would raise would then be questions of natural justice. I suppose it is a bit like the mandatory sentencing issue. If it is your third request for adjournment, then perhaps it is because you are in the ambulance being taken to hospital. I mean I am using an extreme example* [284]

The Committee considers that some tightening of adjournment arrangements is required, to ensure matters are undertaken expediently for both parties, so that adjournments are given in exceptional circumstances and not misused to 'wear down' either party.

- **Transition issues**

The Committee has also noted that in the transition to the new Tribunal, some cases have been adversely affected by changing rules mid way through their cases. For example the Tribunal delayed the handing down of a decision, which then meant that the consumer was ineligibility to apply for a re-hearing because revised legislation limited the value of claims that can be re-heard to matters less than $25,000.

***Ms CHOPPING:** The $25,000 limit is something I cannot comment on. It came in and the law changed. If it changes and that limit is increased, that will be fine.*

***The Hon. JOHN RYAN:** But you can understand their annoyance.*

***Ms CHOPPING:** Absolutely.*

***The Hon. JOHN RYAN:** Waiting six months means being caught by a different law.*

***Ms CHOPPING:** Absolutely….*

***The Hon. JOHN RYAN:** If there are any other people caught like that it seems to me to be not impossible to recommend to the Minister that we legislate in such a way to provide for a proper transition. It could be legislated in a way that makes it possible for them to apply?*

***Ms CHOPPING:** Certainly the tribunal would have no argument with such a provision.*

***The Hon. JOHN RYAN:** That seems to me to be a neat solution.*[285]

The Committee sees that the Tribunal activities should be closely scrutinised to ensure that it delivers a better system than it predecessors. Under Section 91 of the Consumer, Trader and Tenancy Act, the objectives of the Act are to be reviewed after 3 years of the Tribunal's commencement (early 2005). This review will encompass the range of activities undertaken by the Tribunal not just its building matters. The Committee proposes that this review should include a performance audit of building matters and examine the concerns raised in this Chapter about the Tribunal.

[284] Transcript of Evidence 19 June p18-19 in camera
[285] Transcript of Evidence 14 June p 6 in camera

Recommendation 50
The Committee recommends that the review of the Act establishing the Tribunal include a performance audit of its home building dispute activities to identify it those objectives are being achieved, its resourcing adequate, and its staffing appropriate. Specifically the performance audit should examine:

- reduction in legalistic operations;
- effective caseload management;
- preferred jurisdiction arrangements;
- decision consistency and appropriateness;
- adjournment frequency; and
- management of cases caught between legislative amendments.

- **Introducing more parties to the Tribunal proceedings**

As noted previously, the Tribunal has the capacity to join other parties in proceedings. The parties commonly joined are the insurer and builder. Since insurers are now last resort, and therefore only a relevant option for the consumer when the builder is dead, insolvent or disappeared, insurers will not frequently appear at the Tribunal.

The Committee has considered submissions suggesting extending the Tribunal's jurisdiction and powers to enable it to make orders against certifiers and other parties to make these parties more accountable in the building process. Also, this may prevent the consumer having to undertake additional legal cases in other forums to track down the other parties.

> ***CHAIR:*** *That is right and, at the end of the day, the person whose home is uninhabitable or is falling down around them, they have enough on their plate chasing the builder, they have probably lost all their money in the house, they do not have any money to engage legal representation, so they can only rely on the tribunal to chase the builder, they cannot afford legal representation to go to another jurisdiction to chase down the certifier as well and they simply financially cannot afford it and probably emotionally cannot afford it, so the concept that has been talked about is that the certifier and indeed maybe, in some cases, the developer and the builder might end up before the tribunal with orders against all of them and, if they all think that is going to happen, they might actually take more care early in the process to avoid it in the first place.*[286]

The Committee heard various consequences which could arise from adding parties to the dispute:

> ***Ms CHOPPING****: Yes. It would then be an issue I suppose in a practical sense, I mean a legal sense, whether the certifier was somehow joined as a party to the consumer's application, and there would then perhaps need to be some thought given to whether that means that the consumer is facing then both the builder and the certifier. Possibly you have then doubled the potential costs order that the consumer may be liable for if they lose, certainly doubled the number of legal representatives at the table. Presumably the certifier is going to be insured, so that might be yet another complication.*[287]

Given the evidence of the complexity of current cases before the Tribunal, the Committee is cautious to add more litigants and inevitably more cost and time to proceedings. Placing

[286] Transcript of Evidence 10 May p65
[287] Transcript of Evidence 10 May p66

consumers in a ‘David and Goliath’ battle is again moving away from a simple non legalistic system.

The Committee believes that the way to make other practitioners more accountable in building disputes can be achieved though the licensing mechanism. The recommendations in this report to license other practitioners, to enable consumers to complain about those other practitioners, and to have audits and disciplinary action imposed upon them is one part of improving accountability. By requiring indemnity insurance on those practitioners, the builder is able to pursue a practitioner in cases where they are liable for contributing to the building problem. Finally, the Commission assessor and the Tribunal, on discovery of other practitioners being involved in the dispute, will be required to cross reference this information to ensure prompt action is taken against these other parties.

Recommendation 51
The Committee recommends that the Consumer Trader and Tenancy Tribunal be required to refer its decisions regarding builders and other practitioners to the license/ audit unit of the Commission.

CHAPTER 7 Strata Schemes

7.1 INTRODUCTION

While a large number of submissions raise concerns relating to free standing or attached single dwellings, approximately ten per cent deal specifically with problems encountered in the purchase of strata scheme units, where particular issues emerge in addition to those identified in earlier chapters of the report.

Therefore, where there is a commonality of concerns relating to compliance with the Building Code of Australia and Australian Standards, the licensing of builders, the certification process and the Home Warranty Insurance Scheme, these are covered in preceding chapters. This Chapter details the particular issues confronting purchasers of individual lots in multi-dwelling buildings known as residential strata schemes.

7.2 BACKGROUND

7.2.1 When were Strata Schemes established?

The private ownership of individual lots in multi-dwelling units commenced in NSW in 1961 with the enactment of the Conveyancing (Strata Titles) Act. The resulting development of strata schemes, particularly in Sydney suburban areas, was further regulated by the Strata Titles Act 1973, which addressed important management and dispute resolution issues and provided for the administration and further development of these schemes.

The evolution of strata schemes over the succeeding two decades, encompassing a variety of models, including commercial, mixed use, industrial, retirement villages, townhouse and villa developments, necessitated further legislative changes to adequately provide for the circumstances arising in modern strata schemes. As a result of comprehensive public consultations, the Strata Schemes Management Act 1996 came into operation in July 1997, providing management legislation for conventional and leasehold strata schemes.

7.2.2 What proportion of the housing market constitutes Strata Schemes?

As at November 1999, there were approximately 50,000 strata schemes in NSW, with 5 new schemes registered each day, ranging from 2 lots to over 200 lots. It is estimated that there are an average of 10 lots per scheme with more than half a million individual strata lots in existence, of which in excess of 80 per cent are residential.[288]

Nationally, while only 12 per cent of the existing housing stock constitutes multi-dwelling units, in recent years new construction of multi-dwelling units has averaged around 25 per cent of total new construction. In major urban areas, the proportion of attached housing is significantly higher and in Sydney, the proportion of detached dwellings being approved declined from 51 per cent of the total in 1993 to 46 per cent of total in 1997. PlanningNSW has predicted that the ratio of multi-dwelling units to detached dwellings will remain at 55:45

[288] Department of Fair Trading, Review of Strata Schemes Management Act 1996, Issues Paper p9, November 1999.

for the foreseeable future. Moreover, 100 per cent of new dwellings constructed within the Sydney CBD are expected to be multi-dwelling units.[289]

7.2.3 What are the provisions of the Strata Schemes Management Act 1996?

A strata scheme is comprised of common property, which is owned by the owners corporation, and the lots, which are owned by individual lot owners. The lot owner generally only owns the air space within their unit and the car space. This includes dividing walls within the unit, paint on the walls and kitchen, laundry and bathroom fittings and fixtures.

Should an owner or the owners corporation become aware of defective building work in common property, a motion must be carried at a meeting before an insurance claim can be lodged. If the motion is carried, the owners corporation would then lodge the claim.

The Strata Schemes Management Act provides a system of financial and administrative management and decision-making by defining the rights of collective owners in the owners corporation and each owner and occupier in a strata scheme. The 1996 Act introduced a series of reforms in relation to the previous administration of strata schemes by providing:

- More appropriate dispute resolution processes with an emphasis on mediation
- A mechanism to deal with disputes between adjoining strata schemes
- More flexible range of by-laws for the differing types of strata developments
- More direct means of enforcing by-laws of the owners corporations
- Streamlined meeting procedures and changes to quorum and proxy requirements
- Special provisions for 2 lot schemes
- New information mediation and education functions for the Strata Schemes Commissioner
- Increased responsibilities for owners corporations in financial, building maintenance and insurance matters[290]

7.2.4 How are Strata Schemes organized?

Once construction work is completed and the strata plan is registered with the Land Titles Office, the owners corporation comes into existence. In most cases, the original owner, being the builder or developer, will constitute the initial owners corporation. This situation remains in force until 1/3 of the total unit entitlements have been sold and is referred to as the “initial period”. A series of restrictions apply during the initial period, designed to protect the interests of subsequent purchasers. However, these do not prevent the original owner from engaging in activities forming the basis for some of the concerns raised in submissions to the Committee, which will be described later in the Chapter.

Within two months of the sale of 1/3 of the unit entitlements, an Annual General Meeting must be held. This meeting allows the then constituted owners corporation to receive all plans, specifications, certificates, diagrams and other documents (including insurance policies) about the strata scheme and other financial and legal records necessary for the administration of the scheme. The AGM also conducts business to elect office bearers to the executive committee, to appoint a strata managing agent, to adopt the by-laws and to agree to levies.

[289] Australian Building Codes Board, Sound Insulation Regulatory Impact Statement p16, February 2002
[290] DFT Issues Paper, op cit p8

Persons entitled to vote at a general meeting are a lot owner/mortgagee or covenant chargee whose name appears on the strata roll (register of names of owners kept by the Land Titles Office), a company nominee or an appointed proxy. Proxies have effect for a period being not more than 12 months or for 2 consecutive AGMs, whichever is the greater.[291]

The executive committee of the owners corporation is a group representing owners or owners' nominees and may comprise from 1 to 9 members. It administers the daily running of the strata scheme and is elected at each AGM. Any decision made by the executive committee is treated as a decision of the owners corporation, but no individual executive member can make a decision for the owners corporation.

A strata managing agent may carry out some or all of the functions, duties or powers of the owners corporation and is licensed under the *Property, Stock and Business Agents Act*. The appointment and giving of powers to a managing agent can only be decided by majority vote at a general meeting of the owners corporation. A strata manager can only be dismissed or have a delegation changed at a general meeting by a majority of votes.

Dispute resolution procedures, defined in the Act, include a process of mediation provided by the DFT and/or applications to the Strata Schemes Adjudicator or Strata Schemes Board for orders to be made.

7.3 ISSUES RAISED IN THE INQUIRY

Although submissions from unit owners have made reference to concerns about lack of compliance with BCA standards, problems with self-certification, the need for independent auditing of private certifiers and builders licensing issues, these have been dealt with in earlier chapters of the report. Consequently, this Chapter will confine itself to issues relating particularly to strata schemes, resulting in specific conclusions and recommendations in this area of the housing sector.

7.3.1 Adequacy of consumer information

A recurring theme in most submissions from unit owners concerns the lack of information provided for off-the-plan purchases. Specific reference is made to the paucity of details regarding the legal requirements for occupation certificates to be issued before completing the sale to a prospective owner. This issue is also dealt with in Chapter 5 of the report.

A representative submission from a unit purchaser raised the following problems:

- *Apparent lack of clear records & documentation with statutory authorities relating to the home owners insurance/warranty provisions.*
- *Apparent lack of clear records & documentation with statutory authorities relating to certification approvals during the long construction phase.*
- *The appointment of a Private Certifying Authority, later in the construction phase, did not assist in gaining occupancy as the PCA was not able to certify all the requirements necessary to permit the issue of a Certificate of Occupancy.*[292]

[291] Strata Schemes Management Act 1996, Schedule 2, Part 2, Clause 11(4)
[292] Submission No 146, p1

According to the Director-General of Planning NSW:

> *No-one who moved into the block of units should have been advised by their solicitors to agree to move in without an occupation certificate…We are proposing to Government that the occupation certificate not just say, "I have inspected the block of apartments and it is safe to move in" but "I have inspected the block of apartments and it is consistent with the construction certificate", which in turn has to say that it is consistent with the development consent. So you have that chain right through to the end and the final certificate says not only is it safe to move in but that the building that has been constructed is the same building that was issued a construction certificate, which is in accordance with the DA.*[293]

An officer of Blacktown City Council made this observation on the same topic:

> *I have a case now where we cannot approve a strata plan because the building has been built differently from the approved development consent. The builder cannot sell the building that was certified by his certifier as complying with the development consent. That is not economically efficient.*[294]

The Department of Fair Trading, in response to a question regarding the completion of a sale contract by a purchaser without an occupation certificate or home warranty insurance responded:

> *The difficulty is that you cannot stop a consumer, if they want to complete on legal advice, for whatever reason … or their advisers do not pick up in the contract that there are any deficiencies about planning requirements, people can complete, and some people do.*[295]

The uncertainty in off-the-plan purchases was described by the past President of the Law Society of New South Wales in the following terms:

> *When you are advising a client who is buying off the plan…It is like buying a sponge before it is cooked: do you get one that has risen or one that hasn't? The only way you can really address it, and I tell clients this, is to ensure as much as you can that in the contract there are provisions that allow you to object to what is in a building and what is there at the end of the day if you believe it is different to what you believed you were going to get…You are entering into a contract for something that has not been born yet.*[296]

A representative of the Owners Corporation Network, an organisation representing the interests of 5,000 individual property owners in Sydney's larger strata title developments, described the problem in the following terms:

> *…I agree with you that the buyer should be aware. The challenge we face at the moment is that most buyers are not aware of what they should be aware of, and hence the reason for our existence.*[297]

The above illustrations of the lack of consumer protection reflect a general shortcoming in the provision of advice to consumers when they are contemplating making one of the most important financial decisions in their lives. While the availability of such advice, in itself, may not be a complete solution, it would at least arm potential purchasers with information to make further inquiries about the process and their rights.

[293] Transcript of evidence, 6 May 2002, pp17-18
[294] Transcript of evidence, 6 May 2002, p62
[295] Transcript of evidence, 10 May 2002, p31
[296] Transcript of evidence, 23 May 2002, p58
[297] Transcript of evidence, 5 June 2002, p21

This also applies to the estimated strata fees payable once a Strata Plan has been registered. Prospective purchasers should be entitled to have access to more detailed budget figures specifying the cost of maintaining the building when buying off the plan.

An information document, setting out planning requirements, information about the Strata Schemes Management Act and an estimate of strata fees payable, attached to the sale contract for strata title developments, would assist the purchaser in making more informed decisions and result in better outcomes for all parties. Additionally, there is a need for greater disclosure provisions in relation to linkages between the contractual parties, ie the developer/owner and/or strata/building manager and the contractors hired to provide services and to specify competitive tendering processes for work contracted.

The broader question of consumer advice and protection in contracting for the purchase of home buildings is covered in greater detail in Chapter 4, dealing with consumers.

7.3.2 Conduct of owner during initial period

One of the most contentious issues raised in submissions and oral evidence concerns the selling of on-site management rights to private companies before the first AGM of the owners corporation. Many instances have been cited where contracts for large sums of money have been entered into between the original owner and a private company to provide management services for periods of up to 25 years.

A witness appearing as a member of the Owners Corporation Network described it in the following terms:

> *Unfortunately, in New South Wales, developers have treated that as a new way of developing a new saleable asset because New South Wales does not impose any due diligence on developers in the sale of building management rights… What happened is we have an unskilled building manager who was sold management rights bundled up with a rent roll…*[298]

The witness then summarised his position as follows:

> *What the owners and occupiers of Regis Towers want you to do is to prevent the sale of building management rights for a term of 25 years and allow a developer to control the first meeting of the owners corporation to ensure that agreement is ratified by an owners corporation that did not know of its existence until they went to that first meeting, bright eyed and bushy tailed, having just purchased their new home... The way to prevent the obvious tragedy of Regis Towers would have been to prevent an owners corporation from entering into any performance agreements for a period of time greater than one or two years…Meriton did nothing wrong. It may not be in the public interest, it may not be illegal, but that is what happened, and if you do nothing it will continue and the number of people you hurt will continue.*[299]

A submission from the Management Rights Association of NSW made the claim that;

> *Lengthy terms for management agreements are necessary to allow managers to operate as a proper business with security of tenure. Limiting the term of agreements to periods*

[298] Transcript of evidence, 5 June 2002, p10
[299] Transcript of evidence, 5 June 2002, p10

> *less than twenty-five years will only cause more instability in the minds of managers and make the business less appealing – consequently less attractive to the better operators.*[300]

The Committee is unaware of contracts of similar length applying in other areas of service provision. It therefore cannot support an argument that a contract to provide building management services should have a longer duration than other commercial contracts and considers that, as with other service contracts, periodic reviews and renewals within reasonable time frames is appropriate.

In the issues paper released by the Department of Fair Trading in 1999, as part of its review of the Strata Schemes Management Act, reference is also made to this practice. The specific areas of concern identified include the unregulated nature of the sale of on-site management rights, the lack of restrictions on the length of contracts, the lack of disclosure provisions about arrangements and fees, the lack of dispute resolution processes over fees and lack of financial returns to the owners corporation.

A possible mechanism for ensuring the transparency of contract arrangements entered into during the initial period is to require any such contracts to be registered in the by-laws of the strata scheme. As the by-laws are registered along with the strata plan, this would make any such arrangements open to scrutiny at the first AGM of the owners corporation or at a subsequent meeting convened by the owners corporation. The owners corporation could then vote to change or cancel such a by-law by special resolution.

Additionally, there is a need for greater disclosure provisions in relation to linkages between the contractual parties, ie the developer/owner and/or strata/building manager and the contractors hired to provide services and to specify competitive tendering processes for work contracted. A further check in the system to provide greater protection for owners would be to require that all management contracts be subject to regular reviews with agreed performance measures, renewable for a maximum of 5 years.

As a representative of the Home Unit Owners Association of New South Wales, in giving evidence to the Committee concluded:

> *Basically, we are trying to emphasise that the construction and sale of a building is a handover, not a takeover.*[301]

7.3.3 Priority voting rights

Another area of concern raised in a majority of submissions dealing with strata scheme issues is that of the power imbalance between the builder/developer and the individual lot owner when exercising voting rights at meetings of the owners corporation. This can be done by the original owner retaining the majority vote by keeping a certain number of lots or, alternatively, the original owner may provide vendor finance to the purchaser.

The Strata Schemes Management Act contains a provision that mortgagees have an automatic priority right to vote in the place of a lot owner, should the mortgagee decide to exercise it.[302] The principle behind the provision is that there may be occasions where the

[300] Management Rights Assn, submission, p6
[301] Transcript of evidence, 23 May 2002, p41
[302] Strata Schemes Management Act 1996, Schedule2, Part2, Clause 10(1)

mortgagee would have a financial interest in a decision of the owners corporation, which could potentially undermine the value of the property and may want to protect that interest.

In commenting on this practice, a representative of the Owners Corporation Network made the following observations:

> *…consider the conflict of interest that is created in a situation during the first three years of development where you have the builder holding 60 per cent of the voting rights of the building during the warranty period.*[303]

The exercising of priority voting rights may result in an unreasonable level of control over the operation of the strata scheme to the detriment of individual owners by, for example, preventing an insurance claim being submitted by the owners corporation. However, the 1996 Act amended the previous provision of automatic notification of mortgagees of all owners corporation meetings to notification only if an agenda item requires a unanimous or special resolution to be passed.

It would seem that more information should be provided to potential purchasers of strata scheme units about the priority voting provisions.

In addition, some purchase contracts stipulate that the purchaser will execute proxy forms in favour of the developer/financier for a certain period after sale. The question of proxy votes seems less problematic, in that the Act makes it clear that in the case of proxies, if a lot owner attends a meeting, his or her vote renders the proxy ineffective. Moreover, as previously described, proxies are only valid for 12 months or for 2 consecutive AGMs, whichever is the greater.

7.3.4 Claims and dispute resolution

As described above, a case may exist where an owners corporation refuses to lodge an insurance claim for defective building work on common property. The lot owner can apply for an order under Section 138 of the Act and, if successful, the owners corporation could be ordered to make or pursue an insurance claim. A process of mediation, arranged by the Department of Fair Trading, must precede the hearing for an application of this order.

Currently, claims under the home warranty scheme relating to defective work can only be made up to 7 years after the date of completion of the building work. Claims must be notified within 6 months of the claimant first becoming aware of the problem and a person aggrieved by the decision of an insurer can lodge an appeal to the Consumer, Trader and Tenancy Tribunal within 45 days of the decision. This process is described in greater detail in Chapter 6 of the report.

In relation to individual lots, a lot owner is able to lodge an insurance claim, but only in relation to defective work within the air space of their own lot.

A member of the Owners Corporation Network suggested that:

> *The Home Building Act of 1999 should be amended to state that the developer and builder are jointly and severally liable for building defects. Secondly, the developer and*

[303] Transcript of evidence, 5 June 2002, p15

> *builder should be held liable for rectifying all defects that are discovered within the building within the period of 36 months after initial settlement for non-structural defects and seven years after initial settlement for structural defects.*[304]

Legislation has been introduced during the current session, which provides for 6-year cover for structural defects and 2-year cover for other faults.

7.3.5 BCA standards and strata schemes

Whereas the broader question of the adequacy of the building codes and standards applying throughout the construction industry has been covered in Chapter 3, two particular issues have been raised consistently in relation to strata schemes. These are the adequacy of current noise and fire safety standards in multi-dwelling units.

The Australian Building Codes Board, in its regulatory impact statement on sound insulation, identifies a number of factors contributing to increased problems being experienced with current standards and monitoring of noise in multi-dwelling units. As well as the subjective element of noise tolerance by people who have moved from detached housing to high rise apartments, the development and purchase of sophisticated home entertainment systems, including multi-channel home theatre equipment, has resulted in higher levels of noise being generated in apartment buildings.[305]

A number of sources of market failure in relation to sound insulation performance are identified in the ABCB impact statement, including lack of consumer awareness of the problem, high transaction costs for rectification, investment demand and the extended economic life of apartments.[306]

According to evidence provided by a representative of the Australian Acoustical Society:

> *…although the Building Code of Australia sets minimum standards for privacy, many members of the housing industry have interpreted these as absolute requirements…The result has been that owners of luxury apartments built to BCA standards have become dissatisfied with acoustical performances, which in their view are not commensurate with the price they have paid.*[307]*…The way regulations are made at the moment, councils and local authorities are able to specify their own required sound installation standards…If there is no guidance from the local authority, you must use the BCA. The way it is arranged at the moment, local councils are allowed to implement higher standards than are mandatory. The Sydney City Council came to us because, we presume, they were receiving a large number of complaints from apartments in the city and asked for something to be done.*[308]

Representatives from the Australian Building Codes Board, in commenting on a review of acoustic standards currently being undertaken told the Committee:

> *We have a public proposal. We have received 80 submissions…about increasing the level of protection against sound transmission between sole occupancy units…Some people think it should be higher, some people think it should not change and some people think*

[304] Transcript of evidence, 5 June 2002, p6
[305] Australian Building Codes Board, op cit., p17
[306] Australian Building Codes Board, op cit., pp18-19
[307] Transcript of evidence, 20 May 2002, p3
[308] Transcript of evidence, 20 May 2002, p8

we have it about right. So my expectation is that we will go to government within the next month or so with a proposal for the Building Code to change on 1 January 2003.[309]

7.3.6 Corporate governance for larger strata schemes

The issue of the appropriateness of provisions in the Strata Schemes Management Act to deal with the complexities of management of very large apartment buildings was raised by the Owners Corporation Network in the following terms:

The major development in our community now rarely goes below 50 lots…Owners cannot afford to abdicate responsibility to a strata manager who cannot accept it…we need to revisit the Strata Schemes Management Act legislation to provide for a vehicle that deals with, not the block of 12 at Hurstville because we have done it, but with the block of 200 and more we have to find a way of dealing with strata schemes.[310]

In discussing the circumstances relating to the administration of a very large strata scheme, the witness continued:

In my case we turn over $3.2 million per annum in levies. That to me is a lot of money. It needs to be stewarded in a more direct way. We need to have a board of directors…not so much a strata manager after the style of section28; we need a financial controller that writes up the books, draws the cheques. We need an on-site building manager who will be operationally responsible for the implementation of strategic planning undertaken by that board of directors elected by the lot holders…We have to get these corporate governance issues into place or these assets will turn into things you do not want to own.[311]

7.3.7 Changes to assist purchasers of strata units

The Committee is not satisfied that purchasers of strata titled units are provided with adequate information about the nature of strata schemes generally and, in particular, about planning requirements and avenues for redressing problems.

RECOMMENDATION 52

The Committee Recommends that an information document setting out planning requirements and information about the Strata Schemes Management Act, including:

- the potential exercising of priority voting rights by mortgagees;
- an estimate of strata fees payable; and
- a draft budget to substantiate the estimated strata fees

be attached to the sale contract for strata title developments, to assist the purchaser in making more informed decisions.

This document should also specify the rights of individual purchasers and describe the process of seeking legal redress for any problems with building defects and home warranty insurance.

Action is also needed in relation to the selling of on-site management rights by the original owner during the initial period of a strata scheme.

[309] Transcript of evidence, 20 May 2002, p70
[310] Transcript of evidence, 5 June 2002, p11
[311] Transcript of evidence, 5 June 2002, p12

RECOMMENDATION 53
The Committee recommends that any management contract entered into in the initial period must be registered in the by-laws of the strata scheme. All management contracts should be subject to annual reviews with agreed performance measures, renewable for a maximum of 5 years

RECOMMENDATION 54
The Committee recommends that there must be greater disclosure provisions in relation to linkages between the contractual parties, ie the developer/owner and/or strata/building manager and the contractors hired to provide services and to specify competitive tendering processes for work contracted.

In the current review of acoustic standards currently being undertaken by the ABCB, the Committee urges the Board to adopt a higher noise standard for multi-dwelling apartment buildings, to ensure that a greater level of amenity is provided for residents. This is detailed in Chapter 3 of the report, along with the question of the adequacy of current fire safety standards in large apartment buildings.

The Committee has also recommended change in the area of large-scale strata schemes.

RECOMMENDATION 55
The Committee recommends consideration be given to a differential system of “corporate governance” for larger complex strata developments, implemented under the Strata Schemes Management Act, to impose greater emphasis on the owners corporation’s duty to ensure asset protection.