



LEGISLATIVE COUNCIL

PUBLIC ACCOUNTABILITY COMMITTEE

Regulation of building standards, building quality and building disputes

Final report



Report 6

April 2020

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Public Accountability Committee

Regulation of building standards, building quality and building disputes

Final report

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Terms of reference

1. That the Public Accountability Committee inquire into and report on the regulation of building standards, building quality and building disputes by government agencies in New South Wales, including:
 - (a) the role of private certification in protecting building standards, including:
 - (i) conflicts of interest
 - (ii) effectiveness of inspections
 - (iii) accountability of private certifiers
 - (iv) alternatives to private certifiers,
 - (b) the adequacy of consumer protections for owners and purchasers of new apartments/dwellings, and limitations on building insurance and compensation schemes, including:
 - (i) the extent of insurance coverage and limitations of existing statutory protections
 - (ii) the effectiveness and integrity of insurance provisions under the *Home Building Act 1989*
 - (iii) liability for defects in apartment buildings,
 - (c) the role of strata committees in responding to building defects discovered in common property, including the protections offered for all strata owners in disputes that impact on only a minority of strata owners,
 - (d) case studies related to flammable cladding on NSW buildings and the defects discovered in Mascot Towers and the Opal Tower,
 - (e) the current status and degree of implementation of recommendations of reports into the building industry including the Lambert report 2016, the Shergold/Weir report 2018 and the Opal Tower investigation final report 2019, and
 - (f) any other related matter.
2. That the committee table an interim report as soon as practical and its final report by 14 May 2020¹.

The terms of reference were self-referred by the committee on 4 July 2019.²

¹ The original reporting date was 14 February 2020 (*Minutes*, NSW Legislative Council, 6 August 2019, p 305). The reporting date was later extended to 14 May 2020 (*Minutes*, NSW Legislative Council, 15 October 2019, p 504).

² *Minutes*, NSW Legislative Council, 6 August 2019, p 305.

Committee details

Committee members

Mr David Shoebridge MLC	The Greens	<i>Chair</i>
The Hon Robert Borsak MLC	Shooters, Fishers and Farmers Party	<i>Deputy Chair</i>
The Hon John Graham MLC	Australian Labor Party	
The Hon Courtney Houssos MLC	Australian Labor Party	
The Hon Trevor Khan MLC	The Nationals	
The Hon Matthew Mason-Cox MLC	Liberal Party	
The Hon Natalie Ward MLC³	Liberal Party	

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³ The Hon Natalie Ward MLC replaced the Hon Scott Farlow MLC as a substantive member of the committee on 31 January 2020 (*Minutes*, NSW Legislative Council, 25 February 2020, p 792).

Chair's foreword

The safety and integrity of the New South Wales building and construction industry has never been more important. With all levels of government looking to deliver a sustained increase in construction activity during the Covid-19 pandemic, it is essential that the Parliament acts now to deliver critical and long-delayed reforms. The case for urgent action is laid out clearly in this final report by the committee.

This report highlights the systemic issues plaguing the building and construction industry and the lack of regulation and oversight by the NSW Government. Alongside the deeply concerning issues covered in our first report, this final report documents the concerns regarding flammable cladding, private certification and the role of strata committees in dealing with defective buildings.

The issue of flammable cladding is a major public safety issue. It is widespread and requires urgent attention. The risk is too great for government to not take action and help homeowners in removing flammable cladding from their buildings. We do not want a Grenfell Tower crisis here in New South Wales before the government is forced to take meaningful action to solve a problem that was created from the lack of government regulation in the first place.

The response from the NSW Government in addressing the issue of flammable cladding so far is wholly inadequate. We have looked to Victoria as a model for moving forward in remediating flammable cladding. Although not perfect, Victoria has taken significant steps to address this issue beyond any other state in Australia. Therefore, the committee has made recommendations modelled on Victoria's response, including the establishment of a separate division within a new NSW Building Commission, to lead the response and the establishment of an expert panel to assess and provide advice free of charge to homeowners on cladding rectification plans.

We have also recommended a substantial funding package, proportionate to the Victorian Government's \$600 million package, be provided by the government to fund the rectification of buildings containing flammable cladding. The committee also makes a number of recommendations to prevent the further use of flammable products and dangerous cladding systems on buildings in New South Wales and to inform those purchasing or renting a building or entering a building designed for public use that it has been assessed as high-risk.

The committee heard how the collapse of the professional indemnity market is impacting on the ability of homeowners to rectify buildings through restricting the number of professionals willing to conduct this urgent work. This in turn is impacting on the cost of insuring buildings containing flammable cladding. It is imperative that the NSW Government acts to address the insurance failure, not only in relation to cladding but insurance across the entire building and construction industry.

This report also focuses on the concerns surrounding private certification. It is clear that the experiment of the last 20 years with private certification has not worked. Many participants and stakeholders told the committee that the conflicts of interest inherent with private certification were not able to be remedied. They pointed to years of attempted reforms that so far have failed to restore confidence or integrity in the system of private certification. Others suggested that it was possible to conceive of further reforms to make the system work better. Whilst it is clear that the status quo is broken, and that public control of certification needs to be strengthened, the committee did not at this stage recommend that building certification revert back to local councils. The committee has instead recommended that this proposal be considered in a further inquiry we plan to establish at the end of 2020 to continue to review the NSW Government's reforms into the building and construction industry.

Although many blame private certification for the collapse of confidence in the industry, it is important to note that the problems in the industry are much deeper and more fundamental and lie in a widespread lack of accountability or regulation. Fixing only the issue of certification is like putting a Band-Aid on an amputation and so again we come back to the recommendations of the Shergold Weir report to ensure accountability all the way down the construction chain. We also agree with the suggestions put forward by Mr Michael Lambert during this inquiry to improve the certification system and recommend that these be implemented immediately regardless of whether certification is conducted by private or public authorities.

The final issue the committee considered is the role of strata committees in dealing with defective buildings. Given defects are a common issue, particularly in apartment buildings, it is essential that strata committees are given the right tools and support to deal with these complex issues, to avoid the emotional and financial impacts and disputes amongst homeowners that we heard are prevalent in this space. In providing this support we call for a Strata Commissioner to be appointed to sit within the Building Commission to provide a number of services to strata committees.

There are a significant number of strata homeowners out there today dealing with the costs of rectifying major defects in their buildings, who have nowhere to turn. These problems were created by decades of deregulation by the State Government, which has stepped away from its responsibilities to ensure homes are built to an acceptable standard and are safe for occupation. It is not right that the whole of this liability is left in the hands of the innocent homeowners in strata buildings who bear no responsibility for defective building work. Homeowners who are not able to claim under the statutory warranties scheme or the Home Building Compensation scheme have been given no assistance and many face extreme financial pressure for rectifying a defective building. Given this, we have recommended that the NSW Government explore additional financial assistance measures for homeowners of strata properties in this position to assist them to rectify defects.

The committee thanks all those who participated in this important inquiry through their submissions and oral evidence. We particularly thank those brave homeowners who gave us an insight into the real costs of the experiment with deregulation and privatisation of the construction industry and those from the industry who forthrightly acknowledged the need for reform and assisted us in mapping out a workable strategy of reform. I also wish to thank my committee colleagues and acknowledge the excellent work of the committee secretariat.



Mr David Shoebridge MLC
Committee Chair

Recommendations

Recommendation 1

12

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

12

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

13

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

38

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.

Recommendation 5

38

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

39

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

39

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** 40
- 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** 71
- 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** 72
- 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** 72
- 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** 72
- 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** 73
- 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** 73
- 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** 74
- 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** 101
- That the NSW Government undertake a review of the mandatory critical stage inspection regime under the *Environmental Planning and Assessment Act 1979* with a view to expanding the number and scope of required inspections undertaken by accredited certifiers.

Recommendation 17**101**

That the NSW Government consider amending the *Environmental Planning and Assessment Act 1979* 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**103**

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:

- 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 Reference Panel for mandatory reviews of select designated complex and higher risk developments
- 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**104**

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.

Recommendation 20**131**

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.

Recommendation 21**131**

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:

- 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**132**

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.

Conduct of inquiry

The terms of reference for the inquiry were self-referred by the committee on 4 July 2019.

The committee received 177 submissions and 25 supplementary submissions.

The committee received 390 responses to an online questionnaire.

The committee held six public hearings at Parliament House in Sydney, including a half day *in camera* hearing, and one at Newcastle City Hall in Newcastle.

The committee published a first report on 13 November 2019.

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

Procedural issues

During this inquiry, the committee pursued the release of the 'register of buildings with potentially combustible cladding'. At its first hearing, the committee requested the NSW Government provide the cladding register on notice.⁴ Subsequently, the committee formally wrote to the Minister for Better Regulation and Innovation and the Minister for Planning and Public Spaces requesting this information.⁵

The Minister for Planning and Public Spaces, the assumed holder of the register, declined on two occasions to provide the register.⁶ The committee wrote again to the Minister reiterating its request and advising that it may consider ordering the production of the document subject to the provisions of the Legislative Council *Sessional order – Orders for the production of documents by committees*, adopted 8 May 2019.⁷

In September 2019, the Minister again declined to provide the cladding register to the committee.⁸ The committee subsequently resolved 'that notwithstanding the likely power of Legislative Council committees to order the production of State papers, in view of the timeframes of this inquiry and the importance of obtaining the required information in a timely manner, the committee authorises the Chair to order the production through the House under standing order 52'.⁹

On 31 October 2019 the 'register of buildings with potentially combustible cladding' was produced under standing order 52 to the House, of which the NSW Government claimed privilege of this document.¹⁰ A member of the Legislative Council disputed this claim for privilege and an independent legal arbiter was appointed to report on whether the register should be published. The Hon Keith Mason AC concluded that the register is relevantly privileged on public safety grounds.¹¹ At the time of writing, the cladding register remains a privileged document and is only available to view by members of the Legislative Council.

⁴ Evidence, Ms Rose Webb, Deputy Secretary, Better Regulation Division and NSW Fair Trading Commissioner, 12 August 2019, p 18.

⁵ Correspondence from Chair, to the Hon Kevin Anderson MP, Minister for Better Regulation and Innovation, 13 August 2019; Correspondence from Chair, to the Hon Rob Stokes MP, Minister for Planning and Public Spaces, 13 August 2019.

⁶ Correspondence from Ms Katie Stevenson, Chief of Staff to the Hon Rob Stokes MP, Minister for Planning and Public Spaces, to Chair, 15 August 2019; Correspondence from Hon Rob Stokes MP, Minister for Planning and Public Spaces, to Chair, 26 August 2019.

⁷ Correspondence from Chair, to Hon Rob Stokes MP, Minister for Planning and Public Spaces, 30 August 2019.

⁸ Correspondence from Hon Rob Stokes MP, Minister for Planning and Public Spaces, 6 September 2019.

⁹ *Minutes*, Public Accountability Committee, NSW Legislative Council, 14 October 2019.

¹⁰ The register was ordered on 17 August 2019 (*Minutes*, NSW Legislative Council, 17 October 2019, pp 550-551). The register was returned on 31 October 2019 (*Minutes*, NSW Legislative Council, 12 November 2019, p 632).

¹¹ Report of the Independent Legal Arbiter, the Hon Keith Mason AC, entitled *Report Under Standing Order 52 on Disputed Claim of Privilege: Register of Buildings Containing Potentially Combustible Cladding*, 13 December 2019.

Chapter 1 Developments since the first report

Purpose of the final report

1.1 The committee tabled its first report of this inquiry in November 2019, making 19 recommendations to the NSW Government. A response is due by 13 May 2020. In this first report the committee focused on:

- the adequacy of the NSW Government's response to the current 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 in the Shergold Weir and Lambert Reports.¹²

1.2 The 19 recommendations made in the committee's first report are detailed in the following table.

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

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, that 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.

¹² Public Accountability Committee, NSW Legislative Council, *Regulation of building standards, building quality and building disputes: First report* (2019).

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 • 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 <i>Design and Building Practitioners Bill 2019</i> 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 <i>Design and Building Practitioners Bill 2019</i> 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 <i>Design and Building Practitioners Bill 2019</i> 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.

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

- 1.3** This final report considers a number of other significant problems evident within the building and construction industry.
- 1.4** A key issue that the committee pursued during the second half of the inquiry was the use of flammable cladding on New South Wales buildings and the absence of progress in rectifying the resulting dangerous buildings. Chapter 2 therefore examines how the NSW Government has responded to the significant safety risks posed by flammable cladding. A key concern here is the accessibility and accuracy of the register of buildings with flammable cladding, which was created by the NSW Government to identify at-risk buildings and track their progress towards remediation.
- 1.5** Chapter 3 further explores issues surrounding the management of buildings with flammable cladding, including the operational response of Fire and Rescue NSW and the role of local councils in tackling this issue. It also considers the difficulties homeowners face in trying to remediate flammable cladding from their buildings. Finally, it looks at how the NSW Government is responding to other flammable products within the industry and the testing of these products.
- 1.6** Chapter 4 explores numerous concerns relating to building certification and whether private certification is adequate to protect building standards. A key concern is whether private certification creates a conflict of interest for private certifiers in performing their role. Therefore this chapter concludes by considering whether building certification should return to be a responsibility of local councils.
- 1.7** The final chapter, chapter 5, considers the challenges faced by homeowners living in strata properties who try to rectify building defects. This chapter begins by providing context to the challenges faced by homeowners by considering the extent of building defects in New South Wales, before turning to the difficulties experienced by strata committees and owners' corporations.

NSW Government actions

- 1.8** This section provides an update on evidence from the NSW Building Commissioner and NSW Fair Trading representatives, who appeared before the committee on numerous occasions throughout this inquiry. These witnesses informed the committee of the NSW Government's actions to address the crisis in the industry, as well as providing updates on the progress of

measures already in place. We thank those witnesses for the co-operation they have given to the committee in undertaking this important inquiry.

NSW Building Commissioner's initiatives

1.9 Mr David Chandler OAM, NSW Building Commissioner, told the committee that he intends to address a wide range of issues, which include 'product labelling, improper products, [and] lack of design'. Mr Chandler advised that he intends to put '30 boots on the ground that will be made available once the [*Design and Building Practitioners Bill 2019*] passes, and start a full frontal across the construction sites of New South Wales'. He emphasised that, in his opinion, he does not need a Building Commission to do this.¹³

1.10 Mr Chandler told the committee that he is seeking further powers to undertake his role:

They are additional to the powers, because the powers that we have at the moment are to inspect and to respond to complaints. I want to actually take a more forward and activist position where I have reasonable concerns to explore those reasonable concerns. More importantly, I want to go onto completed buildings. At the moment, I do not have the power to call in the documents. I have been around and it is quite clear that people are not going to give up documents voluntarily. I am going to have the power to call those documents in, I am going to have to have the power to stop work, I am going to have to have the power to dig up work. The sooner I get that, the sooner we can start to get the message out there that the game has changed.¹⁴

1.11 Mr Chandler confirmed that the NSW Government would bring forward legislation early in 2020 that will provide those additional powers and he expects he will have those by the middle of 2020.¹⁵ Mr John Tansey, Executive Director Regulatory Policy, Better Regulation Division, Department of Customer Service, confirmed that his team had been working on this piece of legislation and hoped 'to have legislation come forward in the current session to present to Parliament'.¹⁶

1.12 Mr Chandler outlined further initiatives he wishes to implement as part of his plan to fix the industry, including to:

- conduct audits of occupancy certificates for risky projects, with the intention of initially targeting 10 per cent of projects from 1 July 2020
- develop a certifiers' practice guide, with the intention to call in risky players and step them through that guide before an occupancy certificate is issued
- stop an occupancy certificate being issued, where occupancy certificates are not of standard, and require a developer to rectify defects before purchasers can be required to settle on their apartments

¹³ Evidence, Mr David Chandler OAM, NSW Building Commissioner, 24 February 2020, p 24.

¹⁴ Evidence, Mr Chandler, 24 February 2020, p 24.

¹⁵ Evidence, Mr Chandler, 24 February 2020, pp 24-25.

¹⁶ Evidence, Mr John Tansey, Executive Director Regulatory Policy, Better Regulation Division, Department of Customer Service, 24 February 2020, p 25.

- introduce the role of a duty holder within the strata management industry, who is to be responsible for the custody of the design of buildings and the declaration of designs, and the as-built drawings, as per the construction manual
- review the strata legislation in consultation with strata communities
- 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, builders and certifiers
- work with the insurance industry to introduce a policy product available to the 'good players' that will offer a 10-year warranty as a first resort to purchasers of a new building to cover the structure, envelope, waterproofing and fire rating systems, and potentially the acoustics.¹⁷

1.13 Mr Chandler gave evidence that there are a number of other initiatives that he plans to implement and he offered to brief the committee on these areas in the future.¹⁸

1.14 When questioned on how long it will take to fix the crisis in the building industry, Mr Chandler advised:

I have said it will take some years. I have used a deadline of 2025 to rebuild public confidence in this industry, which will not happen overnight. But I can assure you that the resurrection of public confidence in this industry will start as soon as my powers are clear and we can start to stand up the things that are needed to rebuild confidence in the industry in this State. The impact of that will be much quicker but it will take a few years for the public to believe that.¹⁹

1.15 Providing further information on the rating system proposed by the NSW Building Commissioner, the NSW Government advised that it will evaluate the 'riskiness of building inputs (products, practitioners, certificates) and their final product (buildings)' by using a private ratings tool. It explained that the information will 'ensure that high quality (low risk) is adequately rewarded in financial, insurance and consumer markets' and that regulators will be able to use the information to 'enhance their market intelligence capabilities'.²⁰

1.16 In addition, the NSW Government indicated that the ratings scores will enable insurers to identify buildings that are low risk and high-quality thereby giving insurers the comfort to offer a 'decennial liability insurance product (10 year first resort policy)'. The NSW Government contended that 'if such products could be established for class 2 buildings it would allow those consumers to have warranty insurance for the first time since the market collapsed in 2001'.²¹

1.17 Further to this, the NSW Government informed the committee of plans to digitise records of all 'global compliance certifications from manufacture through to installation and maintenance' and data related to inspections for Class 2 development sites. The NSW Government stated that 'digitisation will completely redefine how buildings, practitioners and products are insured',

¹⁷ Evidence, Mr Chandler, 24 February 2020, pp 29-33.

¹⁸ Evidence, Mr Chandler, 24 February 2020, pp 35-36.

¹⁹ Evidence, Mr Chandler, 24 February 2020, p 22.

²⁰ Answers to questions on notice, NSW Government, 20 March 2020, p 8.

²¹ Answers to questions on notice, NSW Government, 20 March 2020, p 8.

as this will ensure 'clarity over the relative riskiness of each input, and this visibility will enable far more rational and proportionate pricing throughout the supply chain'.²²

Implementation of the Shergold Weir recommendations

- 1.18** NSW Government representatives also updated the committee on the implementation of the recommendations in the Shergold Weir report, since the tabling of the first report of this inquiry.
- 1.19** The NSW Government advised that as at 20 March 2020 it has 'completed or is progressing 20 of the recommendations of the Shergold Weir report, with the remaining four recommendations under active consideration'. It advised that nine of these recommendations will be implemented in part or in full under the *Design and Building Practitioners Bill 2019* (discussed later in the chapter). It also advised that a further seven will be addressed in part or in full under the *Building and Development Certifiers Act 2018* and its supporting regulations (discussed in chapter 4).²³
- 1.20** In addition, the NSW Government informed the committee that it was supporting the implementation of the Shergold Weir report on a national scale by participating in the Building Ministers' Forum. The NSW Government reported that work on the recommendations at a national level was underway with the establishment of an implementation team, who had advanced a number of responses, 'including action on education and training, model continuing professional development requirements, support for performance solutions, and definition of complex buildings'. The NSW Government indicated that the implementation team has been tasked with 'finalising all responses by August 2021'.²⁴

Passage of the Design and Building Practitioners Bill 2019

- 1.21** Since the committee tabled the first report of this inquiry there have been a number of developments relating to the passage through Parliament of the *Design and Building Practitioners Bill 2019* (the bill). At the time of tabling the first report, the bill had been introduced in the NSW Legislative Assembly and the Minister for Better Regulation and Innovation, Hon Kevin Anderson MP, had given his second reading speech.²⁵
- 1.22** From its review, as outlined in the first report of this inquiry, the committee expressed disappointment that the bill continued the fragmented approach of the government in addressing the building and construction industry. It was also concerned that the bill relied entirely on regulations that had yet to be drafted and that there were no current insurance products available to support the bill.²⁶ The committee therefore in the first report of this inquiry recommended that the NSW Government consolidate existing laws and regulation into a

²² Answers to questions on notice, NSW Government, 20 March 2020, p 8.

²³ Answers to questions on notice, NSW Government, 20 March 2020, p 7.

²⁴ Answers to questions on notice, NSW Government, 20 March 2020, p 7.

²⁵ Kevin Anderson, Second reading speech: Design and Building Practitioners Bill 2019, 23 October 2019.

²⁶ Public Accountability Committee, NSW Legislative Council, *Regulation of building standards, building quality and building disputes: First report* (2019), pp 87-119.

standalone Building Act covering building regulation and establish a single, senior Building Minister with responsibility for building regulation in New South Wales.²⁷

- 1.23** Noting the concerns of stakeholders, the committee also recommended that the bill be amended to ensure that:
- 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
 - 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.²⁸
- 1.24** Finally, the committee recommended that the bill not proceed until the NSW Government:
- works closely with the Insurance Council of Australia and its members to develop appropriate insurance products
 - develops the draft regulations in close consultation with stakeholders and make this available to the Parliament for scrutiny.²⁹
- 1.25** On 13 November 2019, the bill passed the Legislative Assembly with a number of amendments moved by independent member, Alex Greenwich MP and the Government. The Government's amendments primarily related to the duty of care provisions within the bill.³⁰
- 1.26** On 14 November 2019 the bill was declared urgent and introduced in the NSW Legislative Council by the Hon Damien Tudehope MLC, Minister for Finance and Small Business.³¹
- 1.27** On 19 November Minister Tudehope gave the second reading speech and noted the amendments made in the Legislative Assembly, with the result that the bill:
- requires a design that is prepared for a building element for building work, and a design that is prepared for a performance solution for building work, to be regulated designs
 - widens the definition of a building element to include building services

²⁷ Public Accountability Committee, NSW Legislative Council, *Regulation of building standards, building quality and building disputes: First report* (2019), p 117.

²⁸ Public Accountability Committee, NSW Legislative Council, *Regulation of building standards, building quality and building disputes: First report* (2019), p 118.

²⁹ Public Accountability Committee, NSW Legislative Council, *Regulation of building standards, building quality and building disputes: First report* (2019), pp 118-119.

³⁰ NSW Parliament, *Design and Building Practitioners Bill 2019*, <<https://www.parliament.nsw.gov.au/bills/Pages/Profiles/design-and-building-practitioners-bill-2019.aspx>>.

³¹ NSW Parliament, *Design and Building Practitioners Bill 2019*, <<https://www.parliament.nsw.gov.au/bills/Pages/Profiles/design-and-building-practitioners-bill-2019.aspx>>.

- imposes an obligation on builders to provide a list of all contractors and subcontractors and the work they have done on the building
- requires the principal certifying officer to receive all compliance declarations and consider any declared noncompliance before issuing an occupation certificate.³²

1.28 The second reading debate proceeded, in which the Opposition and the Greens anticipated bringing forward a number of amendments on the bill. However, debate was interrupted and was not brought back by the government before the end of the 2019 parliamentary year.³³ The Legislative Council next met during the sitting week of 25, 26 and 27 February 2020, and then again on 24 March 2020 without the government putting the bill forward for consideration. The Legislative Council then adjourned until September 2020.³⁴

Further detail on the operation of the Design and Building Practitioners Bill 2019

1.29 NSW Government representatives also provided further detail on the operation of the bill, following the publication of the first report of this inquiry. The Minister for Better Regulation and Innovation, Hon Kevin Anderson MP, was questioned on the bill during a Budget Estimates hearing by Portfolio Committee No. 6 – Transport and Customer Service in March 2020. In particular, the Minister was asked if there was currently an insurance market for building designers under the bill. The Minister responded:

Part of the Design and Building Practitioners Bill is to look at what we do to get accountability, transparency and quality back into the market. Part of that process is looking at weeding out those building practitioners who are the bad apples. And from the amount of consultation that we have done right across the board, significant consultation roundtables as well as industry players, they too want the bad apples gone. So alleviate the concerns, get rid of the bad apples, and then the insurance market has a product to offer a particular project that there is quality accountability and transparency through the regulated designs so that buildings are built as per those designs.³⁵

1.30 Further, Minister Anderson claimed that there 'is an insurance market currently for buildings' that 'is operating as per normal' and that work was continuing to improve this system. He advised that at the Building Ministers' Forum, the Insurance Council of Australia and other stakeholders were invited to address the Building Ministers. The Minister clarified that the aim of the bill is 'to try to provide the environment where insurance companies will come back to the market'.³⁶

³² Damien Tudehope, Second reading speech: Design and Building Practitioners Bill 2019, 19 November 2019.

³³ NSW Parliament, *Design and Building Practitioners Bill 2019*, <<https://www.parliament.nsw.gov.au/bills/Pages/Profiles/design-and-building-practitioners-bill-2019.aspx>>.

³⁴ NSW Parliament, *House Business Papers*, <<https://www.parliament.nsw.gov.au/lc/papers/Pages/house-papers.aspx?s=1>>.

³⁵ Evidence, Hon Keven Anderson MP, Minister for Better Regulation and Innovation, Portfolio Committee No. 6 – Transport and Customer Service, Budget Estimates 2019-20, 16 March 2020, p 47.

³⁶ Evidence, Minister Anderson, 16 March 2020, p 47.

- 1.31** The Minister was also asked to clarify the delegations and powers of the NSW Building Commissioner, who is not specifically mentioned in the bill. Minister Anderson contended that these delegations and powers are in the bill, which 'incorporates the work plan of the NSW Building Commissioner and his powers'. The Minister advised that 'there is more to come' and the Government is looking at what they need to do to bring the NSW Building Commissioner's powers forward.³⁷
- 1.32** When questioned as to why the NSW Building Commissioner is not specifically mentioned in the bill, the Minister advised:

It does clearly outline what needs to be done in terms of accountability, transparency and quality with the Building Commissioner. We are also bringing forward the residential apartments bill, which will have the powers for the Building Commissioner to get on with doing the job that we believe the industry is calling for at great length—that is, to put the confidence back in the building industry.³⁸

- 1.33** The NSW Building Commissioner, Mr Chandler, had been questioned on how his powers are delegated within the bill at an earlier hearing. In answers to questions on notice the NSW Government advised that the bill 'provides the Secretary of the Department with comprehensive powers of investigation, enforcement and compliance' and the Secretary is able to delegate these powers to any person employed by the department, including the NSW Building Commissioner. The NSW Government confirmed that on commencement of the bill 'it is intended that the Building Commissioner and, where appropriate, other officers will be delegated these powers to ensure compliance is enforced'.³⁹
- 1.34** The NSW Government explained that the bill will provide authorised officers with the powers necessary to undertake their enforcement role, including 'the power to inspect anything, the power to direct a person to produce records of inspection, the power to examine and inspect any records and the power to make copies of those records'.⁴⁰
- 1.35** Further, the NSW Government advised that it would introduce additional legislation to provide the NSW Building Commissioner with additional powers and enhance consumer protections:

In addition, the NSW Government is expediting the development of complementary legislation that will empower the Building Commissioner to undertake intensive and risk-based inspections of building work before an occupation certificate is issued, and at any time within six years of the building's completion. This scheme will be supported through robust compliance, enforcement and investigation powers to enable the Building Commissioner to identify and rectify any potentially serious defects. Importantly, the legislation has been designed to commence without the need for supporting regulations, providing immediate protections for consumers upon proclamation.⁴¹

³⁷ Evidence, Minister Anderson, 16 March 2020, p 51.

³⁸ Evidence, Minister Anderson, 16 March 2020, p 52.

³⁹ Answers to questions on notice, NSW Government, 20 March 2020, pp 3-4.

⁴⁰ Answers to questions on notice, NSW Government, 20 March 2020, p 4.

⁴¹ Answers to questions on notice, NSW Government, 20 March 2020, p 4.

Ongoing concerns raised by industry professionals

1.36 The committee obtained evidence from industry professionals during an *in camera* hearing. The purpose of the hearing was to have a frank exchange about the issues occurring on the ground and to hear from them of ongoing concerns relating to the building industry in New South Wales. Together with the government's updates on progress since the first report of this inquiry, this evidence from building industry professionals provides important context to the issues examined in the remainder of this report.

1.37 The themes and concerns that arose during these confidential hearings are summarised below.

- Faulty testing for combustibility of building products taking place in laboratories that are not accredited by the National Association of Testing Authorities (NATA), including tests that are selected to obtain the specific results needed to pass.
- Architects being told by development managers that they are 'good friends' with the certifier and that the certifier can be 'flexible'.
- Architects being directed by developers to not communicate at all with certifiers during construction of a building.
- Following the development application stage the original architect working on the designs is 'dumped' and another office is given the project with the focus on only documenting work to ensure an occupancy certificate is issued.
- Architects preparing reports detailing concerns relating to the construction of their designs, however the developer takes no further action and claims that it is 'too late to do anything about it'.
- Architects being threatened with legal action unless they sign a design verification statement, despite raising issues with the as-built design for months with the developer.
- Building contractors seeking to gain financial advantage by re-tendering the design, documentation and inspection services, and seek to 'value manage' out expensive processes and materials, after the design has been approved by the client and authorities.
- Unqualified builders being awarded multi-storey residential contracts and then turning to the architect and asking them how they build the design.
- Fire safety reports being ignored by clients, who try and find another practitioner who will sign off on the works without taking the necessary measures to address the identified defects.
- Phoenixing is a regular practice within the industry and is increasing; developers are making astounding profits on major high-rise buildings and yet can evade long-term responsibilities.

Committee comments

1.38 The NSW Building Commissioner clearly needs full statutory powers to confront the alarming problems in the building industry. The committee is not satisfied that the *Design and Building Practitioners Bill 2019* – or the further steps taken by the government – will provide the Commissioner with the powers he needs. We strongly believe that the Commissioner should be

leading a fully resourced, independent Building Commission, with broad powers and sufficient resourcing and funding to oversee and regulate the industry. This was recommended in the first report of this inquiry and we urge the government to establish such a Building Commission.

- 1.39** The committee notes that in response to the current COVID-19 crisis the NSW Government has taken steps to accelerate building and construction as a stimulus in this period. The committee considers that this makes it more urgent to ensure that the NSW Building Commissioner has in place the appropriate powers to ensure building standards. The committee further notes that such powers were planned to be gazetted and operational by the middle of 2020.
- 1.40** The committee therefore recommends that this powers bill is dealt with 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.
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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.

- 1.41** It is unacceptable that the Minister for Better Regulation and Innovation could say the current insurance market is operating as 'normal'. This is clearly not the case, given insurance companies are refusing to provide professional indemnity insurance to certifiers due to the lack of confidence in the building and construction industry. Again, we are not satisfied that the *Design and Building Practitioners Bill 2019* will solve this issue – it is a situation of the cart before the horse. We strongly emphasise the recommendation made in the first report of this inquiry that the NSW Government work closely with the Insurance Council of Australia and its members to develop appropriate insurance products for the building industry. In the absence of an insurance product, the objectives of this bill cannot be met.
- 1.42** With that said, we note that the *Design and Building Practitioners Bill 2019* should be brought forward as a package with the powers bill and we therefore recommend that the NSW Government resume debate on the *Design and Building Practitioners Bill 2019* when NSW Parliament reconvenes in May 2020.
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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.

- 1.43** We note that the NSW Government has taken other steps to begin reforming the building and construction industry. However, the committee is extremely concerned that these measures do not go far enough to resolve the issues plaguing the industry. Given this we believe that further
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scrutiny of the government's reforms is crucial. The committee therefore notes the intention to establish a further inquiry by the end of 2020 to review the NSW Government's reforms into the building and construction industry and the implementation of the recommendations made in both committee reports for this inquiry.

- 1.44** The committee acknowledges the frank and forthright evidence provided by the NSW Building Commissioner and acknowledge his offer to continue to brief the committee in the event the committee holds a further review into the NSW Government's reforms of the building and construction industry.
- 1.45** The committee expresses its support for the efforts made by the NSW Building Commissioner and encourages the NSW Government to adopt the recommendations that he outlined to the committee for further reforms. Additionally, the committee supports and request for further resources that the NSW Building Commissioner may make.
- 1.46** In relation to the NSW Building Commissioner's offer to brief the committee, we note this would be worthwhile to enable the committee to hold the government to account and we appreciate the Commissioner's ongoing engagement with this inquiry. We therefore note our intention to also hold quarterly briefings with the NSW Building Commissioner to obtain further updates on the government's reforms as they are implemented.
- 1.47** The committee notes the testimony of the NSW Building Commissioner who outlined that 30 additional inspectors will be hired by the Department to audit the certification process of existing buildings. These inspectors will be largely former certifiers, builders and designers.
- 1.48** The inquiry also received compelling evidence of unlicensed workers, particularly electrical workers, and a small number of specialised inspectors within the Department of Fair Trading. The committee is concerned that these new inspectors will not have specialised expertise for electrical, gas or plumbing, or be conducting licence checks.
- 1.49** The committee believes that licencing and inspections, with the specialist expertise for these, should be centralised, under the supervision of the NSW Building Commissioner, within the newly created Building Commission. The committee also believes there should be additional licencing and specialist inspections across electrical, gas and plumbing in the New South Wales construction industry.

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.

- 1.50** Finally, it goes without saying that the committee was alarmed to hear of the shonky practices that are endemic within the building and construction industry, including at its *in camera* hearings. This evidence shone a light on how we have ended up with a glut of defective buildings and an industry in crisis. This testimony resonates with the evidence given by numerous other inquiry participations. We further explore these issues in the following chapters.

Chapter 2 Flammable cladding

This chapter and the following chapter will focus on the important and urgent issue of flammable cladding on New South Wales buildings. This chapter begins with an overview of recent high profile building fires that have brought the issue of flammable cladding to the fore, as well as an overview of the response in other jurisdictions. It then outlines the NSW Government's response to cladding and considers how the NSW Government is identifying buildings with flammable cladding and notifying stakeholders, including through the cladding register.

Overview

- 2.1** 'Cladding' refers to a non-loadbearing skin or layer attached to the outside of a building. It is attached to a building's framework or an intermediate layer of battens or spacers to stop wind and water from entering the building. Cladding is also used for sound and thermal insulation purposes, as well as for aesthetic reasons.⁴²
- 2.2** Cladding can be made from a variety of materials. This means that, while some types of cladding are fire resistant, others are considered to be combustible. However, the presence of combustible cladding on its own does not automatically translate to a fire safety risk. A variety of factors, including but not limited to the location and configuration of cladding, building characteristics and existing fire safety measures, can influence a building's overall safety and performance in case of a fire.⁴³
- 2.3** The problem of flammable cladding is widespread. Initial estimates showed that around 3,500 apartment buildings in NSW are affected by flammable cladding,⁴⁴ with thousands of buildings around Australia also affected.
- 2.4** One example of cladding that has been under the spotlight recently is cladding made from aluminium composite panels (known as ACP), a product that is popular in Australia with a multitude of uses in buildings and beyond.⁴⁵ The combustibility of the product has led to the banning of certain types of ACP cladding in New South Wales in 2018.⁴⁶

⁴² Department of the Environment and Energy, *Cladding Systems, Your Home – Australia's Guide to Environmentally Sustainable Homes*, <<https://www.yourhome.gov.au/materials/cladding-systems>>.

⁴³ For further information, see NSW Department of Planning, Industry and Environment, *Guide for the Assessment of Buildings with Combustible Cladding* (5 September 2019), <<https://www.planning.nsw.gov.au/-/media/Files/DPE/Guidelines/Policy-and-legislation/guide-for-the-assessment-of-buildings-with-combustible-cladding-2019-09-05.pdf>>.

⁴⁴ Evidence, Mr Leighton Drury, State Secretary, Fire Brigade Employees Union, 11 December 2019, p 25.

⁴⁵ Department of Industry, Innovation and Science, *Senate Inquiry into Non-conforming Building Products: Government Response to the interim report*, February 2018, p 7.

⁴⁶ NSW Fair Trading, *Aluminium composite panel ban*, <<https://www.fairtrading.nsw.gov.au/trades-and-businesses/construction-and-trade-essentials/building-products/aluminium-composite-panel-ban>>.

Why is cladding a fire risk?

- 2.5** Cladding, such as ACP, is a problem due to how quickly it spreads fire and then becomes falling, burning debris. The committee heard that this presents difficulties for residents escaping a fire and for firefighters trying to access the fire. Mr Leighton Drury, State Secretary of the Fire Brigade Employees Union, described how the way cladding burns through a building makes things more hazardous for firefighters:

... [O]nce it starts catching on fire it is a rapid spread of fire. We do not always know where it is going because once you are inside the building obviously it is generally on the outside. Once you are entering the building the cladding comes away, as we saw in Grenfell and most other cladding fires, and becomes a risk not only to firefighters going in but the people evacuating out. Due to the composition it creates a toxic, thick black smoke which then has other different risks.⁴⁷

- 2.6** The risk of cladding is exacerbated by other features of modern buildings, such as buildings being constructed out of synthetic materials. Mr Drury, for example, argued:

The materials that buildings are made out of and the contents that go in them are generally made out of a synthetic material, which burns faster, hotter and with more toxic smoke. At the beginning of my career it might have taken a building with more natural materials 20 minutes to fully catch alight, but we are finding that now within minutes buildings are going up in smoke. When you throw in materials like cladding that is flammable it poses bigger problems and more complex problems to an already dangerous job that we do.⁴⁸

- 2.7** Additionally, Mr Drury told the committee that flammable cladding is a particular problem for high-rise buildings as these buildings tend to be in densely populated, urban areas that are difficult for firefighters to reach.⁴⁹

- 2.8** Mr Wayne Smith, Chief Executive Officer of the National Fire Industry Association also described how modern furniture inside buildings exacerbates the fire risks of cladding and argued that this means residents have much less time to escape from an apartment fire:

... [W]ith the current day use of materials that go into modern furniture in an apartment building, the combustibility of that is much, much greater than traditional furniture product from 25 or 30 years ago – to the extent where the egress time for a person in a modern apartment fire with modern furniture today is about six times less than what it was in the nineties. So instead of having 17 minutes to get out of the building, you have like three minutes to get out of the ... apartment.⁵⁰

⁴⁷ Evidence, Mr Leighton Drury, State Secretary of the Fire Brigade Employees Union, 11 December 2019, p 23.

⁴⁸ Evidence, Mr Drury, 11 December 2019, p 23.

⁴⁹ Evidence, Mr Drury, 11 December 2019, p 27.

⁵⁰ Evidence, Mr Wayne Smith, Chief Executive Officer, National Fire Industry Association, 27 August 2019, p 61.

- 2.9** This was reflected in evidence from Mr John Tansey, Executive Director, Regulatory Policy, Better Regulation Division, Department of Customer Service, who told the committee that flammable cladding on multi-storey residential buildings has been the NSW Government's focus due to the risk that cladding on these buildings represents:

It is the nature of the fact that people are vulnerable because they are sleeping. It is also about the way we all live and use our buildings. It heightens the risk. If you live in a building you are more likely to have a barbecue on the veranda than if it is a commercial office tower. The nature of bedding, furniture, the filling of a building makes it a greater risk. So it is absolutely the case. That is why all the way through multistorey residential high-rise has been our absolute number one focus.⁵¹

Recent building fires

- 2.10** A number of building fires that involved flammable cladding have highlighted the fire risks of flammable cladding in recent years. High profile cases of building fires exacerbated by flammable cladding are outlined below.

Lacrosse Tower

- 2.11** The Lacrosse Tower building is a 23-storey apartment block located on La Trobe Street to the north of the Marvel stadium, in Melbourne, Victoria.⁵²
- 2.12** On 25 November 2014, a fire broke out in the building, started by a lit cigarette on a balcony. The rapidity of the spread was such that the fire, which had reached level 14 at the time of the firefighters' arrival, had spread to the roof of the tower above level 21 just six minutes later.⁵³ It was later determined that the building was clad with ACP type cladding, and that it contributed to the fire load and spread.⁵⁴

Grenfell Tower

- 2.13** Grenfell Tower was a residential tower block in London that provided 129 flats to 350 social housing tenants.⁵⁵ On 14 June 2017, a catastrophic fire engulfed the Grenfell Tower, causing the death of 72 people.

⁵¹ Evidence, Mr John Tansey, Executive Director, Regulatory Policy, Better Regulation Division, Department of Customer Service, 11 December 2019, p 76.

⁵² Owners Corporation No.1 of PS613436T v LU Simon Builders Pty Ltd (Building and Property) [2019] VCAT 286, p 5.

⁵³ Owners Corporation No.1 of PS613436T v LU Simon Builders Pty Ltd (Building and Property) [2019] VCAT 286, p 5.

⁵⁴ State of Victoria Department of Environment, Land, Water and Planning, *Victorian Cladding Taskforce: Interim Report*, November 2017, p 12.

⁵⁵ Economics Reference Committee, the Senate, *Non-Conforming Building Products Interim Report: aluminium composite cladding*, September 2017, p 9.

- 2.14** Built in 1974, the tower was originally constructed of reinforced concrete, a fire-resistant material. However, an ACP type cladding system was added as part of a refurbishment in 2016.⁵⁶ An inquiry into the fire determined this cladding system to be the principal reason for the spread of the fire.⁵⁷

Neo 200

- 2.15** On 4 February 2019, a 41-storey Melbourne apartment, Neo 200, was set on fire by a lit cigarette. The rapid spread of the fire was attributed to the building's cladding, which was of ACP type.⁵⁸
- 2.16** News reports following the fire revealed that the City of Melbourne Council had raised concerns about the building's cladding the previous year. It was also revealed that many residents were unaware about the cladding before the fire.⁵⁹

The Cube

- 2.17** In November 2019, a large fire broke out at a six-storey student accommodation block known as the Cube in Bolton, United Kingdom, causing two injuries and requiring the rehousing of 200 students. Witnesses reported seeing the fire 'crawling up' the cladding and footage showed falling debris.⁶⁰
- 2.18** Notably, the cladding used was not the ACP type that is under the regulatory spotlight, but was high-pressure laminate, a material that is also widely used in Australia.⁶¹

Government responses to building fires involving flammable cladding

- 2.19** Instances of building fires involving flammable cladding have prompted governments, in Australia and beyond, to respond.

⁵⁶ Economics Reference Committee, *Non-Conforming Building Products Interim Report: aluminium composite cladding*, 2017, p 9.

⁵⁷ The Rt Hon Sir Martin Moore-Bick, *Grenfell Tower Inquiry – Phase 1 Report*, UK Parliament, p 12.

⁵⁸ Simone Fox Koob, *How hundreds of lives were thrown into chaos when Neo 200 caught fire* (3 May 2019), the Age, <<https://www.theage.com.au/national/victoria/how-hundreds-of-lives-were-thrown-into-chaos-when-neo-200-caught-fire-20190429-p51i62.html>>.

⁵⁹ Simone Fox Koob, *How hundreds of lives were thrown into chaos when Neo 200 caught fire* (3 May 2019), the Age, <<https://www.theage.com.au/national/victoria/how-hundreds-of-lives-were-thrown-into-chaos-when-neo-200-caught-fire-20190429-p51i62.html>>.

⁶⁰ Robert Booth and Nazia Parveen, *Bolton fire: government downplaying risks of HPL cladding, say critics* (18 November 2019), the Guardian, <<https://www.theguardian.com/uk-news/2019/nov/17/bolton-blaze-housing-and-fire-chiefs-hit-out-over-cladding-lottery>>.

⁶¹ BBC, *Fears over student buildings across the UK after Bolton blaze* (18 November 2019), <<https://www.bbc.com/news/uk-england-manchester-50457593>> and Evidence, Mr Greenfield, 11 December 2019, pp 48-49.

- 2.20** For instance, the United Kingdom Government established two inquiries following the Grenfell Tower fire, one examining the fire's specific circumstances, and another regarding the nation's building regulation and fire safety. Such work led to the banning of combustible materials on new high-rise homes in 2018,⁶² as well as a plan to reform building regulation.⁶³
- 2.21** The responses across Australian jurisdictions, including the Commonwealth, New South Wales and Victoria governments, are outlined below. Stakeholder concerns with New South Wales' response compared to the Victorian response, are also discussed below.

Commonwealth Government response

- 2.22** Under the Australian Constitution, the governance of buildings, including construction and plumbing, is the responsibility of the State and Territory governments.⁶⁴
- 2.23** However, the Commonwealth Government provides policy and coordination support to ensure that building regulations are nationally consistent.⁶⁵ The Commonwealth Government also convenes the Building Ministers' Forum, which comprises Commonwealth, State and Territory building ministers and auspices the implementation of nationally consistent regulation.
- 2.24** In 2017 following the Grenfell Tower fire, the Building Ministers' Forum commissioned Professor Peter Shergold and Ms Bronwyn Weir to report on the systemic failures in building regulation and enforcement systems across Australia.⁶⁶ The resultant *Building Confidence* report made 24 recommendations to improve the effectiveness of compliance and enforcement systems for the building and construction industry across Australia. Although it did not specifically make recommendations about cladding it did include a recommendation that the Building Ministers' Forum reach a position on the establishment of a compulsory product certification system for high-risk building products.⁶⁷
- 2.25** Beyond policy consistency and coordination among Australian governments, State and Territory governments remain responsible for implementing the report's recommendations. State and Territory governments also remain responsible for the remediation and rectification of flammable cladding on buildings.

⁶² Ministry of Housing, Communities and Local Government, *Guidance: Ban on combustible materials*, 17 April 2019, Gov.UK, <<https://www.gov.uk/guidance/ban-on-combustible-materials>>.

⁶³ Ministry of Housing, Communities and Local Government, *Building a Safer Future: An Implementation Plan*, December 2018, <<https://www.gov.uk/government/publications/building-a-safer-future-an-implementation-plan>>.

⁶⁴ Economics References Committee, *Non-conforming building products, Interim report: aluminium composite cladding*, 2017, p 8.

⁶⁵ Economics References Committee, *Non-conforming building products, Interim report: aluminium composite cladding*, 2017, p 8.

⁶⁶ Professor Peter Shergold AC and Ms Bronwyn Weir, *Building Confidence: Improving the effectiveness of compliance and enforcement systems for the building and construction industry across Australia*, February 2018.

⁶⁷ Professor Peter Shergold AC and Ms Bronwyn Weir, *Building Confidence: Improving the effectiveness of compliance and enforcement systems for the building and construction industry across Australia*, February 2018, recommendation 21.

NSW Government response

- 2.26** Following the Lacrosse and Grenfell fires, the NSW Government has sought to address the issue of flammable cladding and strengthen fire safety measures in the State through its ten-point plan for fire safety reform.⁶⁸ Broadly, the plan seeks to strengthen fire safety measures by prohibiting the sale of unsafe building products; accounting for all buildings with combustible cladding; and ensuring that only appropriate experts certify buildings and sign off on fire safety.⁶⁹
- 2.27** In its submission, the NSW Government set out its ten point plan for fire safety, announced in July 2017. The ten points are detailed below.
1. The introduction of a comprehensive building product safety scheme to prevent the use of dangerous building products.
 2. Identify buildings that may have aluminium or other unsafe cladding.
 3. Communicate to building/strata managers or owners of identified buildings and encourage inspections of the cladding and installation of cladding.
 4. Fire and Rescue NSW to visit all identified buildings as part of a fire safety education program.
 5. Establish a new fire safety declaration to require high-rise residential buildings to inform state and local government, and Fire and Rescue NSW if their building has cladding.
 6. Fast-track reforms to improve the regulation of building certifiers.
 7. Implement an industry-based accreditation scheme, ensuring that only skilled and experienced people can carry out fire inspections.
 8. Establish a whole-of-government taskforce to coordinate and implement the reforms.
 9. Provide instructions to all government departments to audit their buildings and determine if they have aluminium cladding.
 10. Follow up with local councils on correspondence they received in 2016 from the NSW Government after Melbourne's Lacrosse Tower Fire.⁷⁰
- 2.28** At the beginning of the committee's inquiry, the NSW Government advised that six of the ten action points had been completed, with the other four ongoing. Completed points included the establishment of a cladding taskforce to coordinate the fire response across government, amendments to the *Environmental Planning and Assessment Regulation 2000* to require registration of certain multi-storey buildings which contain certain flammable cladding, and introduction of the *Building Products (Safety) Act 2017* which empowers the NSW Commissioner for Fair Trading to investigate and ban unsafe building products.⁷¹

⁶⁸ Submission 132, NSW Government, p 40.

⁶⁹ NSW Government, *Ten-point plan for fire safety reforms*, 31 July 2017, NSW.gov.au, <<https://www.nsw.gov.au/news-and-events/news/ten-point-plan-for-fire-safety-reforms/>>.

⁷⁰ Submission 132, NSW Government, pp 42-46.

⁷¹ Submission 132, NSW Government, pp 42-46.

- 2.29** In August 2018, the NSW Commissioner for Fair Trading exercised the new powers under the *Building Products (Safety) Act 2017* to ban ACP cladding comprising a core of greater than 30 per cent polyethylene for certain multi-storey buildings.⁷² As of February 2020, local councils are continuing to work with State agencies, including Fire and Rescue NSW, to inspect and issue rectification orders as appropriate.
- 2.30** Another development is the establishment of the NSW Fire Safety and External Wall Cladding Taskforce ('the cladding taskforce') in July 2017. The cladding taskforce comprises representatives from across the State Government, including the Department of Customer Service, the NSW Data Analytics Centre, the Department of Planning, Industry and Environment, Fire & Rescue NSW, the Office of Local Government, Treasury and the Department of Premier and Cabinet.
- 2.31** The cladding taskforce is intended as a central forum to 'spearhead the NSW Government's efforts',⁷³ ensuring consistency and coordination in State and local government actions. The taskforce is also responsible for implementing the ten point plan.⁷⁴
- 2.32** A cladding support unit of four staff in the Department of Customer Service was also established in 2019 to provide advice and resources to local government.⁷⁵
- 2.33** Additionally, as discussed in the first report of this inquiry, the NSW Government appointed a Building Commissioner to lead the government's policy response to building issues, particularly cladding. At the hearing on 24 February 2020, the NSW Building Commissioner Mr David Chandler OAM gave evidence that he was not yet in charge of cladding issues.⁷⁶ At a hearing on 5 November 2019, he confirmed that he had provided recommendations to the NSW Government on flammable cladding within a fortnight of commencing as Commissioner.⁷⁷ On 24 February 2020, Mr Chandler confirmed that he had provided plans on flammable cladding to the Minister for Better Regulation and Innovation, the Hon Kevin Anderson MP, and the plans were before Cabinet.⁷⁸
- 2.34** At the final hearing of the inquiry, representatives from the NSW Government were asked to update the committee on the progress of the ten point plan. Mr Tansey indicated that almost all points had been completed or were close to completion.⁷⁹

⁷² Submission 132, NSW Government, p 42.

⁷³ Submission 132, NSW Government, p 38.

⁷⁴ NSW Government, *Ten-point plan for fire safety reforms*, 31 July 2017, NSW.gov.au, <<https://www.nsw.gov.au/news-and-events/news/ten-point-plan-for-fire-safety-reforms/>>.

⁷⁵ Evidence, Mr Tansey, 11 December 2019, p 67.

⁷⁶ Evidence, Mr David Chandler OAM, NSW Building Commissioner, 24 February 2020, p 17.

⁷⁷ Evidence, Mr Chandler, 5 November 2019, p 74.

⁷⁸ Evidence, Mr Chandler, 24 February 2020, p 17.

⁷⁹ Evidence, Mr Tansey, 24 February 2020, pp 25-27.

- 2.35** At a Budget Estimates hearing of Portfolio Committee No. 6 – Transport and Customer Service, Minister Anderson was asked to provide an update on the Government's work in remediating buildings in relation to cladding. The Minister stated, in response:

We have made significant inroads into clearing buildings and assessing buildings that have cladding in New South Wales ... The cladding taskforce, which I think has met something like 52 times now, is methodically, practically and strategically working through those buildings to keep people safe.⁸⁰

- 2.36** In relation to implementation of the NSW Building Commissioner's work plan for dealing with flammable cladding, the Minister stated: 'we are carefully considering the Building Commissioner's work plan. It is in Cabinet and we will carefully consider what those options are'.⁸¹

Victorian Government response

- 2.37** Following the Lacrosse Tower and Grenfell Tower fires, the Victorian Government, like the NSW Government, sought to ascertain the scope of flammable cladding in the State. To this end, the Victorian Cladding Taskforce was established to investigate the extent of non-compliant cladding on Victorian buildings and make recommendations for improvement.⁸² The Victorian Building Authority was also commissioned to lead a state-wide audit of apartments and other large buildings.⁸³
- 2.38** A point of distinction in the Victorian response is the availability of public funding for affected owners and owners corporations. Following the recommendation of the Taskforce, the Victorian Government announced a \$600 million policy package to fund the rectification process and established a new dedicated government agency, Cladding Safety Victoria, to oversee the process.⁸⁴ Cladding Safety Victoria funds the rectification of combustibile cladding on eligible higher risk residential apartment buildings, as identified by the Victorian Building Authority in its audit. Funding covers design phase costs as well as the rectification.⁸⁵
- 2.39** In addition the Victorian Building Authority provides a centralised flammable cladding risk assessment process and is the Municipal Building Surveyor for the highest risk buildings in Victoria.⁸⁶

⁸⁰ Evidence, Hon Kevin Anderson MP, Minister for Better Regulation and Innovation, Budget Estimates 2019-2020, 16 March 2020, p 15.

⁸¹ Evidence, Minister Anderson, Budget Estimates 2019-2020, 16 March 2020, p 15.

⁸² The State of Victoria Department of Environment, Land, Water and Planning, *Victorian Cladding Taskforce*, Interim Report, November 2017, p 6.

⁸³ Victorian Government, *The risk of combustibile cladding*, 22 October 2019, <<https://www.vic.gov.au/combustibile-cladding/>>.

⁸⁴ Media Release, Hon Dan Andrews MP, Premier, State of Victoria, 'Tackling High-Risk Cladding to Keep Victorians Safe', 16 July 2019.

⁸⁵ Victorian Government, *Eligibility, assessment and process for higher risk buildings*, 28 January 2020, <<https://www.vic.gov.au/process-fix-high-risk-combustibile-cladding/>>.

⁸⁶ State of Victoria Department of Environment, Land, Water and Planning, 'Victorian Cladding Taskforce, Report from the Co-Chairs, July 2019'.

- 2.40 During the rectification process, Cladding Safety Victoria's dedicated officers engage with owners and owner corporations to assist in the process and help identify safe materials to replace the existing flammable cladding. Cladding Safety Victoria also maintains a register of preferred building suppliers who can undertake the rectification works.⁸⁷

Comparisons between New South Wales approach and other jurisdictions

- 2.41 Despite developments to date, a number of stakeholders expressed concern with the NSW Government's response and identified areas where this could be improved. In this regard, some witnesses advocated for New South Wales to adopt a more centralised and hands-on approach to flammable cladding, pointing to the Victorian scheme as a good example.
- 2.42 Ms Bronwyn Weir, who addressed the committee in her capacity as the co-author of the Shergold-Weir *Building Confidence Report* told the committee that, in her opinion, the approach to cladding in Victoria has been 'quite different' to the approach of New South Wales. She explained that the Victorian Government set up an advisory reference panel of experts and all buildings were audited and subject to review by this panel, which ensured a consistent approach.⁸⁸ She stated:

[Victoria] seemed to be in a much better position to understand how many buildings and what level of risk different buildings are. I think what Victoria came to realise quite quickly was that identifying risk was one thing, but then actually mobilising rectification and the difficulties that owners will face ... was becoming very difficult so that owners were not able to navigate themselves well enough or quickly enough to deal with the public safety risk.⁸⁹

- 2.43 Mr Karl Sullivan, Head of Risk and Operations, Insurance Council of Australia, told the committee that he would like to see in New South Wales a program like in Victoria which involves a rigorous audit program to identify high-risk buildings and a standard remediation program.⁹⁰ He noted that, while all State Governments have areas for improvement in their response to combustible cladding, 'Victoria has probably taken the most proactive approach'.⁹¹
- 2.44 Local government representatives had similar views. Cr Linda Scott, President of Local Government NSW, said that local councils 'would strongly support the State Government of NSW following the lead of the Victorian Government'.⁹² She called for more State Government oversight of flammable cladding remediation and for councils to be supported with technical information and advice as well as resourcing.⁹³

⁸⁷ Victorian Government, *Eligibility, assessment and process for higher risk buildings*, 28 January 2020, <<https://www.vic.gov.au/process-fix-high-risk-combustible-cladding/>>.

⁸⁸ Evidence, Ms Bronwyn Weir, Co-author *Building Confidence: Improving the Effectiveness of Compliance and Enforcement Systems for the Building and Construction Industry Across Australia*, 27 August 2019, pp 56-57.

⁸⁹ Evidence, Ms Weir, 27 August 2019, p 57.

⁹⁰ Evidence, Mr Karl Sullivan, Head of Risk and Operations, Insurance Council of Australia, 11 December 2019, pp 19-20.

⁹¹ Evidence, Mr Sullivan, 11 December 2019, p 19.

⁹² Evidence, Cr Linda Scott, President, Local Government NSW, 11 December 2019, p 13.

⁹³ Evidence, Cr Scott, 11 December 2019, p 13.

- 2.45** Likewise, Mr Michael Corrigan, a Senior Building Surveyor with Lake Macquarie Council, argued that a fully resourced model, like that of Victoria, 'is superior to that which we have in New South Wales'.⁹⁴ Mr Chris Rumore, an owner and resident of an affected strata complex, also described the Victorian model as a '... more reasonable and helpful approach'.⁹⁵
- 2.46** Mr Nigel Davies, the National Assistant Secretary of the Construction, Forestry, Mining and Energy Union (CFMEU), stated that the union would 'encourage every State Government' to follow Victoria's lead.⁹⁶

The cladding register

- 2.47** The first step on the NSW Government's ten point plan is the introduction of a building product safety scheme to prevent the use of dangerous building products. As mentioned earlier, the NSW Government banned the use of ACP cladding comprising a core of greater than 30 per cent polyethylene on certain multi-storey buildings in 2018.⁹⁷
- 2.48** The ban affects the future use of ACP in construction. All buildings that already contain ACP must be assessed to determine what risk ACP poses to the building and how this risk can be mitigated, which may include having the cladding removed.⁹⁸
- 2.49** The NSW Government has been collecting data about buildings that may contain ACP cladding and now maintains various databases of buildings, including a register of buildings identified by owners as potentially containing ACP cladding, and a register of buildings deemed to be high-risk.⁹⁹ Identifying buildings with aluminium or other cladding is the second step of the ten point plan for fire safety.¹⁰⁰
- 2.50** There was much confusion in the evidence about what the registers consist of, who is responsible for maintaining them, and the criteria used to list buildings as high-risk. It was not always clear which register stakeholders were referring to as there were multiple lists maintained by different agencies, and none of these lists were available to the public. The lack of public information and guidance regarding the different lists was heavily criticised by inquiry stakeholders.

⁹⁴ Evidence, Mr Michael Corrigan, Senior Building Surveyor, Lake Macquarie City Council, 20 February 2020, p 2.

⁹⁵ Submission 159, Mr Chris Rumore, p 1.

⁹⁶ Evidence, Mr Greenfield, and Mr Nigel Davies, National Assistant Secretary, Construction, Forestry, Mining and Energy Union, 11 December 2019, pp 46-47.

⁹⁷ Submission 132, NSW Government, p 42.

⁹⁸ NSW Fair Trading, *Aluminium composite panel ban*, <fairtrading.nsw.gov.au/trades-and-businesses/construction-and-trade-essentials/building-products/aluminium-composite-panel-ban>.

⁹⁹ Evidence, Mr Tansey, 5 November 2019, p 75.

¹⁰⁰ Submission 132, NSW Government, pp 42-43.

The register of high-risk buildings

- 2.51** The NSW Government has been collecting data since 2017 to identify buildings with ACP cladding. Information has been collected through data analysis of building records through the NSW Government's Data Analytics Centre,¹⁰¹ and through information collected from Fire and Rescue NSW and local councils, often identified during inspections.¹⁰²
- 2.52** Additionally, building owners are required to register if they believe their building has ACP cladding under the *Environmental Planning and Assessment Amendment (Identification of Buildings with External Combustible Cladding) Regulation 2018*.¹⁰³ Registration is required for certain buildings of two or more storeys,¹⁰⁴ that have 'external combustible cladding', defined as any cladding comprising certain metal composite panels or any insulation cladding system made up of certain plastics.¹⁰⁵ Buildings registered under the regulation are recorded in a database by the NSW Government's cladding taskforce, sometimes referred to as the 'cladding register'.
- 2.53** Assistant Commissioner Community Safety, Fire and Rescue NSW, Mr Mark Whybro gave evidence that for all buildings assessed, 26 per cent were identified through the Data Analytics Centre, 12 per cent through the Department of Planning, Industry and Environment, 7 per cent through Fire and Rescue NSW, 17 per cent by local councils, 37 per cent through the cladding register (via owner registration) and 1 per cent were owned or leased by the NSW Government.¹⁰⁶
- 2.54** If a building on the cladding register or otherwise identified as potentially containing ACP cladding is assessed to be a 'high-risk' building, it is placed on the register of buildings with potentially flammable cladding, or the 'high-risk register'.¹⁰⁷
- 2.55** Buildings are deemed to be high-risk based on an initial risk assessment by Fire and Rescue NSW. Assistant Commissioner Whybro explained that this initial assessment is a visual check only to determine the risk the building represents. He told the committee:

That assessment is not done to determine the type of cladding or the combustibility of the cladding; it looks at the building, sees the presence of cladding and, based on the location, the arrangement and the quantity, determines whether it is no risk, high-risk or low risk.¹⁰⁸

¹⁰¹ Submission 132, NSW Government, pp 42-43.

¹⁰² Evidence, Mr Mark Whybro, Assistant Commissioner Community Safety, Fire and Rescue NSW, 11 December 2019, p 51.

¹⁰³ *Environmental Planning and Assessment Amendment (Identification of Buildings with External Combustible Cladding) Regulation 2018*, sch 1, cl 5.

¹⁰⁴ Submission 132, NSW Government, p 47.

¹⁰⁵ *Environmental Planning and Assessment Amendment (Identification of Buildings with External Combustible Cladding) Regulation 2018*, sch 1, cl 1.

¹⁰⁶ Answers to questions on notice, Mr Mark Whybro, Assistant Commissioner, Community Safety, Fire and Rescue NSW, received 4 February 2020, p 2.

¹⁰⁷ Evidence, Assistant Commissioner Whybro, 11 December 2019, p 52.

¹⁰⁸ Evidence, Assistant Commissioner Whybro, 11 December 2019, p 51.

- 2.56** Assistant Commissioner Whybro told the committee that the number of buildings on the high-risk register 'changes week by week'. He explained that buildings are added to the list as they are identified and deemed high-risk and then removed once the cladding is either removed or the fire risk adequately mitigated, or as the cladding is found not to be ACP cladding. He expressed the view that 'I would be surprised if we do not keep finding buildings for a while', as at the time of appearing before the committee in December 2019 he commented that there were 'still dribs and drabs coming in from the cladding register'.¹⁰⁹
- 2.57** Mr Tim Reardon, Secretary of the Department of Premier and Cabinet, in documentation provided to the Legislative Council through the order for papers process, described the register as a 'working list' of buildings including those 'that have been assessed and confirmed to have combustible cladding and others that are yet to be confirmed or cleared by the consent authorities'.¹¹⁰
- 2.58** As of 11 December 2019, Fire and Rescue NSW had conducted an initial assessment of 4,127 buildings on the cladding register.¹¹¹ 463 of those buildings had been declared potentially high-risk and placed on the high-risk register.¹¹² This includes 8 publicly owned buildings¹¹³ and 14 private buildings leased to NSW Government agencies.¹¹⁴
- 2.59** According to Assistant Commissioner Whybro, as of 10 January 2020, 136 buildings on the register had been progressed by the relevant consent authority, which he said means they either require an action plan to address cladding risks, are subject to remediation orders or are 'otherwise progressing towards remediation work'.¹¹⁵
- 2.60** On 16 March 2020, Minister Anderson indicated at a Budget Estimates hearing of Portfolio Committee No. 6 – Transport and Customer Service that the high-risk register then contained 444 buildings.¹¹⁶ Mr Tansey indicated this was a reduction from an initial number of 664 high-risk buildings and that these buildings had progressed along the way to remediation. He stated:

[The list] is down to 444 in total, but it is also the fact that the progress of buildings from their very first identification through to being assessed, having plans for action and then remediation is the trajectory we want to see.¹¹⁷

¹⁰⁹ Evidence, Assistant Commissioner Whybro, 11 December 2019, pp 55-56.

¹¹⁰ Return to order for papers, 31 October 2019, Register of buildings with potentially combustible cladding, Appendix C, *Explanatory notes and claim for privilege*, p 1.

¹¹¹ Evidence, Assistant Commissioner Whybro, 11 December 2019, p 53.

¹¹² Evidence, Assistant Commissioner Whybro, 11 December 2019, p 54.

¹¹³ Evidence, Mr Tansey, 11 December 2019, p 64.

¹¹⁴ Answers to questions on notice, Mr John Tansey, Executive Director, Regulatory Policy, Better Regulation Division, Department of Customer Service, received 29 January 2020, p 1.

¹¹⁵ Answers to questions on notice, Assistant Commissioner Whybro, received 4 February 2020, p 1.

¹¹⁶ Evidence, Minister Anderson, Budget Estimates 2019-2020, 16 March 2020, p 20.

¹¹⁷ Evidence, Mr Tansey, 16 March 2020, p 21.

Stakeholder concerns about the cladding register

- 2.61** A number of inquiry participants told the committee that they were concerned with how the cladding register has been managed, including concerns of over reporting by owners, and the classification of high and low risk.
- 2.62** For example, Cr Scott from Local Government NSW told the committee that different approaches and resources of different strata committees would lead to discrepancies on the registers. She gave the following examples:
- [I]n a strata that does not have enough reserve funds to commission the necessary reports, they may report even if they are not aware that there is combustible cladding in their building in order not to breach the current rules. This, of course, means then the council has potentially a very large number of buildings to inspect because there may be over-reporting. Similarly though and to counterbalance that, there is inadequate training for stratas, so they may not even be aware of this requirement and therefore, may not have reported because they did not understand they had an obligation to even check.¹¹⁸
- 2.63** Further, Cr Scott advised that local councils have reported that most buildings that were self-reported 'were found to have no cladding, non-combustible cladding or cladding that posed a minimal risk'. She commented that 'because the strata has a responsibility to report and they do not have enough money to undertake the technical specification reports to understand what is in their building they just report'.¹¹⁹
- 2.64** In relation to confusion around the different lists, Cr Scott stated: 'councils have, at one point, had three separate State agencies giving lists in our areas of the potential cladding that was flammable' and that these separate lists did not correlate.¹²⁰
- 2.65** Mr Drury expressed the view that he was not confident in the NSW Government's assessment of risk and suggested that there are some buildings which 'would go onto the high-risk category that are not'.¹²¹ He called for more details on the risk assessment to be released, highlighting that 'some of that methodology needs to be looked at'.¹²²
- 2.66** At a hearing, Assistant Commissioner Whybro was questioned on these issues. He gave evidence that, in their initial assessment, Fire and Rescue NSW uses a visual inspection to classify buildings as either no, low, or high-risk and buildings that are assessed to be high-risk are placed on the high-risk register.¹²³
- 2.67** Mr Davies from the CFMEU questioned why the classification system of no, low or high-risk was used rather than classifications such as that used in Victorian where buildings are further classified as either high or extreme risk.¹²⁴

¹¹⁸ Evidence, Cr Scott, 16 August 2019, p 46.

¹¹⁹ Evidence, Cr Scott, 11 December 2019, p 12.

¹²⁰ Evidence, Cr Scott, 16 August 2019, p 46.

¹²¹ Evidence, Mr Drury, 11 December 2019, p 26.

¹²² Evidence, Mr Drury, 11 December 2019, p 26.

¹²³ Evidence, Assistant Commissioner Whybro, 11 December 2019, p 52.

¹²⁴ Evidence, Mr Davies, 11 December 2019, p 50.

- 2.68** When asked why Fire and Rescue NSW had not adopted the Victorian model, Assistant Commissioner Whybro said while they had spoken to and learnt lessons from other jurisdictions, the NSW Government had developed its own categorisation. He clarified that 'high-risk means the highest risk that we rated a building at for life safety'.¹²⁵ Further, Assistant Commissioner Whybro told the committee that priority is given to shared accommodation buildings as people are most vulnerable when they are asleep.¹²⁶
- 2.69** Assistant Commissioner Whybro was questioned on whether the register contained more buildings than it should. He explained that around 60 per cent of the 1600 buildings registered through the online portal by homeowners were found to have no cladding.¹²⁷ When questioned about possible reasons for over-reporting, Assistant Commissioner Whybro agreed that penalties for non-disclosure may have contributed to people registering buildings without flammable cladding as a precaution.¹²⁸
- 2.70** The committee also asked Assistant Commissioner Whybro about stakeholder concerns around whether the register was missing certain buildings. When asked if he was confident that all relevant buildings have been placed on the register, he replied that buildings are still being added and it is likely that more buildings of concern would be identified in future.¹²⁹
- 2.71** It was unclear in evidence whether buildings with three or less storeys are excluded from the high-risk register. Assistant Commissioner Whybro confirmed that buildings under four storeys in height may be included in the high-risk register, stating that of the 463 buildings on the high-risk register in December 2019, 271 had four or more storeys.¹³⁰
- 2.72** Representatives of the NSW Government answered further questions relating to stakeholders' concerns about the register at a number of Budget Estimates hearings before Portfolio Committee No. 6 – Transport and Customer Service.
- 2.73** At the initial Budget Estimates hearing in September 2019, Mr Tansey described the risk assessment as a risk matrix based on the amount, type and use of cladding. Mr Tansey noted that a building's high-risk label may be changed later based on further assessment:
- Where the buildings – either on that detailed inspection or subsequently by the consent authorities – have been found to have no cladding or cladding that may have looked initially to be aluminium composite but turned out to be a completely different type of cladding or the assessment says that given the nature of the building or the small amount of cladding on it, it poses no risk, they are no longer identified as being at risk.¹³¹
- 2.74** At a supplementary Budget Estimates hearing, NSW Government representatives were questioned about the criteria used to determine that a building is high-risk and specifically whether buildings with few storeys were deemed not to be high-risk on the basis of their height alone. Ms Rose Webb, Deputy Secretary, Better Regulation Division and NSW Fair Trading

¹²⁵ Evidence, Assistant Commissioner Whybro, 11 December 2019, p 54.

¹²⁶ Evidence, Assistant Commissioner Whybro, 11 December 2019, p 51.

¹²⁷ Evidence, Assistant Commissioner Whybro, 11 December 2019, p 57.

¹²⁸ Evidence, Assistant Commissioner Whybro, 11 December 2019, p 57.

¹²⁹ Evidence, Assistant Commissioner Whybro, 11 December 2019, p 56.

¹³⁰ Evidence, Assistant Commissioner Whybro, 11 December 2019, p 60.

¹³¹ Evidence, Mr Tansey, Budget Estimates 2019-2020, 9 September 2019, p 9.

Commissioner, stated: 'high-risk, by definition, is more than three storeys ...'¹³² However in answers to questions on notice, the Department later clarified that 'no buildings have been excluded from consideration by the Taskforce on the basis of the number of storeys alone'.¹³³

- 2.75** At a further Budget Estimates hearing in March 2020, Mr Tansey indicated that 34 additional buildings had been added to the high-risk register around late November or early December 2019.¹³⁴
- 2.76** Given the confusion among stakeholders, representatives from NSW Fair Trading appeared again before this committee on a number of occasions to answer further questions on these issues.
- 2.77** When questioned about whether there may be disincentives for owners to disclose flammable cladding on their buildings, Mr Tansey, conceded that 'sometimes there can be perverse incentives and people do not want to out themselves'. He noted, however, that owner registration of buildings is not the only source of information on buildings with flammable cladding and characterised owner registration as a 'backstop provision' to the work the NSW Government was undertaking to identify potentially high-risk buildings.¹³⁵
- 2.78** By the time the committee held its final hearing on 24 February 2020, representatives of the NSW Government indicated that no new buildings were likely to be identified and added to the cladding register. Mr Tansey told the committee that, while the NSW Government will continue to seek to identify buildings, 'we think we have reached a point of stasis where all of the buildings have been identified. He advised that 'it has been some little time since any new buildings have been identified'.¹³⁶
- 2.79** At the final hearing, Mr Tansey was again questioned on the risk assessment used. He confirmed it is based on the configuration, amount and location of cladding and that these factors are used to determine whether there is an increased fire risk. He stated:

... [T]he essential criteria following inspections by Fire and Rescue NSW and when they determine that the configuration, the amount and the location of the cladding on a building gives them concern it might increase the fire risk—either for the spread of fire or firefighting evacuation—that is when we put it on the potential high-risk list.¹³⁷

Stakeholder views on publication of the cladding register

- 2.80** There was much debate throughout the inquiry as to whether or not the register of buildings containing flammable cladding should be made public. Stakeholders expressed varying views about this issue.

¹³² Evidence, Ms Rose Webb, Deputy Secretary, Better Regulation Division and NSW Fair Trading Commissioner, Budget Estimates 2019-2020, 28 October 2019, p 9.

¹³³ Answers to questions on notice, Budget Estimates 2019-2020, Minister Anderson, received 22 November 2019, p 2.

¹³⁴ Evidence, Mr Tansey, Budget Estimates 2019-2020, 16 March 2020, p 21.

¹³⁵ Evidence, Mr Tansey, 11 December 2019, p 74.

¹³⁶ Evidence, Mr Tansey, 24 February 2020, p 26.

¹³⁷ Evidence, Mr Tansey, 24 February 2020, p 19.

- 2.81** Mr Ravendra Mawjee, a resident of a building that contains flammable cladding, stated that the information on the register is important for the public and that he would not have an issue with its publication.¹³⁸ On the other hand, Mr Rumore, another resident in a building with flammable cladding, said that he would have an issue with the register's publication and that he was concerned about security risks to buildings identified as having flammable cladding (such as being a target for arson).¹³⁹
- 2.82** Some witnesses spoke in favour of providing the information to people who would be impacted by affected buildings but against releasing the details to the general public. Mr Chris Duggan, NSW President of the Strata Community Association, for example, cautioned against the register's general release and was of the view that affected stakeholders such as owners, tenants or third parties should be notified. Mr Duggan also highlighted that there is the risk of an 'enduring impact' on the value of properties should the list be released prematurely, particularly with buildings being on the list and then later found to be compliant.¹⁴⁰
- 2.83** Mr Philip Gall, Chair of the Owners Corporation, had a similar view, stating that more details in the register need to be made available, but whether or not that is a full public release comes back to the objectives of releasing the information:
- Clearly if government is going to be more accountable and you are going to be able to monitor the progress, you probably need more disclosure than there is at the moment. Does that mean you need to name names and name buildings? Probably not. There is a question mark there. Is it about making sure that all of the affected parties know that they are in a building that is—again, is releasing the list the best way to do that, or are there other ways? I think it comes back to what are the objectives. We are very cautious about saying "release a list" when you have people talking about fire, fire hazards and terrorism and stuff like that if you do not need to do it. But we are also very keen on proper accountability and transparency of the delivery of a very important program. If the list needs to be expanded and more information made public to achieve that, then good. So it comes back to the objectives.¹⁴¹
- 2.84** In addition, Ms Jane Hearn, Vice Chair, Owners Corporation Network, said that they 'would not be advocating publication to the world, because I think we would certainly take the advice of our fire professionals', stating 'we do not want to put people at risk'. However, she was also of the view that as a prospective purchaser 'you have a right to know' and this information should be obtained in the strata report.¹⁴² Issues surrounding strata reports are discussed in the final chapter.
- 2.85** Mr Leo Patterson Ross, Senior Policy Officer at the 'Tenants' Union of NSW, said that the 'Tenants' Union would be supportive of 'more information and more transparency around the issue' and advocated for a publicly available online register that could be searched by prospective

¹³⁸ Evidence, Mr Ravendra Mawjee, Resident in a building containing flammable cladding, 11 December 2019, p 9.

¹³⁹ Evidence, Mr Chris Rumore, Resident and Chair, Sub-committee Owners Corporation, building containing flammable cladding, 11 December 2019, p 9.

¹⁴⁰ Evidence, Mr Chris Duggan, President, Strata Community Association NSW, 11 December 2019, p 34.

¹⁴¹ Evidence, Mr Philip Gall, Chair, Owners Corporation Network, 11 December 2019, p 34.

¹⁴² Evidence, Ms Jane Hearn, Vice Chair, Owners Corporation Network, 11 December 2019, p 34.

tenants. He suggested that perhaps buildings that have been registered as a precaution but not yet assessed would not need to be disclosed. Mr Patterson Ross argued that tenants are in particular need of reliable information about buildings they occupy as they are usually excluded from strata meetings.¹⁴³

2.86 Mr Darren Greenfield, State Secretary of the CFMEU NSW Branch, characterised the confidentiality of the cladding register as 'alarming' and stated that he would not like to be a resident in a building that had flammable cladding and not know about it.¹⁴⁴ Further, Mr Davies, also of the CFMEU, noted that, in Victoria, only the addresses of the buildings identified as extreme risk were published.¹⁴⁵

2.87 Cr Scott argued that, as the 'body politic of the governing organisation', Local Government NSW should be provided with the high-risk register. She advised that local councils are separately provided with the addresses of the high-risk buildings in their area and local councils had resolved, at their conference in October 2019, to make these public. Cr Scott argued that, for consistency, the same list should be available to bodies involved in managing and coordinating remediation of flammable cladding, stating:

It is [in] everybody's interest to have one list and to try to make sure that list is as accurate as possible, to have everybody in all the regulatory sections of this puzzle on top of the remediation plans and where they are up to and to have some oversight of that by the State.¹⁴⁶

2.88 The committee was also interested in stakeholders' views on releasing information about particular types of buildings such as nursing homes and shopping centres, where users may not be notified as occupants.

2.89 In response to a question about this, Ms Hearn noted that people in buildings such as hospitals are particularly vulnerable and said 'I think as a member of the public I would want to know'.¹⁴⁷ Mr Gall noted that, while this is different to strata buildings, it is still a question of balance and a question of 'what is the purpose of releasing the information and in what form?'¹⁴⁸ Both Ms Hearn and Mr Gall agreed that a delay of 18 months in notifying patients and staff of flammable cladding in a Sydney hospital was 'unacceptable'.¹⁴⁹

2.90 Mr Patterson Ross made the point that if releasing the information publicly represents a legitimate safety threat, then 'there should be great haste in rectifying these buildings ... rather than spending 18 months thinking about doing something about it'.¹⁵⁰

¹⁴³ Evidence, Mr Leo Patterson Ross, Senior Policy Officer, Tenants' Union of NSW, 11 December 2019, pp 29 and 34-35.

¹⁴⁴ Evidence, Mr Greenfield, 5 November 2019, p 31.

¹⁴⁵ Evidence, Mr Davies, 11 December 2019, pp 46-47.

¹⁴⁶ Evidence, Cr Scott, 11 December 2019, p 13.

¹⁴⁷ Evidence, Ms Hearn, 11 December 2019, p 35.

¹⁴⁸ Evidence, Mr Gall, 11 December 2019, p 35.

¹⁴⁹ Evidence, Ms Hearn, 11 December 2019, p 35; Evidence, Mr Gall, 11 December 2019, p 35.

¹⁵⁰ Evidence, Mr Patterson Ross, 11 December 2019, p 35.

Government views on publication of the cladding register

- 2.91** Throughout this inquiry the view of the NSW Government has been that the cladding register should remain confidential. Mr Reardon, Secretary of the Department of Premier and Cabinet, in documentation provided with the register, cited issues of public safety and the financial interests of building stakeholders.¹⁵¹ He also argued that one of the reasons the register should remain confidential is that 'the information the cladding taskforce has is not necessarily complete as it depends on voluntary reporting by third party agencies such as local councils'.¹⁵²
- 2.92** Deputy Commissioner Dave Hudson, Investigations and Counter Terrorism, NSW Police, provided to the committee a copy of the written advice NSW Police had provided to government on the release of the register. The written advice recommended that, from a general perspective, it would not be in the public interest for information identifying addresses to be made public.¹⁵³
- 2.93** Deputy Commissioner Hudson told the committee that publication of the register 'is a matter of balance and whether the information outweighs any detrimental effect'. In the opinion of NSW Police, he advised that 'there will be people who will try and set fire to those buildings' if the information is publicly available. He commented that although there is no specific terrorist threat there is still a concern:
- In our opinion, whilst there is no direct terrorist threat, it has been mentioned in Islamic State of Iraq and the Levant [ISIL] and al-Qaeda communications over the last 10 years of terrorism by fire—normally as wildfires in the United States—which we have been alerted to. Whilst we do not think there is any specific terrorist threat from my point of view it would be, whilst not terrorism, more miscreant behaviour trying to set fire to buildings to cause damage if the list was publicly available.¹⁵⁴
- 2.94** When questioned about whether addresses of public-use buildings such as cinemas should be released, Assistant Commissioner Whybro responded by saying: 'the public release of information that identifies a building that is more vulnerable than other buildings in the community is not something that Fire and Rescue recommends'.¹⁵⁵

¹⁵¹ Return to order for papers, 31 October 2019, Register of buildings with potentially combustible cladding, Attachment B, pp 2-4.

¹⁵² Return to order for papers, 31 October 2019, Register of buildings with potentially combustible cladding, Appendix C, p 3.

¹⁵³ Answers to questions on notice, Deputy Commissioner Dave Hudson, Deputy Commissioner, Investigations and Counter Terrorism, NSW Police Force, received 30 January 2020, Attachment 1, p 1.

¹⁵⁴ Evidence, Deputy Commissioner Dave Hudson, Deputy Commissioner, Investigations and Counter Terrorism, NSW Police Force, 11 December 2019, p 61.

¹⁵⁵ Evidence, Assistant Commissioner Whybro, 11 December 2019, p 61.

- 2.95** The committee pursued the release of the high-risk register throughout this inquiry. In October 2019, the Legislative Council under standing order 52 ordered that the register be produced. The NSW Government produced the register on 31 October 2019 under a claim of privilege. The register is therefore confidential and available only to members of the Legislative Council.¹⁵⁶
- 2.96** The independent legal arbiter appointed to report on whether the register should be published, the Hon Keith Mason AC, concluded that the register is relevantly privileged on public safety grounds. The arbiter rejected the government's arguments that releasing the register would impact on property values or the government's ability to regulate properly but felt that public safety considerations tipped the balance in favour of keeping the register confidential.¹⁵⁷ Although he noted that his report does not prevent the Legislative Council from releasing information about particular buildings, he felt that the House could fulfil its role in holding the Government to account without identifying the location of individual buildings.¹⁵⁸
- 2.97** At a Budget Estimates hearing of Portfolio Committee No. 4 – Industry in March 2020, the Hon Melinda Pavey MP, Minister for Water, Property and Housing, was asked if she believed it was in the public interest that information related to Property NSW buildings on the register be published. The Minister said that 'I think it is information that should be available, certainly'. When questioned further as to how long it would take to remove flammable cladding on government buildings, Minister Pavey advised:
- There are privacy issues in relation to this. I would have to take advice from other agencies around it. There are, potentially, provisions. In an ideal world you would want information to be made public but if there is other advice and other information that prevents that from happening in the greater general interest then that also should be considered.¹⁵⁹
- 2.98** When questioned about Minister Pavey's comments at a Budget Estimates hearing before Portfolio Committee No. 6 – Transport and Customer Service on 16 March 2020, Minister Anderson stated: 'the Government strongly opposed the public release of the cladding register and a document which lists personal details, including names and addresses'.¹⁶⁰
- 2.99** Specifically, the NSW Government introduced the *Property, Stock and Business Agents Amendment Regulation 2019* – effective 23 March 2020 – that specifies the kinds of material facts that an agent knows or should reasonably know and must disclose to a prospective purchaser. These include that the property:

¹⁵⁶ The register was on ordered 17 August 2019 (*Minutes*, NSW Legislative Council, 17 October 2019, pp 550-551). The register was returned on 31 October 2019 (*Minutes*, NSW Legislative Council, 12 November 2019, p 632).

¹⁵⁷ Report of the Independent Legal Arbiter, the Hon Keith Mason AC, entitled *Report Under Standing Order 52 on Disputed Claim of Privilege: Register of Buildings Containing Potentially Combustible Cladding*, 13 December 2019, pp 3-6.

¹⁵⁸ Report of the Independent Legal Arbiter, the Hon Keith Mason AC, entitled *Report Under Standing Order 52 on Disputed Claim of Privilege: Register of Buildings Containing Potentially Combustible Cladding*, 13 December 2019, pp 3-6.

¹⁵⁹ Evidence, Hon Melinda Pavey MP, Minister for Water, Property and Housing, Budget Estimates 2019-2020, 10 March 2020, p 14.

¹⁶⁰ Evidence, Minister Anderson, Budget Estimates 2019-2020, 16 March 2020, p 26.

- is, or is part of, a building that contains external combustible cladding to which:
 - a fire safety order, or a notice of intention to issue a fire safety order, has been issued requiring the building to be rectified regarding the cladding
 - a building product rectification order, or a notice of intention to issue a building product rectification order, has been issued requiring the building to be rectified regarding the cladding
 - a development application or complying development certificate application has been lodged for rectification regarding the cladding.
- The agent will be liable if they fail to disclose these facts, whether or not they intended to conceal them from the prospective purchaser, if they knew of the fact, or should have reasonably known about the fact.¹⁶¹

2.100 Commencing in July 2017, the Cladding Taskforce wrote to the registered owners and managers of identified buildings to alert them to the presence of potentially non-compliant cladding and encourage them to take action to check the documentation and approvals for the building and (if necessary) arrange an expert fire safety assessment.

2.101 The Taskforce has hand delivered over 33,000 letters to residents (owner-occupiers and tenants) with information about apartment fire safety and how to check that building owners are taking necessary action.¹⁶²

Notifying stakeholders of the presence of flammable cladding

2.102 While the high-risk register has not been made public, the NSW Government advised that it has been notifying owners and tenants of the potential presence of high-risk flammable cladding in their buildings.

2.103 However, stakeholders raised concerns about the notification process, not just for those living in affected buildings but also other building users.

Notifying tenants

2.104 The concerns raised with the committee included notifying tenants of high-risk buildings. This is a particular issue for renters living in apartment buildings, who sleep in these buildings.

2.105 The NSW Government advised what they had done to date to notify tenants of cladding in their buildings. Mr Tansey said that tenants do not have access to strata records, however, tenants in high-risk buildings have been notified through the Rental Bond Board records. He told the committee that approximately 500,000 tenant notifications were mailed out in late 2019.¹⁶³

2.106 A key stakeholder in this area, Mr Patterson Ross, from the 'Tenants' Union of NSW, said that contacting tenants in this way means tenants are informed much earlier and in a much more reliable way than would otherwise occur. He noted, however, that for other building quality

¹⁶¹ *Property, Stock and Business Agents Amendment Regulation 2019*, cl 18.

¹⁶² Submission 132, NSW Government, p 43.

¹⁶³ Evidence, Mr Tansey, 24 February 2020, p 26.

issues, tenants 'are still likely to be left in the dark' and must rely on media reports or neighbours.¹⁶⁴

- 2.107** In terms of landlords disclosing information to prospective tenants, Mr Patterson Ross told the committee that this disclosure happens too late 'at the microsecond before they sign the tenancy agreement'. Mr Patterson Ross argued that disclosures should happen much earlier, such as at the application stage, in order for tenants to make informed decisions about the buildings they live in. He recommended that, in addition to government notification of tenants, information should be made available for tenants to access themselves.¹⁶⁵
- 2.108** When questioned about whether prospective tenants should be informed of flammable cladding on a building at a Budget Estimates hearing of Portfolio Committee No. 6 – Transport and Customer Service in March 2020, Minister Anderson stated: 'we deal with the owners of the building to ensure that they look at their risk portfolio and go "is there a need to know?" And if they believe that their people need to know then they will do that'.¹⁶⁶

Notifying other building users

- 2.109** The committee was also concerned about how the public is informed that public-access buildings such as cinemas, shopping centres, universities, hotels, entertainment centres, childcare centres and hospitals may have flammable cladding. Mr Tansey told the committee that all buildings on the high-risk register have been referred to local councils and where councils have safety concerns, councils require those premises to put interim fire measures in place.¹⁶⁷
- 2.110** At a Budget Estimates hearing of Portfolio Committee No. 6 – Transport and Customer Service in March 2020, the Minister for Better Regulation and Innovation was questioned about whether people in buildings designed for public use such as cinemas, shopping centres, universities, hotels, entertainment centres, childcare centres and hospitals had been informed about flammable cladding in those buildings. He was also asked whether tenants in a shopping centre would be informed of flammable cladding. During the hearing, the Minister stated: 'they would be informed by the owner of the building'.¹⁶⁸ The Minister indicated he would provide further details on notice and later provided the following response:

Consent authorities thoroughly assess each potentially high-risk building to determine what action is required. This may include requiring expert assessment of the cladding and also includes consideration of the other aspects of the building's fire safety systems. Orders issued by consent authorities can require owners to take specific action to notify occupants, if this is appropriate in the circumstances. Orders can also be issued requiring interim measures to enhance fire safety while further assessment or remediation work is carried out, if this is appropriate. This particular question relates to

¹⁶⁴ Evidence, Mr Patterson Ross, 11 December 2019, pp 29-30.

¹⁶⁵ Evidence, Mr Patterson Ross, 11 December 2019, p 33.

¹⁶⁶ Evidence, Minister Anderson, Budget Estimates 2019-2020, 16 March 2020, p 38.

¹⁶⁷ Evidence, Mr Tansey, 11 December 2019, p 75.

¹⁶⁸ Evidence, Minister Anderson, Budget Estimates 2019-2020, 16 March 2020, p 33.

a hypothetical scenario with unknown variables and as such so it is impossible to answer with the level of detail requested.¹⁶⁹

- 2.111** Mr Peter Dunphy, Executive Director, Compliance and Dispute Resolution, Department of Customer Service, told the committee that 'people need to know on a need-to-know basis' and that ultimately 'it would be up to the owner of that particular building ... to put the appropriate risk measures in place'. He said:

[I]t is about the building owners and occupiers of the building to actually ensure that they have got in place appropriate controls for fire safety ... and that they build into that the fact that not everybody in the building may be aware of the status of the building.¹⁷⁰

Progress in notifying stakeholders

- 2.112** One of the points of the NSW Government's 10 point plan for fire safety was to communicate to building managers or owners that their building may contain flammable cladding. According to the submission of the NSW Government, letters have been delivered to all occupants of residential buildings identified as having a potentially higher risk.¹⁷¹
- 2.113** Local councils have also been made aware of identified buildings and are required to report back to Fire and Rescue NSW on the status of any identified high-risk buildings in their area. Assistant Commissioner Whybro told the committee that 'where we have referred a building to council to further investigate the adequacy of fire safety provisions, that information has to come back to the Fire and Rescue Commissioner'.¹⁷²
- 2.114** As of 10 January 2020, the cladding taskforce was awaiting an update from local councils on the progress of 24 high-risk buildings.¹⁷³
- 2.115** However, the committee received evidence that some local councils have not progressed in notifying owners of buildings with cladding. Mr Gordon Dryburgh of Newcastle City Council told the committee in February 2020 that none of the owners of apartments in the 10 high-risk buildings within Newcastle City Council's jurisdiction, had been notified.¹⁷⁴
- 2.116** When the committee raised concerns with the NSW Building Commissioner that owners in high-risk buildings in Newcastle had not been informed, Mr Chandler argued that Fire and Rescue NSW and local fire brigades were aware of these particular buildings:

¹⁶⁹ Answers to questions on notice, Budget Estimates 2019-2020, Minister Anderson, received 24 April 2020, p 8.

¹⁷⁰ Evidence, Mr Peter Dunphy, Executive Director, Compliance and Dispute Resolution, Department of Customer Service, Budget Estimates 2019-2020, 16 March 2020, pp 33-35.

¹⁷¹ Submission 132, NSW Government, p 43.

¹⁷² Evidence, Assistant Commissioner Whybro, 11 December 2019, p 55.

¹⁷³ Answers to questions on notice, Assistant Commissioner Whybro, received 4 February 2020, p 1.

¹⁷⁴ Evidence, Mr Gordon Dryburgh, Regulatory Section Manager, Newcastle City Council, 20 February 2020, p 3.

I understand that the local brigades in each of those locations are actually fully briefed on which are the riskier and which are the less risky. I do not believe that anybody is out there in a situation where nobody knows where cladding is or what the issues are.¹⁷⁵

- 2.117** Given the delayed response of some councils, the committee explored whether people living or working in potentially high-risk buildings could be notified in other ways. Ms Hearn suggested that one way to find out about flammable cladding on a building was through a pre-purchase strata report. She noted, however, that strata reports are not obtained by all prospective purchasers.¹⁷⁶
- 2.118** The committee was also interested in whether annual fire safety inspections might be used to notify owners of flammable cladding. Since 2017, competent fire safety professionals must endorse plans of fire safety systems and endorse an annual fire safety statement of essential fire safety measures in certain strata buildings.¹⁷⁷ However, according to Mr Michael Lambert, author of the *Independent Review of the Building Professionals Act 2005*, this scheme is problematic as the 'professional' who can carry out this work is not required to be accredited and the inspection does not consider installation.¹⁷⁸
- 2.119** When questioned by the committee about whether he believed flammable cladding should be included as part of annual fire safety inspections, Assistant Commissioner Whybro responded that building owners must declare their cladding under the new regulation.¹⁷⁹ He agreed, however, that declaring the existence of cladding to the government under the regulation is not the same as what would be required as part of an annual fire safety inspection, which would involve regular reporting and to have a remediation or mitigation plan in place.¹⁸⁰
- 2.120** It was suggested to the committee that some sort of inspection and report of flammable materials does occur in certain buildings as part of insurance requirements. Mr Duggan suggested that the insurance market has 'stepped up the tempo' and insurers now require annual disclosures on whether buildings contain any combustible material.¹⁸¹

Committee comments

- 2.121** Flammable cladding requires urgent attention. To date the NSW Government has not recognised the seriousness of the situation, or acted quickly enough. Flammable cladding has been responsible for fires spreading quickly through a number of buildings around the world and for loss of homes and lives. It is only a matter of time before New South Wales experiences something similar. It should not take a building fire here for the NSW Government to act comprehensively to address this problem.

¹⁷⁵ Evidence, Mr Chandler, 24 February 2020, p 21.

¹⁷⁶ Evidence, Ms Hearn, 11 December 2019, p 34.

¹⁷⁷ Submission 132, NSW Government, p 44.

¹⁷⁸ Evidence, Mr Michael Lambert, Author, *Independent Review of the Building Professionals Act 2005*, 5 November 2019, p 44.

¹⁷⁹ Evidence, Assistant Commissioner Whybro, 11 December 2019, p 57.

¹⁸⁰ Evidence, Assistant Commissioner Whybro, 11 December 2019, p 57.

¹⁸¹ Evidence, Mr Duggan, 11 December 2019, p 38.

- 2.122** The committee welcomes the fact that the NSW Building Commissioner provided advice within a fortnight of his appointment by the NSW Government in relation to flammable cladding. As the NSW Building Commissioner has made clear to the committee, he currently does not have a role in regulating flammable cladding.
- 2.123** That advice was not available to the committee as government witnesses observed it was before Cabinet. At no point has the NSW Government been able to explain what this advice is, why it has not yet been agreed to or dismissed, or when that might occur. The committee regards this delay on this important public safety matter as inexplicable and inexcusable.
- 2.124** Accordingly the committee recommends that the NSW Government act immediately on the advice of the NSW Building Commissioner in relation to flammable cladding, or alternatively release the advice and explain why it prefers an alternative approach.
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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.

- 2.125** Despite the NSW Government's ten point plan it is clear from the evidence before this inquiry that only a small minority of buildings with dangerous flammable cladding have been made safe. This is simply unacceptable.
- 2.126** The committee calls attention to the Victorian Government's response to flammable cladding. The Victorian Government, while its response is not perfect, has taken responsibility for addressing the problem by establishing a dedicated body to act on cladding. By contrast, the NSW Government's cladding taskforce is under-resourced and not fit for purpose. The committee believes that a more centralised and coordinated response, like that in Victoria, should be adopted in New South Wales. The committee therefore recommends that the NSW Government establish a new agency modelled on Cladding Safety Victoria, to lead the government's response to flammable cladding. The new agency would be a separate division within the newly-established Building Commission and report to the senior Building Minister that the committee recommended in the first report of this inquiry.
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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.

- 2.127** The committee was particularly concerned by evidence from some councils that they had not made much progress remediating buildings with flammable cladding or even notifying occupants. We call on local councils to urgently notify all residents in identified high-risk buildings and for the NSW Government to play a more active role in ensuring all stakeholders are notified.
- 2.128** We are also concerned that prospective buyers of units in buildings with flammable cladding are not required to be made aware that a building may contain flammable materials or of proposed works to rectify the cladding. Prospective tenants may only be informed of flammable cladding just before signing a lease.
- 2.129** In this regard, we believe that the NSW Government should mandate a requirement for property owners, landlords and real estate agents to disclose to prospective buyers and tenants if a building contains flammable cladding and any proposed rectification measures, within a reasonable timeframe, for example during open for inspections.

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.

- 2.130** The committee is also concerned that people in public spaces such as cinemas, shopping centres, universities, hotels, entertainment centres, childcare centres and hospitals may not be aware that these buildings contain flammable cladding. The NSW Government's position, that disclosure is up to local councils or business owners on a 'need to know basis' is inadequate. The committee is aware of no evidence that members of the public are being notified by building owners that they are entering a building designed for public use with high-risk flammable cladding. We acknowledge that this is a complicated area but we believe that the NSW Government must do more to ensure that people are informed where these types of buildings contain flammable cladding, and that these buildings are remediated quickly so that people are safe when they step inside.

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.

- 2.131** The committee has a number of concerns about the cladding database and high-risk register; in particular, whether the high-risk register is an accurate picture of all high-risk buildings out there. There is a lack of detail around the risk assessment used to determine if a building is high-risk and this information may not have been passed on to local councils or building owners. Owners need this information if they are to progress remediation of flammable cladding on their buildings. The public, the construction industry and insurers need this information if they are to have any faith in the Government's assessment of the risk to these buildings. We therefore recommend that the NSW government publish the specific criteria used to classify buildings as no, low or high-risk.

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.

- 2.132** While the evidence received indicates that there are concerns with releasing the full address details of buildings on the high-risk register publicly, the committee is concerned about the lack of public disclosure generally. The confusion among witnesses as to the different registers produced by the NSW Government and where they are held is emblematic of a lack of coordinated action on cladding. We therefore refer back to Recommendation 5 and believe by establishing a discrete division within an independent Building Commission to lead the government response to cladding, it will ensure consolidation of the information contained in the cladding register and clear up the confusion among stakeholders.

Chapter 3 Addressing flammable cladding

Once a building has been identified as having flammable cladding, and assessed for being high risk, steps need to be taken to remediate the building and manage the fire risk. This chapter outlines how buildings with cladding are managed, including the process undertaken by local councils and building owners to further investigate and if necessary remove flammable cladding from buildings. The chapter also examines stakeholder concerns with many aspects of this process, in particular a lack of guidance and support from government and difficulties in obtaining appropriate insurance to cover remediation work. Finally, it considers the issue of non-compliant building products more broadly and testing of building products.

Progress addressing buildings with flammable cladding

- 3.1 Buildings deemed to be high-risk (as discussed in chapter 2) are managed to mitigate the risk of fire and fire spread, either by removing the flammable cladding or introducing fire safety measures. High-risk buildings are also subject to further inspection to confirm the cladding is aluminium composite panels (ACP) and is flammable. This process is overseen by local councils but ultimately is the responsibility of owners' corporations and strata committees of individual buildings.
- 3.2 During the inquiry, NSW Government representatives reported on the progress that had been made in working with local councils and owners to remediate buildings.
- 3.3 NSW Government representatives updated the committee on how some of the buildings on the high-risk register had progressed. Mr Mark Whybro, Assistant Commissioner Community Safety, Fire and Rescue NSW, told the committee that of the 463 buildings declared to be high-risk, approximately 202 buildings had been cleared by consent authorities as of 10 January 2020. He advised that, as of 10 January 2020, 136 high-risk buildings had been either: assessed by a consent authority as requiring an action plan to address cladding risks, were subject to remediation orders, or were otherwise progressing towards remediation work. Assistant Commissioner Whybro added that expert assessments had not been sought or received for 35 buildings.¹⁸²
- 3.4 Representatives from NSW Fair Trading told the committee that remediation of buildings on the high-risk register is progressing but expected to take some time. According to Mr John Tansey, Executive Director Regulatory Policy, Better Regulation Division, Department of Customer Service, to remediate more complex buildings with multiple storeys 'you could easily be talking 12 to 18 months from the time they are identified ...'. Mr Tansey added that 'full remediation will not happen overnight'.¹⁸³

¹⁸² Answers to questions on notice, Mr Mark Whybro, Assistant Commissioner Community Safety, Fire and Rescue NSW, received 4 February 2020, p 1.

¹⁸³ Evidence, Mr John Tansey, Executive Director Regulatory Policy, Better Regulation Division, Department of Customer Service, 24 February 2020, p 18.

- 3.5** Further, Mr Tansey confirmed that work around identifying and remediating high-risk buildings with flammable cladding is ongoing. He stated:

Our objective is to have all the buildings assessed and either determine that they are safe but then cleared, they were identified but do not need rectification, or to have them properly assessed and ordered to be rectified and then building works undertaken to make each building safe.¹⁸⁴

- 3.6** The Minister for Better Regulation and Innovation, the Hon Kevin Anderson MP, was asked at a Budget Estimates hearing of Portfolio Committee No. 6 – Transport and Customer Service in March 2020 about this timeline and whether anything was being done to ensure remediation of cladding happens sooner. In response, the Minister stated: 'we have a clear plan that we are working to. We are taking strong action in relation to the very serious issue of flammable cladding on buildings in New South Wales'.¹⁸⁵

- 3.7** At the same Budget Estimates hearing, Mr Tansey gave a final update on buildings on the register. He told the committee that the number of buildings on the high-risk register had reduced to 444 and that a number of those had progressed further to remediation:

It [the register] is down to 444 [buildings] in total, but it is also the fact that the progress of buildings from their very first identification through to being assessed, having plans for action and then remediation is the trajectory we want to see. The other thing I would highlight is that back in December when the figures were at 463 total, we had 77 under remediation. That is now up to 94 and the headline figure is really the total number cleared has increased by about 93 as well.¹⁸⁶

The role of Fire and Rescue NSW

- 3.8** This section considers the role of Fire and Rescue NSW in inspecting buildings that are deemed high-risk. It also notes the concern of stakeholders that Fire and Rescue NSW do not have adequate resources to conduct cladding inspections or to conduct inspections required under the development application process.

Inspections by Fire and Rescue NSW

- 3.9** All buildings deemed high-risk are inspected by Fire and Rescue NSW in order to create a pre-incident plan for each building. Assistant Commissioner Whybro, responsible for Community Safety at Fire and Rescue NSW, clarified that this inspection is to determine the operational response from Fire and Rescue NSW if a building should catch fire. He stated that this 'is not a fire safety engineering risk assessment' and does not test the design of the building or combustibility of the cladding, commenting that it is a 'visual inspection' and 'we do not have the capacity to do materials analysis on cladding'.¹⁸⁷

¹⁸⁴ Evidence, Mr Tansey, 24 February 2020, p 18.

¹⁸⁵ Evidence, Hon Kevin Anderson MP, Minister for Better Regulation and Innovation, Budget Estimates 2019-2020, 16 March 2020, p 50.

¹⁸⁶ Evidence, Mr Tansey, Budget Estimates 2019-2020, 16 March 2020, p 21.

¹⁸⁷ Evidence, Mr Mark Whybro, Assistant Commissioner Community Safety, Fire and Rescue NSW, 11 December 2019, pp 52-53.

- 3.10** The purpose of the operational assessment, according to Assistant Commissioner Whybro, is to 'help the crews familiarise themselves with the buildings, the systems and the occupancy' and create a pre-incident plan. From this, Fire and Rescue NSW decide how many fire trucks to deploy should a fire occur. Assistant Commissioner Whybro advised that high-risk buildings with flammable cladding have been given 'an enhanced alarm response protocol, over and above the normal first alarm response of two pumps [firetrucks]'.¹⁸⁸
- 3.11** Other than the operational response assessment and providing advice to local government on proposed remediation plans (discussed below), Fire and Rescue NSW have very little involvement in the practical management of individual high-risk buildings. Assistant Commissioner Whybro described the role of Fire and Rescue NSW in managing flammable cladding as follows:

If the building is deemed firefighter high-risk ACP ... other regulatory actions are then taken by Fire and Rescue NSW and the cladding taskforce. For private cladding buildings these include referrals to council, exercising the Fire and Rescue NSW Commissioner's powers to ask councils to check on the adequacy of fire safety provisions within a building. They have to report back to the fire commissioner. Letters to both owners and occupants are sent and a review of fire risk assessments and rectification proposals.¹⁸⁹

Advice on remediation from Fire and Rescue NSW

- 3.12** Aside from conducting initial cladding inspections, Fire and Rescue NSW also play a role in advising local councils on plans to rectify flammable cladding. Once rectification measures have been proposed by the relevant fire safety professionals, local councils may request advice from Fire and Rescue NSW on whether these measures would be appropriate for particular buildings.
- 3.13** However, Local Government NSW advised that long delays in obtaining a response from Fire and Rescue NSW were impacting on the rectification process. Cr Linda Scott, President of Local Government NSW, told the committee that councils were regularly waiting six months for Fire and Rescue NSW to respond. She gave the following examples from local councils:

In one example I have from a council they say "Two fire engineering reports proposing alternative fire solutions were referred to Fire and Rescue NSW for comment six months ago. We are still awaiting a reply". I have another example: "Council referred all of our received cladding assessment fire engineer reports to Fire and Rescue NSW for comment and after several months council is yet to receive a reply".¹⁹⁰

- 3.14** When asked about the substantial delays experienced by councils, Assistant Commissioner Whybro said that providing this advice is 'discretionary work for us' and that regulatory responsibilities and other issues, including bushfires, take priority. He stated: 'We prioritise our resource allocation on the basis of where the greatest need is at that particular time'.¹⁹¹

¹⁸⁸ Evidence, Assistant Commissioner Whybro, 11 December 2019, p 52; Answers to questions on notice, Assistant Commissioner Whybro, received 4 February 2020, p 1.

¹⁸⁹ Evidence, Assistant Commissioner Whybro, 11 December 2019, pp 52-53.

¹⁹⁰ Evidence, Cr Linda Scott, President, Local Government NSW, 11 December 2019, p 11.

¹⁹¹ Evidence, Assistant Commissioner Whybro, 11 December 2019, p 62.

- 3.15** Further, Assistant Commissioner Whybro told the committee that Fire and Rescue NSW had begun to assess the rectification proposals they had received. He stated: 'We have started a preliminary assessment around the rectification proposals that have come to us. It falls into a couple of categories: yes, no and maybe, in terms of whether or not a rectification proposal will be acceptable'.¹⁹²
- 3.16** Assistant Commissioner Whybro indicated that 'we are going to get through them as fast as we possibly can' and that he was hopeful Fire and Rescue NSW could get back to all councils with advice within a few months. He stated, however, that Fire and Rescue NSW would be providing advice only and that local councils are the regulatory authority with the necessary powers to make the decisions.¹⁹³
- 3.17** In this regard, Mr Tansey noted that Fire and Rescue NSW's role here was only to provide advice on specific measures proposed for particular buildings after the council has done their own investigations. He said that the advice councils can ask Fire and Rescue NSW for would be: 'Do you agree with these proposed specific rectification measures'.¹⁹⁴
- 3.18** Fire and Rescue NSW has been creating a policy document to assist local councils with general advice about how it assesses rectification plans. According to Mr Tansey, the policy document put forward by Fire and Rescue NSW sets out for councils the 'decision-making framework when they are asked for an opinion on a proposed solution'.¹⁹⁵
- 3.19** Assistant Commissioner Whybro acknowledged that there had been some delays in putting out this document, stating 'it has taken us a while to get a landing on the policy position on how we are going to risk assess ... we now have a position that has been reviewed by the Cladding Taskforce and is going to our executive for approval'.¹⁹⁶
- 3.20** Ms Rose Webb, Deputy Secretary, Better Regulation Division and NSW Fair Trading Commissioner, acknowledged that councils were calling for 'something that is slightly more sophisticated than just the information that we are trying to distribute'. She said that 'we are working on all the different ways in which we can put people in touch with the people who can provide that expertise'.¹⁹⁷

Initial fire inspections by Fire and Rescue NSW

- 3.21** One issue raised by the Fire Brigade Employees Union is that Fire and Rescue NSW are no longer required to comment on initial fire safety reports as part of a development application and are not properly resourced to effectively undertake this role. As a result, many development applications proceed without input from Fire and Rescue NSW.

¹⁹² Evidence, Assistant Commissioner Whybro, 11 December 2019, p 62.

¹⁹³ Evidence, Assistant Commissioner Whybro, 11 December 2019, p 62.

¹⁹⁴ Evidence, Mr Tansey, 11 December 2019, p 66.

¹⁹⁵ Evidence, Mr Tansey, 11 December 2019, p 68.

¹⁹⁶ Evidence, Assistant Commissioner Whybro, 11 December 2019, p 62.

¹⁹⁷ Evidence, Ms Rose Webb, Deputy Secretary, Better Regulation Division and NSW Fair Trading Commissioner, 11 December 2019, p 68.

3.22 Ms Anastasia Polites, Senior Industrial Officer, Fire Brigade Employees Union, told the committee that Fire and Rescue NSW has 28 days to comment on an initial fire safety report but that they are 'overwhelmed' with the number of requests and do not routinely comment on the reports within the timeframe.¹⁹⁸ Mr Leighton Drury, State Secretary, Fire Brigade Employees Union, described what happens in practice:

Prior to construction the developers, at the moment, submit their development application or building approval to Fire and Rescue NSW and they apply for an initial fire safety report. Fire Safety is a branch of Fire and Rescue NSW. It has an opportunity to analyse and make recommendations to the proposal within a certain amount of time. Unfortunately, many of these reports are not being analysed or scrutinised within the timeframe ... Many of these, at the initial stage, are going unchecked.¹⁹⁹

3.23 Mr Drury further explained that the relevant regulation no longer states that an initial fire safety rescue report *must* be provided but now states that one *may* be provided. This means that Fire and Rescue NSW are forced to prioritise which applications to assess based on risk.²⁰⁰ Mr Drury also noted that rectifying a fire safety issue after a building is constructed can be expensive if not impossible and argued that 'if the department was resourced appropriately in the first instance a lot of these things would be fixed'.²⁰¹

Resourcing of Fire and Rescue NSW

3.24 The Fire Brigade Employees Union raised concerns with the committee that Fire and Rescue NSW do not have adequate resources to effectively respond to the flammable cladding issue.

3.25 Mr Drury gave evidence that the fire safety division, which has been tasked with working on this issue, employs approximately 20 fire safety firefighters compared to 100 in Queensland.²⁰² Mr Drury indicated that many of those 20 firefighters are not additional resources, but have been moved from five different units to focus on the issue of flammable cladding. He argued that there is now 'a whole bunch of unsafe' work, such as blocked fire exits and dismantled fire panels, that the fire safety division usually check and inspect, but that this work is not getting done as the team is busy with cladding.²⁰³

3.26 Ms Polites stated that 'the safety branch of Fire and Rescue NSW is under staffed'. She explained that 'it does not even have minimum staffing', claiming that 'they have not filled the minimum staffing criteria and that is inadequate'.²⁰⁴

3.27 Mr Drury recommended that the fire safety division be resourced separately with standalone staff, commenting 'we could double, if not triple, that division'. He highlighted that this division

¹⁹⁸ Evidence, Ms Anastasia Polites, Senior Industrial Officer, Fire Brigade Employees Union, 11 December 2019, p 24.

¹⁹⁹ Evidence, Mr Leighton Drury, State Secretary, Fire Brigade Employees Union, 11 December 2019, p 23.

²⁰⁰ Evidence, Mr Drury, 11 December 2019, p 24.

²⁰¹ Evidence, Mr Drury, 11 December 2019, p 24.

²⁰² Evidence, Mr Drury, 11 December 2019, p 24.

²⁰³ Evidence, Mr Drury, 11 December 2019, pp 24-26.

²⁰⁴ Evidence, Ms Polites, 11 December 2019, p 24.

'actually makes money because it obviously charges developers for each one of these initial fire safety reports' and emphasised that investing in this area results in 'a safer community and safer buildings'.²⁰⁵

- 3.28** When the issue of resourcing was put to Assistant Commissioner Whybro, he told the committee that the fire safety branch has between 40 and 50 people, and that the 20 people referred to by the Fire Brigade Employees Union are likely to be uniformed positions.²⁰⁶ He later confirmed that as of 4 February 2020, there were 57 full time equivalent positions in or supporting the fire safety branch, with four positions vacant.²⁰⁷
- 3.29** Assistant Commissioner Whybro also noted that at the end of 2019, Fire and Rescue NSW had gained approval for the establishment of seven additional temporary positions, moved from other areas of the organisation, to assist with building work. He advised that six out of seven of these positions are uniformed roles, with one position that is an administrative assistant. Given these are uniformed positions, Assistant Commissioner Whybro explained that there is a cost incurred by 'removing people off the back of trucks to come in and do fire safety work', as overtime may then be incurred by the commands they have come from.²⁰⁸
- 3.30** When asked whether or not these additional seven positions are sufficient, Assistant Commissioner Whybro replied: 'I am given an allocation to do the job that is expected of me. I will always advocate for more when required, but any larger, broader implications around staffing establishment I think should be referred to the Minister or the Government'.²⁰⁹

The role of local government

- 3.31** This section examines the role of local councils in identifying and rectifying flammable cladding. Local councils have the power to order rectification works and are responsible for managing high-risk buildings in their jurisdiction and reporting progress back to the NSW Government. The experience of local councils has been varied, with councils progressing remediation at different rates. Many gave evidence that they are not adequately resourced or supported to manage the problem of flammable cladding.

Inspections and rectification by local councils

- 3.32** Buildings on the high-risk register are referred to the relevant consent authorities (local councils or the Department of Planning, Industry and Environment) to carry out more technical inspections to determine if the building is in fact high-risk and, if so, to determine how this risk can be mitigated.²¹⁰

²⁰⁵ Evidence, Mr Drury, 11 December 2019, pp 26-27.

²⁰⁶ Evidence, Assistant Commissioner Whybro, 11 December 2019, p 62.

²⁰⁷ Answers to questions on notice, Assistant Commissioner Whybro, received 4 February 2020, p 3.

²⁰⁸ Evidence, Assistant Commissioner Whybro, 11 December 2019, pp 62-63; Correspondence from Mr Mark Whybro, Assistant Commissioner Community Safety, Fire and Rescue NSW, to Committee, 4 February 2020, p 1.

²⁰⁹ Evidence, Assistant Commissioner Whybro, 11 December 2019, p 63.

²¹⁰ Submission 132, NSW Government, p 46.

- 3.33** The NSW Government explained in their submission that the *Building Products (Safety) Act 2017* gives local councils the power to issue a rectification order to eliminate or minimise the risk.²¹¹ However, Cr Scott from Local Government NSW gave evidence that local councils are not always equipped to deal with the issue. She said that many councils report they are struggling to acquire the technical expertise to make inspections in the first place and are not assisted by sufficient guidance from Fire and Rescue NSW or the NSW Fire Safety and External Wall Cladding Taskforce ('the cladding taskforce').²¹²
- 3.34** Cr Scott noted that the power local councils have to order cladding be removed is limited. It does not extend, for example, to removing people from buildings if they fail to comply with either an order to evacuate or an order not to enter a premises. Cr Scott stated that 'councils lack the ability to enforce them [orders] and we lack the resourcing to do that as well'.²¹³
- 3.35** Regarding resourcing of local councils, Cr Scott stated:
- [R]esourcing remains a challenge for many councils, with the process requiring detailed work, expertise and time to review relevant approvals and certification; obtain fire engineering reports and specialist advice; issue letters, notices and orders; and facilitate and monitor any necessary upgrade works.²¹⁴
- 3.36** Cr Scott said that local councils are 'not protective of their powers' under the Act and would 'strongly welcome more State involvement and support'.²¹⁵
- 3.37** Evidence from individual local councils indicated that their responses so far were markedly different, with some councils having identified cladding and remediated some buildings, while others had yet to notify building owners that their building was potentially high-risk.
- 3.38** For example, Mr Gordon Dryburgh, Regulatory Section Manager at Newcastle City Council, told the committee that of the 45 buildings on the cladding register in the Newcastle City Council area, only one had been rectified. When Mr Dryburgh spoke to the committee in February 2020, Newcastle City Council was still in the process of reviewing submitted documentation and beginning investigations into the other 44 buildings. Mr Dryburgh described the process they had followed:

Buildings are identified. We then have to write to the owners. We then have to prepare a notice of intention to issue an order to start the process. What we have done at the City of Newcastle is get our draft orders in place ready to go. So we have done our first desktop audit.²¹⁶

²¹¹ Submission 132, NSW Government, p 42.

²¹² Evidence, Cr Scott, 11 December 2019, p 12.

²¹³ Evidence, Cr Scott, 11 December 2019, p 10.

²¹⁴ Evidence, Cr Scott, 11 December 2019, p 10.

²¹⁵ Evidence, Cr Scott, 11 December 2019, p 13.

²¹⁶ Evidence, Mr Gordon Dryburgh, Regulatory Section Manager, Newcastle City Council, 20 February 2020, pp 3-4.

- 3.39** Newcastle City Council updated the committee in March 2020, noting that they had since developed their 'pre/post inspection process' and expected to commence inspections of properties in April 2020.²¹⁷
- 3.40** Other councils had progressed to varying stages. Mr Scott Rathgen, Section Manager of Building Certification at Central Coast Council, told the committee they have been working through inspecting buildings, either in person or as a desktop analysis, for risk.²¹⁸
- 3.41** Mr Rathgen later confirmed that Central Coast Council had assessed 19 buildings in their jurisdiction as no or low risk and ten low to medium risk buildings were undergoing further investigations. Of these ten, four were owned by the NSW Government and six were privately owned and had been contacted and were being monitored by the council's fire safety officer.²¹⁹
- 3.42** Mr Michael Corrigan, a Senior Building Surveyor with Lake Macquarie City Council, told the committee that Lake Macquarie City Council had written to the owners of the four buildings on the high-risk register in their area. The council had also worked through an additional building that was identified to them separately. For the additional building that had been remediated, the council had issued a notice of intention to serve an order (NOI) but had not then issued an order as the matter had been resolved.²²⁰
- 3.43** Further, Mr Corrigan told the committee that Lake Macquarie City Council had learned, through the process of remediating that building that the process was demanding on resources and time of councils and requires that building owners are cooperative and have the means to address the issue. Mr Corrigan argued that the government has largely relied on local councils 'to manage the problem at a local level without technical and financial support', and 'we do see this as a problem'.²²¹

Support for local councils

- 3.44** The committee heard that the resourcing challenges faced by local councils were exacerbated by a lack of support and advice provided to local councils from the cladding taskforce and cladding support unit.

²¹⁷ Answers to questions on notice, Mr Geoff Douglass, Development Projects Coordinator, and Mr Gordon Dryburgh, Regulatory Section Manager, Newcastle City Council, received 9 March 2020, p 1.

²¹⁸ Evidence, Mr Scott Rathgen, Section Manager, Building Certification, Central Coast Council, 20 February 2020, p 6.

²¹⁹ Answers to questions on notice, Mr Scott Rathgen, Section Manager, Building Certification, Central Coast Council, received 28 February 2020, p 1.

²²⁰ Answers to questions on notice, Mr Michael Corrigan, Senior Building Surveyor, Lake Macquarie Council, received 5 March 2020, p 1.

²²¹ Evidence, Mr Michael Corrigan, Senior Building Surveyor, Lake Macquarie Council, 20 February 2020, pp 2 and 4.

- 3.45** Cr Scott from Local Government NSW, said local councils welcomed the establishment of the cladding support unit but it was a first step only and councils had, until recently, been left to approach the issue of flammable cladding on their own.²²² She noted that 'coordination between State agencies and councils has been what we would characterise as limited and in the absence of state-wide guidance, each council has currently been left to take its own approach'.²²³
- 3.46** Cr Scott quoted a local council that had commented that the cladding support unit does not provide technical advice but instead was 'largely directing councils to simplistic questions and answers'. Cr Scott told the committee she believed this was due to the cladding support unit being underfunded and under-resourced.²²⁴
- 3.47** Further, Cr Scott told the committee that Local Government NSW had assisted the cladding taskforce in coordinating with local councils but that it did not have representation on the taskforce. She agreed, when asked, that along with other State regulators, it would be helpful for Local Government NSW to be on the cladding taskforce.²²⁵
- 3.48** Cr Scott called on the State government 'to take more of a leadership role in the management of cladding issues in New South Wales'. She advised that local councils had resolved at their annual conference in October 2019 to seek 'additional action, support and funding to deal with the cladding crisis and the release of details surrounding identified high-risk buildings'. She went on to describe what this should look like:
- This means having clear communication between State agencies and local governments about roles, responsibilities and expectations; technical guidance for issuing notices and orders to building owners; consistent frequently asked questions and other supporting information; and opportunities to share information between State agencies and councils about how they are managing their regulation and enforcement responsibilities.²²⁶
- 3.49** When questioned about concerns raised by local councils, Mr Tansey indicated that the cladding support unit provides only general advice and it is up to local councils to find individual solutions for each building, based on technical expertise and the minimum standards within the National Construction Code.²²⁷
- 3.50** Mr Tansey told the committee that the NSW Government was 'trying to join up councils' to share expertise amongst them. He also advised that they had commenced a program, through the cladding support unit, of actively providing councils with more detailed information.²²⁸

²²² Evidence, Cr Scott, 11 December 2019, p 10.

²²³ Evidence, Cr Scott, 16 August 2019, p 46.

²²⁴ Evidence, Cr Scott, 11 December 2019, p 11.

²²⁵ Evidence, Cr Scott, 11 December 2019, p 13.

²²⁶ Evidence, Cr Scott, 11 December 2019, p 10.

²²⁷ Evidence, Mr Tansey, 11 December 2019, p 67.

²²⁸ Evidence, Mr Tansey, 11 December 2019, p 67.

- 3.51** To this end, the Department of Planning, Industry and Environment released a *Guide for the Assessment of Buildings with Combustible Cladding* in September 2019 to provide information about different assessment methodologies and other tools for preliminary risk assessment and how to design a rectification.²²⁹
- 3.52** When asked if the NSW Government had a communication plan for local councils, Mr Tansey said that the cladding support unit is in 'daily and weekly contact with councils' and that 'council's contact us proactively and we also reach out to councils if there is any lack of progress in their numbers'.²³⁰
- 3.53** Further, Ms Webb commented that ultimately decisions are up to individual councils. She conceded that the 'cladding support unit has not set itself up as experts providing expert advice in the way that people need to get expert advice for these complex issues'. She went on to say that they are working on different ways to put people in touch with the people who can provide that expertise. She also distinguished between advice from the cladding support unit and advice from Fire and Rescue NSW, clarifying that the Department's expertise is around the Building Code.²³¹
- 3.54** Representatives from the NSW Government were also asked about what advice they had provided to specific councils. NSW Government representatives replied that 'the NSW Cladding Taskforce has consistently communicated to councils that multi-storey residential buildings with potentially combustible cladding pose a particularly significant fire safety risk'. They noted, further, that local councils had been sent a letter regarding general information about cladding risk assessments in December 2017.²³²
- 3.55** In March 2020, NSW Government representatives updated the committee further on what support the cladding support unit had provided directly to local councils:

The Cladding Support Unit has been engaging extensively with local councils and has been communicating with councils on an ongoing basis based on feedback and information gathered through this engagement, which has included onsite meetings, email and phone enquiries and two 'roundtable' council forums. The Cladding Support Unit has communicated information to councils in response to direct enquiries as well as via the Department of Customer Service website, email updates, an online collaboration tool, and the two 'roundtable' forums.²³³

The role of homeowners

- 3.56** This section details the experience of homeowners in dealing with flammable cladding on their buildings, including with the complicated process of confirming whether cladding is high risk and may need to be removed. Homeowners told the committee that the experience has been financially and emotionally overwhelming and there has been a lack of support and guidance from all levels of government.

²²⁹ Evidence, Mr Tansey, 11 December 2019, p 67.

²³⁰ Evidence, Mr Tansey, 24 February 2020, p 26.

²³¹ Evidence, Ms Webb, 11 December 2019, pp 65-69.

²³² Answers to questions on notice, NSW Government, received 20 March 2020, p 2.

²³³ Answers to questions on notice, NSW Government, received 20 March 2020, p 5.

Homeowners' experiences with remediating flammable cladding

- 3.57** Homeowners are the ones ultimately tasked with remediating flammable cladding in their buildings. The committee heard that, for owners, the process of identifying and remediating cladding was stressful, expensive and time-consuming and that residents felt unsupported in dealing with such a huge and complicated task.
- 3.58** Mr Philip Gall, Chair of the Owners Corporation Network told the committee that 'at the end of the chain it is the owners who carry the cost for all of this'. He described the process owners must undergo as an unreasonable and unjust burden as owners are responsible for fixing a problem they did not create. He said: 'An excessive and unreasonable burden has been imposed on many apartment owners and their strata committees as a result of building safety defects like flammable cladding. This burden is not of their making'.²³⁴
- 3.59** Further, Mr Gall argued that rectifying cladding involves a long and disruptive process that includes 'getting consultants, it involves organising tenders, it involves getting projects underway and project management, it involves disruption to tenants, it involves costs'.²³⁵ He described how different factors which are not under owners' control can influence how difficult and expensive the process of rectification can be. For example, he highlighted that a large building would find the process easier partly as a result of having more resources to share between owners:

The owners corporation I mentioned earlier was able to – because it is a big building with lots of resources – spend time, go through the process and do a lot that a 13-lot building could not do. Because of that they were able to reduce the costs of that project by half of what the original estimate was and come up with a satisfactory solution. Small buildings cannot do that.²³⁶

- 3.60** When asked about what the reality of coping with cladding is like for strata committees, Ms Alisha Fisher, Chief Executive Officer of Strata Community Association, described the situation as overwhelming:

I think the first thing is they really do not even know where to start. You know, who do they call? What are the decisions they make? What is the expense of this? I think this is an absolute mess. They are looking at strata managers to provide them that guidance. Again, on our end, we have a lot of strata managers that are not even qualified to be dealing with this ... [A]t the end of the day they are making decisions on: We have got to find lawyers and who do we even call? I think that is a major. We do not have a five-step plan of what you do when you find cladding on your building.²³⁷

²³⁴ Evidence, Mr Philip Gall, Chair, Owners Corporation Network, 11 December 2019, p 28; 32.

²³⁵ Evidence, Mr Gall, Chair, 11 December 2019, p 39.

²³⁶ Evidence, Mr Gall, Chair, 11 December 2019, p 32.

²³⁷ Evidence, Ms Alisha Fisher, Chief Executive Officer, Strata Community Association, 16 August 2019, p 71.

3.61 Mr Chris Duggan, President of the NSW Strata Community Association, described how complicated this can be for homeowners, with multiple consultants and other strata obligations, to deal with:

Following identification and assuming it is a positive identification for a non-compliant product, there is a whole suite of experts that get involved. There may be planners involved if a development application is required. There may be cost assessors required if they are required to pull together pricing. We also need to be mindful that owners corporations have compliance obligations under the Strata Schemes Management Act around multiple quotes and general meeting approvals. Then there is administrative oversight required through that process ... You may well commence proceedings at that point in time and then you have a whole different suit of experts ...²³⁸

3.62 In terms of the cost of rectifying buildings, Ms Fisher described the exorbitant costs in just the initial phase of determining cladding:

You are paying up to \$5,000 to just have someone come out and even tell you that you have got cladding. Then, if you need to have that next phase, you are talking about \$20,000 to \$40,000 to have a fire engineer come in and do the next phase.²³⁹

3.63 Inquiry participants called for a compensation package for homeowners. Mr Chris Rumore, Resident and Chair, Sub-committee Owners Corporation in a building containing flammable cladding, suggested a compensation scheme similar to that implemented by the Victorian Government and argued that this package should include those who had already begun remediation. He stated 'those that do act first because they are either responsible or get a government order to do so, should be compensated, irrespective of when any compensation package is put together'.²⁴⁰

3.64 Further, Mr Rumore argued that the Victorian response 'is more than financial assistance' and 'there are clear guidelines in Victoria as to the process of what you should do, who should do it, and the Government is taking responsibility for solving the problem'.²⁴¹ Other stakeholders, such as Local Government NSW, the Owners' Corporation Network and the Construction, Forestry, Mining and Energy Union (CFMEU), indicated they strongly supported New South Wales following the approach of the Victorian Government including a financial package to homeowners.²⁴²

²³⁸ Evidence, Mr Chris Duggan, President, Strata Community Association NSW, 11 December 2019, p 36.

²³⁹ Evidence, Ms Fisher, 16 August 2019, p 72.

²⁴⁰ Evidence, Mr Chris Rumore, Resident and Chair, Sub-committee Owners Corporation in a building containing flammable cladding, 11 December 2019, pp 2-3; 8.

²⁴¹ Evidence, Mr Rumore, 11 December 2019, p 6.

²⁴² E.g. Evidence, Cr Scott, 11 December 2019, p 13; Mr Gall, 11 December 2019, p 28; Mr Nigel Davies, Assistant Secretary, Construction, Forestry, Mining and Energy Union (CFMEU), 11 December 2019, p 46.

- 3.65** Another example of a homeowners' experience with addressing the flammable cladding on their building is described in the following case study.

Case study: Ravendra²⁴³

Ravendra is a resident and member of a strata committee of a building comprising 31 lots. Around two years ago, the local council issued the owners with an order to test, verify and report on the composition of the building's cladding. Despite the fact that the building was only four years old and within the statutory warranty period, and although the developer was working nearby on other projects, it was the owners who had to organise and pay for the \$20,000 test.

Following the test, which found the cladding to be combustible, the local council issued a directive for the cladding to be removed and replaced. When Ravendra approached the building's developer and the builder, they denied liability, highlighting the fact that the cladding used was permitted at the time of construction. When Ravendra asked the building developer for information on the cladding, none was provided and then, when information was finally provided, it was incorrect.

Ravendra and other owners have found the rectification process to be complex and confusing even when financial considerations were put aside. In the absence of any official guidance on what a suitable replacement could be, the owners needed to engage expert advice, which contributed further to the rectification timeline and cost. The only support was time extensions granted by the council, and a meeting with the developer and the builder brokered by NSW Fair Trading. Despite getting the developer and builder to meet with owners, Fair Trading was unable to force the builder to fix the cladding and Ravendra and the other homeowners must bear the cost.

It is now apparent that the owners will be responsible for at least a portion of the estimated \$300,000 - \$400,000 cost. Ravendra is stressed about what rectification will involve, financially as well as emotionally, as well as living in what is effectively a building site.

Ravendra is concerned about the lack of advice regarding what materials can be used to replace ACP cladding on the building. Specifically, he is concerned that a building material may be used that is subject to a future ban and they will have to go through this process again. After two years of bearing the emotional, financial and social burden of living in a home with flammable cladding, Ravendra believes the current system to be 'broken'.

Identifying and confirming flammable cladding

- 3.66** The committee heard that one of the key challenges is to confirm whether material thought to be flammable ACP cladding from an initial inspection is in fact dangerous. Qualified fire safety engineers must be engaged to confirm the fire risk of the cladding, adding to the cost and timeline of remediation.

²⁴³ Evidence, Mr Mawjee, Resident in a building containing cladding, 11 December 2019, pp 2-9. This case study is not taken verbatim from the witness, but is an accurate reflection of how the witness presented his story to the committee.

- 3.67** Cladding in the middle or between panels cannot be identified through visual inspection only but must be tested by a fire safety engineer.²⁴⁴ Mr Drury for example, stated: 'I cannot tell the two different types of cladding apart. The guys in my fire safety division, the firefighters there can – in most cases. To be 100 per cent sure, you need to test'.²⁴⁵
- 3.68** According to Mr Duggan testing to confirm cladding can be expensive and involved. He said: 'The first point of call in any identification process is to test the product. There is a consultant that typically provides a set of core samples that gets them off to a laboratory ... that can be several thousand dollars to \$10,000 in terms of the initial assessment phase'.²⁴⁶
- 3.69** Local Government NSW acknowledged that identifying flammable cladding is complicated and explained some of the complications for the committee:
- ... [S]ome of these aluminium panels that were compliant before 2017 are now not, some of these aluminium panels have never been compliant and some of them still are. How you find that out goes to what is in the panel. That requires, obviously, a very detailed process to check what is in the panel physically. That requires technical knowledge about levels of particular materials in a panel to check that it is compliant or not, and technical support and advice around that.²⁴⁷
- 3.70** Another reason remediating cladding is so difficult is that flammable cladding is not uniform – it appears in many different configurations and may serve many different functions. As Mr Gall put it, the issue 'goes beyond the actual material. It goes to how it is used in the building as well'.²⁴⁸ This makes determining how to remove the cladding, or remediate the risk of cladding, especially difficult as each building requires an individual assessment and rectification plan by a qualified professional.
- 3.71** One resident and chair of the Owners Corporation sub-committee in a building with flammable cladding, Mr Rumore illustrated how difficult and confusing this made the process of remediating cladding on his building. He said:

[O]ur cladding is also difficult in that it is not sheet cladding on the outside of the building, it is cladding that is predominantly used for aesthetic and acoustic purposes. It is on panels, on balconies and on the exterior of the building so it has to be removed piece by piece and it is going to be a very long and expensive process.²⁴⁹

²⁴⁴ Evidence, Mr Dryburgh, 20 February 2020, p 6.

²⁴⁵ Evidence, Mr Drury, 11 December, p 27.

²⁴⁶ Evidence, Mr Duggan, 11 December 2019, p 36.

²⁴⁷ Evidence, Cr Scott, 11 December 2019, pp 11-12.

²⁴⁸ Evidence, Mr Gall, 11 December 2019, p 37.

²⁴⁹ Evidence, Mr Rumore, 11 December 2019, p 2.

- 3.72** Minister Anderson agreed, at a Budget Estimates hearing of Portfolio Committee No. 6 – Transport and Customer Service, that each building is unique in its use of cladding and each building needs its own solution:

There are some buildings that through their assessment process might just need, say, for instance around the foyer or it might just be a windowsill or others might have whole facades on them. Each building is unique in respect of what the remediation would look like.²⁵⁰

- 3.73** Mr Karl Sullivan of the Insurance Council of Australia expanded, from an insurance perspective, on the complications of identifying and remediating flammable cladding. He stated:

It is complicated. It is to do with what the material is; how much of the material there is; is it contiguous, in that it is long enough to cause a serious problem to the building; how is it fixed to the building; are there accessible ignition points – for example, balconies and barbecues – and lastly, what other mitigation systems are in the building that might limit the risk.²⁵¹

- 3.74** Another issue is what happens to the flammable material once it is removed. Mr Darren Greenfield, State Secretary of the CFMEU argued there is a chance it will be re-used as cheap building material on other buildings. Mr Greenfield called for flammable cladding that has been removed to be destroyed and tracked to avoid its re-use elsewhere, stating:

There is also here in New South Wales a lot of concern about where this stuff ends up when it eventually comes off buildings as well. That has to be part of the whole program of this coming off and getting replaced. You will find this stuff going up on residential houses cheap ... This stuff will be out there. It comes off, still intact, and it will be used by homeowners thinking it is ok to put it on their houses.²⁵²

- 3.75** The most recent report of the Victorian Flammable Cladding Taskforce states:

The VBA receives many enquiries from residents, owners and those looking to purchase or occupy specific properties. The VBA has a database of buildings with cladding based on the audit inspections and will share this information with genuine purchasers and potential tenants.²⁵³

Guidance and support for homeowners

- 3.76** Homeowners gave evidence that they felt unsupported and were not given any guidance on how to remediate buildings with cladding.

²⁵⁰ Evidence, Minister Anderson, 16 March 2020, Budget Estimates 2019-2020, p 21.

²⁵¹ Evidence, Mr Karl Sullivan, Head of Risk and Operations, Insurance Council of Australia, 11 December 2019, p 17.

²⁵² Evidence, Mr Darren Greenfield, State Secretary, Construction, Forestry, Mining and Energy Union – NSW Branch (CFMEU), 11 December 2019, p 50.

²⁵³ State of Victoria Department of Environment, Land, Water and Planning, 'Victorian Cladding Taskforce, Report from the Co-Chairs, July 2019', p 38.

3.77 Mr Ravendra Mawjee, a resident of a building with flammable cladding, observed:

There is no assistance, no guidance from people, we are just on our own to get the whole process done and sorted ... We are bearing the financial, the emotional and the social cost for this whole situation.²⁵⁴

3.78 Mr Gall of the Owners Corporation Network summarised some of the views of owners, saying that from their point of view 'we get them [buildings] on the list, we get to the point where they get told to do something and then they get left to do it on their own'.²⁵⁵

3.79 Mr Dryburgh from Newcastle City Council, acknowledged that identifying combustible cladding 'is a fairly involved process' but indicated that their advice to owners 'would be to engage a fire safety engineer to progress that matter forward'.²⁵⁶

3.80 The case study below is a clear example of the difficulties homeowners face in remediating their buildings with little guidance. The case study details the experience of Mr Rumore, whose building was proactive in its approach to rectifying cladding, but found the process extremely challenging.

Case study: Chris²⁵⁷

Chris is a resident and owner in a strata complex comprising 104 lots across two buildings. In 2018, the owners corporation decided to test the building's cladding after concerns were expressed by some residents. As the complex was outside the statutory warranty period, Chris as chair of the sub-committee led the hiring of an expert to undertake the work. This was a protracted and expensive process, with testing alone costing around \$100,000. When the cladding was found to be combustible, the strata committee reported the issue and a mandatory rectification order was issued by the local council.

After 18 months of working to rectify the cladding in his strata complex, Chris is of the view that the NSW Government 'has not taken proper responsibility' on the issue of combustible cladding. The administrative work associated with remediation is taking a significant toll on Chris and other lot owners. Rectification is expected to take another year and will involve 'enormous inconvenience to the residents'. Additionally, special levies will have to be raised to cover the likely \$50,000 payment per lot.

Chris and other homeowners in the building have had trouble insuring the building since they have identified flammable cladding. They have only been able to find one insurer who was prepared to insure the building. Chris says he did the right thing by disclosing that the building contains flammable cladding and feels that he is now at a disadvantage for doing so.

²⁵⁴ Evidence, Mr Mawjee, 11 December 2019, p 3.

²⁵⁵ Evidence, Mr Gall, 11 December 2019, p 39.

²⁵⁶ Evidence, Mr Dryburgh, 20 February 2020, p 5.

²⁵⁷ Evidence, Mr Rumore, 11 December 2019, pp 1-8 and Submission 159, Mr Chris Rumore. This case study is not taken verbatim from the witness, but is an accurate reflection of how the witness presented his story to the committee.

Chris is particularly frustrated as he has been ordered to remove the cladding in his building when in the opinion of one expert it may not be necessary. Although it is flammable, the cladding is in thin panels on exterior doorways and some balconies and Chris had received advice from one consultant that the cladding does not present a risk of fire spread and does not need to be removed. Despite this, Chris and other homeowners must now spend millions of dollars removing the cladding because of the rectification order.

Chris feels that in New South Wales the onus is on the owners to undertake rectification. This in turn means that the owners face prospects of legal action and fines in case of failure to comply. Chris called for a model such as is Victoria to be implemented in New South Wales, where owners with combustible cladding are working together with a dedicated government agency and have financial assistance options available to them. Chris would like such a package to be available retrospectively and be available to homeowners who had already disclosed that their building contained flammable cladding and made some effort to address it.

Chris is also disappointed that while the removal and replacement of combustible cladding is mandated, he found no corresponding guidance on what safe replacement options would be. In fact, Chris found different government agencies to have different views on specific products, and that the advice was evolving as he was working to identify a suitable replacement.

3.81 Another issue put forward by stakeholders is that homeowners are subject to orders from local councils, which vary depending on the council. Stakeholders told the committee that the lack of guidance provided to councils may make councils more likely to err on the side of caution and make conservative assessments.

3.82 Mr Gall for example, argued that:

To have fire orders served on them out of a conservative framework to get something done in a hurry just forces them to do something that may not be necessary. Also, doing something in a hurry to make the building safe creates much higher costs per lot.²⁵⁸

3.83 Cr Scott agreed that the lack of guidance to councils has led to different approaches by different local councils:

Councils are expected to work through the list that they have been provided to determine whether and how property owners should rectify the cladding on their building ... the result is that there is no consistent approach to the treatment of buildings with cladding and how any rectification requirements are determined. Obviously, this is causing confusion and uncertainty for property owners and residents.²⁵⁹

²⁵⁸ Evidence, Mr Gall, 11 December 2019, p 32.

²⁵⁹ Evidence, Cr Scott, 16 August 2019, p 46.

- 3.84** Cr Scott argued that a consistent approach and clear guidelines from the NSW Government would assist local councils:

It is clearly the case that New South Wales needs a better system to identify buildings and needs very clear guidelines for the remediation works and how that should be done in a consistent way. It is clearly not in the public interest to have 128 different councils with different views about the remediation works that might need to be done. We would continue to call on the Government to have a consistent approach to this.²⁶⁰

- 3.85** Mr Sullivan told the committee that the Insurance Council had developed its own identification protocol to assist insurers in identifying cladding. Mr Sullivan argued that, while industry groups were doing work to 'fill the gap' in providing advice on flammable cladding, 'this is not a great substitute for very clear guidance ... about what is an acceptable remediation regime ...'.²⁶¹

- 3.86** When questioned on the lack of centralised government support and the different approaches of local councils, Ms Webb told the committee that, under the New South Wales planning system, remediation is a 'council-by-council decision-making process'.²⁶² Further, Mr Tansey confirmed that the 'National Construction Code is the set of rules for what you should or should not do on a building'. He advised that 'when people are looking to rectify a building that is still the main set of nationally consistent technical rules'.²⁶³

- 3.87** However, Mr Gall argued that this was insufficient and that 'meeting the [Australian Building] Code does not guarantee safe homes'.²⁶⁴

Insurance for rectification of flammable cladding

- 3.88** Broader issues with insurance and the building industry generally are discussed in the first report of this inquiry. This section focuses on how flammable cladding has impacted on the availability and cost of building and professional indemnity insurance, and stakeholders' difficulties in obtaining insurance coverage for assessment and remediation of flammable cladding.

Exemptions on professional indemnity insurance

- 3.89** Stakeholders told the committee that it was becoming more difficult to find qualified people to assist in assessing and remediating flammable cladding due to a flammable cladding exception in building professionals' professional indemnity insurance.

²⁶⁰ Evidence, Cr Scott, 16 August 2019, p 47.

²⁶¹ Evidence, Mr Sullivan, 11 December 2019, p 17.

²⁶² Evidence, Ms Webb, 11 December 2019, p 69.

²⁶³ Evidence, Mr Tansey, 11 December 2019, p 67.

²⁶⁴ Evidence, Mr Gall, 11 December 2019, p 28.

- 3.90** As discussed in the first report of this inquiry, various building professionals are required to hold professional indemnity insurance. However, from July 2019, this insurance generally excludes building work relating to non-compliant building products, which includes ACP cladding.²⁶⁵
- 3.91** Mr Sullivan advised that all professional indemnity insurance contains an exclusion for flammable cladding. According to Mr Sullivan, 'all professional indemnity cover, particularly for certifiers, surveyors and engineers, carries the exclusion around nonconforming building products, or specifically around cladding'. He explained that this means an engineer would not be covered for undertaking cladding remediation work and would not be covered for claims made against cladding work.²⁶⁶
- 3.92** Mr Sullivan agreed that this lack of insurance cover 'is leading to a loss of appetite' to deal with flammable cladding within the industry.²⁶⁷
- 3.93** Engineers Australia gave evidence that fire safety engineers are dealing with significant price rises in professional indemnity insurance due to flammable cladding and that Engineers Australia was aware of only one insurance broker who could provide professional indemnity insurance without exclusions for work on cladding.²⁶⁸
- 3.94** Mr Edmund Ang, NSW Chapter Chair of the Society for Fire Safety, Engineers Australia, told the committee that, for engineers, the issue with professional indemnity insurance for flammable cladding is three-fold: fire safety engineers face issues around claiming insurance, they face higher prices for insurance, and the insurance they can get has exclusions related to flammable cladding. He stated that they have heard that insurance has 'doubled, tripled from what they were paying previously before all this occurred'. According to Mr Ang, these issues are 'creating significant barriers for practitioners' and is one of the most critical issues for addressing flammable cladding.²⁶⁹
- 3.95** In addition, Ms Sarnia Rusbridge, National Seminar Coordination Chair, Society for Fire Safety, Engineers Australia, told the committee that insurance exclusions mean 'a number of engineers cannot do any sort of cladding work', even going so far as not touching any concrete walls that have plastic in them.²⁷⁰
- 3.96** While some engineers are currently insured, it became evident to the committee that these practitioners are insured under existing policies. When asked what happens when existing insurance policies run out, Mr Ang stated: 'numbers will decrease'. He indicated, however, that there may still be professionals covered by international policies who can continue to work, stating 'some of the major international consultancies have global insurance coverage, so some

²⁶⁵ Media release, Hon Kevin Anderson MP, Minister for Better Regulation and Innovation, 'Statement on NSW Certifiers Insurance', 26 June 2019.

²⁶⁶ Evidence, Mr Sullivan, 11 December 2019, p 21.

²⁶⁷ Evidence, Mr Sullivan, 11 December 2019, p 21.

²⁶⁸ Answers to questions on notice, Engineers Australia, received 23 January 2020, p 1.

²⁶⁹ Evidence, Mr Edmund Ang, NSW Chapter Chair, Society for Fire Safety, Engineers Australia, 11 December 2019, pp 41; 44.

²⁷⁰ Evidence, Ms Sarnia Rusbridge, National Seminar Coordination Chair, Society for Fire Safety, Engineers Australia, 11 December 2019, p 44.

of them may be able to provide assistance on that front as well'. Mr Ang called for the government to play a more active role in resolving this issue.²⁷¹

3.97 From an owner's perspective, Mr Duggan from the Strata Community Association NSW noted 'it is becoming more challenging to find consultants who are willing to give advice, particularly third-party peer reviews on the assessment of an alternative solution or a deemed to satisfy solution'. Mr Duggan commented that they are seeing a more limited stock of advisors available and more conservative assessments which 'goes to the point of the uncertainty of the situation around what products are and are not compliant'. Mr Duggan stated 'it is certainly creating a bottle stop' and that 'there are probably not enough resources in the marketplace to deal with the complexity and volume of issues that are currently before us'.²⁷²

3.98 When asked what the NSW Government can do to help the situation, Mr Sullivan argued that a state government implemented remediation protocol and regime and a clear set of standards would assist the insurance industry. He said: 'in the absence of any standards or any regime at a State level, I can entirely understand how an engineer or a surveyor or a certifier may be left not really being able to comply'.²⁷³

3.99 Mr Sullivan told the committee that, while this problem with insurance exemptions is a problem for every State, they are much closer to a solution in Victoria. He noted there 'is no guarantee that it will happen but that [Victoria] is the only State with a standard that the insurers are actually engaging with at a State government level to consider if they will reintroduce a product without the exclusion'.²⁷⁴

3.100 Ms Webb, the NSW Fair Trading Commissioner, acknowledged that the availability and cost of professional indemnity insurance was a difficult issue and 'another part of why councils and building owners are struggling to manage all of this'. In terms of how the NSW Government is addressing the issue, she said:

From our perspective, getting confidence back in the industry that buildings are properly rectified will make them more insurable. Getting confidence back to people about what is the appropriate standard will also help with the professional advice as well.²⁷⁵

3.101 Mr Tansey said restrictions on building and building professionals' insurance were a national issue and a big focus of the Building Minister's Forum.²⁷⁶

²⁷¹ Evidence, Mr Ang, 11 December 2019, pp 41 and 44-45.

²⁷² Evidence, Mr Duggan, 11 December 2019, p 32.

²⁷³ Evidence, Mr Sullivan, 11 December 2019, p 22.

²⁷⁴ Evidence, Mr Sullivan, 11 December 2019, p 22.

²⁷⁵ Evidence, Ms Webb, 11 December 2019, p 75.

²⁷⁶ Evidence, Mr Tansey, 11 December 2019, p 75.

Building insurance

3.102 Residential strata buildings are required to hold insurance for the building itself. Stakeholders told the committee that the existence of flammable cladding on a building means that it has become harder to obtain insurance for their buildings and this insurance has become more expensive.

3.103 Mr Rumore said that, despite taking all steps to address flammable cladding, the strata committee for his building could only find one person who was willing to insure the building:

[W]e have a significant problem in that this year when we went to renew our insurance—again, we were doing the right thing by disclosing that we have flammable cladding—we really had trouble reinsuring our building because people are saying, "Well, what are you doing about it?" The only reason we have got it is that we said, "We have done all of these things. We have spoken to the New South Wales Fire and Rescue. We have spoken to council. We have spoken to the Department of Planning. Here are all of our reports." And we got one person who was prepared to insure our building.²⁷⁷

3.104 Mr Sullivan of the Insurance Council of Australia agreed that building insurance was becoming more difficult to obtain and more expensive, but said that it may depend on the building products used in each building:

In extreme cases, and there are a few building products of this nature, insurers may refuse to offer cover on a building. A relevant example of that is not aluminium clad panelling. Insurers are still insuring those buildings but it is factoring into price and availability. Thing like expandable polystyrene insulation, most insurers are leaning back from that at the moment.²⁷⁸

3.105 Mr Sullivan explained that 'leaning back' means that insurers are 'not willing to even offer a price on a building that has a gross level of exposure to a building material that they consider to be high-risk'.²⁷⁹

3.106 Mr Sullivan noted that even buildings that comply with the building code may not be insurable. He told the committee that 'the building code standards only go up to safety of life' but that 'we are insuring the building not the occupants' and that 'some situations will require it to be built above and beyond the National Construction Code'.²⁸⁰

3.107 Mr Duggan noted that premium increases vary depending on what steps have been taken to address the fire risks posed by flammable cladding, for example whether mitigants are in place, the building has a plan, or whether owners are rectifying or are in post or pre-identification, as well as on the extent of the cladding. He said that he had heard anecdotally that premiums have increased between 10 and 50 per cent, depending on the severity of impact.²⁸¹

²⁷⁷ Evidence, Mr Rumore, 11 December 2019, p 7.

²⁷⁸ Evidence, Mr Sullivan, 11 December 2019, p 18.

²⁷⁹ Evidence, Mr Sullivan, 11 December 2019, p 18.

²⁸⁰ Evidence, Mr Sullivan, 11 December 2019, p 18.

²⁸¹ Evidence, Mr Duggan, 11 December 2019, pp 38-39.

3.108 Ms Webb acknowledged that not being able to insure a building due to cladding creates a significant problem for strata owners. She said:

It leaves them in a very difficult position. We are absolutely aware of that issue. It is one of the other interesting dynamics here. If they cannot get the insurance they are required to have then they are not complying with their requirements under the Strata Act. We are absolutely alive to that being an issue.²⁸²

3.109 Further, Ms Webb told the committee that the NSW Government was continuing to work with the Insurance Council on issues around insurance.²⁸³ However, she argued that in practice, the issue was not that buildings were not being offered insurance but that they were being offered insurance at a higher price. She stated: 'We have not hit a point yet where there is an uninsured building'.²⁸⁴

Other potentially flammable building products

3.110 Following the ban on ACP, building owners have been seeking to replace ACP cladding on their buildings. However, there are concerns that other replacement cladding material, such as Biowood, may be banned in the future. This section begins by considering the New South Wales Civil and Administrative Tribunal's (NCAT) recent findings on the combustibility of Biowood. This section also considers the flammability of composite products, concerns about testing being conducted in unaccredited laboratories, and the question as to whether other flammable products such as Biowood should be banned.

NCAT findings on the fire risk of Biowood

3.111 In 2019, NCAT heard a case in relation to the use of Biowood, a plastic wood composite building material. The case was brought forward by an owners corporation against a builder and developer of their residential building.²⁸⁵

3.112 The owners corporation alleged that Biowood cladding attached to the external walls of their building was defective as it was combustible and failed to comply with the Building Code of Australia.²⁸⁶

3.113 NCAT was satisfied with the evidence of the owners corporation that Biowood, used as an attachment:

- constitutes an undue risk of fire spread
- is not fit for purpose

²⁸² Evidence, Ms Webb, 11 December 2019, p 75.

²⁸³ Evidence, Ms Webb, 11 December 2019, p 75.

²⁸⁴ Evidence, Ms Webb, 11 December 2019, p 75.

²⁸⁵ *The Owners Strata Plan No 92888 v Taylor Construction Group Pty Ltd and Frasers Putney Pty Ltd* [2019] NSWCATCD 63.

²⁸⁶ *The Owners Strata Plan No 92888 v Taylor Construction Group Pty Ltd and Frasers Putney Pty Ltd* [2019] NSWCATCD 63, 9.

- fails to comply with the Building Code of Australia.²⁸⁷

3.114 Consequently, the Tribunal ordered that the builder and developer rectify the breach by removing the Biowood attachments and replacing them with attachments that comply with the relevant codes, standards and statutory warranties.²⁸⁸

3.115 With Biowood still available on the market, the committee questioned the NSW Government about what action it had taken about the risks identified by NCAT.

3.116 Assistant Commissioner Whybro informed the committee that the issue had been raised 'at the appropriate forum, which is the cladding task force'.²⁸⁹ He also stated that as 'we become aware of products we pay attention to them and put them through the same rigour as we would aluminium composite panels'.²⁹⁰

3.117 Further, Mr Tansey outlined the steps that had been taken by NSW Fair Trading since the decision was handed down:

We sought a copy of the decision from the tribunal because it had not published them so we needed to get those. I have had one read of that decision. As you will be aware, it was a finding regarding defects under the Home Building Act, so it did find in the instance of that case, it accepted the advice of one of the experts that that product was combustible and should not have been used in the way it was on that building. We have taken action since then to talk to the manufacturers and get information regarding their testing history and the history of the actual alleged combustibility of that product so we are still looking at that.²⁹¹

3.118 However, Mr Tansey noted that it is not a 'straightforward or simplistic' matter, explaining that just because the product was found to be defective in the particular NCAT case, does not necessarily mean that it is a non-compliant product generally.²⁹²

3.119 In discussions with government representatives about the NCAT's findings on Biowood, it became clear to the committee that NCAT does not notify the department of their decisions. Ms Webb informed the committee that she had not been notified of NCAT's findings on Biowood, and that currently there is no protocol in place for NCAT to notify the department of any findings about unsafe products.²⁹³ Ms Webb further expressed the view that there should be such a protocol, highlighting that 'we have some engagement with NCAT' about the transparency of their decision-making and it is a continuing conversation'.²⁹⁴

²⁸⁷ *The Owners Strata Plan No 92888 v Taylor Construction Group Pty Ltd and Frasers Putney Pty Ltd* [2019] NSWCATCD 63, 29-30.

²⁸⁸ *The Owners Strata Plan No 92888 v Taylor Construction Group Pty Ltd and Frasers Putney Pty Ltd* [2019] NSWCATCD 63, 32.

²⁸⁹ Evidence, Assistant Commissioner Whybro, 11 December 2019, p 59.

²⁹⁰ Evidence, Assistant Commissioner Whybro, 11 December 2019, p 59.

²⁹¹ Evidence, Mr Tansey, 11 December 2019, p 71.

²⁹² Evidence, Mr Tansey, 11 December 2019, p 71.

²⁹³ Evidence, Ms Webb, 11 December 2019, p 72.

²⁹⁴ Evidence, Ms Webb, 11 December 2019, p 72.

- 3.120** In addition, Mr Tansey advised that NSW Fair Trading is unaware whether there are any other cases before NCAT regarding cladding.²⁹⁵

Guidance from government on cladding alternatives

- 3.121** In the wake of NCAT's findings on Biowood, following on from the ACP ban, some stakeholders claimed that the NSW Government has not provided clear guidelines about what can be used as an acceptable replacement to flammable cladding that will not be banned in the future.²⁹⁶
- 3.122** For example, Mr Rumore told the committee that he has spent lots of time with consultants identifying appropriate cladding to use on his building:

We have spent hundreds of hours with eight different consultants trying to work out what we can safely put on our building and not find that something we use may later on be deemed unacceptable. For example, one product that is still available but many people tell us they believe will shortly be banned is waffle cladding ... If you use that it is quite likely that it will be banned.²⁹⁷

- 3.123** Similarly, while some councils are aware that Biowood and other materials are combustible and do not comply with the building code for use as external walls on certain buildings, Local Government NSW 'understands that councils have not received any specific information from the NSW Government about Biowood and other newer products'.²⁹⁸ Further, while Local Government NSW noted that some information about banned products is available on the NSW Fair Trading website, they also confirmed that no information is provided directly to local councils by the government regarding banned products and proposed future bans:

Local Government NSW understands that councils are not receiving advice from the NSW Government about specific banned products and no information has been provided regarding proposed future bans.²⁹⁹

- 3.124** The Fire Brigade Employees Union indicated that it is not unusual that Biowood is still available for sale and permissible under the National Construction Code. Mr Drury from the Fire Brigade Employees Union stated: 'I think there are probably plenty of products out there at the moment that allow fires to burn faster, hotter and become more problematic'. Mr Leighton believed that 'on a regulatory level' there should be additional focus on other flammable products such as Biowood, and not just ACP.³⁰⁰

- 3.125** The committee queried whether there is a register that records information, based on the current ACP inspections, about any other cladding, that might exist on a building. Cr Scott from Local Government NSW explained that one did not exist. She further noted that if there were to be a

²⁹⁵ Evidence, Mr Tansey, 11 December 2019, p 71; Ms Webb, 11 December 2019, p 71.

²⁹⁶ See, Evidence, Mr Rumore, 11 December 2019, p 2; Mr Mawjee, 11 December 2019, p 5.

²⁹⁷ Evidence, Mr Rumore, 11 December 2019, p 2.

²⁹⁸ Answers to questions on notice, Local Government NSW, 28 January 2020, p 2.

²⁹⁹ Answers to questions on notice, Local Government NSW, 28 January 2020, p 2.

³⁰⁰ Evidence, Mr Drury, 11 December 2019, p 25.

future ban on products other than ACP, the only way to identify buildings with the banned products would be more inspections:

It is not the case that there is a register of buildings and what they contain in New South Wales, to my knowledge. Therefore, should a product be banned based on evidence that it is problematic, the only regime to allow for that identification to occur is a program of inspections undertaken either by the building owners themselves, with a report undertaken by councils on a risk-based inspection regime, and/or by NSW Fire and Rescue.³⁰¹

3.126 Mr Duggan agreed that 'additional testing may be required should further products be determined as non-compliant'. He also provided further detail suggesting that when conducting external wall assessments 'ideally' all products deemed at time of inspection to be combustible should be tested and recorded.³⁰²

3.127 In response to stakeholders' concerns that they are unsure what product to use to replace their cladding, given the risk that other products may be banned in future, Assistant Commissioner Whybro pointed to the National Construction Code for direction. He argued that if the code is complied with, combustible material should never be used on buildings:

Comply with the National Construction Code, which places clear direction around limiting the spread of fire or not having combustible material or flammable material on the building. If we complied with the code, although it is only a minimum standard, these sorts of materials should never have been used on buildings.³⁰³

3.128 Similarly, Ms Sarnia Rusbridge, National Seminar Coordination Chair, Society for Fire Safety, Engineers Australia, disagreed with the premise that there is no guidance about what products can be used and how. She stated: 'the building code is quite clear, you cannot have combustible external walls. It is looking at it from a fire engineering point of view; how each product impacts the building and the risk of it on an individual basis'.³⁰⁴

3.129 Rather, Ms Rusbridge suggested that the key is to 'increase and improve our technical and scientific understanding' of combustible products.³⁰⁵ She argued that incidents can be prevented by understanding how products work on a case-by-case basis taking into consideration that every building, usage and product is different.³⁰⁶

Should there be further bans on flammable products?

3.130 Stakeholders also told the committee that a number of products, such as 'waffle' or 'honeycomb' cladding, as well as high-pressure laminate, are flammable but have not been banned. There were opposing views as to whether or not they should be banned.

³⁰¹ Evidence, Cr Scott, 11 December 2019, pp 14-15.

³⁰² Answers to questions on notice, Strata Community Association NSW, 29 January 2020, pp 1-2.

³⁰³ Evidence, Assistant Commissioner Whybro, 11 December 2019, p 60.

³⁰⁴ Evidence, Ms Rusbridge, 11 December 2019, p 42.

³⁰⁵ Evidence, Ms Rusbridge, 11 December 2019, p 41.

³⁰⁶ Evidence, Ms Rusbridge, 11 December 2019, p 41.

- 3.131** Despite media attention of the flammability of these products, Mr Greenfield, State Secretary of the CFMEU, told the committee that these products 'are still going on buildings today'.³⁰⁷
- 3.132** According to Mr Drury these additional types of cladding, as well as other building products such as sandwich paneling, which 'is basically just chock-full of foam', are potentially an even bigger problem for fire safety professionals.³⁰⁸
- 3.133** Mr Duggan pointed to timber-based products as an example of a product that is not the subject of a ban, but is combustible and therefore not compliant with the National Construction Code:
- Although timber-based products didn't fall into scope in relation to the NSW Government product ban it was determined that wood-based products by its very nature is combustible and therefore non-compliant with the NCC2019.
- There is 0% polymer in most wood composite products, but they are highly flammable. This means legislation based solely around 30% polymer is limited. This allows for highly combustible wood core ACP's (phenolic resin) and various timber composite products to remain compliant in relation to the NSW Governments product ban.³⁰⁹
- 3.134** Some stakeholders disagreed that bans were necessary.
- 3.135** Representatives from Engineers Australia cautioned against a blanket ban on combustible cladding for a number of reasons.
- Bans cannot necessarily keep up with technological advances, which may result in pushing consumers towards a product that is inappropriate, even though it is compliant.³¹⁰ Further, it results in the implication that if a product is not banned, then it is safe.³¹¹
 - Fire safety is just one consideration when choosing a product. Other factors are taken into consideration, such as sustainability and insulation, for which there may not be alternative products.³¹²
 - Products bans will increase the cost of building low-rise properties which can be built with combustible products, in accordance with the building code.³¹³
- 3.136** In response to questioning about stakeholders' concerns that a product that might be compliant now, may be banned in the future, Ms Rusbridge considered this a 'downside' of a ban. She argued that as long as a product was engineered appropriately on the building, it would not matter that a product may be highly combustible.³¹⁴

³⁰⁷ Evidence, Mr Greenfield, 11 December 2019, p 49.

³⁰⁸ Evidence, Mr Drury, 11 December 2019, p 27.

³⁰⁹ Answers to questions on notice, Strata Community Association NSW, 29 January 2020, pp 1-2.

³¹⁰ Evidence, Ms Rusbridge, 11 December 2019, p 41.

³¹¹ Evidence, Mr Greg Ewing, Sydney Division General Manager, Engineers Australia, 11 December 2019, p 42.

³¹² Evidence, Mr Ang, 11 December 2019, p 42.

³¹³ Evidence, Ms Rusbridge, 11 December 2019, p 43.

³¹⁴ Evidence, Ms Rusbridge, 11 December 2019, p 42.

- 3.137** Similarly, co-author of the Building Confidence report, Ms Bronwyn Weir argued that the problem is not combustible products themselves but rather how they are used on buildings. For example, she highlighted that there are 'valid and perfectly compliant' uses of 100 per cent polyethylene panels/aluminium composite panels, but the problem has been use of the product inappropriately.³¹⁵
- 3.138** Mr Greg Ewing, Sydney Division General Manager, Engineers Australia, was also of the view that much risk can be mitigated when a product is used appropriately by people who understand how the product will perform in particular circumstances:

Practically anything will combust given certain circumstances. So it is about thinking where is the level of comfort and surety that we build into the process, that if a product is used in the right way and it is by people with the right knowledge and understanding of how that product will perform given certain circumstances, then there is a lot of risk that can be mitigated in that situation.³¹⁶

Testing of combustibility of composite products and systems

- 3.139** One inquiry participant, Dincel Construction System, an engineering company that creates and sells its own permanent formwork building product, raised concerns in relation to the testing of all components of composite materials.
- 3.140** While C1.9 of the National Construction Code specifies that building elements such as external walls should be non-combustible, Mr Burak Dincel, Chairman, explained that the only prescriptive testing for fire compliance is AS 1530.1, a small-scale test that does not represent a real building fire. He argued that this test is only useful on products used individually and not on products used together in a composite system.³¹⁷
- 3.141** Mr Burak Dincel advised that cladding is often made up of a composite of different materials and not all of these are tested for flammability.³¹⁸ In particular representatives of Dincel Construction System emphasised that glue, for example, becomes dangerous in the event of a fire, meaning the cladding system is, as a whole, more flammable than some of its individual elements. Glue which melts in a fire causes the delamination of materials and increases the danger of falling debris during a fire.³¹⁹

³¹⁵ Evidence, Ms Bronwyn Weir, Co-author, *Building Confidence: Improving the Effectiveness of Compliance and Enforcement Systems for the Building and Construction Industry Across Australia* report, 27 August 2019, p 58.

³¹⁶ Evidence, Mr Ewing, 11 December 2019, p 43.

³¹⁷ Evidence, Mr Burak Dincel, Chairman, Dincel Construction System, 24 February 2020, p 8.

³¹⁸ Evidence, Mr Burak Dincel, 24 February 2020, p 8. See also, Submission 127, Dincel Construction System Pty Ltd, p 3.

³¹⁹ Evidence, Mr Burak Dincel, 24 February 2020, p 8. See also, Submission 127, Dincel Construction System Pty Ltd, p 3; Evidence, Ms Maria Barreto-Tilman, Group Marketing Manager, Dincel Construction System, 24 February 2020, p 10.

3.142 Group Marketing Manager, Ms Maria Barreto-Tilman also explained that builders may refer to glue as a sealant which is exempt from the requirements of C1.9 of the National Construction Code. In doing so, Ms Barreto-Tilman characterised this as 'trying to force a pass' in the certification process.³²⁰

3.143 In response to questions about the testing of adhesive and sheeting together, Mr Tansey explained that the AS 5113 test requires 'a full scale façade test':

AS 5113 requires a full scale façade test. This test takes into consideration all relevant aspects of the façade system, including the façade material itself, the specific method of fixing and/or attachment of that material to the building – which includes whether it is attached with adhesive or other means - and the quantity of debris produced during the test by any and all of the components.³²¹

3.144 Dincel Construction System argued that 'full system tests ... must be made mandatory'.³²²

3.145 Mr Berkay Dincel, a Director at Dincel Construction System, explained that individual components of a composite wall system may comply with prescriptive requirements, but that currently, there is no requirement to test them together as a composite system:

The issue is if you have a composite wall system where each component that makes up that wall system complies with the prescriptive requirements, the National Construction Code is not currently requiring companies to carry out this large-scale test. So what we are saying is whether that composite wall system complies with the prescriptive requirements or not, all composite products should be tested in this large-scale facade fire test or another large-scale test to demonstrate if they are fit for purpose.³²³

3.146 At a Budget Estimates hearing of Portfolio Committee No. 6 – Transport and Customer Service in March 2020, Minister Anderson was questioned about the risks of falling debris as a result of glue and double sided tape used on buildings melting and losing their adhesive qualities during a fire.

3.147 In relation to the concerns about glue, the Minister advised that the department is aware of the issue and is looking into it.³²⁴ In response to questioning about double sided tape, the Minister said that it will 'come under consideration under the building products safety panel that has been set up ... in the Cladding Taskforce to look at those issues'. He advised that 'if they are a concern, if they do not meet the Australian standards, then they should not be used'.³²⁵

³²⁰ Evidence, Ms Barreto-Tilman, 24 February 2020, p 10.

³²¹ Answers to questions on notice, NSW Government, 20 March 2020, p 6.

³²² Submission 127, Dincel Construction System Pty Ltd, p 3. See also, Evidence, Mr Burak Dincel, 24 February 2020, p 8.

³²³ Evidence, Mr Berkay Dincel, Director, Dincel Construction System, 24 February 2020, p 10.

³²⁴ Evidence, Minister Anderson, 16 March 2020, Budget Estimates 2019-2020, p 27.

³²⁵ Evidence, Minister Anderson, 16 March 2020, Budget Estimates 2019-2020, p 28.

3.148 Chair of the building products safety panel, Mr Peter Dunphy, Executive Director, Compliance and Dispute Resolution, Department of Customer Service, stated that 'the matter is in hand; it is being addressed'.³²⁶

3.149 In addition, Mr Dunphy outlined what the cladding taskforce was doing to investigate the glue and double sided tape issue:

These are one of a range of products which have been referred to us. We are in the process of investigating them ... It [Cladding Taskforce] will also look at the external wall assembly methods, which will include things like double-sided tape. It will look at all of those standard procedures and provide advice both to local councils and also to Fire and Rescue members of the panel so that they can provide appropriate advice to strata managers, who are obviously dealing with some of these issues in their building ...³²⁷

3.150 When asked about why the use of adhesives such as double sided tape hasn't been banned, the Minister again referred to the building products safety panel: '[I]f the advice from the product safety panel that comes out of the Cladding Taskforce is not of the Australian standard than that, as a matter of course, will be removed and will not be allowed to be re-applied to that building'.³²⁸

3.151 The Minister added that if there is a problem that is not addressed through the National Construction Code, he would be 'happy' to take the issue to the Building Ministers' Forum:

I am happy to take that forward to the Building Ministers' Forum when we next meet in relation to the National Construction Code. If it is a significant problem that is not being addressed through the National Construction Code or the Building Code of Australia on the advice of the product safety panel through our Cladding Taskforce, I would be happy to bring that forward ... [T]hese are suggestions that we do take on board. We do listen to the industry. We do move forward so that we do have a safe environment so there is no cycle of defects by putting the wrong product back on the building, which ultimately becomes a significant cost problem to those who are associated with the building.³²⁹

Accreditation of testing laboratories

3.152 In addition to the uncertainty involved for stakeholders about how to replace ACP products on existing buildings, a concern was raised regarding the accreditation of the laboratories testing building products for flammability.

³²⁶ Evidence, Mr Peter Dunphy, Executive Director, Compliance and Dispute Resolution, Department of Customer Service, 16 March 2020, Budget Estimates 2019-2020, p 30.

³²⁷ Evidence, Mr Dunphy, 16 March 2020, Budget Estimates 2019-2020, p 30.

³²⁸ Evidence, Minister Anderson, 16 March 2020, Budget Estimates 2019-2020, p 32.

³²⁹ Evidence, Minister Anderson, 16 March 2020, Budget Estimates 2019-2020, p 32.

3.153 One submission author alleged that unsafe and invalid fire testing occurred at a laboratory they worked at in 2018.³³⁰ Some of the issues that the individual witnessed included:

- datasets ... retroactively reconstructed due to equipment failure
- testing done outside of standard mandated conditions
- advice being given on invalid testing, this being referenced on certificates of conformity
- certifications being made on invalid test results
- [requests] to alter test results to force pass criteria.³³¹

3.154 The individual added that the laboratory was not accredited by the National Association of Testing Authorities, Australia (NATA),³³² an independent organisation recognised by the Australian Government as Australia's national authority for the accreditation of laboratories. According to its website, NATA's role is to ensure that 'organisations comply with relevant international and Australian standards and so are competent to provide consistently reliable testing, calibration, measurement and inspection data to government, industry and the wider community'.³³³

3.155 Seeking accreditation by NATA is voluntary. The individual argued that with little regulation or enforcement by the government, corruption may be widespread, which also undermines facilities that are accredited by NATA:

While there is a definite need for NATA accreditation, it is opt-in ... With little regulatory control over this space as no government agency has been tasked with regulation or enforcement it is rife for corruption.

Additionally, this devalues other NATA accredited facilities and the confidence that this brings the industry, should this be constantly undermined I believe we will lose our global standing as producers of quality.³³⁴

3.156 Mr Burak Dincel highlighted that only NATA accredited laboratories should be conducting fire testing. However, he also raised a question about how to deal with imported products that are not tested in NATA accredited laboratories. He suggested that 'importance should be given to Australian-manufactured products so that authorities ... can check the manufacturing and what they are doing'.³³⁵

³³⁰ Submission 172a, Name suppressed, p 1.

³³¹ Submission 172a, Name suppressed, p 1.

³³² Submission 172a, Name suppressed, p 1.

³³³ National Association of Testing Authorities, Australia, *Our Role*, <<https://www.nata.com.au/about-nata/our-role>>.

³³⁴ Submission 172a, Name suppressed, p 1.

³³⁵ Evidence, Mr Burak Dincel, 24 February 2020, p 9.

Committee comments

- 3.157** Addressing flammable cladding is a complicated, expensive and lengthy process. Those who bear responsibility for addressing flammable cladding – Fire and Rescue NSW, local government and homeowners and strata committees – are not resourced or equipped to take on cladding. Their plight is made worse by inadequate support and advice from the NSW Government.
- 3.158** In relation to Fire and Rescue NSW, the committee is particularly concerned about the resourcing of the fire safety unit. The committee was alarmed to hear that Fire and Rescue NSW is removing personnel from active firefighting to address the flammable cladding issue. We recommend that the fire safety unit within Fire and Rescue NSW should have standalone staff and be adequately resourced to be able to play a much bigger role in supporting remediation of 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.

- 3.159** We note the concerns of local government that the cladding taskforce and cladding support unit are under-resourced and not set up to move quickly and resolutely on cladding. In the committee's view, they are also not designed or equipped to provide the specific technical advice that many councils are calling for. Local councils are not equipped to address the issue of flammable cladding which requires expert attention and support. These concerns will be addressed by the establishment of a new government division, within the Building Commission, to tackle flammable cladding, as put forward in recommendation 5.
- 3.160** The lack of support provided to councils also applies to homeowners. The committee was moved by evidence from residents about the personal toll the remediation process takes on residents. Indeed, there are perverse incentives for homeowners not to register buildings with cladding as the act of registration leaves them open to the significant costs of confirming and remediating cladding.
- 3.161** The unanimous evidence from stakeholders is that it is becoming increasingly difficult and expensive to even have a building assessed for the presence of flammable cladding, let alone getting advice on how it can be rectified. This is a major and damaging gap in the NSW Government's response to the cladding crisis which Minister Anderson failed to acknowledge and that current policy settings will not fix.
- 3.162** Homeowners need a single place to go for advice on cladding issues. Clearly, this responsibility should fall to the NSW Government. We reiterate the point we made in chapter 2, which is that New South Wales should look to the Victorian jurisdiction as a model for how to address this vexed issue. As we have recommended a new division of the Building Commission in chapter 2, modelled on Cladding Safety Victoria, here too we recommend an expert panel as is in place in Victoria to assess and provide advice on rectification plans. This advice should extend to the

materials that can be used to replace flammable cladding on buildings, an area where homeowners told us they are in the dark at present.

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.

- 3.163** The committee notes that the Victorian Building Authority has adopted a practice where genuine purchasers and potential tenants are able to check the cladding database to confirm the status of their potential future home. The committee recommends that the NSW Government adopts a similar practice in New South Wales.
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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.

- 3.164** The committee believes that homeowners should not face the full brunt of financial hardship because of a problem they did not create. This costly and distressing situation has been caused in significant part by the lack of effective regulation and oversight by the NSW Government over decades. Because of this the government should accept some of the financial burden of fixing it. This is a matter of fairness. With this in mind the committee recommends that a substantial funding package, proportionate to the \$600 million package announced by the Victorian Government, be made available to homeowners to assist with the huge costs of confirming the presence of high-risk cladding and remediating it. This package should be available to all homeowners of buildings containing aluminium composite panels and building products that may be banned in future, and also apply retrospectively, so it is available to homeowners who have already commenced remediation work.
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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.

- 3.165** We are also convinced that preventing the use of flammable products in the first place is vastly preferable to having to retrospectively remove materials. However there is no evidence that the NSW Government has adjusted its policy settings to ensure this is the case.
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- 3.166** The NSW Government must do more to examine and restrict the use of other potentially flammable cladding products that are being used as a purportedly safe alternative to ACP. We were alarmed by evidence of materials that have been demonstrated to be flammable but have not been banned. In this context, it is understandable that building owners require more certainty around what products they can use to replace flammable cladding.
- 3.167** We note the recommendation made in the first report of this inquiry regarding online lodgement of all relevant construction documentation. We believe that this will go some way to assist homeowners in future buildings to determine what products have been used during construction. We expect that as part of this online lodgement that builders and developers would be required to provide digital records of all building products used for each project and how these products have been used, the composite systems and details of all products that make up any composite products used, and any testing of materials that have been used on the project. We also expect that this information be made available to homeowners if necessary.
- 3.168** All of these reforms to how building work is documented will not be implemented until some years in the future. None of them work to address the present situation where an unknown number of cladding products are currently on the market that if used to replace ACP may pose just as great a risk in a fire. To address this the NSW Government must take a much more proactive role in identifying potentially flammable cladding products and either removing them from the market by banning their use or taking other steps to ensure they are not used in a dangerous manner. The committee believes that the specialised expertise within a Building Commission would be better suited to take this more proactive approach than the Department of Fair Trading.

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.

- 3.169** We heard evidence that while individual building components of a composite system may pass their individual prescriptive tests, the full composition itself may not be tested for the risk of falling debris during a fire. Cladding that falls away from a building during a fire creates a much greater risk of harm for residents, firefighters and the general public. The risk of falling debris of all products, including all products used in composite products, should be tested. The committee therefore recommends 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 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.

- 3.170** It should go without saying that all testing should be conducted in accredited laboratories adhering to the highest standards. We were particularly concerned about evidence suggesting that there are laboratories conducting invalid and unsafe tests and of the presence of unaccredited laboratories in this space.
- 3.171** This is clearly a national issue and we recommend 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, such as laboratories, inspection bodies, calibration services, producers of certified reference materials and proficiency testing scheme providers. The committee recognises this would be a significant change and a brief transition period would be required.

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.

- 3.172** The committee was alarmed by evidence regarding how the fire risk of flammable cladding has affected personal indemnity insurance. Exclusions for cladding work mean that there are less professionals around to conduct this urgent work, creating a further bottleneck in remediating buildings with flammable cladding. Additionally, the committee is concerned about the availability of building insurance and is concerned about how this is driving up prices for all stakeholders. As discussed in the first report of this inquiry, this situation is untenable.
- 3.173** We note the evidence of Ms Webb referring to the difficulties faced by homeowners in obtaining insurance as one of the 'interesting dynamics' of this issue. It is not enough for the government to be aware of the problem; it must institute robust measures to assist homeowners to meet their obligation to obtain appropriate insurance. We refer to our recommendation on insurance in our first report that the NSW Government work with the insurance council on cladding issues to ensure building professionals and owners have continuing and affordable access to appropriate insurance.
- 3.174** We are also of the firm belief that a credible, comprehensive and well-resourced State response to flammable cladding, similar to that in Victoria, is an essential first step in actually fixing the problem. State government leadership is critical. The current situation of leaving the problem to individual local councils and individual homeowners with their only guide being the National Construction Code represents a failure of leadership. The State Government's role here must include setting credible standards that help councils with enforcement and allow homeowners to remove and replace cladding with confidence that it was firstly necessary and second that they will not have to repeat the process when their new cladding is later deemed unsafe. Absent this State leadership it is difficult to see how the flammable cladding crisis will be resolved or when or how insurers will be drawn back into the market to allow the process to work its way through.

Chapter 4 Building certification

This chapter begins with an overview of building certification and the NSW Government's recent actions to reform the current system. It then considers the adequacy of private certification in protecting building standards and details the concerns raised by inquiry participants in relation to how buildings are currently certified. Finally, this chapter outlines the arguments for and against reverting the certification system back to the local council model and other solutions to improve the system.

Overview of building certification system

- 4.1** This section provides an overview of the role of council and private certifiers in New South Wales, including the requirements for certifiers to be accredited.
- 4.2** Building certification is conducted by accredited council and private certifiers in New South Wales. Previously building regulation was carried out solely by local councils, however the introduction of the *Local Government Act 1993* and further reforms in 1998 privatised much of the industry.³³⁶
- 4.3** Stakeholder views on the shift from local council certification to private certification are discussed later in this chapter.
- 4.4** Certifiers are responsible for issuing certificates under Part 4 and 4A of the *Environmental Planning and Assessment Act 1979* and can act as a Principal Certifying Authority for a development if they hold the appropriate accreditation.³³⁷
- 4.5** The role of the Principal Certifying Authority, or another accredited certifier, is to carry out critical stage inspections during construction to ensure that building work is in accordance with the development consent and legislative requirements. At the end of construction, the Principal Certifying Authority will undertake a final inspection and issue an occupation certificate declaring if the building is suitable for occupation or use.³³⁸
- 4.6** Certifiers issue a number of certificates under the *Environmental Planning and Assessment Act 1979*, including:
- construction certificates – state that work completed is in accordance with approved plans and specifications and complies with legislative requirements
 - complying development certificates – state that proposed development is complying development and (if carried out as specified) will comply with relevant development standards and legislative requirements
 - occupation certificates – authorise the occupation and use of a new building, or a change of use for an existing building
 - compliance certificates – confirm that work or designs comply with specified standards

³³⁶ Submission 65, Development and Environmental Professionals' Association (DEPA), p 2; Submission 8, Mr Brett Daintry, pp 7-9.

³³⁷ Submission 74, Association of Accredited Certifiers, p 3.

³³⁸ Answers to questions on notice, NSW Government, 6 September 2019, p 3.

- strata certificates – authorise the registration of a strata plan, strata plan of subdivision or notice of conversion
- subdivision certificates – authorise the registration of a plan of subdivision.³³⁹

4.7 The *Building Professionals Act 2005* regulates the accreditation and professional conduct of council and private certifiers in New South Wales. The Building Professionals Board undertakes the functions under this Act. To be accredited, all certifiers must:

- demonstrate they have the required knowledge, skills, qualifications and experience set out in the accreditation scheme
- demonstrate they are a fit and proper person
- provide evidence of having the required professional indemnity insurance (except if a council employee is covered by the council's insurance)
- pay an accreditation fee.³⁴⁰

4.8 Accredited certifiers must adhere to the Code of Conduct as outlined in the *Building Professionals Act 2005*. The Building Professionals Board has the power to investigate and impose a range of disciplinary measures on accredited certifiers who breach this code. The Act also includes provisions that certifiers must comply with requirements under the *Independent Commission Against Corruption Act 1988* and the *Ombudsman Act 1974* where they are recognised as 'public officials' and 'public authorities'.³⁴¹

NSW Government actions

4.9 This section outlines recent actions taken by government in reforming the building certification system.

4.10 In 2015 responsibility for the *Building Professionals Act 2005* was transferred to NSW Fair Trading. In 2018, the Act was re-written as the *Building and Development Certifiers Act 2018*.³⁴² This Act provides for further accountability mechanisms for certifiers, including the introduction of penalties for certain breaches to the code of conduct, an increase in penalty amounts, strengthening conflict of interest provisions and extending the power of authorised officers to investigate, monitor and enforce compliance.³⁴³

4.11 A key issue for the committee in this inquiry was why the Act had not been implemented soon after it became law. As noted in the first report of this inquiry, the *Building and Development Certifiers Act 2018* was passed in Parliament in October 2018. The NSW Government informed the committee it expected the regulations that are required to implement the Act to be in place by July 2020. Given the significant time lapse between the passing of the Act and when it would

³³⁹ Answers to questions on notice, NSW Government, 6 September 2019, pp 3-4.

³⁴⁰ Answers to questions on notice, NSW Government, 6 September 2019, p 3.

³⁴¹ Submission 132, NSW Government, p 19.

³⁴² Evidence, Ms Rose Webb, Deputy Secretary, Better Regulation Division and NSW Fair Trading Commissioner, 12 August 2019, p 2.

³⁴³ Submission 132, NSW Government, pp 15-19.

come into effect, the committee recommended in its first report of this inquiry that that the government expedite the work to implement the supporting regulations well before July 2020.³⁴⁴

4.12 At the committee's final hearing, Mr John Tansey, Executive Director Regulatory Policy, Better Regulation Division, Department of Customer Service, updated the committee on progress in developing the support regulations. Mr Tansey advised that the reforms to building certifiers 'will now come to fruition in the next couple of weeks when the regulation will be finalised and, subject to the Governor's approval, will be gazetted for commencement in the middle of the year'.³⁴⁵ In March 2020, the NSW Government advised that the implementation date for the supporting regulations was still scheduled to commence on 1 July 2020.³⁴⁶

4.13 The committee also looked at the NSW Government's four-point plan to improve the certification profession, which was announced shortly after the passage of the *Building and Development Certifiers Act 2018*.³⁴⁷ The government committed to the following four actions in the plan:

- increase auditing of certifiers, with 25-30 per cent of the industry to be audited every year
- introduce a new disciplinary policy with harsher penalties for certifiers who are corrupt and negligently sign off a building that is unsafe or structurally unsound
- provide better protection for strata buildings by not permitting certifiers to work on new strata developments if they have breached the code of conduct in the last 12 months
- increase transparency by producing an enhanced register of certifiers which will include more information on a certifier's compliance history.³⁴⁸

4.14 In relation to the new audit plan, Mr Peter Dunphy, Executive Director, NSW Fair Trading Specialist Services, Department of Customer Service, told the committee in August 2019 that they had commenced auditing of high-risk individuals and at that stage had completed eight audits with a further ten remaining. Mr Dunphy advised that the aim is to complete 15 audits per month to achieve the target of 25 to 30 per cent per annum of the industry in the 2019-20 financial year. He advised that there are seven staff members conducting the desktop audits and explained what this entails:

We actually call in information, all of the documentation in terms of audits or work that they have done. We will do a desktop audit. It may also include site visits to check particular issues. It is working with the auditor through the records of the approvals and the certificates that they have issued, looking at a number of sites where they have carried out work and confirming and verifying that the work has been done in accordance with the requirements.³⁴⁹

³⁴⁴ Public Accountability Committee, NSW Legislative Council, *Regulation of building standards, building quality and building disputes, first report*, (2019), pp 22-23.

³⁴⁵ Evidence, Mr John Tansey, Executive Director Regulatory Policy, Better Regulation Division, Department of Customer Service, 24 February 2020, p 27.

³⁴⁶ Answers to questions on notice, NSW Government, 20 March 2020, p 7.

³⁴⁷ Evidence, Ms Webb, 12 August 2019, p 2.

³⁴⁸ Submission 132, NSW Government, p 17.

³⁴⁹ Evidence, Mr Peter Dunphy, Executive Director NSW Fair Trading Specialist Services, Department of Customer Service, 12 August 2019, pp 5-6.

- 4.15** Commenting on the new disciplinary policy for certifiers, Ms Rose Webb, Deputy Secretary, Better Regulation Division and NSW Fair Trading Commissioner, outlined the disciplinary action against certifiers by the department in the last three years:

... [I]n the past three years the department has conducted over 38 audits and investigations of certifiers and issued over half a million dollars' worth of fines. In the past 12 months, six certifiers' accreditations have been cancelled. When noncompliance is detected, a range of sanctions and remedies are employed to right wrongs, including directions, rectification orders, recalls, penalty notices, disciplinary actions and prosecutions. We continuously publicise the outcomes of our compliance and enforcement actions to deter other businesses from engaging in similar behaviour.³⁵⁰

The adequacy of private certification

- 4.16** There were a range of issues raised with the committee regarding the adequacy of private certification in protecting building standards. These issues are outlined below.

Role of private certifiers

- 4.17** Inquiry participants reported that there is confusion amongst the public regarding the role of the private certifier, which has led to a misconception that substandard work by private certifiers is largely to blame for many of the defects seen across buildings in New South Wales.
- 4.18** Local Government NSW advised that 'there is a general lack of understanding of the role of the certifier' and a disconnect between that role and 'what the public/consumers believe their role to be'. Local Government NSW supported any initiatives that would improve consumer awareness of the certifier's role and that this was 'something that can be done immediately by the new building commissioner'.³⁵¹
- 4.19** Waverley, Woollahra and Randwick Councils highlighted that 'it is important to remember that accredited building certifiers do not make the laws, do not design the buildings, do not specify, purchase or install any products, do not hammer a nail, turn a screw or physically construct any element'. The Councils commented that 'private certification is an easy target' and believed that the solution to poor building quality is to look at all building practitioners and take steps to increase the competence and accountability for their actions.³⁵²
- 4.20** Pro Cert Group Pty Ltd, an accredited private certifier business in regional New South Wales, explained that private certifiers are generalists and should not be 'expected to have a detailed knowledge of all aspects of building design', and noted that the current legislative environment focuses on the liability of the certifier with no recognition of the importance of other design and building practitioners. Pro Cert Group stated that 'this results in an expectation in the media, public and elected representatives that certifiers are completely responsible for building quality with every new news story regarding a building defect being laid at the feet of the certifier'.³⁵³

³⁵⁰ Evidence, Ms Webb, 12 August 2019, p 2.

³⁵¹ Submission 145, Local Government NSW, p 7.

³⁵² Submission 86, Waverley, Woollahra & Randwick Councils, p 7.

³⁵³ Submission 75, Pro Cert Group Pty Ltd, p 2.

- 4.21** Stanton Legal argued that the use of the word 'certifier' to describe the profession is an issue as it 'does not reflect their legislative role' and 'typically leads purchasers of units to the impression that a "certifier" has checked and certified that all aspects of the building has been properly constructed'. Stanton Legal suggested that the profession be referred to by a term that accurately reflects their role and 'does not create a false consumer perception'.³⁵⁴
- 4.22** Ms Jane Hearn, Director, Owners Corporation Network, had a similar view, commenting that the profession 'should not be called "certifiers" because that word itself tends to convey a meaning which says that they have looked at every step of the construction process and that they have signed off that work as being compliant'. Ms Hearn told the committee that 'there is a totally understandable misconception that is widely held across the public, and I think across some government agencies, that private certifiers actually perform that role, and they do not'.³⁵⁵
- 4.23** Likewise, Mr Craig Hardy, President of the Association of Accredited Certifiers told the committee that 'we have long held the view with our association that certification is probably not the best choice of word to represent what we do' which is essentially 'giving a permit to build' and not certifying the whole building. Mr Hardy emphasised that certifiers are on the building site 'less than one per cent, probably closer to half a per cent of construction time' and that it is the responsibility of the builder or the project manager or their appointed person to be checking compliance on site.³⁵⁶

Limitations of the role of private certifier

- 4.24** Inquiry participants explained the limitations of the role of a private certifier.
- 4.25** Mr Brett Mace, Chief Executive Officer, Australian Institute of Building Surveyors clarified that building surveyors 'cannot be present on site at all times because legislation does not provide for this'. He stated that the 'sheer numbers of products, complexity of materials, construction system and services that go into buildings make visual detection of non-conforming products near impossible for almost all of these items'. Mr Mace argued that 'the true responsibility for compliance rests with the person undertaking the work and there needs to be much greater accountability for all in the building supply chain'.³⁵⁷
- 4.26** Mr Greg Ewing, General Manager for the Sydney Division, Engineers Australia, also commented on the impossible task of certifiers in being able to inspect what has been built:

The difficulty is in the situation we have now, just to touch on certifiers, that certifiers are effectively certifying after the fact of something. Quite often they cannot see underneath the skin of what has happened ... the architect and the engineers at the

³⁵⁴ Submission 70, Stanton Legal, p 10.

³⁵⁵ Evidence, Ms Jane Hearn, Director, Owners Corporation Network, 12 August 2019, p 33.

³⁵⁶ Evidence, Mr Craig Hardy, President, Association of Accredited Certifiers, 27 August 2019, pp 17-18 and 26.

³⁵⁷ Evidence, Mr Brett Mace, Chief Executive Officer, Australian Institute of Building Surveyors, 27 August 2019, p 14.

beginning can design a diamond and the product that comes out at the end can be a lump of coal.³⁵⁸

4.27 Similarly, Ms Karen Stiles, Executive Officer, Owners Corporation Network, argued that given 'certifiers are on site about 0.5 per cent of the time ... they are too little, too late'. She explained that the system is 'only partially set up' and does not have the 'check and balances', which leaves the certifiers 'in a vulnerable position, because really they are just ticket collectors for people who self-certify'.³⁵⁹

4.28 Mr Michael Lambert, author of the *Independent Review of the Building Professionals Act 2005: Final report*, stated that council and private certifiers 'are given an impossible role'. He explained that certifiers are generalists with an understanding of the building construction code and 'cannot be accountable for the individual designs and the individual construction' which should be the responsibility of the designer and the people building that design.³⁶⁰ Further, Mr Lambert emphasised that the system does not support the certifiers role and there needs to be more accountability placed on other building practitioners:

It is not just a problem of private certification, it is a problem of building regulation in general. Most private certifiers are trying to do a good professional act, but they have not got the support and they have not got the powers required of them to undertake their function effectively and there is no accountability for the range of building professionals who work on a site. So that needs to be resolved. They cannot be the sole expert on site. They need to have the people who are doing the work—the critical elements—accountable and who will sign off certificates for which they are legally liable.³⁶¹

4.29 Stanton Legal highlighted that to do that a person would need to have 'a full time role on site, assistance from various specialist contractors and reasonable payment for such a role' and this is not provided to the certifier.³⁶²

4.30 There was some discussion that reintroducing the role of a clerk of works may fill the gap and address the limitations of the current certifier role.³⁶³ This was discussed in the first report of this inquiry, resulting in a recommendation made to the NSW Government to consider the merits of reintroducing a 'clerk of works' on projects of a significant scale as part of its response to the Lambert report.³⁶⁴

³⁵⁸ Evidence, Mr Greg Ewing, General Manager for the Sydney Division, Engineers Australia, 27 August 2019, p 10.

³⁵⁹ Evidence, Ms Karen Stiles, Executive Officer, Owners Corporation Network, 12 August 2019, p 40.

³⁶⁰ Evidence, Mr Michael Lambert, author of the *Independent Review of the Building Professionals Act 2005: Final report*, 12 August 2019, p 52.

³⁶¹ Evidence, Mr Lambert, 12 August 2019, p 58.

³⁶² Submission 70, Stanton Legal, p 10.

³⁶³ See for example: Evidence, Mr Hardy, Mr Tim Tuxford NSW/ACT Board Director, Australian Institute of Building Surveyors, and Mr Robert Marinelli, Vice-President, Association of Accredited Certifiers, 27 August 2019, pp 20-21; Evidence, Mr Lambert, 12 August 2019, p 58.

³⁶⁴ Public Accountability Committee, NSW Legislative Council, *Regulation of building standards, building quality and building disputes, first report*, (2019), pp 125-128 and 131.

Number of inspections

- 4.31** The current building certification system requires accredited certifiers to undertake a number of mandatory critical stage inspections during the construction of a building. The stages in which inspections must be carried out are regulated in the *Environmental Planning and Assessment Act 1979* and are key to ensuring an occupation certificate can be issued at the end of construction.³⁶⁵
- 4.32** It is the responsibility of the Principal Certifying Authority to carry out these inspections, or an accredited certifier who has been approved by the Principal Certifying Authority. The inspection prior to the issuing of an occupation certificate must be carried out by the Principal Certifying Authority.³⁶⁶
- 4.33** The committee received evidence raising concerns that certifiers only conduct the mandatory inspections and this is insufficient to ensure building quality.
- 4.34** Waverley, Woollahra and Randwick Councils commented that one of the flaws of the *Environmental Planning and Assessment Act 1979* is 'the limited requirement for critical stage inspections, especially of the type of buildings recently highlighted in the media'. The Councils expressed the view that 'it is difficult to point the finger at private certification' when the Act only requires a minimal number of mandatory inspections.³⁶⁷
- 4.35** The Better Planning Network Inc. said that 'Principal Certifying Agents are not required to carry out regular inspections of the building work they are contracted to certify apart from the critical stage inspections required for certification'. The Network explained that these inspections do not specify what needs to be inspected or require the certifier to inspect within a specified time. The Better Planning Network Inc. expressed the view that the 'current lax requirements' could be improved with the reforms proposed in the Lambert Report for inspection regimes for different classes of buildings. However, the Network noted that 'it is not in the commercial interests of a private certifier to diligently pursue a regime of regular inspections to ensure that building is proceeding according to Development Approval specifications'.³⁶⁸
- 4.36** Mr Peter Conroy, an accredited certifier, also commented that 'there are a limited number of mandatory inspections', calling for the inspection regime for apartments and hotel-type buildings to be enhanced, either by principal certifiers or other accredited persons'.³⁶⁹
- 4.37** Similarly, Penrith City Council commented that 'the number of critical stage inspections varies depending upon the class of building' and indicated 'that there is a stricter inspection regime in place for a single detached dwelling than for a residential [multi-storey] flat building'. The Council was of the view that given 'the defects being identified in some residential [multi-storey] flat buildings it may be worthwhile expanding the critical stage inspection regime to include additional inspections and allow other professionals such as structural engineers to be accredited and sign off on structural aspects'.³⁷⁰

³⁶⁵ Submission 132, NSW Government, p 17.

³⁶⁶ Submission 132, NSW Government, p 17.

³⁶⁷ Submission 86, Waverley, Woollahra & Randwick Councils, p 5.

³⁶⁸ Submission 142, Better Planning Network Inc., pp 3-4.

³⁶⁹ Submission 114, Mr Peter Conroy, p 2.

³⁷⁰ Submission 139, Penrith City Council, p 1.

- 4.38** The expansion of the inspection regime for Class 2-9 buildings was recommended by Willoughby City Council, which highlighted that 'in light of recent examples of building construction failures, particularly relating to high rise buildings' the current inspection regime needs to be addressed.³⁷¹
- 4.39** The Planning Institute of Australia (NSW) also raised concerns that 'depending on the complexity of a project, too few pre and post construction certification inspections occur'. The Institute therefore recommended that more frequent inspections occur at critical stages:

PIA recommends that the currently proposed Building Commissioner mandate the points at which inspections occur across different types of projects and consider an optimum inspection regime that increases the frequency and better targets inspections at critical stages. It should also take account of which type of expert should contribute at each inspection. Each inspection should result in a transparent electronic trail of documentation that is accessible to the Building Commissioner, Building Professional Board – and ultimately the interested public.³⁷²

On-site inspections

- 4.40** Another issue highlighted by inquiry participants is that certifiers are not actually visiting the worksite to conduct on-site inspections.
- 4.41** Mr Terry Jones, a long term strata committee member, said that 'physical inspections at critical stages are essential to verify that there is real compliance with standards' and 'to be effective, these inspections must actually [be] carried out, and carried out by truly independent and appropriately qualified professionals'. The author asserted that 'the present system clearly does not ensure that this happens'.³⁷³
- 4.42** Mr John Murray, an architect, reflected on two projects he worked on and compared the due diligence of the private certifier with a local council certifier:

The local government certifier was actively engaged in the design of the project, studying my design carefully and offering constructive criticism and suggestions as to how to proceed. The local government official inspected the project thoroughly at all the required stages of the construction. Once my other project was registered with the private certifier they took no further interest. It appeared that they did not bother to study my documents. When, at the request of the builder, an inspector came to check the footings for the correct reinforcing before the concrete was poured he came just near enough to the site to ask the builder "Everything okay?" and then left without looking at the footings.³⁷⁴

- 4.43** Ms Maureen Partridge had a similar experience, where a certifier inspecting construction work on her home did not visually inspect the works:

³⁷¹ Submission 44, Willoughby City Council, p 1.

³⁷² Submission 124, Planning Institute of Australia (NSW), p 3.

³⁷³ Submission 94, Mr Terry Jones, p 5.

³⁷⁴ Submission 91, Mr John Murray, p 1.

I have personally witnessed the 'work' of a private certifier tasked to inspect a first floor elevated extension to a private home. He was engaged by the builder, though he was unknown to the builder previously. The man walked down the driveway, introduced himself to the builder and asked 'all okay mate?'. When the builder replied in the affirmative the 'certifier' replied 'all good then' and left, never having left the driveway. The builder was disgusted. Nice work if you can get it. On that example even I could be employed as a 'certifier'.³⁷⁵

Documentation and certificates

- 4.44** The mandatory critical inspection process requires accredited certifiers to scrutinise the certificates provided to them by building practitioners and ensure, amongst other things, that the relevant Building Code of Australia provisions are referenced in that documentation.³⁷⁶
- 4.45** Similar to mandatory inspections, inquiry participants raised concerns that the certificates relied upon by accredited certifiers are not worth the paper they are written on.
- 4.46** For example, Ms Kathlyn Loseby, President NSW, Australian Institute of Architects, commented that the certificates relied upon by certifiers hold no value:

Certifiers do not know everything; they never have been required to. They really just collect other people's certificates. The thing is, what are those certificates? What are they worth? If the person behind them redesigned the mechanical ducting and built it themselves and then they are out of business next week ... The self-certification has got no value.³⁷⁷

- 4.47** Mr Brett Daintry, Director, Daintry Associates, had a similar view, describing a certificate issued under this system as 'a useless piece of paper'. He provided the example of waterproofing, which is 'the biggest single building defect in this state', and explained that only 10 per cent of wet areas in large buildings are inspected and sometimes the tiler or company putting in these wet areas will provide a certificate which is accepted as evidence of suitability under the building code and 'that's it'.³⁷⁸ Mr Daintry went further, and claimed that many in the building industry 'provide accredited certifiers with false and misleading information, even forged documents ... as evidence of suitability'.³⁷⁹
- 4.48** Another building industry professional, Mr Grahame Vile, Director, BAAM Consulting, told the committee that he sees the documents that certifiers have relied on and at times they 'do not even refer to the right standard'. He said that all you will find on the certificate is a 'two-line statement saying, "I certify the bathroom waterproofing complies with AS3740", stating 'that is okay, that is the right standard, but what year, what clause, what specific details? None of that comes through'.³⁸⁰

³⁷⁵ Submission 55, Ms Maureen Partridge, p 1.

³⁷⁶ Submission 132, NSW Government, p 18.

³⁷⁷ Evidence, Ms Kathlyn Loseby, President NSW, Australian Institute of Architects, 16 August 2019, p 56.

³⁷⁸ Evidence, Mr Brett Daintry, Director, Daintry Associates, 16 August 2019, p 77.

³⁷⁹ Submission 8, Mr Brett Daintry, p 12.

³⁸⁰ Evidence, Mr Grahame Vile, Director, BAAM Consulting, 20 February 2020, p 24.

- 4.49** The Byles Creek Valley Union Inc. commented that the 'submitting of erroneous, misleading, incomplete and conflicting information has become a major problem and Private Certification has further brought these issues into the limelight with substandard and non-compliant certifications'. The Union called for action to be taken to rectify these issues 'to stop what is looking like a future glut of dangerous, short lived developments putting lives, communities and our environment at risk'.³⁸¹
- 4.50** Australian Foundation Systems Pty Ltd, a screw pile, concrete foundation systems and steel sheet pile solutions manufacturing and installation business, underscored that certifiers are relying on the information that they receive from building practitioners. According to the submission, hand written records are a problem because they can be falsified and manipulated to look viable. It reported that with the absence of visual inspections by certifiers this gives practitioners 'far too much opportunity to cheat and then inform the certifier that the product and installation has met a specification required by the engineer'. Australian Foundation Systems Pty Ltd emphasised that it is much cheaper for builders to use 'inferior products that are not fit for purpose, or sub optimal installation' and avoid responsibility by relying on false compliance certificates that are backed up by the certifiers insurance policy.³⁸²
- 4.51** Mr David Dickson, Consulting Engineer, also raised the concern of builders avoiding their responsibility by relying on the certificates provided by subcontractors:
- There is a lack of chain of responsibility and there is a culture that has developed where builders—building foremen in particular—rely upon receiving a piece of paper that says everything is okay and by having that piece of paper they believe that both legally and more importantly morally relieves them from any responsibility in the work that they do. This goes all the way through the industry and it is what I think is the base cause of the issues that you are seeing today.³⁸³
- 4.52** Mr Dickson observed that more experienced engineers might not be intimidated by a builder putting pressure on them and have the financial means to withstand the withholding of money. However, Mr Dickson said that younger engineers are not in this position and 'so they succumb to the pressure—they succumb to being coerced into giving certificates for things they have not seen or do not know have been changed in the time between when they have seen it and the concrete poured' for example.³⁸⁴

Discrepancies between documentation and as-built buildings

- 4.53** Some inquiry participants raised concerns that changes made while a building is constructed are usually not documented. For example, Cr Linda Scott, President of Local Government NSW, told the committee that at times approved plans do not match the final product and the documentation in the middle is inadequate:

One of the problems with building regulation today – especially the complex multi-storey buildings seen over the last 10-15 years – is that changes during construction are

³⁸¹ Submission 119, Byles Creek Valley Union Inc., p 5.

³⁸² Submission 82, Australian Foundation Systems Pty Ltd, p 2.

³⁸³ Evidence, Mr David Dickson, Consulting Engineer, 16 August 2019, p 60.

³⁸⁴ Evidence, Mr Dickson, 16 August 2019, p 61.

not well documented; the as-built product does not necessarily align with the approved plans, and records of the variations are poor or non-existent.³⁸⁵

4.54 Pro Cert Group Pty Ltd reported that on projects they have been involved in, 'there have been instances where building designs, structural designs, product specifications and the like are changed without consultation with the certifier'. It advised that this can result in non-compliant building work or products being used that are not easily identified with a visual inspection, and certifiers are held liable because they hold insurance:

... [S]ince the certifier is the last man standing in liability terms they, even though through no fault of their own, have certified a non-compliant building and should there be any ramifications occur from this design change they will be the ones held to account, not the person or persons who were responsible for the change.³⁸⁶

4.55 Mr Jonathan Russell, National Manager for Public Affairs, Engineers Australia, advised that the weakness in the system with certifiers inspecting works 'after the fact' and only 'a small percentage of [building work]', creates the risk that the final product may not match the intended design. Mr Russell commented that suitably qualified professionals are needed to modify the design and document changes along the way:

The builders will have people—a good builder should have people who are qualified—to make intelligent engineering decisions about how to modify the original design, but it is a matter of making sure that those people are definitely qualified to do so and are qualified enough to be cognisant of when they need to talk to the original designer and what sort of documentation is required so that the final owner of the building, like the strata body, actually knows what was built. They do not just have the original plan and what was missing in the middle.³⁸⁷

4.56 Ms Loseby gave evidence about the documentation that owners might be provided at the end of construction, highlighting that it 'can be quite a vast difference between what was documented and what was actually built'. Further, Ms Loseby indicated that as-built or record drawings are sometimes provided and sometimes not at the end of a project. Ms Loseby and Ms Leanne Hardwicke, General Manager Policy, Advocacy and Education, Australian Institute of Architects, suggested the following solutions to achieve a better quality as-built set of documents at completion:

- a clerk of works on site managing the documentation as the building is being built
- all documents being lodged electronically in one place, held by the Building Commissioner and searchable by authorities if required
- warranties and manuals handed over to the strata owners on completion, including any updates and changes to the building design.³⁸⁸

³⁸⁵ Answers to questions on notice, Cr Linda Scott, President, Local Government NSW, 3 September 2019, pp 3-4.

³⁸⁶ Submission 75, Pro Cert Group Pty Ltd, p 3.

³⁸⁷ Evidence, Mr Jonathan Russell, National Manager for Public Affairs, Engineers Australia, 27 August 2019, p 10.

³⁸⁸ Evidence, Ms Loseby and Ms Leanne Hardwicke, General Manager Policy, Advocacy and Education, Australian Institute of Architects, 16 August 2019, pp 57-58.

- 4.57** Mr Lambert also called for a digitally based building information system. His recommendations included to:
- i. Establish a digitally based information system for all buildings that keeps information on building plans, approvals and certifications.
 - ii. Establish a digitally based building manual for all commercial buildings and residential class 2 and 3 buildings that is accessible to the building owner, fire authorities and the building regulator that records information on the building plans, approvals, critical building systems and elements, including fire protection systems and all post occupancy work undertaken. This should become mandatory for all new commercial and residential class 2 and 3 buildings and be phased in for existing buildings.³⁸⁹
- 4.58** The Shergold Weir Report also recommended 'that each jurisdiction requires that there be a comprehensive building manual for Commercial buildings that should be lodged with the building owners and made available to successive purchasers of the buildings'.³⁹⁰
- 4.59** Mr Karl Sullivan, Head of Risk and Operations, Insurance Council of Australia, commended this recommendation and highlighted that the building manual would provide 'a suite of documents that adequately describes all of the performance-based solutions that went into its design, who designed it, who approved it, how you maintain it'. Mr Sullivan stated that this 'would put insurers in a position to be able to adequately insure these'.³⁹¹
- 4.60** The electronic collection of documentation was also recommended by a number of other inquiry participants, including Mr Daintry,³⁹² Cr Scott from Local Government NSW,³⁹³ Mr Tim Tuxford from the Australian Institute of Building Surveyors,³⁹⁴ Mr Craig Hardy and Mr Robert Marinelli from the Association of Accredited Certifiers,³⁹⁵ and the Australian Foundation Systems.³⁹⁶
- 4.61** Many inquiry participants emphasised that fundamentally, all building practitioners that provide documentation and produce certificates need to be held to account through a licensing and accreditation scheme that requires practitioners to hold insurance.³⁹⁷ This was a recommendation made in the first report of this inquiry.

³⁸⁹ Submission 56, Mr Michael Lambert, p 12.

³⁹⁰ Professor Peter Shergold AC and Ms Bronwyn Weir, *Building Confidence: Improving the effectiveness of compliance and enforcement systems for the building and construction industry across Australia*, February 2018, p 35.

³⁹¹ Evidence, Mr Karl Sullivan, Head of Risk and Operations, Insurance Council of Australia, 12 August 2019, p 49.

³⁹² Submission 8a, Mr Brett Daintry, p 1; Evidence, Mr Daintry, 16 August 2019, p 76.

³⁹³ Answers to questions on notice, Cr Scott, 3 September 2019, pp 4-5.

³⁹⁴ Evidence, Mr Tuxford, 27 August 2019, pp 22-23.

³⁹⁵ Evidence, Mr Hardy and Mr Marinelli, 27 August 2019, pp 22-24.

³⁹⁶ Submission 82, Australian Foundation Systems Pty Ltd, p 2.

³⁹⁷ Submission 152, Wollongong City Council, p 2; Submission 87, Urban Development Institute of Australia - NSW Division, p 5; Submission 75, Pro Cert Group Pty Ltd, p 3; Submission 56, Mr Michael Lambert, p 8; Submission 8, Mr Brett Daintry, pp 10-11; Evidence, Mr Robert Marinelli, Vice-President, Association of Accredited Certifiers, 27 August 2019, p 16; Submission 145, Local

Occupation certificate

- 4.62** A separate but related issue raised by local councils at a hearing in Newcastle is instances where an occupation certificate has not been issued and when it comes time to sell a property discrepancies are found with the as-built design compared to the approved development application.
- 4.63** Mr Nick Greenhalgh, Senior Development/Building Officer, Dungog Shire Council, explained that a development application consent would be issued based on the required conditions of that consent, following which a construction certificate is issued and mandatory inspections are undertaken by a certifier. Mr Greenhalgh advised that this process is 'generally fairly well regulated', however the process then 'allows for the development to proceed to a point of occupation, but there is no closure in that process where there is an obligation on the certifier to follow-up to find out whether a development has been occupied without consent, and that often then becomes apparent only at the sale of the property'.³⁹⁸
- 4.64** Mr Greenhalgh provided the example of bushfire controls and safety assets having been specified in the development application and consent not being complied with by the time the building reaches the stage of an occupation certificate. He advised that there is an obligation to obtain an occupation certificate or demonstrate why one has not been obtained, however for certificates issued prior to 1 December 2019 there is no time frame in place to obtain that occupation certificate and 'it could be decades down the track'. Mr Greenhalgh noted that there is a discrepancy between the number of development consents and occupation certificates issued, especially in regional areas:
- As an example, in the Dungog shire area we issue around about 200 development applications, on average, a year; of those, about 70 are dwellings and of those we note that occupation certificates are issued on 20 to 30, on average, a year, leaving a large number of dwellings being constructed in isolated bushfire-prone areas that, in my experience, do not meet the minimum standards for access for emergency service vehicles for on-site fire protection and similar bushfire protection measures.³⁹⁹
- 4.65** Further, Mr Greenhalgh advised that even with the statutory obligation for works on a building to be completed within five years 'there is no obligation on the certifier to follow up' and it is unlikely a certifier would follow up as 'there is no cost recovery system in place'. Mr Greenhalgh expressed the view that five years is too long and there should be a follow-up inspection within two years allocated to the responsible certifier.⁴⁰⁰

Government NSW, p 6; Submission 128, Mr Charles Slack-Smith, p 2; Submission 85, Mr Justin Jones-Gardiner, p 2; Submission 35, Mr Che Leonard, p 1.

³⁹⁸ Evidence, Mr Nick Greenhalgh, Senior Development/Building Officer, Dungog, Shire Council, 20 February 2020, pp 12-13.

³⁹⁹ Evidence, Mr Greenhalgh, 20 February 2020, pp 12-13.

⁴⁰⁰ Evidence, Mr Greenhalgh, 20 February 2020, p 14.

- 4.66** Ms Christine Robinson, Manager Planning Building and Regulatory Services, Upper Hunter Shire Council, agreed with the concerns that Mr Greenhalgh put forward, stating that 'we definitely deal with the same problems in the follow-up of occupation certificates' and noted that it usually 'comes to light when or if the property is sold'.⁴⁰¹
- 4.67** Mr Andrew Henry, Building Certifier/Coordinator Regulatory Services, Singleton Council, also informed the committee that 'Singleton Council's experience has been the same with regards to occupation certificates and development that has not been completed, that quite often that will come up at the conveyancing stage, that those issues will be identified in relation to bushfire and fire safety measures'.⁴⁰²
- 4.68** In terms of the action from council when this occurs, Mr Greenhalgh explained it is usually around the high-pressure time of selling a property that council will become aware and would need to use their discretion as to whether or not to issue a notice:
- It is at the sale of a property, which is normally a fairly dynamic time and a lot of pressure ... When I turn up on site, I do an audit of the original consent and if there are access—I appreciate the example, access road non-compliant. We will need to make a judgement on whether that warrants the issue of an order or a notice under the different Acts. In some situations, it would. In other situations where it may be considered minor in nature—and that is a judgement call. It is not prescribed.⁴⁰³
- 4.69** Mr Greenhalgh went on to say that in the last 30 years in local government he has only issued a fine on an owner of a property once, explaining that issuing fines 'does not serve the benefit of rectifying the noncompliance' as they would rather see that money put into remediation works. In terms of prosecuting against a breach of the legislation, Mr Greenhalgh advised that 'once the building is occupied for 12 months, the councils have 12 months to catch the person in breach of the legislation', and 'following that time, the offence cannot be prosecuted'.⁴⁰⁴
- 4.70** When questioned on whether to implement a compulsory inspection two years after a construction certificate is issued, Mr Greenhalgh and Mr Henry both agreed with this proposal.⁴⁰⁵ Further, Mr Henry said that you would also need to look at the resourcing for conducting these inspections, especially in regional areas.⁴⁰⁶
- 4.71** In relation to reporting, Mr Greenhalgh said that reporting requirements for construction certificates and occupation certificates could be introduced as part of the electronic lodgement of certificates under the ePlanning process, where councils could be notified when certain development types have been completed and then there is no further action.⁴⁰⁷

⁴⁰¹ Evidence, Ms Christine Robinson, Manager Planning Building and Regulatory Services, Upper Hunter Shire Council, 20 February 2020, p 13.

⁴⁰² Evidence, Mr Andrew Henry, Building Certifier/Coordinator Regulatory Services, Singleton Council, 20 February 2020, p 13.

⁴⁰³ Evidence, Mr Greenhalgh, 20 February 2020, p 15.

⁴⁰⁴ Evidence, Mr Greenhalgh, 20 February 2020, p 15.

⁴⁰⁵ Evidence, Mr Greenhalgh and Mr Henry, 20 February 2020, p 16.

⁴⁰⁶ Evidence, Mr Henry, 20 February 2020, p 16.

⁴⁰⁷ Evidence, Mr Greenhalgh, 20 February 2020, p 17.

Conflicts of interest

- 4.72** Under the legislation an accredited council or private certifier can only be contracted and engaged by the person with the benefit of development consent, namely the owner. Technically, it is the owner's choice who they engage as a certifier and the builder is not able to appoint the certifier or the Principal Certifying Authority. The owner is also not obligated to engage a certifier who has been suggested by the builder.⁴⁰⁸ Where a property development is being undertaken by a developer, it is the developer who then appoints the certifier or Principal Certifying Authority.⁴⁰⁹
- 4.73** Many inquiry participants suggested that the way in which this model works creates a conflict of interest between the developer and the certifier. Comments from submission authors on this issue are detailed below.
- "The inherent conflict of interest between a private certifier's legal responsibility as a "public officer" (i.e. to act in the public interest) and their commercial interests has been a major flaw in the private certification system since its introduction in 1998".⁴¹⁰
 - "With the engagement of the private certifier being primarily commissioned by the head contractor, there is certainly examples of conflicts of interest between the certifier and the head contractor and what is best for the development and in turn, the client (owner/developer)".⁴¹¹
 - "The private certification system will continue to have a real and perceived conflict of interest which comes from being funded by the developer, whose interest is in the speed of construction and profitability of the development. Certifiers rely on maintaining amiable relationships with developers to ensure future work".⁴¹²
 - "There are clear and unavoidable conflicts of interest inherent in the whole concept of private certification as it currently operates ... It is clearly against the financial interests of private certifiers to impose cost increases or time delays to enforce compliance when their future business depends on the builder or developer selecting them to certify other projects".⁴¹³
 - "While it is nice to think of Certifiers as independent regulators and public officials who do not work for builders, developers or homeowners and must put the public interest first and only issue certificates if all legislative requirements are met the reality is that there is an inherent conflict of interest in this arrangement".⁴¹⁴
- 4.74** The committee also received information on the conflict of interest issue from the NSW Independent Commission Against Corruption (ICAC), in particular the extent of the problem as indicated by the complaints it has received. The Commission noted that although the system of building certification services is at heightened risk of an inherent conflict of interest, it

⁴⁰⁸ Submission 74, Association of Accredited Certifiers, p 4.

⁴⁰⁹ Submission 132, NSW Government, p 15.

⁴¹⁰ Submission 145, Local Government NSW, p 5.

⁴¹¹ Submission 169, MCG Quantity Surveyors, p 1.

⁴¹² Submission 143, City of Sydney, p 4.

⁴¹³ Submission 94, Mr Terry Jones, p 4.

⁴¹⁴ Submission 61, National Fire Industry Association, p 10.

reported that 'it receives relatively few complaints alleging corrupt conduct by a building certifier'. The Commission outlined that since January 2013 it has received the following complaints:

- 3 notices of possible corrupt conduct from the Building Professionals Board
- 1 notice of possible corrupt conduct from the NSW Ombudsman
- 7 notices of possible corrupt conduct from NSW local councils
- 24 complaints from members of the public alleging corrupt conduct
- occasional reports of a development applicant offering a gift or payment to a certifier.⁴¹⁵

4.75 The Commission explained that 'none of the matters raised above have led to findings of corrupt conduct'. It considered that on the face of these figures it would seem there is little corruption in the industry, however the Commission suspected that the risk of corrupt conduct may be understated. The reasons provided include that there is usually a time lapse between improper certification and the identification of building defects, it is difficult to distinguish between incompetence and corruption unless there is evidence of a corrupt payment or favour, the Building Professionals Board role does not extend to investigating the possibility of an unprofessional relationship with a builder, developer or land owner and that the building/development industry will naturally prefer to engage certifiers who are customer-friendly or lenient.⁴¹⁶

Proposals to address conflicts of interest

4.76 Inquiry participants put forward a number of suggestions that could remove the conflict of interest between the certifier and developer or landowner.

4.77 A 'taxi-rank' system to appoint certifiers (where a certifier is appointed based on who is next on the list among a pool of approved certifiers) was one of the most common proposals raised by inquiry participants. The Better Planning Network Inc. suggested local councils or another appropriate government body 'maintain a list of well vetted, qualified and accredited independently operating certifiers' that would be assigned to projects on a rotational basis.⁴¹⁷ The National Fire Industry Association⁴¹⁸ and the Byles Creek Valley Union Inc.⁴¹⁹ also supported such a model where certifiers are assigned to projects by local councils.

4.78 The committee received evidence from some local councils on this issue. Liverpool City Council was of the view that to prevent unsuitable relationships between developer and certifier, the government should appoint the private certifier from a list of those registered to work in an area or region.⁴²⁰ Along similar lines, the Hornsby Shire Council recommended that local councils appoint the building certifier and Principal Certifying Authority through an 'established local

⁴¹⁵ Submission 131, NSW Independent Commission Against Corruption, p 2.

⁴¹⁶ Submission 131, NSW Independent Commission Against Corruption, pp 2-3.

⁴¹⁷ Submission 142, Better Planning Network Inc, p 6.

⁴¹⁸ Submission 61, National Fire Industry Association, p 10.

⁴¹⁹ Submission 12, Name suppressed, p 2.

⁴²⁰ Submission 158, Liverpool City Council, p 1.

building certifier panel ensuring that there is no connection between the builder and the regulator'.⁴²¹

4.79 The Urban Development Institute of Australia recommended that 'no certifier receives more than 50 per cent of its revenue from one client and must have at least five clients', and explained that 'by ensuring a firm is not dependent on revenue from a dominant client, a certifier is more empowered to resist any undue pressure and act independently'.⁴²²

4.80 However, Mr Ian Robertson, Secretary, Development and Environmental Professionals' Association (DEPA), was not convinced that a 'taxi-rank' system would work, stating that the certifier would still be ultimately paid by the developer and 'there is still that difficulty of wanting things done that the developer does not really want to do'.⁴²³

4.81 Mr Lambert was also of the view that the 'taxi-rank' system would not be effective in improving professional standards among certifiers, and instead suggested auditing as the solution:

I think they [cab rank model] are not particularly effective because they do not address the fundamental problem of poor certifiers who still practice. You could have them part of the casino wheel or picked out of a box. You fundamentally need to address the underlying problem which is certifiers who are not professionals. They are a small minority but they keep on happening as recent press statements indicated. You need to get rid of the people who are inappropriately undertaking their job, which requires auditing.⁴²⁴

4.82 The ICAC supported stronger measures to address potential conflicts, such as regular auditing. The Commission advised that 'the relevant code of conduct and the definitions of a "conflict of interest" and "pecuniary interest" in the yet to commence *Building and Development Certifiers Act 2018* may not adequately deal with this particular problem', and made the following recommendations:

Consequently, the Committee should consider the need for:

- a stronger mandate for the Secretary to identify and address situations where a certifier is at risk of becoming financially dependent on a particular customer. This could include enhanced information gathering powers, more frequent audits or inspections and the ability to disrupt improper relationships by rotating the use of certifiers
- refinements to the code of conduct made under section 32 of the Building and Development Certifiers Act 2018 and associated educational programs.⁴²⁵

4.83 Other inquiry participants supported implementation of the recommendation made in the 2002 Campbell report for a targeted auditing system where there is known to be a "close relationship" between a developer and certifier.⁴²⁶ For example, Local Government NSW believed that

⁴²¹ Submission 33, Hornsby Shire Council, p 1.

⁴²² Submission 87, Urban Development Institute of Australia - NSW Division, p 6.

⁴²³ Evidence, Mr Ian Robertson, Secretary, Development and Environmental Professional's Association (DEPA), 27 August 2019, p 34.

⁴²⁴ Evidence, Mr Lambert, 12 August 2019, p 55.

⁴²⁵ Submission 131, NSW Independent Commission Against Corruption, p 3.

⁴²⁶ Joint Select Committee on the Quality of Buildings, Parliament of NSW, *Report upon the Quality of Buildings* (2002), p 117.

implementing this recommendation would be an important measure to reduce the poor outcomes that arise from conflicts of interest.⁴²⁷ The City of Sydney said that 'more action is needed to address the inherent conflict of interest' and made the following recommendation:

Introduce accountability at all levels of the certification process through an immediate overhaul of the procurement of private certification practices including consideration of fee reforms, independent peer review of alternative solutions, increased onsite and desktop auditing of private certifiers, as well as clear enforcement pathways and-reporting obligations.⁴²⁸

- 4.84** However by contrast, the Housing Industry Association questioned whether additional measures are needed to address potential conflicts of interest. The Association argued that 'the conflicts of interest provisions for building certifiers in NSW have been extensive' and 'changes made to these provisions in the last decade have served to clarify and strengthen these rules in relation to building design'. It contended that 'the NSW regulations to address conflict of interest remain the strongest in Australia' with adequate penalties existing under the *Building Professionals Act* and the new *Building and Development Certifiers Act 2018*. The Association stated that 'once these new measure are fully implemented they will assist with restoring confidence in the impartiality of certifiers'.⁴²⁹

Professional support and training

- 4.85** Inquiry participants raised concerns that there is a lack of support available to certifiers and limited opportunities for professional development and training, particularly for sole traders.
- 4.86** Mr Lambert told the committee that certifiers do not have access to 'basic support', explaining that usually certifiers are sole traders and therefore there is no requirement for them to undertake professional development, no expert panels they can draw upon for advice, no state practice guide and no ongoing audit of their work quality.⁴³⁰ Mr Lambert advised that certifiers 'need to be subject to training and to professional standards and they need to be subject to independent review where their work can be examined and assessed'.⁴³¹
- 4.87** Mr Daintry also commented on the lack of support structures for certifiers. He acknowledged that 'the vast majority of accredited certifiers are people of high standing', however noted that with any profession there is 'a small minority [that] are the problem'. Mr Daintry explained that it is sole practitioners in particular that are lacking the support required:

Many sole practitioners in particular go to university, most have limited experience and limited guidance from highly experienced practitioners. They then progress from level to level and don't have adequate management support structures and no or very little peer review on a daily basis. The only exceptions are a few larger and well-structured high end certification companies where high ethical standards are also applied ...⁴³²

⁴²⁷ Submission 145, Local Government NSW, p 5.

⁴²⁸ Submission 143, City of Sydney, p 4.

⁴²⁹ Submission 140, Housing Industry Association, p 7.

⁴³⁰ Evidence, Mr Lambert, 12 August 2019, p 52.

⁴³¹ Evidence, Mr Lambert, 5 November 2019, p 45.

⁴³² Submission 8, Mr Brett Daintry, pp 1-2.

- 4.88** The Planning Institute of Australia suggested 'high training and competency standards must be maintained for certifiers and all accountable design and building professionals' through industry registration and 'the accompanying competency, continuing professional development and code of conduct requirements'.⁴³³
- 4.89** Mr Mace from the Australian Institute of Building Surveyors commented that 'the issues relating to certification are not just the responsibility of government', but also the industry. Mr Mace advised that his organisation has been working on developing a professional standards scheme for building surveyors and 'expect this scheme will provide increased consumer protection and raise the standards of our profession immeasurably'.⁴³⁴
- 4.90** The Association of Accredited Certifiers also informed the committee of the development of a Professional Standards Scheme, which 'will enhance and improve the professional practices' of its members and 'elevate the standard of members' services to their clients'. The Association explained that the scheme will provide 'targeted and effective education for members to ensure they remain informed of the best practice and customer care'.⁴³⁵

Skills shortage in the industry

- 4.91** Another issue raised was a shortage of qualified and experienced certifiers within the industry, particularly in regional areas.
- 4.92** Pro Cert Group Pty Ltd described a number of key features relating to the skills shortage, including:
- a resourcing crisis in regional New South Wales with only a small pool of certifiers across the private and government sectors
 - a decline in the number of certifiers in the industry due to practitioners retiring either through planned retirement or due to the professional indemnity insurance crisis bringing forward those plans
 - difficulties of local councils in filling job vacancies
 - a lack of younger certifiers coming through to fill the positions of those exiting the industry.⁴³⁶
- 4.93** Pro Cert Group Pty Ltd advised that 'this resourcing issue will ultimately result in delays to development approval times and construction programs'. It also highlighted that it 'will lead to a significant worsening of the skills shortage in regional NSW for certification professionals which is already occurring'.⁴³⁷
- 4.94** The committee visited Newcastle as part of its inquiry and heard from regional councils on the difficulties in recruiting accredited and qualified certifiers in their regions.

⁴³³ Submission 124, Planning Institute of Australia, p 3.

⁴³⁴ Evidence, Mr Mace, 27 August 2019, pp 14-15.

⁴³⁵ Supplementary submission 74a, Association of Accredited Certifiers, p 1.

⁴³⁶ Submission 75, Pro Cert Group Pty Ltd, p 1.

⁴³⁷ Submission 75, Pro Cert Group Pty Ltd, pp 1-3.

- 4.95** Mr Henry from Singleton Council informed the committee that 'we find it increasingly difficult to recruit new staff', and explained that if council were to engage a trainee there is a 'significant' time lag for training and qualifications.⁴³⁸
- 4.96** Ms Robinson from Upper Hunter Shire Council advised that the council has had a vacant certifier position for the past two years. Ms Robinson outlined the difficulties this creates:
- It is certainly very difficult. We have two of us at the moment who do it full time and I think it would be very difficult if one of those incumbents were to move on. We would be very difficult to replace. And, as I said, we do have one vacant position. Both our neighbouring councils, being Muswellbrook and Liverpool Plains, do not have a certifier on staff currently. They hire in private certifiers to do the council's work ... It does not work. We had shared resources with Muswellbrook when they have been stuck, but then that certainly leaves us even more under-resourced. It is certainly a problem.⁴³⁹
- 4.97** Mr Greenhalgh advised that at Dungog Council he is the only certifier and that it is challenging for the smaller councils to find 'qualified and experienced staff to take up positions if the positions become vacant'.⁴⁴⁰
- 4.98** When questioned as to whether a state government training and recruitment budget would assist in addressing the skills shortage, Singleton Council, Dungog Shire Council and Upper Hunter Shire Council all agreed that it would.⁴⁴¹

Means to address problems with private certification

- 4.99** There was much debate as to whether building certification should return to the previous system in which local councils undertook this role. This section outlines the arguments for and against private certification, as well as ways to improve the current model, should it be retained.

A return to local council certification?

- 4.100** Numerous inquiry participants called for the role of building certification to return to local councils.
- 4.101** For example, a number of submission authors believed returning building certification to local councils is the best step forward,⁴⁴² with some of the commentary from these submissions outlined below.

⁴³⁸ Evidence, Mr Henry, 20 February 2020, p 18.

⁴³⁹ Evidence, Ms Robinson, 20 February 2020, p 18.

⁴⁴⁰ Evidence, Mr Greenhalgh, 20 February 2020, p 18.

⁴⁴¹ Evidence, Mr Greenhalgh, Mr Henry, Ms Robinson and Mr Phil Hoawerth, Building Certifier/Process Improvement Specialist, Singleton Council, 20 February 2020, p 19.

⁴⁴² For example: Submission 4, Mrs Louise Wilding; Submission 6, Name suppressed; Submission 11, Name suppressed; Submission 48, Mr John Inshaw.

- '... [C]entral to the emerging disasters of our building industry is the privatisation of certification. It has been a complete failure. This failure is no surprise to me. Regulation and its enforcement is the business of government, not of private enterprise'.⁴⁴³
- 'The only outright alternative to the current private certification system is to disband it and return the process to the exclusive control within local government'.⁴⁴⁴
- '... [P]rivate-sector certification of buildings was introduced in 1998 and instead of simplifying the planning approval and building certification process, it has undoubtedly made it more complex, more expensive, more litigious and less credible and reliable'.⁴⁴⁵
- 'No official oversight of building standards. Private certification has proven a disaster and must be reversed. Government needs to do its job. As more people are forced to live in apartments, this must be addressed to stave off future problems and developers creating the slums of tomorrow'.⁴⁴⁶
- 'Friends of Erskineville calls for the scrapping of the private certification system in favour of a public authority with the necessary skill and independence to ensure safe and high quality construction'.⁴⁴⁷

4.102 A strong advocate for local council certification was DEPA. DEPA vigorously opposed the move to privatisation in 1998 and continues to oppose the current private certification model.⁴⁴⁸ Mr Robertson argued 'that the model itself is so fundamentally flawed with the inherent conflict of interest that it is impossible to manage it in a way that allows people to have confidence in it'. Mr Robertson was of the view that the only way for certification to work effectively is by returning the function to local government. Mr Robertson highlighted that a return to local government 'would require significant lead time to ensure that, with the cooperation of government and funding assistance, councils were able to retrieve something which they did run, without the dramas that we have witnessed over the last 20 years'.⁴⁴⁹

4.103 Mr Daintry was another witness who was strongly opposed to privatisation when it was first introduced. Mr Daintry supported this function returning to local government but feared that over the last 20 years we have 'gutted local government of the expertise to have it handed back to them'.⁴⁵⁰

4.104 The Construction, Forestry, Mining and Energy Union (NSW Branch) recommended that certification either be carried out by local councils or through a Building Commission, and 'this will lead to greater transparency, consistency and a surety that these functions are carried out in accordance with the relevant legislative requirements'.⁴⁵¹

⁴⁴³ Submission 91, Mr John Murray, p 1.

⁴⁴⁴ Submission 114, Mr Peter Conroy, p 2.

⁴⁴⁵ Submission 86, Waverley, Woollahra & Randwick Councils, p 3.

⁴⁴⁶ Submission 20, Name suppressed, p 2.

⁴⁴⁷ Submission 72, Friends of Erskineville, p 3.

⁴⁴⁸ Submission 65, Development and Environmental Professionals' Association (DEPA), p 2.

⁴⁴⁹ Evidence, Mr Robertson, 27 August 2019, p 27.

⁴⁵⁰ Evidence, Mr Daintry, 16 August 2019, p 81.

⁴⁵¹ Submission 173, Construction Forestry Mining and Energy Union (NSW Branch), p 2.

- 4.105** Ms Therese Doyle, Member, Better Planning Network Inc. and Co-convenor, Newcastle Hunter Urban Planning and Transport Alliance, advocated for private certification to return to public control. Ms Doyle told the committee that 'the most important thing for us is to break the nexus of direct conflict of interest' in the certification industry, and although their fallback position would be the 'taxi-rank' model, their major recommendation is a return to public control.⁴⁵²
- 4.106** The committee questioned Cr Scott of Local Government NSW, who appeared before the committee on three occasions, on the feasibility of returning certification to local councils. At her first appearance, Cr Scott advised that 'different councils take a different view about whether or not private certification should be resumed back into council functions'.⁴⁵³ Further, Cr Scott advised that given the diversity of views there would need to be ample consultation with all local councils about where certification functions should be placed and managed.⁴⁵⁴
- 4.107** Having undertaken further consultation among councils, at a later hearing Cr Scott told the committee that councils had adopted a new policy at their annual conference calling for 'a review of the private certification system and consideration of a gradual return of these functions to councils'. Cr Scott commented that this change to their previous position 'reflects a deep dissatisfaction within local government and follows the Government's failure to effectively and strongly regulate private certification'.⁴⁵⁵ In addition, Cr Scott said that this would take time and funding, however it would eventually restore the public's confidence in the industry:
- Obviously such a transition would be significant. It would take time. Some councils already employ certifiers but many in New South Wales do not. It would take funding; we would hope that that would be forthcoming by the State to allow this transition to take place. There is obviously a whole lot of details for this that would need to be worked out, but ultimately councils are trying to do this for the public good to restore trust back in the certification and building industry in New South Wales.⁴⁵⁶
- 4.108** The NSW Building Commissioner, Mr David Chandler OAM, told the committee that he had met with Local Government NSW and discussed the proposal for local councils to take back certification, in particular the 'practicalities and the unlikely nature of being able to return to that situation ...'. Mr Chandler added that this 'meeting concluded on a very satisfactory understanding of that response'.⁴⁵⁷

Improving private certification

- 4.109** On the opposite side of the argument, many were opposed to building certification returning to the local council model and provided solutions to improve the current system.

⁴⁵² Evidence, Ms Therese Doyle, Member, Better Planning Network Inc. and Co-convenor, Newcastle Hunter Urban Planning and Transport Alliance, 20 February 2020, p 35.

⁴⁵³ Evidence, Cr Linda Scott, President, Local Government NSW, 16 August 2019, p 43.

⁴⁵⁴ Answers to questions on notice, Cr Scott, 3 September 2019, p 2.

⁴⁵⁵ Evidence, Cr Scott, 5 November 2019, pp 11-12.

⁴⁵⁶ Evidence, Cr Scott, 5 November 2019, p 13.

⁴⁵⁷ Evidence, Mr David Chandler OAM, NSW Building Commissioner, 5 November 2019, p 75.

- 4.110** Pro Cert Group Pty Ltd, a certifier company, said that returning certification to local councils would not address the issues occurring in the building industry today:

It is inevitable that there will be calls for the scrapping of private certification and that everything would be fixed if all certification was carried out by local government. We do not believe that this is a practical or sensible solution and will do nothing to address the root causes of the issues in the certification and building industry...⁴⁵⁸

- 4.111** The Property Council of Australia did not support the move back to local councils. It highlighted that it was originally privatised 'due to corruption by officers in Local Government' and commented that given the complexity of buildings and the specialisation of some certifiers it was 'doubtful that Local Councils would have the expertise or resources to do this role efficiently or effectively'. The Property Council was of the view that the current model could be improved by increasing 'auditing and governance of building certifiers', commenting that this would 'assist in raising standards, improving independence and meeting community expectations'.⁴⁵⁹
- 4.112** Also against the proposal to revert to local councils, the Fire Protection Association of Australia rejected that the current system is 'broken', commenting that 'private certification provides flexibility for applicants by removing bureaucratic barriers to construction and creating greater competition between certifiers'. The Association argued that the concerns raised about the construction industry apply to all building practitioners, not just certifiers, and reforms should focus on lifting the performance of the entire industry through registration and accreditation of all practitioners that certifiers rely upon.⁴⁶⁰
- 4.113** Similarly, the Housing Industry Association (HIA) said that 'there is no evidence to suggest that building defects are isolated to building approvals issued by private certifiers' and that steps to 'improve the operation of building certification must not be limited by the misconception that private certifiers are the root cause of building defects'. The HIA noted that 'broader oversight, guidance and education remain a more critical aspect to improved performance and should be a focus for the Government'.⁴⁶¹
- 4.114** The Toplace Group stated that 'there are no rational alternatives to private certifiers'. It reflected on when local government had this role, explaining that for some councils this task was too 'onerous' and 'time consuming' due to council resourcing and not 'having the necessary skill sets to certify certain large-scale, complex developments'. The Toplace Group argued that should councils be the appointed certifier it would 'mean major delays' given the 'the sheer number of projects under construction at the same time'. It suggested that the current system could be improved with more oversight by an independent body.⁴⁶²
- 4.115** The Planning Institute of Australia noted that it is unlikely that private certification would be 'abandoned given the capabilities gap that would emerge in the public sector unless a very long transition time was adopted'. Given this, the Planning Institute of Australia supported other measures to improve private certification, including other practitioners having authorisation to

⁴⁵⁸ Submission 75, Pro Cert Group Pty Ltd, p 5.

⁴⁵⁹ Submission 133, Property Council of Australia, pp 4-5.

⁴⁶⁰ Submission 78, Fire Protection Association Australia, p 1.

⁴⁶¹ Submission 140, Housing Industry Association (HIA), p 8.

⁴⁶² Submission 137, Toplace Group, pp 1-2.

issue compliance certificates, increased frequency of critical stage inspections, a transparent electronic document trail, more frequent and rigorous auditing of certifiers, revised training and professional development of the profession and an adequately resourced building board or commissioner to oversee the profession.⁴⁶³

- 4.116** Likewise, the National Fire Industry Association noted that it does not object to private certification 'assuming the Buildings Professionals Board or a similar government agency is responsible for the accreditation'. If it was to remain, the Association called for 'initiatives to be put in place that will lead to vigorous and proactive auditing and policing of certifiers, higher penalties, a simpler and unimpeded complaints process, responsive disciplinary action, and an ongoing program of effective audits'. The Association stated that the Building Professionals Board should be provided 'much needed resources' to undertake the regulatory role.⁴⁶⁴
- 4.117** The committee heard from a group of local councils during their visit to Newcastle, who outlined improvements that could be made to the current system. Ms Elizabeth Lambert, Acting Manager Development Assessment and Certification, Lake Macquarie City Council, expressed the view that the private certification system 'is not a system that I would totally abandon' as she believed 'it provides for good competitive tendering for projects' and could be improved with the tightening of 'transparency and scrutiny'.⁴⁶⁵ In addition, Mr Michael Corrigan, Senior Building Surveyor, Lake Macquarie City Council, advised that to improve the system it needed 'a regulatory framework for all practitioners in the building supply chain'.⁴⁶⁶
- 4.118** Likewise, Mr Geoff Douglass, Development Projects Coordinator, Newcastle City Council, was of the view that 'private certification is probably here to stay' and highlighted that the problem with the system is not specifically private certifiers but 'the fact that there are not very many people in the system that are actually accountable through either their accreditation or the requirement to have insurance'. Mr Douglas said that 'the system needs to actually capture a lot more people from the design right through the trades – the whole lot'.⁴⁶⁷
- 4.119** Mr Scott Rathgen, Section Manager, Building Certification, Central Coast Council, also agreed that accountability across all the trades and building professionals is needed. He commented that 'if private certification works properly and is regulated properly it can work well', however he did note the conflict of interest concerns which would somehow need to be 'broken'. Further, Mr Rathgen reflected that 'private certification initially came into place because of the poor service in local government in some areas where it was too bureaucratic' and that 'what private certification has done is improve the service level because it is competitive'.⁴⁶⁸

⁴⁶³ Submission 124, Planning Institute of Australia (NSW), p 4.

⁴⁶⁴ Submission 61, National Fire Industry Association, pp 9-10.

⁴⁶⁵ Evidence, Ms Elizabeth Lambert, Acting Manager Development Assessment and Certification, Lake Macquarie City Council, 20 February 2020, p 9.

⁴⁶⁶ Evidence, Mr Michael Corrigan, Senior Building Surveyor, Lake Macquarie City Council, 20 February 2020, p 10.

⁴⁶⁷ Evidence, Mr Geoff Douglass, Development Projects Coordinator, Newcastle City Council, 20 February 2020, p 10.

⁴⁶⁸ Evidence, Mr Scott Rathgen, Section Manager, Building Certification, Central Coast Council, 20 February 2020, p 10.

4.120 In terms of some of the solutions put forward by key industry stakeholders, Mr Lambert stated that reverting back to council certifiers would be 'a very difficult exercise and would take decades to do' and the better solution for government is 'to make the new system work'.⁴⁶⁹ Mr Lambert added that local councils have lost the expertise in the area, and even when they did have this role 'they found it very difficult to attract and retain skilled people, so there were very long delays'. In terms of enhancing accountability of private certifiers, Mr Lambert recommended the following:

- 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 Reference Panel for mandatory reviews of select designated complex and higher risk developments
- 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.⁴⁷⁰

4.121 These recommendations were amongst other key recommendations that Mr Lambert put forward to address not just the issues with private certification but also the broader problems within the building industry, in particular the establishment of a NSW Building Commission with appropriate powers and governance and the registration and holding to account of building practitioners involved in the design, construction, maintenance and ongoing use of buildings.⁴⁷¹ These recommendations were also made in the first report of this inquiry.

4.122 The Association of Accredited Certifiers also raised the importance of accountability, stating that 'it is vitally important that we improve the accountability of all professionals in the construction industry'. The Association advocated eight key policy reforms that would 'restore confidence in the construction and housing industry and better protect owners', as set out below.

⁴⁶⁹ Evidence, Mr Lambert, 12 August 2019, pp 54-55.

⁴⁷⁰ Submission 56, Mr Michael Lambert, p 12.

⁴⁷¹ Submission 56, Mr Michael Lambert, pp 11-12.

- All professionals involved in the design, installation and approvals process must be accredited and insured.
- All key personnel in the process who are not accredited must be licensed and be required to prove their competency at regular intervals.
- All documents related to the certification of a building should be in a standard form developed by industry and Government.
- All persons involved in the certification of any engineering design or technical aspect of construction must issue a certificate on a standard form.
- Comprehensive auditing of all accredited or licensed persons.
- All parties involved in the building product supply chain need to be accountable for the products they prescribe, specify, purchase and use.
- Amend the BASIX scheme to allow applicants to design buildings based on predetermined standards.
- Strengthen the administration of building regulation in NSW by bringing building regulations and control functions into one portfolio, reporting to one Minister.⁴⁷²

Committee comments

- 4.123** It is clear from the evidence the committee has received that private certification is just one issue amongst a range of issues contributing to the failure of standards in the building industry. Although certifiers have had the finger pointed at them in the media, they are not solely to blame.
- 4.124** The committee agrees that the role of a private certifier is not well understood. It is not their role to be present on a building site the majority of the time or to certify every aspect of the building works. It is the certifier's role to check that the building works are in line with the development consents and the legislative requirements. However, they are relying on certificates that are clearly not worth the paper they are written on, provided to them by building practitioners who are not regulated or insured. This is a clear failing in the system.
- 4.125** The committee believes that the issues with building certification really come back to a lack of accountability of practitioners who are completing the construction work. Given this, the committee comes back to the recommendation made in the first report of this inquiry, and in the Shergold Weir report, for each relevant building practitioner to be registered, subject to professional standards, audit and disciplinary action, and hold a suitable level of insurance. Implementing this recommendation would make great headway in bringing confidence back in the industry.
- 4.126** The committee does however note that there are other steps that can be taken to improve the private certification system. The first is in relation to critical stage inspections. We agree with the evidence that the mandated inspection regime is limited and in some cases fundamentally failing due to the absence of thorough visual inspections. Therefore, the committee recommends a review of the mandatory critical stage inspection regime with a view to expanding the number and scope of required inspections undertaken by accredited certifiers.

⁴⁷² Submission 74, Association of Accredited Certifiers, pp 6-7.

Recommendation 16

That the NSW Government undertake a review of the mandatory critical stage inspection regime under the *Environmental Planning and Assessment Act 1979* with a view to expanding the number and scope of required inspections undertaken by accredited certifiers.

- 4.127** There is a clear failing in how certification is carried out if certifiers are not able to rely upon the certificates provided by building practitioners; really, the system falls over at this point. The committee can understand the frustration of homeowners who are not provided with a full set of documentation when the building is handed over, particularly when owners must go back and rectify defects. Again, we point to the recommendation made in the first report of this inquiry to 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. We believe this will bring back the transparency and scrutiny needed across the industry.
- 4.128** There seems to be a loophole in the system if buildings are not built to the standard as set in the development approval, leaving an unsuspecting future buyer to have to deal with remediation. We believe that one potential remedy would be requiring the certifier, council or private, to have a compulsory 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. The committee therefore makes this recommendation, and this should be considered as part of recommendation 16.
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Recommendation 17

That the NSW Government consider amending the *Environmental Planning and Assessment Act 1979* 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.

- 4.129** Throughout this inquiry the committee heard polarised views as to the most effective model of building certification: council or private certification. On one side of the argument is that private certification creates competition in the industry and to revert back to the local council model would take many years, and require significant funding, particularly given the shortage of certification skills currently within local government.
- 4.130** On the other hand the current private certification system is conducive to conflicts of interest between the developer and builder, which seems to be the crux of the problem. In practice many builders have certifiers that they regularly work with and 'recommend' to their client. Further in cases where the owner is a developer who will be aiming to rapidly on-sell the development using a \$2 company, the fact they are the 'owner' does not remove the conflict of interest apparent in having the building constructed as quickly and cheaply as possible in circumstances where they will not be living with or practically responsible for any defects. Their choice of certifier is likely to be impacted by this fact.
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- 4.131** We note the suggestions put forward by a number of inquiry participants for a 'taxi-rank' system, however we agree with other stakeholders that this will not solve the issue of developers influencing certifiers on site during construction. We also note that there have been repeated efforts to reform private certification in the 22 years since it became widespread in New South Wales and none of these efforts has been close to successful.
- 4.132** We also note the other suggestions put forward by industry stakeholders to improve the current certification system, in particular the recommendations made by Mr Lambert, including to:
- 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 Reference Panel for mandatory reviews of select designated complex and higher risk developments
 - 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.
- 4.133** We agree with these recommendations and believe they should be implemented regardless of whether private or council certifiers are the base model going forward.

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:

- 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 Reference Panel for mandatory reviews of select designated complex and higher risk developments
 - 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 oversights 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.
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4.134 However, the committee also believes the system needs a larger shakeup. Over many years successive governments have tried to make the private certification system work. That is yet to succeed. What is clear from this committee's inquiry is that the status quo is broken.

4.135 The committee has concerns about the conflict of interest in the private certification system as it is currently structured and regulated. While the committee acknowledges the fact that private certifiers have received an inappropriately large share of the public's blame for the systemic failures in the industry, they have also become emblematic of an industry where self-regulation and a lack of public oversight and control have made people's homes unsafe. While these issues remain in certification it will prove difficult to persuade the public that the rules have changed and that there are meaningful steps being taken to restore integrity and confidence to the building and construction industry.

4.136 The committee seriously considered a recommendation strengthening public control of certification, such as returning all certification to local councils. In examining that specific proposition the committee has noted the concerns that currently local councils do not have the resourcing to implement this change. Such a change would require resourcing as well as a training and recruitment package be provided to local councils to rebuild these skills over a transition period.

- 4.137** Whilst not ruling out such a future recommendation, the committee does not do so at this time. This matter will be further considered as a part of the committee's foreshadowed inquiry into the NSW Government's reforms into the building and construction industry. This is expected to be initiated before the end of 2020. The committee will examine closely the effects of the implementation of the *Building and Development Certification Act 2018* on certification, and will carefully consider whether to recommend a strengthening of public control of certification at that stage.

Recommendation 19

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.

Chapter 5 **Role of strata committees in responding to defects**

This chapter looks at the challenges homeowners in strata buildings encounter when trying to rectify building defects. It begins by trying to ascertain the extent of building defects in New South Wales, particularly in multi-storey apartment buildings, and the difficulties of finding reliable data in this space. The chapter then considers the considerable impacts on homeowners when navigating the defect rectification process and the calls for greater government support and assistance. Finally, the chapter turns to the difficulties faced by strata committees and owners corporations in rectifying defects, including limited experience and knowledge among committee members and homeowners, an environment that is conducive to disputes amongst owners, the limitations of the dispute resolution process and issues that can arise where the strata manager is appointed by the developer.

Extent of defects

- 5.1** This section details the extent of the defect problem in New South Wales and the attempts by researchers to calculate this problem, in light of the difficulties in obtaining reliable data. It then considers the concerns of homeowners in disclosing defects in their buildings for fear of devaluing their homes and the inadequacy of the information found in strata reports.

Concerns about the extent of defects in apartment buildings

- 5.2** New South Wales, particularly Sydney, has recently experienced an apartment building boom.⁴⁷³ It is estimated that around 20 per cent of the population live in strata buildings and it is predicted that this will reach 50 per cent by 2040. There are over 80,000 strata schemes in New South Wales with 38 per cent of these registered since 2000. In the 12 months to August 2019, 18,000 high-rise apartments (over four stories high) have been approved.⁴⁷⁴
- 5.3** The extent of defects across strata buildings in New South Wales, many believed, has come to light as a result of the recent high-profile building defects in Mascot Towers and the Opal Tower (discussed in the first report of this inquiry). For example, Australian Foundation Systems Pty Ltd commented that they were 'not surprised that it took the high profile failures of the Opal Tower and Mascot Towers to stir interest, when in truth we know that there are hundreds if not thousands of defects being notified every year'.⁴⁷⁵
- 5.4** Shelter NSW also commented on these cases, stating: 'While the visual impact of hundreds of people evacuating a gleaming new 26 storey tower, when they should have been preparing to celebrate Christmas in 2018, was indeed dramatic, it was pretty much foreseeable'. According to Shelter NSW, although these cases and some others have made it to the media, 'there are many more that don't' and 'the fact that we don't know the extent of the defects and nature of building quality problems, structural or otherwise, exposes a system that has failed to effectively monitor such a critical industry'. Shelter NSW questioned 'how did we get to a point where it

⁴⁷³ City Futures Research Centre, University of NSW, Sydney, *Cracks in the Compact City: Building defects in Strata* (2019), p 1.

⁴⁷⁴ Evidence, Ms Jane Hearn, Director, Owners Corporation Network, 12 August 2019, pp 32-33.

⁴⁷⁵ Submission 82, Australian Foundation Systems Pty Ltd, p 1.

has taken evacuations and an eleventh-hour warning of industry collapse to hasten a response?⁴⁷⁶

5.5 Along similar lines, Cr Linda Scott, President, Local Government NSW, told the committee that 'while the failures of Opal Tower, Mascot Towers and several buildings in my own council electorate— Zetland, Erskineville and Alexandria, for example—were the focus of media attention, these are, of course, a few extreme examples of the fundamental issues with the building industry that councils see every day'.⁴⁷⁷

5.6 Ms Bronwyn Weir, co-author of the Shergold Weir report, commented that 'since our report, there has been—as predicted in the report and certainly no surprise to Professor Shergold and I—some pretty catastrophic events that have become quite prominent in the media in terms of failures of buildings'. She said that 'there was no doubt that there were potential issues brewing in the sector when the report was commissioned,' and 'we now have an awful lot of building stock which is defective [and] unsafe'.⁴⁷⁸

5.7 Other inquiry participants provided general comments highlighting the extent of the defect problem in apartment buildings in New South Wales.

- 'It is concerning to see the number of defects on buildings, particularly significant structural defects continue to rise. There are several media reports, anecdotal accounts, and litigation that suggests new large-scale developments are not meeting the expectations of quality that consumers would expect'.⁴⁷⁹
- '... [T]he independent evidence on building defects has shown for some time that defects in residential – that is, not commercial – multi-unit buildings is endemic. This, I am afraid, must draw us to the conclusion that it is self-evident that in New South Wales we are facing a systemic failure in the industry and in the regulatory system'.⁴⁸⁰
- 'The building industry in NSW is in crisis. It has become clear from the burgeoning number of high-rise apartment buildings with serious design and/or construction-related faults that the current regulatory system in NSW has failed the people it is supposed to protect'.⁴⁸¹
- '... [T]here is failed or non-existing waterproofing, fire safety non-compliance, and the list of defects continues. People live in apartments for cost, security, convenience, low maintenance et cetera; obviously the low maintenance factor has been thrown out the window'.⁴⁸²

⁴⁷⁶ Submission 73, Shelter NSW, p 4.

⁴⁷⁷ Evidence, Cr Linda Scott, President, Local Government NSW, 16 August 2019, p 41.

⁴⁷⁸ Evidence, Ms Bronwyn Weir, co-author of *Building Confidence: Improving the effectiveness of compliance and enforcement systems for the building and construction industry across Australia* report, 27 August 2019, p 50.

⁴⁷⁹ Submission 150, Mascot Towers Owners Corporation, p 4.

⁴⁸⁰ Evidence, Ms Hearn, 12 August 2019, p 32.

⁴⁸¹ Submission 142, Better Planning Network Inc, p 1.

⁴⁸² Evidence, Ms Alisha Fisher, Chief Executive Officer, Strata Community Association, 16 August 2019, p 69.

Research on the extent of defects

- 5.8** A number of research reports have attempted to calculate the extent of defects in buildings across New South Wales.
- 5.9** The City Futures Research Centre, University of NSW, has run a program of research focused on strata title developments over the last 12 years. In 2012 the Research Centre reported results from a survey conducted with strata owners, which found that 72 per cent of a representative sample of owners across New South Wales were aware that there had been defects in their building. In looking at buildings built since 2000, the research found the figure was even higher with 85 per cent⁴⁸³ responding that they were aware of defects in their building.⁴⁸⁴
- 5.10** Further research currently being conducted by the City Futures Research Centre is examining 'the prevalence and common causes of building defects, and how multi-unit housing quality might be improved'.⁴⁸⁵ Associate Professor Hazel Easthope from the City Futures Research Centre, University of NSW, advised that 'we are doing research on this because the strata industry stakeholders that we have been working with have told us that building defects have been a concern to the industry for a long time'.⁴⁸⁶
- 5.11** Another study was raised by Ms Jane Hearn, Director, Owners Corporation Network, who pointed to research conducted by Deakin University which found 'that 97 per cent of buildings have one or more defect'.⁴⁸⁷ Dr Nicholas Johnston, the lead researcher on this study, in a media release commented that 'unfortunately, new residential buildings in Australia appear to be plagued with defects, and while the building itself can be fractured by these defects, it is the residents living there who face the impacts'.⁴⁸⁸
- 5.12** The Construction, Forestry, Mining and Energy Union (CFMEU) also commissioned independent research for their 2019 *Shaky Foundations* report, which found that 'the cost of rectifying defects in apartment buildings constructed over the last ten years will amount to \$6.2 billion'. The CFMEU concluded that: 'Australia's construction industry has reached crisis point. From cracking apartment buildings to massive cost overruns in public infrastructure, there is not one part of the sector that isn't failing in some way'.⁴⁸⁹
- 5.13** In terms of the types of defects found in buildings, Ms Carmel Donnelly, Chief Executive, State Insurance Regulatory Authority (SIRA), listed the most common defects from claims under the Home Building Compensation scheme as follows:

⁴⁸³ Associate Professor Hazel Easthope explained that the 85 per cent response is a subset and not a representative sample. The 72 per cent is a representative sample with a confidence interval of just over 3 per cent. Evidence, Associate Professor Hazel Easthope, City Futures Research Centre, University of NSW, Sydney, 16 August 2019, p 32.

⁴⁸⁴ Evidence, Associate Professor Easthope, 16 August 2019, pp 31-32.

⁴⁸⁵ Submission 79, City Futures Research Centre, University of NSW, Sydney, p 1.

⁴⁸⁶ Evidence, Associate Professor Easthope, 16 August 2019, p 31.

⁴⁸⁷ Evidence, Ms Hearn, 12 August 2019, p 33.

⁴⁸⁸ Media release, Deakin University, 'Deakin report analyses growing number of apartment building defects', 19 June 2019.

⁴⁸⁹ Construction, Forestry, Maritime, Mining and Energy Union, *Shaky Foundations: The National Crisis in Construction* (2019), p 1.

- 15.59 per cent of claims relate to external balcony waterproofing
- 10.41 per cent relate to issues with frames and trusses
- 9.98 per cent relate to external waterproofing (excluding external balconies)
- 9.83 per cent relate to brickwork/masonry
- 8.97 per cent relate to internal waterproofing.⁴⁹⁰

5.14 It is notable that over one third of all claims related to faulty waterproofing in one part or another of the buildings.

Available data on building defects

5.15 Inquiry participants highlighted the difficulty in obtaining reliable data to get a clear picture on the number of defects the state is dealing with, and called for better data collection in future.

5.16 Dr Laura Crommelin, City Futures Research Centre, University of NSW, emphasised the difficulty in accessing reliable data in order to assess the extent of building defects:

The primary observation I would make is that it is extremely hard to find out, even with the support of industry partners, with the support of local government, State Government, there is just not a comprehensive set of information about this issue. We are really pulling together bits and pieces and trying to knit them into something coherent. I think we will get something interesting out of that, but we certainly would not be able to say it was a definitive representation of the defects problem, because the information just is not there.⁴⁹¹

5.17 The Urban Development Institute of Australia, NSW Division (UDIA), also noted that 'there is extremely limited empirical data for the extent of building defects in NSW'.⁴⁹²

5.18 At a hearing, the NSW Building Commissioner, Mr David Chandler OAM, commented on the limitations of current data in relation to defects, stating that it does not differentiate between minor and major defects:

I have been meeting lengthily with the strata advocates and people who do research and comment on defects and I am still yet to be satisfied that anyone has got a line of sight to the difference between defects and material defects. Material defects, in my view, are things that go to the structure, the envelop of the building, all of the waterproofing – basements, podiums, planter boxes, bathrooms and everything to do with the water proofing – and all of the fire installations, passive and active. In my view they are things that are systemic through a building that are actually material. I am less worried about whether someone scratched every benchtop through the whole building. I am interested in the material things.⁴⁹³

⁴⁹⁰ Answers to questions on notice, Ms Carmel Donnelly, Chief Executive, State Insurance Regulatory Authority (SIRA), 29 August 2019, p 9.

⁴⁹¹ Evidence, Dr Laura Crommelin, City Futures Research Centre, University of NSW, Sydney, 16 August 2019, p 32.

⁴⁹² Submission 87, Urban Development Institute of Australia - NSW Division, p 7.

⁴⁹³ Evidence, Mr David Chandler OAM, NSW Building Commissioner, 24 February 2020, pp 31-32.

- 5.19** Mr Chandler advised that he is currently working with the City Futures Research Centre on 'a piece of research that asks, "How do we actually identify where the material defects are?". Mr Chandler said that 'the intention is to go back and have a look at the strata plans that have already been registered to see if we can find a line of sight to what we might find are material defects'.⁴⁹⁴
- 5.20** Associate Professor Easthope advised that their current research demonstrates that base-line data is currently not readily available and this data, as well as ongoing data collection and recording is needed 'in order to assess the benefits for future reforms'.⁴⁹⁵

Disclosure of defects in strata documentation

- 5.21** The committee heard that uncovering the extent of the defect problem in New South Wales residential buildings is challenging given owners are reluctant to disclose these issues as it risks devaluing their homes.
- 5.22** The Better Planning Network Inc said that 'strata committees of high-rise apartment complexes are caught in a terrible bind when major defects occur', because 'if they act promptly and publicly on defects that become apparent in the apartment complexes, they immediately place their own investments in their homes at risk'. The Network commented that the public display of defects, such as the recent cases in the media, can have 'a real effect on the resale value of what is for most people, their most important asset'.⁴⁹⁶
- 5.23** The Strata Community Association NSW also observed this problem, where owners try to conceal details of defects in their buildings to ensure they can resell at a reasonable price, which disadvantages prospective home buyers:

As evidenced by the large number of confidential submissions, many examples have been swept under the rug because owners rightly feared the impact on property values should they complain too loudly. This way, they believed they retained the option of selling at a reasonable price - and making their problem someone else's. It fed a dog-eat-dog culture in the market. Buyers had more consumer protection buying a \$1000 television than a million-dollar apartment. This was well understood by unscrupulous players who took full advantage. This conspiracy of silence could not last forever. Buildings like Opal, Mascot Towers, Sugarcube, and Alexandria are the tip of a very large iceberg.⁴⁹⁷

- 5.24** The UDIA was also aware of 'circumstances where owners corporations do not want to progress or identify defects or make claims, due to concerns about property values' and had heard stories of strata committees not wanting to include certain information in their strata minutes as it would negatively impact property values.⁴⁹⁸

⁴⁹⁴ Evidence, Mr Chandler, 24 February 2020, p 32.

⁴⁹⁵ Evidence, Associate Professor Easthope, 16 August 2019, p 31.

⁴⁹⁶ Submission 142, Better Planning Network Inc, p 8.

⁴⁹⁷ Submission 83, Strata Community Association NSW, p 1.

⁴⁹⁸ Submission 87, Urban Development Institute of Australia, NSW Division, p 10.

5.25 Mr Aidan Ellis, an owner in The Landmark apartment building in Charlestown, commented on his experience of not being informed of problems in the building prior to purchasing his apartment:

Solicitors, Vendors, real estate agents and Strata Management Companies are also involved in continuing the problems. Material facts are frequently not disclosed, Strata searches are not always transparent and are not undertaken carefully enough and people buy units in buildings which may have serious defects both in the individual apartment and in the common property. Again, in these cases, there is no accountability. In our case, we believe our solicitor failed in his duty of care by not alerting us to problems with the common areas which were evident in the Strata report, neither the previous owner nor the real estate agent told us of the water ingress problems and other pertinent material facts relating to the apartment even though they would have been well aware of them.⁴⁹⁹

5.26 LF Economics commented that 'prospective buyers have no way to understand if a particular apartment building has any defects, structural issues or sewerage leaks, or flammable cladding'. In this regard, LF Economics made the following recommendations:

- that any developer, builder or owner of an apartment be required to 'disclose to parties interested in purchasing the apartment "all" the defects or safety issues prior to purchase', and if this is not disclosed it 'be classified as an act of criminality or fraud'
- that the NSW Government 'make available online, a full and complete list of which buildings have structural or safety issues (particularly related to flammable cladding)'.⁵⁰⁰

5.27 The City Futures Research Centre advised that lack of information is a challenge for both initial purchasers buying off the plan and subsequent purchasers. As part of its research the Research Centre found that 'many residents feel they do not have adequate access to information on the history of the building in which they are planning to buy or rent'. The Research Centre explained that 'for subsequent purchasers, information about the building is most commonly accessed through strata inspection reports, which may not provide detailed information about the building itself, including any issues with defects'.⁵⁰¹

5.28 At a hearing, Dr Crommelin highlighted the disparity of information found in strata inspection reports, commenting that 'it depends on who does the report, how well the building has been managed, how well the records have been kept – a whole bunch of things'. She said that 'to really do your due diligence you potentially want to get a number of strata reports done but, even then, things can absolutely fall through the gaps'.⁵⁰²

5.29 Associate Professor Easthope told the committee that 'the bigger issue really is that those reports report on the written documentation and if the written documentation is inadequate, the report is never going to be adequate'. She argued that the adequacy of 'the underlying record keeping is the more important question, rather than the nature of the strata inspection report'.⁵⁰³

⁴⁹⁹ Submission 89, Mr Aidan Ellis, p 2.

⁵⁰⁰ Submission 76, LF Economics, p 2.

⁵⁰¹ Submission 79, City Futures Research Centre, University of NSW, Sydney, p 3.

⁵⁰² Evidence, Dr Crommelin, 16 August 2019, p 37.

⁵⁰³ Evidence, Associate Professor Easthope, 16 August 2019, p 37.

- 5.30** In addressing this problem, the City Futures Research Centre recommended that any reforms should ensure that 'relevant information about the design, construction and defect history of the building is easily available to new and potential owners in a standardised format, and that consumers understand their rights to access this information'.⁵⁰⁴
- 5.31** In terms of what the government could be doing in this space, the UDIA recommended that the government should 'regularly report on the occurrence of defects and the severity of defects, so that the performance of the regulatory system can be properly assessed'.⁵⁰⁵

Impacts on homeowners seeking to rectify defects

- 5.32** The committee heard of both the financial and emotional cost to homeowners during the process of rectifying defects in their homes. This section outlines the evidence received on these impacts and the calls for financial assistance from government to help homeowners who are faced with costly rectification works at no fault of their own.

Emotional and financial costs

- 5.33** The committee received evidence about the significant pressure owners are placed under when attempting to rectify building defects, not only financial but also emotional.
- 5.34** A number of submission authors outlined the personal impact of dealing with defects. According to the author of submission 20, the process took a heavy 'emotional toll':

The total damage to our apartment, outside the plumbing repairs, would have been tens of thousands. The emotional toll was heavier. As we have dogs, we couldn't stay in a hotel and ended up at my father-in-law's house on the Upper North Shore, quite distant to where we live, for several months. As nothing was in my name, my partner had to do all the work of liaising with insurance, builders etc. leaving him burdened and me frustrated. I also am self-employed and have no paid leave. Dealing with this created anxiety, depression and relationship strain.⁵⁰⁶

- 5.35** Author of submission 155 detailed three years of trying to resolve significant defects in their property at a cost of approximately \$210,000 in legal and expert fees, which they said 'does not in any way do justice to the stress and emotional hardship suffered by our family during this time period'. The author explained that the mould in their home reached such 'a hazardous level' and they 'had to move out of the property, with all the emotional and financial hardship that entailed'.⁵⁰⁷
- 5.36** Submission author 60 reported that 'through no fault of my own I am now out of pocket over \$550,000 (paid for by way of a mortgage) and I am still not living in my home due to major building defects, gross negligence and unreasonable delay on the builders part'. The author explained that they could not afford to pursue the builder under the dispute resolution process. The author stated: 'This whole situation has left me with medically-diagnosed severe depression

⁵⁰⁴ Submission 79, City Futures Research Centre, University of NSW, Sydney, p 3.

⁵⁰⁵ Submission 87, Urban Development Institute of Australia - NSW Division, p 7.

⁵⁰⁶ Submission 20, Name suppressed, p 2.

⁵⁰⁷ Submission 155, Name suppressed, p 5.

and has robbed me of the enjoyment of my retirement two years ago. There seems to be no end in sight and I have no idea when or if I will ever move back into my home'.⁵⁰⁸

5.37 Apart from the financial burden, many also described the stress and emotional impact rectifying building defects was having on their life.

- 'There have been brief periods of respite but for the most part I have lived in a constant state of anxiety, with many sleepless nights. I have found it extremely hard to function at work. Trying to juggle my work with my current chaotic living situation and stress over my future has at times been overwhelming'.⁵⁰⁹
- 'I will start by stating that words and numbers on a page cannot adequately convey the human pain and suffering caused, firstly by the handful of individuals responsible for this sorry affair but also the environment within which they were allowed to operate. This is a familiar story of a builder fleecing its' customers, suppliers and subcontractors then going bust. We are just one of the dozens of customers left in the lurch'.⁵¹⁰
- 'The elderly widow occupying this apartment had to move into a rented apartment for eight months, was subjected to abuse and ridicule from other owners, was very stressed and died two months after her return'.⁵¹¹
- 'The experience has been extremely stressful, protracted and financially crippling. The legal costs of pursuing the builder to seek to rectify the defects amounted to in excess of \$50,000 per unit and affected younger owners with little savings and retired owners without disposable income and reliant on the age pension'.⁵¹²
- 'Besides the financial cost, there is also a real hard to measure negative impact on time, health, relationships and ultimately quality of life in the past 8 years for all concerned'.⁵¹³

5.38 Shelter NSW encapsulated the impacts this can have on everyone involved:

And here we are today; owners can't live in the homes they purchased and are exposed to hefty costs for rectification works and possibly also legal proceedings; renters having to find emergency accommodation in an unaffordable market after paying bond and rent for a place that is uninhabitable; and investors who are not only exposed to the cost of rectification works, they still need to meet their obligations to tenants ... Shelter NSW's position is that decades of reform have not worked and we find ourselves in the current situation, because previous reforms focused on industry viability or the Government's budget bottom-line, rather than the needs of the consumer.⁵¹⁴

⁵⁰⁸ Submission 60, Name suppressed, p 1.

⁵⁰⁹ Submission 151, Name suppressed, p 1.

⁵¹⁰ Submission 141, Name suppressed, p 1.

⁵¹¹ Submission 89, Mr Aidan Ellis, p 3.

⁵¹² Public Accountability Committee, NSW Legislative Council, *Preliminary report on the online survey questionnaire: Inquiry into the regulation of building standards, quality and disputes*, 9 August 2019, p 8.

⁵¹³ Submission 51, Name suppressed, p 4.

⁵¹⁴ Submission 73, Shelter NSW, p 3.

Support available to homeowners navigating the defects rectification process

- 5.39** Others felt it was unfair that the cost of rectifying defects fell to homeowners with little support. For example, Ms Hearn told the committee: 'In short, the risk of costly defects has been shifted away from developers, builders and government to the innocent purchaser. These buyers have no bargaining power in the market and little more than a glossy brochure on which they rely for their award-winning luxury apartment'.⁵¹⁵
- 5.40** The Mascot Towers Owners Corporation stated that 'the costs to rectify falls squarely and unfairly on our owners'. The Corporation commented that many of the owners in their buildings had 'bought into the building mere months prior to evacuation, who through no fault of their own now face tens of thousands of dollars of additional expenses to repair'.⁵¹⁶
- 5.41** Along similar lines, the Owners Corporation Network said that it is 'clear that apartment owners have been let down badly by successive Governments and the building industry for the past few decades' and this has 'resulted in far too many instances of personal hardship and serious economic consequences'.⁵¹⁷
- 5.42** The author of submission 94 argued that 'the cost and resources required to rectify major defects in a multi-storey building are typically one or more orders of magnitude greater than the additional cost of "doing it right" the first time'.⁵¹⁸
- 5.43** Mr Grahame Vile, Director, BAAM Consulting, had a similar view, highlighting the frustration when 'the mistakes that are made are fairly simple mistakes'. He said that the most cost effective time to fix an error is during the construction of the building and 'the trouble is these errors are not discovered until year five or six or seven or 15 and then they can be hellishly expensive to fix, relative to the solution at the day'.⁵¹⁹
- 5.44** The City Futures Research Centre also commented on the impact building defects can have on owners and tenants and advocated for reforms to ease the burden:

Our research has shown that property owners and tenants of multi-unit residential housing bear a significant burden in the event of poor building outcomes. Rectifying and finding avenues of recourse for defective building work is emotionally and financially challenging for owners and tenants of multi-unit housing, with obstacles to good outcomes inherent in the process. Reforms to the building system are an important step towards easing the burden on owners and residents.⁵²⁰

- 5.45** In addition, Associate Professor Easthope said that 'building defects have been a concern to the industry for a long time' and 'there are people living and owning buildings with defects who may or may not yet know their extent'. She commented that 'in the absence of the goodwill of developers, builders and other industry stakeholders, in making right building defects, owners currently are in a very weak position when it comes to having the defects rectified'. Given this,

⁵¹⁵ Evidence, Ms Hearn, 12 August 2019, p 32.

⁵¹⁶ Submission 150, Mascot Towers Owners Corporation, p 5.

⁵¹⁷ Submission 117, Owners Corporation Network, p 1.

⁵¹⁸ Submission 94, Mr Terry Jones, p 4.

⁵¹⁹ Evidence, Mr Grahame Vile, Director, BAAM Consulting, 20 February 2020, p 20.

⁵²⁰ Submission 79, City Futures Research Centre, University of NSW, Sydney, p 1.

Associate Professor Easthope noted the importance of the reform process in improving the position of the people affected, as well as improving the quality of new buildings.⁵²¹

Homeowners' calls for financial assistance

5.46 Inquiry participants called on the government to provide financial assistance to homeowners who are stuck in a situation of costly defects with no-where to turn for support.

5.47 The Mascot Towers Owners Corporation argued that many people have profited from their building and it should be those who have gained that should be responsible for fixing the issues:

The developer profited of the Mascot Towers development. Building defects consultants, legal practitioners etc. have profited from Mascot Towers' story. Local Government profited from rates after rezoning the precinct surrounding Mascot Train station. State Government profited from stamp duty on the area's property sales, and Federal Government has collected millions in GST on all of the construction, consultants, local businesses in the area etcetera (not to mention all the other taxes paid by the residents of Mascot Towers). We believe that the government should fund remediating the disaster at Mascot Towers. It's unconscionable to think that owners front the bill for defects they played no part in causing.⁵²²

5.48 The Mascot Towers Owners Corporation demanded from the government 'a clear and definitive action plan from the government to fix this, with no onus on our owners and residents' and 'immediate intervention and ongoing assistance and funding to displaced owners and residents'.⁵²³

5.49 The author of submission 53 expressed the view that it is the state who holds the 'responsibility to ensure the systems of regulation are adequate to not only support the affected homeowner when they are most vulnerable, but to ensure those mistakes cannot be repeated on others'.⁵²⁴

5.50 Mr David Gray, a homeowner in Newcastle, hoped that the government would take some responsibility and assist people like themselves in fixing the issues:

I also would just like to say that I hope the Government—and I know this is probably a big ask—but I am hoping that because building is a public issue, it is a public trust issue that has been falling down here. So in order to restore confidence I would hope the Government can assist people like us because it is heading towards a substantial loss. We do not know how big that loss will be at the moment. I am sure it could very well break some people, including myself, so we will see where that ends up.⁵²⁵

⁵²¹ Evidence, Associate Professor Easthope, 16 August 2019, p 31.

⁵²² Submission 150, Mascot Towers Owners Corporation, p 12.

⁵²³ Submission 150, Mascot Towers Owners Corporation, p 12.

⁵²⁴ Submission 53, Name suppressed, p 3.

⁵²⁵ Evidence, Mr David Gray, Homeowner, 20 February 2020, p 20.

Other financial measures to assist homeowners

- 5.51** Key stakeholders in the industry provided a variety of views on what other financial assistance should be offered to homeowners to rectify defects.
- 5.52** The Owners Corporation Network stated that 'confidence in NSW apartment building construction standards has fallen dramatically' and that it 'will take years to remedy the issues driving lost confidence'. The Network recommended that the government provide long term, interest free or low interest loans. It emphasised that these loans 'should not draw funds from strata schemes or lot owners and that 'the burden should fall most heavily on those drawing the greatest profit from the property development process or contributing most to causing the problems'.⁵²⁶
- 5.53** The Owners Corporation Network also recommended government assistance packages be provided to homeowners to restore confidence:
- ... [I]here is a compelling argument for the establishment of assistance packages for apartment owners who are the unwitting victims of widespread defects in new apartment buildings. Not only is this important to restore consumer confidence but the Government's approach to this issue is a measure of how seriously it sees this problem as well as its understanding of where accountability lies. The prompt establishment of meaningful, well targeted apartment owner assistance arrangements would provide a very strong signal of the Government's determination to restore consumer confidence in the new apartment market.⁵²⁷
- 5.54** To fund such packages, the Owners Corporation Network pointed to stamp duty, commenting that stamp duty on residential property transactions 'delivers close to \$6 billion per annum to State Government revenues' and provided the example of a \$1 million apartment earning the government \$40,449 in stamp duty. However, the Network stated that 'this is very much in line with the typical costs per owner to repair common building defects and well below the costs to owners in the most extreme situations when apartments become unlivable and unsalable'.⁵²⁸
- 5.55** The Strata Community Association NSW had a similar view, commenting that 'given manifest failure of regulatory responsibility, governments have a moral responsibility to respond effectively and provide meaningful assistance to owners' corporations in resolving defects'. The Association also reflected on the collection of stamp duty and other taxes and questioned why this could not be used to assist homeowners:

Governments have collected stamp duty, GST, land tax, payroll tax and headworks charges and have no hesitation in using taxpayers fund to remedy defects on their own sites. The question needs to be asked as to why they are so hesitant to show genuine leadership and firmly commit to a plan for resolving this crisis.⁵²⁹

⁵²⁶ Submission 117, Owner Corporation Network, p 11.

⁵²⁷ Submission 117, Owner Corporation Network, p 16.

⁵²⁸ Submission 117, Owners Corporation Network, pp 11-12.

⁵²⁹ Submission 83, Strata Community Association NSW, p 2.

5.56 Ms Alisha Fisher, Chief Executive Officer, Strata Community Association, was questioned on the proposal of long-term, low interest loans and she told the committee that they have been requesting 'interest-free loans for a period of time' to help people, however cautioned that in some instances even this would not be able to help:

The other thing comes down to is it does not matter how much you loan, there are people that have put their life savings into buying an apartment. There is no spare money around. They do not earn enough to pay off, do they want another 20 year loan, which is also on top of their probably 30 year loan that they have already got, to pay off an apartment. There will be people who just cannot pay the fees. When you are talking of millions and millions of dollars of defects and cladding, people do not have spare change just hanging around.⁵³⁰

5.57 The Society of Construction Law Australia also reflected on the proposal of low interest loans, particularly in the case of Mascot 'Towers' owners who were offered a low interest loan by the government for the cost of emergency accommodation. The Society expressed the view that it should not be just a 'one-off loan' that is offered but further assistance, 'given the considerable increase of new residential buildings in Australia plagued with defects'. The Society went on to argue that 'in circumstances where the statutory warranty period has expired, and the HBC Scheme is not applicable, strata owners have little to no recourse against builders for the cost of defect rectification'. In these circumstances, the Society recommended two possible solutions:

- the establishment of a NSW State Government defect fund that could use a percentage of the funds received by government from stamp duty payable on high rise residential buildings, or if this is not implemented
- the establishment of an insurance based defect fund that could be created by owners corporations paying a levy as part of their compulsory building insurance, with a new government agency established to manage this fund and work with owners corporations through the defect rectification process.⁵³¹

5.58 When questioned on what the government is doing to assist those people currently living with building defects, Mr Chandler provided the following response:

Those people are going to have to look at what their rights are and in the event that they do not have rights some of them are going to have to step up and pay for this work ... The option that people have when they declare what I call material defects – as opposed to defects – is that they will elect as to which path they are going to go down to seek to get recovery. In the event that there is nobody there to recover from – and in many of these cases there is no-one there to recover from – they are going to have to stump and get that work done.⁵³²

⁵³⁰ Evidence, Ms Fisher, 16 August 2019, p 74.

⁵³¹ Submission 167, Society of Construction Law Australia, pp 14-15.

⁵³² Evidence, Mr Chandler, 24 February 2020, p 32.

- 5.59 Mr Chandler further advised that 'there is no appetite and we cannot undo 20 years of whatever regulatory situation that has got us to where we are right now'. He said 'we are just going to have to deal with what we have', and 'there are some owners bodies that are going to have to pay to get their building brought up to a standard for material items'.⁵³³

Management of defects in strata buildings

- 5.60 We now turn to the difficulties strata committees and owners corporations face when navigating the rectification of defects in their buildings. The committee received evidence that owners in strata buildings are ill-equipped to respond to defects and there is a lack of support to help owners in this space and that this can cause disputes amongst owners. The committee was also made aware of a potential conflict of interest with the appointment of a strata manager by the developer which could impact on strata committees rectifying defects later down the track.

Knowledge and experience of strata committee members

- 5.61 The committee received evidence of the complexities involved in managing a strata building and often the limited experience and knowledge of strata committees to effectively address significant defects.
- 5.62 Strata committees are made up of elected representatives from the owners corporation who make many of the day-to-day decisions in relation to the management of the strata building. It is the role of the strata committee to act on behalf of the owners corporation, in accordance with the relevant legislation, and it is the committee who is often the first to take on the management of defects in a residential building. Although the role of the strata committee is to manage the maintenance and repair of the common property, it is ultimately the responsibility of the owners corporation for defect rectification. The cost of rectifying defects of common property is also the responsibility of the collective owners corporation, even when defects may not impact all individual owners.⁵³⁴
- 5.63 The complexities of how strata committees operate were outlined by Associate Professor Easthope, who described strata committees as akin to a 'fourth tier of government':

Strata buildings elect representatives to make decisions on their behalf, through their committees; they levy taxes through their levies; and they set rules that govern the behaviour of their citizens through their by-laws. They do that as volunteers and the volunteers are commercial owners in the building. There is a whole group of other residents in the building – renters – who are not part of that or are not able to be quite so much a part of that. It is an unusual situation and a lot of the roles and responsibilities that used to be the responsibility of local government, now fall to strata buildings. That is how we look at these entities: they are important social institutions; they underpin the governance of cities; and where they do not work, you have problems.⁵³⁵

⁵³³ Evidence, Mr Chandler, 24 February 2020, p 33.

⁵³⁴ Submission 167, Society of Construction Law Australia, p 12.

⁵³⁵ Evidence, Associate Professor Easthope, 16 August 2019, p 39.

5.64 Inquiry participants noted the limited experience and knowledge of strata committees in dealing with complex issues such as defects.

- 'The biggest challenge facing strata committees is the fact that most owners and committee members have insufficient knowledge of building or the builders legal obligations to be able to effectively identify defects, understand what constitutes adequate rectification, or be clearly aware of their rights. Furthermore in my experience, most licensed strata managers do not have an adequate understanding of these issues to provide any meaningful support to the committee'.⁵³⁶
- 'I believe that too much is asked of Strata Committees and they have too much responsibility. Today, many buildings are large and complex, many are seriously defective and most Strata Committees are made up of unqualified, inexperienced people who may have various vested interests in the decision making process'.⁵³⁷
- 'Strata committees for owners corporations are often inexperienced volunteers, which creates challenges in their effectively navigating the courts and legislation to achieve outcomes'.⁵³⁸
- 'Our strata manager lacks the time, expertise and experience to manage the process. The owners' corporation struggled to make decisions due to lack of knowledge and advice on what to do in these situations and varying financial capacity to pursue legal options. Internal strata committee disagreements and poor decision making can result. Owners have had to spend lots of time trying to research and educate themselves about what to do in order to make a decision'.⁵³⁹

5.65 Key industry stakeholders also raised concerns regarding the level of experience and knowledge within strata committees. For example, the Owners Corporation Network said that 'apartment buyers are generally new to apartment living and are poorly equipped to manage the complex set of rights and obligations that come with a new apartment'. The Network explained the crucial role that 'democratically elected strata committees' undertake on behalf of apartment owners within a strata scheme and outlined that 'there is also a wide variation in the capability and motivation of committees'.⁵⁴⁰

5.66 Ms Karen Stiles, Executive Officer, Owners Corporation Network, further emphasised the difficulties of owners in managing their strata buildings:

Really when you think about it owners are deer in the headlights. These are a disparate group of unskilled people who in the majority now have never lived in strata. They do not understand that they are executives managing a medium to large size business. They have bought a home but what they have got is a whole lot more and they are ill-equipped to deal with that.⁵⁴¹

⁵³⁶ Submission 94, Mr Terry Jones, p 7.

⁵³⁷ Submission 89, Mr Aidan Ellis, p 2.

⁵³⁸ Submission 12, Name suppressed, p 4.

⁵³⁹ Public Accountability Committee, NSW Legislative Council, *Preliminary report on the online survey questionnaire: Inquiry into the regulation of building standards, quality and disputes*, 9 August 2019, p 9.

⁵⁴⁰ Submission 117, Owners Corporation Network, p 2.

⁵⁴¹ Evidence, Ms Karen Stiles, Executive Officer, Owners Corporation Network, 12 August 2019, p 36.

- 5.67** Along similar lines, the Society of Construction Law Australia commented that 'strata committee members may only have rudimentary knowledge of the building industry and limited experience managing the defect rectification process'. The Society said that trying to find out who is liable for defects in common property is 'often complicated'. The Society also pointed out that 'dealing with substantial defect rectification without industry knowledge or experience is stressful'.⁵⁴²
- 5.68** Ms Fisher from the Strata Community Association reported that strata committees are unsure where to go for support and they usually turn to strata managers to provide them with guidance. However, Ms Fisher advised that often strata managers are not qualified to deal with building defects and cladding issues and it is the Association's role 'to try to provide education and up-skill them as fast as we can'.⁵⁴³
- 5.69** In this regard, the Owners Corporation Network called for 'significant additional independent expert support and training for apartment owners and their committees as soon as occupation commences'. The Network advised that it had 'submitted a proposal to the NSW Government to establish a training and support function for strata committees funded via a very small levy on each apartment owner in NSW'. Further, the Owners Corporation Network recommended that this be managed by a new specialist strata department or Strata Commissioner who would report to a dedicated senior Minister.⁵⁴⁴
- 5.70** When questioned on the proposal to establish a Strata Commissioner,⁵⁴⁵ Associate Professor Easthope advised that 'it would be beneficial' to establish a Strata Commissioner who could 'operate within an understanding of the context and provide support to those additional levels of citizen government'.⁵⁴⁶

Disputes amongst homeowners

- 5.71** Inquiry participants reported that the complexities surrounding the rectification of defects, as well as the limited experience and knowledge within strata committees, can cause disputes amongst owners.
- 5.72** The Owners Corporation Network said that 'the combination of an inexperienced committee supported by inexperienced or under qualified service providers dealing with major building defects inevitably leads to sometimes intractable disputes with individual apartment owners'. The Network commented that 'it is inevitable that disputes arise in strata schemes' and 'in the most extreme situations the impact on the people involved can be very damaging both personally and financially'.⁵⁴⁷
- 5.73** Mr Terry Jones, a long term strata committee member, told the committee that the majority of disputes amongst owners in his building have related to building defects:

⁵⁴² Submission 167, Society of Construction Law Australia, pp 12-13.

⁵⁴³ Evidence, Ms Fisher, 16 August 2019, p 71.

⁵⁴⁴ Submission 117, Owners Corporation Network, pp 18 and 21.

⁵⁴⁵ Evidence, Ms Fisher, 16 August 2019, p 72.

⁵⁴⁶ Evidence, Associate Professor Easthope, 16 August 2019, p 39.

⁵⁴⁷ Submission 117, Owners Corporation Network, pp 17-18.

I think it would be fair to say that in the time we lived in that building virtually all, if not all, disputes and disagreements either between owners or between owners and the owners' corporation had as their root cause a construction defect in the building. It is not only the stress of having all those problems, living with them and getting them fixed, it is also the discontent it sows within the community.⁵⁴⁸

- 5.74** The committee particularly received evidence that disputes often occur when owners do not all agree on the cost and proposed works for rectification of a defect in common property, when that section of the common property may not directly affect all owners.
- 5.75** Dr Crommelin commented that the 'whole relationship between your apartment and the common property is complicated to understand' and that 'part of the challenge of getting defects dealt with is actually beginning the process of convincing everyone that this is everyone's problem'.⁵⁴⁹
- 5.76** Ms Hearn stated that 'living with defects can be devastating and it is a recipe for conflict, especially if it is a minority of owners that are affected'. She explained that it 'is the owners themselves in strata law that have a strict duty to repair and maintain the common property' and so this means 'they have unlimited liability', which is not well known by most people who move into strata.⁵⁵⁰
- 5.77** The City Futures Research Centre also noted that not all owners understand that 'by law, all owners are responsible for defects in common property, and have an obligation to ensure that they are addressed'.⁵⁵¹
- 5.78** Mr Richard Devon, an owner in The Landmark building, Charlestown, told the committee that in his experience only a small number of owners supported fixing the defects in his building, with the remainder of the owners resisting the work being done:

Unfortunately there are only three of the fifty-nine residential owners who have aggressively tried to bring the situation to something approaching reality. The three of us have been repeatedly ostracized by the other 56 owners, and we have even been subjected to anonymous vindictive letters. Further, one of us three ... has been subjected to much abuse over the last three years, including two disgusting anonymous letters from declared other owners.⁵⁵²

- 5.79** The below case study details the experience of one homeowner who was subjected to bullying by their strata committee over the course of eight years while trying to rectify leaking windows and enclose their balconies.

⁵⁴⁸ Evidence, Mr Terry Jones, Long term strata committee member, 12 August 2019, p 21.

⁵⁴⁹ Evidence, Dr Crommelin, 16 August 2019, p 36.

⁵⁵⁰ Evidence, Ms Hearn, 12 August 2019, pp 32 and 39.

⁵⁵¹ Submission 79, City Futures Research Centre, University of NSW, Sydney, p 2.

⁵⁵² Submission 24, Mr Richard Devon, p 1.

Case study: One owner's experience of a dispute with their strata committee⁵⁵³

In 2010, a strata committee for a block of 36 units agreed to the replacement of bedroom and living room windows due to water leakage. The committee also agreed that any owner could enclose their balcony if they wished to do so. One homeowner shared their experience in dealing with the strata committee over eight years in relation to these two issues.

Between 2011 and 2013, work was completed on a number of defects before work commenced on the bedroom and living room windows and the balconies. The owner explained that the work was disruptive, created further damage, and in one case was defective.

In 2013, a new strata manager commenced and sought quotes for the replacement of the bedroom and living room windows. The manager presented a recommendation at an owners meeting which was unanimously approved. However, due to a later dispute within the committee, the strata manager proposed that a project manager be hired, effectively restarting the project.

In 2014, the owners selected a company to manage the project. This company changed and expanded the brief without consulting with the strata committee. The homeowner described this as an 'expensive exercise that went nowhere', with all confidence in the project manager now lost.

At an owners meeting in 2016, five owners put forward a new plan without consulting other committee members. The plan proposed to remove the previously agreed enclosures and change the windows from UPVC to aluminium. The motion for the new plan was carried. The homeowner consulted their lawyer and applied to the NSW Civil and Administrative Tribunal (NCAT). The motion was subsequently rescinded. The homeowner explained that the plan was not compliant with the Building Code of Australia, and the committee had no legal right to withdraw permission previously noted on the development application for any owner to enclose their balcony.

At the next Annual General Meeting, the homeowner was voted off the strata committee. After six years of waiting, the homeowner along with two other owners sought to independently enclose their balconies. This required a by-law that the owners corporation had to approve. The strata committee sought legal advice and was advised that they would not succeed in stopping the three owners. However, it appears that this advice was not shared with the rest of the owners as the by-law motion was not successful on two occasions.

In 2017, the three owners applied to NCAT for court orders. The homeowner reported that 'this is where the real bullying starts'. At a meeting in April, the owners agreed to defend the NCAT application. Prior to the NCAT hearing, the strata committee granted permission with a five month delay. Subsequently, orders by consent were issued. The homeowner suggested that the strata committee believed that the threat of legal action would make the three homeowners seeking to enclose their balconies independently to 'back down' and not proceed with the NCAT proceedings.

⁵⁵³ Submission 51, Name suppressed. This case study is not taken verbatim from the author, but is an accurate reflection of how the author presented their case to the committee.

Before construction began, the three homeowners submitted relevant paperwork to the strata committee in June 2017. The committee pushed back on the paperwork requiring further details which are ordinarily not necessary. This back and forth between the committee and the three owners delayed the start of the construction.

When trying to erect the scaffold for construction, the three homeowners were delayed again. The building manager parked his car where the scaffold needed to go, therefore obstructing access. The car was removed 44 days later, and construction finally began in August 2018.

The homeowner stated that throughout the construction phase, the strata committee continued to attempt to stop the work. The committee spent a further \$20,000 seeking legal advice and making false allegations that the three homeowners were not complying. The committee wanted to take the matter to NCAT but were advised that they were unlikely to succeed.

Despite the three homeowners complying in 'every way', members of the strata committee kept trying to stop the work right up until the third last day of construction. For example, two strata committee members lodged a complaint against the council employee who approved the development application. They continued to complain to the council and each complaint 'came to nothing'. In one instance, committee members went into another person's unit to take pictures inside of their home.

The works are now complete and the homeowner is 'extremely happy' with the result. However, the homeowner felt that this result came with a 'huge amount of harassment' by the strata committee. They described the ordeal as a 'classic case of bullying'. As of July 2019, the homeowner is still waiting for the leaking windows to be fixed.

5.80 In terms of the services available to strata committees in resolving disputes, the NSW Government advised that it has 'established a framework to ensure fair and democratic decision making for owners corporations and strata committees', including:

- that under the *Strata Schemes Management Act 2015*, decisions must be made fairly and democratically, with a majority of owners required to agree to decisions that affect other owners
- a free strata mediation service provided by NSW Fair Trading for those who are unable to resolve a strata dispute through discussions or through the governance and decision-making powers of the owners' corporation
- the introduction of the Strata Building Bond and Inspections Scheme designed to ensure there is a clear process to incentivise developers and builders to build correctly and to work collaboratively with owners' corporations.⁵⁵⁴

5.81 However, the Owners Corporation Network indicated that regulation and oversight in this area has 'not kept pace with the rapid growth in apartment living and building defects' and this is particularly apparent in the lack of dispute management services.⁵⁵⁵

⁵⁵⁴ Submission 132, NSW Government, p 36.

⁵⁵⁵ Submission 117, Owners Corporation Network, p 2.

5.82 The UDIA commented that 'the timely resolution of defects can potentially be impeded by the owners corporation' and that the 'reluctance to engage into constructive dialogue about resolving defects is created by a complex and confusing system for defect resolution'. The UDIA expressed the view that the Strata Building Bond Scheme, that incentivises developers and builders to work with owners to rectify defects early, may encourage 'an unnecessarily adversarial approach'.⁵⁵⁶

Navigating the dispute resolution process

5.83 Another issue raised with the committee is the complex and expensive process homeowners may need to go through to rectify building defects and recover the cost of this rectification.

5.84 The NSW Government advised that there are a number of options to pursue costs for the rectification of building defects, which vary depending on the type of defect and the length of time since it was discovered. These options include:

- under the *Environmental Planning and Assessment Act 1979* a civil action for loss or damage arising out of or in connection with defective building work can be brought for up to ten years following the completion date of that work
- under the *Home Building Act 1989* a claim for breaching the statutory warranties can be brought within six years after work completed for major defects and two years for other defects
- under the *Home Building Act 1989* NSW Fair Trading can mediate disputes and enforce 'rectification orders' to direct builders to meet their statutory warranty obligations
- under the *Strata Schemes Management Act 2015* a developer is required to lodge a building bond to secure funds to meet the costs of rectifying building defects.⁵⁵⁷

5.85 The committee received evidence during this inquiry that these processes are complex, lengthy and costly, with limited results in recovering the cost of rectifying defects.

5.86 For example, the Mascot Towers Owners Corporation argued that 'owners of defective building sites face enormous challenges to recover remediation costs from builders or insurers'. The Corporation said that many homeowners 'may have to bring legal proceedings to recover these costs, facing years of uncertainty in structurally unsound and undignified living conditions'.⁵⁵⁸

5.87 Mr Philip Gall, Chairman, Owners Corporation Network, commented that rectifying major defective works in buildings 'almost always involves either complex legal claims on third parties or imposing significant new compulsory levies on unsuspecting homeowners'.⁵⁵⁹

⁵⁵⁶ Submission 87, Urban Development Institute of Australia - NSW Division, p 10.

⁵⁵⁷ Submission 132, NSW Government, pp 34-35.

⁵⁵⁸ Submission 150, Mascot Towers Owners Corporation, p 6.

⁵⁵⁹ Evidence, Mr Philip Gall, Chairman, Owners Corporation Network, 11 December 2019, p 28.

- 5.88** One Strata Manager told the committee that they had 'spent the last 17 years dealing with defects, under various regimes', and reported that the 'process is unrelenting on owners, causing financial and emotional stress'. The Strata Manager argued that insurers and builders 'seek to fatigue owners corporations in litigation', commenting that they 'have cases 15 years on and still open'.⁵⁶⁰
- 5.89** The City Futures Research Centre indicated that 'pursuing legal action for defects is often a lengthy, stressful and expensive experience for owners, and in many cases will not result in full recovery of owners' costs, even if successful'. The Research Centre explained that by pursuing legal action this could disadvantage owners by affecting the reputation and value of the building and if the building practitioner becomes insolvent or bankrupt the capacity for recourse is limited. It reported that 'as a result, owners may choose to bear the costs of repairing defects rather than pursuing legal action, or they may decide to accept an offer substantially lower than the costs of rectification', at times under a confidentiality agreement.⁵⁶¹
- 5.90** Likewise, the author of submission 94 commented that 'in most cases adequate restoration is never obtained without recourse to expensive and uncertain legal action'. The author said that 'owners are often reluctant to pursue this path because they fear that they do not have adequate financial resources to cover the costs, and committees are therefore only left with the option of pursuing token and inadequate rectification measures'.⁵⁶²
- 5.91** The author of submission 12 also commented on the financial difficulties, particularly in new buildings, where 'the owners corporation rarely have the funds in their administrative or sinking funds to carry out remedial works or engage solicitors to purs[ue] builders/insurers, necessitating the owners to raise hundreds of thousands in special strata levies'.⁵⁶³

Government support for homeowners

- 5.92** Inquiry participants also reported a lack of support from government agencies in navigating the process for rectifying building defects.
- 5.93** Mr Allan Veney, owner in a strata building, detailed his 'disappointing' experience dealing with the relevant government agencies. He explained that the NSW Police advised that his building dispute was a civil matter. Mr Veney then went to the NSW Civil and Administrative Tribunal (NCAT) who informed him on several occasions that 'it does not have the necessary powers to make the orders sought' and recommended he go to the strata scheme auditor, who is not returning his emails. Mr Veney advised that NSW Fair Trading 'claims it added comments to its building complaints data base and issued "educative notices" to the builder', however more recently advised that given his case involves criminal deception or possibly fraud he should consult again with the police. Mr Veney stated: 'For the past 18 months I've encountered no shortage of very polite public servants happy to tell me what I MIGHT DO! Seek legal advice. Commence court proceedings...'.⁵⁶⁴

⁵⁶⁰ Public Accountability Committee, NSW Legislative Council, *Preliminary report on the online survey questionnaire: Inquiry into the regulation of building standards, quality and disputes*, 9 August 2019, p 7.

⁵⁶¹ Submission 79, City Futures Research Centre, University of NSW, Sydney, p 2.

⁵⁶² Submission 94, Mr Terry Jones, p 7.

⁵⁶³ Submission 12, Name suppressed, p 4.

⁵⁶⁴ Submission 58, Mr Allan Veney, pp 2-3.

- 5.94** Along similar lines, the author of submission 94 reported that 'there appears to be little practical support provided to strata committees by the Department of Fair Trading regarding disputes with the builder' and 'any conversations on this topic simply end with the recommendation to "seek legal advice"'. The author recommended that the department provide at no cost to owners an initial consultation service to help identify any building defects and provide advice for rectification, as well as provide legal support for any issues arising out of this consultation, both of which could be funded from a levy on all multi-dwelling developments.⁵⁶⁵
- 5.95** Mr Jones told the committee that they received 'very little' support from the NSW Government in managing their case, explaining that 'we did contact the Department of Fair Trading on a few occasions and most of the conversations seemed to end up with, "You should seek legal advice", which is not particularly helpful'.⁵⁶⁶
- 5.96** The author of submission 60 stated that the dispute resolutions process in New South Wales 'has clearly failed me'. The author said that they have spent over \$60,000 in legal fees and are now expected to pay a further \$60,000 to proceed with the matter in NCAT. They have been advised by NSW Fair Trading that their 'only option was to seek a refund from the builder' under this process. They believed that this was 'completely unrealistic', and in the end the builder did not agree to the refund. The author recommended some form of 'building ombudsman' who could have made a determination in relation to their case without the cost of a lawyer.⁵⁶⁷
- 5.97** Another submission author commented that 'the court system with building disputes is not working' with owners still ending up having to live with a 'house with faults'. The author stated that 'you shouldn't have to go to the High Court at \$80,000 a day for a barrister' and recommended some form of assistance, such as through Legal Aid.⁵⁶⁸

Duty of care provisions

- 5.98** Other inquiry participants highlighted the challenge in proving a duty of care as part of the legal process.
- 5.99** The Society of Construction Law Australia noted that it is ultimately the responsibility of the owners corporation to rectify defects of common property, however recovering these costs usually 'requires a person to prove there was a duty of care between themselves and the negligent party'. The Society explained that this is difficult as 'it is not always clear with buildings who owes a duty of care to whom and it is even more difficult to determine who owes the duty of care to the final purchaser'. The Society said that even in circumstances where the person can be identified 'it is often the case that they can no longer be found either because of bankruptcy/insolvency, disappearance, or death' and although the Home Building Compensation scheme may cover this, it does not apply to high-rise buildings over three storeys.⁵⁶⁹

⁵⁶⁵ Submission 94, Name suppressed, p 8.

⁵⁶⁶ Evidence, Mr Jones, 12 August 2019, p 22.

⁵⁶⁷ Submission 60, Name suppressed, pp 3-4.

⁵⁶⁸ Submission 9, Name suppressed, p 1.

⁵⁶⁹ Submission 167, Society of Construction Law Australia, p 11.

- 5.100** The City Futures Research Centre also commented on the duty of care provisions. The Research Centre observed that the proposed government reforms to ensure there is a duty of care owed by building practitioners to strata owners could have 'a real benefit to apartment owners and residents', however noted the importance that these reforms 'take into account the barriers to recovering for negligence' and 'make the process of recovery as simple and streamlined as possible'.⁵⁷⁰
- 5.101** The case study below is an example of the difficulties owners face in trying to navigate the legal system and demonstrate a duty of care for the defects that have been found in their building. It also considers the limitations of the *Design and Building Practitioners Bill 2019* that attempts to address the difficulties in proving a duty of care. The bill is discussed further in chapter 1.

Case study: Owners struggle to seek damages for economic loss⁵⁷¹

In January 2016 a five-storey high residential development had its roof blow off causing extensive damage to the fabric of the building and to units and their contents. Some months later, the building subsequently experienced storm water damage during its repair work.

The history of the building's development showed that a modification to the development application was approved by the local council, who was the appointed Principal Certifying Authority, to change the building's roof design from 'one that would drain to a central box gutter to, instead, a conventional pitched roof design'. This modification was approved based on a set of architectural drawings only, with no structural engineering drawings provided. A construction certificate for the modified roof design was never applied for by the developer/builder and the certificate was never issued.

In September 2008, the development of the building was completed purportedly in line with the modified consent, however there was no amended construction certificate. For the first six years the development was fully owned by the developer/builder. In 2014, the developer/builder sold each of the units. By this time, the statutory warranties under the *Home Building Act 1999* had expired.

Given the decision of *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* which found that no duty of care is owed by developers, builders and subcontractors to incoming lot owners or an incoming owners corporation, the owners of this building sought 'to rely on the misleading and deceptive provisions in the Australian Consumer Law and a common law duty of care'. Therefore, the owners commenced proceedings in August 2018 in the Federal Court of Australia seeking damages for economic loss against the developer, who was also the builder, and the local council.

The owners had hoped that the introduction of the *Design and Building Practitioners Bill 2019* and the duty of care provisions in the bill would apply to their case. However, the duty of care provisions in the bill do not apply retrospectively to an owner who has already commenced proceedings for a breach of common law duty of care. The bill further limits the retrospective duty of care by not extending any rights to an owner to take action regarding a particular economic loss, if the date of completion of the construction work was more than ten years before the commencement of the bill.

⁵⁷⁰ Submission 79, City Futures Research Centre, University of NSW, Sydney, p 2.

⁵⁷¹ Correspondence from Ms Tracy Dunford, Special Counsel and Ms Colleen Palmkvist, Partner, Lander & Rogers Lawyers, to Chair, 2 December 2019. This case study is not taken verbatim from the authors, but is an accurate reflection of how the authors presented their case to the committee.

Both of these limitations in the bill apply to the owners in this case who consider this to be 'unfair;' they question why owners who are yet to commence proceedings receive the benefits of this bill and they do not. Their case is currently in the preliminary stages in court and they are a long way off from a hearing or judgement. The owners are currently in 'severe financial hardship as they have had to secure a loan at a rate of eight per cent per annum to fund the rectification works'. Their claim for damages is more than \$10 million.

The owners urged the committee to 'remove Clauses 5 (2) (a) and 5 (2) (c) of Schedule 1 of the bill and adopt a similar approach to that adopted with the retrospective provisions found in clause 69A of the *Home Building Regulation 2014* for major cladding defects that are not restricted by the completion date.

Dispute resolution under NCAT

- 5.102** In terms of the dispute resolution process under NCAT, a number of submission authors detailed concerns surrounding this process.
- 5.103** The author of submission 155 reported that their experience with NCAT was 'extremely disappointing'. The author took this path on advice from NSW Fair Trading and because they thought it would be the 'most expeditious and efficient way of dealing with the dispute', particularly as they were 'living in one room of a water damaged and mould infested house' with small children. The author explained the difficulties they had with the NCAT process:
- In our view, NCAT allowed Individuals 1 and 2 to effectively obfuscate and delay proceedings for over 12 months. A different Tribunal Member presided at almost every Directions Hearing which meant that everything needed to be re-explained. In our view, this also meant that Individuals 1 and 2 were continuously given further extensions of time, despite consistent failure to meet NCAT mandated deadlines.⁵⁷²
- 5.104** The author of submission 53 had a similar experience. They told the committee that during the NCAT proceedings 'the builder was given multiple extensions to the timetable and never required to explain or justify his delays or noncompliance'. The author also found the NCAT members 'were aggressive to the homeowner, gave the impression of being bored and non-plussed with the financial and emotional impact of the builder's dismissive behaviour and delay tactics'. In the end, the company went into external administration and the proceedings are now stayed. The submission author stated: 'My legal costs of the NCAT proceeding are extraordinary and will never be recovered'.⁵⁷³
- 5.105** Others reported that even with a favourable decision from NCAT it is difficult to have these decisions enforced.
- 5.106** The author of submission 12 said that 'even a successful applicant can have huge difficulty in enforcing an order' and that due to the way the Strata Management and NCAT legislation is framed, the homeowner has no way to compel action on an order made by NCAT.⁵⁷⁴

⁵⁷² Submission 155, Name suppressed, p 4.

⁵⁷³ Submission 53, Name suppressed, pp 1-2.

⁵⁷⁴ Submission 12, Name suppressed, p 4.

- 5.107** Mr Devon also reported that he has found decisions given by NCAT 'virtually unenforceable'. He said that 'when you get a ruling in NCAT if the body corporate or the strata committee wants to ignore it they can and there is virtually no way you can make them carry out the changes'.⁵⁷⁵
- 5.108** The Owners Corporation Network told the committee that 'it is not unheard of for strata committees to fail to implement a decision by NCAT either fully or in the time frame required'. The Network indicated that the resourcing of NSW Fair Trading and NCAT 'are unlikely to have kept pace with the rapid growth in strata living and the escalation of disputes associated with the management of building defects'. The Network recommended a review of the resourcing of these two agencies and also measures to be put in place to improve the regulatory oversight and enforcement of strata law.⁵⁷⁶

Appointment of strata manager by the developer

- 5.109** An issue that presents itself even before strata committees are formed following the completion of a building, is the appointment of a strata manager by the developer. Inquiry participants advised that developers are a source of new business to strata managers and were of the view that this could create a conflict where there is an incentive to not raise defective issues during the statutory warranty timeframes as this would be expensive for the developer.
- 5.110** Mr Gray spoke about the history of strata management of his building. He advised that the 'original building of the building was financed by the original strata management group', who 'managed the strata for about 14 or 15 years'. He said that 12 months after they purchased their unit the strata management changed and not long after that the defects became apparent.⁵⁷⁷
- 5.111** Mr Vile the consultant assisting with Mr Gray's building expressed the view that strata managers are mismanaging documentation and holding on to information to prevent defects coming to light:

I think there is an issue with the strata managers winning the first management rights off the developer. There is a conflict there. There should not be but there is. You do not get the documents you need. Files go missing, even though they are supposed to be lodged, all the work is executed. All of that stuff at construction, it kind of disappears, and then when somebody comes along to try to maintain the building they cannot find the documents. We have sort of experienced buildings where the strata manager has nursed it along to get it a little bit further down the track so the general defects can disappear and then in the worst cases they hide as much as they can, I believe. Without knowing, you do not see it on the record.⁵⁷⁸

- 5.112** The Owners Corporation Network stated that 'the handover process from developers to apartment owners can be easily exploited by developers and builders to avoid meeting defect warranty obligations'. The Network explained that strata managers can rely on developers for business and there could be an incentive for them to not pursue defects during the time periods:

⁵⁷⁵ Evidence, Mr Devon, 12 August 2019, p 29; Submission 24, Mr Richard Devon, p 1.

⁵⁷⁶ Submission 117, Owners Corporation Network, p 20.

⁵⁷⁷ Evidence, Mr Gray, 20 February 2020, p 20.

⁵⁷⁸ Evidence, Mr Vile, 20 February 2020, p 23.

Many strata management companies grow their business by working with developers to help manage the handover to new apartment owners. Developers are a vital source of new business for strata management companies and these companies need to walk a delicate line between serving the developer and serving their ultimate potential clients, the new apartment building owners. In the worst cases developers, builders and strata managers can and do 'manage' novice committees out of fully pursuing their rights during the critical period to have major defects identified and rectified.⁵⁷⁹

- 5.113** Mr Gall from the Owners Corporation Network underscored that the conflicted appointment of strata managers by developers 'is not a reflection as a general statement to say they misbehave', however the system puts them in a 'position that they can be conflicted'.⁵⁸⁰
- 5.114** However, Ms Fisher did highlight that strata managers 'are not all bad' and there are many out there 'who work closely with developers and they are the ones left picking up the pieces for homeowners and they are about the homeowners' interests'.⁵⁸¹
- 5.115** Likewise, Ms Hearn noted that many strata managers 'are very good, but they tread a very fine line' as 'they also get a substantial volume of business from new buildings'. She said that there is a need to look at the independence of strata managers at the beginning of a strata scheme, but noted that this is 'difficult'. She did however recommend that new owners be provided with independent information and advice right at the beginning:

We also need to support new owners' corporations with independent information right at the very beginning so that they are not sort of submerged within this environment of conflicted commercial interests, so that they have genuine independent information to assist them. That is why we have talked about a strata committee support service, not just in relation to defects and new owners' corporations but a plethora of issues in strata schemes. It needs a better focal point in Government to look at it from their perspective. Strata owners are literally treated as consumers of property services with very minimal servicing from government.⁵⁸²

- 5.116** Mr Chris Duggan, President, Strata Community Association, informed the committee that a comprehensive review of the strata laws was undertaken in 2016 and lead to a 'series of initiatives aimed at strengthening the transparency and accountability of strata managing agents'. He explained the following measures that had been introduced:
- the initial appointment of a strata manager by the developer can only be until the date of the first Annual General Meeting when lots are transferred to owners
 - limitations on the voting power of developers should they own more than 50 per cent of the lots to restrict their ability to unduly influence decision making in a strata scheme
 - at the first Annual General Meeting there is a restriction for a one-year appointment of the strata manager

⁵⁷⁹ Submission 117, Owners Corporation Network, pp 2 and 18.

⁵⁸⁰ Evidence, Mr Gall, 11 December 2019, p 28.

⁵⁸¹ Evidence, Ms Fisher, 16 August 2019, p 74.

⁵⁸² Evidence, Ms Hearn, 12 August 2019, pp 32 and 41.

- mandatory motions introduced in the new strata act obligate the owners corporation to discuss building defects at each meeting until such time as the statutory warranty period expires.⁵⁸³

5.117 Likewise, Ms Fisher commented that 'there are a range of managers that do roll over from that first year because, in most cases, homeowners have not occupied the premises for more than six months before that year comes around'.⁵⁸⁴

Committee comments

5.118 It is concerning that there may be hundreds, if not thousands, of defective buildings across New South Wales, particularly with the apartment building boom. Although at this stage we do not know the full extent of the defect problem, the indicative results are alarming. From the evidence given to this inquiry we can say that in the New South Wales construction industry defects are widespread; in fact they are dreadfully common.

5.119 We note the difficulties in obtaining reliable data in this space and acknowledge that the NSW Building Commissioner is working with the City Futures Research Centre to produce more accurate data. We believe it is crucial that we know the full extent of the problem we are dealing with. We therefore are encouraged by this collaboration between the City Futures Research Centre and the NSW Building Commissioner and look forward to the findings being made publicly available to inform future government policy across the industry.

5.120 We note that strata buildings are complex machines, similar to small or even medium sized businesses, but run by everyday people. The rectification of defects in a strata complex adds another layer of complexity to this already complex system. We acknowledge that homeowners are struggling with rectification processes, not only the financial burden but also the emotional toll. It is easy to see how disputes form within a strata community, adding to an already stressful situation for all those involved. As noted in chapter 3, this costly and distressing situation for homeowners has been caused in significant part by the lack of effective regulation and oversight by the NSW Government over decades.

5.121 It would seem from the evidence that NCAT does not have the appropriate enforcement powers or case management practices to assist many homeowners with their disputes. Many homeowners have had to go through a lengthy and complex process with no satisfactory result at the end. This is clearly not a resolution system that is working. The committee therefore recommends that the NSW Government review the NCAT dispute resolution process for disputes relating to strata buildings in an effort to ensure the tribunal has sufficient enforcement powers and to simplify and streamline the process, and to ensure that tribunal members have the relevant expertise.

⁵⁸³ Answers to questions on notice, Mr Chris Duggan, President, Strata Community Association, 9 September 2019, p 2.

⁵⁸⁴ Evidence, Ms Fisher, 16 August 2019, p 74.

Recommendation 20

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.

- 5.122** From the evidence we received, insufficient support is offered by NSW Fair Trading to strata committees to assist in rectifying building defects and resolving disputes. Many inquiry participants have called for the appointment of a Strata Commissioner. The committee believes this is justified given the issues now plaguing the residential apartment community and the very one-sided struggles that we have had evidence about between well-resourced and professional builders and developers on the one hand and ordinary homeowners on the other.
- 5.123** We consider that the Strata Commissioner should 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 the function of providing training, support and advice to strata committees, particularly on rectifying building defects and flammable cladding and dealing with strata disputes.
- 5.124** The Commissioner may also have the task of monitoring and recommending any necessary changes to the policy settings that govern disputes between homeowners and builders and developers. This oversight has clearly been missing for many years in New South Wales otherwise how do we explain that issues like the unfortunate policy reversal created by the *Brookfield Multiplex* case⁵⁸⁵ have been left unaddressed for years by the current regulators.
- 5.125** To break the nexus between the developer and strata manager, the committee concludes that the Strata Commissioner could also be responsible for appointing the strata manager at conclusion of construction of a strata building and we therefore recommend that this be considered.
-

Recommendation 21

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:

- 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.
-

⁵⁸⁵ *Brookfield Multiplex Ltd v. Owners Corporation Strata Plan 61288 & Anor* [S66/2014].

- 5.126** We agree that the main reform task is to ensure that residential buildings are built right the first time and this committee's recommendations, as well as those made in the Lambert and Shergold Weir reports, identified many of the reforms needed to achieve this goal. However there are a significant number of homeowners out there today dealing with these issues with nowhere to turn. These problems were created by decades of deregulation by the State Government, which has stepped away from its responsibilities to ensure homes are built to an acceptable standard and are safe for occupation.
- 5.127** It is certainly not right that the whole of this liability is left in the hands of the innocent homeowners in strata buildings who bear no responsibility for defective building work. It is unacceptable that the NSW Building Commissioner is not willing to advocate for any financial support to those people living with significant building defects that are outside of the statutory warranty period and are unable to claim from other avenues. It is ludicrous that homeowners in buildings that are over three storeys high are not provided the same safety net as homeowners in low rise or single level dwellings, particularly given the number of defects in high rise apartments built in recent years.
- 5.128** We believe the government has a responsibility to strata homeowners and therefore we recommend 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.

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.

- 5.129** The building and construction industry is one of the largest industries in this state. With an increasing population and a growing housing demand it is important that we have the fundamental laws and regulations surrounding this industry right. As this inquiry has shown, the regulatory and policy settings need a much greater focus and priority from the government. As future reforms are introduced it is essential that the NSW Government and the NSW Parliament work together to make sure these reforms work and ultimately bring back the public's confidence in the building and construction industry.

Appendix 1 Submissions

No.	Author
1	Rose Bay Residents Association
2	Strata Alert
3	Name suppressed
4	Mrs Louise Wilding
5	Confidential
6	Name suppressed
7	Ms Fernanda Rodas
8	Mr Brett Daintry
8a	Mr Brett Daintry
9	Name suppressed
10	Name suppressed
11	Name suppressed
12	Name suppressed
13	Name suppressed
14	Mr Larry Larstead and Ms Jan Olley
15	Name suppressed
16	Name suppressed
17	Name suppressed
18	Confidential
19	Name suppressed
20	Name suppressed
21	Mr Ian Childs
22	Name suppressed
23	Name suppressed
24	Mr Richard Devon
24a	Mr Richard Devon
25	Name suppressed
26	Cr Cath Blakey
27	Mr Andrew Martin
28	Confidential
29	Mr Peter Nowlan
29a	Mr Peter Nowlan

No.	Author
30	Mr Ron Waters
31	Confidential
31a	Confidential
32	Mr Aleksandr Lukashev
33	Hornsby Shire Council
34	Mr Michael Want
35	Mr Che Leonard
36	Confidential
37	Name suppressed
38	Confidential
39	Name suppressed
40	Mr Neale Murden
41	Name suppressed
42	Confidential
43	Residential Strata Committee
44	Willoughby City Council
45	Mr Scott Smith
46	Mr William Chapman
47	Ms Julie Garoni and Mr Gerard Lukassen
48	Mr John Inshaw
49	Confidential
50	Mr Sean Lander
51	Name suppressed
52	Mr Matt Gregory
53	Name suppressed
54	Mr Peter Hopper and Ms Sharon Lambert
54a	Mr Peter Hopper and Ms Sharon Lambert
55	Ms Maureen Partridge
56	Mr Michael Lambert
56a	Mr Michael Lambert
57	Professor Marton Marosszky
58	Mr Allan Veney
59	Confidential
60	Name suppressed
61	National Fire Industry Association

No.	Author
62	Australian Institute of Quantity Surveyors
63	NSW Plumbing Trades Employees Union and Plumbing Industry Climate Action Centre
64	Terry West Building Approvals and Consultants Pty Ltd
65	Development and Environmental Professionals' Association (DEPA)
66	Mr David Gray
67	Building Products Industry Council
68	Lake Macquarie City Council
69	Name suppressed
70	Stanton Legal
71	Blue Mountains City Council
72	Friends of Erskineville
73	Shelter NSW
74	Association of Accredited Certifiers
74a	Association of Accredited Certifiers
75	Pro Cert Group Pty Ltd
76	LF Economics
77	Electrical Trades Union of Australia, NSW Branch
77a	Confidential
78	Fire Protection Association Australia
79	City Futures Research Centre, UNSW Sydney
80	Mr Mark Hindle
81	Strathfield Council
82	Australian Foundation Systems Pty Ltd
82a	Australian Foundation Systems Pty Ltd
83	Strata Community Association NSW
84	Name suppressed
85	Mr Justin Jones-Gardiner
86	Waverley, Woollahra & Randwick Councils
87	Urban Development Institute of Australia - NSW Division
87a	Urban Development Institute of Australia - NSW Division
88	Name suppressed
88a	Name suppressed
89	Mr Aidan Ellis
89a	Mr Aidan Ellis

No.	Author
90	Name suppressed
91	Mr John Murray
92	Name suppressed
93	Ms Bronwyn Weir and Professor Peter Shergold
94	Name suppressed
95	Name suppressed
96	Name suppressed
97	Name suppressed
98	Mr Tim Stenning
99	Mr Brett Bates
100	Mr Manning Clarke
101	Mr Jan Luikens
102	Confidential
103	Confidential
104	Confidential
105	Confidential
106	Confidential
107	Name suppressed
108	Name suppressed
109	Name suppressed
110	Name suppressed
111	Name suppressed
112	Mr Clifford Bernard
113	Mrs Marcelle Carr
114	Mr Peter Conroy
115	Name suppressed
116	Confidential
117	Owners Corporation Network
117a	Owners Corporation Network
118	Randwick City Council
119	Byles Creek Valley Union Inc
120	Confidential
121	Cr Murray Matson
122	The National Trust of Australia (NSW)
123	Australian Institute of Building Surveyors

No.	Author
124	Planning Institute of Australia (NSW)
125	Engineers Australia
125a	Engineers Australia
125b	Engineers Australia
126	Name suppressed
127	Dincol Construction System Pty Ltd
127a	Dincol Construction System Pty Ltd
128	Mr Charles Slack-Smith
129	Australian Institute of Architects NSW
129a	Australian Institute of Architects NSW
130	SecureBuild
131	NSW Independent Commission Against Corruption
132	NSW Government
133	Property Council of Australia
133a	Property Council of Australia
134	Insurance Council of Australia
135	Confidential
136	Name suppressed
137	Toplace Group
138	Dr Dorothy Robinson
139	Penrith City Council
140	Housing Industry Association (HIA)
141	Name suppressed
141a	Name suppressed
142	Better Planning Network Inc
143	City of Sydney
144	Australian Air Quality Group
145	Local Government NSW
145a	Local Government NSW
146	Name suppressed
146a	Name suppressed
147	Blue Mountains Conservation Society Inc
148	Cooks Hill Community Group Inc
149	Consult Australia
150	Mascot Towers Owners Corporation

No.	Author
151	Name suppressed
152	Wollongong City Council
153	Name suppressed
154	Mr David Baker
155	Name suppressed
156	Name suppressed
157	Name suppressed
158	Liverpool City Council
159	Mr Chris Rumore
160	Sustainable Living Armidale, Subcommittee on Energy
161	Mr John Bush
162	Joe's Pools and Spa Pty Ltd
162a	Joe's Pools and Spa Pty Ltd
163	Mr Paul Schimke
164	Building Designers Association of Australia
165	Mr David Mehan MP
166	Yanni Kagaras
167	Society of Construction Law Australia
168	Name suppressed
169	MCG Quantity Surveyors
170	Ms Carol O'Donnell
171	Lighting Council Australia
172	Confidential
172a	Name suppressed
173	Construction Forestry Mining and Energy Union (NSW Branch)
173a	Construction Forestry Mining and Energy Union (NSW Branch)
174	Institute of Public Works Engineering Australasia Limited NSW Division (IPWEA)
175	Mr Amir Bodenstein
176	Mr Duncan Kennedy
176a	Mr Duncan Kennedy
177	National Electrical and Communications Association (NECA)

Appendix 2 Witnesses at hearings

Date	Name	Position and Organisation
12 August 2019 Jubilee Room Parliament House	Ms Rose Webb	Deputy Secretary, Better Regulation Division and NSW Fair Trading Commissioner
	Mr Peter Dunphy	Executive Director NSW Fair Trading Specialist Services, Department of Customer Service
	Mr John Tansey	Executive Director Regulatory Policy, Better Regulation Division, Department of Customer Service
	Ms Carmel Donnelly	Chief Executive, State Insurance Regulatory Authority
	Mr Richard Devon	Owner, The Landmark, Charlestown
	Mr Vijay Vital	Owner, Mascot Towers
	Mr Alton Chen	Owner, Mascot Towers
	Mr Terry Jones	Long term strata committee member
	Ms Jane Hearn	Director, Owners Corporation Network
	Ms Karen Stiles	Executive Officer, Owners Corporation Network
	Mr Karl Sullivan	Head of Risk and Operations, Insurance Council of Australia
	Mr Michael Lambert	Author of the Independent Review of the Building Professionals Act 2005

Date	Name	Position and Organisation
16 August 2019 Macquarie Room Parliament House	Mr David Chandler, OAM	NSW Building Commissioner
	Ms Rose Webb	Deputy Secretary, Better Regulation Division and NSW Fair Trading Commissioner
	Mr Justin Page	Secretary, Electrical and Trades Union of Australia, NSW Branch
	Mr Chris Seet	Assistant Secretary, NSW Plumbing Trades Employees Union
	Associate Professor Hazel Easthope	City Futures Research Centre, University of New South Wales
	Dr Laura Crommelin	City Futures Research Centre, University of New South Wales
	Cr Linda Scott	President, Local Government NSW
	Ms Vanessa Burow	Senior Policy Officer – Planning, Local Government NSW
	Ms Kathlyn Loseby	President NSW, Australian Institute of Architects
	Ms Leanne Hardwicke	General Manager Policy, Advocacy and Education, Australian Institute of Architects
	Ms Kate Hurford	National Policy Manager, Australian Institute of Architects
	Mr Jonathan Boyle	General Manager, Australian Foundation Systems
	Mr David Christie	Managing Director, Australian Foundation Systems
	Mr David Dickson	Consulting Engineer, Brooker Group
Ms Alisha Fisher	Chief Executive Officer, Strata Community Association	
Mr Brett Daintry	Director, Daintry Associates	

Date	Name	Position and Organisation
27 August 2019 Macquarie Room Parliament House	Mr Jonathan Russell	National Manager for Public Affairs, Engineers Australia
	Mr Greg Ewing	General Manager for the Sydney Division, Engineers Australia
	Mr Brett Mace	Chief Executive Officer, Australian Institute of Building Surveyors
	Mr Tim Tuxford	NSW/ACT Board Director, Australian Institute of Building Surveyors
	Mr Craig Hardy	President, Association of Accredited Certifiers
	Mr Robert Marinelli	Vice-President, Association of Accredited Certifiers
	Mr Ian Robertson	Secretary, Development and Environmental Professionals' Association
	Mr Brian Seidler	Executive Director, Master Builders NSW
	Mr Craig Donovan	Director Operations, Master Builders NSW
	Mr Steve Mann	Chief Executive Officer, Urban Development Institute of Australia
	Mr Elliott Hale	General Manager Policy, Media and Government Relations, Urban Development Institute of Australia
	Ms Bronwyn Weir	Co-author 'Building Confidence: Improving the effectiveness of compliance and enforcement systems for the building and construction industry across Australia' report
Mr Wayne Smith	Chief Executive Officer, National Fire Industry Association	

Date	Name	Position and Organisation
	Ms Anita Campbell	Executive Officer, National Fire Industry Association
	Ms Rose Webb	Deputy Secretary, Better Regulation Division and NSW Fair Trading Commissioner
	Mr Peter Dunphy	Executive Director NSW Fair Trading Specialist Services, Department of Customer Service
	Mr John Tansey	Executive Director Regulatory Policy, Better Regulation Division, Department of Customer Service
	Ms Carmel Donnelly	Chief Executive, State Insurance Regulatory Authority
5 November 2019 Jubilee Room Parliament House	Mr Jonathan Russell	National Manager for Public Affairs, Engineers Australia
	Mr Greg Ewing	General Manager for the Sydney Division, Engineers Australia
	Mr John Roydhouse	Chief Executive Officer, Institute of Public Works Engineering Australasia NSW
	Cr Linda Scott	President, Local Government NSW
	Ms Kathlyn Loseby	President, NSW Chapter, Australian Institute of Architects
	Ms Kathryn Hurford	National Policy Manager, Australian Institute of Architects
	Mr Brett Daintry	Director, Daintry Associates
	Mr Darren Greenfield	State Secretary, Construction, Forestry, Mining and Energy Union – NSW Branch
	Ms Rita Mallia	President, Construction, Forestry, Mining and Energy Union – NSW Branch

Date	Name	Position and Organisation
	Mr Steve Mann	Chief Executive Officer, Urban Development Institute of Australia NSW
	Mr Barry Mann	Chair of the Urban Development Institute of Australia NSW Building Regulation Industry Advisory Panel and former Chief Executive Officer of NSW UrbanGrowth
	Mr Michael Lambert	Author of the Independent Review of the Building Professionals Act 2005
	Ms Karen Stiles	Executive Officer, Owners Corporation Network
	Mr Philip Gall	Chairman, Owners Corporation Network
	Ms Rose Webb	Deputy Secretary, Better Regulation Division and NSW Fair Trading Commissioner
	Mr John Tansey	Executive Director Regulatory Policy, Better Regulation Division, Department of Customer Service
	Mr David Chandler, OAM	NSW Building Commissioner
	Ms Bronwyn Weir	Advisor to NSW Building Commissioner
11 December 2019 Macquarie Room Parliament House	Witness A	
	Mr Chris Rumore	Resident and Chair of the sub-committee owners corporation
	Mr Ravendra Mawjee	Resident in a building containing cladding
	Cr Linda Scott	President, Local Government NSW
	Mr Karl Sullivan	Head of Risk and Operations, Insurance Council of Australia

Date	Name	Position and Organisation
	Mr Leighton Drury	State Secretary, Fire Brigade Employees Union
	Ms Anastasia Polites	Senior Industrial Officer, Fire Brigade Employees Union
	Mr Philip Gall	Chairman, Owners Corporation Network
	Ms Jane Hearn	Vice Chair, Owners Corporation Network
	Mr Chris Duggan	NSW President, Strata Community Association NSW
	Mr Leo Patterson Ross	Senior Policy Officer, Tenants' Union of NSW
	Mr Greg Ewing	General Manager for the Sydney Division, Engineers Australia
	Ms Sarnia Rusbridge	National Seminar Coordination Chair, Society for Fire Safety, Engineers Australia
	Mr Edmund Ang	NSW Chapter Chair, Society for Fire Safety, Engineers Australia
	Mr Darren Greenfield	State Secretary, Construction, Forestry, Mining and Energy Union – NSW Branch
	Mr Nigel Davies	National Assistant Secretary, Construction, Forestry, Maritime, Mining and Energy Union
	Mr Mark Whybro AFSM	Assistant Commissioner Community Safety, Fire and Rescue NSW
	Mr Dave Hudson	Deputy Commissioner, Investigations and Counter Terrorism, NSW Police Force
	Ms Rose Webb	Deputy Secretary, Better Regulation Division and NSW Fair Trading Commissioner

Date	Name	Position and Organisation
	Mr John Tansey	Executive Director Regulatory Policy, Better Regulation Division, Department of Customer Service
20 February 2020 Hunter Room Newcastle City Hall	Mr Geoff Douglass	Development Projects Coordinator, Newcastle City Council
	Mr Gordon Dryburgh	Regulatory Section Manager, Newcastle City Council
	Mr Michael Corrigan	Senior Building Surveyor, Lake Macquarie City Council
	Ms Elizabeth Lambert	Acting Manager Development Assessment and Certification, Lake Macquarie City Council
	Mr Scott Rathgen	Section Manager, Building Certification, Central Coast Council
	Mr Andrew Henry	Building Certifier/Coordinator Regulatory Services, Singleton Council
	Mr Phil Hoawerth	Building Certifier/Process Improvement Specialist, Singleton Council
	Mr Nick Greenhalgh	Senior Development/Building Officer, Dungog Shire Council
	Ms Christine Robinson	Manager Planning Building and Regulatory Services, Upper Hunter Shire Council
	Mr David Gray	Home owner
	Mr Grahame Vile	Director, BAAM Consulting
	Ms Therese Doyle	Member, Better Planning Network Inc and Co-convenor, Newcastle Hunter Urban Planning and Transport Alliance
	Ms Barbara Ferris	Secretary, Body Corporate, local strata building

Date	Name	Position and Organisation
24 February 2020 Macquarie Room Parliament House	Witness B	
	Witness C	
	Witness D	
	Mr Peter Goudie	Consulting Engineer
	Mr Burak Dincel	Chairman, Dincel Construction System
	Mr Berkay Dincel	Director, Dincel Construction System
	Ms Maria Barreto-Tilman	Group Marketing Manager, Dincel Construction System
	Mr David Chandler, OAM	NSW Building Commissioner
	Ms Rose Webb	Deputy Secretary, Better Regulation Division and NSW Fair Trading Commissioner
	Mr John Tansey	Executive Director Regulatory Policy, Better Regulation Division, Department of Customer Service

Appendix 3 Minutes

Minutes no. 2

Thursday 4 July 2019

Public Accountability Committee

Members' Lounge, Parliament House, Sydney at 2.31 pm

1. Members present

Mr Shoebridge, *Chair*

Mr Borsak, *Deputy Chair*

Mr Graham

Mrs Houssos (*by teleconference*)

Mr Khan (*by teleconference from 2.34 pm*)

Mr Martin (*substituting for Mr Farlow by teleconference*)

Mr Mason-Cox (*by teleconference*)

2. Previous minutes

Resolved, on the motion of Mr Borsak: That draft minutes no. 1 be confirmed.

3. Correspondence

The committee noted the following items of correspondence:

Received:

- 17 June 2019 – Letter from the Hon Andrew Constance MP, Minister for Transport and Infrastructure, to Mr David Blunt, Clerk of the Legislative Council, providing the government's response to the inquiry into the impact of the WestConnex project
- 18 June 2019 – Email from Ms Loretta Picone, resident of Balmain, to committee, providing comment on the government's response to the inquiry into the impact of the WestConnex project
- 19 June 2019 – Email from Ms Vanessa Gill, Executive Officer, Office of the Auditor-General, to secretariat, confirming the Auditor-General's attendance to provide a briefing to the committee on 5 August 2019
- 28 June 2019 – Letter from Hon John Ajaka MLC, President and Chair of the Procedure Committee, to chair, advising that the Procedure Committee resolved to conduct an inquiry into the broadcast of proceedings resolution
- 3 July 2019 – Letter from Hon Robert Borsak MLC, Hon John Graham MLC and Mr David Shoebridge MLC requesting a meeting to consider terms of reference relating to regulation of building standards quality and disputes.

4. Consideration of terms of reference

The Chair tabled a letter proposing the following self-reference:

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

1. That the Public Accountability Committee inquire into and report on the regulation of building standards, building quality and building disputes by government agencies in New South Wales, including:
 - (a) the role of private certification in protecting building standards, including:
 - (i) conflicts of interest
 - (ii) effectiveness of inspections
 - (iii) accountability of private certifiers
 - (iv) alternatives to private certifiers,

- (b) the adequacy of consumer protections for owners and purchasers of new apartments/dwellings, and limitations on building insurance and compensation schemes, including:
 - (i) the extent of insurance coverage and limitations of existing statutory protections
 - (ii) the effectiveness and integrity of insurance provisions under the *Home Building Act 1989*
 - (iii) liability for defects in apartment buildings,
- (c) the role of strata committees in responding to building defects discovered in common property, including the protections offered for all strata owners in disputes that impact on only a minority of strata owners,
- (d) case studies related to flammable cladding on NSW buildings and the defects discovered in Mascot Towers and the Opal Tower,
- (e) the current status and degree of implementation of recommendations of reports into the building industry including the Lambert report 2016, the Sherwood/Weir report 2018 and the Opal Tower investigation final report 2019, and
- (f) any other related matter.

2. That the committee table an interim report as soon as practical and its final report by 14 February 2020.

Mr Borsak requested that the minutes record his declaration that he is a Director of a company in the building industry that is involved in construction work.

Resolved, on the motion of Mrs Houssos: That the committee adopt the terms of reference.

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

5.1 Propose timeline

Resolved, on the motion of Mr Graham: That the committee adopt the following timeline for the administration of the inquiry:

- submission closing date – Sunday 28 July, with the potential for extensions
- hearings – two to three initial hearings in August, on 16 and 27 August, and 14 August subject to consultation with members on availability, with further hearing dates to be determined
- site visits – to be determined after consideration of submissions.

5.2 Stakeholder list

Resolved, on the motion of Mr Borsak: That the secretariat circulate to members the chair's 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 by 10.00 am Monday 8 July 2019, unless a meeting of the committee is required to resolve any disagreement.

5.3 Advertising

The committee noted that the inquiry will be advertised via Twitter, Facebook, stakeholder letters and a media release distributed to all media outlets in New South Wales.

5.4 Online questionnaire

Resolved, on the motion of Mr Borsak: That the committee use an online questionnaire, and that:

- the media release announcing the establishment of the inquiry, and the committee's website, note that the committee will use an online questionnaire to capture individual views
- draft questions be circulated to the committee next week, with a meeting called if members wish to discuss in detail.

6. Adjournment

The committee adjourned at 2.45 pm, *sine die*.

Madeleine Foley

Clerk to the Committee

Minutes no. 3

Monday 5 August 2019

Public Accountability Committee

McKell Room, Parliament House, Sydney at 2.03 pm

1. Members present

Mr Shoebridge, *Chair*

Mr Borsak, *Deputy Chair*

Mrs Houssos

Mr Khan

Mr Martin

Mr Mason-Cox

2. Apologies

Mr Graham

3. Previous minutes

Resolved, on the motion of Mr Mason-Cox: That draft minutes no. 2 be confirmed.

4. Auditor-General briefing

The committee received a briefing the role of the Auditor-General and the future priorities of the Audit Office. The briefing was attended by:

- Margaret Crawford, Auditor-General
- Ian Goodwin, Deputy Auditor-General
- Claudia Migotto, Assistant Auditor-General, Performance Audit.

5. Inquiry into the regulation of building standards, building quality and building disputes

5.1 Additional witnesses

Mr Borsak again declared that he is a Director of a company in the building industry that is involved in construction work, and informed the committee that this company is Australian Foundation Systems Pty Ltd, the author of submission no. 82.

Resolved, on the motion of Mrs Houssos: That the following additional witnesses be invited to appear at public hearings on either Friday 16 August 2019 or Tuesday 27 August 2019:

- Daintry Associates
- Australian Foundation Systems.

5.2 Preliminary report on online questionnaire

Resolved, on motion of Mr Borsak: That the committee empower the chair to approve the preliminary report on the online questionnaire to be prepared by the secretariat, and that the preliminary report be published by Friday 9 August 2019.

5.3 Audio-visual filming of hearing

Mr Farlow moved: That the committee authorise a video crew to film NSW Government witnesses giving evidence to the public hearing on Monday 12 August 2019. The committee noted that the video will be

used on the screens around Parliament House, the website, intranet and at events around Parliament House and will feature members and staff as they go about their jobs.

6. Adjournment

The committee adjourned at 3.20 pm until Monday 12 August 2019.

Madeleine Foley

Clerk to the Committee

Minutes no. 4

Monday 12 August 2019

Public Accountability Committee

Jubilee Room, Parliament House, Sydney at 9.48 am

1. Members present

Mr Shoebridge, *Chair*

Mr Borsak, *Deputy Chair*

Mr Buttigieg (*substituting for Mr Graham*)

Mr Farlow

Mr Graham (*participating*) (9.45 – 10.25 am, 12.45 – 1.30 pm)

Mrs Houssos

Mr Khan

2. Apologies

Mr Mason-Cox

3. Previous minutes

Resolved, on the motion of Mrs Houssos: That draft minutes no. 3 be confirmed.

4. Correspondence

The committee noted the following items of correspondence:

Received:

- 15 July 2019 – Letter from Ms Cathy Szczygielski, Principal Registrar & Executive Director, NSW Civil & Administrative Tribunal (NCAT), to the secretariat, advising that NCAT will not be making a submission to the inquiry.
- 16 July 2019 – Letter from Ms Jill Brookfield, Chief Executive Officer, Association of Accredited Certifiers (AAC), to the Chair, advising that they will be making a submission and requesting that they appear as a witness.
- 3 August 2019 – Email from Mr Frederick Santos to secretariat commenting on the ongoing change of the building industry.
- 6 August 2019 – Letter from the Hon Kevin Anderson MP, Minister for Better Regulation and Innovation, to the chair, declining the committee's invitation to appear as a witness at the hearing on 12 August 2019 and declining the committee's invitation for the Building Commissioner to appear as a witness at the hearing on 16 August 2019.
- 8 August 2019 – Email from Mr Gavin Melvin, Chief of Staff to the Hon Kevin Anderson MP, Minister for Better Regulation and Innovation, to the secretariat, advising the Minister will again decline the committee's invitation to appear as a witness at the hearing on 12 August 2019, advising the Building Commissioner will appear as a witness at a hearing on 16 August 2019 and suggesting that government witnesses appear with the Commissioner on 16 August 2019 rather than on 12 August 2019.
- 8 August – Email from Mr Gavin Melvin, Chief of Staff to the Hon Kevin Anderson MP, Minister for Better Regulation and Innovation, to the secretariat, confirming that the Building Commissioner will

appear at 9.30 am on 16 August 2019 with Ms Rose Webb, Deputy Secretary, Better Regulation Division and NSW Fair Trading Commissioner.

Sent:

- 25 July 2019 – Letter to the Hon Kevin Anderson MP, Minister for Better Regulation and Innovation, from the chair, inviting the Minister to appear at the first public hearing on 12 August 2019.
- 5 August 2019 – Letter to the Building Commissioner, via the Minister for Better Regulation and Innovation, from the chair, inviting the Commissioner to appear at the public hearing on 16 August 2019.
- 7 August 2019 – Letter to the Hon Kevin Anderson MP, Minister for Better Regulation and Innovation, from the chair, again inviting the Minister and the Building Commissioner to appear at public hearings.

5. Inquiry into the regulation of building standards, building quality and building disputes

5.1 Approach to the publication of submissions

The committee noted that:

- submissions have been forwarded to members with any proposed redactions (whether requested by the author or identified by the secretariat) highlighted for their information and consideration, and
- where a submission author has requested for their submission to be made public, only significant adverse mention and/or the names of third party individuals will be highlighted for proposed redaction. Building names, street addresses (excluding unit/apartment numbers), and organisation names will not be highlighted for proposed redaction, unless related to significant adverse mention.

5.2 Public submissions

The following submissions were published by the committee clerk under the authorisation of the resolution appointing the committee: submission nos. 1 – 4, 6, 8 – 13, 15, 16, 19 – 22, 25 – 27, 29, 30, 33 – 35, 37, 39, 41, 43 – 48, 52 – 58, 60 – 68, 70 – 94, 96 – 101, 107 – 115, 117-119, 121 – 126, 128 – 134, 136 – 140 and 142 – 153.

5.3 Partially confidential submissions

The following submissions were partially published by the committee clerk under the authorisation of the resolution appointing the committee: submission nos. 3, 6, 9 – 13, 15 – 16, 19 – 20, 22 – 23, 25, 37, 39, 41, 53, 60, 84, 88, 88a, 90, 92, 94, 96, 97, 107 – 111, 115, 126, 136, 146, 151 and 153.

Resolved, on motion of Mr Borsak: That the committee authorise the publication of submissions nos. 3, 6, 9 – 13, 15 – 16, 19 – 20, 22 – 23, 25, 37, 39, 41, 53, 60, 84, 88, 88a, 90, 92, 94, 96, 97, 107 – 111, 115, 126, 136, 146, 151 and 153 with the exception of the author's name, which is to remain confidential, at the request of the author.

The committee considered the following submissions for partial confidentiality, at the recommendation of the secretariat: submission nos. 7, 14, 23, 24, 24a, 32, 51 and 115.

Resolved, on motion of Mr Farlow: That the committee authorise the publication of submissions nos. 7, 14, 23, 24, 24a, 32, 51 and 115, with the exception of:

- addresses or other identifying information relating to properties with building defects, which is to remain confidential, at the recommendation of the secretariat
- the name of the author of submission no. 23, which is to remain confidential, at the request of the author.

5.4 Confidential submissions

Resolved, on motion of Mrs Houssos: That the committee keep submission nos 5, 18, 28, 31, 36, 38, 42, 49, 59, 102-106, 116, 120, 127 and 135 confidential, at the request of the author.

5.5 Change in publication status

Resolved, on motion of Mr Khan: That submission 94 be published, with the author's name.

5.6 Additional submissions

Resolved, on the motion of Mr Khan: That the committee defer consideration of submission no's 17, 50, 69, 95, 141 and 141a until after the hearing.

5.7 Witnesses

Resolved, on motion of Mr Borsak: That the committee invite the Independent Commission Against Corruption to appear as a witness.

5.8 Procedural fairness for inquiry participants

The committee noted the resolution regarding procedural fairness for inquiry participants adopted October 2018.

5.9 Return of answers to questions on notice

Resolved, on motion of Mr Farlow: That witnesses be requested to return answers to questions on notice and supplementary questions within the following timeframes after the date on which questions are forwarded to witnesses:

- Hearings on 12 and 16 August – 14 days
- Hearing on 27 August – 7 days.

5.10 Public hearing

Witnesses, the public and the media were admitted.

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

The following witnesses were sworn and examined:

- Ms Rose Webb, Deputy Secretary, Better Regulation Division and NSW Fair Trading Commissioner
- Mr Peter Dunphy, Executive Director NSW Fair Trading Specialist Services, Department of Customer Service
- Mr John Tansey, Executive Director Regulatory Policy, Better Regulation Division, Department of Customer Service
- Ms Carmel Donnelly, Chief Executive, State Insurance Regulatory Authority.

Mr Graham left the meeting.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Richard Devon, owner, The Landmark, Charlestown
- Mr Vijay Vital, owner, Mascot Towers
- Mr Alton Chen, owner, Mascot Towers
- Mr Terry Jones, long term strata committee member.

The evidence concluded and the witnesses withdrew.

Mr Graham joined the meeting.

The following witnesses were sworn and examined:

- Ms Jane Hearn, Director, Owners Corporation Network
- Ms Karen Stiles, Executive Officer, Owners Corporation Network.

The evidence concluded and the witnesses withdrew.

Mr Graham left the meeting.

The following witness was sworn and examined:

- Mr Karl Sullivan, Head of Risk and Operations, Insurance Council of Australia.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:

- Mr Michael Lambert, author of the 'Independent Review of the Building Professionals Act 2005'.

The evidence concluded and the witness withdrew.

The public hearing concluded at 3.03 pm.

The media and the public withdrew.

5.11 Additional submissions for consideration

Resolved, on motion of Mr Khan: That the committee authorise the publication of submissions nos. submission no's 17, 50, 69, 95, 141 and 141a with the exception of potential adverse mention and other sensitive and/or identifying information relating to third party individuals.

5.12 Request for documents

Mrs Houssos moved: That the committee write to the Hon Kevin Anderson MP, Minister for Better Regulation and Innovation, and Hon Rob Stokes MP, Minister for Planning and Public Spaces, to request that they provide the following documents by 5 pm, Thursday 15 August 2019:

- the project delivery agreement between the Sydney Olympic Park Authority (SOPA) and Ecove relating to SOPA's ownership in the Opal Tower development, and
- the register of certain buildings with combustible cladding in NSW.

Question put.

The committee divided.

Ayes: Mr Borsak, Mr Buttigieg, Mrs Houssos, Mr Shoebridge

Noes: Mr Farlow, Mr Khan.

Question resolved in the affirmative.

5.13 Further witnesses

Resolved, on the motion of Mr Buttigieg: That the committee invite the NSW Government witnesses, including the Minister for Better Regulation and Innovation, to give evidence on 27 August 2019.

6. Adjournment

The committee adjourned at 3.15 pm until Friday 16 August 2019.

Madeleine Foley

Clerk to the Committee

Minutes no. 5

Friday 16 August 2019

Public Accountability Committee

Macquarie Room, Parliament House, Sydney at 9.16 am

1. Members present

Mr Shoebridge, *Chair*

Mr Borsak, *Deputy Chair*

Mr Buttigieg (*participating from 10.30 am – 11.30 am*)

Mr Farlow

Mr Graham

Mrs Houssos

Mr Mason-Cox (*from 1.40 pm*)

2. Apologies

Mr Khan

Mr Mason-Cox (until 1.40 pm)

3. Previous minutes

Resolved, on the motion of Mrs Houssos: That draft minutes no. 4 be confirmed.

4. Correspondence

The committee noted the following items of correspondence:

Received:

- 11 August 2019 – Email from Mr Peter Conroy, to the secretariat, providing further comment on building regulation.
- 12 August 2019 – Email from Ms Leza Turnbull, CFMEU NSW, to the secretariat, advising representatives from the CFMEU NSW are unable to attend in the morning of the public hearing on 16 August 2019.
- 14 August 2019 – Email from Mr George Houssos, Electrical Trades Union of Australia (ETU), to the secretariat, requesting that the ETU film the Secretary at the public hearing on 16 August 2019 to promote the ETU's involvement in the inquiry.
- 15 August 2019 – Letter from Ms Katie Stevenson, Chief of Staff to the Hon Rob Stokes MP, Minister for Planning and Public Spaces, to the chair, responding to the committee's request for documents.
- 15 August 2019 – Letter from Mr Gavin Melvin, Chief of Staff to the Hon Kevin Anderson MP, Minister for Better Regulation and Innovation, to the chair, declining the committee's invitation for the Minister to appear at a public hearing and responding to the committee's request for documents.
- 15 August 2019 – Email from Rita Mallia, President CFMEU NSW, to the secretariat, attaching the CFMEU NSW submission to the NSW government's Building Stronger Foundations discussion paper and noting they would be willing to appear at a future hearing into the inquiry.
- 16 August 2019 – Email from Lewis Rangott, Executive Director Corruption Prevention, NSW Independent Commission Against Corruption, to the secretariat, advising ICAC declines the committee's invitation to appear at a public hearing on 27 August 2019.

Sent:

- 13 August 2019 – Letter to the Hon Kevin Anderson MP, Minister for Better Regulation and Innovation, from the chair, requesting that the Minister provide two documents: first, the project delivery agreement between the Sydney Olympic Park Authority (SOPA) and Ecove relating to SOPA's ownership in the Opal Tower development, and second, the register of buildings with combustible cladding, and inviting the Minister to appear with NSW government officials at a hearing.
- 13 August 2019 – Letter to the Hon Rob Stokes MP, Minister for Planning and Public Spaces, from the chair, requesting that the Minister provide two documents: first, the project delivery agreement between the Sydney Olympic Park Authority (SOPA) and Ecove relating to SOPA's ownership in the Opal Tower development, and second, the register of buildings with combustible cladding.

4.1 Correspondence from the Hon Rob Stokes MP, Minister for Planning and Public Spaces, received 15 August 2019

Mr Graham moved: That the committee again write to the Hon Rob Stokes MP, Minister for Planning and Public Spaces, to reiterate the request for the documents requested on 13 August 2019, and to:

- request that the Minister extend the request to the Department of Planning, Industry and Environment
- if the request is refused, require an explanation of the reasons for not providing the documents
- advise that the committee may consider ordering the production of the relevant documents if they are not provided.

Question put.

The committee divided.

Ayes: Mr Borsak, Mr Graham, Mrs Houssos, Mr Shoebridge

Noes: Mr Farlow

Question resolved in the affirmative.

4.2 Correspondence to the Hon John Sidoti MP, Minister for Sport, Multiculturalism, Seniors and Veterans

Mrs Houssos moved: That the committee write to the Hon John Sidoti MP, Minister for Sport, Multiculturalism, Seniors and Veterans, as the Minister responsible for the *Sydney Olympic Park Authority Act*, to request the following document:

- the project delivery agreement between the Sydney Olympic Park Authority (SOPA) and Ecove relating to SOPA's ownership in the Opal Tower development.

Further, that the correspondence:

- request that the Minister extend the request to the Office of Sport and the Sydney Olympic Park Authority
- if the request is refused, require an explanation of the reasons for not providing the document.

Question put.

The committee divided.

Ayes: Mr Borsak, Mr Graham, Mrs Houssos, Mr Shoebridge

Noes: Mr Farlow

Question resolved in the affirmative.

4.3 Correspondence from the Electrical Trades Union of Australia regarding filming

Resolved, on the motion of Mr Borsak: That the committee authorise the Electrical Trades Union of Australia to film part of the public hearing on 16 August 2019 to promote their witness appearance and the work of the inquiry to their stakeholders, as per their request on 14 August 2019.

4.4 Correspondence from the Construction, Forestry, Mining and Energy Union

Resolved, on the motion of Mr Graham: That correspondence and attached documents received from the Construction, Forestry, Mining and Energy Union on 12 August 2019 be processed as a late submission to the inquiry into the regulation of building standards, building quality and building disputes.

5. Delegation to observe hearing

The committee noted that a delegation of local councillors and administrative staff from Jeju Special Self-Governing Provincial Council, South Korea, may observe the hearing from the public gallery at 11.30 am.

6. Inquiry into the regulation of building standards, building quality and building disputes

6.1 Public hearing

Witnesses, the public and the media were admitted.

The chair made an opening statement regarding the broadcasting of proceedings, adverse mention and other matters.

The following witness was sworn and examined:

- Mr David Chandler, OAM, NSW Building Commissioner.
- Ms Rose Webb, Deputy Secretary, Better Regulation Division and NSW Fair Trading Commissioner, was examined on former oath.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Justin Page, Secretary, Electrical and Trades Union of Australia, NSW Branch
- Mr Chris Seet, Assistant Secretary, NSW Plumbing Trades Employees Union.

Mr Justin Page provided a copy of a supplementary submission for the Electrical and Trades Union of Australia.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- A/Prof Hazel Easthope, City Futures Research Centre, UNSW
- Dr Laura Crommelin, City Futures Research Centre, UNSW.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Cr Linda Scott, President, Local Government NSW
- Ms Vanessa Burow, Senior Policy Officer – Planning, Local Government NSW.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Ms Kathlyn Loseby, Chief Operating Officer, Australian Institute of Architects
- Ms Leanne Hardwicke, General Manager Policy, Advocacy and Education, Australian Institute of Architects
- Ms Kate Hurford, National Policy Manager, Australian Institute of Architects.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Jonathan Boyle, General Manager, Australian Foundation Systems
- Mr David Christie, Managing Director, Australian Foundation Systems
- Mr David Dickson, building industry consultant.

The evidence concluded and the witnesses withdrew.

The following witness was sworn and examined:

- Ms Alisha Fisher, Chief Executive Officer, Strata Community Association.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:

- Mr Brett Daintry, Director, Daintry Associates.

The evidence concluded and the witness withdrew.

The public hearing concluded at 4.58 pm.

The media and the public withdrew.

6.2 Supplementary submission

Resolved, on the motion of Mr Farlow: That the supplementary submission provided by Electrical and Trades Union of Australia NSW Branch today remain confidential.

6.3 Return date for document requests

Resolved, on the motion of Mrs Houssos: That the NSW government be informed that the documents requested again by the committee are due by 4pm Friday 23 August 2019.

6.4 Correspondence from NSW Independent Commission Against Corruption

The committee noted correspondence from the NSW Independent Commission Against Corruption received 16 August 2019 advising that they decline the committee's invitation to appear at a public hearing on 27 August 2019.

6.5 Possible delay in transcript

The committee noted that the transcript may be delayed for up to a week due to Hansard's current workload.

7. Adjournment

The committee adjourned at 5.15 pm until Tuesday 27 August 2019.

Madeleine Foley
Clerk to the Committee

Minutes no. 6

Tuesday, 27 August 2019

Public Accountability Committee

Macquarie Room, Parliament House, Sydney at 9.16 am

1. Members present

Mr Shoebridge, *Chair*
Mr Borsak, *Deputy Chair*
Mr Buttigieg (*participating*)
Mr Farlow (*until 4.30 pm*)
Mr Graham
Mrs Houssos
Mr Khan (*until 4.20 pm*)
Mr Mason-Cox (from 9.34 am)

2. Previous minutes

Resolved, on the motion of Mrs Houssos: That draft minutes no. 5 be confirmed.

3. Correspondence

The Committee noted the following items of correspondence:

Received:

- 22 August 2019 – Letter from the Hon Rob Stokes MP, Minister for Planning and Public Spaces to the chair, advising that his office is seeking advice from the Department of Planning, Industry and Environment relating to the requested cladding register and that he will provide a further response after 23 August 2019
- 22 August 2019 – Email from Master Builders Association New South Wales to secretariat providing documents titled 'New South Wales Policy Priorities, Key policy priorities for the building and construction industry in NSW' and 'Build Better – A blueprint for delivering better building outcomes in New South Wales'
- 26 August 2019 – Letter from Hon Rob Stokes MP, Minister for Planning and Public Spaces, to the chair, again declining to provide the documents requested by the committee.

Sent:

- 19 August 2019 – Letter from the chair to the Hon Rob Stokes MP, Minister for Planning and Public Spaces, requesting the Minister again provide certain documents and extend the request to the department.
- 19 August 2019 – Letter from the chair to the Hon John Sidoti MP, Minister for Sport, Multiculturalism, Seniors and Veterans, requesting the Minister provide a certain document and extend the request to the relevant department.

4. Inquiry into the regulation of building standards, building quality and building disputes

4.1 Transcript of hearing

The committee noted that the transcript of today's hearing may be delayed due to Hansard workload.

4.2 Questions on notice

The committee noted that witnesses have 7 days to answer any questions on notice taken during today's hearing as per a resolution of the committee.

4.3 Interim report deliberative date

The committee noted the chair will canvass availability for the interim report deliberative meeting in late September or early October.

4.4 Further inquiry activity

Resolved, on the motion of Mr Borsak: That the committee hold four further full day hearings, one on each of the following issues and with the flammable cladding hearing to take place first as a priority:

- Public hearing to explore issue of flammable cladding
- Public hearing to examine the building industry legislation after it is introduced by the government
- Public hearing in a regional area such as Newcastle (regional area TBC)
- In-camera hearing to examine construction industry workers.

4.5 Submission attachment

Resolved, on the motion of Mr Farlow: That the committee authorise the publication of attachments to submission no. 65, previously circulated to the committee, for the purposes of questioning during the hearing.

4.6 Public hearing

Witnesses, the public and the media were admitted.

The chair made an opening statement regarding the broadcasting of proceedings, adverse mention and other matters.

The following witnesses were sworn and examined:

- Mr Jonathan Russell, National Manager for Public Affairs, Engineers Australia
- Mr Greg Ewing, General Manager for the Sydney Division, Engineers Australia.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Brett Mace, Chief Executive Officer, Australian Institute of Building Surveyors
- Mr Tim Tuxford, NSW/ACT Board Director, Australian Institute of Building Surveyors
- Mr Craig Hardy, President, Association of Accredited Certifiers
- Mr Robert Marinelli, Vice-President, Association of Accredited Certifiers.

The evidence concluded and the witnesses withdrew.

The following witness was sworn and examined:

- Mr Ian Robertson, Secretary, Development and Environmental Professionals' Association.

The evidence concluded and the witness withdrew.

The following witnesses were sworn and examined:

- Mr Brian Seidler, Executive Director, Master Builders NSW
- Mr Craig Donovan, Director Operations, Master Builders NSW.
- Mr Steve Mann, Chief Executive Officer, Urban Development Institute of Australia
- Mr Elliott Hale, General Manager Policy, Media and Government Relations, Urban Development Institute of Australia.

The evidence concluded and the witnesses withdrew.

The following witness was sworn and examined:

- Ms Bronwyn Weir, Co-author 'Building Confidence: Improving the effectiveness of compliance and enforcement systems for the building and construction industry across Australia' report.

The evidence concluded and the witness withdrew.

The following witnesses were sworn and examined:

- Mr Wayne Smith, Chief Executive Officer, National Fire Industry Association
- Ms Anita Campbell, Executive Officer, National Fire Industry Association.

Ms Campbell tabled the following documents: two articles published in 'Sourcable' relating to issues of fire protection.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Ms Rose Webb, Deputy Secretary, Better Regulation Division and NSW Fair Trading Commissioner
- Mr Peter Dunphy, Executive Director NSW Fair Trading Specialist Services, Department of Customer Service
- Mr John Tansey, Executive Director Regulatory Policy, Better Regulation Division, Department of Customer Service
- Ms Carmel Donnelly, Chief Executive, State Insurance Regulatory Authority.

The evidence concluded and the witnesses withdrew.

The public hearing concluded at 4.48 pm.

The media and the public withdrew.

4.7 Tendered documents

Resolved, on the motion of Mr Mason-Cox: That the committee authorise the publication of documents tendered by the National Fire Industry Association.

4.8 Public submissions

The following submissions were published by the committee clerk under the authorisation of the resolution appointing the committee: submission nos. 29a, 155-156, 158-161, 162a, and 164.

The committee considered submission no. 162 for potential publication.

Resolved, on motion of Mr Borsak: That the committee authorise the publication of submission no. 162.

Resolved, on the motion of Mr Graham: That the committee publish the late submission from Mr David Mehan MP.

4.9 Partially confidential submissions

The following submissions were partially published by the committee clerk under the authorisation of the resolution appointing the committee: submission nos. 155 and 156.

Resolved, on motion of Mr Graham: That the committee authorise the publication of submissions nos. 155 and 156 with the exception of the author's name, which is to remain confidential, at the request of the author.

Resolved, on motion of Mr Graham: That the committee authorise the publication of submissions nos. 154, 157 and 163, with the exception of:

- addresses or other identifying information relating to properties with building defects, which is to remain confidential, at the recommendation of the secretariat
- names of individual building industry professionals, at the recommendation of the secretariat.

4.10 Correspondence from the Hon Rob Stokes MP, Minister for Planning and Public Spaces received 26 August 2019

The Clerk of the Parliaments briefed the committee on the options for responding to the letter from Hon Rob Stokes MP, Minister for Planning and Public Spaces, again declining to provide the documents requested by the committee.

Resolved, on the motion of Mr Borsak: That the committee write to the Minister for Planning and Public Spaces, copied to the Secretary of the Department of Planning, Industry and Environment, to:

- advise that the committee is not pursuing its request for the document known as *the project delivery agreement between Sydney Olympic Park Authority (SOPA) and Ecove relating to SOPA's ownership in the Opal Tower development*, as this document is subject to order for production of documents by the Legislative Council
- reiterate the committee's request for the document known as *the register of certain buildings with combustible cladding in NSW*.

In relation to *the register of certain buildings with combustible cladding in NSW*, the letter will note that:

- the document sought is within the inquiry terms of reference and is essential to the conduct of the inquiry, as the committee intends to hold a public hearing on Tuesday 5 November 2019 to further examine the issue of buildings with combustible cladding
- the four grounds cited by the Minister for previous refusal of access to the document under the *Government Information and Public Access Act*, namely public safety, business and commercial interests, confidentiality, and prejudice the work of government, do not justify non-compliance with the committee's request for the document
- clause 186U of the Environment Planning and Assessment Regulation, as referred to in the Minister's letter, authorises the Secretary of the Department of Planning, Industry and Environment to make the register available to the public, and to publish the register online.

The letter will further advise that if the document is still not provided in response to the committee's further request:

- the committee requests that the Minister provide further detail of the reasons for declining to release the document
- after considering any reasons put forward by the Minister, the committee will consider ordering the production of the document by the Secretary of the Department of Planning, Industry and Environment under its common law power to compel the production of documents, subject to the provisions of Legislative Council *Sessional order – Orders for the production of documents by committees*, adopted 8 May 2019
- should the committee proceed to ordering production of the document, the four grounds cited by the Minister for refusal of access to the document under the *Government Information and Public Access Act* may form the basis of a claim of privilege over the document, and the sessional order sets out the process for dealing with documents considered to be privileged, including the appointment of an independent legal arbiter to evaluate and report as to the validity of the claim. Further, in the twenty years since the Egan cases affirmed the power of the House to order the production of documents, there has never been a breach of confidentiality of documents provided in a return to order, and the committee would be similarly respectful of any claim of confidentiality over the relevant document.

5. Adjournment

The committee adjourned at 5.15 pm *sine die*.

Madeleine Foley

Clerk to the Committee

Minutes no. 7

Monday 14 October 2019

Public Accountability Committee

Room 1136, Parliament House, Sydney, 2.09 pm

1. Members present

Mr Shoebridge, *Chair*

Mr Banasiak (*substituting for Mr Borsak*)

Mr Farlow

Mr Graham

Mrs Houssos
Mr Khan
Mr Mason-Cox

2. Previous minutes

Resolved, on the motion of Mrs Houssos: That draft minutes no. 6 be confirmed.

3. Correspondence

The committee noted the following items of correspondence:

Received:

- 23 August 2019 – Email from an individual, to Chair, providing information to the committee in relation to a letter sent to the Minister
- 29 August 2019 – Letter from Ms Carmel Donnelly, Chief Executive, SIRA, to Chair, providing a clarification to the transcript of 12 August 2019
- 6 September 2019 – Letter from Hon Rob Stokes MP, Minister for Planning and Public Spaces, to Chair, declining again to provide the register of certain buildings with combustible cladding in NSW
- 13 September 2019 – Email from Mr Andy Keane, Licensed Builder, to Chair, informing the committee of a current major issue facing many consumers of property purchase
- 15 September 2019 – Email from Ms Carol O'Donnell, to committee, providing additional comments relating to the inquiry and the Bush Heritage Annual Report
- 26 September 2019 – Email from Ms Carol O'Donnell, to committee, providing additional information on group housing management, financial service literacy and training strata or land managers
- 9 October 2019 – Letter from Hon Robert Borsak MLC, Hon John Graham MLC and Mr David Shoebridge MLC requesting a meeting to consider terms of reference relating to the budget process for independent oversight bodies and the Parliament of New South Wales
- 11 October 2019 – Email from Mr Chris Rumore, Sydney Wharf ACP Sub-committee Chair, to secretariat, providing additional information in relation to rectification of flammable cladding in the Sydney Wharf residential complex.

Sent:

- 30 August 2019 – Letter from Chair, to Hon Rob Stokes MP, Minister for Planning and Public Spaces, reiterating the committee's request for the register of certain buildings with combustible cladding in NSW.

Resolved, on the motion of Mr Banasiak: That the committee keep the following correspondence confidential, as per the request of the author:

- 23 August 2019 – Email from an individual, to Chair, providing information to the committee in relation to a letter sent to the Minister.

4. ***

5. ***

6. Inquiry into the regulation of building standards, building quality and building disputes

6.1 Public 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. 74a, 117a, 166, 167, 169 and 171.

6.2 Partially confidential submissions

The committee noted that submission no. 146a was partially published by the committee clerk under the authorisation of the resolution appointing the committee.

Resolved, on the motion of Mr Farlow: That the committee keep the following information confidential, as per the request of the author: name of the author in submission no. 146a.

Resolved, on the motion of Mr Farlow: That the committee authorise the publication of submission nos. 168 and 170, with the exception of identifying and/or sensitive information which are to remain confidential, as per the recommendation of the secretariat.

6.3 Confidential submission

Resolved, on the motion of Mr Farlow: That the committee keep submission no. 172 confidential, as per the request of the author, as it contains identifying and/or sensitive information.

6.4 Answers to questions on notice and supplementary questions

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

- Mr Vijay Vital, Owner, Mascot Towers, received 25 August 2019
- Ms Rose Webb, NSW Fair Trading Commissioner, Mr John Tansey and Mr Peter Dunphy from the Department of Customer Service, received 28 August 2019
- Ms Carmel Donnelly, Chief Executive, SIRA, received 29 August 2019
- Ms Jane Hearn, Deputy Chair, Owners Corporations Network of Australia, received 29 August 2019
- Mr David Chandler, OAM, NSW Building Commissioner, received on 4 September 2019
- Mr Chris Seet, Assistant Secretary, NSW Plumbing Trades Employees Union, received on 22 August 2019
- A/Prof Hazel Easthope, City Futures Research Centre, UNSW, received on 3 September 2019
- Cr Linda Scott, President, Local Government NSW, received on 3 September 2019
- Ms Kathlyn Loseby, President NSW, Australian Institute of Architects, received on 5 September 2019
- Mr Chris Duggan, President, Strata Community Association, received on 9 September 2019
- Ms Alisha Fisher, Chief Executive Officer, Strata Community Association, received on 9 September 2019
- Mr Jonathan Russell, National Manager for Public Affairs, Engineers Australia, received on 5 September 2019
- Mr Brett Mace, Chief Executive Officer, Australian Institute of Building Surveyors, received on 9 September 2019
- Association of Accredited Certifiers, received 6 September 2019
- Mr Ian Robertson, Secretary, Development and Environmental Professionals' Association, received on 06 September 2019
- Master Builders of NSW, received on 10 September 2019
- National Fire Industry Association, received on 29 August 2019
- Ms Rose Webb, NSW Fair Trading Commissioner, Mr John Tansey and Mr Peter Dunphy from the Department of Customer Service, received 6 September 2019
- Ms Carmel Donnelly, Chief Executive, SIRA, received 6 September 2019.

6.5 Transcript clarification

The committee noted the correspondence received 29 August 2019 from Ms Carmel Donnelly, Chief Executive, SIRA, in relation to a clarification of the transcript of 12 August 2019.

Resolved, on the motion of Mr Khan: That a footnote be included in the transcript of 12 August 2019 noting the clarification received by Ms Carmel Donnelly, Chief Executive, SIRA.

6.6 Interim report

The committee noted the NSW Government's release of the draft *Design and Building Practitioners Bill 2019* for public consultation. The committee also noted that the consultation period will close on 16 October with the final bill expected to be introduced into Parliament by the end of the year.

Mrs Houssos moved: That the:

- committee defers tabling the interim report until consideration by the committee of the draft bill
- hearing on Tuesday 5 November 2019 focus on the draft bill, instead of flammable cladding
- committee meet on Monday 11 November 2019 to consider the interim report
- committee table its interim report by Wednesday 13 November 2019.

Question put.

The committee divided.

Ayes: Mr Banasiak, Mr Graham, Mrs Houssos, Mr Shoebridge.

Noes: Mr Farlow, Mr Khan, Mr Mason-Cox.

Question resolved in the affirmative.

6.7 Hearing on the draft bill - Stakeholder list

Resolved, on the motion of Mrs Houssos: That the committee invite the following stakeholders to provide a submission by Sunday 27 October 2019 commenting on the NSW Government's draft bill and to appear as a witness at the hearing on 5 November 2019:

- Master Builders NSW
- Urban Development Institute of Australia
- Property Council of Australia
- Engineers Australia
- Institute of Public Works Engineering Australasia
- Australian Institute of Architects
- Electrical and Trades Union of Australia
- NSW Plumbing Trades Employees Union
- Unions NSW
- Construction Forestry Maritime Mining Energy Union
- Local Government NSW
- Mr Michael Lambert
- Mr Brett Daintry.

Resolved, on the motion of Mrs Houssos: That the committee invite the following NSW Government representatives to appear for 1.5 hours at the end of the hearing day on 5 November 2019:

- NSW Fair Trading Commissioner and department officers
- NSW Building Commissioner
- Ms Bronwyn Weir, in her capacity as supporting the Building Commissioner with the draft bill.

6.8 Hearing on the draft bill – questions on notice

The committee noted the short turnaround time for tabling the interim report.

Resolved, on the motion of Mr Banasiak: That there be no questions on notice taken at the public hearing to be held on Tuesday 5 November 2019 or supplementary questions from members.

6.9 Further inquiry activity

Resolved, on the motion of Mr Graham: That the committee adopt the following timeline for the future activities of the inquiry, subject to consultation with members on availability:

- public hearing on flammable cladding – one day hearing in the week of 9 December 2019
- *in-camera* hearing to examine construction industry workers – Monday 24 February 2020
- public hearing in a regional area such as Newcastle (regional area TBC) – date to be canvassed with members once the 2020 sitting calendar for the Legislative Council is confirmed.

6.10 Final report tabling

Resolved, on the motion of Mrs Houssos: That the committee extend the inquiry reporting date to 14 May 2020.

6.11 Request for document

The committee noted the correspondence from Hon Rob Stokes MP, Minister for Planning and Public Spaces, again declining to provide the *register of certain buildings with combustible cladding in NSW* in response to the third request from the committee.

Mr Graham moved:

That the committee notes that:

- the Solicitor General has indicated that Legislative Council committees likely have the power of committees to order the production of State papers, and
- this position has also been expressed by the House in the *Sessional order – Order for the production of documents by committees*, adopted 8 May 2019.

That notwithstanding the likely power of Legislative Council committees to order the production of State papers, in view of the timeframes of this inquiry and the importance of obtaining the required information in a timely manner, the committee authorises the Chair to order the production through the House under standing order 52 of the document known as *The register of certain buildings with combustible cladding in NSW*, in the possession, custody or control of the Secretary of the Department of Planning, Industry and Environment.

That the committee write to the Minister for Planning and Public Spaces to:

- advise that the committee is not pursuing its request for the document known as *The register of certain buildings with combustible cladding in NSW*, as the committee has resolved to authorise the Chair to order the production through the House under standing order 52,
- advise that the reason for ordering the production of this document through the House is in view of the timeframes of this inquiry and the importance of obtaining the required information in a timely manner, and
- reiterate the committee's power to order the production of State papers.

That the committee authorise the publication of the following items of correspondence relating to the order for papers:

- 13 August 2019 – Letter to the Hon Kevin Anderson MP, Minister for Better Regulation and Innovation, from the chair, requesting that the Minister provide two documents: first, the project delivery agreement between the Sydney Olympic Park Authority (SOPA) and Ecove relating to SOPA's ownership in the Opal Tower development, and second, the register of buildings with combustible cladding, and inviting the Minister to appear with NSW government officials at a hearing
- 13 August 2019 – Letter to the Hon Rob Stokes MP, Minister for Planning and Public Spaces, from the chair, requesting that the Minister provide two documents: first, the project delivery agreement between the Sydney Olympic Park Authority (SOPA) and Ecove relating to SOPA's ownership in the Opal Tower development, and second, the register of buildings with combustible cladding
- 15 August 2019 – Letter from Ms Katie Stevenson, Chief of Staff to the Hon Rob Stokes MP, Minister for Planning and Public Spaces, to the chair, responding to the committee's request for documents
- 15 August 2019 – Letter from Mr Gavin Melvin, Chief of Staff to the Hon Kevin Anderson MP, Minister for Better Regulation and Innovation, to the chair, declining the committee's invitation for the Minister to appear at a public hearing and responding to the committee's request for documents
- 19 August 2019 – Letter from the chair to the Hon Rob Stokes MP, Minister for Planning and Public Spaces, requesting the Minister again provide certain documents and extend the request to the department
- 19 August 2019 – Letter from the chair to the Hon John Sidoti MP, Minister for Sport, Multiculturalism, Seniors and Veterans, requesting the Minister provide a certain document and extend the request to the relevant department

- 22 August 2019 – Letter from the Hon Rob Stokes MP, Minister for Planning and Public Spaces to the chair, advising that his office is seeking advice from the Department of Planning, Industry and Environment relating to the requested cladding register and that he will provide a further response after 23 August 2019
- 26 August 2019 – Letter from Hon Rob Stokes MP, Minister for Planning and Public Spaces, to the chair, again declining to provide the documents requested by the committee
- 30 August 2019 – Letter from Chair, to Hon Rob Stokes MP, Minister for Planning and Public Spaces, reiterating the committee's request for the register of certain buildings with combustible cladding in NSW
- 6 September 2019 – Letter from Hon Rob Stokes MP, Minister for Planning and Public Spaces, to Chair, declining again to provide the register of certain buildings with combustible cladding in NSW.

Question put.

The committee divided.

Ayes: Mr Banasiak, Mr Graham, Mrs Houssos, Mr Shoebridge.

Noes: Mr Farlow, Mr Khan, Mr Mason-Cox.

Question resolved in the affirmative.

7. Adjournment

The committee adjourned at 2.30 pm until Tuesday 5 November 2019 (public hearing).

Sarah Dunn

Clerk to the Committee

Minutes no. 8

Tuesday 5 November 2019

Public Accountability Committee

Jubilee Room, Parliament House, Sydney at 9.15 am

1. Members present

Mr Shoebridge, *Chair*

Mr Borsak, *Deputy Chair (9.15 am until 12.30 pm)*

Mr Buttigieg (*participating*)

Mr Farlow

Mr Farraway (*substituting for Mr Khan*)

Mr Graham

Mrs Houssos (*9.15 am until 9.30 am, via teleconference; from 10 am, in person*)

2. Apologies

Mr Mason-Cox

3. Previous minutes

Resolved, on the motion of Mr Farlow: That draft minutes no. 7 be confirmed.

4. Correspondence

The committee noted the following items of correspondence:

Received:

- 16 October 2019 – Email from Mr Andrew Chuter, President, Friends of Erskineville, to secretariat, thanking the committee for running a public questionnaire for this inquiry

- 16 October 2019 – Email from Ms Emma Ashton, Senior Policy Advisor, Property Council of Australia, to secretariat, advising that they are unable to attend the hearing on 5 November 2019
- 16 October 2019 – Letter from Hon Rob Stokes MP, Minister for Planning and Public Spaces, to Chair, advising that they do not hold *The register of certain buildings with combustible cladding in NSW* in their office and it's a matter for the Secretary of the Department of Planning, Industry and Environment to decide upon its release under standing order 52
- 28 October 2019 – Email from Mr Chris Seet, NSW Assistant Secretary, NSW Plumbing Trades Employee's Union, to secretariat, advising that they will not be providing an additional submission or appearing at the hearing on 5 November 2019
- 28 October 2019 – Email from Mr George Houssos, Operations Officer, Electrical Trades Union of Australia, to secretariat, advising that they will not be providing an additional submission or appearing at the hearing on 5 November 2019
- 29 October 2019 – Email from Ms Connie Vartuli, Executive Assistant, Unions NSW, to secretariat, advising that they will not be appearing at the hearing on 5 November 2019
- 30 October 2019 – Email from Mr Brian Seidler, Executive Director, Master Builders Association of NSW, to secretariat, advising that they will not be appearing at the hearing on 5 November 2019.
- 5 November 2019 – Letter from Cr Linda Scott, President, Local Government NSW, to chair, providing further information on the timeline for the draft bill and clarifying evidence regarding membership of the Cladding Taskforce.

Sent:

- 16 October 2019 – Letter to Hon Rob Stokes MP, Minister for Planning and Public Spaces, from Chair, advising that the committee has resolved to authorise the Chair to order the production of the document known as *The register of certain buildings with combustible cladding in NSW* through the House under standing order 52.

5. Inquiry into the regulation of building standards, building quality and building disputes

5.1 Submissions

The following submissions were published by the committee clerk under the authorisation of the resolution appointing the committee: submission nos. 8a, 56a, 87a, 125a, 125b, 129a, 133a, 145a, 173 and 174.

Resolved, on the motion of Mr Farlow: That the committee accept and publish submission no. 175.

5.2 Evidence for the report

Resolved, on the motion of Mr Borsak: That the committee note that the Insurance Council of Australia did not provide a submission to the committee regarding the *Design and Practitioners Bill 2019*, and that the committee's report instead refer to the Insurance Council's submission to the NSW Government on the draft bill.

5.3 Date for regional hearing

The chair informed the committee that he will defer a decision on the date of the regional hearing, and requested that members keep the proposed dates of 10, 11 and 12 March 2020 free.

5.4 Allocation of questions

Resolved, on the motion of Mr Farlow: That the allocation of questions be left in the hands of the chair.

5.5 Return to order – disputed claim of privilege

Mrs Houssos moved: That the committee authorise the chair to dispute the claim of privilege on the return to order relating to the *Register of Buildings with Potentially Combustible Cladding*, provided on 31 October 2019.

Question put.

The committee divided.

Ayes: Mr Borsak, Mr Graham, Mrs Houssos, Mr Shoebridge

Noes: Mr Farlow, Mr Farraway

Question resolved in the affirmative.

5.6 Public hearing

The committee noted the previous resolution that there be no questions taken on notice at the public hearing or supplementary questions from members.

Witnesses, the public and the media were admitted.

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

The Chair reminded the following witnesses that they did not need to be sworn, as they had been sworn at another hearing for the same inquiry:

- Mr Jonathan Russell
- Mr Greg Ewing

The following witness was sworn:

- Mr John Roydhouse

The witnesses were examined by the committee.

The evidence concluded and the witnesses withdrew.

The Chair reminded the following witness that they did not need to be sworn, as they had been sworn at another hearing for the same inquiry:

- Cr Linda Scott

The witness was examined by the committee.

Cr Scott tabled the following document:

- *Excerpt from LGNSW 2019 Annual Conference: Record of Decisions.*

The evidence concluded and the witness withdrew.

The Chair reminded the following witnesses that they did not need to be sworn, as they had been sworn at another hearing for the same inquiry:

- Ms Kathlyn Loseby
- Ms Kathryn Hurford

The witnesses were examined by the committee.

The evidence concluded and the witnesses withdrew.

The Chair reminded the following witness that they did not need to be sworn, as they had been sworn at another hearing for the same inquiry:

- Mr Brett Daintry

The witness was examined by the committee.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Darren Greenfield
- Ms Rita Mallia

The evidence concluded and the witnesses withdrew.

The Chair reminded the following witness that they did not need to be sworn, as they had been sworn at another hearing for the same inquiry:

- Mr Steve Mann

The following witness was sworn:

- Mr Barry Mann

The witnesses were examined by the committee.

The evidence concluded and the witnesses withdrew.

The Chair reminded the following witness that they did not need to be sworn, as they had been sworn at another hearing for the same inquiry:

- Mr Michael Lambert

The witness was examined by the committee.

The evidence concluded and the witness withdrew.

The Chair reminded the following witness that they did not need to be sworn, as they had been sworn at another hearing for the same inquiry:

- Ms Karen Stiles

The following witness was sworn:

- Mr Philip Gall

The witnesses were examined by the committee.

The evidence concluded and the witnesses withdrew.

The Chair reminded the following witnesses that they did not need to be sworn, as they had been sworn at another hearing for the same inquiry:

- Ms Rose Webb
- Mr John Tansey
- Mr David Chandler, OAM
- Ms Bronwyn Weir

The witnesses were examined by the committee.

The evidence concluded and the witnesses withdrew.

The public hearing concluded at 5.05 pm.

The media and the public withdrew.

5.7 Tendered documents

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

- *Excerpt from LGNSW 2019 Annual Conference: Record of Decisions*, tabled by Cr Linda Scott.

5.8 Further hearings

The committee noted that a further hearing is scheduled for Wednesday 11 December 2019.

6. Adjournment

The committee adjourned at 5.07 pm until Monday 11 November 2019.

Madeleine Foley

Clerk to the Committee

Minutes no. 9

Monday 11 November 2019

Public Accountability Committee

Room 1136, Parliament House, Sydney at 2.05 pm

1. Members present

Mr Shoebridge, *Chair*
 Mr Borsak, *Deputy Chair*
 Mr Amato (*substituting for Mr Farlow*)
 Mr Graham
 Mrs Houssos
 Mr Khan
 Mr Mason-Cox

2. Draft minutes

Resolved, on the motion of Mr Borsak: That draft minutes no. 8 be confirmed.

3. Correspondence

The committee noted the following items of correspondence:

Received:

- 5 November 2019 – Email from Mr Philip Gall, Chairman, Owners Corporation Network, to committee, providing their proposed changes to the *Design and Building Practitioners Bill 2019*.

Sent:

- 5 November 2019 – Email from secretariat, to Mr Karl Sullivan, Head of Risk and Operations, Insurance Council of Australia, advising of the committee's decision to refer to the Insurance Council's submission to the NSW Government on the draft bill.

Resolved, on the motion of Mr Mason-Cox: That the committee authorise the publication of correspondence from Mr Philip Gall, Chairman, Owners Corporation Network, regarding their proposed changes to the Design and Building Practitioners Bill 2019, dated 5 November 2019.

4. Inquiry into the regulation of building standards, building quality and building disputes**4.1 Consideration of Chair's draft first report**

The Chair submitted his draft report entitled *Regulation of building standards, building quality and building disputes – First report*, which, having been previously circulated, was taken as being read.

Chapter 2

Resolved, on the motion of Mr Graham: That the following new paragraph be inserted after paragraph 2.16:

'The committee notes that in his 2015 report, Mr Michael Lambert supported increasing accountability rather than abolishing the system of private certification: 'On balance it is concluded that at this point in time in the operation of the building certification system, it is best to seek to improve the operation of the existing system by increasing the accountability of certifiers to act in the public interest as regulatory agents.' [FOOTNOTE: Mr Michael Lambert, *Independent Review of the Building Professionals Act 2005: Final report*, October 2015 p 262.]

Resolved, on the motion of Mr Graham: That, subject to the secretariat checking for accuracy, the following new committee comment and recommendation be inserted after Recommendation 1:

Committee comment

It is now two years since the amendments to the *Environmental Planning and Assessment Act 1979* was passed, and it is unacceptable that those amendments have not yet commenced.

Recommendation X

That the NSW Government commence the amendments to the *Environmental Planning and Assessment Act 1979* passed in November 2017, relating to the building and construction industry, that were scheduled to start on 1 September 2019.

Resolved, on the motion of Mrs Houssos: That paragraph 2.101 be amended by inserting at the end:

The committee is particularly concerned by the admission from the Department of Fair Trading that this had not been prioritised by the department. This matter will be further addressed in chapter 6.

Mr Amato moved: That Recommendation 1 be omitted and the following recommendation inserted instead:

'Recommendation 1

That the NSW Government ensure the implementation of the regulations to support the *Building and Development Certifiers Act 2018* as soon as is practicable, taking into account and noting the ongoing stakeholder consultation process.'

Question put.

The committee divided.

Ayes: Mr Amato, Mr Khan, Mr Mason-Cox.

Noes: Mr Borsak, Mr Graham, Mrs Houssos, Mr Shoebridge.

Question resolved in the negative.

Mrs Houssos moved: That the following new committee comment and recommendation be inserted after the new recommendation after Recommendation 1:

'Committee comment

The committee will be holding a further hearing specifically on the issue of flammable cladding, and expects that it will have further recommendations to address the issue in more detail. However, the committee was deeply concerned by evidence already received that shows a disjointed and lacklustre response from the NSW Government. By contrast, other state governments have had a more comprehensive approach, including a financial package to remediate buildings, co-ordinated through a stand-alone agency.'

'Recommendation X

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 NSW buildings, including a financial support package to assist buildings to rectify and remove it as a matter of urgency.'

Question put.

The committee divided.

Ayes: Mr Borsak, Mr Graham, Mrs Houssos, Mr Shoebridge.

Noes: Mr Amato, Mr Khan, Mr Mason-Cox.

Question resolved in the affirmative.

Chapter 3

Mr Amato moved: That Recommendation 2 be amended by inserting 'where practicable to do so' before 'the powers'.

Question put.

The committee divided.

Ayes: Mr Amato, Mr Khan, Mr Mason-Cox.

Noes: Mr Borsak, Mr Graham, Mrs Houssos, Mr Shoebridge.

Question resolved in the negative.

Mr Amato moved: That Recommendation 3 be omitted and the following recommendation inserted instead:

'Recommendation 3

That the NSW Government ensure that the Building Commissioner is given all necessary powers to oversee the activities prescribed in the *Design and Building Practitioners Bill 2019*.'

Question put.

The committee divided.

Ayes: Mr Amato, Mr Khan, Mr Mason-Cox.

Noes: Mr Borsak, Mr Graham, Mrs Houssos, Mr Shoebridge.

Question resolved in the negative.

Mr Amato moved: That Recommendation 4 be deleted and the following recommendation inserted instead:

'Recommendation 4

That the NSW Government continue to support the Building Reference Expert Panel to support the Building Commissioner, with its aims to include strengthening industry ties with government, and providing advice to the Minister and Building Commissioner.'

Question put.

The committee divided.

Ayes: Mr Amato, Mr Khan, Mr Mason-Cox.

Noes: Mr Borsak, Mr Graham, Mrs Houssos, Mr Shoebridge.

Question resolved in the negative.

Chapter 4

Resolved, on the motion of Mr Graham: That paragraph 4.114 be amended by omitting 'due to a long period of deregulation and privatisation' after 'fundamental failure of building standards,'.

Resolved, on the motion of Mr Graham:

- That paragraph 4.119 be amended by:
 - (a) omitting 'by February 2021' and inserting instead 'as the Shergold Weir report recommendations are implemented'
 - (b) omitting 'A realistic timeframe for this would be February 2022.' and inserting instead 'This should be achieved as soon as reasonably practicable.'
- That Recommendation 5 be amended by:
 - (a) omitting 'no later than February 2021'
 - (b) omitting 'by February 2022' and inserting at the end 'as soon as reasonably practicable'.

Mr Amato moved: That Recommendation 5 be omitted.

Question put.

The committee divided

Ayes: Mr Amato, Mr Khan, Mr Mason-Cox.

Noes: Mr Borsak, Mr Graham, Mrs Houssos, Mr Shoebridge.

Question resolved in the negative.

Mr Graham moved: That Recommendation 5 be omitted: 'That the NSW Government extend the time period in which to claim under statutory warranties for residential buildings to 10 years for both major and minor defects, for residential buildings currently covered by the Home Building insurance scheme and for

all other high rise developments as soon as reasonably practicable', and the following new recommendation be inserted instead:

'Recommendation X

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:

- residential buildings currently covered by the Home Building insurance scheme - the timeframe that the Shergold Weir report recommendations are implemented
- all other high rise developments - as soon as reasonably practicable.

That the following new recommendation be inserted after Recommendation 5:

'Recommendation X

That the NSW Government consider amending the definition of 'defect' to provide more clarity for home owners.'

Question put.

The committee divided

Ayes: Mr Borsak, Mr Graham, Mrs Houssos, Mr Shoebridge.

Noes: Mr Amato, Mr Khan, Mr Mason-Cox.

Question resolved in the affirmative.

Resolved, on the motion of Mr Graham: That paragraph 4.120 be amended by omitting 'dodgy operators' and inserting instead 'some operators'.

Mr Khan moved: That:

- (a) paragraph 4.125 be amended by omitting 'Although this goes some way to provide protection to homeowners in multi-storey buildings, it is insufficient to address the current scale of the crisis of building defects' after 'Strata Building Bond and Inspections Scheme'
- (b) paragraph 4.126 be omitted
- (c) paragraph 4.127 be omitted
- (d) Recommendation 6 be omitted.

Question put.

The committee divided

Ayes: Mr Amato, Mr Khan, Mr Mason-Cox.

Noes: Mr Borsak, Mr Graham, Mrs Houssos, Mr Shoebridge.

Question resolved in the negative.

Resolved, on the motion of Mr Graham: That:

- (a) paragraph 4.126 be amended by omitting 'put aside a minimum 10 per cent bond' and inserting instead 'put aside an adequate bond'
- (b) paragraph 4.127 be amended by omitting 'manifestly' before 'inadequate'
- (c) paragraph 4.127 be amended by omitting 'to a minimum of 10 per cent until comprehensive home building insurance is applied to all multi-storey residential buildings' after 'defects bond should be increased'

- (d) paragraph 4.127 be amended by inserting at the end: 'We invite the NSW Government to submit economic modelling and advice assessing the impact of any proposed changes, in consultation with the Building Commissioner and the industry'
- (e) Recommendation 6 be amended by omitting 'to a minimum of 10 per cent under the Strata Building Bond and Inspections Scheme until comprehensive Home Building insurance is applied to all multi-storey residential buildings' and inserting instead 'under the Strata Building Bond and Inspections Scheme, subject to economic modelling of the effect of these changes'.

Mr Khan moved: That paragraph 4.128 be amended by omitting 'stemming from grossly inadequate regulation of the industry. The NSW Government needs to urgently fix these underlying issues before we can see the insurance market start to shift' after 'lack of building quality'.

Question put.

The committee divided

Ayes: Mr Amato, Mr Khan, Mr Mason-Cox.

Noes: Mr Borsak, Mr Graham, Mrs Houssos, Mr Shoebridge.

Question resolved in the negative.

Chapter 5

Mrs Houssos moved: That paragraph 5.107 be amended by inserting at the end: 'Furthermore, unlike other states, electrical tradespeople are not independently examined at the conclusion of their training'.

Question put.

The committee divided

Ayes: Mr Borsak, Mr Graham, Mrs Houssos, Mr Shoebridge.

Noes: Mr Amato, Mr Khan, Mr Mason-Cox.

Question resolved in the affirmative.

Resolved, on the motion of Mr Graham: That paragraph 5.109 be amended by omitting 'are not worth the paper that they are written on' and inserting instead 'do not provide any guarantee of quality'.

Mrs Houssos moved: That the following new recommendation be inserted after paragraph 5.112:

'Recommendation X

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:

- 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
- which additional building practitioners should be licenced, including, but not limited to, installation of medical gas and maintenance of fire safety systems.

Question put.

The committee divided

Ayes: Mr Borsak, Mr Graham, Mrs Houssos, Mr Shoebridge.

Noes: Mr Amato, Mr Khan, Mr Mason-Cox.

Question resolved in the affirmative.

Chapter 6

Mrs Houssos moved: That the following new recommendation be inserted after paragraph 6.150:

'Recommendation X

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.'

Question put.

The committee divided.

Ayes: Mr Borsak, Mr Graham, Mrs Houssos, Mr Shoebridge.

Noes: Mr Amato, Mr Khan, Mr Mason-Cox.

Question resolved in the affirmative.

Mrs Houssos moved: That the following new recommendation be inserted after the new recommendation after paragraph 6.150:

'Recommendation X

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.'

Question put.

The committee divided.

Ayes: Mr Borsak, Mr Graham, Mrs Houssos, Mr Shoebridge.

Noes: Mr Amato, Mr Khan, Mr Mason-Cox.

Question resolved in the affirmative.

Mr Amato moved: That Recommendation 7 be omitted.

Question put.

The committee divided.

Ayes: Mr Amato, Mr Khan, Mr Mason-Cox.

Noes: Mr Borsak, Mr Graham, Mrs Houssos, Mr Shoebridge.

Question resolved in the negative.

Resolved, on the motion of Mr Graham: That Recommendation 7 be amended by omitting 'not proceed with the *Design and Building Practitioners Bill 2019* until the bill is amended' and inserting instead 'amend the *Design and Building Practitioners Bill 2019*'.

Mr Amato moved: That Recommendation 8 be omitted.

Question put.

The committee divided.

Ayes: Mr Amato, Mr Khan, Mr Mason-Cox.

Noes: Mr Borsak, Mr Graham, Mrs Houssos, Mr Shoebridge.

Question resolved in the negative.

Mr Amato moved: That Recommendation 9 be omitted.

Question put.

The committee divided.

Ayes: Mr Amato, Mr Khan, Mr Mason-Cox.

Noes: Mr Borsak, Mr Graham, Mrs Houssos, Mr Shoebridge.

Question resolved in the negative.

Mr Graham moved: That Recommendations 8 and 9 be amended by inserting a new final sentence to each recommendation: 'The committee supports bringing forward the final implementation of the bill and the regulations to 31 March 2020.'

Question put.

The committee divided.

Ayes: Mr Borsak, Mr Graham, Mrs Houssos, Mr Shoebridge.

Noes: Mr Amato, Mr Khan, Mr Mason-Cox.

Question resolved in the affirmative.

Chapter 7

Mr Amato moved: That Recommendation 10 be omitted and the following recommendation be inserted instead:

'Recommendation X

That the NSW Government review its response to the Shergold Weir Report to implement all recommendations and publicly confirm the timeframe for full implementation.'

Question put.

The committee divided.

Ayes: Mr Amato, Mr Khan, Mr Mason-Cox.

Noes: Mr Borsak, Mr Graham, Mrs Houssos, Mr Shoebridge.

Question resolved in the negative.

Mr Amato moved: That Recommendation 11 be omitted.

Question put.

The committee divided.

Ayes: Mr Amato, Mr Khan, Mr Mason-Cox.

Noes: Mr Borsak, Mr Graham, Mrs Houssos, Mr Shoebridge.

Question resolved in the negative.

Resolved, on the motion of Mrs Houssos: That

- (a) paragraph 7.55 be amended by inserting at the end: 'The committee invites the NSW Government to respond to Recommendation 12 before the committee prepares its final report.'
- (b) Recommendation 12 be amended by inserting ', including through the Building Commissioner' after 'That the NSW Government'.

Mr Borsak moved: That:

- The draft report as amended be the report of the committee and that the committee present the report to the House;
- 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 by 12.00 pm Tuesday 12 November 2019 based on the draft minutes of the meeting being delivered at least two hours before;
- That the report be tabled on Wednesday 13 November 2019;
- That the Chair hold a press conference on Wednesday 13 November 2019.

Question put.

The committee divided.

Ayes: Mr Borsak, Mr Graham, Mrs Houssos, Mr Shoebridge.

Noes: Mr Amato, Mr Khan, Mr Mason-Cox.

Question resolved in the affirmative.

5. Adjournment

The committee adjourned at 3.18 pm, until Wednesday 12 December 2019.

Madeleine Foley

Committee Clerk

Minutes no. 10

Thursday 21 November 2019

Public Accountability Committee

Members' Lounge, Parliament House, Sydney at 1.33 pm

1. Members present

Mr Shoebridge, *Chair*

Mr Borsak, *Deputy Chair (arrived 1.35 pm)*

Mr Farlow

Mr Graham

Mrs Houssos

Mr Khan

Mrs Maclaren-Jones (*substituting for Mr Mason-Cox*)

2. Draft minutes

Resolved, on the motion of Mrs Houssos: That draft minutes no. 9 be confirmed.

3. Correspondence

The committee noted the following items of correspondence:

Received:

- 13 November 2019 – Letter from Ms Margaret Crawford, Auditor-General for NSW, to Chair, asking the committee to defer consideration of the Audit Office for the Budget process inquiry until it completes an audit into the effectiveness of the financial arrangements and management practices of other statutory bodies
- 13 November 2019 – Letter from Mr Philip Gall, Chairman, Owners Corporation Network, to Chair, thanking the committee for the opportunity to appear for the building regulations inquiry and providing further comment on amendments made to the *Design and Building Practitioners Bill*
- 15 November 2019 – Letter from Mr Andrew Young, Clerk of the Parliaments and Clerk of the Legislative Council, Parliament of Victoria, to Chair, declining to provide a submission to the Budget process inquiry.

4. Inquiry into the regulation of building standards, building quality and building disputes

4.1 Hearing on Flammable Cladding – Witness list

Resolved, on the motion of Mr Graham: That the Chair's proposed list of witnesses, as well as the Tenants Union and the Construction, Forestry, Maritime, Mining and Energy Union be invited to appear at the hearing on Wednesday 11 December 2019.

Resolved, on the motion of Mrs Houssos: That the committee take evidence from the author of confidential submission no. 172 *in camera* on Wednesday 11 December 2019.

4.2 Newcastle hearing

Resolved, on the motion of Mrs Houssos: That the committee hold an off-site hearing in Newcastle on Wednesday 19 December 2019.

5. ***

6. Adjournment

The committee adjourned at 1.43 pm, until Wednesday 11 December 2019, Macquarie Room, Parliament House (public hearing – Building regulations inquiry)

Sarah Dunn
Committee Clerk

Minutes no. 11

Wednesday, 11 December 2019
Public Accountability Committee
Macquarie Room, Parliament House, Sydney at 9.18 am

1. Members present

Mr Shoebridge, *Chair (until 5.18 pm)*
Mr Buttigieg (*participating from 9.50 am until 10.55 am, from 2.00 pm*)
Mr Farlow (*from 1.30 pm*)
Mr Graham
Mrs Houssos
Mr Khan
Mr Mason-Cox (*from 10.40 am*)

2. Apologies

Mr Borsak, *Deputy Chair*

3. Previous minutes

Resolved, on the motion of Mrs Houssos: That draft minutes no. 10 be confirmed.

4. Correspondence

The committee noted the following items of correspondence:

Received:

- 19 November 2019 – Email from Mr Duncan Kennedy, to secretariat, raising a number of issues in relation to the defective installation of security locks on homes and requesting to appear as a witness at the next committee's hearing and provide a submission
- 20 November 2019 – Email from Mr Duncan Kennedy, to secretariat, providing further information in relation to the defective installation of security locks on homes
- 21 November 2019 – Email from Mr Peter Goudie, to secretariat, requesting to appear as a witness at an upcoming hearing

- 21 November 2019 – Email from Mr Peter Goudie, to secretariat, providing additional information to support his request to appear as a witness at an upcoming hearing
- 25 November 2019 – Email from Ms Sarah Low, Manager Regulatory Policy, Department of Customer Service, to secretariat, advising that Mr David Chandler and Mr John Tansey are not available to attend at the allocated time for the hearing on 11 December 2019
- 26 November 2019 – Email from Mr Rodger Hills, Executive Officer, Building Products Industry Council, advising they are unable to appear at the hearing on 11 December
- 28 November 2019 – Email from Mr Luke Walton, Executive Director, Department of Planning, Industry and Environment, to secretariat, advising that the Building Policy Unit responsible for implementing the government's response to flammable cladding has now formally shifted to the Department of Customer Service and so decline the invitation to attend the hearing
- 29 November 2019 – Email from Ms Sarah Low, Manager Regulatory Policy, Department of Customer Service, to secretariat, advising that there is no other senior officer who can attend in Mr John Tansey's place at the hearing and requesting the committee change the hearing time
- 30 November 2019 – Email from Mr Chris Rumore, to secretariat, confirming attendance at the hearing subject to the identity of his strata scheme not being disclosed
- 3 December 2019 – Email from Mr Damian Spruce, Government Relations Manager, Fire and Rescue NSW, to secretariat, confirming attendance of Assistant Commissioner Mark Whybro AFSM at the hearing on combustible cladding
- 6 December 2019 – Email from Ms Anita Campbell, Executive Officer, National Fire Industry Association, to secretariat, declining the invitation to attend the hearing on 11 December 2019
- 6 December 2019 – Email from Ms Sarah Low, Manager Regulatory Policy, Department of Customer Service, to secretariat, advising that Ms Rose Webb and Mr John Tansey will re-schedule their commitments to attend the hearing
- 11 December 2019 – Email from Ms Kate Boyd, General Counsel, Department of Premier and Cabinet, to secretariat, declining the committee's invitation for Mr Tim Reardon, Secretary of NSW Department of Premier and Cabinet and Mr Mike Pratt AM, Secretary of NSW Treasury, to give evidence at 1.00 pm on Friday 13 December 2019 to the inquiry into the Budget process.

Sent:

- 19 November 2019 – Email from secretariat, to Mr Duncan Kennedy, advising that he can make a late submission and his request to be a witness will be considered by the committee at their next meeting
- 21 November 2019 – Email from secretariat, to Mr Peter Goudie, advising that his request to appear as a witness will be considered by the committee at their next meeting.

5. Inquiry into the regulation of building standards, building quality and building disputes

5.1 Partially confidential submission

Resolved, on the motion of Mr Khan: That the committee authorise the publication of submission no. 176, with the exception of identifying and/or sensitive information which are to remain confidential, as per the request of the author.

5.2 Public submission

Resolved, on the motion of Mr Graham: That the committee authorise the publication of submission no. 176a.

Resolved, on the motion of Mr Khan: That the committee authorise the publication of submission no. 177.

5.3 Requests to appear as a witness

Resolved, on the motion of Mr Khan: That the committee decline Mr Duncan Kennedy's request to appear as a witness at an upcoming hearing.

Resolved, on the motion of Mrs Houssos: That the committee invite Mr Peter Goudie to appear at the hearing scheduled on Monday 24 February 2019.

5.4 Due dates for answers to questions on notice

Resolved, on the motion of Mrs Houssos: That witnesses who appear before the committee at the hearing on Wednesday 11 December 2019 be given until Tuesday 28 January 2020 to respond to any questions taken on notice and/or supplementary questions.

5.5 Allocation of questions

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

5.6 Playing video footage during the hearing

Resolved, on the motion of Mrs Houssos: That the Chair be permitted to play video footage as part of questioning witnesses at the hearing.

5.7 Participating members

Resolved, on the motion of Mr Khan: That Mr Buttigieg be permitted to participate in the *in camera* session during the hearing on 11 December 2019.

6. *****7. Inquiry into the regulation of building standards, building quality and building disputes****7.1 In camera hearing**

The committee previously resolved to take *in camera* evidence from an individual.

The committee proceeded to take *in camera* evidence.

Persons present other than the committee: Ms Madeleine Foley, Ms Sarah Dunn, Mr Joseph Cho, Ms Monica Loftus, Mr Andrew Ratchford and Hansard reporters.

The following witness was sworn and examined:

- Witness A.

Witness A tabled a number of documents.

The evidence concluded and the witness withdrew.

7.2 Public hearing

The committee proceeded to take evidence in public.

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 Rumore, Resident and Chair of the sub-committee owners corporation
- Mr Ravendra Mawjee, Resident in a building containing flammable cladding.

Mr Rumore tabled the following documents:

- Email from Mr Rumore, to Hon Kevin Anderson MP, Minister for Better Regulation and innovation, in relation to the flammable cladding issues in New South Wales, dated 9 August 2018
- Letter from Hon Kevin Anderson MP, Minister for Better Regulation and innovation, to Mr Rumore, in response to his email, dated 31 October 2019.

Mr Mawjee tabled the following document:

- Document containing key messages to convey to the committee.

Mr Mason-Cox joined the meeting at 10.40 am.

The evidence concluded and the witnesses withdrew.

7.3 Election of Deputy Chair

The Chair noted the apologies of Mr Borsak and called for nominations for the Deputy Chair.

Mr Khan moved: That Mrs Houssos be elected Deputy Chair for the purposes of the meeting.

There being no further nominations, the Chair declared Mrs Houssos elected Deputy Chair for the purposes of the meeting.

7.4 Request to take photos

Resolved, on the motion of Mr Mason-Cox: That representatives from Local Government NSW be permitted to take photos during Cr Linda Scott's appearance before the committee.

7.5 Public hearing

The public hearing resumed.

The Chair reminded the following witness that they did not need to be sworn, as they had been sworn at another hearing for the same inquiry:

- Cr Linda Scott, President, Local Government NSW.

The witness was examined by the committee.

Cr Scott tabled the following document:

- Motions from the Local Government NSW 2019 Annual Conference.

The evidence concluded and the witness withdrew.

The Chair reminded the following witness that they did not need to be sworn, as they had been sworn at another hearing for the same inquiry:

- Mr Karl Sullivan, Head of Risk and Operations, Insurance Council of Australia.

The witness was examined by the committee.

The evidence concluded and the witness withdrew.

The following witnesses were sworn and examined:

- Mr Leighton Drury, State Secretary, Fire Brigade Employees Union
- Ms Anastasia Polites, Senior Industrial Officer, Fire Brigade Employees Union.

The evidence concluded and the witnesses withdrew.

The media and the public withdrew for the lunch break.

Mr Farlow arrived at 1.30 pm.

7.6 Newcastle hearing

The committee noted the visit to Newcastle that was previously scheduled for Wednesday 19 February 2020 and deferred consideration of changing this date.

The committee noted the proposed itinerary for the Newcastle visit:

- depart NSW Parliament at approximately 6.30 am
- meet with a representative from the Chamber of Commerce or local council for a briefing and tour of relevant sites in Newcastle
- hold a public hearing at a location TBC in the Newcastle CBD
- return to Sydney by 6.30 pm.

7.7 Newcastle hearing – Witness list

The committee noted the Chair's proposed list of witnesses.

Resolved, on the motion of Mrs Houssos: That the Chair's proposed list of witnesses be invited to appear at the Newcastle hearing, subject to the available time on the day, and that members are to advise the secretariat of any additional stakeholders to be invited.

7.8 *In camera* hearing – Witness list

The committee noted the Chair's proposed list of witnesses.

Resolved, on the motion of Mr Graham: That the Chair's proposed list of witnesses be invited to appear at the *in camera* hearing on Monday 24 February 2020, subject to the available time on the day, and that members are to advise the secretariat of any additional stakeholders to be invited.

7.9 Reporting timeline

Resolved, on the motion of Mr Farlow: That the committee adopt the following reporting timeline for the final report:

- Monday 30 March 2020 – Chair's draft report provided to members with seven days to review, noting the new sessional order regarding provision of Chairs' draft reports
- 12.30 pm, Monday 6 April 2020 – Report deliberative
- Thursday 9 April 2020 – Report tabled.

7.10 Partially confidential submission 159

Resolved, on the motion of Mr Graham: That the committee:

- note that submission no. 159 was previously published by the committee
- now resolve to keep confidential identifying information that would disclose the name of the residential building, as per the request of the author.

7.11 Public hearing

The public hearing resumed.

The Chair reminded the following witnesses that they did not need to be sworn, as they had been sworn at another hearing for the same inquiry:

- Mr Philip Gall, Chair, Owners Corporation Network
- Ms Jane Hearn, Vice Chair, Owners Corporation Network.

The following witnesses were sworn:

- Mr Chris Duggan, President, Strata Community Association NSW
- Mr Leo Patterson Ross, Senior Policy Officer, Tenants' Union of NSW.

The witnesses were examined by the committee.

The evidence concluded and the witnesses withdrew.

The Chair reminded the following witness that they did not need to be sworn, as they had been sworn at another hearing for the same inquiry:

- Mr Greg Ewing, Sydney Division General Manager, Engineers Australia.

The following witnesses were sworn:

- Ms Sarnia Rusbridge, National Seminar Coordination Chair, Society for Fire Safety, Engineers Australia
- Mr Edmund Ang, NSW Chapter Chair, Society for Fire Safety, Engineers Australia.

The witnesses were examined by the committee.

The evidence concluded and the witnesses withdrew.

The Chair reminded the following witness that they did not need to be sworn, as they had been sworn at another hearing for the same inquiry:

- Mr Darren Greenfield, State Secretary, Construction, Forestry, Maritime, Mining and Energy Union – NSW Branch.

The following witness was sworn:

- Mr Nigel Davies, National Assistant Secretary, Construction, Forestry, Maritime, Mining and Energy Union.

The witnesses were examined by the committee.

Mr Davies tabled the following document:

- Letter from Mr Michael O'Connor, National Secretary, Construction, Forestry, Maritime, Mining and Energy Union, to Hon Mike Baird MP, former Premier of NSW, raising concerns in relation to external cladding on buildings, dated 26 May 2015.

The evidence concluded and the witnesses withdrew.

The media and the public withdrew.

8. ***

9. Inquiry into the regulation of building standards, building quality and building disputes

9.1 Public hearing

The public hearing resumed.

The following witnesses were sworn and examined:

- Mr Mark Whybro AFSM, Assistant Commissioner Community Safety, Fire and Rescue NSW
- Mr Dave Hudson, Deputy Commissioner, Investigations and Counter Terrorism, NSW Police Force.

Mr Whybro tabled the following documents:

- NSW Customer Service, Combustible cladding dashboard, dated 29 November 2019
- NSW Customer Service, Combustible cladding dashboard, dated 6 December 2019.

The evidence concluded and the witnesses withdrew.

The Chair reminded the following witnesses that they did not need to be sworn, as they had been sworn at another hearing for the same inquiry:

- Ms Rose Webb, Deputy Secretary, Better Regulation Division, Department of Customer Service and NSW Fair Trading Commissioner
- Mr John Tansey, Executive Director Regulatory Policy, Better Regulation Division, Department of Customer Service.

The witnesses were examined by the committee.

Mr Shoebridge departed at 5.18 pm.

In the absence of the Chair, the Deputy Chair, Mrs Houssos took the chair for the purpose of the meeting.

The evidence concluded and the witnesses withdrew.

The public hearing concluded at 5.30 pm.

The media and the public withdrew.

9.2 Tendered documents

Resolved, on the motion of Mr Farlow: That the committee keep confidential the following document tendered during the public hearing:

- A number of documents, tabled by Witness A.

Resolved, on the motion of Mr Farlow: That the committee accept and publish the following documents tendered during the public hearing, with the exception of identifying information that would disclose the name of the building, which is to remain confidential, as per the request of the author:

- Email from Mr Rumore, to Hon Kevin Anderson MP, Minister for Better Regulation and innovation, in relation to the flammable cladding issues in New South Wales, dated 9 August 2018, tabled by Mr Chris Rumore
- Letter from Hon Kevin Anderson MP, Minister for Better Regulation and innovation, to Mr Rumore, in response to his email, dated 31 October 2019, tabled by Mr Chris Rumore.

Resolved, on the motion of Mr Farlow: That the committee accept and publish the following documents tendered during the public hearing:

- Document containing key message's to convey to the committee, tabled by Mr Ravendra Mawjee

- Motions from the Local Government NSW 2019 Annual Conference, tabled by Cr Linda Scott
- Letter from Mr Michael O'Connor, National Secretary, Construction, Forestry, Maritime, Mining and Energy Union, to Hon Mike Baird MP, former Premier of NSW, raising concerns in relation to external cladding on buildings, dated 26 May 2015, tabled by Mr Nigel Davies.
- NSW Customer Service, Combustible cladding dashboard, dated 29 November 2019, tabled by Mr Mark Whybro AFSM
- NSW Customer Service, Combustible cladding dashboard, dated 6 December 2019, tabled by Mr Mark Whybro AFSM.

10. Adjournment

The committee adjourned at 5.32 pm, until 9.00 am Thursday, 12 December 2019, Macquarie Room, Parliament House (public hearing – Budget process inquiry).

Sarah Dunn

Clerk to the Committee

Minutes no. 14

Tuesday 18 February 2020

Public Accountability Committee

Room 1254, Parliament House, Sydney at 3.31 pm

1. Members present

Mr Shoebridge, *Chair*

Mr Borsak, *Deputy Chair*

Mr Graham

Mrs Houssos (*until 4.00 pm*)

Mr Mason-Cox

Mrs Ward (*until 4.35 pm*)

2. Apologies

Mr Khan

3. Committee membership

The committee noted that the Hon Natalie Ward MLC replaced the Hon Scott Farlow MLC as a member of the committee on 31 January 2020. Mr Farlow has served since 15 May 2019.

4. Previous minutes

Resolved, on the motion of Mr Mason-Cox: That draft minutes nos. 11, 12 and 13 be confirmed.

5. Correspondence

The committee noted the following items of correspondence:

Received:

- 12 December 2019 – Email from the author of confidential submission no. 17, to committee, providing information in relation to their strata scheme and attaching a number of items of correspondence
- 24 December 2019 – Email from Mr Philip Reed, CEO, Independent Commission Against Corruption, to the committee, providing a copy of the NSW Treasury advice to agencies about the 2020-21 budget process
- 17 January 2020 – Email from Mr Tim Errington, Acting Manager Government Relations, Fire and Rescue NSW, to secretariat, seeking an extension to 4 February 2020 to provide answers to questions on notice

- 30 January 2020 – Email from Ms Verety Moffat, Department Liaison Officer, Minister for Police and Emergency Services, to secretariat, confirming the letter from Commissioner Fuller provided by Mr Dave Hudson in response to questions on notice can be published
- 31 January 2020 – Email from submission author 156, to secretariat, advising that they will not be attending the hearing on 24 February 2020
- 31 January 2020 – Email from Ms Sharon Pope, Assistant Director Environment and Community Services, Muswellbrook Shire Council, advising that they are unable to attend the hearing in Newcastle on 20 February 2020
- 10 February 2020 – Email from Mr Gavin Melvin, Chief of Staff, Office of the Hon Kevin Anderson MP, Minister for Better Regulation and Innovation, to secretariat, declining the invitation to attend the hearing on 24 February 2020 and requesting the committee meet with the Building Commissioner for an informal briefing
- 10 February 2020 – Email from Mr Che Leonard, to secretariat, advising he is unable to attend the hearing on 24 February 2020
- 16 February 2020 – Email from submission author 42, to secretariat, advising that they are not available to attend the hearing on 24 February 2020.

Sent:

- 17 December 2019 – Letter from Chair, to Mr Tim Crakanthorp MP, Member for Newcastle, advising of the committee's visit and public hearing in Newcastle on 20 February 2020
- 17 January 2020 – Email from secretariat, to Mr Tim Errington, Acting Manager Government Relations, Fire and Rescue NSW, approving the request for an extension to provide answers to questions on notice
- 30 January 2020 – Letter from secretariat, to the Hon Kevin Anderson MP, Minister for Better Regulation and Innovation, inviting the Minister to give evidence at a hearing on 24 February 2020.

Resolved, on the motion of Mr Borsak: That the committee keep the following items of correspondence confidential as per the recommendation of the secretariat, as they contain identifying and/or sensitive information:

- 12 December 2019 – Email from the author of confidential submission no. 17, to committee, providing information in relation to their strata scheme and attaching a number of items of correspondence
- 31 January 2020 – Email from submission author 156, to secretariat, advising that they will not be attending the hearing on 24 February 2020
- 16 February 2020 – Email from submission author 42, to secretariat, advising that they are not available to attend the hearing on 24 February 2020.

6. Inquiry into the regulation of building standards, building quality and building disputes

6.1 Submission no. 127

Resolved, on the motion of Mr Graham: That the committee authorise the publication of submission no. 127.

6.2 Answers to questions on notice

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

- Mr Nigel Davies, National Assistant Secretary, Construction, Forestry, Maritime, Mining and Energy Union, received 12 December 2019
- Ms Karen Stiles, Executive Officer, Owners Corporation Network, received 20 January 2020
- Mr Jonathan Russell, National Manager, Engineers Australia, received 23 January 2020
- Mr Chris Duggan, President, Strata Community Association, received 28 January 2020
- Cr Linda Scott, President, Local Government NSW, received 28 January 2020
- Ms Rose Webb and Mr John Tansey, NSW Fair Trading, received 29 January 2020
- Mr Dave Hudson, Deputy Commissioner, Investigations and Counter Terrorism, NSW Police Force
- Mr Mark Whybro, Assistant Commissioner, Fire and Rescue NSW.

6.3 Confidential answers to questions on notice

Resolved, on the motion of Mr Borsak: That the committee keep the answers to questions on notice and additional information provided by Witness A on 30 January 2020 confidential, as per the recommendation of the secretariat and agreed to by the author, as they contain identifying and/or sensitive information.

6.4 Transcript clarification

Resolved, on the motion of Mr Mason-Cox: That a footnote be included in the transcript of 11 December 2019 noting the clarification received by Assistant Commissioner Mark Whybro, Fire and Rescue NSW on 4 February 2020.

6.5 Briefing with NSW Building Commissioner

Resolved, on the motion of Mr Borsak: That the briefing by Mr David Chandler OAM, NSW Building Commissioner and Mr Matt Press, Director, on the government's proposed reforms be kept confidential, along with the copy of the presentation slides.

The committee was briefed by Mr David Chandler, OAM, NSW Building Commissioner and Mr Matt Press, Director, on the government's proposed reforms.

7. Adjournment

The committee adjourned at 5.15 pm until Thursday 20 February 2020 at 10.00 am (Newcastle briefing and hearing).

Ms Sarah Dunn
Committee Clerk

Minutes no. 15

Thursday 20 February 2020
Public Accountability Committee
Hunter Room, Newcastle City Hall at 10.35 am

1. Members present

Mr Shoebridge, *Chair*
Mr Graham
Mr Martin (*substituting for Mr Khan*)

2. Apologies

Mr Borsak
Mrs Houssos
Mr Mason-Cox
Mrs Ward

3. Correspondence

The committee noted the following items of correspondence:

Received:

- 18 February 2020 – Email from the Hunter and Central Coast Development Corporation, to the secretariat, advising that they are unable to attend the building standards hearing on 20 February 2020.

4. Inquiry into the regulation of building standards, building quality and building disputes**4.1 Timetable for transcripts**

The committee noted advice from Hansard regarding the timetable for transcript delivery for today's and upcoming hearings.

Resolved, on the motion of Mr Graham: That the committee, through the Clerk of the Parliaments:

- request that Hansard prioritise the transcripts for the building standards inquiry hearings on 20 and 24 February, and that the transcripts be requested to be provided by Friday 28 February, in order for the committee to meet its reporting date, and
- request an explanation of any factors preventing Hansard from providing the transcripts by the requested date.

4.2 Timetable for answers to questions on notice

Resolved, on the motion of Mr Graham: That, given the short timeframe for the report, witnesses at the hearings on 20 February and 24 February be given 14 days to return answers to questions on notice.

4.3 Briefing with Newcastle City Council

The committee met with representatives from Newcastle City Council for an informal briefing.

4.4 Public hearing

Witnesses, the public and the media were admitted.

The chair made an opening statement regarding the broadcasting of proceedings, adverse mention and other matters.

The following witnesses were sworn and examined:

- Mr Geoff Douglass, Development Projects Coordinator, Newcastle City Council
- Mr Gordon Dryburgh, Regulatory Section Manager, Newcastle City Council
- Mr Michael Corrigan, Senior Building Surveyor, Lake Macquarie City Council
- Ms Elizabeth Lambert, Acting Manager, Development Assessment and Certification, Lake Macquarie City Council
- Mr Scott Rathgen, Section Manager, Building Certification, Central Coast Council.

Mr Shoebridge tendered the following document:

- a collection of photos of buildings in Newcastle with defects.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Andrew Henry, Building Certifier/Coordinator Regulatory Services, Singleton Council
- Mr Phil Hoawerth, Building Certifier/Process Improvement Specialist, Singleton Council
- Mr Nick Greenhalgh, Senior Development/Building Officer, Dungog Shire Council
- Ms Christine Robinson, Manager Planning Building and Regulatory Services, Upper Hunter Shire Council.

Mr Greenhalgh tendered the following document:

- Dungog Shire Council opening statement and building statistics.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr David Gray, Home owner
- Mr Grahame Vile, Director, BAAM Consulting.

Mr Vile tendered the following document:

- document by BAAM Consulting entitled 'Independent strata and asset management advice' detailing defects found in buildings.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Ms Therese Doyle, Member, Better Planning Network Inc and Co-convenor, Newcastle Hunter Urban Planning and Transport Alliance
- Ms Barbara Ferris, Secretary, Body Corporate, local strata building.

Ms Ferris tabled the following document:

- documents relating to defects at a building in Newcastle including two letters to residents regarding the defects and an ENGIE Services building report.

Ms Doyle tendered the following document:

- document by Better Planning Network responding to inquiry terms of reference.

The evidence concluded and the witnesses withdrew.

The public hearing concluded at 2.30 pm.

The media and the public withdrew.

4.5 Tended documents

Resolved, on the motion of Mr Graham: That the committee accept and publish the following documents tendered during the public hearing:

- collection of photos of buildings in Newcastle with defects, tabled by Mr David Shoebridge, Committee Chair
- Dungog Shire Council opening statement and building statistics, tabled by Mr Nick Greenhalgh, Senior Development/Building Officer, Dungog Shire Council
- two letters to residents regarding defects, tabled by Ms Barbara Ferris, Secretary, Body Corporate, local strata building
- document by Better Planning Network responding to inquiry terms of reference, tabled by Ms Therese Doyle, Member, Better Planning Network Inc and Co-convenor, Newcastle Hunter Urban Planning and Transport Alliance.

Resolved, on the motion of Mr Graham: That the committee accept and keep confidential:

- ENGIE Services building report, tabled by Ms Barbara Ferris, Secretary, Body Corporate, local strata building.

5. Adjournment

The committee adjourned at 2.32 pm until Monday 24 February 2020 at 10.15 am (*in camera* building standards inquiry hearing).

Ms Sarah Dunn
Committee Clerk

Minutes no. 16

Monday 24 February 2020

Public Accountability Committee

Macquarie Room, Parliament House, Sydney at 10.21 am

1. Members present

Mr Shoebridge, *Chair*
Mr Graham (*until 4.18 pm*)
Mrs Houssos
Mr Khan (*from 1.30 pm*)
Mr Mason-Cox (*from 10.40 am*)
Mrs Ward

2. Apologies

Mr Borsak

3. Correspondence

The committee noted the following items of correspondence:

Received:

- 21 February 2020 – Email from Hansard to secretariat confirming they will prioritise transcripts for the building standards inquiry and providing reasons for any potential delay
- 21 February 2020 – Email from Mr Grahame Vile, Director, BAAM Consulting, attaching an edited copy of a document tendered by him at the hearing on 20 February 2020, edited to remove identifying building information.

Sent:

- 21 February 2020 – Email from secretariat to Hansard requesting transcripts for the building standards inquiry hearings on 20 and 24 February be given priority.

4. Inquiry into the regulation of building standards, building quality and building disputes

4.1 Tendered document from 20 February hearing

Resolved, on the motion of Mr Graham: That the committee accept and publish the edited version of the document tendered by Mr Graham Vile at the hearing on 20 February 2020, edited to remove identifying building information and received by the secretariat on Friday 21 February 2020.

4.2 Election of temporary Deputy Chair

The Chair noted the absence of the Deputy Chair for the meeting.

Mrs Ward moved: That Mrs Houssos be elected as Deputy Chair for the hearing on 24 February 2020.

There being no further nominations, the Chair declared Mrs Houssos elected Deputy Chair for the hearing on 24 February 2020.

4.3 Consideration of *in camera* evidence

The committee noted that a generalised summary of the *in camera* evidence of 24 February 2020 to be included in the committee's final report.

4.4 *In camera* hearing

Resolved, on the motion of Mrs Houssos: that the committee take *in camera* evidence from individuals.

The committee proceeded to take *in camera* evidence.

Persons present other than the committee: Ms Madeleine Foley, Ms Sarah Dunn, Ms Monica Loftus, Mr Andrew Ratchford and Hansard reporters.

The following witness was sworn and examined:

- Witness B.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:

- Witness C.

Witness C tabled two documents.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:

- Witness D.

The evidence concluded and the witness withdrew.

4.5 Tendered documents – *in camera* hearing

Resolved, on the motion of Mrs Houssos: That the committee accept and keep confidential two documents tendered by Witness C during the *in camera* hearing.

4.6 Public hearing

The committee proceeded to take evidence in public.

Witnesses, the public and the media were admitted.

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

The following witness was sworn and examined:

- Mr Peter Goudie, Consulting Engineer.

Mr Goudie tendered the following document:

- various photos of defects in buildings and building materials.

The evidence concluded and the witness withdrew.

The following witnesses were sworn and examined:

- Mr Burak Dincel, Chairman, Dincel Construction System
- Mr Berkay Dincel, Director, Dincel Construction System
- Ms Maria Barreto-Tilman, Group Marketing Manager, Dincel Construction System.

Mr Burak Dincel tendered the following document:

- Dincel Construction System supplementary submission.

The evidence concluded and the witnesses withdrew.

The following witnesses were examined on former oath:

- Mr David Chandler OAM, NSW Building Commissioner
- Ms Rose Webb, Deputy Secretary, Better Regulation Division and NSW Fair Trading Commissioner, Department of Customer Service
- Mr John Tansey, Executive Director Regulatory Policy, Better Regulation Division, Department of Customer Service.

The evidence concluded and the witnesses withdrew.

The public hearing concluded at 4.30 pm.

The media and the public withdrew.

4.7 Tendered documents

Resolved, on the motion of Mr Mason-Cox: That the committee accept and publish the following document tendered during the public hearing:

- various photos of defects in buildings and building materials, tendered by Mr Peter Goudie, Consulting Engineer.

4.8 Supplementary submission

Resolved, on the motion of Mr Khan: That the committee accept and publish as a late supplementary submission the document tendered by Mr Burak Dincel, Chairman, Dincel Construction System, pending a review by the secretariat.

5. Adjournment

The committee adjourned at 4.45 pm, until Thursday 27 February 2020 at 1.30 pm (building standards inquiry briefing from UNSW academics).

Ms Sarah Dunn
Committee Clerk

Minutes no. 17

Friday 20 March 2020

Public Accountability Committee

Preston Stanley Room, Parliament House, 10.06 am

1. Members presentMr Shoebridge, *Chair*

Mr Donnelly (substituting for Mr Graham, until 10.30 am)

Mr Franklin (substituting for Mr Mason-Cox)

Mr Khan

Mr Primrose

Mr Searle (substituting for Mr Graham, from 10.30 am)

Mrs Ward

2. Apologies

Mr Borsak

3. Previous minutes

Resolved, on the motion of Mr Khan: That draft minutes nos. 14, 15 and 16 be confirmed.

4. Correspondence

The committee noted the following items of correspondence:

Received:

- 2 December 2019 – Letter from Ms Tracy Dunford, Special Counsel and Ms Colleen Palmkvist, Partner, Lander & Rogers Lawyers, to Chair, providing comment on the *Design and Building Practitioners Bill 2019* in light of proceedings of owners of a residential apartment block in Lidcombe with damage
- 24 December 2019 – Email from Mr Philip Reed, CEO, NSW Independent Commission against Corruption, to the secretariat, forwarding copy of NSW Treasury advice to agencies about the 2020-21 budget process provided to agencies dated 16 December 2019
- 29 January 2020 – Letter from Mr David Blunt, Clerk of the Parliaments, to the committee, forwarding the final draft of Chapter 17 Financial Legislation from the forthcoming edition of *New South Wales Legislative Council Practice*
- 21 February 2020 – Email from Ms Maria Barreto-Tilman, Group Marketing Manager, Dintel Construction System, to the secretariat, providing links to videos of various building product fire tests
- 2 March 2020 – Email from Dr Laura Crommelin, Research Lecturer, City Futures Research Centre, UNSW, to secretariat, regarding the informal meeting held with some committee members and attaching a draft conference paper on building defects
- 4 March 2020 – Email from Dr Laura Crommelin, Research Lecturer, City Futures Research Centre, UNSW, to secretariat, following up on a query and attaching a link to an article in *The Conversation* on building defects
- 6 March 2020 – Email from Mr Eric Aubert, Media Manager – Policy and Regulation, Department of Customer Service, to secretariat, requesting a copy of a document tendered at the building standards hearing on 24 February 2020.

Sent:

- 6 March 2020 – Email from secretariat to Mr Eric Aubert, Media Manager – Policy and Regulation, Department of Customer Service, responding to a request for a copy of a document tendered at the building standards hearing on 24 February 2020.

Resolved, on the motion of Mr Khan: That the committee authorise the publication of correspondence from Ms Tracy Dunford, Special Counsel and Ms Colleen Palmkvist, Partner, Lander & Rogers Lawyers, to Chair, providing comment on the *Design and Building Practitioners Bill 2019* in light of proceedings of owners of a residential apartment block in Lidcombe with damage, dated 2 December 2019.

Resolved, on the motion of Mr Khan: That the committee keep confidential the attachment to the email received from Dr Laura Crommelin, Research Lecturer, City Futures Research Centre, UNSW, dated 21 February 2020.

5. Inquiry into the regulation of building standards, building quality and building disputes

5.1 Supplementary submission 127a

Resolved, on the motion of Mrs Ward: That the committee publish the first page of submission no. 127a but keep the additional pages confidential, as per the recommendation of the secretariat.

5.2 Report deliberative date

Resolved, on the motion of Mr Khan: That the meeting scheduled for Monday 6 April 2020 to consider the chair's draft report be postponed, and that the chair canvass members' availability on Friday 24 April 2020. If this date is not suitable, the date of the deliberative meeting will be determined by the chair in consultation with members.

5.3 Minister's request relating to the Government response

Resolved, on the motion of Mr Franklin: That the chair write to the Minister for Better Regulation and Innovation to:

- note that the committee has considered the Minister's request to provide one combined response to the first and final reports
- advise that under Legislative Council standing orders, there is no provision for a committee to extend the due date for a government response, and therefore the Minister is unable to extend the due date for a response to the first report in order to provide a combined response
- inform the Minister of the likely tabling date for the final report.

6. ***

7. Adjournment

The committee adjourned at 11.06 am, *sine die*.

Madeleine Foley
Committee Clerk

Minutes no. 21

Friday 24 April 2020

Public Accountability Committee

Webex conferencing at 10.02 am

1. Members

Mr Shoebridge, *Chair*

Mr Borsak, *Deputy Chair*

Ms Faehrmann (*participating*) (*until 10.22 am*)

Mr Graham

Mrs Houssos

Mr Khan

Mr Mason-Cox

Mr Searle (*substituting for Mrs Houssos for the management of the COVI-19 pandemic inquiry*) (*until 10.22 am*)

Mrs Ward

2. Electronic participation

The committee noted the provisions of the amended sessional order relating to electronic participation in committee proceedings require that when a committee deliberates, members of the committee constituting a quorum are able to speak to and hear each other.

The Chair briefed the committee about the conduct of proceedings.

Resolved, on the motion of Mr Borsak: That the meeting be recorded through Webex for the purposes of the secretariat cross-checking amendments following the meeting only.

Resolved, on the motion of Mr Borsak: That the draft minutes for meeting no. 21 be circulated to members electronically and be confirmed by members 24 hours after receipt of the draft minutes by agreement via email.

3. Draft minutes

Resolved, on the motion of Mr Mason-Cox: That draft minutes no. 20 be confirmed.

4. Correspondence

The committee noted the following items of correspondence:

Received:

- 25 February 2020 – Email from Mr Karl Sullivan, Head of Risk & Operations, Insurance Council of Australia, to secretariat, advising they have been focused on the bushfire response and will provide their answers to questions on notice as soon as possible
- 12 March 2020 – Email from Mr Grahame Vile, Director, BAAM Consulting, to secretariat, requesting an extension to provide answers to questions on notice from the hearing on 20 February 2020
- 13 March 2020 – Email from Ms Sarah Low, Manager Policy and Strategy, Department of Customer Service, to secretariat, seeking an extension to provide answers to questions on notice from the hearing on 24 February 2020
- 19 March 2020 – Email from Witness A, to secretariat, agreeing to the proposal to publish a statement as name suppressed to refer to this evidence in the committee's report
- 3 April 2020 – Email from Ms Barbara Ferris, Secretary, Body Corporate, local strata building, to secretariat, advising that Ms Therese Doyle is responding to the questions on notice on her behalf
- 9 April 2020 – Letter from Ms Margaret Crawford, Auditor-General for New South Wales, to Chair, advising that she expects to complete the audit into the effectiveness of financial arrangements and management practices within the next two months
- 22 April 2020 – Letter from Hon Damien Tudehope MLC, Minister for Finance and Small Business, Vice President of the Executive Council, Leader of the Government in the Legislative Council, to Chair, responding to the proposed dates for the initial COVID-19 pandemic hearings based on the agreed topics for examination.

Sent:

- 25 February 2020 – Email from secretariat, to Mr Karl Sullivan, Head of Risk & Operations, Insurance Council of Australia, following up the response to the questions taken on notice at the hearing on 11 December 2019
- 25 February 2020 Email from secretariat, to Mr Leighton Drury, State Secretary, and Ms Anastasia Polites, Senior Industrial Officer, Fire Brigade Employees Union, following up the response to the questions taken on notice at the hearing on 11 December 2019
- 12 March 2020 – Email from secretariat, to Mr Grahame Vile, Director, BAAM Consulting, approving the request for extension to provide answers to question on notice from the hearing on 20 February 2020
- 16 March 2020 – Email from secretariat, to Ms Sarah Low, Manager Policy and Strategy, Department of Customer Service, approving the request for extension to provide answers to questions on notice from the hearing on 24 February 2020

- 19 March 2020 – Email from secretariat, to Witness A, seeking confirmation to publish a statement as name suppressed to refer to this evidence in the committee's report
- 23 March 2020 – Email from secretariat, to Ms Maria Barreto-Tilman, Group Marketing Manager, Dincel Construction System, advising of the committee's decision regarding the publication status of their supplementary submission
- 23 March 2020 – Letter from Chair, to Hon Kevin Anderson MP, Minister for Better Regulation and Innovation, advising that the committee is unable to extend the due date for a government response to the first report in order to provide a combined response
- 24 March 2020 – Email from secretariat, to Mr Grahame Vile, Director, BAAM Consulting, following up the response to the questions taken on notice at the hearing on 20 February 2020
- 24 March 2020 – Email from secretariat, to Ms Barbara Ferris, Secretary, Body Corporate, local strata building, following up the response to the questions taken on notice at the hearing on 20 February 2020
- 24 March 2020 – Email from secretariat, to Ms Therese Doyle, Member, Better Planning Network Inc and Co-convenor, Newcastle Hunter Urban Planning and Transport Alliance, following up the response to the questions taken on notice at the hearing on 20 February 2020.

Resolved, on the motion of Mrs Houssos: That the committee keep the following items of correspondence confidential, as per the recommendation of the secretariat, as they contain identifying and/or sensitive information:

- 19 March 2020 – Email from secretariat, to Witness A, seeking confirmation to publish a statement as name suppressed to refer to this evidence in the committee's report
- 19 March 2020 – Email from Witness A, to secretariat, agreeing to the proposal to publish a statement as name suppressed to refer to this evidence in the committee's report.

Mr Borsak left the meeting.

5. ***

6. Inquiry into the regulation of building standards, building quality and building disputes

6.1 Supplementary submission 172a

The committee considered the partial publication of a statement from Witness A, who appeared before the committee at an *in camera* hearing on 11 December 2019, to be able to reflect this evidence in the committee's report. The committee noted that Witness A has been consulted and agrees with the publication of the statement as a name suppressed supplementary submission.

Resolved, on the motion of Mr Khan: That the committee authorise the publication of submission no. 172a and keep confidential the name and identifying information, as per the request of the author.

6.2 Partially confidential submission

Resolved, on the motion of Mr Khan: That the committee keep the following information confidential, as per the recommendation of the secretariat: names and/or identifying and sensitive information in submission no. 40.

6.3 Answers to questions on notice

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

- answers to questions on notice from Mr Scott Rathgen, Section Manager, Building Certification, Central Coast Council, received 26 and 28 February 2020
- answers to question on notice from Mr Michael Corrigan, Senior Building Surveyor, Lake Macquarie City Council, received 5 March 2020
- answers to question on notice from Ms Michelle Bisson, Manager Regulatory, Planning & Assessment, City of Newcastle, received 9 March 2020
- additional information from Mr Peter Goudie, Consulting Engineer, received 16 March 2020
- answers to question on notice from the NSW Government, received 20 March 2020.

6.4 Confidential answers to questions on notice

Resolved, on the motion of Mrs Houssos: That the committee keep confidential the following answers to questions on notice, as per the recommendation of the secretariat as they contain identifying and/or sensitive information:

- answers to questions on notice from Witness C, received 12 March 2020
- answers to questions on notice from Witness B, received 16 March 2020
- answers to questions on notice from Mr Grahame Vile, Director, BAAM Consulting, received 26 March 2020.

6.5 Transcript clarification

The committee noted the transcript clarification received 20 March 2020 from Mr Berkay Dincel, Director, Dincel Construction System, in relation to a clarification of the transcript of 24 February 2020.

Resolved, on the motion of Mrs Ward: That a footnote be included in the transcript of 24 February 2020 noting the clarification received by Mr Berkay Dincel, Director, Dincel Construction System.

6.6 Consideration of Chair's draft report

The Chair submitted his draft report entitled *Regulation of building standards, building quality and building disputes – Final report*, which, having been previously circulated, was taken as being read.

Chapter 1

Resolved, on the motion of Mrs Houssos: That the list of recommendations from the committee's first report be inserted following paragraph 1.1.

Resolved, on the motion of Mr Khan: That the following committee comments be inserted after paragraph 1.39:

'The committee acknowledges the frank and forthright evidence provided by the NSW Building Commissioner and acknowledge his offer to continue to brief the committee in the event the committee holds a further review into the NSW Government's reforms of the building and construction industry.

The committee expresses its support for the efforts made by the NSW Building Commissioner and encourages the NSW Government to adopt the recommendations that he outlined to the committee for further reforms. Additionally, the committee supports and request for further resources that the NSW Building Commissioner may make.'

Mr Graham moved: That the following paragraph be inserted after paragraph 1.37:

'The committee notes that in response to the current COVID-19 crisis the NSW Government has taken steps to accelerate building and construction as a stimulus in this period. The committee considers that this makes it more urgent to ensure that the NSW Building Commissioner has in place the appropriate powers to ensure building standards. The committee further notes that such powers were planned to be gazetted and operational by the middle of 2020.

The committee therefore recommends that this powers bill is dealt with 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.'

Question put.

The committee divided.

Ayes: Mr Borsak, Mr Graham, Mrs Houssos, Mr Shoebridge.

Noes: Mr Khan, Mr Mason-Cox, Mrs Ward.

Question resolved in the affirmative.

Mr Khan moved: That paragraphs 1.37, 1.38, 1.39, 1.40 and 1.41 be omitted.

Question put.

The committee divided.

Ayes: Mr Khan, Mr Mason-Cox, Mrs Ward.

Noes: Mr Borsak, Mr Graham, Mrs Houssos, Mr Shoebridge.

Question resolved in the negative.

Resolved, on the motion of Mr Graham: That paragraph 1.41 be amended by inserting 'including' after 'building industry'.

Mrs Houssos moved: That the following new paragraphs and recommendation be inserted after paragraph 1.40:

'The committee notes the testimony of the NSW Building Commissioner that outlined that 30 additional inspectors will be hired by the Department to audit the certification process of existing buildings. These inspectors will be largely former certifiers, builders and designers.

The inquiry also received compelling evidence of unlicensed workers, particularly electrical workers, and a small number of specialised inspectors within the Department of Fair Trading. The committee is concerned that these new inspectors will not have specialised expertise for electrical, gas or plumbing, or be conducting licence checks.

The committee believes that licencing and inspections, with the specialist expertise for these, should be centralised, under the supervision of the NSW Building Commissioner, within the newly created Building Commission. The committee also believes there should be additional licencing and specialist inspections across electrical, gas and plumbing in the NSW construction industry.

Recommendation X

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.'

Question put.

The committee divided.

Ayes: Mr Borsak, Mr Graham, Mrs Houssos, Mr Shoebridge.

Noes: Mr Khan, Mr Mason-Cox, Mrs Ward.

Question resolved in the affirmative.

Mr Graham moved: That:

(a) the following new recommendation be inserted before paragraph 1.38:

'Recommendation X

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.'

(b) the following new recommendation be inserted after paragraph 1.38:

Recommendation X

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.'

Question put.

The committee divided.

Ayes: Mr Borsak, Mr Graham, Mrs Houssos, Mr Shoebridge.

Noes: Mr Khan, Mr Mason-Cox, Mrs Ward.

Question resolved in the affirmative.

Chapter 2

Resolved, on the motion of Mr Graham: That paragraph 2.3 be amended by omitting 'we effect be' and inserting instead 'are affected by'.

Resolved, on the motion of Mr Graham: That paragraph 2.33 be amended by:

- (a) inserting 'At the hearing on 24 February 2020, the Building Commissioner gave evidence that he is not yet in charge of cladding issues' after 'particularly cladding'.
- (b) inserting 'within a fortnight of commencing as Commissioner' after 'provided recommendations to the NSW Government on flammable cladding'

Resolved, on the motion of Mr Graham: That the following new paragraph be inserted after paragraph 2.38:

'In addition the Victorian Building Authority provides a centralised flammable cladding risk assessment process and is the Municipal Building Surveyor for the highest risk buildings in Victoria.' [FOOTNOTE: State of Victoria Department of Environment, Land, Water and Planning, 'Victorian Cladding Taskforce, Report from the Co-Chairs, July 2019'.]

Resolved, on the motion of Mr Khan: That the following new paragraphs be inserted after paragraph 2.98:

'Specifically, the Government introduced the *Property, Stock and Business Agents Amendment Regulation 2019* – effective 23 March 2020 – that specifies the kinds of material facts that an agent knows or should reasonably know and must disclose to a prospective purchaser. These include that the property:

- is, or is part of, a building that contains external combustible cladding to which:
 - a fire safety order, or a notice of intention to issue a fire safety order, has been issued requiring the building to be rectified regarding the cladding
 - a building product rectification order, or a notice of intention to issue a building product rectification order, has been issued requiring the building to be rectified regarding the cladding
 - a development application or complying development certificate application has been lodged for rectification regarding the cladding.
- The agent will be liable if they fail to disclose these facts, whether or not they intended to conceal them from the prospective purchaser, if they knew of the fact, or should have reasonably known about the fact. [FOOTNOTE: *Property, Stock and Business Agents Amendment Regulation 2019*, cl 18.]

Commencing in July 2017, the Cladding Taskforce wrote to the registered owners and managers of identified buildings to alert them to the presence of potentially non-compliant cladding and encourage them to take action to check the documentation and approvals for the building and (if necessary) arrange an expert fire safety assessment.

The Taskforce has hand delivered over 33,000 letters to residents (owner-occupiers and tenants) with information about apartment fire safety and how to check that building owners are taking necessary action.' [FOOTNOTE: Submission 132, NSW Government, p 43.]

Resolved, on the motion of Mr Khan: That paragraph 2.98 be amended by making the final sentence: 'However, stakeholders raised concerns about the notification process, not just for those living in affected buildings but also other building users' its own paragraph.

Resolved, on the motion of Mr Graham: That paragraph 2.104 be amended by inserting 'universities, hotels, entertainment centres, childcare centres' before 'and hospitals'.

Mr Graham moved: That paragraph 2.105 be amended by:

- (a) omitting 'public buildings' and inserting instead 'buildings designed for public use such as cinemas, shopping centres, universities, hotels, entertainment centres, childcare centres and hospitals'
- (b) inserting at the end: 'He was also asked whether shoppers in that shopping centre would be informed of flammable cladding. The Minister indicated he would take this on notice.'
- (c) inserting the Minister's answer to question on notice if it has been received at the end.

Question put.

The committee divided.

Ayes: Mr Borsak, Mr Graham, Mrs Houssos, Mr Shoebridge.

Noes: Mr Khan, Mr Mason-Cox, Mrs Ward.

Question resolved in the affirmative.

Mr Khan moved: That paragraphs 2.116, 2.117, 2.118, 2.119 and 2.120 and Recommendation 1 be omitted.

The committee divided.

Ayes: Mr Khan, Mr Mason-Cox, Mrs Ward.

Noes: Mr Borsak, Mr Graham, Mrs Houssos, Mr Shoebridge.

Question resolved in the negative.

Mr Graham moved: That the following new committee comments and recommendation be inserted after paragraph 2.116:

'Committee comment

The committee welcomes the fact that the NSW Building Commissioner provided advice within a fortnight of his appointment by the NSW Government in relation to flammable cladding. As the Building Commissioner has made clear to the committee, he currently does not have a role in regulating flammable cladding.

That advice was not available to the committee as government witnesses observed it was before Cabinet. At no point has the Government been able to explain what this advice is, why it has not yet been agreed to or dismissed, or when that might occur. The committee regards this delay on this important public safety matter as inexplicable and inexcusable.

Accordingly the committee recommends that the Government act immediately on the advice of the Building Commissioner in relation to flammable cladding, or alternatively release the advice and explain why it prefers an alternative approach.'

Recommendation X

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.'

The committee divided.

Ayes: Mr Borsak, Mr Graham, Mrs Houssos, Mr Shoebridge.

Noes: Mr Khan, Mr Mason-Cox, Mrs Ward.

Question resolved in the affirmative.

Resolved, on the motion of Mrs Houssos: That Recommendation 2 be amended by inserting at the end: 'and when a property is open for inspection'.

Mr Khan moved: That paragraph 2.122 be omitted.

The committee divided.

Ayes: Mr Khan, Mr Mason-Cox, Mrs Ward.

Noes: Mr Borsak, Mr Graham, Mrs Houssos, Mr Shoebridge.

Question resolved in the negative.

Mrs Ward moved: That paragraph 2.122 be amended by omitting: 'The NSW Government's position, that disclosure is up to local councils or business owners on a 'need to know basis' is inadequate. We acknowledge that this is a complicated area but we believe that the NSW Government must do more to ensure that people are informed where these types of buildings contain flammable cladding, and that these buildings are remediated quickly so that people are safe when they step inside' after 'may not be aware that these buildings contain flammable cladding'.

The committee divided.

Ayes: Mr Khan, Mr Mason-Cox, Mrs Ward.

Noes: Mr Borsak, Mr Graham, Mrs Houssos, Mr Shoebridge.

Question resolved in the negative.

Resolved, on the motion of Mr Graham: That paragraph 2.122 be amended by:

- (a) inserting the words 'universities, hotels, entertainment centres, childcare centres' before 'and hospitals'
- (b) inserting the words 'The committee is aware of no evidence that members of the public are being notified by building owners that they are entering a building designed as public use with high-risk flammable cladding' after 'is inadequate'.

Mr Khan moved: That Recommendation 3 be omitted.

The committee divided.

Ayes: Mr Khan, Mr Mason-Cox, Mrs Ward.

Noes: Mr Borsak, Mr Graham, Mrs Houssos, Mr Shoebridge.

Question resolved in the negative.

Mr Graham moved: That Recommendation 3 be omitted: 'That the NSW Government ensure that all buildings that are open to the public and contain flammable cladding are remediated as a priority and that people entering those buildings are made aware if that building is high-risk', and the following new recommendation be inserted instead:

'Recommendation X

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 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.'

The committee divided.

Ayes: Mr Borsak, Mr Graham, Mrs Houssos, Mr Shoebridge.

Noes: Mr Khan, Mr Mason-Cox, Mrs Ward.

Question resolved in the affirmative.

Mr Khan moved:

- (a) That paragraph 2.123 be amended by omitting 'Owners need this information if they are to progress remediation of flammable cladding on their buildings. The public, the construction industry and insurers

need this information if they are to have any faith in the Government's assessment of the risk to these buildings'

(b) That paragraph 2.124 be omitted.

The committee divided.

Ayes: Mr Khan, Mr Mason-Cox, Mrs Ward.

Noes: Mr Borsak, Mr Graham, Mrs Houssos, Mr Shoebridge.

Question resolved in the negative.

Chapter 3

Resolved, on the motion of Mr Graham: That the following new paragraph be inserted after paragraph 3.74:

'The most recent report of the Victorian Flammable Cladding Taskforce states:

"The VBA receives many enquiries from residents, owners and those looking to purchase or occupy specific properties. The VBA has a database of buildings with cladding based on the audit inspections and will share this information with genuine purchasers and potential tenants." ' [FOOTNOTE: State of Victoria Department of Environment, Land, Water and Planning, 'Victorian Cladding Taskforce, Report from the Co-Chairs, July 2019', p 38.]

Mr Khan moved: That paragraphs 3.156, 3.157 and Recommendation 5 be omitted.

The committee divided.

Ayes: Mr Khan, Mr Mason-Cox, Mrs Ward.

Noes: Mr Borsak, Mr Graham, Mrs Houssos, Mr Shoebridge.

Question resolved in the negative.

Mrs Houssos moved: That Recommendation 6 be amended by inserting 'free of charge' after 'advice'.

The committee divided.

Ayes: Mr Borsak, Mr Graham, Mrs Houssos, Mr Shoebridge.

Noes: Mr Khan, Mr Mason-Cox, Mrs Ward.

Question resolved in the affirmative.

Mr Graham moved: That the following new committee comments and recommendation be inserted after Recommendation 6:

'Committee comment

The committee notes that the Victorian Building Authority has adopted a practice where genuine purchasers and potential tenants are able to check the cladding database to confirm the status of their potential future home. The committee recommends that the NSW Government adopts a similar practice in New South Wales.

Recommendation X

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.'

The committee divided.

Ayes: Mr Borsak, Mr Graham, Mrs Houssos, Mr Shoebridge.

Noes: Mr Khan, Mr Mason-Cox, Mrs Ward.

Question resolved in the affirmative.

Mr Khan moved: That paragraph 3.162 and Recommendation 7 be omitted.

The committee divided.

Ayes: Mr Khan, Mr Mason-Cox, Mrs Ward.

Noes: Mr Borsak, Mr Graham, Mrs Houssos, Mr Shoebridge.

Question resolved in the negative.

Mrs Houssos moved: That Recommendation 7 be amended by:

(a) inserting 'substantial' after 'provide a'

(b) omitting 'similar' and inserting instead 'proportionate to'.

The committee divided.

Ayes: Mr Borsak, Mr Graham, Mrs Houssos, Mr Shoebridge.

Noes: Mr Khan, Mr Mason-Cox, Mrs Ward.

Question resolved in the affirmative.

Mrs Houssos moved: That paragraph 3.166 be amended by inserting at the end: 'The committee believes that the specialised expertise within a Building Commission would be better suited to take this more proactive approach than the Department of Fair Trading.'

The committee divided.

Ayes: Mr Borsak, Mr Graham, Mrs Houssos, Mr Shoebridge.

Noes: Mr Khan, Mr Mason-Cox, Mrs Ward.

Question resolved in the affirmative.

Resolved, on the motion of Mr Graham: That paragraph 3.171 be amended by omitting 'We are dissatisfied with this response'.

Mr Khan moved: That paragraph 3.171 be omitted.

The committee divided.

Ayes: Mr Khan, Mr Mason-Cox, Mrs Ward.

Noes: Mr Borsak, Mr Graham, Mrs Houssos, Mr Shoebridge.

Question resolved in the negative.

Mr Khan moved: That paragraph 3.172 be omitted.

The committee divided.

Ayes: Mr Khan, Mr Mason-Cox, Mrs Ward.

Noes: Mr Borsak, Mr Graham, Mrs Houssos, Mr Shoebridge.

Question resolved in the negative.

Chapter 4

Mr Khan moved: That paragraph 4.126, Recommendation 11 and paragraphs 4.127 and 4.128 be omitted.

Question put.

The committee divided.

Ayes: Mr Khan, Mr Mason-Cox, Mrs Ward.

Noes: Mr Borsak, Mr Graham, Mrs Houssos, Mr Shoebridge.

Question resolved in the negative.

Mr Khan moved: That Recommendation 12 be omitted.

Question put.

The committee divided.

Ayes: Mr Khan, Mr Mason-Cox, Mrs Ward.

Noes: Mr Borsak, Mr Graham, Mrs Houssos, Mr Shoebridge.

Question resolved in the negative.

Resolved, on the motion of Mrs Houssos: That:

- (a) paragraph 4.128 be amended by omitting 'one obvious remedy' and inserting instead 'one potential remedy'
- (b) Recommendation 12 be amended by omitting 'NSW Government amend the' and inserting instead 'NSW Government consider amending the'.

Resolved, on the motion of Mr Khan: That paragraph 4.132 be amended by:

- (a) omitting 'and the Association of Accredited Certifiers' after 'Mr Lambert'
- (b) inserting ', including to:' after 'Mr Lambert'
- (c) inserting the following dot points after 'Mr Lambert, including to:'
 - '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 Reference Panel for mandatory reviews of select designated complex and higher risk developments
 - 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 overseen 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.'

Resolved, on the motion of Mr Khan: That Recommendation 13 be amended by:

- (a) omitting 'where applicable' and inserting instead 'where practical'
- (b) omitting 'and the Association of Accredited Certifiers' after 'Mr Michael Lambert'
- (c) inserting at the end: 'Specifically, the recommendations made by Mr Lambert to:'
 - '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 Reference Panel for mandatory reviews of select designated complex and higher risk developments
- 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 overseen 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.'

Resolved, on the motion of Mrs Houssos: That Recommendation 13 be amended by inserting 'as soon as possible and no later than within two years' after 'the certification system'.

Mr Khan moved: That paragraphs 4.133, 4.134, 4.135 and Recommendation 14 be omitted.

Question put.

The committee divided.

Ayes: Mr Khan, Mr Mason-Cox, Mrs Ward.

Noes: Mr Borsak, Mr Graham, Mrs Houssos, Mr Shoebridge.

Question resolved in the negative.

Mr Graham moved: That paragraphs 4.133, 4.134, 4.135 and Recommendation 14 be omitted:

'However, the committee also believes the system needs much more of a shakeup to bring back the confidence in the industry. We therefore conclude that building certification should revert back to local councils. Over many years successive governments have tried to make the private certification system work, however we find ourselves with a system that is fundamentally flawed. Continually reforming the industry in an attempt to improve the system has not worked. We believe that local councils have in place the management structure, internal accountabilities, independent auditing and oversight that is missing from the private certification industry.

Importantly returning building certification to local councils and public control will send a crucial signal to the general public that the NSW Government is undertaking serious reform, that the rules have changed and that there are meaningful steps being taken to restore integrity and confidence to the construction industry. While we acknowledge the fact that private certifiers have received an inappropriately large share of the public's blame for the systemic failures in the industry, they are also emblematic of an industry where self-regulation and the lack of public oversight and control have made people's homes unsafe. Going forward restoring public confidence is an essential part of fixing the industry.

Noting the concerns that currently local councils do not have the resourcing to implement this change, we recommend a training and recruitment package be provided to local councils to rebuild these skills over a transition period. It is important that the NSW Government consult extensively with local councils on its implementation. We therefore recommend that the NSW Government revert building certification back under the control of local councils over a three-year period.

Recommendation 14

That the NSW Government revert building certification back under the control of local councils, including by:

- working closely with local councils over a three-year period to develop and implement a new model
- providing a state government training and recruitment package to local councils targeted at developing the skills and expertise of building certifiers in councils.'

And the following new paragraphs and recommendation be inserted instead:

'However, the committee also believes the system needs a larger shakeup. Over many years successive governments have tried to make the private certification system work. That is yet to succeed. What is clear from this committee's inquiry is that the status quo is broken.

The committee has concerns about the conflict of interest in the private certification system as it is currently structured and regulated. While the committee acknowledges the fact that private certifiers have received an inappropriately large share of the public's blame for the systemic failures in the industry, they have also become emblematic of an industry where self-regulation and a lack of public oversight and control have made people's homes unsafe. While these issues remain in certification it will prove difficult to persuade the public that the rules have changed and that there are meaningful steps being taken to restore integrity and confidence to the building and construction industry.

The committee seriously considered a recommendation strengthening public control of certification, such as returning all certification to local councils. In examining that specific proposition the committee has noted the concerns that currently local councils do not have the resourcing to implement this change. Such a change would require resourcing as well as a training and recruitment package be provided to local councils to rebuild these skills over a transition period.

Whilst not ruling out such a future recommendation, the committee does not do so at this time. This matter will be further considered as a part of the committee's foreshadowed inquiry into the NSW Government's reforms into the construction and building industry. This is expected to be initiated before the end of 2020. The committee will examine closely the effects of the implementation of the *Building and Development Certification Act 2018* on certification, and will carefully consider whether to recommend a strengthening of public control of certification at that stage.

Recommendation X

That the 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.'

Question put.

The committee divided.

Ayes: Mr Borsak, Mr Graham, Mrs Houssos, Mr Khan, Mr Mason-Cox, Mrs Ward.

Noes: Mr Shoebridge.

Question resolved in the affirmative.

Chapter 5

Resolved, on the motion of Mr Graham: That Recommendation 15 be amended by inserting ', and to ensure that tribunal members have the relevant expertise' after 'streamline the dispute resolution process'

Resolved, on the motion of Mrs Houssos: That Recommendation 16 be amended by omitting 'That the NSW Government appoint a Strata Commissioner, to sit within the Building Commission, as recommended in the first report of this inquiry, with responsibility for:' and inserting instead:

'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:'.

Mr Khan moved: That paragraphs 5.122, 5.123, 5.124, 5.125 and Recommendation 16 be omitted.

Question put.

The committee divided.

Ayes: Mr Khan, Mr Mason-Cox, Mrs Ward.

Noes: Mr Borsak, Mr Graham, Mrs Houssos, Mr Shoebridge.

Question resolved in the negative.

Resolved, on the motion of Mr Graham: That paragraph 5.126 be amended by omitting 'with no-where to turn' and inserting instead 'with nowhere to turn'.

Mr Khan moved: That paragraphs 5.126, 5.127 and 5.128 and Recommendation 17 be omitted.

Question put.

The committee divided.

Ayes: Mr Khan, Mr Mason-Cox, Mrs Ward.

Noes: Mr Borsak, Mr Graham, Mrs Houssos, Mr Shoebridge.

Question resolved in the negative.

Resolved, on the motion of Mr Graham: That Recommendation 17 be amended by:

- (a) omitting 'NSW Government provide a financial assistance package to strata homeowners' and inserting instead 'NSW Government explore additional financial assistance measures for strata homeowners'
- (b) inserting ', noting that the committee will further consider this matter in its foreshadowed inquiry to review the NSW Governments' reforms into the building and construction industry' after 'Home Building Compensation scheme'.

Resolved, on the motion of Mrs Houssos: 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, answers to questions on notice and supplementary questions, responses to the online questionnaire and summary report of these responses, and correspondence relating to the inquiry be tabled in the House with the report;
- Upon tabling, all unpublished attachments to submissions and responses to the online questionnaire be kept confidential by the committee;
- Upon tabling, all unpublished transcripts of evidence, submissions, tabled documents, answers to questions on notice and supplementary questions, summary report of responses to the online questionnaire, 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;
- That the report be tabled on Thursday 30 April 2020;
- That the Chair hold a press conference on Thursday 30 April 2020.

Resolved, on the motion of Mr Mason-Cox: That the committee commend the secretariat and IT staff for a wonderful job in organising the Webex report deliberative and note it was a successful process.

7. Adjournment

The committee adjourned at 1.00 pm, *sine die*.

Sarah Dunn

Clerk to the Committee

Appendix 4 Dissenting statement

The Hon Trevor Khan MLC and the Hon Natalie Ward MLC

This Inquiry was established against well publicised problems in the building and construction industry. The response of the Government has been to progress a series of reforms designed to improve the performance of the building and construction industry. Included in these reforms has been extensive work ensuring that buildings identified as being at high risk because of flammable cladding are identified and remediation work undertaken.

Central to these reforms has been the appointment of the NSW Building Commissioner, indeed the Committee amended its draft report to specifically acknowledge the frank and forthright evidence given by the Building Commissioner (para. 1.44), and further noted that:

“The committee expresses its support for the efforts made by the NSW Building Commissioner and encourages the NSW Government to adopt the recommendations that he outlined to the committee for further reforms. Additionally, the committee supports any request for further resources that the NSW Building Commissioner may make.” (para. 1.45).

It is against this background that the authors of the dissenting statement find some of the recommendations made by the Committee counterproductive and likely to delay and frustrate reforms that have already commenced. Specifically, in that respect, the majority of the Committee maintained a position of supporting the establishment of a Building Commission, similar to that established in Victoria. This is model that the Commissioner himself has publicly stated he does not support. Therefore, rather than waiting for the effectiveness of the reforms recommended by the NSW Building Commissioner to be enacted and implemented, the majority of the Committee wishes to start the process of reform of the building and construction industry over again. The losers from such an approach are not just consumers, but also all those professionals who have worked constructively with the NSW Government to improve the performance of the industry.

It is notable also that the majority of Committee has adopted a series of recommendations (Rec 9, 12 and 22) calling upon the NSW Government to commit hundreds of millions, if not billions of dollars to fund rectification and remediation works. Whilst this may sound attractive, it fails to take account of the liability of a range of parties in the industry who have been involved in the construction of these defective buildings. The NSW taxpayer should not foot the bill for the poor practices of others who have failed to adhere to the appropriate building codes and standards. Just as importantly, the majority of the Committee has failed to explain which schools, hospitals and other projects will be stripped of funding and how many police officer, nurse, ambulance and teacher positions will be abolished to meet this proposal.

Thus, whilst the authors of the dissenting statement are sympathetic to the plight of those homeowners impacted by a range of practices in the building and construction industry, particularly in the current economic circumstances created by the Covid-19 Pandemic, the Report creates unrealistic expectations.

In summary, the authors of the dissenting statement support some of the observations and recommendations contained in the Report, however believe now is the time for thoughtful and constructive steps towards rebuilding confidence in the building and construction industry. It is not the time for political point scoring and grandstanding through the presentation of a potpourri of thought bubbles and empty gestures.

