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Further inquiry into the regulation of building standards



Report 11

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Public Accountability Committee

Further inquiry into the regulation of building standards

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Chair: Mr David Shoebridge MLC



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Terms of reference

1. That the Public Accountability Committee inquire into and report on:
 - (a) the efficacy and adequacy of the government's regulation of building standards and specifically,
 - (i) the cost, effectiveness and safety concerns arising from the use of flammable cladding,
 - (ii) private certification of and engineering reports for construction projects, and
 - (b) any other related matter.
2. That the committee report by 25 November 2021.¹

The terms of reference were self-referred by the committee on 24 May 2021.²

¹ The original reporting date was 25 November 2021 (*Minutes*, NSW Legislative Council, 8 June 2021, p 2254). The reporting date was extended to 28 February 2022 (*Minutes*, NSW Legislative Council, 12 October 2021, p 2423).

² *Minutes*, NSW Legislative Council, 8 June 2021, p 2254.

Committee details

Committee members

Mr David Shoebridge MLC	The Greens	<i>Chair</i>
Hon Robert Borsak MLC	Shooters, Fishers and Farmers Party	<i>Deputy Chair</i>
Hon Lou Amato MLC*	Liberal Party	
Hon Anthony D'Adam MLC**	Australian Labor Party	
Hon Scott Farlow MLC	Liberal Party	
Hon Courtney Houssos MLC	Australian Labor Party	
Hon Peter Poulos MLC	Liberal Party	

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* The Hon Lou Amato MLC replaced the Hon Trevor Khan MLC as a substantive member of the committee from 25 January 2022. The Hon Trevor Khan MLC was a substantive member of the committee to 6 January 2022.

** The Hon Anthony D'Adam MLC substituted for the Hon John Graham MLC from 1 October 2021 for the duration of the inquiry.

Chair's foreword

The construction industry is not only one of the largest employers and sources of economic activity in New South Wales, it is also the industry that builds our homes. While significant technological innovations have made construction, especially of high rise apartments, quicker and less expensive, the industry is failing to provide safe, reliable and defect free homes to the residents of New South Wales. Within the context of ever escalating house prices, there is more money than ever to be made from building, and ever greater risks for purchasers should their homes have defects.

The devastating financial and emotional consequences that flow from building defects stood front and centre in this further inquiry into the regulation of building standards, just as it did in our original inquiry, which commenced in mid 2019. Three years ago it was the catastrophic human impact of serious defects in the Opal Towers and Mascot Towers developments; this time it is the Imperial Towers and Skyview developments, and the financial collapse of Privium Homes. This has impacted homeowners in apartments and in a single dwelling traditional homes.

Also front and centre in both inquiries has been the context of 'light touch' regulation which has allowed poor building standards to continue. The industry failings correlate with a process of deregulation by state and federal governments that has left few effective regulators on the ground to enforce standards. This must end and the hopelessly ineffective and splintered regulation of building standards consolidated in a single, well-resourced and empowered Building Commission.

In the last three years there has been a slow and partial turnaround toward re-regulation of elements of the industry, particularly class 2 (high rise) buildings. The questions this inquiry has considered are: have these reforms been working, what further steps are required, and what should be the overall goal of building regulation in New South Wales? We have concluded that, together with the establishment of the Building Commission, the protections currently afforded class 2 buildings must urgently be extended to all homeowners and therefore encompass class 1 (single dwelling) homes.

While the committee's intention in this further inquiry was to revisit the specific issues of private certification and flammable cladding, we are now even more convinced that broader systemic reforms are required, for the protection of those at risk and to prevent further building failures. All three areas are addressed in the 20 recommendations set out in this report.

We have reiterated all of the recommendations of our previous inquiry, especially that the NSW Government establish a single, senior Building Minister with responsibility for building regulation, including administering a new stand-alone Building Act, and for a state-wide Building Commission. Matched with this, the government must move regulatory responsibility for the building and construction industry from NSW Fair Trading to the Building Commission, with a fundamentally different culture of enforcement and compliance, to protect consumers and restore confidence in the industry.

I thank each of the stakeholders, professionals and individuals who took part in this inquiry, especially the people personally affected by the failures of the system, who came forward in the hope of better protections for consumers. I am grateful to my committee colleagues for their collaborative and respectful engagement throughout both of our inquiries, which has lent momentum to the reform process in this critical aspect of oversight. I also thank the committee secretariat for their capable assistance.



David Shoebridge MLC
Committee Chair

Recommendations

- Recommendation 1** **31**
 That the NSW Government adopt the Public Accountability Committee's previous recommendations to establish a single, senior Building Minister with responsibility for building regulation in New South Wales, including administering the new stand-alone Building Act and responsibility for the Building Commission and its Building Commissioner.
- Recommendation 2** **32**
 That the NSW Government ensure that the Building Commission be provided with broad powers and sufficient resourcing and funding to properly oversee and regulate the building and construction industry in New South Wales with a strong customer focus. As an essential component, these powers must be extended to class 1 buildings and others where people sleep at night and whose occupants rely on safeguards.
- Recommendation 3** **33**
 That the NSW Government move all regulatory responsibility for the building and construction industry from NSW Fair Trading, and its accompanying resources, to a newly established Building Commission, with a fundamentally different culture of enforcement and compliance, to protect consumers and restore confidence in the building and construction industry.
- Recommendation 4** **33**
 That the NSW Government urgently create a category for registration under the *Design and Building Practitioners Act 2020* for interior designers and review the five year experience threshold for architects to be registered for class two work under that Act.
- Recommendation 5** **33**
 That the NSW Government place additional statutory controls on phoenixing and phoenixing activity in the building and construction industry.
- Recommendation 6** **59**
 That the Office of the Building Commissioner and NSW Fair Trading ensure that there are clear lines of communication, responsibility and procedural fairness in respect of decisions about building prohibition orders, so that the rights of purchasers are fully protected.
- Recommendation 7** **59**
 That the NSW Government strengthen legislation to ensure that building purchasers are protected from changes to prohibition orders preventing them from triggering sunset clauses to rescind their contracts prior to a property under a prohibition order being deemed suitable for occupation.
- Recommendation 8** **59**
 That the NSW Government ensure that it acts on the recommendation of the statutory review of the *Strata Schemes Development Act 2015* and the *Strata Schemes Management Act 2015*, to establish, in partnership with key stakeholders, a targeted program of support and education for strata residents and owners corporations to build capability in and understanding of strata scheme operation and governance and expressly regulate to provide that regulated attendance fees and costs may be paid to strata committee members undertaking relevant training.

- Recommendation 9** **60**
That the NSW Government implement each of the recommendations of the review report by Mr Michael Lambert for Construct NSW, *Improving fire safety: Industry report on reforms to improve fire safety in new and existing buildings*.
- Recommendation 10** **60**
That the NSW Government act urgently to require that post installation certification of fire systems be completed by an accredited certifier before an occupation certificate can be issued.
- Recommendation 11** **60**
That the NSW Government implement a requirement for practitioners to be licensed in order to inspect, test and maintain fire protection systems in New South Wales.
- Recommendation 12** **61**
That the NSW Government address further requirements on building manuals via the Environmental Planning and Assessment Regulation, and in doing so, adopt the proposal developed by the Australian Building Codes Board, towards a nationally consistent approach.
- Recommendation 13** **61**
That the NSW Government abandon the system of self-accreditation by building certifiers and instead empower and resource a Building Commission, as envisaged in recommendation 2, in consultation with local councils, to fulfil this role.
- Recommendation 14** **62**
That the NSW Government undertake an independent review of the adequacies of Clause 1 in Schedule 1 of the Environmental Planning and Assessment Amendment (Compliance Fees) Regulation 2021, in allowing councils to adequately fund the regulatory and compliance activities required to be undertaken by local councils across New South Wales.
- Recommendation 15** **63**
That the NSW Government ensure that any future government-endorsed or regulated rating system for the corporate entities responsible for class 2 buildings, at a minimum be managed and closely overseen by a government agency, ideally the created Building Commission.
- Recommendation 16** **81**
That, in order to facilitate the timely and effective remediation of flammable cladding across the state, the NSW Government, as a priority:
- work with Local Government NSW to provide enhanced funding to local government to contribute to the costs of regulatory activity related to cladding compliance, and associated legal work
 - work with the insurance industry and other stakeholders to find a solution to the professional indemnity issue, so that the engineers and other consultants required to undertake this skilled work are not exposed to unnecessary risk.
- Recommendation 17** **82**
That the NSW Government provide a substantial funding package, proportionate to the Victorian Government's \$600 million package, to fund the rectification of buildings containing aluminium composite panels and building products that may be banned in future. The package should be available to homeowners who have already commenced remediation work.

Recommendation 18**82**

That the NSW Government continue to support the urgent adoption of mandatory cavity barriers under the National Construction Code in order to address the risk of fire spreading on buildings that have significant aluminium external cladding installed. In the event that the National Construction Code is not rapidly amended to provide for this, a separate NSW requirement should be adopted.

Recommendation 19**82**

That the NSW Government resource and empower the NSW Building Commissioner to assess the risk to health and safety from buildings that have had aluminium cladding installed with façade systems that created the risk of fire spread in the past five years.

Recommendation 20**83**

That the NSW Building Commissioner and NSW Cladding Product Safety Panel ensure, as a matter of urgency, that each cladding product – whether composite or solid aluminium – be tested against both the Australian Standard 1530 (oven test), and also the Australian Standard 5113 (wall test), and that a comparison of the performance of each product be published on the Panel's website. Further, that if solid aluminium is found not to be comparably safe, it be abandoned as the endorsed product to replace cladding under Project Remediate.

Conduct of inquiry

The terms of reference for the inquiry were self-referred by the committee on 24 May 2021.

The committee received 70 submissions.

The committee held two public hearings: one fully virtual and one at Parliament House in Sydney.

Inquiry related documents are available on the committee's website, including submissions, hearing transcripts, tabled documents and answers to questions on notice.

Chapter 1 Background

The construction industry is not only one of the largest employers and sources of economic activity in New South Wales, it is also the industry that builds our homes. Despite significant technological innovations that have made construction, especially of high rise apartments, quicker and less expensive over the past three decades, the industry continues to fail to provide safe, reliable and defect free homes to New South Wales residents. These industry failings have closely followed a process of deregulation by state and federal governments that has left few effective regulators on the ground to enforce standards.

This overall story is one that has been acknowledged by many residents and homeowners, a growing number of industry players and a handful of regulators and politicians. In the last three years this has seen a slow turnaround in New South Wales with the beginnings of re-regulation of elements of the industry associated with class 2 (high rise) buildings. The questions this inquiry has considered are: have these reforms been working, what further steps are required, and what should be the overall goal of building regulation in New South Wales?

Thirteen months after tabling the final report for the inquiry into the regulation of building standards, building quality and building disputes, the Public Accountability Committee self-referred the further inquiry into the regulation of building standards in New South Wales. The commencement of the further inquiry came almost two and a half years after the evacuation of 392 apartments at the Opal Tower in Homebush, followed six months later by the evacuation of 132 apartments at Mascot Towers in Mascot, and four years since the Grenfell Towers tragedy in the United Kingdom.

The emergence of serious defects in the 22 storey Imperial Towers complex in Parramatta and the 960 apartment Skyview Towers development at Castle Hill in mid 2021, as well as the commencement of litigation against the developers of the near new Riviera apartments along the Parramatta River, provided the catalyst for the committee to revisit the regulation and oversight of both building certification and flammable cladding in New South Wales.

Although a number of the committee's recommendations from the first inquiry have been implemented, the committee expressed the need to urgently learn from the overseas disasters and major issues with local developments, for the protection of those at risk and to prevent other building failures. This chapter presents an overview of the first inquiry, the first report, final report and government response.

Initial inquiry into building standards

- 1.1 The Public Accountability Committee announced its initial inquiry into the regulation of building standards, building quality and building disputes on 4 July 2019. The committee's first report *Regulation of building standards, building quality and building disputes*, was handed down on 13 November 2019 and the final report, *Regulation of building standards, building quality and building disputes, Final report* was tabled on 30 April 2020.

First report

- 1.2 In our first report the committee made 19 recommendations with a focus on:
- the adequacy of the NSW Government's response to the crisis in the building and construction industry

- the need for a fully resourced Building Commission
- issues surrounding consumer protections under statutory warranties for residential buildings, professional indemnity insurance, the Home Building Compensation Scheme and the Strata Building Bond and Inspections Scheme
- the introduction of licensing, certification and regulation across the construction chain
- the adequacy of the reforms introduced under the Design and Building Practitioners Bill 2019
- the NSW Government's implementation of the recommendations of two key reports: *Building Confidence: Improving the effectiveness of compliance and enforcement systems for the building and construction industry across Australia*, released 27 August 2019, commissioned by the Building Ministers Forum (comprised of Australian Government, State and Territory Ministers responsible for building and construction) and authored by Professor Peter Shergold AC and Ms Bronwyn Weir (hereafter referred to as the Shergold Weir report), and the *Independent Review of the Building Professionals Act 2005*, released 12 August 2019, authored by Mr Michael Lambert for the NSW Government (hereafter referred to as the Lambert report).³

1.3 The 19 recommendations in the committee's first report are set out in the following table.

Table 1 Recommendations made in the Public Accountability Committee's first report⁴

Recommendation number	Recommendation
Recommendation 1	That the NSW Government expedite the implementation of the regulations to support the <i>Building and Development Certifiers Act 2018</i> , to ensure the Act and regulations are operational well in advance of July 2020.
Recommendation 2	That the NSW Government commence the amendments to the <i>Environmental Planning and Assessment Act 1979</i> passed in November 2017, relating to the building and construction industry, which were scheduled to start on 1 September 2019.
Recommendation 3	That the NSW Government act now to address the issue of flammable cladding. The committee supports a more centralised approach to the issue of flammable cladding on New South Wales buildings, including a financial support package to assist buildings to rectify and remove it as a matter of urgency.

³ Public Accountability Committee, NSW Legislative Council, *Regulation of building standards, building quality and building disputes: Final report* (2020).

⁴ Public Accountability Committee, NSW Legislative Council, *Regulation of building standards, building quality and building disputes: First report* (2019), pp xi-xiii.

Recommendation 4	That the Building Commissioner finalise his work plan as soon as possible, by the end of 2019 at the latest, including detailing the powers, resources and funding required to undertake this role, and make this work plan publicly available.
Recommendation 5	That the NSW Government establish a Building Commission as an independent statutory body led by a Building Commissioner, and that the Commission be provided with broad powers and sufficient resourcing and funding to oversee and regulate the building and construction industry in New South Wales.
Recommendation 6	That the NSW Government establish a statutory industry advisory committee to support the Building Commission, with its aims to include strengthening industry ties with government and guiding the strategic direction of the Building Commission.
Recommendation 7	That the NSW Government, subject to engagement with the insurance industry and economic modelling of the effect of these changes, extend the time period in which to claim under statutory warranties for residential buildings to a minimum seven years for both major and minor defects. Further, the implementation period be as follows: <ul style="list-style-type: none"> • residential buildings currently covered by the Home Building Insurance Scheme – the timeframe in which the Shergold Weir report recommendations are implemented • all other high rise developments – as soon as reasonably practicable.
Recommendation 8	That the NSW Government consider amending the definition of 'defect' to provide more clarity for home owners.
Recommendation 9	That the NSW Government increase the defects bond under the Strata Building Bond and Inspections Scheme, subject to economic modelling of the effect of these changes.
Recommendation 10	That the NSW Government, as part of its implementation of Recommendation 1 of the Shergold Weir report, immediately investigate the current licencing system for building trades in New South Wales, giving particular consideration to: <ul style="list-style-type: none"> • the effectiveness of the existing inspection regime • the need for an independent examination of building trades before a licence is granted, especially for electrical trades

	<ul style="list-style-type: none"> • which additional building practitioners should be licenced, including, but not limited to, installation of medical gas and maintenance of fire safety systems.
Recommendation 11	That the NSW Government, in accordance with the recommendation from the Lambert Review, undertake to consolidate the existing laws and regulation into a consolidated, stand-alone Building Act covering building regulation in New South Wales. This should be principles-based and written in plain English.
Recommendation 12	That the NSW Government establish a single, senior Building Minister with responsibility for building regulation in New South Wales, including administering the new stand-alone Building Act, and responsibility for the Building Commission and its Building Commissioner.
Recommendation 13	That the NSW Government amend the Design and Building Practitioners Bill 2019 to address stakeholder concerns raised during this inquiry, in particular ensuring that: <ul style="list-style-type: none"> • all classes of building practitioners and types of buildings are specified in the bill • a Professional Engineers Registration scheme is put in place • a Building Commission is established, as per recommendation 5 • stakeholders' concerns in relation to the duty of care provisions are reviewed and changes made where appropriate • the duty of care provisions commence on the date of assent of the Act and are applied retrospectively.
Recommendation 14	That the NSW Government not proceed with the Design and Building Practitioners Bill 2019 until it works closely with the Insurance Council of Australia and its members to develop appropriate insurance products. The committee supports bringing forward the final implementation of the bill and the regulations to 31 March 2020.
Recommendation 15	That the NSW Government not proceed with the Design and Building Practitioners Bill 2019 until the draft regulations are developed in close consultation with stakeholders and made available to the Parliament for scrutiny. The committee supports bringing forward the final implementation of the bill and the regulations to 31 March 2020.
Recommendation 16	That the NSW Government review its response to the Shergold Weir report, in light of the evidence to this inquiry that its response does not fully implement the recommendations. Further, that the NSW

	Government expedite its response to fully implement the recommendations within three years, by February 2021.
Recommendation 17	That the NSW Government revisit its response to the Lambert report, and commit to implement those recommendations not covered in the Shergold Weir report that are specific to the New South Wales building and construction industry by February 2021.
Recommendation 18	That the NSW Government, including through the Building Commissioner, consider the merits of reintroducing a 'clerk of works' on projects of a significant scale as part of its review of its response to the Lambert report.
Recommendation 19	That the NSW Government require on-line contemporaneous lodgement through the NSW Planning Portal of all relevant documentation, including plans, drawings and certification, to clearly document the full project as built.

NSW Government response to the first report

1.4 The government response to the first report was tabled in May 2020. As the committee made two reports, the government advised that it would provide a full and complete response to both reports in its response to the final report. The government provided an update on initiatives and reforms and expressed its strong commitment to ensuring the safety of buildings through effective regulation and enforcement.⁵ The government cited various measures as progressively improving the performance of the building sector, and specifically that it had:

- progressed a legislative reform program to deliver tangible, industry wide improvements in building construction and planning
- continued its four point plan to strengthen compliance and oversight in the certification sector, and the development of a certifier practice guide
- continued the assessment and remediation of potentially combustible cladding and provided additional support to councils
- announced the work plan of the Building Commissioner and the six pillar Construct NSW transformation strategy aimed at rebuilding confidence in the construction industry by 2025
- established the Building Reform Expert Panel, a mechanism for regular expert consultation with a broad cross-section of the building and construction sector

⁵ Correspondence from Hon Kevin Anderson MP, Minister for Better Regulation and Innovation, to the Clerk of the Parliaments, providing government response to the first report of the inquiry into the regulation of building standards, building quality and building disputes, 7 May 2020, p 2.

- contributed to the progress of a coordinated national response to the Shergold and Weir report driven by the Building Ministers' Forum and resourced by a National Implementation Team.⁶

1.5 The government noted that it had made progress in the implementation of legislative reforms to address the state's certification laws to enhance protections for current and future owners of residential buildings, specifically:

- amendments to the building and subdivision certification under the *Environmental Planning and Assessment Act 1979*, which commenced on 1 December 2019, providing new compliance powers for private principal certifiers to issue a written direction notice to address non-compliance and streamline the issuing of occupation certificates and subdivision works certificates⁷
- the publication of the Building and Development Certifiers Regulation 2020, together with the *Building and Development Certifiers Act 2018*, to commence on 1 July 2020, to strengthen the accountability and registration framework for certifiers⁸
- the passing of the Design and Building Practitioners Bill 2019 on 13 November 2019, to deliver reforms recommended in the Shergold Weir report to significantly improve the accountability of practitioners involved in design, building and construction⁹
- the finalisation of legislation giving the Building Commissioner compliance and enforcement powers to intervene in and identify and rectify serious defects in existing multi-story residential and mixed-use residential buildings¹⁰, extending his powers to cover buildings under construction and those within the same class completed within 6 years since the occupation certificate¹¹
- the introduction of two new powers:
 - to empower the Building Commissioner to prohibit the issue of an occupation certificate or the registration of a strata plan in prescribed circumstances
 - to issue a stop work order to ensure that building work stops in prescribed circumstances¹²

⁶ Government response to the first report of the inquiry into the regulation of building standards, building quality and building disputes, 7 May 2020, p 2.

⁷ Government response to the first report of the inquiry into the regulation of building standards, building quality and building disputes, 7 May 2020, pp 2-3.

⁸ Government response to the first report of the inquiry into the regulation of building standards, building quality and building disputes, 7 May 2020, p 3.

⁹ Government response to the first report of the inquiry into the regulation of building standards, building quality and building disputes, 7 May 2020, p 3.

¹⁰ Government response to the first report of the inquiry into the regulation of building standards, building quality and building disputes, 7 May 2020, p 3.

¹¹ Government response to the first report of the inquiry into the regulation of building standards, building quality and building disputes, 7 May 2020, p 3.

¹² Government response to the first report of the inquiry into the regulation of building standards, building quality and building disputes, 7 May 2020, pp 3-4.

- oversight by the NSW Cladding Taskforce of the implementation of the NSW Government's plan for fire safety and external combustible cladding ... to ensure that buildings are made safe and emerging issues are addressed¹³
- the establishment of the Cladding Product Safety Panel to provide consistent technical advice on appropriate products to replace non-conforming combustible cladding on buildings¹⁴
- the announcement of six pillars of the work plan of the Building Commissioner to rebuild confidence in the construction industry, supported by the Building Reform Expert Panel¹⁵
- recruitment of up to 15 operational staff to the Transformation Management Team to deliver the six pillars and a further phased delivery of up to 60 new roles responsible for the implementation and operation of the new auditing, registration and design lodgment functions within the Design and Building Practitioners Bill 2019¹⁶
- agreement to the establishment of an implementation team to develop and publicly report on a national framework for the consistent implementation of the Shergold Weir recommendations.¹⁷

Final report

- 1.6** The committee's final report scrutinised further significant problems within the building and construction industry, including safety risks associated with the use of flammable cladding on buildings within New South Wales. It also examined the operational response of Fire and Rescue NSW and role of local councils. The report further explored concerns relating to private building certification and the challenges faced by homeowners, strata committees and owners' corporations in dealing with the rectification of building defects.¹⁸
- 1.7** The committee received an update on the NSW Government actions to address the issues within the industry and progress made in the implementation of the Shergold Weir recommendations, since the tabling of the first report.¹⁹

¹³ Government response to the first report of the inquiry into the regulation of building standards, building quality and building disputes, 7 May 2020, p 4.

¹⁴ Government response to the first report of the inquiry into the regulation of building standards, building quality and building disputes, 7 May 2020, p 4.

¹⁵ Government response to the first report of the inquiry into the regulation of building standards, building quality and building disputes, 7 May 2020, p 4.

¹⁶ Government response to the first report of the inquiry into the regulation of building standards, building quality and building disputes, 7 May 2020, pp 4-5.

¹⁷ Government response to the first report of the inquiry into the regulation of building standards, building quality and building disputes, 7 May 2020, p 5.

¹⁸ Public Accountability Committee, *Regulation of building standards, building quality and building disputes: Final report*, p 4.

¹⁹ Public Accountability Committee, *Regulation of building standards, building quality and building disputes: Final report*, pp 4-7.

- 1.8 Of particular significance, the committee highlighted the need for the NSW Building Commissioner to have statutory powers to address the alarming problems in the building industry.²⁰
- 1.9 The committee expressed its dissatisfaction with the Design and Building Practitioners Bill 2019 and urged the government to adequately resource a Building Commission, to be led by the NSW Building Commissioner, to oversee and regulate the industry.²¹
- 1.10 The 22 recommendations made in the committee's final report are set out in the following table.

Table 2 Recommendations made in the Public Accountability Committee's final report²²

Recommendation number	Recommendation
Recommendation 1	That the NSW Government introduce and debate the powers bill granting the NSW Building Commissioner new powers to ensure building standards as a matter of urgency when the NSW Parliament is reconvened in May 2020, with prompt circulation of the proposed bill to members of Parliament.
Recommendation 2	That the NSW Government resume debate on the Design and Building Practitioners Bill 2019 as a matter of urgency when the NSW Parliament is reconvened in May 2020.
Recommendation 3	That the NSW Government empower the NSW Building Commissioner to oversee all licencing inspections, within the newly created Building Commission. Further, that the Building Commission hire additional, specialised inspectors to create a more robust inspection regime for building, electrical and plumbing work in New South Wales.
Recommendation 4	That the NSW Government release and act immediately on the advice of the NSW Building Commissioner in relation to flammable cladding, or alternatively explain why it prefers an alternative approach.

²⁰ Public Accountability Committee, *Regulation of building standards, building quality and building disputes: Final report*, p 11.

²¹ Public Accountability Committee, *Regulation of building standards, building quality and building disputes: Final report*, p11 – 12.

²² Public Accountability Committee, *Regulation of building standards, building quality and building disputes: Final report*, pp x-xiii.

Recommendation 5	That the NSW Government establish a separate division in the Building Commission, modelled on Cladding Safety Victoria, to lead the response to flammable cladding on New South Wales buildings. The cladding division should sit within the Building Commission, as recommended in the first report of this inquiry, and be responsible to the NSW Building Commissioner.
Recommendation 6	That the NSW Government require property owners, landlords and real estate agents to disclose whether a building contains flammable cladding, and the progress of any rectification measures, to prospective buyers and tenants within a reasonable timeframe prior to signing contracts and when a property is open for inspection.
Recommendation 7	That the NSW Government ensure that all buildings designed for public use such as cinemas, shopping centres, universities, hotels, entertainment centres, childcare centres and hospitals that are assessed as high-risk for flammable cladding are remediated as a priority. Additionally members of the public entering those buildings should be made aware that a building is high-risk. This might take the form of the compulsory display of a notice to this effect and compulsory notification at the time of booking where possible.
Recommendation 8	That the NSW Government publish the specific criteria used to classify buildings as no, low or high-risk in regards to flammable cladding.
Recommendation 9	That the NSW Government provide significant further resources to Fire and Rescue NSW to enable the Fire Safety Branch to respond to the issue of flammable cladding in a timely and comprehensive manner.
Recommendation 10	That the NSW Government urgently establish an expert panel or panels, similar to the panel established in Victoria, to assess and provide advice free of charge on cladding rectification plans, including what materials homeowners can use to replace flammable cladding.
Recommendation 11	That the NSW Government adopt a practice where genuine purchasers and potential tenants are able to access information from the cladding register or similar database to clarify the cladding status of their potential future home.

Recommendation 12	That the NSW Government provide a substantial funding package, proportionate to the Victorian Government's \$600 million package, to fund the rectification of buildings containing aluminium composite panels and building products that may be banned in future. The package should be available to homeowners who have already commenced remediation work.
Recommendation 13	That the NSW Government take a proactive role in identifying other potentially flammable cladding products on the market and move to ban them or otherwise prevent their unsafe use in the construction industry.
Recommendation 14	That the NSW Government, through the Building Ministers' Forum, seek to amend the National Construction Code to require that building materials do not create a risk of debris falling from a building during fire conditions, including for composite products.
Recommendation 15	That the NSW Government, through the Building Ministers' Forum, seek to ensure mandatory accreditation by the National Association of Testing Authorities, Australia (NATA) for all entities that test building materials.
Recommendation 16	That the NSW Government undertake a review of the mandatory critical stage inspection regime under the <i>Environmental Planning and Assessment Act 1979</i> with a view to expanding the number and scope of required inspections undertaken by accredited certifiers.
Recommendation 17	That the NSW Government consider amending the <i>Environmental Planning and Assessment Act 1979</i> to require a mandatory inspection two years after a development consent has been issued to ensure that construction is consistent with the approved development application plan and the construction certificate.
Recommendation 18	That the NSW Government implement the recommendations, where practical, put forward in this report by Mr Michael Lambert to improve the certification system as soon as possible and no later than within two years. Specifically, the recommendations made by Mr Lambert to: <ul style="list-style-type: none"> • provide practice guides for building certifiers and each other class of certifier of building work, setting out the role and responsibilities to which certifiers are held to account • undertake a regular audit program of the work of building certifiers • provide support for certifiers in the form of a help desk and a panel of experts on which they can draw for advice and a

	<p>Reference Panel for mandatory reviews of select designated complex and higher risk developments</p> <ul style="list-style-type: none"> • put in place controls to mitigate conflicts of interest and increase the independence and transparency of engagement of building certifiers and building practitioners • provide building certifiers with enhanced supervisory powers and mandatory reporting obligations in respect to building non-compliance • establish and maintain a program of Continuing Professional Development for all building certifiers • require building certifiers to be members of an approved professional association which is subject to a full professionalisation process oversighted by the Professional Standards Authority • establish a requirement for councils and building certifiers to work together, including a requirement for mandatory reporting to councils by building certifiers of non-compliance and for councils to act on such notices and keep the building certifier informed of developments.
Recommendation 19	<p>That the Legislative Council's Public Accountability Committee as part of its foreshadowed inquiry to review the NSW Governments' reforms into the building and construction industry consider as one of its terms of reference the strengthening of public control of certification, such as returning certification to local councils.</p>
Recommendation 20	<p>That the NSW Government review the NSW Civil and Administrative Tribunal dispute resolution process for disputes relating to strata buildings to ensure the tribunal has sufficient enforcement powers and to simplify and streamline the dispute resolution process, and to ensure that tribunal members have the relevant expertise.</p>
Recommendation 21	<p>That the NSW Government appoint a Strata Commissioner, to sit within the Building Commission that was recommended in the first report of this inquiry. Once established, the Strata Commissioner should undertake an initial project to scope their specific responsibilities. These may include:</p> <ul style="list-style-type: none"> • providing training, support and advice to strata committees, particularly on rectifying building defects and flammable cladding and dealing with strata disputes • monitoring and recommending any necessary changes to the policy settings that govern disputes between homeowners and builders and developers • appointing a buildings' initial strata manager to be in place until the first Annual General Meeting.

Recommendation 22	That the NSW Government explore additional financial assistance measures for strata homeowners who have major defects in their buildings and who are unable to claim under the statutory warranties scheme or the Home Building Compensation scheme, noting that the committee will further consider this matter in its foreshadowed inquiry to review the NSW Government's reforms into the building and construction industry.
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NSW Government response to the final report

- 1.11** The NSW Government's response to the committee's final report was tabled in October 2020 and re-addressed the issues raised in the first report in addition to the recommendations made in the final report.
- 1.12** The government cited significant 'progress on its building reform agenda to restore transparency, accountability and quality to the building industry in New South Wales' towards full implementation by 2025. It specifically reiterated previous developments from the first report and noted further progress as follows:
- the appointment of Mr David Chandler OAM as the NSW Building Commissioner on 1 August 2019
 - the announcement of the six pillar Construct NSW transformation strategy to restore public confidence and create a customer-facing building and construction sector by 2025, including activities related to legislation, ratings information, education, contracts, standards and research
 - the establishment of stakeholder consultation groups to support each of the six pillars
 - commencement of the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (the RAB Act) on 1 September 2020 to provide increased powers of investigation to the NSW Building Commissioner to rectify building work
 - the introduction of a legislative 'duty of care' to the end user regarding the liability for defective construction work which commenced on 10 June 2020, established by the *Design and Building Practitioners Act 2020* (the DBP Act), also extending to work carried out before that date if the breach of the duty of care first came to notice after 10 June 2010
 - the introduction of further checks and balances during the construction process through regulated designs and compliance declarations introduced with the passing of the DBP Act.²³
- 1.13** To address compensation for retrospective defects, the government response explained that retrospective duty of care arrangements within the DBP Act provide clarification for owners

²³ Correspondence from Hon Kevin Anderson MP, Minister for Better Regulation and Innovation, to the Clerk of the Parliaments, providing government response to the final report of the inquiry into the regulation of building standards, building quality and building disputes, 28 October 2020, p 7.

regarding their capacity to seek compensation for buildings with existing defects in certain circumstances.²⁴

- 1.14** For building works currently under construction, the government advised that the RAB Act provides the NSW Building Commissioner with the powers to undertake inspections of building work at critical stages and to issue rectification orders for any defective building work. The NSW Building Commissioner also has the power to issue prohibition orders under the RAB Act, blocking the release of an occupation certificate.²⁵
- 1.15** The government also referred to other legislative reforms implemented to extend the levels of protections to provide residents and purchasers of real estate property through amendments to the Residential Tenancies Regulation 2019 and Property and Stock Agents Regulation 2014. The amendments introduced on 23 March 2020 require real estate agents and/or landlords to notify tenants or new buyers if external combustible cladding exists as part of the property or building.²⁶
- 1.16** Further reforms undertaken by the government include:
- the clarification of roles and responsibilities of certifiers, including conflict of interest provisions and increased compliance and enforcement powers under the *Building and Development Certifiers Act 2018* and the Building and Development Certifiers Regulation commenced on 1 July 2020
 - amendments to building and subdivision certification under the *Environmental Planning and Assessment Act 1979* which commenced on 1 December 2019, providing principal certifiers with new compliance powers to be able to 'issue a written direction notice to address non-compliance matters'.²⁷

Legislation, regulatory controls and key initiatives

- 1.17** The regulation of the New South Wales building and construction industry is complex and multilayered. There are 16 separate legislative Acts which currently apply to class 2 buildings, with 13 Acts applying to all other classes of building work.²⁸ A typology of the five main areas of legislative and regulatory control applicable to the New South Wales building and construction industry, provided by the Australian Institute of Building Surveyors, is set out below in Figure 1.

²⁴ Government response to the final report of the inquiry into the regulation of building standards, building quality and building disputes, 28 October 2020, p 8.

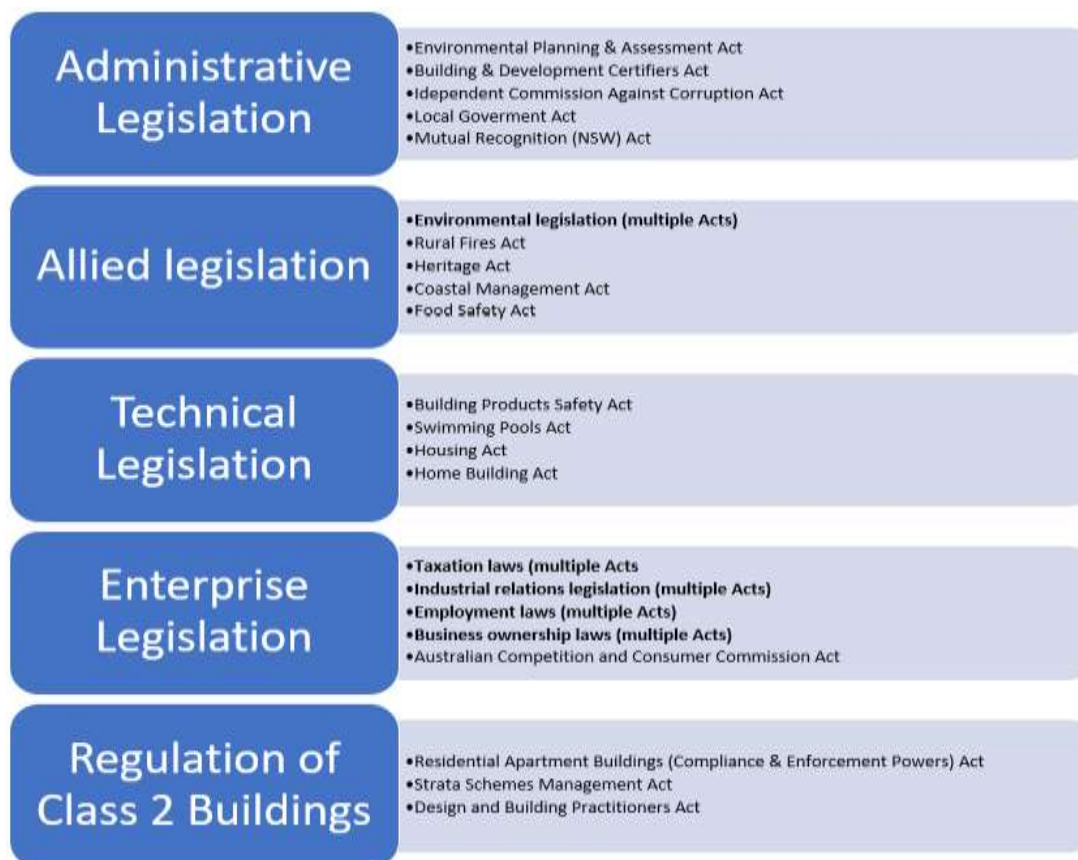
²⁵ Government response to the final report of the inquiry into the regulation of building standards, building quality and building disputes, 28 October 2020, p 8.

²⁶ Government response to the final report of the inquiry into the regulation of building standards, building quality and building disputes, 28 October 2020, p 8.

²⁷ Government response to the final report of the inquiry into the regulation of building standards, building quality and building disputes, 28 October 2020, p 8.

²⁸ Submission 35, Australian Institute of Building Surveyors, p 5.

Figure 1 Legislation applying to the New South Wales building and construction industry



Submission 35, Australian Institute of Building Surveyors, p5

- 1.18** The key legislative instruments that comprise the government's recent reforms and which were the focus of this further inquiry are summarised below.

Design and Building Practitioners Act 2020

- 1.19** The DBP Act, passed in June 2020, and consolidates the government's response to the Shergold Weir report with the aim of restoring public confidence in the building and construction industry through enhanced regulation, following concerns raised about both building defects and combustible cladding. Its provisions are focused on class 2 buildings.
- 1.20** The DBP Act establishes a clear legislative duty of care that is owed to the end user and with respect to liability for defective construction work. This duty of care commenced June 2020 and extends to work carried out before that date if the economic loss caused by a breach of the duty of care first became apparent after June 2010. This retrospective duty of care clarifies the capacity of homeowners to pursue compensation for existing defects in certain circumstances.
- 1.21** Other key elements include:

- It creates a new regulatory framework for the registration of building designers and other building practitioners that prepare and/or declare plans for building elements and performance solutions
- It establishes a registration scheme for professional engineers working on class 2 buildings whereby anyone doing professional work under the classes of structural, civil, fire safety, mechanical, electrical or geotechnical engineering must be registered or supervised by someone who is registered
- A new compliance declaration scheme requiring registered design and building practitioners to declare that design and building work complies with the requirements of the Building Code of Australia.

1.22 In July 2020, further regulation of design and building work, practitioner registration, disciplinary actions, investigations and enforcement provisions came into effect.²⁹

1.23 Evidence to the committee regarding the regulation of private certifiers, as well as the unintended adverse consequences of the Act for interior designers and architects, is discussed in chapter 3.

Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020

1.24 The RAB Act was passed in June 2020 and commenced September 2020. The RAB Act provides the Building Commissioner with a suite of powers to investigate and rectify building work. It allows for the Building Commissioner to inspect work at critical stages, issue rectification orders for defective building work, and, if necessary, issue a prohibition order preventing an occupation certificate being released.

1.25 By definition the RAB Act focuses on class 2 buildings. Specifically it:

- establishes a new defect category of serious defect for the purposes of the Act
- requires developers to notify the Secretary of the Department of Fair Trading at least six months before applying for an occupation certificate
- allows the Secretary or Commissioner to make a prohibition order preventing the issuing of an occupation certificate or registration of a strata plan if the developer has failed to notify the Secretary of completion
- prohibits a principal certifier from issuing an occupation certificate in contravention of a prohibition order
- provides the Secretary and Commissioner with a range of new compliance and enforcement powers, including powers of inspection throughout the construction phase and at any time within ten years of the occupation certificate date
- provides the Secretary and Commissioner with powers to monitor compliance under the Act including the power to accept undertakings, apply for orders to restrain or remedy contraventions, investigate developers and issue a stop work order

²⁹ Submission 38, NSW Government, pp 2 and 7-8.

- establishes a rectification scheme to empower the Secretary to issue a building work rectification order when serious defects are identified through inspections, and to recover the costs incurred by the Secretary in connection with a rectification order.³⁰

Construct NSW

- 1.26** The six pillar Construct NSW transformation strategy was announced in January 2020. Its aim is 'to restore public confidence and create a customer facing building and construction sector by 2025' to deliver a 'trustworthy building'.³¹
- 1.27** The main strategies of the six pillars led by the Building Commissioner focus on:
- a better regulatory framework – to transform legislation and regulation to create a customer focussed regulatory framework to deliver quality outputs
 - ratings systems – to rate the performance of the quality of the entire construction team, identify 'risky players in the industry' and provide greater information transparency to potential buyers, financiers and insurers
 - skills and capabilities - to uplift practitioner performance leading to an increase in the confidence in the performance capabilities of the building and construction industry by customers and the market
 - strengthened contracts – to create transparent and clear contract templates to reduce customer exposure to risky projects
 - a digital future – to create a public digital system to capture, store and share information and to allow building and safety regulators to improve monitoring and compliance activities
 - quality research – to create an 'evidence based approach' to identify gaps and improvements and address them.³²
- 1.28** Each of the six pillars is supported by its own working group comprising subject matter experts, who meet every two weeks.³³
- 1.29** The number of operational staff working on Construct NSW is 'over 70' and this includes 12 staff located in the Office of the Building Commissioner.³⁴

Project Remediate

- 1.30** Project Remediate is a voluntary scheme, announced in the 2020-21 NSW Budget to provide 10 year interest-free loans and assurance services for the remediation of flammable cladding on

³⁰ Submission 38, NSW Government, pp 2 and 5.

³¹ Submission 38, NSW Government, p 2.

³² Submission 38, NSW Government, p 4.

³³ Submission 38, NSW Government, p 4.

³⁴ Submission 38, NSW Government, p 5.

high-risk class 2 buildings, including 'mixed-use such as part commercial/part residential buildings'.

- 1.31** Project Remediate also offers expert project management services to provide technical and practical support to owners corporations and strata managing agents.³⁵
- 1.32** To be eligible to participate in Project Remediate, the NSW Cladding Taskforce is required to confirm the existence of 'a high-risk combustible cladding façade that requires remediation'.³⁶ Buildings that have already commenced work, including engaging consultants to scope or design the removal of flammable cladding, are not eligible for a low-interest loan under Project Remediate. In order to qualify, they must begin the process again.

Role of the NSW Cladding Taskforce

- 1.33** In July 2017, the NSW Government commenced a review of potential high-risk flammable cladding on buildings across New South Wales by establishing the NSW Cladding Taskforce. The taskforce is responsible for identifying buildings that potentially have combustible cladding and to provide support and direction to local councils on the use of non-compliant cladding materials. The Department of Customer Service leads the taskforce and the other representatives come from NSW Fair Trading, Department of Planning and Environment, Fire and Rescue NSW, Office of Local Government, Treasury and the Department of Premier and Cabinet.
- 1.34** Buildings potentially affected by combustible cladding are identified by the NSW Cladding Taskforce through numerous methods. Once a building is identified as containing flammable cladding, Fire and Rescue NSW undertake an inspection, assessing the type, amount, arrangement and location of cladding material provided to the façade and how the cladding would, if combustible, impact upon fire-fighting operations in the instance of a fire.³⁷
- 1.35** Buildings considered a higher risk are referred to consent authorities (local councils or the Department of Planning, Industry and Environment) for further investigation. Buildings are considered cleared if:
- they do not have cladding that Fire and Rescue NSW considers increases safety risks
 - the cladding has been investigated and cleared by a consent authority
 - unsafe cladding has been fully remediated.³⁸
- 1.36** The progress of Project Remediate is discussed in chapter 4.

³⁵ Submission 38, NSW Government, p 3.

³⁶ Submission 38, NSW Government, p 11.

³⁷ Submission 38, NSW Government, p 9.

³⁸ Submission 38, NSW Government, p 9.

The impact of the building and construction industry on the economy

- 1.37** In July 2020, the building and construction industry was estimated to be worth \$60 billion to the New South Wales economy.³⁹ It is one of the largest employers in New South Wales along with the retail, hospitality and health sectors.
- 1.38** Further, the output multiplier effect of the residential sector alone is up to 1.93, that is, for every \$100 spent on residential building, \$93 is spent elsewhere in extra production.⁴⁰
- 1.39** Information published by the Master Builders Association shows that New South Wales accounts for the largest construction workforce (about 400,000), with its share of total employment being the highest in New South Wales at 10.3 per cent. In addition to being one of the largest workforce employers, the building and construction industry is a major contributor to the labour supply market through apprentices and trainees. Australian Bureau of Statistics data indicates that over the year to June 2020, the total value of construction work across Australia was worth \$211.3 billion, with residential building contributing \$72.2 billion to this total, suggesting that residential building sustained 649,500 jobs across the economy and boosted gross domestic product by \$20.3 billion during 2019-20. The size of the building and construction industry has a wider impact on the economy through the wages and salaries that ultimately circulate back within the local economy. Further, thirteen sectors of the Australian economy rely on the building and construction industry by supplying at least \$5 billion annually of output to the industry.⁴¹
- 1.40** While these figures are not New South Wales-specific, they nevertheless point to the significance of the building industry to the New South Wales economy.

The present inquiry

- 1.41** Throughout this further inquiry, the committee has received a range of evidence on the adequacy of the government's regulation of building standards in New South Wales. In particular, the committee has heard from stakeholders that the issue is not so much compliance with building standards but more broadly the adequacy of the actual building standards themselves.
- 1.42** This report revisits both the recommendations of the first and final reports tabled in 2020 and identifies ongoing significant issues within the building and construction industry.
- 1.43** Several key issues were pursued by the committee during the course of the inquiry. Whilst acknowledging the reforms that are now underway, chapter 2 examines the need for further systemic reforms. The key concerns here are the need for greater oversight, funding and resourcing required from the NSW Government to commit to the establishment of a single senior cabinet Minister with responsibility for all building and construction regulations, the

³⁹ Carolyn Cummins and Nick Bonyhady, 'Construction sector set to lose billions in 'catastrophic' shutdown,' *Sydney Morning Herald*, 19 July 2021.

⁴⁰ Master Builders Association New South Wales, *Build Better – A blueprint for delivering better building outcomes in New South Wales*, April 2019, p 5.

⁴¹ Master Builders Association New South Wales, *Facts and stats on how building supports the economy*, <https://masterbuilders.com.au/Blog/Facts-Stats-on-how-building-supports-the-economy>.

consolidation of regulations and administration into a single Building Act, and an expanded Building Commission to oversee the building and construction of all classes of buildings. The chapter also explores the key concerns of clear lines of accountability, the need for stronger regulation, the lack of transparency in terms of shell companies and phoenixed entities, in addition to the unintended adverse consequences created by the DBP Act impacting interior designers and architects.

- 1.44** Chapter 3 explores the extent of defects in class 2 buildings, the human story of purchasers of class 2 buildings with defects, and the devastating impact that the purchase of a defective apartment has on people's lives. It also considers the issues for strata committees and owners corporations dealing with the burden of fixing problems they did not create. This chapter considers the extent to which the reforms put in place by the NSW Government to regulate the building and construction industry are delivering their intended outcomes. The key concerns here are the issues surrounding consumer protections and procedural fairness, the certification, compliance and maintenance of fire safety and protection systems, the importance of building manuals, the regulation of private certifiers, the shifting of compliance functions to local councils without adequate funding, issues with insurance coverage and the proposed rollout of the rating system for developers and builders due to be implemented in March 2022.
- 1.45** The final chapter, chapter 4, focuses on the urgent issue of flammable cladding on buildings across New South Wales. It explores the limited progress made in removing and replacing flammable cladding under Project Remediate. It further explores the demands on local councils to address flammable cladding, the availability and affordability of insurance coverage for façade engineers and the scope of cladding product testing being undertaken by the NSW Government's Cladding Product Safety Panel.

Chapter 2 Systemic reforms to enhance regulation

The committee's previous inquiry on the regulation of building standards, building quality and building disputes by government agencies in New South Wales highlighted the systemic issues affecting the building and construction industry and the need for much greater regulation and oversight to improve building standards. In this further inquiry, participants acknowledged the steps that the NSW Government has taken to address the significant deficiencies in standards and regulation. At the same time, they readily explored areas where they consider further and stronger systemic reforms are needed to build confidence in the building and construction industry.

This chapter examines the fragmentation in government oversight of building standards, and the lack of accountability that flows from it. It explores this as a compelling reason for consolidating the various legislation covering the building and construction industry into a single Building Act, and for the appointment of a Building Minister and the establishment of a NSW Building Commission to expand the powers, remit and resources available to the NSW Building Commissioner. Next it examines the implementation of recent mandatory disclosure requirements on real estate agents, then the need for greater protections for buyers and residents in terms of phoenix companies. Finally, it discusses the unintended adverse outcomes of the *Design and Building Practitioners Act 2020* on both interior designers and architects. It calls on the government to make urgent amendments to that legislation to lift the restrictions on trade currently being encountered by both professions.

Addressing fragmentation

- 2.1 Underpinning much of the evidence and many of the conclusions of our previous inquiry was a recognition that fragmentation in the government oversight of building and construction is intrinsically linked to poor regulation, and a very significant contributor to poor building standards in New South Wales. A clear message was that the fragmentation that detracts from accountability must be addressed if the industry is to improve in any serious way.
- 2.2 This understanding has continued in the current inquiry. Stakeholders including the Australian Institute of Building Surveyors (AIBS) and Randwick City Council highlighted the complexity of the system from both a planning and industry perspective, with the latter further observing that while welcome, the many reforms now underway have actually added further complexity.⁴² The AIBS suggested that New South Wales regulatory arrangements are 'an example of how a regulatory system can be the cause of non-conformity through complexity, and at the same time be an example of why complex legislative environments can act as a shield from responsibility'. It further noted that the presence of multiple ministers means that they are able to 'point to multiple portfolios and various shared responsibilities and potentially not take responsibility, where otherwise it might exist'.⁴³
- 2.3 Inquiry participants also highlighted the significant complexity of the system directly impacts on consumers. Owners, purchasers and residents find navigating the differing government agencies and seeking assistance from the right watchdog 'bewildering', leaving them to 'feel

⁴² Submission 17, Randwick City Council, p 3; Submission 25, Consult Australia, p 12

⁴³ Evidence, Mr Jeremy Turner, Technical and Policy Manager, Australian Institute of Building Surveyors, 11 October 2021, p 35.

completely alone in their quest for assistance'⁴⁴ at a time of financial and personal stress, and in many cases crisis.⁴⁵ This reality was highlighted by evidence received from Mr Patrick Wang and Mr Oliver Burgess, purchasers of apartments in the Imperial Towers development in Parramatta, whose case study is set out in chapter 3. Their experience illustrated the serious challenges that consumers have navigating the industry and regulatory system when their building has serious defects. They spoke of how they were unable to identify a 'government watchdog of relevance' or to understand 'which ministerial portfolio may be responsible for the actions or inactions of such watchdogs'.⁴⁶

- 2.4** The fragmented regulation of the building and construction industry and resulting challenge for consumers to obtain assistance was further highlighted when the committee heard evidence that conditions placed on the licence of the Privium Group, prior to going into administration in November 2021, were not part of the *Home Building Act 1989* administered by the Building Commissioner.⁴⁷ This is discussed later in the chapter.

Government agencies and statutory bodies

- 2.5** It is self-evident that there are many government agencies and statutory bodies involved in the regulation of the building and construction industry and at times their roles overlap.
- 2.6** The Office of the Building Commissioner, Construct NSW and responsibility for class 2 building reforms, each sit within NSW Fair Trading, which is but one of many agencies that make up the Department of Customer Service.
- 2.7** NSW Fair Trading has remit over licensing, registration and building product bans, whilst the powers of the NSW Building Commissioner, Mr David Chandler OAM, are restricted to class 2 buildings and buildings that have class 2 parts within them. The Office of the Building Commissioner is responsible for leading the strategy of Construct NSW across the six areas of regulation, ratings, education, contracts, digital tools and data and research. The Building Commissioner is not available to respond directly to complaints about building defects and all such complaints are required to be lodged through NSW Fair Trading (see chapter 1 for more detail).
- 2.8** Local councils and Fire and Rescue NSW are further statutory bodies who also play an important role in overseeing the legislative and regulatory requirements of the building and construction industry in New South Wales. The responsibility of building certifications and technical regulations often falls to local councils when the use of private certifications fails, whilst Fire and Rescue NSW are the subject matter experts on fire safety and have responsibility for fire safety policy development, advocacy for improvements in safety, resilience and confidence in built environments in New South Wales.

⁴⁴ Submission 35, Australian Institute of Building Surveyors, p 8.

⁴⁵ Evidence, Mr Turner, 11 October 2021, p 35; Submission 35, Australian Institute of Building Surveyors, p 8.

⁴⁶ Evidence, Mr Patrick Wang, Individual, and Mr Oliver Burgess, Individual, 11 October 2021, p 4.

⁴⁷ Evidence, Mr David Chandler OAM, NSW Building Commissioner, 22 November 2021, p 52; Evidence, Mr John Tansey, Executive Director, Policy and Strategy, Better Regulation Division, Department of Customer Service, 22 November 2021, p 53.

- 2.9** Alongside all of these government and statutory bodies are private certifiers. Private certifiers exercise statutory powers to approve certain developments, certify compliance with development approvals and issue construction and occupation certificates. Private certifiers are often sole practitioners, although some operate in larger firms. How their practices are structured is largely unregulated.
- 2.10** The AIBS argued to the committee that having a single department that supports the responsible ministerial portfolio would create an environment where reforms are more easily identifiable, the likelihood of duplicate regulations is decreased and consumers have a single place to contact.⁴⁸

Legislation and regulatory controls

- 2.11** Participants also pointed to the plethora of legislation surrounding the regulatory system as reflective of fragmentation and contributing to poor accountability and poor standards.
- 2.12** As noted in chapter 1, the AIBS highlighted that as many as 16 separate pieces of legislation currently apply to class 2 buildings with 13 applying to all other classes of building work, with no less than five main areas of legislative and regulatory control applicable to the New South Wales building and construction industry. The Institute went so far as to argue that the excessive number of regulations are in fact having an adverse impact on compliance and redress for consumers, resulting in significant life threatening outcomes for building residents.⁴⁹
- 2.13** Randwick City Council spoke in similarly strong terms, calling for a single building act:
- Until there is a single piece of over-arching building legislation that regulates all of the aspects of building construction and certification, distinct and discrete from planning legislation, there will continue to be a necessity to further amend and add to the current legislative clutter that exists to regulate the building sector.⁵⁰

Expanding the remit of the Building Commissioner

- 2.14** As noted in chapter 1, Mr David Chandler OAM was appointed to the role of the NSW Building Commissioner on 1 August 2019, with responsibility for driving legislative reforms, overseeing licensing and auditing across the high rise building industry, and investigation and compliance activities designed to restore and strengthen community confidence in the New South Wales building and construction industry.
- 2.15** With the introduction of both the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (RAB Act) and the *Design and Building Practitioners Act 2020* (DBP Act), Mr Chandler was provided with increased powers of investigation. The powers conferred on the Building Commissioner under the RAB Act allow him to issue stop work orders, rectification orders and prohibit the issue of an occupation certificate for class 2 buildings, while the DBP

⁴⁸ Evidence, Mr Turner, 11 October 2021, p 35.

⁴⁹ Submission 35, Australian Institute of Building Surveyors, p 3, pp 5-6.

⁵⁰ Submission 17, Randwick City Council, p 3.

Act provided further investigative, enforcement and disciplinary provisions created for the regulation of design and building work.

2.16 During the course of the inquiry, the committee heard evidence from numerous stakeholders supporting the good work performed by the NSW Building Commissioner since his appointment and commending his ongoing commitment to engagement and constructive consultation with the range of interests. Local Government NSW (LGNSW) for example welcomed the Building Commissioner's 'proactive reform program and the progress and achievements made in the two years since his appointment', and acknowledged his engagement with the sector.⁵¹ Mr Jeremy Turner, Technical and Policy Manager, AIBS, told the committee that his organisation has 'certainly noticed that there has been a shift in the culture within the sector that is constructing and involved in class 2 buildings, the apartment sector'. He observed that this change in culture is 'moving towards a far greater degree of voluntary compliance than we have seen in the past'.⁵² Others who affirmed the work of the Building Commissioner included representatives of Randwick City Council, the Association of Australian Certifiers, the Australian Institute of Architects, and the Property Council of Australia.⁵³

2.17 At the same time, a range of participants called for the Building Commissioner's powers to go much further. Councillor Linda Scott, President of Local Government NSW, expressed the view that that the role of the Building Commissioner is limited in that he 'is not able to take steps forward on buildings that are not class 2 buildings, and that is ... in many cases the vast majority of the buildings that continue to have problematic or illegal materials within them'.⁵⁴ Accordingly, the Local Government NSW submission recommended that the NSW Government 'commit to a program, timeline and sustained resources to extend the application of the new building reforms ... beyond class 2 buildings, with priority on other forms of building where people sleep at night and whose occupants rely on safeguards of others to protect them:

- class 1b – smaller boarding houses
- class 3 – which includes boarding houses, guest houses, hostels/backpacker accommodation
- class 9 – 'public' buildings which include health care, child care, education and public assembly facilities.⁵⁵

2.18 The AIBS echoed its support for an expansion of effective regulatory oversight in all building classes to ensure positive outcomes for consumers,⁵⁶ as did the Australian Institute of

⁵¹ Submission 30, Local Government NSW, p 3; see also Evidence, Councillor Linda Scott, President, Local Government NSW, 11 October 2021, p 11

⁵² Evidence, Mr Turner, 11 October 2021, p 37.

⁵³ Evidence, Mr Roman Wereszczynski, Manager, Health, Building and Regulatory Services, Randwick City Council, 11 October 2021, p 12; Evidence, Ms Jill Brookfield, Chief Executive Officer, Association of Australian Certifiers, 11 October 2021, p 38; Evidence, Ms Laura Cockburn, NSW State President, Australian Institute of Architects, 22 November 2021, p 17; Evidence, Mr Steve Mann, Chief Executive Officer, Urban Development Institute of Australia – NSW Division, 22 November 2021, p 33; Evidence, Ms Lauren Conceicao, NSW Deputy Executive Director, Property Council of Australia, 22 November 2021, p 33.

⁵⁴ Evidence, Councillor Scott, 11 October 2021, p 15.

⁵⁵ Submission 30, Local Government NSW, p 4.

⁵⁶ Evidence, Mr Turner, 11 October 2021, p 37.

Architects. Its support had a particular focus on extending regulatory reforms to protect consumers in other building classes, urgently prioritising boarding houses, aged care and health facilities.⁵⁷

- 2.19** Specific issues explored in evidence concerning class 2 buildings are documented in chapter 3. For now the committee notes the call from numerous stakeholders that the reforms underway in respect of class 2 buildings now be extended to other classifications.
- 2.20** The relative absence of protections for class 1 buildings, as well as the fragmented and bureaucratic nature of the system, was highlighted in the committee's discussion of the collapse of the Privium Group, a developer of residential standalone houses in Queensland, New South Wales and Victoria. The company went into administration on 4 November 2021, affecting more than 2000 individual homebuyers across the three states.⁵⁸
- 2.21** During its second hearing the committee explored with government representatives significant concerns that people buying class 1 residential homes through Privium Group were experiencing the same frustrations and bureaucratic difficulties in obtaining assistance from government, as Mr Wang and Mr Burgess had in respect of class 2. When asked about Privium Group, Mr Chandler informed the committee that his 'remit is principally on class 2 buildings ... that was a matter that was handled and responded to directly by ... the Building Regulation Division' in NSW Fair Trading.⁵⁹
- 2.22** In an effort to understand the pathways for assistance for affected home purchasers, the committee's questioning was then redirected to representatives of the Better Regulation Division regarding the number of homes being built in New South Wales by Privium Group and the number of complaints lodged with NSW Fair Trading.
- 2.23** Mr John Tansey, Executive Director of the Better Regulation Division, confirmed the difficulties for people caught in this situation being able to obtain assistance and redress, even after Fair Trading had a week before provided comments to Channel 7 encouraging people to make a complaint. He explained that his agency does not hold responsibility for the portfolio either:

[J]ust in the interest of being clear – the home Building Compensation Fund and that part of the Home Building Act is not within the allocation of the Minister for Better Regulation and Innovation. So it is, honestly, outside of our portfolio's administration now because responsibility is shared between SIRA and the Minister responsible for SIRA and icare and the Minister responsible for icare. Just so nobody thinks we are trying to be unhelpful. It is, honestly, not something that Fair Trading directly deals in and administers ... Of course there might be a distinction between the people who would come to Fair Trading with a complaint generally about building or the completeness of building or incompleteness of building ... once there is a trigger event like this and the builder goes into some form of administration ... it will trigger the potential for coverage by the compensation fund, which, as I said, is not something that

⁵⁷ Evidence, Ms Lisa King, Policy and Advocacy Manager, Australian Institute of Architects, 22 November 2021, p 21.

⁵⁸ Evidence, Mr Chandler, 22 November 2021, p 50; Michael Bleby, 'Privium failure hits more than 2000 home buyers', *Financial Review*, 29 November 2021.

⁵⁹ Evidence, Mr Chandler, 22 November 2021, p 49.

we administer or are close up to. There is a distinction there between how we would or would not become directly involved in the matter.⁶⁰

- 2.24** The complicated nature of navigating government assistance for those affected by the collapse of the Privium Group was further highlighted when evidence was outlined by one of the committee members. Challenged as to whether information provided by the administrators of the Privium Group to affected homebuyers which stated that the administrators 'were working closely with the applicable building regulators in Queensland, New South Wales and Victoria', might lead the average person to believe that the Building Commissioner would be able to provide some assistance, Mr Chandler again explained that this 'is not his direct remit'.⁶¹

Protecting consumers before they purchase: disclosure by real estate agents

- 2.25** The committee explored with participants the implementation of recent mandatory disclosure requirements on real estate agents as an example of NSW Fair Trading's 'light touch' approach to regulation.

- 2.26** The NSW Government advised the committee that on 23 March 2020, the Residential Tenancies Regulation 2019 and the Property and Stock Agents Regulation 2014 were amended to require real estate agents and/or landlords to notify tenants or prospective purchasers if the property is or is part of a building that contains external combustible cladding. The agent or landlord must disclose if they are on notice that:

- a notice of intention to issue a fire safety order, or one has been issued requiring notification of the cladding or
- a notice of intention to issue a building product rectification order or one has been issued in relation to the cladding.

Failure to abide by this requirement may lead to a penalty of up to \$22,000.⁶²

- 2.27** The Budget Estimates 2021-2022 hearing for the portfolio of Better Regulation and Innovation was held during the course of this inquiry. During this hearing, the committee questioned that despite the introduction of new rules on 23 March 2020, under the Residential Tenancies Regulation 2019 and the Property and Stock Agents Regulation 2014, some real estate agents are still failing to notify prospective purchasers of buildings with defects identified in prohibition orders issued by the Building Commissioner. Mr Chandler responded:

Where we have issued orders, we issue a notice to the developer to make sure that they have advised the real estate agent that in fact they should be making the presence of the orders known. In some instances where we have seen the agents continue to represent the product, we call the agents directly and put them on notice that they should be making prospective purchasers aware of those notices.⁶³

⁶⁰ Evidence, Mr Tansey, 22 November 2021, p 51.

⁶¹ Evidence, Mr Chandler, 22 November 2021, p 52.

⁶² Submission 38, NSW Government, p 12.

⁶³ Evidence, Mr David Chandler OAM, NSW Building Commissioner, Budget Estimates hearing for Portfolio Committee no. 6 – Transport and Customer Service, Better Regulation and Innovation, 27 October 2021, p 5.

2.28 However, during the November hearing a committee member tabled examples of advertisements for two properties which did not disclose that they were subject to any prohibition orders, and indicated that when she had spoken directly with the real estate agent that morning, 'he made no disclosure of the prohibition orders'. When pressed on what action has been taken to make potential buyers aware of serious defects in buildings and to address the non-disclosures by real estate agents, the Minister for Better Regulation and Innovation, Mr Kevin Anderson MP, stated:

We are doing everything we can in informing agents of their obligations ... There are education programs, there are campaigns, it has been talked about through the Building Commission and it is online and lots of social media outlets.⁶⁴

2.29 The Chief Executive of the Real Estate Institute of NSW, Mr Tim McKibbon, was later reported in the media as disagreeing with this assessment. He stated to ABC News 'for Fair Trading to say they've been out educating agents is wrong, putting it on the website is not education'. He acknowledged that real estate agents were aware of their regulatory obligations to disclose building defects but claimed 'there's also no clarity around how and when. Do you disclose in the marketing material? We don't have guidance'. Mr McKibbon further added that it was unclear 'if information buried in strata documents made available to the buyer ... count as disclosure by the agent'.⁶⁵

Shell companies

2.30 During this inquiry, the committee received evidence in relation to the lack of transparency for buyers and residents in terms of phoenix companies. The Plumbing Trades Employee's Union NSW Branch (hereafter the PTEU) pointed to the continued presence in the market of 'building companies doing poor quality work and then disappearing into a maze of shell companies and "phoenixed" entities, making themselves untouchable in terms of responsibility for remediation work and/or consumer compensation'.⁶⁶

2.31 Of note was the Building Commissioner's evidence, which emphasised the difficulties he has experienced, despite his best efforts, in identifying which developers to issue building works rectification orders to. Mr Chandler provided an alarming example of one such experience. The Otto Project at Rosebery was built by a company called Icon Construction Australia (NSW) Pty Ltd, which also built the notorious Opal Towers development in Homebush. At the end of last year, Icon Construction went into receivership. Meanwhile Icon Construction Australia (NSW) Pty Ltd sold the business to the Kajima group of companies, however, Kajima only took the assets, leaving the responsibilities of Icon Construction Australia (NSW) Pty Ltd behind. In an attempt to obtain a commitment from the directors of the new business for Otto 2, the Building Commissioner was unable to obtain clarity 'as to which company was speaking on behalf of whom'.⁶⁷

⁶⁴ Evidence, Hon Kevin Anderson, Minister for Better Regulation and Innovation, Budget Estimates hearing for Portfolio Committee no. 6 – Transport and Customer Service, Better Regulation and Innovation, 27 October 2021, p 7.

⁶⁵ Amy Greenbank, 'Sydney real estate agents under fire for failing to warn buyers of 'serious defects' in apartment towers', *ABC News Online*, 27 October 2021.

⁶⁶ Submission 10, Plumbing Trades Employee's Union NSW Branch, p 2.

⁶⁷ Evidence, Mr Chandler, 22 November 2021, pp 56-57.

- 2.32** Mr Chandler advised the committee that a new company called Icon SI (Aust) Pty Ltd commenced taking on the work of the new business during 2020. He had recently received a request from the legal representatives of Icon Co, attempting to have him 'agree to relinquish' his 'powers to refer directors of that company to organisations like ASIC'.⁶⁸
- 2.33** Disturbingly, the committee heard that although Icon Co (NSW) are not contracting any new projects, Icon SI (Aust) Pty Ltd is 'tendering for new work'.⁶⁹
- 2.34** Asked by the committee what he considers must be done to address this kind of activity, the NSW Building Commissioner declared that 'the days of simply being able to buy the company out of a company and leave the shell behind should be something we need to look at closing down'.⁷⁰ He contended that 'significant change' was occurring across the industry since the introduction of RAB Act and DBP Act, and suggested that the real change will come for consumers with the introduction of the rating system for class 2 building developers, further discussed in detail in chapter 3.⁷¹

Unforeseen impacts of the *Design and Building Practitioners Act 2020*

- 2.35** A separate systemic issue highlighted by certain inquiry participants was the unforeseen impacts on specific professional groups arising from the DBP Act. The evidence the committee received from interior designers and from architects is explored below.

Interior designers

- 2.36** The committee received evidence from numerous individual interior designers and their representative body, the Design Institute of Australia, that the introduction of the DBP Act and subsequent creation of a scheme for the registration of registered practitioners threatened to stop designers from doing work that they are qualified to do, as the Act in its current form does not recognise their existence as a profession.
- 2.37** A number of stakeholders expressed their concerns that the new registration framework needs to be urgently addressed to stop the exclusion of interior designers/interior architects from carrying out their work.⁷² The committee received evidence from both the Design Institute of

⁶⁸ Evidence, Mr Chandler, 22 November 2021, p 57; Correspondence from Mr David Chandler, NSW Building Commissioner, to the Chair, forwarding a cover letter from Minter Ellison, legal representative of Icon (NSW) Pty Ltd and email from Icon (NSW) Pty Ltd to the NSW Department of Customer Service, received 22 November 2021; Undertaking sought but not obtained from Mr David Chandler, NSW Building Commissioner, by the legal representatives of Icon Co (NSW) Pty Ltd, September 2021, titled, 'Icon Co (NSW) Pty Ltd v Secretary of the Department of Customer Service (2021/00228168)', tendered by Mr Chandler, 22 November 2021.

⁶⁹ Evidence, Mr Chandler, 22 November 2021, p 57.

⁷⁰ Evidence, Mr Chandler, 22 November 2021, p 58.

⁷¹ Evidence, Mr Chandler, 22 November 2021, p 60.

⁷² Submission 29, Citrus ID Pty Ltd, p 3; Submission 32, Mima Design Pty Ltd, p 2; Submission 42, Mrs Ash Guven, p 1; Submission 46, Mr James Guerrisi, p 1; Submission 50, Miss Anna Thompson, p 1; Submission 53, Sydney Design School, p 1; Submission 61, TAFE NSW Design Centre Enmore, pp 2-3.

Australia along with numerous submissions from current interior designers describing the adverse impact the introduction of the new legislation is having on their businesses, including the restriction of trade incurred under the new registration system. Forward Thinking Design Pty Ltd outlined in their submission that the new registration system 'specifies qualifications rather than competencies and the qualifications are drawn only from architecture, building design and the building trades.' They indicated that interior design/interior architecture qualifications have been omitted entirely.⁷³

- 2.38** Mr Bradley Schott, Policy Committee Chair, Design Institute of Australia, gave evidence that a regulatory change was required to the DBP Act as 'there is no category for interior designers in the regulation so we effectively do not exist'.⁷⁴
- 2.39** The committee sought clarification from the Design Institute as to the minimum standards and qualifications that would be required for an interior designer to achieve certification. The Institute advised that an Australian Qualifications Framework level 7 qualification, advanced diploma or degree would be required and that this reflected the minimum standard for full membership of the Design Institute. The Institute provided specific details of formal recognition of interior designers as an occupation.⁷⁵
- 2.40** Practitioners emphasised to the committee that qualified interior designers have professional expertise in and responsibility for the function, planning and structure of a space.⁷⁶
- 2.41** When asked by the committee how this situation could be addressed, Mr Schott suggested that as a first step, it could be remedied by those who draft the legislation understanding what it is the occupation does. He explained the difference between the role of interior decorators and interior designers as 'decorators move the curtains and designers move the walls', noting that interior designers 'have a fairly significant impact on the built environment within the envelope of a building and that does not seem to have been allowed for in either the legislation or the regulation'.⁷⁷
- 2.42** The committee raised interior designers' concerns about the absence of an accreditation model for them under the DBP Act with the Building Commissioner and Mr John Tansey, Executive Director, Policy and Strategy, Better Regulation Division, during the second hearing. Whilst Mr Chandler indicated that he considered interior designers to have 'a very credible and reasonable case to present to get an industry-based accreditation', Mr Tansey did not share the same view. He told the committee that 'at this stage' the Better Regulation Division is not 'minded to set

⁷³ Evidence, Ms Denise Ryan, Senior Policy Advisor, Design Institute of Australia, 22 November 2021, p 19; Submission 29, Citrus ID Pty Ltd, p 3; Submission 32, Mima Design Pty Ltd, p 2; Submission 55, Interior Fitout Association, p 3; Submission 57, Ryder Shop and Office Fitting Pty Ltd, p 1; Submission 58, Total Fitouts Surry Hills, p 1; Submission 60, Mr Brad Ward, p 1.

⁷⁴ Evidence, Mr Bradley Schott, Policy Committee Chair, Design Institute of Australia, 22 November 2021, p 20.

⁷⁵ Evidence, Mr Schott, 22 November 2021, p 20.

⁷⁶ Submission 6, Pia Francesca Design Pty Ltd, p 1; Submission 7, Forward Thinking Design, p 2; Submission 29, Citrus ID Pty Ltd, p 2; Submission 32, Mima Design Pty Ltd, p 1; Submission 42, More Than Space, p 1.

⁷⁷ Evidence, Mr Schott, 22 November 2021, p 19.

up that specialist line of registration for interior designers', but he remained 'open to continuing to have those discussions' with them.⁷⁸

Architects

2.43 The committee heard that registered architects are similarly affected as the interior designers in their ability to practice across all building classes due to the introduction of the registration requirements under the DBP Act.⁷⁹

2.44 The Australian Institute of Architects highlighted that the requirement under the DPB Act for architects to have five years' recent experience and relevant practical experience in specific building classes in order to be eligible to be registered is 'causing adverse outcomes' among the profession.⁸⁰ The Institute gave evidence that registered architects are necessarily suitably qualified to undertake their work:

We would maintain that architect's registration process is certainly very robust in comparison with any other design practitioner group and that, as a registered architect, having a master's degree in addition to supervised professional experience and then a registration process as well, is certainly more than enough. But we do understand the Government's intent to ensure that consumers are protected, so we are trying to sort of work within the legislation to find a solution that does not restrict the trade of registered architects ... it should be able to enable us to actually practise unrestricted.⁸¹

2.45 When questioned by the committee during the second hearing for a solution to this issue, the Mr John Tansey, indicated to the committee that 'we are nearly there ... in agreement with them' to resolve the structural changes required to the DBP Act for the registration requirements of architects to work in class 2 buildings.⁸²

Committee comment

2.46 When the committee embarked on this further inquiry into the regulation of building standards one year after the completion of our previous inquiry, we did so with the intention of scrutinising two key areas: defects in class 2 residential buildings and flammable cladding. However, it was readily apparent that wider systemic problems remain and much more systemic reform is required, for the protection of those at risk and to prevent further building failures.

2.47 While the government has made important although limited steps forward, we are fully convinced that unless wholesale reform takes place, the NSW Government will only ever be scratching the surface of building regulation. Further additions to a patchwork of legislation, continued division of responsibilities between multiple agencies, and lasting artificial demarcations between ministers' portfolios will only continue to undermine the government's own effectiveness improving in building standards and protecting consumers.

⁷⁸ Evidence, Mr Chandler, 22 November 2021, p 64; Evidence, Mr Tansey, 22 November 2021 p 65.

⁷⁹ Evidence, Ms King, 22 November 2021, p 21.

⁸⁰ Submission 28, Australian Institute of Architects, p 10.

⁸¹ Evidence, Ms King, 22 November 2021, p 22; Ms Cockburn, 22 November 2021, p 22.

⁸² Evidence, Mr Tansey, 22 November 2021 p 66.

- 2.48** We believe that the importance of the building and construction industry in New South Wales is such that the both the industry and people of New South Wales deserve a single senior minister with oversight of this portfolio, a stand-alone Building Act and a properly resourced Building Commission to address the continuing building crisis in New South Wales. As this inquiry has shown, the overly complex system of regulation and compliance is harming the industry, planners and most importantly people across the state who live in the homes the industry builds. Without a greater focus from the government to address the regulatory nightmare, consumers will continue to be vulnerable and confidence will not be restored in the building and construction industry.
- 2.49** In our previous inquiry the committee recommended that NSW Government establish a single, senior Building Minister with responsibility for building regulation in New South Wales, including administering the new stand-alone Building Act, and responsibility for the Building Commission and its Building Commissioner. Having conducted this further inquiry, the committee is even more compelled that such significant reforms are required. This major industry is critically important to the NSW economy, is one of the largest employers in the state, and is responsible for producing the houses and apartments that people will live their lives in. The recent announcement of a Minister for Homes gave the committee some hope that the government finally understood the need to act, however a close inspection of the detail of current portfolio responsibilities indicates that each of the significant Acts that regulate the building industry remain within the remit of the Minister for Fair Trading.⁸³ The committee is very disappointed by this missed opportunity. We reiterate all the recommendations of our previous inquiry and especially that to establish a Building Minister, a Building Act and a Building Commission for New South Wales.

Recommendation 1

That the NSW Government adopt the Public Accountability Committee's previous recommendations to establish a single, senior Building Minister with responsibility for building regulation in New South Wales, including administering the new stand-alone Building Act and responsibility for the Building Commission and its Building Commissioner.

- 2.50** We agree with the comments of stakeholders commending the work and commitment of the Building Commissioner and the progress he has made since his appointment to the role. Mr Chandler has clearly been very active, has brought forward a number of useful reforms, and has changed the conversation in the industry, but we come back to the problem that there is only

⁸³ The *Allocation of the Administration of Acts 2001*, as at 21 December 2021, lists the responsibilities of the Minister for Homes as: *Aboriginal Housing Act 1998*, jointly with the Minister for Families and Communities; *Community Housing Providers (Adoption of National Law) Act 2012*, jointly with the Minister for Families and Communities; *Housing Act 2001*, section 6 (and the remaining provisions of the Act jointly with the Minister for Families and Communities); *Property NSW Act 2006*; *Residential Tenancies Act 2010*, Part 7, jointly with the Minister for Fair Trading and the Minister for Families and Communities; *Teacher Housing Authority Act 1975*. The Minister for Fair Trading's responsibilities continue to include: *Building and Development Certifiers Act 2018*; *Design and Building Practitioners Act 2020*; *Environmental Planning and Assessment Act 1979* (Part 6, jointly with the Minister for Planning); *Home Building Act 1989* (except parts, the Minister for Finance and the Minister for Customer Service and Digital Government); and *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020*.

one of him. The committee continues to support the reforms Mr Chandler has implemented and calls on the government to provide further resources to allow the Building Commissioner to effectively oversee and regulate the New South Wales building and construction industry with a strong customer focus. We consider that as an essential component of this, the Building Commissioner's powers must be extended to cover class 1 buildings, that is standalone houses, so that the purchasers such as those of Privium homes are able to have comparable protections to those in class 2 buildings. Protections for homebuyers in New South Wales should be universal, not dependent on the type of home purchased. Similarly, we concur with the position of Local Government NSW that priority should also be given to buildings where people sleep at night and whose occupants rely on safeguards, that is, class 1b, class 3, and class 9 buildings.

- 2.51** The committee believes that the urgent task to protect homeowners is to extend the Building Commissioner's powers to class 1 buildings. However, this should not prevent the government from consulting with stakeholders and industry regarding extending the provisions of the *Design and Building Practitioners Act 2020* to all classes of buildings in New South Wales.

Recommendation 2

That the NSW Government ensure that the Building Commission be provided with broad powers and sufficient resourcing and funding to properly oversee and regulate the building and construction industry in New South Wales with a strong customer focus. As an essential component, these powers must be extended to class 1 buildings and others where people sleep at night and whose occupants rely on safeguards.

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- 2.52** It is clear to the committee that 'light touch regulation' in New South Wales is delivering very little for consumers or the industry. Inquiry participants, especially homeowners, attested to their inability to gain satisfaction from NSW Fair Trading in stepping in when they need assistance, let alone acting on their behalf in a time of crisis. The light touch approach results people's lives being put on hold emotionally and financially, or worse. We note that NSW Fair Trading has failed to ensure that the Residential Tenancies Regulation 2019 and the Property and Stock Agents Regulation 2014 have operated so that prospective purchasers are informed of defects prior to purchase. In addition, we accept the view of local councils that NSW Fair Trading is ill-equipped to deal with the regulation of private certifiers and complaints against them.
- 2.53** The committee considers that the culture of minimal regulation in NSW Fair Trading is not fit for purpose when it comes to the building industry. In the committee's view, the resources of NSW Fair Trading should be moved into a Building Commission with a fundamentally different culture of enforcement and compliance, to protect consumers and restore confidence in the building and construction industry. This is the case in Victoria and Queensland. Put simply, the lack of adequate regulation and consumer protections in the building industry is a long standing and complex problem, one that Fair Trading has proven itself incapable of seriously acknowledging, let alone solving.

Recommendation 3

That the NSW Government move all regulatory responsibility for the building and construction industry from NSW Fair Trading, and its accompanying resources, to a newly established Building Commission, with a fundamentally different culture of enforcement and compliance, to protect consumers and restore confidence in the building and construction industry.

- 2.54** We acknowledge the impact on interior designers and architects of the introduction of new registration requirements on 1 July 2021 under the DBP Act, and agree that there needs to be a solution for both groups. The committee notes that the Australian Institute of Architects is currently in discussions with the Office of the Building Commissioner and is nearing a resolution, however, the restrictions on trade for interior designers still exists. We believe that this needs to be addressed as a matter of urgency. The committee acknowledges that architects have a distinct place in the industry as a result of their lengthy professional training, compulsory insurance and strong industry led regulation. In these circumstances the mandatory five year experience requirement for registration to work on class 2 buildings appears excessive.
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Recommendation 4

That the NSW Government urgently create a category for registration under the *Design and Building Practitioners Act 2020* for interior designers and review the five year experience threshold for architects to be registered for class two work under that Act.

- 2.55** The committee considers that current protective measures are inadequate in that they allow companies to dissolve, then reappear as new companies and tender for new work in the building and construction industry, when subject to building rectification orders. The recent experience of the Building Commissioner in seeking to use the enforcement powers the Parliament granted him in the face of phoenixing demonstrates the need for government to act. Further protections are urgently required to shield future home buyers from the potential financial and emotional ruin experienced by home buyers left in the wake of the dissolved companies. The options for reform here are broad but at a minimum should include prohibitions on severing the liabilities from the assets of any of the entities with obligations under the DBP Act including by sale or otherwise.
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Recommendation 5

That the NSW Government place additional statutory controls on phoenixing and phoenixing activity in the building and construction industry.

Chapter 3 Class 2 buildings

This chapter explores the progress made since our first inquiry by the NSW Government, led by the NSW Building Commissioner, in protecting consumers and improving building standards in class 2 residential buildings, along with numerous continuing and emerging concerns that stakeholders identified during this further inquiry.

After commencing with a snapshot of the extent and range of serious problems in class 2 residential buildings, it sets the scene for all that follows with a vivid picture of the human impacts of building defects and the difficulties that purchasers encounter when seeking to have them addressed. The devastating and prolonged emotional and financial consequences for the individuals and families involved are patently clear in the experience of two purchasers of apartments in the Imperial Towers complex in Parramatta whom the committee met with. In a similar vein, it explores the challenges that exist for strata committee members responsible for buildings with defects and how these challenges might be remedied. It then examines a number of issues in respect of fire safety and protection, and the need for much greater action in respect of certification, accreditation and maintenance. The chapter then turns to private certification of buildings and the specific issues of conflicts of interest, regulation by NSW Fair Trading and self-regulation.

Next the committee documents the concerns of local government participants about the recent regulation removing the ability of councils to recover the costs of the compliance activities that they undertake. It then explores a number of issues with regard to insurance coverage in the building industry related to professional indemnity insurance, calls to de-risk the insurance market and decennial liability insurance. Finally, it examines the privately operated ratings system soon to be established for all new apartment developments in New South Wales.

The extent of problems

3.1 In its submission the NSW Government reported that of 73 audits of residential apartment building work around the state between September 2020 and August 2021 targeting high risk projects and practitioners:

- 46 percent of buildings had a serious defect related to building services
- 43 percent of buildings had a serious defect related to fire safety
- over 39 percent of buildings had a serious defect related to waterproofing.⁸⁴

3.2 Asked by the committee to comment on the range of defects plaguing apartment owners, Ms Karen Stiles, Executive Director of the Owners Corporation Network of Australia (hereafter OCN), responded:

It is a tsunami of building defects that people have been suffering for the past two decades, a variety of those, but with waterproofing and fire safety being the most prevalent and also the most expensive and difficult to fix and clearly life-threatening when you add that to flammable cladding.⁸⁵

⁸⁴ Submission 38, NSW Government, p 5.

⁸⁵ Evidence, Ms Karen Stiles, Executive Director, Owners Corporation Network of Australia, 22 November 2021, p 2.

- 3.3** Mr Chris Duggan, President of the Strata Community Association NSW (SCA (NSW)), referred to the findings of joint SCA (NSW) and Office of the Building Commissioner research with the majority of the Association's members providing insights into the extent of defects and the experience of consumers in trying to have them addressed. The survey found that 39 per cent of buildings have serious defects, with a similar research project that the Association conducted with the University of New South Wales City Futures finding a comparable proportion. Mr Duggan expressed his hope that both sets of findings will lend weight to action by government to better prevent defects.⁸⁶
- 3.4** Mr Duggan attested that waterproofing was found to be the most common serious defect, then fire safety, external enclosures, building fabric and structure. He explained that 'serious defects' refers to 'major elements of the building [that] if unrectified, impact the habitability and the liveability of those apartments'.⁸⁷
- 3.5** Ms Stiles spoke of waterproofing as an 'enormous problem that can go on for decades' referring to the owners of a building she is currently working with who have been in negotiations with the builder for 10 years trying to have their waterproofing rectified.⁸⁸ Asked about other incidents she is aware of, Ms Stiles responded:

I can think of an elderly couple who had to build a moat in their living room to keep the water in so that they could Hoover it up when it rained so that it did not flood the building. People are living with black mould. There are enormous problems: there are bathrooms, there are building fabrics, it is balcony falls—you name it, it is a problem.⁸⁹

Human impact of building defects

- 3.6** As the committee heard in our previous inquiry, both the building defects and the difficulties that owners can encounter trying to get them rectified, have an enormous impact on the individuals and families affected.
- 3.7** Stakeholders such as Ms Stiles told the committee that when building defects are detected it can signal the start of devastating and prolonged emotional and financial consequences:

[B]uilding defects do not just cause damage to the building and its fabric; they can destroy peoples' lives. The damage does not just stop the day people are evacuated; it is merely the beginning of years and years of enormous suffering.⁹⁰

- 3.8** The committee heard of this enormous financial and personal impact first hand from two individual home buyers, Mr Patrick Wang and Mr Oliver Burgess, who each purchased off-the-plan apartments in the Imperial Towers complex located in Parramatta, in 2017. While the defects in the building caused the NSW Building Commissioner to issue a prohibition order that would have enabled them to exit their contracts with the developer, a subsequent decision by NSW Fair

⁸⁶ Evidence, Mr Chris Duggan, President, Strata Community Association NSW, 22 November 2021, p 3.

⁸⁷ Evidence, Mr Duggan, 22 November 2021, p 3.

⁸⁸ Evidence, Ms Stiles, 22 November 2021, p 3.

⁸⁹ Evidence, Ms Stiles, 22 November 2021, p 3.

⁹⁰ Evidence, Ms Stiles, 22 November 2021, p 2.

Trading had the effect of locking them and the complex's other purchasers into buying their apartments, even though the serious defects have not been addressed.

- 3.9** Mr Wang and Mr Burgess's stories are set out in the case study below. Their experiences not only point to the knowingly wrongful actions of developers and their agents, but also absence of procedural fairness and remedies for consumers in the system at present.

Case study: Purchasers of Imperial Towers apartments⁹¹

In 2017 Patrick Wang and Oliver Burgess, along with many other individuals and families, purchased off-the-plan apartments in the Imperial Towers complex in Parramatta, comprised of 179 units. In November 2020 building audits revealed structural, fire resistance and waterproofing defects of such seriousness as to cause the NSW Building Commissioner to issue a prohibition order in June 2021 preventing the developer from registering the strata plan and obtaining an occupation certificate until all defects were rectified. But according to Mr Burgess, 'We were not notified of the prohibition order even though it affects us considerably. We are the actual people who will be moving here and living here but there was no notification given to us'.⁹²

Following this, and without any notice to Mr Wang, Mr Burgess or any other purchaser, an official in Fair Trading issued a fresh prohibition order that had the effect of rescinding that previously issued by the Building Commissioner. Crucially, this amended prohibition order did not contain the prohibition on registering the strata plan. Having obtained this from Fair Trading, the developer then lodged a request with Parramatta Council to have their consent requirements altered in an attempt to obtain the strata certificate for the building. The following month Council granted the developer's request without consulting with the purchasers, and the decision enabled the strata plan to be registered despite the prohibition order, effectively binding Mr Burgess, Mr Wang and many others into their contracts. Council did not inform any purchasers of the reasons for its decision; indeed they had to resort to a *Government Information (Public Access) Act 2009* (GIPA) application to gain this information.

Mr Burgess explained that a key factor was the sunset date in the contract, that is, the date upon which the buyer has the right to exit the contract if the developer has not completed the build to the point where they can 'hand over the keys' and the buyers can take possession. The registration of the strata plan was tied to the sunset date in both Mr Wang's and Mr Burgess's contracts, which they had signed under the advice of a solicitor with links to the developer.

Further adding to their sense of powerlessness in the face of personal and financial disaster was the absence of any support or assistance from NSW Fair Trading, who simply referred them back to the builder. As Mr Burgess told the committee:

I think purchasers definitely need to be notified ... [W]hen I called up Fair Trading to attempt to understand what is actually going on, they gave me an email address. But the email address was actually just the vendor's email address. They said "You should talk to the vendor. They can let you know what Fair Trading is doing".⁹³

⁹¹ Evidence, Mr Patrick Wang, Individual, and Mr Oliver Burgess, Individual, 11 October 2021, pp 2-10.

⁹² Evidence, Mr Burgess, 11 October 2021, p 2.

⁹³ Evidence, Mr Burgess, 11 October 2021, p 3.

Mr Burgess spoke to the extraordinary unfairness of the situation:

I am now locked into the purchase and there is no guarantee when I can get possession. Some others in our situation have been trying to get loans. They cannot get a loan from the big four banks because there is public knowledge of the defects. That is the purchasers' situation. As for the vendor, after the order has been changed, now they do not have a time limit to complete the building; they can take their time. All the purchasers are locked into a highly inflated price because of course now if they were to attempt to sell it, it would be a lot less. To my knowledge, the vendor, for their actions, has not needed to pay any fines, and their reputational damage will be limited because the holding company can create a new company and no-one will ever know about it. I do not think the situation is fair. The purchasers are taking all of the damage. The vendor really has not faced any consequences.⁹⁴

- 3.10** Participants also highlighted the profoundly stressful impact that the presence of flammable cladding, discussed in detail in chapter 4, has on some owners and residents, especially vulnerable people who cannot always understand the processes for rectifying defects. Ms Stiles referred to the elderly residents of a small building, four storeys in height, all of whom are on fixed incomes, and 'who are frightened for their lives because they are reading in the paper all the time about how the building could burn down in the middle of the night'.⁹⁵

Challenges for strata committee members

- 3.11** Another human aspect of building deficits are the very significant challenges that face strata committee members as they navigate the complex minefield of responsibilities regarding rectification of deficits. Modern apartment buildings are multi-million dollar complex systems that would be challenging even for well trained professionals to effectively manage.
- 3.12** Evidence to the committee indicated that many strata committees are not armed with the education, expertise, knowledge, capacity or proper processes to address building defects and remediation. The members of strata committees are volunteers and often do not have the time and capacity to upskill; nor do they always have a full understanding of the legal requirements and liabilities attributed to them. The challenges are compounded when some owners refuse to spend money to fix defects not directly impacting them. It can be difficult to gain consensus to pay for the defects to be repaired or to pursue those responsible for the defects. In some buildings where developers own apartments, they subvert the decision making process of the strata committees for their own purposes. Also, where the building owners are investors rather than residents, they may lack understanding of problems within their building and the impact those who live there.⁹⁶
- 3.13** The committee explored three strategies to deal with this situation: training of strata committee members, a strata register and strata commissioner.

⁹⁴ Evidence, Mr Burgess, 11 October 2021, p 3.

⁹⁵ Evidence, Ms Stiles, 22 November 2021, p 5.

⁹⁶ Evidence, Mr Duggan, 22 November 2021, p 5; Evidence, Ms Stiles, 22 November 2021, p 5; Evidence, Mr Banjo Stanton, Solicitor, Stanton Legal, assisting Owners Corporation Network of Australia, 22 November 2021, p 7.

Training

- 3.14** Representatives of SCA (NSW) identified enhanced training provisions for strata members as fundamental to improving people's understanding of their role and their capacity to fulfil it effectively.⁹⁷ Asked specifically about training as a means of improving decisions by committees experiencing dysfunction, Mr Duggan highlighted education as key, but expressed resistance to compulsory training on the basis that the role is voluntary and strata committees already struggle to attract members. He pointed to 'other mechanisms that owners can rely on without having to be trained themselves' such as 'legal advisers, engineers, managers and other advisers, depending on what the issue is'.⁹⁸ Mr Duggan instead advocated voluntary training modules, matched with funding to support them.⁹⁹
- 3.15** The OCN indicated support for a compulsory model. Following the hearing, Mr Stanton expressed support for 'a compulsory but modest minimum level of training for a strata committee member coupled with a reasonable regulated amount of remuneration for carrying out that training'.¹⁰⁰ He noted that while it is possible that the detail of Sections 73 and 74 of the *Strata Schemes Management Act 2015* (NSW) might permit an owners corporation to pay the fees for a strata committee member to undertake a course to improve the committee member's ability to carry out their duties, the correctness of this position is arguable. Mr Stanton thus suggested:

There would be a collective benefit in amending the legislation to allow for an owners corporation to pay, or contribute to, the cost of a committee member undertaking training that will improve the committee member's ability to carry out his or her responsibilities as a committee member and/or as an officer of the owners corporation. There would also be justification for such an amendment allowing for payment of a modest fee to committee members for their time in carrying out such training. I suggest that such an amendment authorise a body such as Fair Trading to regulate what can be paid and the courses for which such payments would be considered appropriate. That may be needed to avoid potential abuse of such a payment ability.¹⁰¹

- 3.16** Mr John Tansey, Executive Director, Policy and Strategy, Better Regulation Division, advised the committee that the issues around people volunteering to be strata committee members were considered at length in the strata legislation review.¹⁰² He confirmed that Section 73(4) of the *Strata Schemes Management Act 2015* does not prevent owners' corporations paying for relevant training of strata committee members if that training is connected to the exercise of the owners' corporation's functions.¹⁰³

⁹⁷ Evidence, Mr Duggan, 22 November 2021, p 7; Evidence, Mr Stephen Brell, Vice President, Strata Community Association NSW, 22 November 2021, p 7.

⁹⁸ Evidence, Mr Duggan, 22 November 2021, p 8.

⁹⁹ Evidence, Mr Duggan, 22 November 2021, p 8.

¹⁰⁰ Answers to questions on notice, Owners Corporation Network of Australia, received 24 December 2021, p 1.

¹⁰¹ Answers to questions on notice, Owners Corporation Network of Australia, p 1.

¹⁰² Evidence, Mr John Tansey, Executive Director, Policy and Strategy, Better Regulation Division, Department of Customer Service, 22 November 2021, p 70.

¹⁰³ Answers to questions on notice, Better Regulation Division, Department of Customer Service, received 17 December 2021, p 8.

- 3.17** Shortly after the committee's second and final hearing, in late November 2021, the NSW Government released the report of its statutory review of the *Strata Schemes Development Act 2015* and the *Strata Schemes Management Act 2015*. In respect of strata scheme knowledge and support it stated:

The review has heard consistent feedback about the need for greater support and education for strata residents to help them participate effectively in the management of strata schemes and to provide appropriate oversight of their owners corporation and their managing agent. Feedback to the review also highlighted some specific areas where better information and education was needed, alongside amendments to the laws themselves. This included education and training for strata committee members, as well as the development of further guidance on matters such as privacy, unfair contracts and disclosure of conflicts of interest, commissions and other benefits.¹⁰⁴

- 3.18** The review thus recommended the establishment, in partnership with key stakeholders, of a targeted program of support and education for strata residents and owners corporations to build capability in and understanding of strata scheme operation and governance. It suggested this include the use of the new Strata Hub as a central location for strata education materials, and as a key source of information for lot owners about their scheme.¹⁰⁵

A strata register and strata commissioner

- 3.19** Inquiry participants expressed support for the establishment of a strata commissioner in New South Wales as a means of dispute resolution and a strata register as a repository of information useful to the regulator and ultimately to the benefit of owners.
- 3.20** The OCN briefly expressed support in its submission for an 'independent, properly resourced Strata Commissioner'.¹⁰⁶ Ms Stiles pointed to the value of a commissioner to enable dispute resolution outside of the mechanism of appointment of an administrator, on the determination of the NSW Civil and Administrative Tribunal (NCAT). Acknowledging the seriousness of any decision to take away the ability of owners to make decisions about the property that they own, she stated, 'that is why the Owners Corporation Network has called consistently for a strata commissioner whose role it would be to educate and adjudicate on behalf of these issues'.¹⁰⁷
- 3.21** Ms Stiles gave the example of a member of the Network who has spent around \$500,000 over a seven year period fighting to have their issues with water ingress addressed. She also referred to a four lot building which has been flooded four times, the last time with raw sewage, but where the developer controls strata and will not permit the defects to be addressed. She attested, 'the mechanisms that are in place at the moment look good on paper but do not function for individuals who are being victimised'.¹⁰⁸

¹⁰⁴ NSW Government, *Statutory Review of the Strata Schemes Development Act 2015 and the Strata Schemes Management Act 2015*, November 2021, pp 34-35.

¹⁰⁵ NSW Government, *Statutory Review of the Strata Schemes Development Act 2015 and the Strata Schemes Management Act 2015*, p 35.

¹⁰⁶ Submission 65, Owners Corporation Network, p 5.

¹⁰⁷ Evidence, Ms Stiles, 22 November 2021, p 9.

¹⁰⁸ Evidence, Ms Stiles, 22 November 2021, p 9.

- 3.22** Representatives of the OCN advised the committee that a strata register is currently being developed that will include every strata scheme in New South Wales. The register will initially capture data on the existence of a strata manager or building management company, details of the last annual general meeting, and the contact details of two strata committee members, to enable the government to communicate with strata committees. Initially expected to be released in 2021, its remit was expanded to include extra information with regard to building defects and the lodgement of as-built documents, and stakeholders did not know the timeframe for its release. Future iterations of the register are proposed to capture data on the number of owner-occupiers and investors for a building, including the number of overseas investors. Ms Stiles confirmed that such information would be useful to a regulator when determining whether to intervene if defects are not being addressed.¹⁰⁹
- 3.23** Ms Stiles advised that although at this stage the strata register is not a legislative requirement, she expected that data collection will be mandatory, with an annual return required of strata schemes in New South Wales.¹¹⁰
- 3.24** When asked about the timeframe for the establishment of a strata register, Mr John Tansey, Executive Director, Better Regulation Division informed the committee that consultations had been completed 'with a view that it starts in the middle of next year'.¹¹¹ The report on the statutory review of the strata Acts published in November 2021 noted that 'better access to data about strata schemes ... is being addressed through development of the Strata Hub mandatory reporting scheme', but did not detail the government's intentions.¹¹²

Fire safety and protection

- 3.25** Participants confirmed for the committee that defects with fire safety and protection systems continue to be major concern in class 2 buildings.¹¹³ As noted above, the NSW Government's own audits found that 43 percent of the buildings examined from September 2020 had a serious defect related to fire safety. Ms Stiles of the Owners Corporation Network referred to there being 'a gamut' of common issues, with substandard fire separation a common problem. She also referred to an instance where fire hydrants were not connected to water.¹¹⁴
- 3.26** A number of witnesses reported that it is common for deficits in fire safety and protection systems to not be identified until 12 months after those systems have been signed off by the developer-appointed certifier. It is only when the subsequent annual fire inspection and safety statement is being completed 'by someone perhaps more diligent' that it is discovered that what was planned and approved was not actually installed in the building.¹¹⁵

¹⁰⁹ Evidence, Mr Duggan, 22 November 2021, p 10; Evidence, Ms Stiles, 22 November 2021, pp 9 -10.

¹¹⁰ Evidence, Ms Stiles, 22 November 2021, p 10.

¹¹¹ Evidence, Mr Tansey, 22 November 2021, p 71.

¹¹² NSW Government, *Statutory Review of the Strata Schemes Development Act 2015 and the Strata Schemes Management Act 2015*, p 91.

¹¹³ Evidence, Mr Duggan, 22 November 2021, p 3.

¹¹⁴ Evidence, Ms Stiles, 22 November 2021, p 3.

¹¹⁵ Evidence, Mr Duggan, 22 November 2021, p 8; Evidence, Mr Joe Smith, Acting Chief Executive Officer, National Fire Industry Association, 22 November 2022, pp 18 and 23; Evidence, Ms Stiles, 22 November 2022, p 3.

- 3.27** Mr Joe Smith, Acting Chief Executive Officer of the National Fire Industry Association (NFIA), called for a best practice framework for New South Wales that includes 'design, install and maintain; inspect and test; and certification, and that it should cover all streams of fire protection, which would be the active wet, that is sprinklers, as well as passive, electrical, portables and special hazards'.¹¹⁶
- 3.28** The need to improve certifications, compliance and maintenance of fire systems to ensure the safety of the community and firefighters was highlighted in the evidence provided to the committee by the Fire Brigade Employees Union (FBEU) and echoed by both Fire and Rescue NSW and the NSW Building Commissioner.¹¹⁷ Mr Leighton Drury, State Secretary of the FBEU, explained to the committee the importance of having the subject matter experts, being firefighters, involved in the 'decision-making process from start to finish, to ensure compliance with regulatory and legislative obligations that provide fire safety within the built environment'.¹¹⁸

Certification

- 3.29** The Hills Shire Council reported a number of concerning observations about certification practices in respect of fire safety, citing examples. Its observations included:
- Private certifiers (discussed again in a later section of this chapter) continue to engage in 'self-certification', such that occupation certificates do not actually reflect the physical building, having been based on earlier certificates completed by those who actually did the work.
 - Provisions for fire safety – particularly fire engineering reports – are often inadequate despite being certified otherwise.¹¹⁹
 - It has become 'industry standard' for a fire engineer to be engaged towards the end of a new apartment development to write a retrospective fire engineering report known as a 'performance solution' to justify why the building does not comply with the approved plans.¹²⁰
- 3.30** Thus the Hills Shire Council recommended that the *Environmental Planning and Assessment Act 1979* (EPA Act) be updated to:
- include a requirement that a report or certificate be obtained from the fire engineer that confirms compliance with the fire engineering report has been achieved prior to an occupation certificate being issued
 - include an offence for a fire engineer to issue the abovementioned report or certificate when the building work has not been completed in strict accordance with the fire engineering report

¹¹⁶ Evidence, Mr Smith, 22 November 2022, p 18.

¹¹⁷ Evidence, Mr Trent Curtin, Acting Deputy Commissioner, Field Operations, Fire and Rescue NSW, 22 November 2021, p 67; Evidence, Mr Leighton Drury, State Secretary, Fire Brigade Employees Union, 22 November 2021, p 42; Evidence, Mr David Chandler OAM, NSW Building Commissioner, 22 November 2021, pp 68-69.

¹¹⁸ Evidence, Mr Drury, 22 November 2021, p 43.

¹¹⁹ Submission 18, The Hills Shire Council, p 5.

¹²⁰ Submission 18, The Hills Shire Council, p 5.

- include a provision that any fire engineer who prepares a performance solution relating to fire safety must have conducted a site inspection not less than two days prior to issuing the performance solution report to confirm the building works subject to the performance solution have not commenced
- make it an offence for a fire engineer to issue a performance solution for building work that has already commenced.¹²¹

3.31 The council further recommended that NSW Fair Trading audit the work of private certifiers, particularly on developments that include performance solutions, to confirm the completed development actually complies with the design specified in the approved fire engineering report.¹²²

Accreditation

3.32 Mr Joe Smith, Acting Chief Executive of the National Fire Industry Association, advocated for a higher standard of accreditation, linked to an improved Australian Skills Quality Authority (ASQA) certificate IV qualification, referencing recommendation 19 of the Shergold Weir report. Arguing that 'for some of the biggest, most important buildings in New South Wales to have somebody with a certificate II qualification signing off on the fire protection system or elements of [it] is inappropriate', he insisted that a higher bar in certification is 'critical'.¹²³

3.33 Mr Smith further advocated for a certificate IV commissioning certifier classification within fire protection licensing to certify that fire systems have been installed correctly and as per the design in their totality. Currently, the person that installs the fire system provides documentation to the private certifier, who then signs off on it. He told the committee that, although in the last year accreditation has been required to install a fire system, anecdotally, members of the National Fire Safety Association are still reporting issues of approved designs not being properly installed and these issues are not being identified until the first inspection.¹²⁴

3.34 The committee heard that on 1 July 2020, under the *Building and Development Certifiers Act 2018*, an accreditation scheme for fire safety practitioners aimed at increasing building compliance with fire standards came into effect. The scheme is currently privately run and requires all fire safety practitioners to be licensed in the categories for which they certify work. The National Fire Industry Association and SCA (NSW) advised the committee that at present practitioners are required to be accredited by the Fire Protection Association Australia against 30 measures, each at a cost of around \$1000, therefore costing an individual practitioner who needs to be accredited for all measures \$30,000.¹²⁵ Participants further advised that this 'extraordinarily costly regime' acts as a distinctive barrier to accreditation, and encourages a practice where in some fire companies one person is accredited but the inspectors beneath them may not be.¹²⁶

¹²¹ Submission 18, The Hills Shire Council, p 6.

¹²² Submission 18, The Hills Shire Council, p 6.

¹²³ Evidence, Mr Smith, 22 November 2021, p 18.

¹²⁴ Evidence, Mr Smith, 22 November 2021, pp 23-24.

¹²⁵ Evidence, Mr Brell, 22 November 2021, pp 10 -11; Evidence, Mr Smith, 22 November 2021, p 18.

¹²⁶ Evidence, Mr Brell, 22 November 2021, pp 10 -11.

Fire system maintenance

- 3.35** The committee heard that whilst fire inspectors are required to be licensed, workers conducting maintenance work on fire safety and protection systems are not. Numerous stakeholders, including the Plumbing Trades Employees Union, expressed support for licensing maintenance work, with the National Fire Industry Association recommending a certificate III apprenticeship as the most suitable qualification, for installation.¹²⁷

Recent developments

- 3.36** The Building Commissioner advised the committee that he established a subcommittee under pillar 1 of the building reform strategies, legislative reforms, which is being led by the Fire Protection Association Australia to develop a regime to address ongoing fire system maintenance, as part of the review of the strata titles legislation.¹²⁸
- 3.37** In November 2021, Mr Chandler advised the committee that the following month, Mr Michael Lambert would hand down his report on reforms to improve fire safety in new and existing buildings, setting 'the best practice objectives we are looking for' in respect of fire safety. He noted that Fire and Rescue NSW were working closely with his office on the report as well as 'collaborating on a range of fronts now'. Mr Chandler also confirmed that the forthcoming Lambert report would specifically address fire safety and protection system maintenance.¹²⁹
- 3.38** Mr Lambert's report was released on 17 December 2021 and identified the following areas for reform:
- Putting in place the fire safety component of a building manual and consistent maintenance standards for fire safety measures
 - Exploring the implementation of a holistic approach to fire safety design and implementation
 - A comprehensive and consistent approach to the regulation of fire safety functions and practitioners
 - Improving key fire safety documentation, and
 - Enhancing the role of government regulators and bodies responsible for fire-related compliance.¹³⁰
- 3.39** Mr Lambert made four recommendations:
- establish a customer-facing building manual – with further consultation on a template manual and the implementation pathway with the objective of mandating adoption by both new and existing buildings of various classes over a suitable timeframe

¹²⁷ Evidence, Mr Brell, 22 November 2021, p 12; Evidence, Mr Stanton, 22 November 2021, p 12; Evidence, Mr Smith, 22 November 2021, p 23; Evidence, Mr Con Tsiakoulas, Compliance Officer, Plumbing Trades Employees Union, 22 November 2021, p 44; Submission 10, Plumbing Trades Employees Union NSW Branch, pp 4-5.

¹²⁸ Evidence, Mr Stanton, 22 November 2021, p 12, Evidence Mr David Chandler OAM, NSW Building Commissioner, 22 November 2021, p 69.

¹²⁹ Evidence, Mr Chandler, 22 November 2021, pp 67-68.

¹³⁰ Michael Lambert, *Improving fire safety: Industry report on reforms to improve fire safety in new and existing buildings*, Construct NSW, October 2021, p 2.

- ensure the effective regulation of fire safety practitioners
- enhance the trustworthiness of Fire Safety Schedules, Fire Safety Certificates and Annual Fire Safety Statements
- more effective regulatory and compliance action.¹³¹

3.40 His report also noted how the fragmentation of fire safety legislative provisions across multiple Acts and of compliance obligations across multiple state and local government bodies and private certifiers created complexity and confusion, and worked against fire safety outcomes.¹³²

Building manuals

3.41 There was some discussion during the inquiry about how to ensure more complete, better quality building manuals to inform owners' management of their building once certified, with a view to better safeguarding the quality of buildings over time.

3.42 In its submission, Engineers Australia confirmed building manuals as an important tool for all buildings, and emphasised the need for enforcement of requirements from the *Environmental Planning and Assessment Act 1979* for more complete, better-quality manuals. While currently the Act forbids a certifier issuing an occupation certificate unless a building manual has been prepared and provided to the owner, and provides for further requirements on manuals, none of the requirements is included in the Environmental Planning and Assessment Regulation 2000 'which leaves a void to be filled'.¹³³

3.43 Engineers Australia noted that 'Building manuals are only useful if as-built drawings are a true reflection of as-constructed work. Checking and reviewing the submitted as-built drawings is critical'. It further advocated that manuals make simpler statements of building functionality and systems, to help owners and underwriters to better understand the buildings for the purpose of assessing property investment risks and to enable property insurance to be priced more cost effectively for owners.¹³⁴

3.44 Mr Baoying Tong, Senior Manager, Building Reform and Projects with Engineers Australia, advised the committee that as part of its response to the Shergold Weir *Building Confidence* report, the Australian Building Codes Board (ABCB) assembled an implementation team tasked with providing a response to each of the report's recommendations. In 2021 the implementation team provided certain guidelines addressing the requirements of building manuals. Mr Tong recommended that when the NSW Government moves to address further requirements on building manuals in the Environmental Planning and Assessment Regulation, or future revisions,

¹³¹ Michael Lambert, *Improving fire safety: Industry report on reforms to improve fire safety in new and existing buildings*, pp 6-7.

¹³² Michael Lambert, *Improving fire safety: Industry report on reforms to improve fire safety in new and existing buildings*, p 6.

¹³³ Submission 26, Engineers Australia, p 13.

¹³⁴ Submission 26, Engineers Australia, p 13.

it should consider what has been proposed by the ABCB team and thereby follow a nationally consistent approach.¹³⁵

- 3.45** Questioned by the committee in November, the Building Commissioner confirmed that it will be a requirement for the builder/developer to hand over a building manual to the strata committee 'as part of the role of the contractor now declaring their designs and handing their work in ... That will all be available'. He further confirmed that the building manual will be part of the lodgement on the ePlanning portal, hopefully by the end of 2022.¹³⁶

Private certification

- 3.46** The present system of private certification for class 2 buildings was highlighted in the committee's first inquiry as significant contributor to the failure of standards in the building industry. Prior to its introduction in New South Wales in 1988, almost all approvals were the responsibility of local government. Private building certification was intended to streamline the certification process and improve approval response times. In the first inquiry, stakeholders and the committee itself focused on the need for greater accountability, and for each relevant building practitioner to be registered, subject to professional standards, audit and disciplinary action, and to hold a suitable level of insurance. The committee also made recommendations regarding mandatory inspections and endorsed the comprehensive recommendations of Mr Michael Lambert to improve the certification system.
- 3.47** The government response to the inquiry final report indicated that as part of the Government's building reform agenda to 2025, improvements had been made to the regulation of certifiers through the legislative instruments of the *Building and Development Certifiers Act 2018* and the *Building and Development Certifiers Regulation 2020*, both commencing on 1 July 2020. The government advised that 'together, they clarify roles and responsibilities of certifiers, strengthen conflict of interest provisions and enhance compliance and enforcement powers'.¹³⁷
- 3.48** However, numerous stakeholders again expressed strong concerns during this further inquiry.
- 3.49** Several councils reported that private certifiers continue to fail to identify defects and also continue to certify buildings that are not fit for occupation, potentially putting the health and safety of residents at risk.¹³⁸ Randwick City Council, for example, stated that whilst many private certifiers are competent, there are also many who 'provide an inadequate level of oversight of the development, fail to take appropriate and prompt action in respect of any non-compliances ... [and] fail to adequately investigate, action and respond to community complaints'.¹³⁹ As noted above with respect to fire safety, The Hills Shire Council reported that some private certifiers also continue to facilitate 'self-certification', based not on a final inspection, but on earlier certificates issued by the developer, fire engineer, designers and tradespeople who did the work.

¹³⁵ Evidence, Mr Baoying Tong, Senior Manager, Building Reform and Projects, Engineers Australia, 11 October 2021, p 27.

¹³⁶ Evidence, Mr Chandler, 22 November 2021, p 69.

¹³⁷ Correspondence from Hon Kevin Anderson MP, Minister for Better Regulation and Innovation, to the Clerk of the Parliaments, providing government response to the final report of the inquiry into the regulation of building standards, building quality and building disputes, 28 October 2020, p 8.

¹³⁸ Submission 18, The Hills Shire Council, p 3, Submission 17, Randwick City Council, p 9.

¹³⁹ Submission 17, Randwick City Council, p 7.

This is despite a NSW Building Professionals Board ruling that certifiers must conduct independent checks, such as a visual inspection.¹⁴⁰

- 3.50** Local Government NSW told the committee that when private certification was introduced almost 25 years ago, it had opposed that introduction 'for all the reasons that we are now seeing unfold in the building system'. It noted that more recently, at the 2019 Local Government Annual Conference, councils adopted a policy position calling for 'a review of the private certification system and consideration of phasing out private certifiers', on the following basis:

This reflects a long-held dissatisfaction with the entire private certification system, weak and ineffective regulation of certifiers and concerns about potential and perceived conflicts of interest with the private certification system.¹⁴¹

- 3.51** Councillor Linda Scott, President of Local Government NSW, reiterated these long-held dissatisfaction and probity concerns across the local government sector regarding private certification, observing that 'perceived conflicts of interest remain'. She advised the committee of how 'only last week' residents in the City of Sydney had contacted her raising their concerns about buying into a new building in the city 'because of these very issues'.¹⁴²
- 3.52** On the other hand, the Australian Association of Certifiers (AAC), which represents registered certifiers employed in private practice and in local government, along with the Australian Institute of Building Surveyors (AIBS), which represents building surveyor practitioners, cautioned against focusing on one part of the building industry. Rather, they urged consideration of the industry as a whole and all parties involved in the building process. Mr Jeremy Turner, Technical and Policy Manager with the AIBS, emphasised that 'building surveyors who are registered as building certifiers in New South Wales are one player in the whole process of ensuring that a compliant outcome is achieved'.¹⁴³ Similarly, the AAC observed 'the certification system does not operate in a vacuum, it exists within a broader framework, which cannot be examined in isolation'.¹⁴⁴
- 3.53** The AAC defended the private certification system as having played a positive role in the construction industry in New South Wales that has 'delivered overwhelmingly positive results for the general public'. Whilst it acknowledged there is a 'small minority of people doing the wrong thing', it insisted that the 'majority of private certifiers perform their role in a professional manner and in the best interests of the broader community'.¹⁴⁵
- 3.54** Looking more broadly, The Hill Shire Council pointed to the mismatch between the government's rhetoric about tightening its grip on certifiers and its actions to permit more and more planning decisions and approvals to rest with private certifiers:

Also confusing is the government rhetoric about getting tough on private certifiers which is somewhat perplexing given that it is the government's own planning system that is constantly expanding to permit more and larger types of development to be

¹⁴⁰ Submission 18, The Hills Shire Council, p 6.

¹⁴¹ Submission 30, Local Government NSW, p 5.

¹⁴² Evidence, Councillor Linda Scott, President, Local Government NSW, 11 October 2021, p 11.

¹⁴³ Evidence, Mr Jeremy Turner, Technical and Policy Manager, Australian Institute of Building Surveyors, 11 October 2021, p 38.

¹⁴⁴ Submission 36, Association of Australian Certifiers, p 2.

¹⁴⁵ Submission 36, Association of Australian Certifiers, p 5.

approved and certified by one of the entities it contends needs greater regulation. Private certifiers can now, under various State Environmental Planning Instruments, not only 'certify' but approve, as complying development, a range of commercial, industrial and housing developments including retail liquor outlets, warehouse and distribution centres and other large industrial development, major additions to schools and other educational institutions, group homes, low rise density housing development, dual occupancies, and the list goes on.¹⁴⁶

- 3.55** Several specific areas of concern emerged during the committee's discussions with stakeholders. These concerns focused on conflicts of interest, the standard of work by private certifiers in certifying buildings with defects and flammable cladding, in addition to the failure of the systems regulating private certifiers.¹⁴⁷

Conflicts of interest

- 3.56** As in the previous inquiry, stakeholders reported strong concerns about conflicts of interest arising from the relationship between a private certifier and the building company engaging them to undertake their work.
- 3.57** Councillor Linda Scott, President of Local Government NSW, emphasised to the committee that there has been 'a long-held dissatisfaction with the probity concerns of the private certification system and perceived conflicts of interest remain within the sector'.¹⁴⁸
- 3.58** According to The Hills Shire Council, 'there is a lack of willingness to act impartially, ethically and in the public interest due to an inherent conflict of interest' in private certifiers undertaking the dual role of acting as a public official whilst conducting a private business.¹⁴⁹ It noted that government had envisaged that private certifiers would be held accountable through the marketplace as their employment opportunities would be determined by their reputation, and went on to suggest that this is true, but has tended to operate opposite to how it was intended:

Where a private certifier is found to be too strict and insists on every part of the development being as it should be, the developer chooses another private certifier who is willing to not be as diligent and is prepared to disregard some significant non-compliances that will save the developer time and money. The certifier who has a reputation of being strict and enforces compliance is not engaged.

Council staff has met with multiple private certifiers that have issued occupation certificates for new apartment buildings that contained significant fire safety non-compliances and required fire safety orders. The common responses were "If I don't approve it, someone else will and I will be out of work" and "I know it doesn't comply but that is industry standard".¹⁵⁰

¹⁴⁶ Submission 17, Randwick City Council, p 9.

¹⁴⁷ Submission 9, Liverpool Council, p 1; Submission 10, Plumbing Trades Employees Union NSW Branch, p 2; Submission 13, Mr Aiden Ellis, p 2; Submission 17, Randwick City Council, p 9; Submission 18, The Hills Shire Council, pp 3-13; Submission 20, National Fire Industry Association, p 7; Submission 68, Goulburn Mulwaree Council, pp 1-2.

¹⁴⁸ Evidence, Councillor Scott, 11 October 2021, p 11.

¹⁴⁹ Submission 18, The Hills Shire Council, pp 4-5.

¹⁵⁰ Submission 18, The Hills Shire Council, p 5.

- 3.59** To overcome this conflict and ensure accountability and integrity, The Hills Shire Council called for certification to fully revert to local government.¹⁵¹
- 3.60** The AIBS challenged these views, with Mr Turner responding that his organisation is 'yet to see any hard evidence that demonstrates' a conflict of interest inherent in the developer client choosing the certifier. He emphasised that 'even if you do have a longstanding engagement with a client, this does not prevent you from acting professionally'. Mr Turner further stated that any member alleged to have compromised themselves in regard to a conflict of interest would contravene the requirements of the accreditation system as well as the professional code of conduct, and that his organisation 'have not yet been asked to investigate that sort of complaint'.¹⁵² This is discussed further below in the section on self-regulation.

Regulation by NSW Fair Trading

- 3.61** In this further inquiry the committee heard from a number of councils continuing to point to weak regulation of private certifiers on the part of the state government, consistent with the framework of 'light touch regulation' explored in chapter 2. Related to this, councils pointed to burdens on them to pursue private certifiers when the *Building and Development Certifiers Act 2018* clearly identifies NSW Fair Trading as the regulator of certifiers.¹⁵³
- 3.62** Liverpool Council claimed that private certifiers in New South Wales are currently operating in a regulatory environment in which 'they have little chance of being caught and even if they are, can continue to operate'. As evidence, it pointed to the certifier disciplinary register, noting that it only indicates the certifiers actually caught out, generally arising from Council or public complaints'.¹⁵⁴
- 3.63** Evidence provided to the committee confirmed that many local councils were being asked to 'intervene in non-complying development in which a private certifier is the appointed principal certifier'. Randwick City Council stated that it is often the first point of contact for residents' complaints to 'investigate and resolve' issues of non-compliance.¹⁵⁵ Further, it explained how it had become 'increasingly involved in the remedy of noncompliant building work through what is known as the "building information certificate" process'.¹⁵⁶ Liverpool Council advised that it receives 'numerous phone calls where the public are referred to Council by Fair Trading instead of logging and investigating a complaint'.¹⁵⁷
- 3.64** The Hills Shire Council indicated that its approach is to resolve issues directly with private certifiers but there are occasions where it receives a complaint about the professional conduct of

¹⁵¹ Submission 18, The Hills Shire Council, p 5.

¹⁵² Evidence, Mr Turner, 11 October 2021, p 36.

¹⁵³ Submission 17, Randwick City Council, p 8, Submission 18, The Hills Shire Council, p 10,

¹⁵⁴ Submission 9, Liverpool Council, p 1.

¹⁵⁵ Submission 17, Randwick City Council, p 8.

¹⁵⁶ Evidence, Mr Roman Wereszczynski, Manager, Health, Building and Regulatory Services, Randwick City Council, 11 October 2021, p 11.

¹⁵⁷ Submission 9, Liverpool Council, pp 1-2.

a private certifier and if serious, council will lodge a complaint with NSW Fair Trading.¹⁵⁸ Disturbingly, it reported that each such complaint receives the same generic and passive response:

NSW Fair Trading has assessed the issues you have raised. The information provided will be retained for intelligence purposes. Fair Trading has a range of regulatory options where conduct issues and breaches of legislation are identified. This includes education, investigation, audits and/or disciplinary action taken against the Certifier. The option selected will depend on the circumstances of the breach and will include consideration of the trader's previous history of compliance, consumer detriment, and the agency's compliance priorities.¹⁵⁹

- 3.65** The Hills Shire Council further reported that a NSW Fair Trading Senior Investigator advised council that it should consider pursuing criminal charges under Part 9 of the *Environmental Planning and Assessment Act* if it held serious concerns about the professional conduct of a private certifier because NSW Fair Trading 'do not have the resources' to take action.¹⁶⁰
- 3.66** The NSW Government advised that since the commencement of the government reforms from 1 July 2020, investigations of certifiers have led to two certifiers being referred for disciplinary action and 21 penalty infringement notices issued.¹⁶¹

Self-regulation

- 3.67** Following on from the concerns raised by councils and others about conflicts of interest and poor standards of work on the part of some private certifiers, the committee explored with the AIBS and Australian Association of Certifiers the effectiveness of the system of self-regulation operating in respect of these professions.
- 3.68** The AIBS advised the committee that it operates the professional standards scheme for building surveyors across Australia, whereby it monitors, enforces and improves the professional standards of its members.¹⁶² It noted that members can expect to be audited and in turn penalised if 'any impropriety' was found in relation to an engagement and that their 'ongoing participation in the industry' would be jeopardised.¹⁶³ As noted above, Mr Turner advised the committee that any member alleged to have compromised themselves in regard to a conflict of interest would contravene the requirements of the accreditation system as well as the professional code of conduct, and that his organisation had not been asked to investigate any such complaint.¹⁶⁴
- 3.69** The committee challenged the effectiveness of the professional standards scheme, providing two examples of certifiers who have had numerous adverse findings, yet have continued to operate without penalty for long periods. One such certifier had 29 findings made against him before being removed from the field; another had 15. In respect of the first, Mr Turner responded that he was not aware that any of those 29 findings were made in respect of a conflict of interest issue,

¹⁵⁸ Submission 18, The Hills Shire Council, p 9.

¹⁵⁹ Submission 18, The Hills Shire Council, p 10.

¹⁶⁰ Submission 18, The Hills Shire Council, p 10.

¹⁶¹ Submission 38, NSW Government, p 15.

¹⁶² Evidence, Mr Turner, 11 October 2021, p 34; Submission 38, NSW Government, p 16.

¹⁶³ Evidence, Mr Turner, 11 October 2021, p 36.

¹⁶⁴ Evidence, Mr Turner, 11 October 2021, p 36.

and cautioned that they should not be taken to assume a conflict of interest. He did, however, concede that a certifier with 29 adverse findings 'should not have a role in the industry' in light of consumer outcomes.¹⁶⁵

- 3.70** Questioned as to why, as is permitted in the self-regulation system, private certifiers with sustained complaints remained members of the AIBS whilst suspended, the AIBS informed the committee that some members 'had their accreditation suspended' but remained members to enable them to undertake further professional development 'in order to resume their accreditation after their suspension was lifted'.¹⁶⁶
- 3.71** The AAC advised the committee that it was in the final stages of developing a professional standards scheme to 'enhance and improve the professional practices of Association of Australian Certifiers members and elevate the standards of delivery of members' services to their clients'.¹⁶⁷
- 3.72** Asked whether she considers the regulatory system is working, Ms Jill Brookfield, Chief Executive Officer of the AAC, indicated that she sees legislative changes as having brought about some change, but also pointed to the failure of NSW Fair Trading 'to audit and look after the building certifiers'. She argued that NSW Fair Trading 'should have audited' and 'as far as ... education, training, keeping everybody up to date, Fair Trading has ... not taken on the role as they should have'.¹⁶⁸
- 3.73** This view was shared by The Hills Shire Council which contended that some issues 'could have been avoided and stopped at an early stage if regular audits of private certifiers were being conducted'. Accordingly, it recommended that NSW Fair Trading:
- conduct regular audits of private certifiers to ensure they are complying with their obligations as public officials¹⁶⁹
 - be required to audit every private certifier prior to renewing their registration
 - be required to publish the number of audits conducted each year on its website
 - be required to publish common findings of audits where significant issues are identified to stop poor practises becoming the "industry standard" among private certifiers.¹⁷⁰

Recovery of costs for compliance activities undertaken by local councils

- 3.74** As a separate issue related to compliance regulation, the committee heard that the recent introduction of the Environmental Planning and Assessment Amendment (Compliance Fees) Regulation 2021 by the NSW Government removed the ability of councils to collect revenue to recoup some of the costs of its regulatory activities. Councillor Scott told the committee,

¹⁶⁵ Evidence, Mr Turner, 11 October 2021, p 37.

¹⁶⁶ Answers to questions on notice, Mr Brett Mace, Australian Institute of Building Surveyors, received 17 December 2021, pp 1-2.

¹⁶⁷ Evidence, Ms Jill Brookfield, Chief Executive Officer, Association of Australian Certifiers, 11 October 2021, p 34.

¹⁶⁸ Evidence, Ms Brookfield, 11 October 2021, p 38.

¹⁶⁹ Submission 18, The Hills Shire Council, p 8.

¹⁷⁰ Submission 18, The Hills Shire Council, p 9.

'Councils are extremely disappointed that the government is asking us to carry out an ever-expanding list of compliance work, while at the same time removing the capacity for us to help fund the cost of these activities'.¹⁷¹ She reported that local government is 'baffled' by this change, which coincided with the government introducing its own levy on developers to fund the state's compliance activities. According to Councillor Scott, by significantly impacting councils across New South Wales ability to fund compliance and regulatory work, the change threatens councils' ability to fulfil their responsibilities by reducing the number of local government staff 'who are going to be cracking down on dodgy building work'.¹⁷² She further argued that it risks the community's ability to have confidence in the building and construction industry.¹⁷³

- 3.75** Supporting this position, Mr Roman Wereszczynski, Manager of Health, Regulatory and Building Services at Randwick City Council, emphasised that the investigation, resolution and remedy of non-compliant building work in response to complaints from residents requires a 'workable cost recovery' mechanism for 'council to recoup the significant costs' associated with these activities.¹⁷⁴
- 3.76** Local Government NSW provided examples of the estimated revenue losses arising from the regulation: in City of Ryde an estimated \$1.3 million; \$500,000 to Ballina Shire; \$700,000 loss to Wollondilly Shire; a \$300,000 loss to Lismore Shire; and a \$260,000 loss to Tweed Council.¹⁷⁵

Insurance coverage

- 3.77** In our previous inquiry the committee concluded that the diverse and serious problems in the building insurance market are a consequence of a fundamental failure of building standards, which in turn reflected a failure of government to regulate. The committee expressed deep concern that the insurance market environment was unsustainable. In light of the number of issues across all elements of the insurance market involved in the building sector, the committee called for an urgent and coordinated approach to fix the failures of the statutory warranty, professional indemnity and Home Building Compensation schemes. Two years on, the committee explored with stakeholders a number of concerns which are taking shape in the context of the reforms now underway. The focus of the discussion was on professional indemnity insurance, calls on the government to address risk, and decennial liability insurance.

Professional indemnity insurance

- 3.78** The need for the reform of insurance products for the building and construction industry was never more evident than when the Insurance Council of Australia explained to committee the difficulties the insurance market has faced with professional indemnity insurance within the last three years.
- 3.79** Mr Corey Nugent, Senior Operations Manager with the Insurance Council of Australia advised the committee that the extent of serious defects documented across building stock – for example the 39 percent of high risk buildings audited referred to at the start of this chapter – is causing

¹⁷¹ Evidence, Councillor Scott, 11 October 2021, p 11.

¹⁷² Evidence, Councillor Scott, 11 October 2021, pp 12-13.

¹⁷³ Evidence, Councillor Scott, 11 October 2021, pp 12-13.

¹⁷⁴ Evidence, Mr Wereszczynski, 11 October 2021, p 12.

¹⁷⁵ Evidence, Councillor Scott, 11 October 2021, p 15.

hesitancy among insurers to underwrite the risk of participants in the building and construction industry. This has played out in substantial premium increases and insurers exiting the market.¹⁷⁶ The Insurance Council advised the committee:

[The professional indemnity insurance] market has ... experienced loss ratios of 95 per cent for the past three years. A gross loss ratio of more than 100 percent means that insurers do not have sufficient income from premiums alone to pay out claims. Claims incurred have grown from around \$1.2 billion in 2017 to \$2.7 billion in 2020, representing a 125 percent increase over the past four years while average premiums have risen from around \$2,504 in 2017 to \$4,078 in 2020, representing a 63 percent increase over the past four years. As a result of these losses, a number of insurers no longer offer [professional indemnity] insurance lines.¹⁷⁷

- 3.80** The committee heard that the insurance premiums of building owners with flammable cladding are doubling and in some cases a tripling in cost, with excesses having risen by 10 to 100 times, some up to \$1 million.¹⁷⁸ This is further discussed in chapter 4. Further, according to the Insurance Council, Engineers Australia and Consult Australia, the cladding related fires at Grenfell Tower in London and the Lacrosse Building in Melbourne caused insurers in the professional indemnity market to increase premiums or restrict cover by excluding non-compliant combustible cladding.¹⁷⁹

Rising premiums for industry stakeholders

- 3.81** In turn, industry stakeholders requiring professional indemnity insurance reported that rises in premiums are one of the key strains currently facing the industry. Consult Australia, which represents more than 55,000 design, advisory and engineering members, found via a survey of its membership that around 90 percent of businesses had experienced significant premium increases to their professional indemnity insurance, with 11 percent reporting that they had experienced increases of over 100 percent in the previous 12 months.¹⁸⁰ Small and medium business members of Consult Australia indicated that professional indemnity insurance is now one of largest single costs to their businesses, and that whilst the coverage they had previously is being reduced, additional exclusions are being applied and premiums are increasing. Consult Australia cited the example of one member whose professional indemnity premium had increased from \$30,000 for a policy with \$2 million coverage in 2019-20 to over \$100,000 for coverage of \$1 million in 2020-21.¹⁸¹
- 3.82** Likewise, Engineers Australia reported that anecdotally, some engineers have stopped working on residential apartments because of difficulties with the availability and affordability of insurance.¹⁸²

¹⁷⁶ Evidence, Mr Corey Nugent, Senior Operations Manager, Insurance Council of Australia, 11 October 2021, p 22.

¹⁷⁷ Submission 25, Consult Australia, p 7.

¹⁷⁸ Submission 18, The Hills Shire Council, p3

¹⁷⁹ Submission 39, Insurance Council of Australia, Engineers Australia and Consult Australia, p 2.

¹⁸⁰ Submission 25, Consult Australia, p 3.

¹⁸¹ Submission 25, Consult Australia, p 8.

¹⁸² Submission 26, Engineers Australia, p 4.

- 3.83** Nevertheless, the Insurance Council informed the committee that professional indemnity insurance is 'most definitely available' and that the 'market in Australia is competitive ... while performance of the product is challenging for general insurers, there is cover available to those wishing to purchase it'.¹⁸³

Pain points for interior designers and architects

- 3.84** The committee heard from the Design Institute of Australia and the business Forward Thinking Design, that the exclusion of interior designers from registering as design practitioners arising from changes to the *Design and Practitioners Act 2020* (the DBP Act), discussed in detail in chapter 2, is exerting a 'prohibitive influence' on these professionals' ability to renew their insurance.¹⁸⁴
- 3.85** Similarly, the Australian Institute of Architects attested to the impacts of recent reforms on architects. Whilst its members support the intent to improve consumer confidence and protections,¹⁸⁵ they have a number of concerns:
- Practitioners anticipate that their premiums will rise.¹⁸⁶
 - Some contractors and building practitioners, during the 12 month transition period for them to acquire mandatory insurance, are expected to use the current provisions of the Act to avoid proportionate liability, leaving architects to pay for costly rectifications through their insurance.¹⁸⁷
 - Many architects, as evidenced in a survey of Institute members, expect that their ability to pay for premium increases arising from the DBP Act, will deter them from undertaking work on class 2 buildings.¹⁸⁸

Calls on the government to de-risk the insurance market

- 3.86** The concerns of the Australian Institute of Architects to protect proportionate liability were echoed by the Insurance Council, Engineers Australia and Consult Australia.
- 3.87** In a joint submission to the inquiry, the Insurance Council, Engineers Australia and Consult Australia asserted that the reforms arising from the partial adoption under the DBP Act of recommendations made in the Shergold Weir report 'in fact increased the risks in the market and therefore should be reconsidered'.¹⁸⁹
- 3.88** Consult Australia pointed to the need for amendments to the DBP Act and regulation to de-risk the insurance market through the removal of 'unnecessary financial and administrative burdens on industry'. They offered the following solutions:

¹⁸³ Evidence, Mr Nugent, 11 October 2021, p 22.

¹⁸⁴ Submission 5, Design Institute of Australia, p 2; Submission 7, Forward Thinking Design Pty Ltd, p 4.

¹⁸⁵ Submission 28, Australian Institute of Architects, pp 4-5.

¹⁸⁶ Evidence, Ms Lisa King, Policy and Advocacy Manager, Australian Institute of Architects, 22 November 2021, p 17.

¹⁸⁷ Submission 28, Australian Institute of Architects, p 7.

¹⁸⁸ Submission 28, Australian Institute of Architects, p 8.

¹⁸⁹ Submission 39, Insurance Council of Australia, Engineers Australia and Consult Australia, p 1.

- amend the statutory [duty] of care to avoid indeterminacy, remove retrospectivity, protect the availability of proportionate liability and to focus on the obligations imposed and parties regulated by the Act to ensure adequate consumer protection
- remove insurance obligations from the Act and Regulation
- streamline the legislation to provide clarity and certainty
- streamline and redesign the registration scheme to alleviate unnecessary burdens.¹⁹⁰

3.89 The Insurance Council reported that the insurance industry is 'unable to support those retrospective duty of care requirements which have arisen from the amendment to the DPB regulations 'now or in the future'.¹⁹¹ Its combined submission with Engineers Australia and Consult Australia explained their perspective that:

To develop insurance products for a given market, insurers need to understand the risks inherent in that market so that they can price their products appropriately. As insurers have no way to accurately price the ten-year retrospective risk, no such insurance products have emerged. The practical impact therefore would be that relevant practitioners would be unable to source insurance products that would satisfy their registration requirements – or attest to it as required by the [regulations].¹⁹²

Decennial liability insurance

3.90 Although the introduction of decennial liability insurance is intended as the government's key mechanism for protecting consumers to enable remediation of defects in buildings when they occur, the committee heard that the path towards implementation has not been smooth. Decennial insurance will provide consumer protection to apartment building owners in the event of the emergence of structural defects impacting the integrity of a building up to ten years after construction. It will be a first resort product, with claims able to be made by owners corporations regardless of whether the original developer is still available. It will only be available for newly constructed buildings.¹⁹³

3.91 Engineers Australia recommended that in the interests of protecting consumers, the development of practical proposals for project-based insurance, such as the decennial liability insurance product being led by the NSW Government, occur as a priority.¹⁹⁴

¹⁹⁰ Submission 25, Consult Australia, pp 3-4.

¹⁹¹ Evidence, Mr Nugent, 11 October 2021, p 22,

¹⁹² Submission 39, Insurance Council of Australia, Engineers Australia and Consult Australia, p 3.

¹⁹³ Answers to supplementary questions, Department of Customer Service, Budget Estimates 2020-2021, Portfolio Committee No 6 – Transport and Customer Service, Better Regulation and Innovation, hearing 27 October 2021, received 24 November 2021, answer 139, p 37; Evidence, Mr Nugent, 11 October 2021, p 26.

¹⁹⁴ Submission 26, Engineers Australia, p 10.

- 3.92** The committee notes that to date, the NSW Government is yet to introduce a single decennial liability insurance product despite professional membership bodies calling on the government to expedite this.¹⁹⁵
- 3.93** According to the Insurance Council of Australia, Engineers Australia and Consult Australia, 'reducing risks within the market has a longer trajectory than one year, especially when it comes to changing industry culture and becoming less litigious'.¹⁹⁶
- 3.94** The Urban Development Institute of Australia advised the committee during its November hearing that the ministerial panel focusing on decennial liability insurance has not yet commenced; nor has a decision been made as to whether this type of insurance will be voluntary or mandatory.¹⁹⁷
- 3.95** In turn, the Building Commissioner acknowledged the need for insurers to have the confidence to support a decennial insurance product, and informed the committee that the proposed ratings system for class 2 buildings 'is going to become the main plank' to enable that confidence.¹⁹⁸

Proposed ratings system

- 3.96** The final focus of discussion in respect of class 2 buildings revisited by the committee was the proposed ratings system being championed by the Building Commissioner. The committee took the opportunity to explore its establishment, benefits and a number of unresolved issues, discussed in turn below.

Establishment

- 3.97** Mr Chandler, NSW Building Commissioner, updated the committee on the rating system which he described as a one of a suite of further initiatives to fix the building and construction industry. During our earlier inquiry, Mr Chandler advised the committee of his intention to 'introduce a rating system to assist the public to identify more risky industry participants and products, for example by identifying the risks attached to particular developers, builder and certifiers'.¹⁹⁹ With the ultimate aim of lifting standards in design and construction to reduce defects, the ratings system is intended to assist potential buyers to identify trusted builders and developers when purchasing new class 2 apartments.
- 3.98** In its submission to the current inquiry the NSW Government stated that under the six Construct NSW transformation pillars led by Mr Chandler, it has 'helped to establish a new market for regulated ratings services provided by the private sector'.²⁰⁰ The private sector provider Equifax

¹⁹⁵ Submission 26, Engineers Australia, p 5; Evidence, Mr Steve Mann, Chief Executive Officer, Urban Development Institute of Australia – NSW Division, 22 November 2021, p 33.

¹⁹⁶ Submission 39, Insurance Council of Australia, Engineers Australia and Consult Australia, p 3, Submission 27, Australian Institute of Architects, p 7.

¹⁹⁷ Evidence, Mr Mann, 22 November 2021, p 34, p 38.

¹⁹⁸ Evidence, Mr Chandler, 22 November 2021, p 64.

¹⁹⁹ See Public Accountability Committee, NSW Legislative Council, *Regulation of building standards, building quality and building disputes: Final report* (2020), p 6.

²⁰⁰ Submission 8, NSW Government, p 6.

had been contracted to run the ratings system, with its rating service tool 'iCIRT' introduced in July 2021. Initially it is intended that this tool will assess developers and builders, and it is likely to be extended to other practitioners over time. The ratings will be made publicly available on the Equifax website.²⁰¹

- 3.99** In his November 2021 hearing, Mr Chandler advised that he had been in discussions with other private market players, including 'Moody's and Standard and Poor's etc' inviting them to consider taking part in the market in addition to Equifax.²⁰²

Benefits for industry stakeholders and consumers

- 3.100** The Minister for Better Regulation and Innovation, the Hon Kevin Anderson MP, identified the benefits of the proposed rating system as follows:

In respect of Class 2 building, the introduction of ratings is likely to significantly reduce the ability of a company to phoenix to avoid legal or financial responsibilities, as such actions would impact their ratings.²⁰³

- 3.101** When asked by the committee about the proposed ratings scheme, the Urban Development Institute of Australia explained that the building 'project' itself will not be the subject of the ratings system but rather the rating will apply to the developer and builder team that are delivering the project and their historical performance on other projects.²⁰⁴ According to the Property Council of Australia, the ratings tool would provide developers and builders with the 'confidence' to partner with others with similar or higher ratings, leading to a lift in quality standards.²⁰⁵ A three star rating is considered to be a 'pass mark' and a 'safe product to purchase into and live within'.²⁰⁶
- 3.102** Although the proposed ratings system will be voluntary, Mr Chandler informed the committee that, '80 per cent to 90 per cent of good players in the industry are now moving to realise that in fact having a rating is the thing that sets them apart from people that will never have a rating and never should.'²⁰⁷
- 3.103** As the proposed ratings system will be a regulated system, businesses that believe they had been unfairly rated can seek recourse through the regulator, the Australian Prudential Regulation Authority.²⁰⁸

²⁰¹ Submission 8, NSW Government, p 6; Evidence, Mr Chandler, 22 November 2021, p 63.

²⁰² Evidence, Mr Chandler, 22 November 2021, p 61.

²⁰³ Answers to supplementary questions, Department of Customer Service, Budget Estimates 2020-2021, Portfolio Committee No 6 – Transport and Customer Service, Better Regulation and Innovation, hearing 27 October 2021, received 24 November 2021, answer 139, p 37.

²⁰⁴ Evidence, Mr Mann, 22 November 2021, p 36.

²⁰⁵ Evidence, Mr Mann, 22 November 2021, p 37, Evidence, Mr Charles Kekovich, NSW Senior Policy Adviser, Property Council of Australia, 22 November 2021, p 37.

²⁰⁶ Evidence, Ms Lauren Conceicao, NSW Deputy Executive Director, Property Council of Australia, 22 November 2021, p 39.

²⁰⁷ Evidence, Mr Chandler, 22 November 2021, p 60.

²⁰⁸ Evidence, Mr Chandler, 22 November 2021, p 62.

- 3.104** A further and broader benefit, according to Mr Chandler, is that by lifting standards and building confidence, the ratings system will assist the regulator to focus on the 'people at the bottom' and 'if we are focused on just them, then we are starting to extinguish the pipeline of stuff that has caused so much grief in the past'.²⁰⁹

Unresolved aspects

- 3.105** Although Mr Chandler advised the committee that the proposed ratings system was 'truly a customer-facing product', during the November 2021 hearing the committee expressed concerns that the onus would be on potential buyers to take responsibility for knowing where to find the ratings and how to apply them. In response, Mr Chandler commented that he believed any potential buyers being offered a mortgage would be advised by the financial institution that they were buying an apartment- 'off a non-rated developer'. He conceded that the rating system would take a little bit of time to 'mature' but eventually would 'be normalised in the market'.²¹⁰

Committee comment

- 3.106** Once again, in this further inquiry into building standards, the human experience of home buyers who purchase building with serious defects hit home to the committee – just as it did in our first inquiry. Mr Wang and Mr Burgess's story of being locked into buying a defect ridden building that the developer refuses to fix not only points to the devastating financial and personal impacts on individuals and families that flow from building defects, but also to owners' powerlessness in the face of few options and 'light touch regulation'. Their stories further highlight the absence of procedural fairness for consumers when planning and development decisions are made, and indeed the lack of regard for what is surely purchasers' right to be directly informed of when and why government decisions about their property are made.
- 3.107** Thus the plight of Mr Wang and Mr Burgess highlighted to the committee the urgent need for clear lines of communication, responsibility and procedural fairness. When a building prohibition is put in place the purchasers should be informed directly and promptly. If a protective mechanism is proposed to be lifted purchasers must be directly informed, with reasons, and have some means of procedural fairness.
- 3.108** More specifically, we cannot see how the legal loophole exploited by the developers of the Imperial Towers to the profound detriment of purchasers can possibly be allowed to go unaddressed. We recommend the NSW Government strengthen legislation to ensure that building purchasers are protected from changes to prohibition orders preventing them from triggering sunset clauses to rescind their contracts prior to a property under a prohibition order being deemed suitable for occupation.

²⁰⁹ Evidence, Mr Chandler, 22 November 2021, p 61.

²¹⁰ Evidence, Mr Chandler, 22 November 2021, pp 62 and 64.

Recommendation 6

That the Office of the Building Commissioner and NSW Fair Trading ensure that there are clear lines of communication, responsibility and procedural fairness in respect of decisions about building prohibition orders, so that the rights of purchasers are fully protected.

Recommendation 7

That the NSW Government strengthen legislation to ensure that building purchasers are protected from changes to prohibition orders preventing them from triggering sunset clauses to rescind their contracts prior to a property under a prohibition order being deemed suitable for occupation.

- 3.109** Noting the many challenges that strata committee members face in exercising their complex and substantial responsibilities, in the committee's view an enhanced training regime recommended in the recently completed statutory review of strata laws is a very welcome development. The committee endorses this recommendation. We welcome the forthcoming strata register as a means of collecting information and intelligence that can inform the regulator's decisions to act, and also lend accountability to the strata system.
- 3.110** While we have not examined the outcomes of the statutory review of strata laws in any detail, we anticipate valuable discussion of them in Parliament in the coming months and as a matter of principle, support measures to equip and support strata members in their role. For this reason we specifically endorse the recommendation of the statutory strata review that the government establish, in partnership with key stakeholders, a targeted program of support and education for strata residents and owners corporations to build capability in and understanding of strata scheme operation and governance.
- 3.111** We also note the evidence from participants that the ability to compensate strata committee members for the cost and time of attendance on training is in question. It is clearly to the benefit of the strata system that committee members undertake proper training and any unnecessary barriers to this occurring should therefore be removed. As such we believe it would be a step forward for the government to expressly regulate to provide that regulated attendance fees and costs may be paid to strata committee members undertaking relevant training.
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Recommendation 8

That the NSW Government ensure that it acts on the recommendation of the statutory review of the *Strata Schemes Development Act 2015* and the *Strata Schemes Management Act 2015*, to establish, in partnership with key stakeholders, a targeted program of support and education for strata residents and owners corporations to build capability in and understanding of strata scheme operation and governance and expressly regulate to provide that regulated attendance fees and costs may be paid to strata committee members undertaking relevant training.

- 3.112** The committee acknowledges the complexity of certifications required to install and maintain fire safety and protection systems. Clearly a person certified for all 30 different components of
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certification should be conducting the post installation certification of a fire system, yet many non-compliance issues are going unidentified until the 12 month inspection is completed. The committee welcomes Mr Michael Lambert's 2022 report on reforms to improve fire safety in both new and existing buildings commissioned by the Building Commissioner. We note our support for each of the areas of reform that it identifies and for its recommendations, noting that they address building manuals, maintenance, enhanced regulation of practitioners and more effective regulatory and compliance action.

- 3.113** As an immediate and specific recommendation, we call on the NSW Government to urgently require that post installation certification of fire systems be completed by an accredited certifier before an occupancy certificate can be issued.
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Recommendation 9

That the NSW Government implement each of the recommendations of the review report by Mr Michael Lambert for Construct NSW, *Improving fire safety: Industry report on reforms to improve fire safety in new and existing buildings*.

Recommendation 10

That the NSW Government act urgently to require that post installation certification of fire systems be completed by an accredited certifier before an occupation certificate can be issued.

- 3.114** The committee notes the importance of maintaining fire safety standards after the initial installation of fire protection systems. We must ensure that proper maintenance is being conducted by competent practitioners. Practitioners involved in fire protection work should hold appropriate qualifications and credentials to ensure that these standards are adequately upheld.
- 3.115** The committee further notes the current inconsistency of NSW fire protection legislation with other state jurisdictions. Practitioners operating in both Queensland and Victoria are required to have a licence to inspect, test and maintain fire protections systems, however in New South Wales this is not a requirement. It is important that those inspecting these systems have a comprehensive understanding of how the fire protection system operates in its entirety. For these reasons, the committee recommends that the NSW Government implement a requirement for practitioners to be licensed in order to inspect, test and maintain fire protection systems in New South Wales.
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Recommendation 11

That the NSW Government implement a requirement for practitioners to be licensed in order to inspect, test and maintain fire protection systems in New South Wales.

- 3.116** The committee welcomes the advice of Engineers Australia as to how building manuals must improve, and how government requirements can be refined to enable this with the longer term goal of better management and enhanced safeguarding of the quality of buildings over time. We specifically endorse its recommendation that the NSW Government move to address further
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requirements on building manuals in the Environmental Planning and Assessment Regulation, to consider the proposal developed by the Australian Building Codes Board, and thereby follow a nationally consistent approach.²¹¹

Recommendation 12

That the NSW Government address further requirements on building manuals via the Environmental Planning and Assessment Regulation, and in doing so, adopt the proposal developed by the Australian Building Codes Board, towards a nationally consistent approach.

- 3.117** The committee's strong concerns about private certification were reflected in the recommendations of our previous inquiry, but there is little evidence before us in this second inquiry that our concerns have been addressed.
- 3.118** The committee agrees that there is an inherent conflict of interest arising from the relationship between private certifiers and the developer that engages them. We are satisfied by the evidence before us that this conflict plays out in very real ways, and that the operation of market principles is entirely inappropriate in this field.
- 3.119** We were also very concerned by reports of a lack of action by Fair Trading in response to complaints about certifiers. Clearly 'light touch regulation' and an under resourced regulator is achieving very little in this space, despite the massive consequences that a certification influenced by a conflict of interest may have for purchasers. This must be addressed.
- 3.120** Also failing is the practice of self-regulation by certifiers. Whilst the committee notes the evidence received by professional bodies representing private certifiers attesting to their positive contribution to the building and construction industry, we acknowledge the strength of the evidence received from local councils detailing their issues resulting from the fallout of the failures in the regulation of private certifiers, their conflicts of interests with developers and inadequate professional standards schemes.
- 3.121** In fact, in the view of the committee, the certifiers' professional bodies are failing to self-regulate – as evidenced by the mismatch between the stories of purchaser misery in the media and the very short list of certifiers who lose their accreditation – or indeed whose accreditation is only suspended so that it can be later renewed. In the committee's view the self-regulation system brings into question the entire standards of the industry and must be abandoned. We recommend that the NSW Government instead empower and resource a Building Commission, as envisaged in recommendation 2, in consultation with local councils, to fulfil this role.

Recommendation 13

That the NSW Government abandon the system of self-accreditation by building certifiers and instead empower and resource a Building Commission, as envisaged in recommendation 2, in consultation with local councils, to fulfil this role.

²¹¹ Evidence, Mr Tong, 11 October 2021, p 27.

- 3.122** The committee recognises the substantial financial burden being carried by councils to rectify issues when private certifiers fail and acknowledges the loss of the funding stream to local councils for compliance and regulatory activities. Like councils, we are perplexed that at the same time as the NSW Government established its own levy on developers to fund its compliance activities, it removed the ability of councils to collect revenue to recoup some of the costs of their regulatory activities. We concur that this will impact on councils' ability to undertake important compliance and activity work, and ultimately risks the public's confidence in the building industry.
- 3.123** Accordingly, we recommend that the NSW Government undertake an independent review of the adequacies of Clause 1 in Schedule 1 of the Environmental Planning and Assessment Amendment (Compliance Fees) Regulation 2021, in allowing councils to properly and adequately fund the regulatory and compliance activities required to be undertaken by local councils across New South Wales.

Recommendation 14

That the NSW Government undertake an independent review of the adequacies of Clause 1 in Schedule 1 of the Environmental Planning and Assessment Amendment (Compliance Fees) Regulation 2021, in allowing councils to adequately fund the regulatory and compliance activities required to be undertaken by local councils across New South Wales.

- 3.124** In the committee's view, the rising costs of insurance premiums for stakeholders in the building and construction industry is reflective of the risk profile of the industry. The government has made promises about the introduction of decennial insurance policies for certain higher quality buildings, but we are yet to see a single policy.
- 3.125** The committee sees a real danger in going down a pathway where some projects will have decennial insurance and others will not. If allowed to develop this will create a two tier apartment market where those with sufficient resources can buy higher quality and higher cost apartments with adequate insurance protection while those that cannot will be limited to less safe, defect-ridden buildings with high ongoing maintenance costs. Safer buildings, minimal defects and a systemic lift in building standards are what is required for insurers to feel comfortable to issue policies. These same outcomes will benefit everyone and the goal must be for all residential buildings to have adequate insurance, not just those at the higher end of the market.
- 3.126** Turning to the proposed ratings system, aspects of it continue to remain unclear to the committee. While Mr Chandler is highly optimistic of the impact that the ratings system will eventually have on the practices of builders and developers, and ultimately on the quality of buildings, numerous questions remain about the detail of how it will work. Answers to these questions will be important in building support, trust and momentum towards implementation. Our questions about the ratings system include:
- whether a business that does not have a rating could still conduct its business
 - how new builders and new developers attain a rating
 - how consumers will access the rating of a particular business

- how ratings will be published
- the impact on economic fairness should the ratings affect the purchase price of an apartment
- whether a building with a lower rating or no rating is shifting the risk of defects to those consumers that can least afford it
- eligibility for decennial insurance and if it will only be available to five-star ratings and consequential equity issues
- whether higher star ratings will result in cheaper insurance premiums
- whether ratings under three stars will result in it being untenable for businesses to continue in the building and construction industry
- whether ratings under three stars will result in buildings being refused an occupancy certificate, and
- whether finance will be refused or limited for businesses without a rating or with a lower rating and how this will affect new builders and developers yet to obtain a rating.

3.127 On a related point, the need to build the trust of consumers in this rating system cannot be underestimated, and central to this will be effective communication with them as to how the ratings system works. The effectiveness of the system will stand or fall on its engagement with prospective buyers. The committee did not explore this with Mr Chandler but we emphasise it nonetheless.

3.128 Moreover, the committee is concerned that the proposed ratings system will create a market where projects will be priced based on their star rating, such that those that can least afford it are going to have the defect ridden apartments. The end point will be a two tier system in which well-resourced purchasers have high quality buildings with higher ratings, while less resourced will have poorer quality buildings prone to the same old defects.

3.129 The committee is also concerned with the ratings being performed entirely by a private entity, by the lack of transparency regarding both the ratings methodology and the quality control measures in place.

3.130 While there are undeniably some potential benefits from a privately run ratings system for developers, the uncertainty and questions surrounding such a scheme are significant. Given so many of the problems in the industry already relate to lack of proper regulation and private assessment and enforcement of building standards there are obvious concerns with a private entity undertaking the ratings role. The committee considers that at a minimum, even if elements of it are contracted to a private entity, this work should be managed and closely overseen by a government agency, ideally the newly created Building Commission.

Recommendation 15

That the NSW Government ensure that any future government-endorsed or regulated rating system for the corporate entities responsible for class 2 buildings, at a minimum be managed and closely overseen by a government agency, ideally the created Building Commission.

Chapter 4 Flammable cladding

The risks arising from the presence of flammable cladding on and within apartment buildings came to worldwide attention in 2017 with the Grenfell Tower disaster in London causing the deaths of 72 people. Serious fires in 2019 and 2014 in Melbourne, in which aluminum composite panels (known as ACP type cladding) were found to contribute to the quick spread of the fires, further highlighted the imperative to address the risk arising from cladding across around Australia. Nevertheless, progress to date in New South Wales has been very slow, and many, many buildings remain at risk, including all those accepted into Project Remediate.

This chapter begins by documenting a number of challenges that have emerged for the remediation process across the state from the perspective of homeowners, industry and local government participants. It then examines in detail the progress of Project Remediate, including barriers to participation, the adequacy of assistance, and the failure of the project to have yet remediated flammable cladding on a single class 2 building. Next, it examines participants' views about the industry standards being applied to cladding remediation products in New South Wales.

Challenges for remediation

4.1 This further inquiry commenced on the understanding that despite the imperative to address flammable cladding in apartment buildings and on other buildings around New South Wales, little progress has been made to date. Participants identified a number of challenges for the remediation process across the state, including the complexity and cost of the task, demands on local government, and private certifiers' difficulties obtaining professional indemnity insurance. Each of these is discussed in turn below. Specific issues in relation to Project Remediate are examined in detail in a later section.

Complexity and cost of the task

- 4.2** Engineers Australia highlighted that the manner in which the majority of cladding products have been designed, fabricated and installed make it a 'difficult and costly task' to remove and replace non-complaint cladding. It noted that 'combustibility/fire performance' is but one aspect of external façade design and that numerous other factors such as waterproofing, wind loading, thermal performance, acoustic performance, structural performance and aesthetics also need to be considered when cladding is being removed and replaced.²¹²
- 4.3** Similarly, the ACP sub-committee of a large residential building reported that significant challenges arise from the fact that 'the flammable cladding is not simply present in large sheets on the outside of buildings; it is also in smaller areas located in entrances, fire exits, roof areas, balconies, and on exterior sections as decorative panelling'.²¹³
- 4.4** Engineers Australia further advised that because cladding remedial works are usually not exempted under the *Design and Building Practitioners Act 2020* (DBP Act), they find it problematic

²¹² Submission 26, Engineers Australia, p 6. See also Evidence, Mr Kim Regler, Managing Director, Network Architectural, 22 November 2021, p 18; Evidence Mr Joe Smith, Acting Chief Executive Officer, National Fire Industry Association, 22 November 2021, p 18.

²¹³ Submission 4, ACP sub-committee, p 1.

to declare cladding remedial works are 'fully compliant' with the Building Code of Australia (BCA). According to Engineers Australia, the current duty of care provisions of the DBP Act make it untenable for engineers to put forward 'technically feasible options that are more economically viable and greatly solve the problems for owners' that may not be fully compliant, as the engineers risk a claim against them from owners. In addition, 'it is difficult to achieve full BCA compliance for the enclosure of an aged building due to changing standards and general wear and tear'. The outcome is that engineers are reluctant to provide any solutions other than costly full replacement. If unaffordable to the owners, this leaves problems to remain until such time as they become bigger and more expensive.²¹⁴

4.5 Similarly, the Association of Australian Certifiers argued that the threshold for replacement of cladding is set too low, making replacement prohibitively expensive.²¹⁵ It explained that the Cladding Product Safety Panel has reached the decision that panels with greater than 8 per cent combustible material mass are regarded as 'too dangerous' and require replacement. The Association noted that prior to the product ban of August 2018 pursuant to the *Building Products (Safety) Act 2017*, the threshold was greater than 30 per cent polyethylene by mass.²¹⁶

4.6 The Association of Australian Certifiers cited the Law Council of Australia Newsletter, 4 May 2021 which contended that this higher standard has actually heightened the challenges of removing an aluminium composite panel (ACP):

NSW faces the nightmare that rectification of the ACP problem, by wholesale removal, may become so expensive, that the process becomes a money pit – meaning that too many residential apartment blocks will not be able to afford to replace all the 8% ACP without sinking into a debt cycle. The result could well be that there is less ACP replacement than even there would have been with the 30% threshold – making a bad situation worse for everyone.²¹⁷

4.7 Mr Con Tsiakoulas, Compliance Officer with the Plumbing Trades Employees Union (PTEU), told the committee that the rectification of flammable cladding within buildings across New South Wales 'could take many years to complete'. He voiced the union's in principle support for removal and replacement of non-compliant cladding, but questioned the extent to which it is practically achievable. Thus, in addition to remediation, he called for a much greater focus on a strong licencing regime for testing and maintenance of fire systems to reduce risks. In doing so, he noted that effective fire safety and protection systems were the reasons why a 'catastrophe was avoided' in the building fires in both the Lacrosse Tower and Neo200 apartment building in Melbourne.²¹⁸ Specifically, the PTEU called for government to 'consider redirecting part of

²¹⁴ Submission 26, Engineers Australia, p 6.

²¹⁵ Submission 36, Association of Australian Certifiers, p 5. Others who argued that the approach of the Cladding Taskforce was too conservative, risk averse and costly included the Australian Institute of Building Surveyors: see Evidence, Mr Jeremy Turner, Technical and Policy Manager, Australian Institute of Building Surveyors, 11 October 2021, p 39.

²¹⁶ Submission 36, Association of Australian Certifiers, p 5.

²¹⁷ Submission 36, Association of Australian Certifiers, citing 'ACP Cladding Rectification', *Law Council of Australia Newsletter*, 4 May 2021, p 5.

²¹⁸ Evidence, Mr Con Tsiakoulas, Compliance Officer, Plumbing Trades Employees Union NSW Branch, 22 November 2021, pp 43-44.

that allocated \$1 billion' within Project Remediate 'or allocating additional funds, to improving the fire safety level of the affected buildings'.²¹⁹

Demand on local government

- 4.8** Numerous local government stakeholders reported to the committee that councils lack the resources required to conduct the regulatory and compliance activities expected of them in relation to flammable cladding.
- 4.9** The committee heard that through the issuance of fire safety orders under the *Environmental Planning and Assessment Act 1979*, many local councils are able to identify buildings within their local areas with flammable cladding. Council are able to then issue orders requiring owners to undertake a review of the cladding installed in their buildings. Once buildings with flammable cladding have been identified, councils then issue orders requiring rectification works to be undertaken.²²⁰
- 4.10** Randwick City Council put forward the view that the process recently introduced by the NSW Cladding Taskforce for the remediation of designated 'high-risk' buildings, is heavily reliant on local councils, 'many of which simply do not have the resources or specialist technical expertise to assess and manage the remediation (or acceptance) of combustible cladding on these buildings'.²²¹
- 4.11** Mr Roman Wereszczynski, Manager of Health, Building and Regulatory Services at Randwick City Council, told the committee that although councils acknowledged the work of the Building Commissioner and his staff in addressing the substandard work in class 2 buildings through Project Remediate, councils are bearing the greatest burden of buildings on the cladding register and need clear criteria, funding and other support:

[C]ouncils have been left to deal with most of the buildings with noncompliant cladding in the absence of any clear and consistent criteria without any assistance or funding. Noncompliant high-rise buildings also only represent a small percentage of buildings on the New South Wales cladding register and, again, councils have been left to deal with these buildings as they consider or may be necessary to do so. Overall, the level of support given to local government to deal with this issue has been insufficient and councils should be given funding to deal with all of the buildings on the cladding register.²²²

- 4.12** Mr Andrew Thomas, Executive Manager of Planning and Development with Sydney City Council, informed the committee that in the absence of a clear set of standards provided by the NSW Government, council assessors are required to make their risk assessments on an individual building-by-building basis on buildings of other classifications, such as hospitals and universities. He noted that this is not only resource intensive for councils; it also requires

²¹⁹ Submission 10, Plumbing Trades Employees Union, NSW Branch, p 6.

²²⁰ Submission 9, Liverpool Council, p 1.

²²¹ Submission 17, Randwick City Council, p 6.

²²² Evidence, Mr Roman Wereszczynski, Manager, Health, Building and Regulatory Service, Randwick City Council, 11 October 2021, p 12.

building owners to conduct quite technical and extensive investigations of their building, so is consuming and costly for them.²²³

- 4.13** The City of Sydney Council advised that 'the assessment and remediation works associated with flammable cladding continues to impact the City's technical and legal staff resourcing'. This is in addition to council allocating resources to respond to 'government requests for information and support for the Project Remediate program'.²²⁴
- 4.14** The City of Sydney Council reported that in three years the council has expended \$378,000 per year on 'wages for senior building surveyors, plus management, administration and legal costs' arising from this work. In addition, a legal challenge incurred \$66,000 in legal costs.²²⁵ While Project Remediate provides councils with a \$10,000 one off payment per building, which they welcome, in the experience of councils, this does not reflect the cost of their work; nor does it apply to buildings outside of Project Remediate.²²⁶
- 4.15** Following the hearing, the City of Sydney confirmed that council receives this payment only when a building is remediated under Project Remediate and because no buildings within the City of Sydney have yet entered into remediate contracts, the council is yet to receive any such \$10,000 payment from the NSW Government.²²⁷
- 4.16** Councillor Linda Scott, President of Local Government NSW, also indicated that the one-off \$10,000 payment 'is not guaranteed to continue' and that it remained unclear 'how it will be funded into the future'.²²⁸
- 4.17** As to the specific volume of this work, Mr Thomas indicated that City of Sydney Council currently has 509 properties within their local government area on the cladding register. Of those, to date 18 were confirmed as eligible for Project Remediate, and another 72 were anticipated to be eligible.²²⁹
- 4.18** Echoing these concerns was Lake Macquarie Council as well as The Hills Shire Council, with the latter advising the committee that it expected to incur costs of approximately \$500,000 to investigate, assess and regulate the remediation of approximately 80 buildings with external combustible cladding.²³⁰

²²³ Evidence, Mr Andrew Thomas, Executive Manager, Planning and Development, Sydney City Council, p 14.

²²⁴ Submission 40, City of Sydney Council, p2.

²²⁵ Submission 40, City of Sydney Council, p 3.

²²⁶ Submission 40, City of Sydney Council, p 3; Evidence, Mr Thomas, 11 October 2021, p 17; Evidence, Mr Roman Wereszczynski, Manager, Health, Building and Regulatory Service, Randwick City Council, 11 October 2021, p 17.

²²⁷ Answers to questions on notice, City of Sydney Council, p 2, received 15 December 2021.

²²⁸ Evidence, Councillor Linda Scott, President, Local Government NSW, 11 October 2021, p 18.

²²⁹ Evidence, Mr Thomas, 11 October 2021, p 13.

²³⁰ Submission 24, Lake Macquarie City Council, p 2; Submission 18, The Hills Shire Council, p 3.

- 4.19 To address these shortfalls the City of Sydney called on the NSW Government to 'provide further financial assistance to councils to contribute to the cost of regulatory activity related to cladding compliance programs and legal challenges'.²³¹

Professional indemnity insurance

- 4.20 Engineers Australia highlighted that professional indemnity insurance for façade engineers remains a 'severe problem', such that some are deciding to stop offering design engineer services in certain markets or entirely.²³² Mr Baoying Tong, Senior Manager, Building Reform and Projects, advised that engineers working in building façade face significant challenges obtaining affordable insurance and a product with adequate coverage.²³³ These issues in respect of class 2 buildings more generally were discussed in chapter 2.
- 4.21 Engineers Australia reported that policy exclusions appear to be broadening with the effect that it is extremely difficult to find and secure an insurance policy that properly covers all façade related works, without exclusions on non-conforming cladding products. This creates challenges for façade engineers in interpreting their changing policies from engineering, commercial, product and legal perspectives. It also creates risks for both clients and engineering businesses if policies do not cover the actual risks.²³⁴ Mr Tong indicated that engineers working either for themselves or for medium-sized companies are those experiencing the greatest difficulties in this regard.²³⁵
- 4.22 As noted in chapter 3, Consult Australia confirmed that the affordability of professional indemnity insurance was a particularly challenging issue for its members, both in cladding and across the board in building work.²³⁶
- 4.23 In turn, the committee heard that this situation is a significant contributor to the increased demand on local government noted above. Mr Thomas of the City of Sydney Council told the committee that, 'We are seeing more owners looking for certification through councils rather than through the private sector because of their inability to get professional indemnity insurance'.²³⁷
- 4.24 Mr Corey Nugent, Senior Operations Manager with the Insurance Council of Australia, indicated that the insurance industry was actively engaging with the Building Commissioner and the Cladding Product Safety Panel to deliver an appropriate solution in respect of combustible cladding.²³⁸

²³¹ Submission 40, City of Sydney Council, p 2.

²³² Submission 26, Engineers Australia, p 7.

²³³ Evidence, Mr Baoying Tong, Senior Manager, Building Reform and Projects, Engineers Australia, 11 October 2021, p 25.

²³⁴ Submission 26, Engineers Australia, p 7.

²³⁵ Evidence, Mr Tong, 11 October 2021, p 25.

²³⁶ Evidence, Ms Kristy Eulenstein, Head of Policy and Government Relations, Consult Australia, p 23.

²³⁷ Evidence Mr Thomas, 11 October 2021, p 20; see also Evidence, Mr Wereszczynski, 11 October 2021, p 20.

²³⁸ Evidence, Mr Corey Nugent, Senior Operations Manager, Insurance Council of Australia, 11 October 2021, p 22.

- 4.25 Mr Nugent's evidence clarified that the Building Commissioner is sourcing a professional indemnity insurance product to cover cladding remediation under Project Remediate. When asked whether there is currently a professional indemnity product available for the majority of buildings with flammable cladding that do not qualify for Project Remediate, Mr Nugent responded 'No'. He did however indicate that a 'major international insurer' has a product 'now available for that segment, so that would indicate that ... capacity is there where the conditions meet the risk proposition'.²³⁹

Project Remediate

- 4.26 As noted in chapter 2, Project Remediate was established in 2020 as a key NSW Government response to flammable cladding. It is a voluntary scheme to help remove cladding on up to 239 eligible residential apartment buildings known to the NSW Cladding Taskforce. Project Remediate is coordinated by the Building Commissioner and offers owners of eligible buildings 10 year interest free loans, with repayments to commence upon completion of the work. It also offers expert assurance and project management services to provide technical and practical support to owners corporations and strata managing agents. The effectiveness of Project Remediate to date in removing flammable cladding was considered by the committee during the course of this inquiry.
- 4.27 The committee's discussion with inquiry participants focused on three key areas: barriers to participation in the program; the adequacy of financial and other assistance; and progress to date.

Barriers to participation

- 4.28 Stakeholders voiced a number of concerns that may generally be considered as barriers to participation in the program.
- 4.29 The committee heard that Project Remediate was announced some years after many owners, strata committees and owners' corporations had already progressed the identification and rectification process. Accordingly, some stakeholders told the committee that the program's implementation had come too late for many. Some building owners were forced to commence remediation work outside of Project Remediate to meet insurer requirements and to alleviate concerns of residents that they were living in potential fire traps.²⁴⁰
- 4.30 The committee received a submission from the chair of an aluminium cladding (ACP) sub-committee of a large residential strata complex, that represents 104 apartment owners in Sydney. He informed the committee that the owners received an order from their council requiring them to have replaced all aluminium composite panels and other metal composite panels and to have lodged all documentation with the council by May 2022. Their insurer extended their building insurance policy until the end of 2021 on the condition that they were to have removed the majority of flammable cladding by December 2021. He stated that the benefits of Project

²³⁹ Evidence, Mr Nugent, 11 October 2021, p 24.

²⁴⁰ Evidence, Mr Chris Duggan, President, Strata Community Association of NSW, 22 November 2021, p 13.

Remediate 'have effectively come too late for our strata scheme', and argued that this is unfair, even discriminatory.²⁴¹

- 4.31** The committee received further evidence that the cost of opting into Project Remediate was substantial. If a stakeholder who has already commenced remediation works wanted to opt into Project Remediate they would be forced into the position of foregoing all monies paid to date to consultants and experts, to start over again with new ones nominated by Project Remediate.²⁴²
- 4.32** In its submission to the inquiry, the NSW Government advised that residential building owners that choose not to opt in to Project Remediate can arrange the remediation of their building independently, and will need to ensure the intended solution complies with fire safety orders and/or development controls issued by the local council or consent authority. Remediation work must also comply with the DBP Act. This means a registered design practitioner must prepare designs for the remediation proposal, declare that the work meets the requirements of the Building Code of Australia, and lodge this declaration on the NSW Planning Portal before a registered building practitioner can commence work.²⁴³

Adequacy of financial and other assistance

- 4.33** The adequacy of the financial assistance offered through Project Remediate was of concern to many stakeholders. Councillor Linda Scott, President of Local Government NSW, noted in her evidence to the committee that resourcing for the remediation of cladding is a significant challenge for the many strata bodies faced with this unexpected cost.²⁴⁴
- 4.34** In submissions to the inquiry, it became clear that the cost of replacing flammable cladding is being borne primarily by owners.²⁴⁵ Of the 24 development applications approved by The Hills Shire Council for remediation and removal of flammable cladding, the cost of building works declared by property owners ranges from between \$50,000 to \$2.2 million.²⁴⁶
- 4.35** The City of Sydney Council explained that many building owners are funding the cost of 'seeking the services of building consultants to either demonstrate that existing cladding is safe to remain or requires removal and replacement'. It stated that under the current funding program 'these costs are not eligible for funding', and called upon the NSW Government to 'broaden the financial assistance currently available for owners so that funding assistance can be provided towards the engagement of building consultants to assess cladding on buildings'.²⁴⁷
- 4.36** Whilst the Owners Corporation Network of Australia commended Project Remediate 'for the framework and processes that it has put in place' it highlighted four major concerns on the part of members with regard to the progression of cladding:

²⁴¹ Submission 4, ACP sub-committee, p 1.

²⁴² Submission 4, ACP sub-committee, p 1.

²⁴³ Submission 38, NSW Government, p 11.

²⁴⁴ Evidence, Councillor Scott, 11 October 2021, p11

²⁴⁵ Submission 9, Liverpool Council, p 1.

²⁴⁶ Submission 18, The Hills Shire Council, p 3. While it is not known whether these are within our outside Project Remediate, they are provided as an indicative range.

²⁴⁷ Submission 40, City of Sydney, p 4.

Only a small number of owners of buildings deemed high risk can access Project Remediate leaving a large number of vulnerable owners to fend for themselves;

Eligible owners, although significantly assisted by interest free loans, still having to fund the repairs themselves. The owners are the victims of regulatory and industry failures. The repairs should be government funded with the government then being able to recover those costs, where possible, via a statutory assignment or subrogation of owners corporation rights;

Owners corporations already under stress paying for the replacement of cladding are not being assisted in addressing the defect issues in the façade that have been covered up by the cladding. Those owners corporations are currently unconscionably being left to themselves to address those issues despite often not being in a position to; and

The communication to owners corporations of why the Project Remediate framework provides the most cost effective process to achieve a proper cladding repair needs to improve to the point that all affected owners corporation understand that.²⁴⁸

- 4.37** When asked to comment on whether the Victorian model which set certain standards and \$600 million aside to remove flammable cladding from both residential and government buildings should be adopted in New South Wales, Councillor Scott called on the NSW Government 'to commit additional funds to support the significant cost on residents and councils' and to adopt the Victorian approach, which she observed has been 'extremely successful' with better outcomes than New South Wales,²⁴⁹ stating:

There is no doubt that the Victorian approach that had serious standards and allowed funding to be allocated to support building owners to undertake remediation has led to better outcomes. It is very clear when you look to the Victorian example that their approach has been far more successful than the approach taken here in New South Wales.²⁵⁰

- 4.38** The ACP sub-committee referred to in the previous section also pointed to the comparative generosity of the Victorian scheme, commenting, 'the financial assistance offered through Project Remediate is much less beneficial than the cash payments made by the Victorian Government which would be a more appropriate form of financial assistance to strata schemes like ours.'²⁵¹

Progress to date

- 4.39** The committee explored with numerous participants the limited progress achieved under Project Remediate to date.
- 4.40** The inquiry heard from a number of stakeholders that the remediation process for the removal of flammable cladding 'is still in ... the administrative stage', whereby work undertaken to date

²⁴⁸ Submission 65, Owners Corporation Network of Australia Limited, p 3.

²⁴⁹ Evidence, Councillor Scott, 11 October 2021, pp 11-15.

²⁵⁰ Evidence, Councillor Scott, 11 October 2021, p15

²⁵¹ Submission 4, ACP sub-committee, p 2.

has primarily been concerned with the identification of buildings with flammable cladding, how the cladding should be removed and replaced and what should be funded.²⁵²

4.41 In November 2021, Mr David Chandler OAM, the NSW Building Commissioner, advised that no building had been remediated but that 290 buildings had applied for acceptance into the program, with 155 of these confirmed and intended to proceed. Of those assessed to date, 46 have been considered not eligible, and the NSW Cladding taskforce is considering another 89.²⁵³ By comparison, as of June 2021, Victoria had completed 40 buildings, with 117 underway.²⁵⁴

4.42 Defending claims raised during the inquiry that the progress of Project Remediate has been too slow, Mr Chandler responded:

We have taken cladding off buildings for testing and triaging for seven or eight buildings at the moment, and we should have a further 26 done in the next month. That is where we lift the cladding and we do a detailed look underneath the building to inform the design process which follows.²⁵⁵

4.43 Mr Chandler noted that COVID had been a factor in the delay and went on to explain the thoroughness of the approach in each case by way of example:

On that project at Darlington the other week, for example, there was just aluminium. There was no moisture barrier, there were no fire barriers, and there were no window heads. There was no drainage at the bottom of the facade wall. We want to make sure all of those things are identified so that when we design a solution—a multi-component solution—for this replacement program, all of those multi-components do their job and they are there.²⁵⁶

Cladding standards

4.44 There was substantial discussion during the inquiry about the industry standards being applied to the cladding remediation task in New South Wales and nationally. Four particular issues emerged: product conformity with standards; testing of cladding products; whether cavity barriers should be required for installation of solid aluminium panels; and testing to the standard AS 5113. These are discussed in turn below.

Product conformity

4.45 The committee explored with several participants the testing standards applied to cladding products as a further area where government needs to act. It is evident that there are conflicting views on the standards of fire testing that should be undertaken on solid aluminium panels – that is, the primary endorsed product to replace flammable cladding under Project Remediate.

²⁵² Submission 17, Randwick City Council, p 6.

²⁵³ Evidence, Mr David Chandler OAM, NSW Building Commissioner, 22 November 2021, p 71.

²⁵⁴ 'Extended wait to get flammable cladding removed from hundreds of buildings', *Daily Telegraph*, 10 October 2021.

²⁵⁵ Evidence, Mr Chandler, 22 November 2021, p 71.

²⁵⁶ Evidence, Mr Chandler, 22 November 2021, p 74.

- 4.46** Standards Australia advised the committee that it has no responsibility for the certification of building projects, products or systems. However, with regard to cladding specifically, it does maintain several product standards and standards for testing products and systems concerning the risk of fire spread.²⁵⁷
- 4.47** The two testing standards that apply to the testing of cladding products are:
- AS 1530 series – sets out methods for fire tests on building materials, components and structure (an oven based test)
 - AS 5113-2016 – fire propagation testing and classification of external walls of buildings based on reaction-to-fire performance 'for large scale wall systems related to the tendency of fire to spread'.²⁵⁸
- 4.48** Standards Australia have also developed a technical specification SA TS 5344:2019, permanent labelling for aluminium composite panel (ACP) products, which requires the panels to be marked so that they can be easily identified, thus limiting the risk of the 'wrong product being supplied and installed'.²⁵⁹
- 4.49** The NSW Government advised the committee that it had introduced the *Building Products (Safety) Act 2017* to create a comprehensive building products safety scheme to prevent the use of dangerous building products by conferring powers on the Department of Customer Service to prohibit the use of certain products. In addition, the Act empowered the department to identify buildings where products have been used in a way that is prohibited and enable the investigation and assessment of products so that unsafe uses can be identified, prevented and prohibited.²⁶⁰
- 4.50** In July 2020, the NSW Government established the Cladding Product Safety Panel to advise the NSW Cladding Taskforce, local councils, consent authorities, building owners and the insurance industry on the suitability of building products and external wall assembly methods associated with the replacement of non-compliant and/or non-conforming external combustible panels and other wall cladding systems, to ensure that the buildings are made safe and are able to be appropriately insured.²⁶¹
- 4.51** Despite the measures put in place by the NSW Government, Engineers Australia reported to the committee that façade engineers continue to face challenges in selecting cladding products. It claimed that 'confusing datasheets, inconsistent compliance statements and misleading testing certificates', make it difficult for engineers to find 'the single source of truth'. Moreover, engineers are reliant on the expertise of the supplier in respect of product compliance.²⁶²
- 4.52** Ms Laura Cockburn, NSW State President of the Australian Institute of Architects, explained to the committee that architects take a 'whole of system approach' to a building envelope which requires them to have the knowledge and information to allow them to build up that system. She emphasised that architects rely on the advice of engineers regarding products:

²⁵⁷ Submission 22, Standards Australia, p 1.

²⁵⁸ Submission 22, Standards Australia, p 1.

²⁵⁹ Submission 22, Standards Australia, p 1.

²⁶⁰ Submission 38, NSW Government, p 12.

²⁶¹ Submission 38, NSW Government, p 12.

²⁶² Submission 26, Engineers Australia, p 7.

We rely on the expertise or the specialist advice from specific engineers that enables us to build that and then we also need to have clear information, product information, to the nth degree - and by that I mean it is not just that it covers the Australian standard but it covers all parts of that Australian standard and is very clear about where it does not comply with that Australian standard.²⁶³

4.53 Ms Cockburn stated that it is very difficult for architects to actually make decisions on materiality when the information is not clearly displayed within the products. Such ambiguity can lead to substitution of items without it being clear whether they are compliant or not.²⁶⁴

4.54 In addition, Ms Cockburn reported that there is currently insufficient testing on materials and long wait times at CSIRO for product testing, thus inhibiting innovation in the industry. She advocated for further funding to resource the CSIRO, whose expertise is such that 'it would be well-invested money to expand their ability to get this testing done in a timely manner'.²⁶⁵

Testing of cladding products

4.55 Witnesses explored with the committee a number of issues regarding the testing of cladding products. Of particular concern was evidence that the cladding product endorsed as the primary replacement product under Project Remediate – solid aluminium panels – is not actually itself safe.

4.56 Mr Kim Regler, Managing Director of Network Architectural, a company that imports a certain type of aluminium composite cladding, told the committee that the Cladding Product Safety Panel has been 'tasked to recommend the safest and most suitable cladding products', however as of November 2021 it had not revealed whether products recommended in phase one have been subject to Australian standard fire safety or combustion testing, and had delayed recommending safer composites that do meet that testing.²⁶⁶

4.57 Mr Regler emphasised that cladding panels need to be 'comprehensively assessed' on 'other criteria like durability, environmental performance and warranty'.²⁶⁷ This view was shared by Ms Cockburn of the Australian Institute of Architects, who as noted above spoke of panels as part of a whole system:

I think if we just take it away from the product and we just talk about the envelope, it is really important to understand that it is a system – It is system that has to breathe, it has to seal, it has to protect, it has to perform acoustically; sometimes it has to perform from a security basis. There are many aspects to an envelope and within that you have to have a whole-of-system approach.²⁶⁸

4.58 Mr Regler called on the Cladding Product Safety Panel to:

²⁶³ Evidence, Ms Laura Cockburn, NSW State President, Australian Institute of Architects, 22 November 2021, p 27.

²⁶⁴ Evidence, Ms Cockburn, 22 November 2021, p 30.

²⁶⁵ Evidence, Ms Cockburn, 22 November 2021, p 30.

²⁶⁶ Evidence, Mr Regler, 22 November 2021, p 18.

²⁶⁷ Evidence, Mr Regler, 22 November 2021, p 18.

²⁶⁸ Evidence, Ms Cockburn, 22 November 2021, p 27.

- test all products including solid aluminium panels to the AS 5113, on the basis that this is the only Australian standard test that simulates real fire conditions
- publish the results of testing, with guidance on how all products, both solid aluminium and safe composites, perform against both fire and non-fire criteria.²⁶⁹

4.59 Mr Clint Gavin, National Sales Manager of Network Architectural, presented to the committee three physical examples of cladding products currently deemed compliant in New South Wales and Australia, and stated that:

- the solid aluminium sample – currently endorsed by the Cladding Product Safety Panel – is three millimetres thick, with no core so the heat 'goes straight through it' and, like all aluminium, it melts at 660 degrees
- the Mitsubishi ALPOLIC sample – a product distributed by Network Architectural – has an aluminium skin either side of a non-combustible inner mineral core
- the corrugated core panel sample, currently considered a bonded laminate, which has two pieces of aluminium either side of a corrugated aluminium core held together with glue, and when exposed to fire, 'you have got oxygen and glue going through the middle of the panel and the fire spreads'.²⁷⁰

4.60 Mr Gavin informed the committee that both the Mitsubishi ALPOLIC and corrugated core panels had recently been called 'for further testing to test to a fairly low standard called AS 1503.3'. However the solid aluminium panel has not been called for any testing by the Cladding Product Safety Panel or under the National Construction Code (NCC). He observed that the Panel 'have not called for any fire testing really on solid aluminium ... that just gets a green light anywhere for some reason ... so there is no evidence whatsoever to say that solid aluminium is a safe product'.²⁷¹

4.61 He stated that despite the fact that solid aluminium has been shown to melt under AS 1530.1 testing, the Cladding Product Safety Panel endorses the use of solid aluminium cladding on class 2, high-rise buildings – through Project Remediate.²⁷²

4.62 Responding to the committee's observation that in the Grenfell disaster, melting was not the problem, but rather combustibility problems were, Mr Gavin concurred, then stated that the safety of the occupants getting out of the building is a further consideration, and that it has been shown that solid aluminium forms chunks with melting debris falling down on people trying to exit a building. He cited a CSIRO National Association of Testing Authorities (NATA) test finding that 'the panel actually comes off the wall; the whole panel comes down because the heat that is generated in this test melts the aluminium and it melts away from the fixing and it comes crashing down'. He underscored, 'There is a whole range of separate topics where this product has not been tested to and is not suitable for'.²⁷³

²⁶⁹ Evidence, Mr Regler, 22 November 2021, p 18.

²⁷⁰ Evidence, Mr Clint Gavin, National Sales Manager, Network Architectural, 22 November 2021, p 25.

²⁷¹ Evidence, Mr Gavin, 22 November 2021, p 25.

²⁷² Evidence, Mr Gavin, 22 November 2021, p 25.

²⁷³ Evidence, Mr Gavin, 22 November 2021, p 26.

- 4.63** Mr Gavin then asserted, on the committee's questioning, that Mitsubishi ALPOLIC has been tested to the highest European and Australian standards, yet it has not received a recommendation from the Cladding Safety Product Panel.²⁷⁴
- 4.64** With regard to solid aluminium, Ms Cockburn verified its poor insulating behaviour, in particular the large moisture build up due to rapid heating and cooling and the chimney effect in a fire. She advised the committee that 'we have not used aluminium for quite a while for that reason'.²⁷⁵
- 4.65** Mr Chandler responded with frustration to the evidence of Network Architectural representatives regarding testing of solid aluminium versus their product, suggesting that they were motivated by commercial interests.²⁷⁶

How the product has been installed: Should cavity barriers be required?

- 4.66** The committee also heard that in respect of fire safety, the installation as well as the insulation surrounding cladding panels is as important as the panel itself. It explored with witnesses the content of a Project Remediate industry briefing by a member of the Cladding Product Safety Panel. This briefing outlined how, when an aluminium-clad wall is separated out some centimetres through the insulation system, it creates a chimney effect, such that the fire spreads rapidly and melts the aluminium. In particular, the use of polystyrene as insulation, installed behind the solid aluminium panels is hazardous. However, while the use of cavity barriers has been shown under AS 5113 testing to address this risk and reduce the risk of the fire from spreading vertically, they are not required by the Building Code of Australia to be installed.²⁷⁷
- 4.67** The images below, taken from slides accompanying the briefing, show the comparative effect of the presence or absence of cavity barriers under AS 5113 testing. The image on the left is of the effect on solid aluminium with cavity barriers, while the image on the right is solid aluminium without cavity barriers. The window frame locations are marked in red.
- 4.68** Mr Gavin informed the committee that because the cavity barriers are not mandatory under the National Building Code, they are only a requirement of the 220 or so buildings identified as eligible under Project Remediate, while a further 700 or so requiring remediation are not mandated to have to cavity barriers when using solid aluminium panels; nor are new builds.²⁷⁸
- 4.69** This was confirmed to be the case by Mr Chandler, who advised that the use of cavity barriers is required under Project Remediate, but not for buildings with cladding outside of the program.²⁷⁹

²⁷⁴ Evidence, Mr Gavin, 22 November 2021, p 26.

²⁷⁵ Evidence, Ms Cockburn, 22 November 2021, p 28.

²⁷⁶ Evidence, Mr Chandler, 22 November 2021, p 72.

²⁷⁷ NSW Government, 'Project Remediate Industry Briefing' by Allan Harriman, Cladding Product Safety Panel Member, 1 September 2021, tabled in the Budget Estimates hearing for the portfolio of Better Regulation and Innovation, 27 October 2021, p 27.

²⁷⁸ Evidence, Mr Gavin, 22 November 2021, pp 28-29.

²⁷⁹ Evidence, Mr Chandler, 27 October 2021, p 10.

Figure 2 Comparative effect of the presence of cavity barriers adjacent to solid aluminium panels



NSW Government, 'Project Remediate Industry Briefing' by Allan Harriman, Cladding Product Safety Panel Member, 1 September 2021. The panels on the left had barriers installed while the panels on the right did not.

4.70 During the Budget Estimates hearing held on 27 October 2021, over a long series of questions, members of Portfolio Committee 6 – Transport and Customer Service, challenged the Hon Kevin Anderson MP, Minister for Minister for Better Regulation and Innovation, as to what he is doing to provide for the requirement for cavity barriers to be extended to the greater majority of buildings with cladding who are excluded from Project Remediate, who will thus have their cladding replaced without this particular hazard being addressed.

4.71 Throughout the course of questioning Mr Anderson insisted that because the traditional installation without cavity barriers is compliant with the Building Code of Australia, and therefore would be signed off by a consent authority, its use is legitimate. He concluded:

The Cladding Product Safety Panel does very good work in relation to the products available for cladding. It will continue that work. It is onto the second tranche now ... It will continue to ascertain the criteria required to make them safe with the Building Code of Australia.²⁸⁰

4.72 In respect of the large number of buildings not eligible under Project Remediate, following the November hearing Mr John Tansey, Executive Director, Policy and Strategy, Better Regulation Division, Department of Customer Service, informed the committee that 'the next edition of the National Construction Code' is being finalised and 'within that consideration of improvements or enhancements to the code'. Mr Tansey indicated that the changes to the NCC

²⁸⁰ Evidence, Hon Kevin Anderson MP, Minister for Minister for Better Regulation and Innovation, Budget Estimates hearing for Portfolio Committee 6 – Transport and Customer Service, Better Regulation and Innovation, 27 October 2021, pp 41-43.

would address the use of solid aluminium panels with a gap between the cladding and wall, without cavity barriers.²⁸¹

Testing to Australian Standard 5113

4.73 When asked by the committee if solid aluminium cladding has been assessed to AS 1530.3, Mr Gavin explained that:

[T]he solid aluminium ... that does not have to do anything. And what we are finding is a mass of this coming in from all different suppliers, different grades, different melting points, and none of it has to be tested—it can go straight onto a building.²⁸²

4.74 Mr Regler recommended to the committee that all cladding panels be tested to the higher standard AS 5113 which is a wall test.²⁸³ This view was supported by Ms Cockburn who agreed that AS 5113 should be the 'basic minimum' and that 'a minimum standard for all materials would be a good starting point'. Ms Cockburn emphasised the importance of applying the test not just to the cladding panel but to the whole system, stating, 'It is the system that needs to be tested holistically from outside to inside with all aspects of it to be considered'.²⁸⁴ Network Architectural further recommended that the NSW Government publish a table on the Cladding Product Safety Panel's website showing the comparative performance of all products against the same criteria.²⁸⁵

4.75 In contrast, Mr Chandler continually resisted the testing of all panel systems, including solid aluminium panels, against AS 5113 under Project Remediate. When asked for the reasons for the resistance to testing all panels equally, Mr Chandler insisted, 'there is no need to test solid aluminium. We are quite happy to provide you with the paper that concluded as to why that is the case'.²⁸⁶

4.76 As promised, Mr Chandler subsequently provided details of the paper, *Public Comment Draft of National Consultation Code*, released by the Australian Building Codes Board (ABCB) on 10 May 2021, which exempted solid aluminium from the testing to AS 1530.1.²⁸⁷

4.77 Following the hearing, the committee asked Mr Chandler whether the Cladding Product Safety Panel (CPSP) compare the performance of all cladding products on the same façade system and

²⁸¹ Evidence, Mr John Tansey, Executive Director, Policy and Strategy, Better Regulation Division, Department of Customer Service, 22 November 2021, p 74.

²⁸² Evidence, Mr Gavin, 22 November 2021, pp 29-30.

²⁸³ Evidence, Mr Regler, 22 November 2021, p 18.

²⁸⁴ Evidence, Mr Gavin, 22 November 2021, p 30; Evidence Ms Cockburn, 22 November 2021, p 29. See also correspondence from Mr Tony Rouady, Co-founder and General Manager, Network Architectural, to Chair, responding to evidence provided by Mr David Chandler OAM, NSW Building Commissioner, on 22 November 2021, attaching briefing note on cladding product recommendations and a table comparing cladding products, received 14 December 2021.

²⁸⁵ Correspondence from Mr Tony Rouady to Chair, received 14 December 2021.

²⁸⁶ Evidence, Mr Chandler, 22 November 2021, p 72.

²⁸⁷ Answers to supplementary questions, Mr David Chandler OAM, NSW Building Commissioner, received 2 February 2022, p 1.

if not, what other control method will be put in place to assess and compare cladding products. He responded:

The CPSP is following a scientific and pragmatic approach to assess products based on testing methodologies accepted by local government, industry and the NCC. Non-combustibility is assessed against AS 1530.1 and the spread of flame and smoke developed indices are determined using AS/NZS 1530.3. Every material category has its own feature and testing on one façade system will not cater for all facades. Instead, the CPSP is conducting reference testing to evaluate how material types such as bonded laminate perform when put to test as-installed. The outcome of the reference material testing, which is based on testing to AS/NZS 1530.3 and sample preparation as per Schedule 6 of the NCC, will not only throw light on how these cladding materials perform but also guide the industry on performance of joints and sealants.²⁸⁸

- 4.78** Given that testing against AS 1530.1 does not assess the safety of panels as a system as the real-world simulated wall test under AS 5113 does, the committee asked the Building Commissioner how the safety of the product and/or the product as part of a façade system will be measured. Mr Chandler responded that they will be measured in two ways: first, NATA accredited test report demonstrating Deemed-To-Satisfy (“DTS”) compliance with the NCC for fire performance requirements; and second, additional safety measures such as non-combustible mechanical fixing and cavity barriers in appropriate locations.²⁸⁹
- 4.79** Asked whether all cladding products recommended by the Cladding Taskforce are required to meet Australian Standards on weatherproofing and condensation criteria, Mr Chandler responded that cladding systems considered by the Cladding Product Safety Panel (as opposed to cladding products) must meet the DTS NCC requirements for weatherproofing and condensation management.

Committee comment

- 4.80** The slow rollout of Project Remediate, and of the assessment and remediation of the likely thousands of residential, commercial and industrial buildings with flammable cladding in New South Wales, has many implications across the building and construction industry. The impacts are not limited to building owners paying much higher insurance premiums to live in buildings with flammable cladding whilst awaiting their cladding to be removed; the failure to promptly remove flammable cladding puts at risk the safety and lives of those that currently reside or work in buildings with non-compliant cladding.
- 4.81** It is clear from the evidence before the committee that numerous factors are contributing to the prolonged risks of waiting for remediation to progress and finally be achieved: the complexity and cost of the task for any one building, let alone across the state; the lack of resources and significant demands on local government; and the availability, coverage and cost of private indemnity insurance for the engineers who must undertake this highly skilled work. For the fundamental reason of protecting people's safety, the NSW Government must do all it can to address these factors so that all relevant buildings are remediated quickly and effectively. It can and should take greater action with regard to local government and private insurance.

²⁸⁸ Answers to supplementary questions, Mr Chandler, p 1.

²⁸⁹ Answers to supplementary questions, Mr Chandler, p 1.

Recommendation 16

That, in order to facilitate the timely and effective remediation of flammable cladding across the state, the NSW Government, as a priority:

- work with Local Government NSW to provide enhanced funding to local government to contribute to the costs of regulatory activity related to cladding compliance, and associated legal work
 - work with the insurance industry and other stakeholders to find a solution to the professional indemnity issue, so that the engineers and other consultants required to undertake this skilled work are not exposed to unnecessary risk.
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- 4.82** More broadly, the committee has sympathy with the view of various participants, notably owners within apartment buildings, local government, the Australian Association of Certifiers and indeed the Law Council of Australia, that the costs of remediation are extremely high and may be unaffordable for many. While the Victorian Government actually funded the rectification of buildings, having accepted responsibility for a regulatory system that allowed the cladding problem to occur on its watch, the NSW Government has opted for a for more limited approach. The results of this speak for themselves. In Victoria, flammable cladding has been removed from 40 private residential buildings, with a further 117 buildings underway. In New South Wales, not a single building has removed any flammable cladding under Project Remediate.²⁹⁰
- 4.83** It is of significant concern to the committee that under Project Remediate, the NSW Government has only offered 10 year, interest free loans. These may be of some help, but they still leave the burden of financial cost on the shoulders of the building owners. The committee considers that apartment owners need more support to remove dangerous cladding from their buildings, without incurring further debt. We call on the government to introduce direct funding for building owners to remove their flammable cladding.
- 4.84** The committee accepts that the deregulation and privatisation of the building industry has contributed to the flammable cladding emergency for buildings across New South Wales, and as such the government should accept at least some of the burden and responsibility for removing it. The committee reiterates the recommendation of our earlier report: that the NSW Government provide a substantial funding package, proportionate to the Victorian Government's \$600 million package, to fund the rectification of buildings containing aluminium composite panels and building products that may be banned in future. The package should be available to homeowners who have already commenced remediation work who are currently excluded from the NSW Government's program. The intention of this recommendation was and remains that the NSW Government actually fund the work, not simply coordinate and provide no interest loans.

²⁹⁰ These figures were as of 30 June 2021: 'Extended wait to get flammable cladding removed from hundreds of buildings', *Daily Telegraph*, 10 October 2021.

Recommendation 17

That the NSW Government provide a substantial funding package, proportionate to the Victorian Government's \$600 million package, to fund the rectification of buildings containing aluminium composite panels and building products that may be banned in future. The package should be available to homeowners who have already commenced remediation work.

- 4.85** The committee was pleased to learn from NSW Fair Trading in December 2021 that changes to the National Construction Code have been proposed by NSW to address the need for cavity barriers, which we note will have the effect of making them mandatory on all buildings on which solid aluminium cladding will be installed. If implemented this will be an important shift; it addresses a significant weakness in the building code. It also made no sense that buildings outside of Project Remediate would have a lower level of requirement, especially when the evidence is clear – and publicly acknowledged by a member of the Cladding Product Safety Panel – that the absence of cavity barriers encourages a chimney effect that is extraordinarily dangerous.
- 4.86** We strongly support the urgent adoption of mandatory cavity barriers to address the risk of fire spreading on buildings that have significant aluminium external cladding installed, in order to prevent the chimney effect and the rapid spread of fires. In the event that the National Construction Code is not rapidly amended to provide for this a separate NSW requirement should be adopted. Even with this in place going forward it raises the ongoing safety risk from the unknown number of buildings that have had aluminium cladding installed with façade systems that created the risk of fire spread in the past five years post-Grenfell. This is a safety risk that we would urge the Building Commissioner to assess and report on as soon as practicable. We cannot allow these risks to only be addressed following a tragedy.
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Recommendation 18

That the NSW Government continue to support the urgent adoption of mandatory cavity barriers under the National Construction Code in order to address the risk of fire spreading on buildings that have significant aluminium external cladding installed. In the event that the National Construction Code is not rapidly amended to provide for this, a separate NSW requirement should be adopted.

Recommendation 19

That the NSW Government resource and empower the NSW Building Commissioner to assess the risk to health and safety from buildings that have had aluminium cladding installed with façade systems that created the risk of fire spread in the past five years.

- 4.87** More fundamentally, we note the inconsistencies in fire testing of cladding panels and are very concerned that solid aluminium has only been required to be tested at the lower threshold of AS 1530.1. The committee does not understand the Building Commissioner's reluctance to test all panels to the higher standard of AS 5113. We were pleased by the Commissioner's indication in answers to written questions that the Cladding Product Safety Panel is now testing 'to evaluate how material types such as bonded laminate perform when put to test as installed', noting that the panels are one element in a system. Whilst we accept that the cladding panels are but one
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part of the whole system of a wall from the outside in, that will now, on the advice of the Building Commissioner be tested as a whole, we continue to hold real concerns that the failure to fire test solid aluminium panels could have disastrous consequences on building owners. They must be tested both as a standalone product and as part of a system to ensure that they are safe.

- 4.88** Our fears are not only for the safety of those who have panels installed; they are also that when the chimney effect created by solid aluminium panel fires eventually becomes recognised, building owners who have remediated their buildings with solid aluminium once more have to go through the remediation process to remove yet another defective system, again at massive expense to individuals and the taxpayer. The committee has a very real concern that the use of solid aluminium panels will be the big future risk.
- 4.89** Accordingly the committee recommends that the Building Commissioner and Cladding Product Safety Panel ensure that each cladding product – whether composite or solid aluminium – be tested against both the AS 1530 (oven test), and also the AS 5113 (wall test), with a comparison of the performance of each product to be published on the Panel's website. Further, we recommend that that if solid aluminium is found not to be comparably safe, it no longer be an endorsed product to replace cladding under Project Remediate. This must occur as soon as possible to allow Project Remediate to proceed without delay, and in order to limit any further use of potentiality unsafe cladding on other buildings.

Recommendation 20

That the NSW Building Commissioner and NSW Cladding Product Safety Panel ensure, as a matter of urgency, that each cladding product – whether composite or solid aluminium – be tested against both the Australian Standard 1530 (oven test), and also the Australian Standard 5113 (wall test), and that a comparison of the performance of each product be published on the Panel's website. Further, that if solid aluminium is found not to be comparably safe, it be abandoned as the endorsed product to replace cladding under Project Remediate.

- 4.90** The committee does not underestimate the enormity and complexity of the Building Commissioner's task, nor his commitment to it, nor the thoroughness of his approach to scoping. We are, however, very concerned that to date not one building has been remediated under Project Remediate. The process has been woefully slow. Our concern is focused on the people living and working in these buildings, whose safety remains at risk as long as flammable cladding remains on and in them.
- 4.91** Throughout this report and our previous report it has become increasingly clear that the Department of Fair Trading is not capable of the scope of regulatory reform and oversight needed to make buildings safe. Further, the complexity of building regulation and the lack of clear lines of responsibility allows unscrupulous developers and builders to avoid detection and punishment and consequently places the good operators at an unfair economic disadvantage. The only winners in this scenario are the worst operators and the costs are almost entirely borne by homeowners and individual investors. This is so clearly wrong and the mess that is the regulation of flammable cladding again highlights the problem.
- 4.92** Given the additional checks and balances put in place to test façade systems under Project Remediate we are satisfied that it will provide safe remediation outcomes for the tiny minority

of buildings that go through that process. All of this will be under the remit of the Building Commissioner. Meanwhile countless other buildings are being built and or remediated using likely dangerous cladding systems with solid aluminium and no cavity barriers. All of this has been happening under the “eye” of Fair Trading without ever even generating a blink. Within this context we reiterate our view, reflected in recommendation 2, that the Building Commissioner be empowered through the establishment of a Building Commission, and adequately resourced to perform his very substantial role.

Appendix 1 Submissions

No.	Author
1	Mr Michael Green
2	Ms Linda Avramides
3	Ms Jacqueline Marks
4	ACP sub-committee
5	Design Institute of Australia
6	Pia Francesca Design Pty Ltd
7	Forward Thinking Design Pty Ltd
8	Bing Xue
9	Liverpool Council
10	Plumbing Trades Employee's Union (PTEU) NSW Branch
11	Confidential
12	Name suppressed
13	Mr Aidan Ellis
14	Name suppressed
15	Property Council of Australia
16	MidCoast Council
17	Randwick City Council
18	The Hills Shire Council
19	Strata Community Association NSW
20	National Fire Industry Association
21	Hornsby Shire Council
22	Standards Australia
23	Name suppressed
24	Lake Macquarie City Council
25	Consult Australia
26	Engineers Australia
27	Urban Development Institute of Australia - NSW Division
28	Australian Institute of Architects NSW
29	Citrus ID Pty Ltd
30	Local Government NSW
31	Strata Choice

No.	Author
32	Mima Design Pty Ltd
33	Name suppressed
34	Joe's Pools and Spa Pty Ltd
35	Australian Institute of Building Surveyors
36	Association of Australian Certifiers
37	Expert Engineering Services Australia
38	NSW Government
39	Insurance Council of Australia, Engineers Australia and Consult Australia
40	City of Sydney Council
41	Name suppressed
42	Ms Diane Fernandes
43	More Than Space
44	Mrs Ash Guven
45	Property Owners Association NSW
46	Mr James Guerrisi
47	Gregory Meyer Industrial Design Pty Ltd
48	Name suppressed
49	Confidential
50	Miss Anna Thompson
51	Confidential
52	Name suppressed
53	Sydney Design School
54	Confidential
55	Interior Fitout Association
56	Name suppressed
57	Ryder Shop and Office Fitting Pty Ltd
58	Total Fitouts Surry Hills
59	Name suppressed
60	Mr Brad Ward
61	TAFE NSW
62	Network Architectural
63	Mr Tomas Scerbo
64	Luchetti Krelle Pty Ltd
65	Owners Corporation Network
66	Confidential

No.	Author
67	Enhanced Space Projects Pty Ltd
68	Goulburn Mulwaree Council
69	Name suppressed
70	Mr Patrick Wang

Appendix 2 Witnesses at hearings

Date	Name	Position and Organisation
Monday 11 October 2021	Mr Patrick Wang	Private Individual
Virtual hearing	Mr Oliver Burgess	Private Individual
	Councillor Linda Scott	President, Local Government NSW
	Mr Roman Wereszczynski	Manager, Health, Building and Regulatory Services, Randwick City Council
	Mr Andrew Thomas	Executive Manager, Planning and Development, City of Sydney Council
	Ms Jane MacMaster	Chief Engineer, Engineers Australia
	Mr Baoying Tong	Senior Manager, Building Reform and Projects, Engineers Australia
	Mr Corey Nugent	Senior Operations Manager, Insurance Council of Australia
	Ms Kristy Eulenstein	Head of Policy and Government Relations, Consult Australia
	Mr Charles Slack-Smith	Director, Group DLA, and Treasurer, Association of Australian Certifiers
	Mr Jeremy Turner	Technical and Policy Manager, Australian Institute of Building Surveyors
	Ms Jill Brookfield	Chief Executive Officer, Association of Australian Certifiers
Monday 22 November 2021	Ms Karen Stiles	Executive Director, Owners Corporation Network of Australia
Macquarie Room	Mr Banjo Stanton	Solicitor, Stanton Legal, assisting Owners Corporation Network of Australia
Parliament House, Sydney	Mr Chris Duggan	President, Strata Community Association NSW
	Mr Stephen Brell	Vice President, Strata Community Association NSW
	Ms Lisa King	Policy and Advocacy Manager, Australian Institute of Architects

Date	Name	Position and Organisation
	Ms Laura Cockburn	NSW State President, Australian Institute of Architects
	Mr Joe Smith	Acting Chief Executive Officer, National Fire Industry Association
	Ms Denise Ryan	Senior Policy Advisor, Design Institute of Australia
	Mr Bradley Schott	Policy Committee Chair, Design Institute of Australia
	Mr Clint Gavin	National Sales Manager, Network Architectural
	Mr Kim Regler	Managing Director, Network Architectural
	Mr Steve Mann	Chief Executive Officer, Urban Development Institute of Australia – NSW Division
	Ms Lauren Conceicao	NSW Deputy Executive Director, Property Council of Australia
	Mr Charles Kekovich	NSW Senior Policy Adviser, Property Council of Australia
	Mr Con Tsiakoulas	Compliance Officer, Plumbing Trades Employees Union
	Mr Leighton Drury	State Secretary, Fire Brigade Employees Union
	Mr David Chandler	NSW Building Commissioner
	Mr John Tansey	Executive Director, Policy and Strategy, Better Regulation Division, Department of Customer Service
	Mr Trent Curtin	Acting Deputy Commissioner, Field Operations, Fire and Rescue NSW
	Mr Jamie Vistnes	Manager, Fire Safety Policy Unit, Field Operations, Fire and Rescue NSW

Appendix 3 Minutes

Minutes no. 49

Monday 24 May 2021

Public Accountability Committee

Macquarie Room, Parliament House, 1.32 pm

1. Members present

Mr Shoebridge, *Chair*

Mr Graham (via Webex)

Mrs Houssos

Mr Khan

Mr Poulos

Mrs Ward

2. Apologies

Mr Borsak

3. Previous minutes

Resolved, on the motion of Mrs Houssos: That draft minutes no. 48 be confirmed.

4. Consideration of terms of reference

The Chair tabled the letter proposing the self-reference:

1. That the Public Accountability Committee inquire into and report on:

- a. the efficacy and adequacy of the government's regulation of building standards and specifically,
 - i. the cost, effectiveness and safety concerns arising from the use of flammable cladding,
 - ii. private certification of and engineering reports for construction projects, and
- b. any other related matter.

2. That the committee report by 25 November 2021.

Mrs Houssos moved: That the committee adopt the terms of reference.

Mrs Ward moved: That the motion of Mrs Houssos be amended by omitting 'adopt the terms of reference' and inserting instead 'defer consideration of the terms of reference until 1 July 2022 to allow others reviews to take place'.

The committee divided.

Ayes: Mr Khan, Mr Poulos, Mrs Ward.

Noes: Mr Graham, Mrs Houssos, Mr Shoebridge.

There being an equality of votes, question resolved in the negative on the casting vote of the chair.

Original question of Mrs Houssos put.

The committee divided.

Ayes: Mr Graham, Mrs Houssos, Mr Shoebridge.

Noes: Mr Khan, Mr Poulos, Mrs Ward.

There being an equality of votes, question resolved in the affirmative on the casting vote of the chair.

5. Conduct of inquiry into the regulation of regulation of building standards, building quality and building disputes – Further inquiry

5.1 Proposed timeline

Resolved, on the motion of Mrs Houssos:

1. That the committee adopt the following timeline for the administration of the inquiry:
 - Call for submissions – Thursday 1 July 2021
 - Closing date for submissions – Sunday 29 August 2021
 - Hearing – Monday 11 October 2021 – focus on private certification
 - Report deliberative – Monday 22 November 2021.
2. That the secretariat canvass dates in late September and early October for an additional hearing to focus on cladding.

5.2 Stakeholder list

Resolved, on the motion of Mr Khan: That the secretariat circulate to members the Chairs' proposed list of stakeholders to provide them with the opportunity to amend the list or nominate additional stakeholders, and that the committee agree to the stakeholder list by email, unless a meeting of the committee is required to resolve any disagreement.

5.3 Advertising

All inquiries are advertised via Twitter, Facebook, stakeholder emails and a media release distributed to all media outlets in New South Wales.

It is no longer standard practice to advertise in the print media. The committee should pass a resolution if it wishes to do so.

6. Inquiry into the management of the COVID-19 pandemic

6.1 Extension of reporting date

Resolved, on the motion of Mrs Houssos: That the committee extend the reporting date of the inquiry into the NSW Government's management of the COVID-19 pandemic to 30 September 2021.

7. Adjournment

The committee adjourned at 1.43 pm, *sine die*.

Monica Loftus
Committee Clerk

Minutes no. 62

Monday 11 October 2021
Public Accountability Committee
Via videoconference at 9.32 am

1. Members present

Mr Shoebridge, Chair
Mr Borsak, Deputy Chair (until 12.10 pm)
Mr D'Adam (substituting for Mr Graham for the duration of the further inquiry into the regulation of building standards)
Mr Fang (substituting for Mr Farlow from 10.50 am to 12.05 pm)
Mr Farlow
Mrs Houssos
Mr Khan
Mr Poulos

2. Previous minutes

Resolved, on the motion of Mr Poulos: That draft minutes no. 59 and 60 be confirmed.

3. Correspondence

The committee noted the following items of correspondence:

Received

- 14 July 2021 – Letter from Mr Andrew Ziolkowski, Group Executive, Insurance for NSW & HBCF, icare, to Chair, advising that icare will not be making a submission to the Further inquiry into building standards
- 1 October 2021 – Email from Cara Punch, Office of the Opposition Whip, advising that the Hon Anthony D'Adam MLC will be substituting for the Hon John Graham MLC for the duration of the further inquiry into the regulation of building standards
- 6 October 2021 – Email from Mr Craig Woods, Manager – Regulatory Services, The Hills Shire Council, declining the invitation to appear before the building standards hearing on 5 October 2021.

Sent

- 1 October 2021 – Letter from Chair, to Hon Mick Veitch MLC, Chair, Regulation Committee, responding to his recent correspondence relating to the NSW Council for Civil Liberties (pandemic inquiry)

4. Further inquiry into the regulation of building standards**4.1 Submissions**

The committee noted that the following submissions were published by the committee clerk under the authorisation of the resolution appointing the committee: submission nos. 1-10, 15-22, 24-32, 34-40, 42-47, 50, 53, 55, 57, 58, 60-65, 67 and 68.

Resolved, on the motion of Mr Khan: That the committee authorise the publication of submission no. 70.

4.2 Partially confidential submissions

Resolved, on the motion of Mrs Houssos: That the committee keep the following submissions partially confidential as per the request of the author's: submission no's 12, 14, 23, 33, 41, 48, 52, 56, 59 and 69.

Resolved, on the motion of Mrs Houssos: That the committee authorise the publication of submission no 13, with the exception of potential adverse mention, which is to remain confidential as per the recommendation of the secretariat.

4.3 Confidential submissions

Resolved, on the motion of Mrs Houssos: That the committee keep submission no's 11, 49, 51, 54, 66 confidential as per the request of the author.

4.4 Allocation of questioning

Resolved, on the motion of Mrs Houssos: That the timing of questioning be left in the hands of the Chair.

5. Extension of reporting date

Resolved, on the motion of Ms Houssos: That the committee extend the reporting date in the terms of reference to 28 February 2022.

6. Public hearing

Witnesses were admitted via videoconference.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witnesses were sworn and examined:

- Mr Patrick Wang, Individual property owner
- Mr Oliver Burgess, Individual property owner.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Councillor Linda Scott, President, Local Government NSW
- Mr Roman Wereszczynski Manager Health, Building and Regulatory Services, Randwick Council
- Mr Andrew Thomas, Executive Manager, Planning and Development, City of Sydney Council.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Ms Jane MacMaster, Chief Engineer, Engineers Australia
- Mr Baoying Tong, Senior Manager, Building Reform and Projects, Engineers Australia
- Mr Corey Nugent, Subject Matter Expert, Insurance Council Australia
- Ms Kristy Eulenstein, Head of Policy and Government Relations, Consult Australia.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Jeremy Turner, Technical and Policy Manager, Australian Institute of Building Surveyors
- Ms Jill Brookfield, Chief Executive Officer, Association of Australian Certifiers
- Mr Charles Slack-Smith, Director, DLA, Association of Australian Certifiers

7. **Adjournment**

The committee adjourned at 3.29 pm, until Monday 15 November 2021 (public hearing – Transport Asset Holding Entity).

Donna Glover

Committee Clerk

Minutes no. 67

Monday 22 November 2021

Public Accountability Committee

Macquarie Room, Parliament House, Sydney at 9.31am

1. **Members present**

Mr Shoebridge, Chair
 Mr D'Adam
 Mr Farlow
 Mrs Houssos
 Mr Khan
 Ms Cusack (substituting for Mr Poulos) (via videoconference)

2. **Apologies**

Mr Borsak

3. **Previous minutes**

Resolved, on the motion of Mr Farlow: That draft minutes no. 62 be confirmed.

4. **Correspondence**

The committee noted the following items of correspondence:

Received:

- 15 November 2021 – Email from Ms Rose Webb, Deputy Secretary, Commissioner for NSW, Fair Trading to the secretariat, indicating that Mr John Tansey, Executive Director, Policy and Strategy, Better Regulation Division, Department of Customer Service will give evidence at the 22 November 2021 hearing (building standards inquiry)

- 16 November 2021 – Email from Ms Leza Turnbull, Personal Assistant to Mr Darren Greenfield, NSW State Secretary, Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU), to secretariat, declining the invitation to appear before the committee (building standards inquiry)
- 18 November 2021 – Email from Ms Connie Vartuli, Executive Assistant to Mr Mark Morey, Secretary Unions NSW, to secretariat, declining the invitation to appear before the committee (building standards inquiry)
- 18 November 2021 – Letter from the Hon Brad Hazzard MP, Minister for Health and Medical Research, to the Chair, responding to Chair's letter inviting a response to a letter from Hon Mark Latham MLC to the Chair, received 11 November 2021 regarding isolation requirements (pandemic inquiry).

Sent:

- 16 November 2021 – Letter from Chair, to Hon Brad Hazzard MP, Minister for Health and Medical Research, enclosing Mr Latham's correspondence received 11 November 2021 regarding isolation requirements and inviting the Minister's response (pandemic inquiry).

Resolved, on the motion of Mr Farlow: That the committee note Mr Hazzard's response to the correspondence from Mr Latham, invited by the Chair and received 18 November 2021, and that the committee defer further discussion until its next meeting.

5. Inquiry into the Transport Asset Holding Entity

5.1 Documents produced by Mr Lyon

The following documents were published at the meeting on 8 November 2021: 246-247, 250-257, 263-266.

The following documents were published at the meeting on 15 November 2021: 153-262, 267-271, 283-301.

Resolved, on the motion of Mrs Houssos: That the committee authorise the publication of the following documents produced by Mr Brendan Lyon, Former Partner, KPMG Australia, at the hearing on 8 November, with the exception of identifying and sensitive information which are to remain confidential, as per the recommendation of the secretariat: 1-152.

5.2 Reporting date

The committee discussed extending the reporting date from the end of February 2022, due to the following factors:

- committee office workload and staffing constraints
- Hansard delays for the 8 and 15 November hearing transcripts, which impact the secretariat's capacity to draft components of the report this year
- the additional hearings scheduled for December and February.

6. Further inquiry into the regulation of building standards

6.1 Publication of 11 October 2021 transcript

The committee noted that it agreed via email to the publication of the unsubedited transcript of the 11 October 2021 hearing.

6.2 Allocation of questioning

Resolved, on the motion of Mr D'Adam: That the timing of questioning be left in the hands of the Chair.

6.3 Public hearing

Witnesses, the public and the media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witnesses were sworn and examined:

- Mr Chris Duggan, President, Strata Community Association NSW
- Mr Stephen Brell, Vice President, Strata Community Association NSW
- Ms Karen Stiles, Executive Director, Owners Corporation Network

- Mr Banjo Stanton, Solicitor, Stanton Legal, assisting the Owners Corporation Network.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Ms Lisa King, Policy and Advocacy Manager, Australian Institute of Architects
- Ms Laura Cockburn, NSW State President, Australian Institute of Architects
- Mr Joe Smith, Acting Chief Executive Officer, National Fire Industry Association
- Mr Bradley Schott, Policy Committee Chair, Design Institute of Australia
- Ms Denise Ryan, Senior Policy Advisor, Design Institute of Australia (via videoconference)
- Mr Clint Gavin, National Sales Manager, Network Architectural
- Mr Kim Regler, Managing Director, Network Architectural.

Mr Gavin tendered the following items:

- sample of solid aluminium cladding product
- sample of Mitsubishi ALPOLIC cladding product
- sample of corrugated core cladding product.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Steve Mann, Chief Executive Officer, Urban Development Institute of Australia – NSW Division
- Ms Lauren Conceicao, NSW Deputy Executive Director, Property Council of Australia
- Mr Charles Kekovich, NSW Senior Policy Advisor, Property Council of Australia

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Con Tsiakoulas, Compliance Officer, Plumbing Trades Employees Union
- Mr Leighton Drury, State Secretary, Fire Brigade Employees Union

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr David Chandler, NSW Building Commissioner
- Mr John Tansey, Executive Director, Policy and Strategy, Better Regulation Division, Department of Customer Service
- Mr Trent Curtin, A/Deputy Commissioner, Field Operations, Fire and Rescue NSW
- Mr Jamie Vistnes, Manager, Fire Safety Policy Unit, Field Operations, Fire and Rescue NSW.

Mr Chandler tendered the following document:

- Undertaking sought but not obtained from Mr David Chandler, NSW Building Commissioner, by the legal representatives of Icon Co (NSW) Pty Ltd, September 2021, titled, 'Icon Co (NSW) PTY Ltd v Secretary of the Department of Customer Service (2021/00228168)'

The evidence concluded and the witnesses withdrew.

The hearing concluded at 4.30 pm.

6.4 Tabled document and items

Resolved, on the motion of Mrs Houssos: That the committee accept and publish the following document tendered during the public hearing:

- Undertaking sought but not obtained from Mr David Chandler, NSW Building Commissioner, by the legal representatives of Icon Co (NSW) Pty Ltd, September 2021, titled, 'Icon Co (NSW) PTY Ltd v Secretary of the Department of Customer Service (2021/00228168)', tendered by Mr Chandler.

Resolved, on the motion of Mrs Houssos: That the committee accept the following items tendered during the public hearing:

- sample of solid aluminium cladding product, tendered by Mr Gavin
- sample of Mitsubishi ALPOLIC cladding product, tendered by Mr Gavin
- sample of corrugated core cladding product, tendered by Mr Gavin.

7. Inquiry into the NSW Government's management of the COVID-19 pandemic

7.1 Answers to questions on notice and supplementary questions

The committee noted that the following answers to questions on notice and supplementary questions were published by the committee clerk under the authorisation of the resolution appointing the committee:

- answers to questions on notice and supplementary questions from the Hon Sarah Mitchell MLC, Minister for Education and Early Childhood Learning, received 9 September 2021
- answers to questions on notice and supplementary questions from the Hon Brad Hazzard MP, Minister for Health and Medical Research, received 10 September 2021
- answers to supplementary questions from Ms Mary Ronayne, Community and Culture Manager, Wilcannia Safe House, received 23 September 2021
- answers to questions on notice, from NSW Police Force, received 11 October 2021 (13 September hearing)
- answers to questions on notice, from NSW Police, received 11 October 2021 (17 September hearing)
- answers to questions on notice, from NSW Ombudsman, received 11 October 2021
- answers to questions on notice, from Multicultural NSW, received 11 October 2021
- answers to questions on notice, from Corrective Services NSW, received 15 October 2021
- answers to questions on notice, from NSW Health, received on 18 October 2021
- answers to questions on notice, from Department of Premier and Cabinet, received 18 October 2021
- answers to questions on notice, from Justice Health and Forensic Mental Health Network, NSW Health, received 18 October 2021
- answers to questions on notice, from Ms Randa Kattan, Chief Executive Officer, Arab Council Australia, received 19 October 2021
- answers to questions on notice, from Professor Jodie McVernon, Professor and Director of Doherty Epidemiology, Doherty Institute, received 21 October 2021
- answers to questions on notice, from Mr Nathan Bradshaw, Industrial Manager, Public Service Association of NSW, received 22 October 2021
- answers to questions on notice and supplementary questions, from Department of Education, received 22 October 2021
- answers to questions on notice and supplementary questions, from South Western Sydney Local Health District, received 26 October 2021
- answers to supplementary questions, from Cr Charles Lynch, Deputy Chair, NSW Aboriginal Land Council, received 26 October 2021
- answers to question on notice, from NSW Treasury, received 29 October 2021
- answers to questions on notice and supplementary questions, from NSW Health, received 3 November 2021
- answers to questions on notice, from Resilience NSW, received 15 November 2021.

7.2 Clarifications to the transcript

The committee noted that it agreed via email to authorise the publication of the following witnesses' clarifications of evidence and the insertion of a footnote in the respective hearing transcript linked to their correspondence:

- Ms Wendy Hoey, Executive Director, Clinical Operations, Justice Health and Forensic Mental Health Network, NSW Health, dated 19 October 2021
- Hon Sarah Mitchell MLC, Minister for Education and Early Childhood Learning, dated 22 October 2021
- Nathan Bradshaw, Industrial Manager, Public Service Association of NSW, dated 22 October 2021.

8. Inquiry into the Transport Asset Holding Entity

8.1 Documents produced by Mr Lyon

Resolved, on the motion of Mr Farlow: That the following documents produced by Mr Lyon, Former Partner, KPMG Australia, at the hearing on 8 November be kept confidential: 272 – 282, and that the committee further consider the documents at its next TAHE meeting.

9. Adjournment

The committee adjourned at 4.32 pm, until Thursday 9 December 2021 (public hearing – NSW Government grant programs inquiry).

Donna Glover and Shaza Barbar

Committee Clerks

Minutes no. 70

Thursday 16 December 2021

Public Accountability Committee

Jubilee Room, Parliament House, Sydney, 10.15 am

1. Members present

Mr Shoebridge, *Chair* (via Webex)

Ms Boyd, *Acting Chair* (substituting for Mr Borsak)

Mr Farlow

Mr Graham

Mr Mallard (substituting for Mr Khan)

Mr Mookhey (substituting for Mrs Houssos)

Mr Poulos

2. Previous minutes

Resolved, on the motion of Mr Graham: That draft minutes no. 69 be confirmed.

3. Correspondence

The committee noted the following items of correspondence:

Received

- 5 November 2021 – Correspondence from Ms Jenelle Moore, Usher of the Black Rod to the committee, providing affidavit of service of summons to Mr Brendan Lyon
- 8 November 2021 – Correspondence from Ms Jenelle Moore, Usher of the Black Rod to the committee, providing affidavit of service of summons to Mr Brendan Lyon
- 10 November 2021 – Correspondence from Ms Jenelle Moore, Usher of the Black Rod to the committee, providing affidavit of service of summons to Mr Rodd Staples
- 22 November 2021 – Letter and email from Mr David Chandler, NSW Building Commissioner, to the Chair, forwarding a cover letter from Minter Ellison, legal representative of Icon (NSW) Pty Ltd and email from Icon (NSW) Pty Ltd to the NSW Department of Customer Service
- 23 November 2021 – Email from Mr Jonathon Russell, General Manager, Policy and Advocacy, Engineers Australia, to the secretariat, seeking to correct evidence provided by Mr David Chandler, NSW Building Commissioner
- 24 November 2021 – Email from Mr James Copsy to the secretariat, advising that Mr James Hunter and Mr Matthew Box will not be taking the opportunity to respond to evidence provided by Mr Brendan Lyon
- 30 November 2021 – Email from Ms Anne Hayes to the secretariat, advising that she will not be taking the opportunity to respond to evidence provided by Mr Brendan Lyon
- 30 November 2021 – Letter from Mr Michael Pratt, Secretary, Mr San Midha, Deputy Secretary and Ms Cassandra Wilkinson, Executive Director – Transport, Regions, Infrastructure and Planning, NSW Treasury, responding to evidence provided by Mr Brendan Lyon

- 8 December 2021 – Email from Ms Renata Trkulja, NSW Treasury to the secretariat, confirming NW Treasury witnesses to appear at the TAHE hearing on 16 December 2021 and requesting that the committee invite Mr Rob Sharp, Secretary, Transport for NSW and Mr Bruce Morgan, Chair, TAHE to appear alongside the Treasury witnesses
- 15 December 2021 – Email from Ms Renata Trkulja, NSW Treasury to the secretariat, advising that Mr Sean Osborn and Ms Anne Bible can no longer attend the TAHE hearing on 16 December 2021.

Sent

- 17 November 2021 – Letter from the Chair to the Hon Peter Primrose MLC, Chair, Privileges Committee, alerting Privileges Committee to the publication of additional documents marked cabinet-in-confidence
- 23 November 2021 – Letter from the Chair to Ms Anne Hayes, Former A/CEO, Transport Asset Holding Entity, providing an opportunity to respond to evidence provided by Mr Brendan Lyon
- 23 November 2021 – Letter from the Chair to Mr Michael Pratt, Secretary, NSW Treasury, providing an opportunity to respond to evidence provided by Mr Brendan Lyon
- 23 November 2021 – Letter from the Chair to Mr James Hunter, Partner, Management Consulting, KPMG Australia, providing an opportunity to respond to evidence provided by Mr Brendan Lyon
- 23 November 2021 - Letter from the Chair to Mr Matthew Box, Associate Director, KPMG Australia, providing an opportunity to respond to evidence provided by Mr Brendan Lyon
- 15 December 2021 – Letter from the Chair to Hon Greg Donnelly, Chair, Portfolio Committee No. 2 – Health, enclosing correspondence to and from Health Minister regarding his isolation requirements.

Resolved, on the motion of Mr Mookhey: That the committee authorise the publication of the correspondence from Mr David Chandler dated 22 November 2021.

4. Further inquiry into the regulation of building standards**4.1 Correction of evidence**

Resolved, on the motion of Mr Graham:

- That the committee authorise the publication of the following correspondence: Email from Mr Jonathon Russell, General Manager, Policy and Advocacy, Engineers Australia dated 23 November 2021, correcting evidence provided by Mr David Chandler, NSW Building Commissioner, that Engineers Australia does not have a chartered scheme for fire engineers
- That the committee authorise the addition of a footnote to the evidence of Mr David Chandler, 22 November 2021, reflecting the correction of evidence.

5. Inquiry into the Transport Asset Holding Entity**5.1 Election of Acting Chair**

As the Chair was attending via Webex, the committee elected an Acting Chair for the purposes of the meeting.

The Chair called for nominations for the Acting Chair.

Mr Mookhey moved: That Ms Boyd be elected Acting Chair of the committee.

There being no further nominations, the Chair declared Ms Boyd elected Acting Chair.

5.2 Public submission

The committee noted that the following submission was published by the committee clerk under the authorisation of the resolution appointing the committee: submission no. 9.

5.3 Hearing dates

The committee noted that it agreed via email to hold additional hearings on Thursday 16 December 2021 and Thursday 10 February 2021.

5.4 Answers to questions on notice

Resolved, on the motion of Mr Farlow: That the committee request that answers to questions on notice following the hearing on Thursday 16 December 2021 be returned by Monday 24 January 2022.

5.5 Reporting date

Resolved, on the motion of Mr Shoebridge: That the committee resolve a new reporting date over email by Tuesday 21 December 2021.

5.6 Documents produced by Mr Lyon

Resolved, on the motion of Mr Farlow: That the following documents produced by Mr Lyon be kept confidential: 272-282.

5.7 Request to take photos at the hearing

Resolved, on the motion of Mr Shoebridge: That Mr Nick Moir, a photographer with the Sydney Morning Herald, be authorised to take photos during the public hearing.

5.8 Allocation of questioning

Resolved, on the motion of Mr Mookhey: That the timing of questioning for today's hearing be as follows: 20 minutes each for Opposition, Crossbench and Government with the remainder to be divided evenly.

5.9 Public hearing

The public and the media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witnesses were sworn and examined:

- Mr Michael Pratt, Secretary, NSW Treasury
- Mr Stewart Walters, Chief Finance and Operations Officer, NSW Treasury
- Mr Rob Sharp, Secretary, Transport for NSW.

The following witnesses were examined on their former oaths:

- Mr San Midha, Deputy Secretary Policy and Budget, NSW Treasury
- Ms Cassandra Wilkinson, Executive Director Transport and Planning/Industry, NSW Treasury
- Mr Bruce Morgan, Chair, Transport Asset Holding Entity (via videoconference).

The public hearing was adjourned due to technical difficulties.

The witnesses and media withdrew.

The committee re-convened at 12.00 pm to continue the hearing.

The witnesses and media were admitted.

The witnesses were examined.

Mr Mookhey tabled the following document:

- KPMG, Transport Asset Holding Entity (TAHE): Application of financial and budgetary framework to NSW Government funding for heavy rail infrastructure, Draft, August 2021.

The evidence concluded and the witnesses withdrew.

The hearing concluded at 1.02 pm.

5.10 Tabled documents

Resolved, on the motion of Mr Mookhey: That the committee accept and publish the following document tendered by Mr Mookhey: KPMG, Transport Asset Holding Entity (TAHE): Application of financial and budgetary framework to NSW Government funding for heavy rail infrastructure, Draft, August 2021.

5.11 Witnesses for hearing on 10 February 2022

Resolved, on the motion of Mr Shoebridge: That the committee reinvite the witnesses scheduled to appear on 16 December 2021, in addition to the Auditor-General on Thursday 10 February 2022.

6. Adjournment

The committee adjourned at 1.05 pm until Thursday 10 February 2021 (public hearing – TAHE).

Shaza Barbar

Committee Clerk

Draft minutes no. 75

Monday 21 February 2022

Public Accountability Committee

Macquarie Room, Parliament House, Sydney, at 12.45 pm

1. Members present

Mr Shoebridge, *Chair*

Mr D'Adam

Mr Farlow

Mrs Houssos

2. Apologies

Mr Borsak, *Deputy Chair*

Mr Amato

Mr Poulos

3. Correspondence

The committee noted the following items of correspondence:

Received

- 14 December 2021 – Letter from Mr Tony Rouady, Co-founder and General Manager, Network Architectural, to Chair, responding to evidence provided by Mr David Chandler OAM, NSW Building Commissioner, on 22 November 2021, attaching briefing note with cladding product recommendations and a table comparing cladding products
- 8 February 2022 – Email exchange between Mr Brett Mace, Chief Executive Officer, Australian Institute of Building Surveyors, and the secretariat, clarifying his request for partial confidentiality of answers to questions on notice.

Resolved, on the motion of Mrs Houssos: That the committee authorise the publication of the letter from Mr Tony Rouady, Co-founder and General Manager, Network Architectural, to Chair, responding to evidence provided by Mr David Chandler OAM, NSW Building Commissioner, on 22 November 2021, attaching briefing note on cladding product recommendations and a table comparing cladding products, received 14 December 2021.

4. Further inquiry into the regulation of building standards

4.1 Answers to questions on notice and supplementary questions

The Committee noted that the following answers to questions on notice and supplementary questions were published by the committee clerk under the authorisation of the resolution appointing the committee:

- answers to supplementary questions from Randwick City Council, received 13 December 2021
- answers to questions on notice from the Association of Australian Certifiers, received 14 December 2021
- answers to supplementary questions from Mr Patrick Wang, received 14 December 2021
- answers to questions on notice from City of Sydney Council, received 15 December 2021
- answers to questions on notice from the Australian Institute of Architects, received 16 December 2021
- answers to questions on notice and supplementary questions from the Better Regulation Division, Department of Customer Service, received 17 December 2021
- answers to questions on notice from Fire and Rescue NSW, received 23 December 2021

- answers to questions on notice from the Owners Corporation Network of Australia, received 24 December 2021
- answers to questions on notice from Mr Oliver Burgess and attachment 2, received 20 January 2022
- answers to questions on notice from the Strata Community Association NSW, received 20 January 2022
- answers to supplementary questions and attachments 1 and 2 from the NSW Building Commissioner, received 2 February 2022.

Resolved, on the motion of Mrs Houssos:

- That the committee authorise the publication of answers to questions on notice from the Australian Institute of Building Surveyors, received 16 December 2021, with the exception of identifying and/or sensitive information, which is to remain confidential, as per the request of the author
- That the committee keep attachment 1 to answers to questions on notice from Mr Oliver Burgess, received 20 January 2022, confidential, as per the request of the author, as it contains identifying and/or sensitive information.

4.2 Recording of the deliberative meeting

Resolved, on the motion of Mr Farlow: That the meeting be recorded through WebEx for the purposes of the secretariat cross-checking amendments following the meeting only, with the recording deleted after this use.

4.3 Circulation of Chair's draft report

The committee noted that it agreed via email that the Chair's draft report would be circulated less than seven days prior to the report deliberative, by COB 16 February 2022.

4.4 Consideration of Chair's draft report

The Chair submitted his draft report entitled *Further inquiry into the regulation of building standards*, which, having been previously circulated, was taken as being read.

Resolved, on the motion of Mrs Houssos: That paragraph 1.32 be amended by inserting at the end: 'Buildings that have already commenced work, including engaging consultants to scope or design the removal of flammable cladding, are not eligible for a low-interest loan under Project Remediate. In order to qualify, they must begin the process again.'

Resolved, on the motion of Mrs Houssos: That paragraph 2.51 be amended by inserting after 'comparable protections to those in class 2 buildings': 'Protections for homebuyers in New South Wales should be universal, not dependent on the type of home purchased.'

Mrs Houssos moved: That paragraph 2.52 be amended by inserting a new paragraph, to be drafted by the secretariat, on the need to expand the provisions of the Design and Building Practitioners Act 2020 to all classes of buildings.

Resolved, on the motion of Mr Shoebridge: That the motion of Mrs Houssos be amended by moving it to after paragraph 2.51 with the text to read:

'The committee believes that the urgent task to protect homeowners is to extend the Building Commissioner's powers to class 1 buildings, but that this should not prevent the government from consulting with stakeholders and industry regarding extending the provisions of the *Design and Building Practitioners Act 2020* to all classes of buildings in New South Wales.'

Amendment of Mr Shoebridge put.

Original question of Mrs Houssos, as amended, put and passed.

Resolved, on the motion of Mrs Houssos: That paragraph 2.53 be amended by inserting 'This is the case in Victoria and Queensland.' after 'restore confidence in the building and construction industry.'

Resolved, on the motion of Mrs Houssos: That paragraph 3.35 be amended by inserting ', including the Plumbing Trades Employees Union' after 'Numerous stakeholders'.

Resolved, on the motion of Mrs Houssos: That:

- (a) the following new paragraphs be inserted before paragraph 3.114:

'The committee notes the importance of maintaining fire safety standards after the initial installation of fire protection systems. We must ensure that proper maintenance is being conducted by competent practitioners. Practitioners involved in fire protection work should hold appropriate qualifications and credentials to ensure that these standards are adequately upheld.'

The committee further notes the current inconsistency of NSW fire protection legislation with other state jurisdictions. Practitioners operating in both Queensland and Victoria are required to have a licence to inspect, test and maintain fire protection systems, however in NSW this is not a requirement. It is important that those inspecting these systems have a comprehensive understanding how the fire protection system operates in its entirety.'

- (b) a new recommendation be inserted after the new paragraphs:

'Recommendation X

That the NSW Government implement a requirement for practitioners to be licensed in order to inspect, test and maintain fire protection systems in New South Wales.'

Resolved, on the motion of Mrs Houssos:

- (a) That paragraph 3.115 be amended by omitting 'no evidence before us' and inserting instead 'little evidence before us'
- (b) That paragraph 3.119 be amended by:
- (i) omitting 'fundamentally' before 'failing to self-regulate'
 - (ii) omitting 'This is an industry with highly dubious professional standards that is woefully incapable of self-regulation.' after 'or indeed whose accreditation is only suspended so that it can be later renewed.'
 - (iii) omitting 'together with local councils' before ', to fulfil this role.' and inserting instead 'in consultation with local councils'.
- (c) That recommendation 12 be amended by:
- (i) omitting 'self-regulation' after 'abandon the system of' and inserting instead 'self-accreditation'
 - (ii) omitting 'together with local councils' before ', to fulfil this role.' and inserting instead 'in consultation with local councils'.

Mrs Houssos moved: That paragraph 3.120 and recommendation 13 be omitted:

'Matched with this, the committee recommends that the government establish a plan to transition away from private certifiers and back to publicly employed and accredited certifiers. We appreciate that local government does not currently have the resources or capacity to fulfil this significant responsibility, so we recommend that the transition back to public certification be achieved in five years' time and in close collaboration with Local Government NSW.'

Recommendation 13

That the NSW Government, in close collaboration with Local Government NSW, establish a five year plan to transition from private building certification back to publicly appointed certifiers.'

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Farlow, Mrs Houssos.

Noes: Mr Shoebridge

Question resolved in the affirmative.

Mrs Houssos moved: That paragraph 3.122 and recommendation 14 be amended by:

- (a) omitting 'repeal Clause 1 in Schedule 1 of the Environmental Planning and Assessment Amendment (Compliance Fees) Regulation' and insert instead 'undertake an independent review on the adequacies of Clause 1 in Schedule 1 of the Environmental Planning and Assessment Amendment (Compliance Fees) Regulation'

(b) omitting 'in order to allow councils' and inserting instead 'allowing councils'.

Question put.

The committee divided.

Ayes: Mr D'Adam, Mr Farlow, Mrs Houssos.

Noes: Mr Shoebridge

Question resolved in the affirmative.

Resolved, on the motion of Mrs Houssos: That paragraph 3.128 be amended by omitting 'entirely before private entity' and inserting 'entirely' after 'ratings being performed'.

Resolved, on the motion of Mrs Houssos:

- (a) That paragraph 4.82 be amended by omitting 'with dozens of buildings already having been made safe in Victoria compared to none in NSW.' after 'The results of this speak for themselves.' and inserting instead 'In Victoria, flammable cladding has been removed from 40 private residential buildings, with a further 117 buildings underway. In NSW, not a single building has removed any flammable cladding under Project Remediate.'
- (b) That a footnote be added referencing August 2021 and the article 'Extended wait to get flammable cladding removed from hundreds of buildings'.

Resolved, on the motion of Mrs Houssos: That paragraph 4.84 be amended to insert 'who are currently excluded from the NSW Government's program' after 'who have already commenced remediation work'.

Mrs Houssos moved: That:

The draft report, as amended, be the report of the committee and that the committee present the report to the House;

The transcripts of evidence, submissions, tabled documents and items, answers to questions on notice and supplementary questions, and correspondence relating to the inquiry be tabled in the House with the report;

Upon tabling, all unpublished attachments to submissions be kept confidential by the committee;

Upon tabling, all unpublished transcripts of evidence, submissions, tabled documents and items, answers to questions on notice and supplementary questions, and correspondence relating to the inquiry, be published by the committee, except for those documents kept confidential by resolution of the committee;

The committee secretariat correct any typographical, grammatical and formatting errors prior to tabling;

The committee secretariat be authorised to update any committee comments where necessary to reflect changes to recommendations or new recommendations resolved by the committee;

Dissenting statements be provided to the secretariat within 24 hours after receipt of the draft minutes of the meeting;

The secretariat table the report on 25 February 2021.

The Chair to advise the secretariat and members if they intend to hold a press conference, and if so, the date and time.

Question put.

The committee divided.

Ayes: Mr D'Adam, Mrs Houssos, Mr Shoebridge.

Noes: Mr Farlow.

Question resolved in the affirmative.

5. Adjournment

The committee adjourned at 1.23 pm, until 1.40 pm, Monday 21 February 2022.

Merrin Thompson
Committee Clerk

