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PUBLIC ACCOUNTABILITY COMMITTEE

Regulation of building standards, building quality and building disputes

First report



Report 4

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Public Accountability Committee

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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 Scott Farlow MLC	Liberal Party	
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	

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Chair's foreword

The public's faith in building standards and building quality in New South Wales is at an all-time low. The lack of standards in the industry has been highlighted in many reports before us, dating back 20 years. It has been a two decade-long experiment with privatisation, deregulation and industry self-regulation. It is unacceptable that to this day comprehensive reform has not been put in place. I hope that this report will help deliver that change.

The government's approach to tackling the longstanding issues within the building and construction industry will not fix the crisis. Piece-meal legislation, and the progress in implementing it, is no-where near enough to address the loss of confidence in the industry. Regulators have failed to regulate in New South Wales and it is home owners who are paying the cost.

The problems with the government's approach are illustrated by the *Building and Development Certifiers Act 2018*, which is yet to be implemented – almost two years after the legislation was passed. The committee and stakeholders also critiqued the *Design and Building Practitioners Bill 2019*, which was introduced as this inquiry progressed. It was important for the committee to deliver our report in time for our findings to influence debate on the bill in the Legislative Council.

We heard from many key industry stakeholders that there are deep structural failings in the New South Wales construction industry; not all practitioners are required to be licensed or registered; there are two-dollar companies setting up and closing down; there are unqualified and unprincipled developers building complex multi-storey apartment blocks; and a regulator who's performance is inadequate. There is no transparency or visibility in what is being built and who is doing the building. The issues occurring within the industry are not only significant and complex, but have dire consequences if left unresolved, as we have seen with Opal Tower and Mascot Towers.

As a direct result of the lack of standards in the industry there is no functioning insurance market willing to take on the risk of residential building and construction. This comes down to a fundamental failure of building standards and the failure of successive governments to effectively regulate the industry. The magnitude of defects we are seeing today is just the tip of the iceberg. The government needs to urgently address the standard of building quality to ensure the insurance market is confident in underwriting that risk.

Many stakeholders welcomed the appointment of a Building Commissioner. However, they also advised the committee that it was unacceptable that the Building Commissioner, who is tasked with reforming the building and construction industry, has only a handful of staff and is not provided with the powers to even sign off on his own work plan. The crisis in the industry needs to be addressed by a Building Commission that is sufficiently resourced and with the powers it needs to effectively regulate and oversight the industry. It is a central recommendation of this committee that this occurs as a matter of priority.

The committee has also made a number of other recommendations to improve the building and construction industry. These recommendations follow the blueprint laid down in the Shergold Weir and Lambert reports. We urge the government to fully implement these recommendations to resolve the current crisis in the industry.

The committee is yet to consider further issues that are plaguing the industry, in particular the significant issue of flammable cladding. This and other issues will be presented in the committee's final report.

Finally, on behalf of the committee, I'd like to express my thanks to all those who have participated so far in this inquiry. My thanks also go to my committee colleagues and to the secretariat.

A handwritten signature in black ink, appearing to read 'D. Shoebridge', written in a cursive style.

David Shoebridge MLC

Committee Chair

Recommendations

- Recommendation 1** **23**
 That the NSW Government expedite the implementation of the regulations to support the *Building and Development Certifiers Act 2018*, to ensure the Act and regulations are operational well in advance of July 2020.
- Recommendation 2** **23**
 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.
- Recommendation 3** **23**
 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.
- Recommendation 4** **35**
 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** **36**
 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** **36**
 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** **62**
 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 in which the Shergold Weir report recommendations are implemented
 - all other high rise developments – as soon as reasonably practicable.
- Recommendation 8** **62**
 That the NSW Government consider amending the definition of 'defect' to provide more clarity for home owners.

- Recommendation 9** **63**
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** **86**
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.
- Recommendation 11** **117**
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** **117**
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** **118**
That the NSW Government amend the *Design and Building Practitioners Bill 2019* to address stakeholder concerns raised during this inquiry, in particular ensuring 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, 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** **118**
That the NSW Government not proceed with the *Design and Building Practitioners Bill 2019* until it works closely with the Insurance Council of Australia and its members to develop appropriate insurance products. The committee supports bringing forward the final implementation of the bill and the regulations to 31 March 2020.
- Recommendation 15** **119**
That the NSW Government not proceed with the *Design and Building Practitioners Bill 2019* until the draft regulations are developed in close consultation with stakeholders and made available to the Parliament for scrutiny. The committee supports bringing forward the final implementation of the bill and the regulations to 31 March 2020.

Recommendation 16**130**

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**131**

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**131**

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**132**

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.

Conduct of inquiry

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

The committee received 175 submissions and 22 supplementary submissions.

The committee received 390 responses to an online questionnaire.

The committee held four public hearings at Parliament House in Sydney, prior to the tabling of this first report.

This first report also considers the *Design and Building Practitioners Bill 2019*, introduced to the Legislative Assembly in October 2019. The bill was not formally referred to the committee. However, given the timing of when the NSW Government introduced the bill and the inquiry timeframes, the committee resolved to inquire into the draft bill under its terms of reference.

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

Chapter 1 Introduction to the first report

Purpose of the first report

- 1.1 The purpose of this first report is to provide an early indication of the committee's views on the key issues coming forward in evidence. This will inform the Parliament's response to the government's legislative agenda as it considers legislation to reform the building and construction industry over the coming months.
- 1.2 This first report does not cover all of the issues raised in the terms of reference. This was impossible given the complexity and scope of the issues under consideration and the timeframe for delivering the first report. A full analysis will be left until our final report is tabled in 2020.
- 1.3 The committee will hold more hearings later in 2019 and early 2020 to gather further evidence for the final report. The first hearing will focus on flammable cladding on New South Wales buildings. This is an area of imminent concern to the committee. The committee will also hold a regional hearing, to learn about the experience of building defects outside Sydney; and another hearing with building and construction industry professionals, to hear first-hand about the inside workings of the industry.
- 1.4 In addition to examining the evidence gathered from these hearings, the final report will address two key issues raised in the terms of reference, but not covered in detail in this report: the role of private certification in protecting building standards, and the role of strata committees in responding to defects.

Report outline

- 1.5 Over the last thirty years significant and concerning problems have emerged within the building and construction industry. This is evident with the recent spate of high profile building failures. Chapter 2 sets out key events in the move to privatisation of building regulation, in particular private certification, and notes the numerous inquiries that have sounded warning signals, starting with the Campbell report as early as 2002. The chapter also describes the high profile building failures that preceded the establishment of this inquiry, and acknowledges the government's efforts to address problems in the building and construction industry.
- 1.6 The following chapters 3, 4 and 5 consider the evidence to this committee regarding the adequacy of the NSW Government's response to the current crisis in the building and construction industry, as articulated in the *Building Stronger Foundations* discussion paper and other places. Three key areas are singled out as needing further work:
 - the creation of a strong and appropriately resourced Building Commission to oversight the building and construction industry
 - adequate insurance protections for consumers, in particular protections under statutory warranties for residential buildings, professional indemnity insurance and the Home

Building Compensation scheme, as well as the Strata Building Bond and Inspection Scheme

- the introduction of licensing, certification and regulation across the construction chain, that is, for all of those people who actually build buildings.

1.7 During this first phase of the inquiry, the NSW Government introduced in the Legislative Assembly the *Design and Building Practitioners Bill 2019*, which provides for the registration of design practitioners, principal design practitioners and other building practitioners, including the provisions for compliance declarations and duty of care obligations.³ Chapter 6 details the evidence the committee received specifically on the bill from key stakeholders during its fourth public hearing.

1.8 Our final chapter, chapter 7, assesses the government's progress in implementing the recommendations of two key reports: the Shergold Weir and Lambert reports. A number of inquiry participants told the committee that together, these landmark reports provide a blueprint for reform of the building and construction industry in this State, if their recommendations are implemented fully.

1.9 The committee is sympathetic to the view that a blueprint already exists, and it is now up to the NSW Government to follow it.

³ NSW Government, *Design and Building Practitioners Bill 2019*, first print, 23 October 2019.

Chapter 2 Inquiry background and recent initiatives

Changes in the New South Wales building and construction industry over the last thirty years have contributed to the significant and concerning problems now coming to light. This chapter outlines reform of building regulation in New South Wales over this period, as well as the key inquiries into the building and construction industry. It then turns to the recent high profile building failures that precipitated this inquiry, and what they may reflect about the prevalence of defective buildings in New South Wales. Finally, the chapter finishes with an overview of recent government initiatives in response to building failures in New South Wales and national efforts to reform the building and construction industry.

Reform of building regulation

2.1 Over the last 30 years, there has been continuous reform of building regulation in New South Wales. These changes can be characterised broadly as a move away from local governments having responsibility for all aspects of construction to privatisation of various parts of building regulation, most notably of certification.

Reforms over the last 30 years

2.2 Previously, the *Local Government Act 1919* regulated construction of buildings and the *Environmental Planning and Assessment Act 1979* regulated development applications.⁴ The Building Services Corporation, established in 1987, was responsible for licensing of building professionals and regulating building contracts, as well as education, advice and dispute resolution.⁵

2.3 Privatisation of building regulation occurred gradually with numerous changes to the *Local Government Act 1919* and the *Environmental Planning and Assessment Act 1979*. This occurred alongside changes to licensing of building professionals, beginning with changes in 1990 to create a single category of licence for all building contractors and remove legislative qualifications for a licence.⁶

2.4 A key landmark in the privatisation of building regulation was the *Local Government Act 1993*. Under this Act local councils were no longer solely responsible for all aspects of building regulation, whereas previously 'building control was regulated solely by local government with council employees, employed to protect community interests and safety ... and to ensure that construction and development complied with planning instruments and proper standards'.⁷

⁴ Evidence, Mr Ian Robertson, Secretary, Development and Environmental Professionals' Association, 27 August 2019, p 29.

⁵ Standing Committee on Law and Justice, NSW Legislative Council, *Report on the Home Building Amendment (Insurance) Act 2002*, 3 September 2002, p 3.

⁶ Joint Select Committee on the Quality of Buildings, NSW Parliament, *Report upon the Quality of Buildings*, July 2002, p 32.

⁷ Submission 65, Development and Environmental Professionals' Association, p 2.

The *Local Government Act 1993* also removed the compulsory requirement for Councils to carry out inspections of buildings.⁸

- 2.5** It wasn't until a 1997 package of reforms, enacted 1 July 1998, however, that building regulation and certification was considered to have been fully privatised. In 1997, the *Environment Planning and Assessment Act 1979* was amended to allow private certifiers to issue construction certificates and complying development certificates. The amendments also introduced several new categories of development, including exempt and complying development,⁹ and changed how performance-based alternative solutions were regulated.¹⁰
- 2.6** Further reforms followed in 2001 when a number of significant amendments were made to the *Home Building Act 1989*. The 2001 reform package tightened the licensing system, including by introducing changes to the disciplinary processes and penalties for non-compliance.¹¹
- 2.7** Then in 2003, the *Environmental Planning and Assessment Amendment (Quality of Construction) Act 2003* was amended to allow private certifiers to conduct critical stage inspections.

Reforms to building insurance

- 2.8** Major reforms in building insurance also occurred over this period. The Home Warranty Insurance Scheme commenced in 1997 to provide cover for home owners against defective building work. It was amended with the *Home Building Amendment Act 1999* and amended again as part of the 2001 reforms in the *Home Building Legislation Amendment Act 2001*.¹²
- 2.9** In 2002, the *Home Building Amendment (Insurance) Act 2002* was enacted in response to an increase in the cost of insurance cover for building defects. The Act reduced the overall extent of insurer liability through five main changes that limited insurance coverage for new homeowners, including providing that home warranty insurance for residential building was a last resort only and setting out separate types of cover for structural and non-structural defects.¹³
- 2.10** The 2002 reforms were ineffective. As a result the *Home Building Amendment (Insurance Exemptions) Regulation 2003* removed high rise buildings from the scheme in 2003. Despite all these restrictions on insurance coverage the cost of meeting building defects eventually drove all private insurers out of the market. The NSW Government then entered the market in 2010 and became the sole provider of insurance in 2011 selling insurance at a subsidised rate.¹⁴

⁸ Joint Select Committee on the Quality of Buildings, NSW Parliament, *Report upon the Quality of Buildings*, July 2002, p 120.

⁹ NSW Parliamentary Library Research Service, *NSW Planning Framework: History of Reforms*, June 2010, e-brief 10/2010, Holly Park, pp 6-7.

¹⁰ Submission 8, Mr Brett Daintry, p 9.

¹¹ Joint Select Committee on the Quality of Buildings, NSW Parliament, *Report upon the Quality of Buildings*, July 2002, p 32.

¹² Standing Committee on Law and Justice, NSW Legislative Council, *Report on the Home Building Amendment (Insurance) Act 2002*, 3 September 2002, pp 3-5.

¹³ Standing Committee on Law and Justice, NSW Legislative Council, *Report on the Home Building Amendment (Insurance) Act 2002*, 3 September 2002, pp x-xi.

¹⁴ Submission 132, NSW Government, p 25.

Insurance protection for consumers under the Home Building Compensation scheme is considered in chapter 4.

Stakeholder views on reforms

- 2.11** Inquiry participants told the committee that problems with the major building reforms of the early 1990s have been evident for almost as long as the changes have been in place. The problems have also been acknowledged in multiple inquiries over this time. For example, the Campbell Report remarked that 'the NSW home building industry has been subject to substantial legislative change and market expansion over the last decade. Concerns have arisen that the combined impact of these two changes has been to reduce the quality of home building'.¹⁵
- 2.12** Mr Brett Daintry, a building industry professional, characterised the building regulatory framework as having '... staggered on for more than 20 years, propped up by hundreds of Act and Regulation changes to keep it going',¹⁶ concluding that the current framework is still ultimately 'a failure':
- We have given private certification 20 years. There have been hundreds of Act and Regulation changes to prop this system up, trying to make it work, and it remains, on any reasonable observation, a failure.¹⁷
- 2.13** Mr Daintry was one of a number of witnesses at this inquiry who remarked that they had given similar evidence at previous inquiries: 'I, among many of my peers, have, over the last 20 years made significant personal contributions to State Government panels and committees ... trying to make this system work'.¹⁸ Mr Daintry summed up his views by asserting: 'How many inquiries and reports must be undertaken before it is acknowledged' that the reforms 'are so fundamentally flawed'.¹⁹
- 2.14** Similarly, Mr Ian Robertson, Secretary, Development and Environmental Professionals' Association noted that 'there is a familiarity about this process. It was in 2001 where I did precisely this with the Campbell inquiry'.²⁰
- 2.15** Local Government NSW also noted that 'Local Government NSW has called on successive State Governments to address the deficiencies with building and certifier regulation in New South Wales'.²¹ Commenting on the impact of the 1998 reforms, they noted that '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'.²²

¹⁵ Joint Select Committee on the Quality of Buildings, NSW Parliament, *Report upon the Quality of Buildings*, July 2002, p iv.

¹⁶ Submission 8, Mr Brett Daintry, p 2.

¹⁷ Submission 8, Mr Brett Daintry, p 1.

¹⁸ Submission 8, Mr Brett Daintry, p 1.

¹⁹ Submission 8, Mr Brett Daintry, p 4.

²⁰ Evidence, Mr Robertson, 27 August 2019, p 27.

²¹ Evidence, Cr Linda Scott, President, Local Government NSW, 16 August 2019, p 41.

²² Submission 145, Local Government NSW, p 5.

- 2.16** According to Mr Robertson, in commenting on the introduction of private certification, 'the issue for us has always been ... that the model itself is so fundamentally flawed ... We keep saying that and have been saying it for 30 years on the 1988 initiative and 20 years on the 1998 initiative'.²³
- 2.17** The committee notes that in his 2015 report, Mr Michael Lambert, author of the *Independent Review of the Building Professionals Act 2005: Final report*, 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.²⁴

Previous reports into the building and construction industry

- 2.18** The serious and concerning problems to emerge over the last 30 years have been well documented – as shown by the 18 reports into building regulation in this state over the last 20 years.²⁵ Deficiencies in the building and construction industry have also been in the spotlight internationally: in the United Kingdom, a report following the Grenfell Tower fire in London found building regulation in the United Kingdom to be weak and not fit for purpose.²⁶
- 2.19** New South Wales Parliamentary committees have played a part in this scrutiny, with a number of inquiries into various aspects of the building and construction industry.²⁷ The most significant of these is the Campbell report, discussed below, followed by other key reviews of the industry.

Campbell report 2002

- 2.20** Problems with reforms to building regulation were evident early on and in 2002, a Joint Select Committee on the Quality of Buildings, chaired by Mr David Campbell MP, was convened to examine the industry. The committee inquired into the quality of buildings in New South Wales, including regulation of the building and construction industry as well as certification and licensing of builders. The report (the Campbell report) noted that 'given the major

²³ Evidence, Mr Robertson, 27 August 2019, p 27.

²⁴ Mr Michael Lambert, *Independent Review of the Building Professionals Act 2005: Final report*, October 2015, p 262.

²⁵ Submission 56, Mr Michael Lambert, p 2. Note: This total includes the Shergold Weir report which addresses issues not just in New South Wales but across Australia.

²⁶ Dame Judith Hackitt DBE FREng, *Building a Safer Future: Independent Review of Building Regulations and Fire Safety: Interim Report*, December 2017, p 9.

²⁷ For example: General Purpose Standing Committee No. 2, NSW Legislative Council, *Inquiry into the operations of the Home Building Service*, December 2007; Standing Committee on Law and Justice, NSW Legislative Council, *Report on the Home Building Amendment (Insurance) Act 2002*, 3 September 2002.

consequences for individuals when things go wrong and the power imbalances in the process, governments should and do have a major role in the home building industry'.²⁸

- 2.21** The inquiry found that 'both the industry and consumers have told the Committee that quality improvement of the industry and the regulatory framework is essential. Consolidation of regulatory operations, early identification of potential problems, and increased accountability of building practitioners is required'.²⁹
- 2.22** The Campbell report, tabled in July 2002, made 39 recommendations including 'significant restructure of regulatory arrangements'.³⁰ In particular, the committee recommended the creation of a Building Compliance Commission with extensive powers to oversee home building regulation and design and establish standard non-modifiable conditions of home building contracts.
- 2.23** The report advocated reforming licensing of building practitioners and expanding certification and planning processes. It made a number of recommendations to improve consumer protection and education as well as calling for further review by various parts of government into the development consent scheme, the Building Code, waterproofing and fire protection.
- 2.24** According to the NSW Government's response to the Campbell report, as a result of the report, the Home Building Service was established in 2003.³¹ Mr Daintry stated that after the Campbell report, mandatory critical stage inspections were reintroduced.³² The great majority of the Campbell report's recommendations, including its principle recommendation of a Building Compliance Commission, were not adopted by the government.

Lambert report 2015

- 2.25** In 2014 Mr Lambert was commissioned by the Hon Robert Stokes MP, Assistant Minister for Planning, to conduct an independent review of the building regulation and certification system in New South Wales. The *Independent Review of the Building Professionals Act 2005: Final report* (the Lambert report) was delivered in October 2015.
- 2.26** The report had a broad terms of reference and involved a full review of building regulation in New South Wales.³³ Mr Lambert concluded that 'a number of significant problems have been

²⁸ Joint Select Committee on the Quality of Buildings, NSW Parliament, *Report upon the Quality of Buildings*, July 2002, p 3.

²⁹ Joint Select Committee on the Quality of Buildings, NSW Parliament, *Report upon the Quality of Buildings*, July 2002, p v.

³⁰ Joint Select Committee on the Quality of Buildings, NSW Parliament, *Report upon the Quality of Buildings*, July 2002, p v.

³¹ NSW Government Fair Trading, *Home building licensing in NSW: History*, <<https://www.fairtrading.nsw.gov.au/about-fair-trading/how-we-work/protection-schemes-and-systems/home-building-licensing-in-nsw>>.

³² Evidence, Mr Brett Daintry, Director, Daintry Associates, 16 August 2019, p 78.

³³ Submission 56, Mr Michael Lambert, p 2.

identified with the current building regulation and certification system ... These problems have been identified in a number of earlier reviews'.³⁴

2.27 The report made 150 recommendations³⁵ across 10 reform categories.³⁶ The report set out a sequenced implementation plan to cover the short, medium and longer term,³⁷ and identified the 12 highest priority reforms to be addressed during the first six months.³⁸

2.28 The NSW Government's response to the Lambert report is discussed in chapter 7.

Lacrosse Building fire report 2015

2.29 In 2014, a fire at the Lacrosse building in Melbourne was started by a cigarette on a balcony. The fire in the predominantly-residential 23 storey building spread rapidly up the building due to external cladding material.³⁹ The Buildings Appeal Board ordered the cladding be removed in January 2017 and in May 2019, apartment owners were awarded over \$5.7 million in damages against the builder LU Simon.⁴⁰

2.30 A report by the City of Melbourne in 2015 reviewed responses to the fire and commented on shortfalls in the Victorian building regulatory framework. The report recommended a review of existing building legislation and regulations, noting that they are particularly unsuitable for the large, complex buildings currently being built.⁴¹

2.31 In 2017, the Victorian Government established the Victorian Cladding Taskforce to investigate the extent of non-compliant external wall cladding in Victoria. In a report released in July 2019, the Taskforce made 37 recommendation to address issues in the regulatory framework, including funding for rectification works.⁴² In 2019, the Victorian Government announced a \$600 million package to fix buildings with combustible cladding, along with a new agency 'Cladding Safety Victoria' to manage the work.⁴³

³⁴ Mr Michael Lambert, *Independent Review of the Building Professionals Act 2005: Final report*, October 2015, p 14.

³⁵ Submission 132, NSW Government, p 54.

³⁶ Mr Michael Lambert, *Independent Review of the Building Professionals Act 2005: Final report*, October 2015, pp 18-20.

³⁷ Mr Michael Lambert, *Independent Review of the Building Professionals Act 2005: Final report*, October 2015, p 287.

³⁸ Mr Michael Lambert, *Independent Review of the Building Professionals Act 2005: Final report*, October 2015, p 22.

³⁹ Metropolitan Fire and Emergency Services Board, *Post Incident Analysis Report: Lacrosse Docklands: 673-675 La Trobe Street, Docklands*, 25 November 2014, p 36.

⁴⁰ Joseph Dunstan, *Lacrosse apartment owners awarded \$5.7 million in damages after flammable cladding blaze*, 1 March 2019, ABC News, <<https://www.abc.net.au/news/2019-02-28/lacrosse-apartment-owners-win-5.7-million-cladding-fire-damages/10857060>>.

⁴¹ Giuseppe Genco, Municipal Building Surveyor, City of Melbourne, *Lacrosse Building Fire: 673 La Trobe Street, Docklands on 25 November 2014*, April 2015, p 21.

⁴² State of Victoria Department of Environment, Land, Water and Planning, *Victorian Cladding Taskforce: Report from the Co-Chairs*, July 2019, p 7-8.

⁴³ Media release, Hon Dan Andrews MP, Premier, State of Victoria, 'Tackling High-Risk Cladding To Keep Victorians Safe', 16 July 2019.

Grenfell Tower fire report 2018

- 2.32** In June 2017, a catastrophic fire in the Grenfell Tower, part of a council housing complex in London, destroyed the building and caused the deaths of 72 people. An ongoing lawsuit alleges the fire was spread by highly combustible materials in the insulation and exterior cladding of the structure.⁴⁴
- 2.33** In response, the United Kingdom Government established two separate inquiries – one into the circumstances surrounding the fire, with the first report due to be released in October 2019,⁴⁵ and the *Independent Review of Building Regulations and Fire Safety* conducted by Dame Judith Hackitt (the Hackitt review). The report of the Hackitt review, released in May 2018, branded building regulation and fire safety in the United Kingdom as 'not fit for purpose'.⁴⁶
- 2.34** The Hackitt review noted that both regulatory and cultural changes is required and that 'the system of failure ... has allowed a culture of indifference to perpetuate'.⁴⁷ The review recommended a new regulatory framework with a focus on creating and maintaining safe buildings by strengthening regulatory oversight, clarifying roles and responsibilities, and improving competence of building professionals and quality of construction materials.⁴⁸
- 2.35** In October 2018, the United Kingdom Government regulated to ban combustible materials on new high-rise homes,⁴⁹ and in December 2018 released an implementation plan to reform building regulation,⁵⁰ including committing to fully fund the removal and replacement of unsafe cladding by councils and housing associations.⁵¹

Shergold Weir report 2018

- 2.36** In 2017 the Building Ministers' Forum (comprised of federal, state and territory ministers with responsibility for building and construction) commissioned Professor Peter Shergold AC and Ms Bronwyn Weir to report on systemic failures in building regulation and enforcement systems across Australia. Their report, *Building Confidence: Improving the effectiveness of compliance and enforcement systems for the building and construction industry across Australia* (the Shergold Weir report), was delivered in February 2018 and published in April 2018.

⁴⁴ Reuters/Associated Press, *London's Grenfell Tower blaze spread by faulty building materials*, 12 June 2019, ABC News, <<https://www.abc.net.au/news/2019-06-12/grenfell-tower-fire-spread-by-building-materials-lawsuit-claims/11202856>>.

⁴⁵ Grenfell Tower Inquiry, <<https://www.grenfelltowerinquiry.org.uk/>>

⁴⁶ Dame Judith Hackitt DBE FREng, *Building a Safer Future: Independent Review of Building Regulations and Fire Safety: Interim Report*, December 2017, p 9.

⁴⁷ Dame Judith Hackitt DBE FREng, *Building a Safer Future: Independent Review of Building Regulations and Fire Safety: Final Report*, May 2018, p 11.

⁴⁸ Dame Judith Hackitt DBE FREng, *Building a Safer Future: Independent Review of Building Regulations and Fire Safety: Final Report*, May 2018, p 11.

⁴⁹ 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>>.

⁵⁰ Ministry of Housing, Communities and Local Government, *Building a Safer Future: An Implementation Plan*, December 2018.

⁵¹ Ed Potton, House of Commons Library Briefing Papers, *Grenfell Tower Fire: Background*, 5 June 2019, p 5.

- 2.37** Professor Shergold and Ms Weir concluded that: 'It is our considered view that the nature and extent of the problems put to us are significant and concerning. They are likely to undermine public trust in the health and safety of buildings if they are not addressed in a comprehensive manner'.⁵²
- 2.38** The report focused on shortcomings in the implementation of the National Construction Code. The Code contains the technical requirements and standards for building construction and plumbing work. The Code is adopted by each jurisdiction in its own legislation.⁵³
- 2.39** The report made 24 recommendations to address the highest priority issues. The recommendations form the basis of a national best practice model for compliance and enforcement for the building and construction industry in Australia.⁵⁴ The report called for the recommendations to be implemented over a three year period.⁵⁵
- 2.40** The NSW Government's response to the Shergold Weir report is discussed in chapter 7, together with the response to the Lambert report.

High profile building failures

- 2.41** As shown by the preceding section, this inquiry is the latest in a long line of reviews of the building and construction sector. This latest inquiry has been precipitated by two high profile building failures resulting in the evacuation of hundreds of residents from the Opal Tower and Mascot Towers high rise apartments in Sydney. These events triggered intense media coverage and high levels of public concern, heightened by suggestions that they are only the tip of the iceberg in terms of defective buildings in New South Wales.
- 2.42** Opal Tower and Mascot Towers and other prominent building failures are outlined below, concluding with a discussion of the potential extent of the problems in New South Wales.

Opal Tower, Sydney Olympic Park

- 2.43** The Opal Tower, a block of 392 units in Sydney's Olympic Park, was completed in mid-2018 and occupied in late 2018. Built by developer Ecove and builder Icon, the building consisted of 36 storeys above ground and 3 basement levels.

⁵² 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 1.

⁵³ Submission 132, NSW Government, p 56.

⁵⁴ 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 4.

⁵⁵ 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 4.

- 2.44** The Opal Tower was evacuated only a few months after residents moved in, just before Christmas in 2018, when residents heard a loud bang. Residents were evacuated on 24 December 2018, allowed to re-enter and evacuated again on 27 December 2018.⁵⁶
- 2.45** Developer Ecove stated that the building was 'well above the industry standard' and that full liability lay with builder Icon Construction.⁵⁷ Icon paid for temporary accommodation and food but announced in January 2019 it would no longer do so for units declared safe to occupy.⁵⁸
- 2.46** In response to the evacuation, the NSW Government commissioned a technical failure report into the structural damage of the building. The final report, released in February 2019, found that deficiencies in construction and materials led to the cracks and that significant rectification works would be necessary for the building to become safe to occupy.⁵⁹
- 2.47** It has been reported that over half of the apartments were deemed safe for re-occupation a few weeks after the evacuation.⁶⁰ However 170 apartments in the tower were still uninhabitable in June 2019.⁶¹ Most residents had moved back into the building as of September 2019, and the 12 remaining residents will be able to return after Christmas 2019.⁶²
- 2.48** The NSW Government stated that it has been involved in 'providing information, assistance and intervention' to residents, tenants and owners of Opal Tower, including engaging face to face with owners and residents and making information available through Fair Trading's website and phone line.⁶³
- 2.49** In July 2019, it was reported that owners of apartments in the Opal Tower had commenced legal action in a class action against the Sydney Olympic Park Authority, the owners of the

⁵⁶ Unisearch, *Opal Tower Investigation Final Report: Independent Advice to NSW Minister for Planning and Housing*, 19 February 2019, p 3.

⁵⁷ Naaman Zhou, *Sydney Opal Tower cracks: developer defends 'high quality' building at Olympic Park*, 26 December 2018, The Guardian, <<https://www.theguardian.com/australia-news/2018/dec/26/opal-tower-cracks-nsw-government-urgent-investigation>>.

⁵⁸ Australian Associated Press, *Some Opal Tower residents refuse to return home as builder stops paying allowance*, 27 January 2019, The Guardian, <<https://www.theguardian.com/australia-news/2019/jan/27/more-opal-tower-residents-to-return-home-as-builder-stops-paying-allowance>>.

⁵⁹ Unisearch, *Opal Tower Investigation Final Report: Independent Advice to NSW Minister for Planning and Housing*, 19 February 2019, pp 1-2.

⁶⁰ Nick Sas, *Opal Tower apartment owners move back in, but repairs continue as builder claims 'exemplary' approach*, 3 August 2019, ABC News, <<https://www.abc.net.au/news/2019-08-03/opal-tower-apartments-moving-day-as-icon-claims-exemplary/11379254>>.

⁶¹ Kate Burke and Tawar Razaghi, *Five months on, more than 170 Opal Tower apartments still uninhabitable*, 3 June 2019, Domain, <<https://www.domain.com.au/news/five-months-on-more-than-170-opal-tower-apartments-still-uninhabitable-843214/>>.

⁶² Josh Dye, *Remaining Opal Tower residents to return home by Christmas*, 22 September 2019, Sydney Morning Herald, <<https://www.smh.com.au/national/nsw/remaining-opal-tower-residents-to-return-home-by-christmas-20190920-p52ser.html>>.

⁶³ Submission 132, NSW Government, p 50.

land during the building's construction.⁶⁴ Owners are claiming breach of warranty and that the complex was not built with due care and skill or in accordance with the Home Building Act. Builder Icon and developer Ecove are now involved in the class action, with Sydney Olympic Park Authority launching cross claims against them in October 2019.⁶⁵

- 2.50** In October 2019, it was reported that residents of Otto Rosebery, another apartment block built by Icon, were warned not to use their balconies as they were structurally defective.⁶⁶

Mascot Towers, Mascot

- 2.51** Mascot Towers is a 10 storey block of 132 units in Mascot. Completed in 2008, the building was evacuated in June 2019 after cracks became apparent: residents were given less than two hours notice to evacuate.⁶⁷
- 2.52** Locks were changed after residents were evacuated with their possessions left inside.⁶⁸ In the next few days, 64 units were determined to be partly accessible and residents were able to collect possessions while escorted by management and security.
- 2.53** Residents told our inquiry that they had reported problems for a number of years before they were evacuated. Minor defects, such as the hot water system, were identified in 2011,⁶⁹ and apartment owners had paid higher than normal strata fees in order to fix defects.⁷⁰ Vibrations were also reported by residents to strata and local councils on a number of occasions.⁷¹
- 2.54** Mr David Chandler OAM, the newly-appointed Building Commissioner, told the committee after he had visited the building that 'I am embarrassed frankly that the industry has allowed a product like Mascot Towers to turn up on the marketplace'.⁷² He stated that the building was constructed poorly, telling the committee 'my personal observation of the engineering design is that it is poor ... I do not think I have seen many buildings as poorly built as that'.⁷³

⁶⁴ Nick Sas, *Opal Tower unit owners launch multi-million-dollar class action against NSW State Government*, 30 July 2019, ABC News, <<https://www.abc.net.au/news/2019-07-29/opal-tower-class-action-suit-by-owners-sydney-olympic-park/11354562>>.

⁶⁵ Su-Lin Tau, *NSW government drags Icon and Ecove into Opal Tower class action*, 6 October 2019, Australian Financial Review, <<https://www.afr.com/property/residential/nsw-government-drags-icon-and-ecove-into-opal-tower-class-action-20191004-p52xsw>>.

⁶⁶ Euan Black, *Balcony safety fears for more apartments linked to Opal Tower builder*, 9 October 2019, The New Daily, <https://thenewdaily.com.au/money/property/2019/10/08/otto-apartments-balconies/?utm_source=Adestra&utm_medium=email&utm_campaign=Morning%20News%20-%2020191009>.

⁶⁷ Evidence, Mr Vijay Vital, Owner, Mascot Towers, 12 August 2019, p 24.

⁶⁸ Phoebe Loomes, *Mascot Towers cost estimates at \$5.5 million in fees to owners*, 18 June 2019, News.com.au, <<https://www.news.com.au/national/nsw-act/news/mascot-towers-cost-estimated-at-41-million-in-fees-to-owners/news-story/ebcfa0d6cabd27df0b6602b0b0f677a0>>.

⁶⁹ Evidence, Mr Vital, 12 August 2019, p 26.

⁷⁰ Evidence, Mr Vital, 12 August 2019, p 20.

⁷¹ Evidence, Mr Vital, 12 August 2019, p 24.

⁷² Evidence, Mr David Chandler OAM, NSW Building Commissioner, 16 August 2019, p 10.

⁷³ Evidence, Mr Chandler, 16 August 2019, p 11.

- 2.55** In an extraordinary general meeting held soon after the evacuation, an immediate special levy of \$1 million was agreed to, due by 1 August 2019, to cover costs of emergency propping and engineering, as well as legal fees and media.⁷⁴
- 2.56** In evidence to the inquiry, apartment owners said they were frustrated that even though they were not at fault, they were experiencing significant financial and emotional hardship. Mr Anton Chen said 'we have done our due diligence; we went through every single page of the strata report and we found no fault'.⁷⁵ Mr Vijay Vital told the committee that when he bought the property 'we found nothing defective' but that multiple defects became apparent over the last 10 years.⁷⁶
- 2.57** Apartment owners could not pursue the builder or developer as four of the five companies responsible for construction of the building had been deregistered.⁷⁷ Though the building was insured, residents noted that they could not make an insurance claim until the root cause could be determined.⁷⁸
- 2.58** Apartment owners were unhappy that they were still living out of home and did not know when they could return, with Mr Vital telling the committee that the situation 'has caused a lot of trauma'.⁷⁹ Mr Chen stated: 'We do not know when we can go home. We do not know how much liability there is right in front of us'.⁸⁰ Residents have since been informed they are unlikely to return by the end of 2019.⁸¹
- 2.59** Uncertainty about the future, particularly around remediation costs, was a particular concern. Mr Vital noted that: 'we still have not accounted for what is in the future, what is the additional insurance we might have to pay and other costs that have not been accounted for'.⁸² Owners also noted they felt unprotected, especially in relation to consumer protections and protections offered to insurers and developers. Mr Chen stated:

Perhaps then what we all should have done is to invest in a caravan, because if it was burnt down at least it would be covered by the insurance. From my point of view, it seems that we owners are picking up the aftermath and we happen to be the ones to pay all the bills while developers and builders have got all these protections ...⁸³

⁷⁴ SBS News, *Sydney cracked unit owners to pay \$1m levy*, 19 June 2019, <<https://www.sbs.com.au/news/sydney-cracked-unit-owners-to-pay-1m-levy>>.

⁷⁵ Evidence, Mr Alton Chen, Owner, Mascot Towers, 12 August 2019, p 20.

⁷⁶ Evidence, Mr Vital, 12 August 2019, p 20.

⁷⁷ Jacob Saulwick, Laura Chung and Carrier Fellner, *Mascot Towers developers busy building apartments across Sydney*, 25 June 2019, Sydney Morning Herald, <<https://www.smh.com.au/national/nsw/mascot-towers-developers-busy-building-apartments-across-sydney-20190625-p5217s.html>>.

⁷⁸ Evidence, Mr Vital, 12 August 2019, pp 20 and 27.

⁷⁹ Evidence, Mr Vital, 12 August 2019, p 20.

⁸⁰ Evidence, Mr Chen, 12 August 2019, pp 20-21.

⁸¹ Megan Gorrey, *Mascot Towers residents told they will not return home this year*, 23 August 2019, Sydney Morning Herald, <<https://www.smh.com.au/national/nsw/mascot-towers-residents-told-they-will-not-return-home-this-year-20190822-p52job.html>>.

⁸² Evidence, Mr Vital, 12 August 2019, p 20.

⁸³ Evidence, Mr Chen, 12 August 2019, p 27.

- 2.60** The NSW Government provided support for Mascot Towers residents by making information about counselling and other support resources available, including providing information on the rights and obligations of affected parties and the Tenants' Advice and Advocacy Service. This information was provided through a phone hotline established within 24 hours of the incident and through regular updates to social media sites.⁸⁴
- 2.61** The NSW Government also announced temporary accommodation assistance for residents while their units are unsafe for occupation.⁸⁵ According to residents, this assistance package was accessed by residents approximately a month after they were evacuated.⁸⁶ The temporary accommodation support 'is available on the basis it will be repaid if the recipient later receives compensation or payment for accommodation costs under an insurance policy or by other means'.⁸⁷
- 2.62** Mr Chen acknowledged the government's assistance but expressed concern about whether this support would be ongoing as well as concern about future legal and rectification costs:
- If that [government] assistance package stops then a lot of us will have to pay mortgages for a place that we cannot live in. At the same time, we have got to pay for the alternative accommodations. And at the same time, there is going to be a possible or quite likely increase in our insurance premium. Now, lawyers ... that is going to cost a lot of money as well.⁸⁸
- 2.63** Mascot Towers apartment owners have continued to lobby the government for support, particularly support to fund remediation works in the building. When pressed about financial support for remediation works in a Budget Estimates hearing, the Building Commissioner Mr Chandler indicated this should be pursued through insurance, stating:
- ... the government has stepped up and helped the occupiers of that building with some rent. The executive committee is responsible for administering the strata plan and the management of the building. My question has been repeatedly to the representatives of the owners' association: Is the building insured for its replacement value? If it is, why are you not dealing with this matter through that process?⁸⁹
- 2.64** In August 2019, Mascot Towers owners voted to raise approximately \$7 million in special levies to pay for remediation work on the building.⁹⁰ It soon emerged that many owners could not afford this levy.⁹¹

⁸⁴ Submission 132, NSW Government, p 51.

⁸⁵ Submission 132, NSW Government, p 52.

⁸⁶ Evidence, Mr Vital, 12 August 2019, p 24.

⁸⁷ Submission 132, NSW Government, p 52.

⁸⁸ Evidence, Mr Chen, 12 August 2019, p 20.

⁸⁹ Evidence, Budget Estimates, Portfolio Committee No. 6 – Transport and Customer Service, Mr Chandler, 9 September 2019, p 46.

⁹⁰ Liv Casben, *Mascot Towers' residents vote to pay \$7 million in levies as repair bill blows out to \$20 million*, 23 August 2019, ABC News, <<https://www.abc.net.au/news/2019-08-23/mascot-towers-repair-bill-soars-to-20-million/11439856>>.

⁹¹ Danielle Le Messurier, 'Mascot Towers apartment owners feel "fobbed off" by Berejiklian government', *Daily Telegraph*, 24 September 2019.

2.65 In Question Time on 25 September 2019, Minister for Better Regulation and Innovation Kevin Anderson stated that on 22 August 2019, Mascot Towers voted to reject a 15 year loan of \$10 million, voting in favour of raising \$7.7 million in nine months using a special levy instead. He also stated that this money was for remediation works to fix defects identified in 2017, rather than the current issues that caused the evacuation.⁹²

2.66 In relation to ongoing government support the Minister stated:

... [W]e have extended the temporary emergency accommodation package. We have spoken to the banks in relation to financial support. They are switching off their mortgages. We have said to the insurance companies to crack on with the insurance claim to meet the current defect, which has affected the building next door. We want them to release those funds. We are encouraging insurance companies to release the funds so they can start the remediation works and people can return to their homes just like they want to.⁹³

2.67 In October 2019, it was reported that a structural engineer who inspected Mascot Towers found that the foundation was much worse than previously assumed and that existing cracks had widened and new cracks had appeared.⁹⁴ Later that month, residents voted to rescind the \$7 million special levy to pay for immediate remediation work, voting in favour of an alternative \$5 million commercial loan.⁹⁵

2.68 Subsequently, NSW Building Commissioner David Chandler appeared at a Budget Estimates supplementary hearing and stated that he was working on a recommendation to the government regarding Mascot Towers but he could not do so without 'having all the facts'⁹⁶, Mr Chandler further advised that he had commissioned a technical investigation to provide more information.⁹⁷ He stated:

... we have engaged an external technical adviser, as was engaged with Opal Tower, to actually go and provide a detailed technical overview of the circumstances there and the necessary actions to get that building returned to a state of occupancy. That is currently underway ...⁹⁸

⁹² *Hansard*, NSW Legislative Assembly, 25 September 2019, pp 38-39 (Kevin Anderson).

⁹³ *Hansard*, NSW Legislative Assembly, 25 September 2019, p 39 (Kevin Anderson).

⁹⁴ Josh Dye, Megan Gorrey, Laura Chung, *'Worse than previously assumed': Mascot Towers at risk of 'structural failure' as new cracks emerge*, 15 October 2019, Sydney Morning Herald, <<https://www.smh.com.au/national/nsw/mascot-towers-at-risk-of-structural-failure-as-new-cracks-emerge-20191015-p530xs.html>>.

⁹⁵ Paige Cockburn, Nicole Chettle, *Mascot Towers on unstable ground due to 'loss of soil', owners say*, 23 October 2019, ABC News <<https://www.abc.net.au/news/2019-10-22/mascot-towers-on-unstable-ground-owners-say/11626120>>.

⁹⁶ Evidence, Budget Estimates, Portfolio Committee No. 6 – Transport and Customer Service, Mr Chandler, 28 October 2019, p 16.

⁹⁷ Evidence, Budget Estimates, Portfolio Committee No. 6 – Transport and Customer Service, Mr Chandler, 28 October 2019, p 16.

⁹⁸ Evidence, Budget Estimates, Portfolio Committee No. 6 – Transport and Customer Service, Mr Chandler, 28 October 2019, p 16.

Landmark Building, Charlestown

- 2.69** The Landmark Building in Charlestown, near Newcastle, is a nine storey mixed used building consisting of 59 residential units and two levels of commercial space. The complex was completed in 2008 and won a Master Builders Association Excellence in Construction award in 2009.⁹⁹
- 2.70** The Landmark Building has had multiple defects, with one owner noting that problems in the building became apparent immediately.¹⁰⁰ Defects included cracks on balconies and problems with waterproofing, resulting in water pouring in during rain, damage to internal fixtures and mould.¹⁰¹ An engineers' report in 2017 found that the building had inadequate bracing, incorrectly installed cladding, and sloping and unsafe balconies.¹⁰²
- 2.71** One owner stated that defects were not adequately addressed by the strata committee.¹⁰³ Another owner, however, noted that a number of defects had been rectified and there had been no further reports of water ingress since late 2017.¹⁰⁴
- 2.72** Residents described problems pursuing those responsible. The original owner, developer and builder was liquidated in 2015.¹⁰⁵ One resident described some difficulty identifying the correct entity and stated that the owners corporation commenced legal action against the wrong entity.¹⁰⁶
- 2.73** The committee was told that the rectification process was marked by conflict between some residents and the strata committee. One apartment owner, Mr Richard Devon, noted he had incurred huge costs attempting to have defects addressed by the strata committee.¹⁰⁷ He was particularly concerned that decisions by the NSW Civil and Administrative Tribunal (NCAT) were not enforceable if not pursued by the committee.¹⁰⁸ Another apartment owner disputed some of these claims, arguing the strata committee had worked hard and noted a decision of NCAT in their favour.¹⁰⁹

Extent of the problems and other building failures

- 2.74** Following the Opal Tower and Mascot Towers evacuations that precipitated this inquiry, a number of other high profile building failures came to light in the media.

⁹⁹ *Hansard*, NSW Legislative Assembly, 16 May 2018, p 60 (Ms Jodie Harrison).

¹⁰⁰ Submission 89, Mr Aidan Ellis, p 1.

¹⁰¹ Submission 95, Name suppressed, p 1.

¹⁰² Submission 89, Mr Aidan Ellis, p 1.

¹⁰³ Submission 24, Mr Richard Devon, p 1.

¹⁰⁴ Submission 95, Name suppressed, p 1.

¹⁰⁵ Submission 24a, Mr Richard Devon, p 1.

¹⁰⁶ Evidence, Mr Richard Devon, Owner, The Landmark, Charlestown, 12 August 2019, p 30.

¹⁰⁷ Submission 24, Mr Richard Devon, p 1.

¹⁰⁸ Submission 24, Mr Richard Devon, p 1.

¹⁰⁹ Submission 95, Name suppressed.

- The Garland Loft block of 30 apartments in Zetland was evacuated in 2018 due to water and fire safety defects, and residents are still unable to return.¹¹⁰
- The 109 Sugarcube apartments and 18 Honeycomb terraces in Erskineville were unable to be occupied 12 months after they were completed, over concerns the developer had not properly cleaned up toxic land they were built on.¹¹¹
- The Joshua building in Alexandria was occupied despite being the subject of ongoing legal action after the City of Sydney found the building was not built within approvals and not compliant with the Building Code.¹¹²

2.75 There is concern that these building failures may just be the 'tip of the iceberg' as significant defect issues are often not publicised.¹¹³ Researchers from the University of NSW City Futures Research Centre gave evidence to the committee on their research into building defects in New South Wales, including a current project into the prevalence and causes of building defects.

2.76 Their research has shown that property owners and tenants of multi-unit residential housing bear a significant, and often emotionally and financially challenging burden of addressing building defects.¹¹⁴ Speaking to the committee, Associate Professor Hazel Easthope noted that a previous study found that 72 per cent of strata owners surveyed in New South Wales were aware there had been defects in their building.¹¹⁵

2.77 These findings are supported by submissions to this inquiry, which described situations in owning apartments where:

- 'defects have been numerous and, as is common, the developer had liquidated the company'¹¹⁶
- 'my experience is that we do not have anyone to help'¹¹⁷
- 'this issue has been unresolved for almost two years and the developer has now moved on.'¹¹⁸

¹¹⁰ Carrier Fellner and Laura Chung, *\$1.2m apartments 'unsaleable' in fresh casualty of Zetland lofts evacuation*, 17 July 2019, Sydney Morning Herald, <<https://www.smh.com.au/national/1-2m-apartments-unsaleable-in-fresh-casualty-of-zetland-lofts-evacuation-20190716-p527tc.html>>

¹¹¹ Carrier Fellner, *'It's a joke. We can't go on like this': fourth block of units abandoned in Sydney*, 19 July 2019, Sydney Morning Herald, <<https://www.smh.com.au/national/it-s-a-joke-we-can-t-go-on-like-this-fourth-block-of-units-abandoned-in-sydney-20190718-p528l7.html>>

¹¹² Carrier Fellner, *Residents at risk: Council sought demolition orders on Alexandria block*, 24 July 2019, Sydney Morning Herald, <<https://www.smh.com.au/national/residents-at-risk-council-sought-demolition-orders-on-alexandria-block-20190723-p52a1t.html>>

¹¹³ Submission 79, City Futures Research Centre, UNSW Sydney, pp 2-3.

¹¹⁴ Submission 79, City Futures Research Centre, UNSW Sydney, p 1.

¹¹⁵ Evidence, Associate Professor Hazel Easthope, City Futures Research Centre, University of New South Wales, 16 August 2019, p 32.

¹¹⁶ Submission 20, Name suppressed, p 1.

¹¹⁷ Submission 7, Ms Fernanda Rodas, p 1.

¹¹⁸ Submission 52, Mr Matt Gregory, p 1.

2.78 Submission authors described a range of defects they had struggled to have fixed, from major structural problems to minor defects:

- 'my downpipes were never connected to the storm water drain or gutter'¹¹⁹
- 'water ingress into basement carpark, sandstone falling off external walls, tress planted in areas that will cause extensive damage when trees mature ...'¹²⁰
- 'our building needs over \$7 million in rectification work due to faulty construction. We have also spent the best part of \$1 million on legal fees pursuing the developer and related entities ... the developer escaped responsibility by putting his company into administration'.¹²¹

2.79 These submissions were supported by responses to an online questionnaire conducted by the committee.¹²² Many survey respondents, especially in Sydney, noted that they had been significantly impacted by building failures and were unhappy with various aspects of the building and construction industry. Over 90 per cent of respondents said they were dissatisfied or very dissatisfied with private certification. Over 90 per cent of respondents also felt that protections for owners and purchasers of new apartments were inadequate or highly inadequate.¹²³

2.80 Most respondents (63 per cent) had experience with a strata committee in responding to building defects but satisfaction with this process was varied, with 43 per cent dissatisfied or very dissatisfied while 34 per cent were satisfied or very satisfied.

2.81 Survey respondents also described their difficulties in seeking to have defects addressed.

The experience has been highly complex, bureaucratic and stressful from a consumer point of view. It has been 9 years since the defects were first identified and they still haven't been fixed while the process of seeking redress runs its course. (Home owner, Metropolitan Sydney).¹²⁴

My experience was very frustrating. Suddenly, the [strata] committee needed to engage engineers and lawyers and the budget had to be expanded. To establish the fact the building has serious risks in terms of safety, compliance, finance, people management, and communication ... (Home owner, Metropolitan Sydney).¹²⁵

¹¹⁹ Submission 3, Name suppressed, p 1.

¹²⁰ Submission 39, Name suppressed, p 1.

¹²¹ Submission 10, Name suppressed, p 1.

¹²² The online questionnaire was not a statistically valid, random survey. Respondents were self-selected in choosing to participate (in the same way that submission authors are self-selected) and should not be considered a representative sample of the population.

¹²³ 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, pp 3-5.

¹²⁴ 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.

¹²⁵ 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.

- 2.82** When asked what their experience was with seeking to address building defects, respondents also felt that various government agencies had not been able to assist them:

Each and every government agency contacted failed to resolve dispute. All keen to "pass the parcel" to another agency. Police say it's a civil matter. NCAT says it doesn't have the necessary powers under the Strata Management Act. Fair Trading says it appears fraud may be involved, therefore it's a matter for the police! (Home owner, Metropolitan Sydney)¹²⁶

Disgraceful. Whilst building – had building inspectors visit the house and builders were told of defects but continued. Rang Fair Trading whilst still building – nothing can be done until you get the keys. Engaged Fair Trading after we moved in – the whole process was a joke. Fair Trading still had no power and we were told to engage legal advice ... (Home owner, Regional/rural New South Wales)¹²⁷

Recent government initiatives

- 2.83** Responding to the concerns raised by stakeholders and members of the public about building standards and industry regulation, the submission from the NSW Government and evidence from government officials outlined the efforts that have been made to address the issues.
- 2.84** The NSW Government advised that they have 'made substantial progress in recent years to reform the state's building and construction sector'.¹²⁸ The major initiatives since 2014 are outlined below, as well as a brief discussion of inquiry participants' views on the adequacy of these reforms.

Legislative response to Lambert report

- 2.85** The NSW Government has introduced a number of legislative changes in response to concerns with the building and construction industry.
- 2.86** In a partial response to the Lambert report, the NSW Government committed to address two key reform areas requiring legislative change: to create a principles-based legislative framework, and to address fire safety in new and existing buildings.¹²⁹
- 2.87** To implement a principles-based legislative framework, the NSW Government revised two key pieces of legislation regulating the building and construction industry.
- Amendments to the *Environmental Planning and Assessment Act 1979* in November 2017 consolidated certification provisions for buildings and subdivisions. The changes included new compliance powers requiring principal private certifiers to issue a written notice when they become aware of non-compliance with the development consent and

¹²⁶ 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.

¹²⁷ 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.

¹²⁸ Submission 132, NSW Government, p 5.

¹²⁹ Submission 132, NSW Government, p 54.

approved plans.¹³⁰ The changes were scheduled to start on 1 September 2019,¹³¹ they have not yet commenced.

- The *Building and Development Certifiers Act 2018* was introduced to replace the *Building Professionals Act 2005* and the *Building Professionals Regulation 2007*. The Act strengthens regulatory requirements for the registration of certifiers, improves complaints handling and disciplinary processes for certifiers and introduces more robust conflict of interest provisions and stronger penalties for breaches.¹³² The Act received assent in October 2018 after being passed with urgency by the Parliament. The Act and supporting regulations will commence in 2020,¹³³ over a year after the legislation was passed.

2.88 To improve the fire safety of new and existing buildings, in 2017 the NSW Government amended the *Environmental Planning and Assessment Regulation 2000*,¹³⁴ resulting in the new *Environmental Planning and Assessment Amendment (Fire Safety and Building Certification) Regulation 2017*.¹³⁵

Other legislative reforms

2.89 Other legislative reforms include the introduction of the *Building Products (Safety) Act 2017* in December 2017 to monitor and restrict the use of unsafe building products.¹³⁶ The Act responded to fire safety in high-rise buildings by enabling the Fair Trading Commissioner to identify buildings where unsafe products have been used and enabling councils or other relevant authorities to issue rectification orders. Its efficacy was not discussed by the government in its submission.¹³⁷

2.90 The Strata Building Bonds and Inspections Scheme commenced in January 2019 and is implemented under the *Strata Schemes and Management Act 2015*. The Scheme is intended to incentivise owners' corporations to work with developers and builders to identify and rectify defective building work early in a building's life.¹³⁸

Consolidation of building regulation

2.91 Also in line with the recommendations in the Lambert report, the NSW Government consolidated a number of responsibilities for building regulation and certification in the Better Regulation Division of the Department of Customer Service.¹³⁹

¹³⁰ Submission 132, NSW Government, p 6.

¹³¹ Submission 132, NSW Government, p 6.

¹³² Submission 132, NSW Government, p 11.

¹³³ Submission 132, NSW Government, p 54.

¹³⁴ Submission 132, NSW Government, p 9.

¹³⁵ Submission 132, NSW Government, p 54.

¹³⁶ Submission 132, NSW Government, p 12.

¹³⁷ Submission 132, NSW Government, p 12.

¹³⁸ Submission 132, NSW Government, p 37.

¹³⁹ Submission 132, NSW Government, p 54.

- 2.92** As part of its response to the Shergold Weir report, the NSW Government established the position of Building Commissioner. Mr David Chandler OAM was appointed as the state's first Building Commissioner on 1 August 2019. There is no responding legislative package related to this new position.

Legislative and national response to Shergold Weir report

- 2.93** The NSW Government released the *Building Stronger Foundations* discussion paper in June 2019 to seek stakeholder views on implementing the NSW Government response to the Shergold Weir report. Consultation closed in July 2019. The submissions received were considered by the government before introducing the *Design and Building Practitioners Bill 2019* into the Parliament.¹⁴⁰
- 2.94** On 2 October 2019 the NSW Government released its draft of the *Design and Building Practitioners Bill 2019* for public consultation.¹⁴¹ Subsequently, the NSW Government introduced the bill into the Legislative Assembly on 23 October 2019. The draft bill is discussed further in chapter 6.
- 2.95** The Shergold Weir report recommendations are also being pursued on a national level. The Building Ministers' Forum convened an industry roundtable with major stakeholders in August 2018 and subsequently published a national implementation plan in March 2019. Building Ministers formally agreed to a national approach to implementation in July 2019.¹⁴² It has since been announced that a national implementation team will be established as part of the Australian Building Codes Board, to develop and publicly report on a national framework for the implementation of the Shergold Weir report recommendations.¹⁴³

Measures to address combustible cladding

- 2.96** In response to the Lacrosse building fire in Melbourne in November 2014 and the Grenfell Tower fire in June 2017, the NSW Government announced a 10-point plan to strengthen fire safety measures in July 2017.¹⁴⁴ An interagency NSW Fire Safety and External Wall Cladding Taskforce was established in July 2017 to plan and coordinate the government's response to combustible cladding.¹⁴⁵ To date no specific legislative or financial response has been forthcoming to address the scale of the flammable cladding issue in New South Wales.

¹⁴⁰ Evidence, Ms Rose Webb, Deputy Secretary, Better Regulation Division and NSW Fair Trading Commissioner, 12 August 2019, p 2.

¹⁴¹ NSW Government, *Release of the draft Design and Building Practitioners Bill 2019 for public consultation*, October 2019, Fair Trading, <<https://www.fairtrading.nsw.gov.au/consultation-tool/design-and-building-practitioners-bill-2019>>.

¹⁴² Submission 132, NSW Government, pp 56-57.

¹⁴³ Submission 132, NSW Government, p 57.

¹⁴⁴ Submission 132, NSW Government, p 40.

¹⁴⁵ Submission 132, NSW Government, p 41.

Stakeholder views on government reforms

- 2.97** Stakeholder views on particular reform efforts are covered in detail in later chapters. At this stage, the committee notes the sentiment expressed by a number of inquiry participants, who told us that the NSW Government's proposals in the *Building Stronger Foundations* discussion paper, as well as the proposed reforms in the *Design and Building Practitioners Bill 2019*, are inadequate to address the scale of the problems. For example, Mr Lambert told the committee: 'The current proposals before us in the discussion paper, Building Stronger Foundations, are totally inadequate and are quite clearly written by someone who does not know building regulation'.¹⁴⁶
- 2.98** Similarly, Ms Kathlyn Loseby, NSW President of the Australian Institute of Architects, described the government's response as 'piecemeal' noting that certain items have been 'cherry-picked' to enable quick action, and 'we think that unless, holistically, there is a larger approach, it actually will not be purposeful, we certainly will not get competence back and we will not get the insurance industry back'.¹⁴⁷

Committee comment

- 2.99** Detailed conclusions on the adequacy of government initiatives are outlined in the remaining chapters. However, a number of issues must be highlighted at this point, beginning with the government's inexcusable delay in implementing the *Building and Development Certifiers Act 2018*.
- 2.100** The Act was passed by the NSW Parliament in October 2018. However, neither the Act nor the supporting regulations have come into force. During this inquiry we were advised that this is not expected to occur until July 2020.
- 2.101** In a detailed timeline provided to the committee, the NSW Government advised us that stakeholder consultation would take place in September; public consultation in October; redrafting in November; gazettal in December; and stakeholder education programs from January to June 2020. The new regulations and Act are now scheduled to commence on 1 July 2020.¹⁴⁸
- 2.102** The committee understands that proper process takes time. However, the committee is alarmed at the time lag between the NSW Parliament passing the *Building and Development Certifiers Act 2018* in October 2018 and the 2020 commencement date – almost two years after the legislation was passed by Parliament. This is far too long to address the significant and concerning issues with private certification in this state. In particular, improved disciplinary processes and stronger penalties for certifiers need to be in place now. 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.

¹⁴⁶ Evidence, Mr Michael Lambert, author of the *Independent Review of the Building Professionals Act 2005*, 12 August 2019, p 50.

¹⁴⁷ Evidence, Ms Kathlyn Loseby, President NSW, Australian Institute of Architects, 16 August 2019, pp 54.

¹⁴⁸ Answers to questions on notice, NSW Government, 28 August 2019, p 2.

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- 2.103** The committee therefore recommends that the NSW Government expedite the work to implement the regulations supporting the *Building and Development Certifiers Act 2018*, to ensure they are in place well before the planned timeframe of July 2020.

Recommendation 1

That the NSW Government expedite the implementation of the regulations to support the *Building and Development Certifiers Act 2018*, to ensure the Act and regulations are operational well in advance of July 2020.

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- 2.104** 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 2

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.

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- 2.105** 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 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.

Chapter 3 Oversight by a Building Commissioner

Since this inquiry was established, the NSW Government has appointed a Building Commissioner. The committee received evidence from stakeholders who were encouraged by this appointment. However concerns were raised in relation to the staff available to the Commissioner, the powers sufficient to undertake this role and the adequacy of funding. This section considers these issues and the call to establish an appropriately resourced and staffed building commission to support the commissioner in his work.

Appointment of a NSW Building Commissioner

- 3.1** As part of its response to the Shergold Weir report, the NSW Government appointed Mr David Chandler OAM as the state's first Building Commissioner on 1 August 2019.¹⁴⁹
- 3.2** The Building Commissioner's role has been described by the government as being is to lead and oversee building regulation and administration in New South Wales, including:
- licensing and authorisation of building practitioners
 - residential building investigations
 - building plan regulation and audit
 - residential building inspections and dispute resolution
 - plumbing regulation
 - electrical and gas safety regulation
 - strata building bond scheme
 - building product safety
 - building and construction security of payment scheme
 - engagement and strategic collaboration with local government.¹⁵⁰
- 3.3** The NSW Government advised that a critical part of this role 'will be an intensive, risk-based approach to auditing building plans' and that the Building Commissioner will have strong investigative powers to 'monitor and scrutinise suspected incidents of wrongdoing in the industry'. The Building Commissioner will also be able to take disciplinary action, including suspending or cancelling registrations, as well as ordering the rectification of building work in circumstances of non-compliance.¹⁵¹

¹⁴⁹ Submission 132, NSW Government, p 54.

¹⁵⁰ NSW Government, *NSW Government Response to the Shergold Weir Building Confidence Report* (February 2019), p 10.

¹⁵¹ NSW Government, *NSW Government Response to the Shergold Weir Building Confidence Report* (February 2019), p 10.

- 3.4** Mr Chandler appeared before the committee on his third day in the position and commented on the NSW Government's approach to reforming the industry:

For those who may be in any doubt about the government's or my intent to get on top of this, please let there be no misunderstanding. The New South Wales Government intends to lead the nation on building reforms and ultimately deliver a framework that is considered amongst the best in the global construction market ...¹⁵²

- 3.5** Mr Chandler told the committee that he would engage Ms Bronwyn Weir, co-author of the Shergold Weir report, to provide advice and assist with the preparation of proposed legislation and that he will also establish a building and construction advisory committee. The committee, as Mr Chandler explained, will build upon stakeholder engagement to address the issues within the industry:

For the first time, through this reform process, we have seen a full range of interest groups and industry leaders engaged and happy to sit around one table to achieve outcomes the government has in mind. The government intends to capitalise on the success of these discussions to ensure stakeholders, whether they are builders, developers, architects, insurers, financiers, owners, strata managers or certifiers, all work together to get the reform outcomes that we believe are possible. With the engagement of the stakeholders we can more easily address outdated industry work practices and models of operation that are no longer relevant in a modern construction environment.¹⁵³

- 3.6** Mr Chandler was confident that together the NSW Government and industry stakeholders can implement change to tackle the current issues and build a stronger industry:

Under the New South Wales Government's reform process we have a once-in-a-lifetime opportunity to transform the building and construction industry. That is why I have put my hand up to lead these initiatives. Working in collaboration with everyone who has skin in the game, I believe we can create an environment where future generations are confident in the quality of construction, the security of their investments and the prospect of great places to live. I can assure the Committee that there is a very clear mandate for me—from the Premier and from the Minister—to deal with today's issues and then to set a direction for a stronger, more confident construction industry.¹⁵⁴

Resourcing and powers of the Building Commissioner

- 3.7** Stakeholders welcomed the appointment of a Building Commissioner but raised concerns relating to the number of staff available to him, the budget of his office and his powers.

¹⁵² Evidence, Mr David Chandler OAM, NSW Building Commissioner, 16 August 2019, p 2.

¹⁵³ Evidence, Mr Chandler, 16 August 2019, p 2.

¹⁵⁴ Evidence, Mr Chandler, 16 August 2019, p 3.

3.8 Many inquiry participants were encouraged by the appointment of the Building Commissioner.

- Local Government NSW described the appointment as a positive step 'towards fixing the problems and delivering safe and compliant buildings that protect the public interest'.¹⁵⁵
- The Insurance Council of Australia said it is 'encouraged by the appointment of the NSW Building Commissioner and looks forward to engagement with this office to work towards re-establishing confidence in the sector'.¹⁵⁶
- The Australian Institute of Building Surveyors commented that 'such an authority would be highly influential in strengthening an appropriate culture within the industry as well as in providing an important public confidence feature to the system'.¹⁵⁷

3.9 However, inquiry participants cautioned that the Building Commissioner needs to be provided with the appropriate powers and enough resources to be successful in the role.

3.10 Local Government NSW raised concerns that 'no details of funding and administrative support for the building commissioner have been announced and it is unclear what statutory provisions are proposed to support this role'. Local Government NSW urged the government to 'prioritise sufficient funding and staff resourcing to support the role'.¹⁵⁸

3.11 During a hearing, Cr Linda Scott, President, Local Government NSW, emphasised that the success of the role will depend on the government's commitment to properly resource the position 'with skilled, expert and capable staff and that the position have very clear accountabilities and roles, within government and also in their regulatory powers'.¹⁵⁹

3.12 The Owners Corporation Network suggested that a key test of the government's commitment to reforming the industry will be whether additional funding is allocated to the Building Commissioner, the relevant capability of the appointee, and the authority and political support provided to the role.¹⁶⁰

3.13 Mr Michael Lambert, author of the Lambert report, commented on the importance of the Building Commissioner being fully resourced and transparent in undertaking the role:

It is essential that the proposed NSW Building Commissioner is suitably resourced and tasked with responsibility for establishing an implementation program to progress the reforms as an integrated package, undertaken in a consistent manner with other jurisdictions and that the implementation program is made publicly available to ensure full accountability to the community.¹⁶¹

¹⁵⁵ Submission 145, Local Government NSW, p 3.

¹⁵⁶ Submission 134, Insurance Council of Australia, p 3.

¹⁵⁷ Submission 123, Australian Institute of Building Surveyors, p 4.

¹⁵⁸ Submission 145, Local Government NSW, pp 10-11.

¹⁵⁹ Evidence, Cr Linda Scott, President, Local Government NSW, 16 August 2019, p 42.

¹⁶⁰ Submission 117, Owners Corporation Network, p 15.

¹⁶¹ Submission 56, Mr Michael Lambert, p 3.

- 3.14** Mr Chandler appeared before the committee and gave evidence on two occasions. When questioned at his first appearance on the available resources for his office, Mr Chandler explained that he has been provided with four to five people within the Department of Fair Trading as direct resources and will also have available to him the remainder of the department. Mr Chandler stated that he is 'absolutely satisfied that the resources that will be required will be available and the directions to be taken will be followed'.¹⁶²
- 3.15** Ms Rose Webb, the NSW Fair Trading Commissioner, confirmed at the committee's third hearing that they were currently building up the secretariat team of four to five full-time staff that would be assigned to Mr Chandler and noted that a number of other staff had been assisting him already.¹⁶³
- 3.16** When pressed further on the issue of undertaking this task with only a small number of resources, Mr Chandler argued that 'there is a huge team that is committed to support what I am about to do'. Mr Chandler added that 'most of the resources we will find internally, within the organisation, but if we need to go outside we will go outside and get those resources in addition'.¹⁶⁴
- 3.17** At his first appearance, Mr Chandler explained to the committee that he was developing a work plan which would map out the resources that were needed moving forward and this would be made available within the next three months. Mr Chandler indicated that 'as I progressively reveal the work plan, you will see how the resources that are there will be better applied to achieving the outcomes to build stronger foundations for the construction industry'.¹⁶⁵
- 3.18** Mr Chandler was of the view that "the job is about leadership; it is about developing policies and recommendations for the whole of the organisation to take on", commenting that in his experience strong leadership is what is needed to get things done:
- ... [T]hat on all the turnarounds that I have done over my many years is that once you actually bring the right leadership in and you bring the right level of confidence in and you point the ship in the right direction, actually people jump on board and you start doing good things.¹⁶⁶
- 3.19** In terms of his budget, Mr Chandler indicated at this first hearing that he did not have a budget at that stage and this would be incorporated in his work plan.¹⁶⁷ Ms Webb further clarified that the work plan 'will inform our submissions to the Government about the budget', however she confirmed at that time that there was nothing specifically allocated to the Building Commissioner in any published budget.¹⁶⁸

¹⁶² Evidence, Mr Chandler, 16 August 2019, pp 3-4.

¹⁶³ Evidence, Ms Rose Webb, Deputy Secretary, Better Regulation Division and NSW Fair Trading Commissioner, 27 August 2019, p 79.

¹⁶⁴ Evidence, Mr Chandler, 16 August 2019, pp 7 and 15.

¹⁶⁵ Evidence, Mr Chandler, 16 August 2019, p 4.

¹⁶⁶ Evidence, Mr Chandler, 16 August 2019, pp 4 and 14.

¹⁶⁷ Evidence, Mr Chandler, 16 August 2019, p 3.

¹⁶⁸ Evidence, Ms Webb, 27 August 2019, p 80.

- 3.20** When Mr Chandler appeared before Portfolio Committee No. 6 – Transport and Customer Service during the 2019-20 supplementary Budget Estimates hearings, he advised that he had prepared the work plan, and it was 'currently being socialised with industry and the relevant parts of government' and expected to be published in early 2020. Mr Chandler said that 'the content of the work plan is well advanced and well discussed' and that 'we are travelling very much on schedule'.¹⁶⁹
- 3.21** When questioned as to why the work plan had not been published within the three months originally committed to, Mr Chandler responded: 'Because there is an appropriate process before it is appropriate for me to publish a document that is yet to be signed off by Government'. Mr Chandler could not provide a definitive date on when the work plan would be published in early 2020, on the basis that publication would need 'to follow full submission to government, then agreement by government to that work plan and then authorisation to release it publicly'.¹⁷⁰

Calls to establish a Building Commission

- 3.22** In addition to appointing a Building Commissioner a number of stakeholders called for the Building Commissioner to be supported by a fully resourced building commission with the requisite staff, budget and powers. It was argued that a building commission would bring together the current fragmented approach to the regulation of the industry, in line with the response from other Australian states and territories.
- 3.23** Several witnesses who appeared before the committee called for the establishment of a Building Commission to address the fragmentation.
- Ms Kathlyn Loseby, President NSW, Australian Institute of Architects, stated that 'we would wholeheartedly say that the Building Commissioner needs a commission—needs incredible support'.¹⁷¹
 - Mr Brett Daintry, Director, Daintry Associates also argued that 'the building commission needs to exist ... It needs to be given resources and it needs to fill a proper function: regulating the building system in New South Wales'.¹⁷²
 - Likewise, Mr Craig Hardy, President of the Association of Accredited Certifiers said 'we are strong supporters of a building commission and having it all together. There is an existing legislative framework and it probably has the elements in it to make it work, but it needs to be under the control of one body'.¹⁷³
- 3.24** Mr Brian Seidler, Executive Director, Master Builders Association of NSW, highlighted that the establishment of a building commission 'has been one of the top priorities for the industry for over 15 years'. Mr Seidler noted that the Campbell inquiry in 2002 recommended the establishment of a building commission and 'many subsequent inquiries into the industry have

¹⁶⁹ Evidence, Mr Chandler, 28 October 2019, pp 13-14.

¹⁷⁰ Evidence, Mr Chandler, 28 October 2019, pp 13-14.

¹⁷¹ Evidence, Ms Kathlyn Loseby, President NSW, Australian Institute of Architects, 16 August 2019, p 56.

¹⁷² Evidence, Mr Brett Daintry, Director, Daintry Associates, 16 August 2019, p 82.

¹⁷³ Evidence, Mr Craig Hardy, President, Association of Accredited Certifiers, 27 August 2019, p 18.

made similar recommendations'. Mr Seidler was perplexed as to why a building commission has not been introduced, commenting that a holistic approach was needed to rebuild the industry:

As I said earlier, unless all issues impacting the industry are dealt with holistically, and everyone in the building chain takes ownership and is held responsible for their contribution, the industry will not produce a better built environment, which is what we as consumers demand.¹⁷⁴

3.25 A key advocate for the establishment of a building commission, Mr Lambert, stated that 'while there is an in-principle benefit in having a Building Commissioner, this is totally inadequate as a reform proposal in that it fails to address crucial issues'. Mr Lambert advocated for a building commission that would be directly accountable to the Minister and fully resourced with the necessary powers.¹⁷⁵ Mr Lambert cautioned that 'failure to act in this area will lead to a continuing decline in confidence, continuing increase in insurance premiums and a collapse of building certification'.¹⁷⁶

Location of a Building Commission within government

3.26 Stakeholders told the committee that a key benefit of a building commission would be to consolidate functions that are currently fragmented across government.

3.27 Mr Lambert explained that at present, 'there are two areas of government with a building regulation and policy function: the Building Policy Unit in the Department of Planning and the Environment, which advises the Minister for Planning on the National Construction Code, and the Home Building Services part of Fair Trading'.¹⁷⁷

3.28 Mr Lambert recommended the establishment of a NSW Building Regulation agency with broad powers to audit building work and take effective compliance and enforcement action across the building sector, including the commercial building sector, located in a regulation hub in the Department of Finance, Services and Innovation, and incorporating the building policy function currently in the Department of Planning, Industry and the Environment.¹⁷⁸

3.29 Ms Loseby pointed out that currently the functions sit across Finance, Planning and Better Regulation and highlighted that this structure has many different and disparate groups holding the responsibilities.¹⁷⁹

¹⁷⁴ Evidence, Mr Brian Seidler, Executive Director, Master Builders Association of NSW, 27 August 2019, p 37.

¹⁷⁵ Submission 56, Mr Michael Lambert, pp 9-10.

¹⁷⁶ Evidence, Mr Michael Lambert, author of the *Independent Review of the Building Professionals Act 2005*, 12 August 2019, p 50.

¹⁷⁷ Submission 56, Mr Michael Lambert, p 9.

¹⁷⁸ Submission 56, Mr Michael Lambert, p 11.

¹⁷⁹ Evidence, Ms Loseby, 16 August 2019, p 53.

- 3.30** Mr Daintry expressed the view that the building and construction industry has not been given the focus that is needed, commenting that the functions have always sat in small sections of government departments and not been provided with sufficient resources:

For too long in my opinion, ever since the Local Government Act 1993, the importance of building in New South Wales has been hived off and shoved into other departments. It got put into the Department of Planning as a small little department and not given a lot of resources. The building professionals board was formed, again it stayed within the Department of Planning, and was not given a lot of resources. The building commission needs to exist.¹⁸⁰

- 3.31** Mr Lambert recommended that the functions be combined into one office, located outside of Fair Trading. Mr Lambert explained that 'the reason for proposing this relocation is that the culture and philosophy of Fair Trading is at variance with what is required of an Office of Building Regulation'.¹⁸¹ When questioned further on this point during a hearing, Mr Lambert advised:

Fundamentally, Fair Trading is about consumer protection and it has no understanding or knowledge of regulation, per se. It has a reactive approach to informing consumers of their rights and to investigating problems. But this requires you to be very much involved in regulating the industry on a hands-on basis. That is not in Fair Trading's DNA.¹⁸²

- 3.32** In terms of the Department of Fair Trading, Mr Daintry indicated that it does a great job in regulating automotive dealers and dodgy products, but the 'regulation of tradesmen and builders should be part of the building commission, not the Department of Fair Trading'. Mr Daintry argued that 'there is a real pressing need to once again raise the pre-eminent importance of building control in New South Wales' and 'bring those disparate functions back together within a building commission'.¹⁸³

- 3.33** Mr Justin Page, Secretary, Electrical and Trades Union of Australia, NSW Branch, at a hearing agreed that Fair Trading's regulation in this area has been inadequate and that 'the current system is failing'. Mr Page remarked that 'unfortunately the evidence I have seen Mr Chandler give today does not give me any confidence that is going to be turned around any time soon'.¹⁸⁴

- 3.34** Along similar lines, Cr Scott commented that they appreciate the work of Fair Trading however highlighted that it is 'manifestly evident by the building faults that we have today in New South Wales that their powers and their funding have been insufficient to prevent the problems'.¹⁸⁵

¹⁸⁰ Evidence, Mr Daintry, 16 August 2019, p 82.

¹⁸¹ Submission 56, Mr Michael Lambert, pp 9-10.

¹⁸² Evidence, Mr Lambert, 12 August 2019, p 56.

¹⁸³ Evidence, Mr Daintry, 16 August 2019, p 82.

¹⁸⁴ Evidence, Mr Justin Page, Secretary, Electrical and Trades Union of Australia, NSW Branch, 16 August 2019, p 27.

¹⁸⁵ Evidence, Cr Scott, 16 August 2019, p 42.

- 3.35** A related issue raised by inquiry participants was the establishment of a dedicated cabinet minister to support building regulation. Mr Seidler highlighted that currently there are four or five Ministers overseeing elements of the industry and 'there can be a lot of disconnect over those ministries'. Mr Seidler suggested a 'standalone independent commission with an advisory committee of industry could report to a dedicated Cabinet Minister', and explained why this is so important for the industry:

We are the second-largest industry in New South Wales and across Australia. We engage over 1.1 million people. We train more apprentices and tradespeople than any other industry, even though that is not enough to make the work in the pipeline. We think the industry has earned having a dedicated Minister.¹⁸⁶

- 3.36** Likewise, the Owners Corporation Network recommended that a new senior 'Minister for Housing, Strata and Building Quality' be established, with a building commission reporting to this dedicated Minister to oversee and implement the reforms of the residential building and construction industry. The Owners Corporation Network stated that it is crucial that these responsibilities are resourced appropriately.¹⁸⁷
- 3.37** The idea of an advisory committee was supported by Mr Lambert, who recommended that a Building Regulation Advisory Committee be established to advise both the Building Commissioner and the Minister on building regulation reform and practice, with membership drawn from suitable persons in key parts of the industry and relevant consumer representative organisations, each with relevant knowledge and experience and a commitment to best practice regulation and industry performance.¹⁸⁸

Approach in other jurisdictions

- 3.38** Inquiry participants reflected on the merits of the models in place in other jurisdictions that have established a stand-alone building commission. In particular, inquiry participants pointed to the building commissions in Queensland and Victoria, which are not located within a government agency but are independent bodies.

Queensland Building and Construction Commission

- 3.39** The Queensland Building and Construction Commission is an independent statutory body that provides information, advice and regulation to ensure the maintenance of proper building standards and remedies for defective building work in Queensland. The Commission is led by a commissioner and governed by a board and reports to the Minister for Housing and Public Works.¹⁸⁹

¹⁸⁶ Evidence, Mr Seidler, 27 August 2019, p 46.

¹⁸⁷ Submission 117, Owners Corporation Network, p 1.

¹⁸⁸ Submission 56, Mr Michael Lambert, p 11.

¹⁸⁹ Queensland Building and Construction Commission, *Overview*, <<https://www.qbcc.qld.gov.au/about-us/overview>>

- 3.40** The Commission is responsible for administering the *Queensland Building and Construction Commission Act 1991*, which includes:
- regulating the building industry to ensure the maintenance of proper standards in the industry and achieving a reasonable balance between the interests of building contractors and consumers
 - providing remedies for defective building work
 - providing support, education and advice for those who undertake building work and consumers
 - regulating domestic building contracts to achieve a reasonable balance between the interests of building contractors and home owners
 - regulating building products to ensure the safety of consumers and the public generally and that persons involved in the production, supply or installation of building products are held responsible for the safety of the products and their use
 - providing for the proper, efficient and effective management of the commission in the performance of its functions.¹⁹⁰
- 3.41** As at 30 June 2018, the Commission employed 429.12 full-time equivalent staff across professional, technical and administrative roles with 87 per cent of staff providing frontline services. In 2017-18 the Commission recorded a total income of \$257.3 million from continuing operations and total expenses of \$262.7 million.¹⁹¹

Victorian Building Authority

- 3.42** The Victorian Building Authority is a statutory authority that is governed by a board of commissioners named the Victorian Building Authority Board. The Board is responsible for the governance and strategic management of the Authority to ensure its effectiveness as a regulator. The Board and the Authority are accountable to the Minister for Planning.¹⁹²
- 3.43** The Victorian Building Authority is responsible for monitoring and enforcing compliance with a number of relevant building acts. Its functions include but are not limited to:
- the registration and monitoring of building and plumbing practitioners
 - promoting the resolution of consumer complaints
 - conducting and promoting research
 - monitoring the collection of building permit levies
 - issuing certificates of consent.¹⁹³

¹⁹⁰ Queensland Building and Construction Commission, *Overview*, <<https://www.qbcc.qld.gov.au/about-us/overview>>

¹⁹¹ Queensland Building and Construction Commission, *Building trust and confidence in the construction industry through innovation and efficiency* (Annual Report 2017-2018), p 68.

¹⁹² *Building Act 1993* (Vic).

¹⁹³ *Building Act 1993* (Vic).

3.44 As at June 2018 the Victorian Building Authority had a combined ongoing, fixed term and casual employee headcount of 289.36 full-time equivalent staff and total expenses of \$63.2 million for the financial year 2017-18. The Authority collected a total income of \$69 million for the financial year 2017-18.¹⁹⁴

Stakeholder views on other jurisdictions

3.45 Inquiry participants commented on the models in Queensland and Victoria, as described above, in comparison to what has been introduced in New South Wales.

3.46 Mr Seidler observed that Queensland and Victoria are of a similar size to New South Wales and hoped that the establishment of the Building Commissioner in New South Wales is the first step to establishing a building commission.¹⁹⁵

3.47 Mr Lambert expressed the view that 'Queensland is the best of the systems in place in Australia and it has the resources and the general mindset and philosophy that make it reasonably effective'. Mr Lambert reported that the commission in Queensland has around 400 staff and it is a similar number in Victoria.¹⁹⁶ Mr Lambert added that 'a comparison of the current level and type of resourcing of building regulation in NSW relative to Victoria and Queensland reveals that NSW commits far fewer resources to the function and undertakes a less active approach'.¹⁹⁷

3.48 Mr Ian Robertson, Secretary, Development and Environmental Professionals' Association, expressed his disappointment at the response of New South Wales compared to the other states, commenting that 'a building commission should be big' and 'if it is 55 people as it was in 1997 in Victoria, it is hard to imagine it would be any smaller in New South Wales'.¹⁹⁸

3.49 Ms Weir acknowledged that Victoria and Queensland's separate building authorities are 'very large organisations' and are independent of government. However she noted that some of the other states and territories have taken a different approach and have the functions sitting within government departments. Ms Weir said that there are pros and cons for each different model and that it is really a matter for governments as to how they decide to structure it.¹⁹⁹

3.50 In addition, Ms Weir observed that while New South Wales does have a fragmented approach to oversighting the industry, this is also a feature in the other states even when they have a separate independent building commission. Ms Weir stated that 'fragmentation is a feature of building regulation and in fact many other sectors that are regulated by governments' and that a balance needs to be achieved 'between a siloed approach and an integrated approach and how you slice and dice these things will be open to opinion'.²⁰⁰

¹⁹⁴ Victorian Building Authority, *Annual Report 2017-18*, p 64.

¹⁹⁵ Evidence, Mr Seidler, 27 August 2019, p 46.

¹⁹⁶ Evidence, Mr Lambert, 12 August 2019, p 52.

¹⁹⁷ Submission 56, Mr Michael Lambert, p 10.

¹⁹⁸ Evidence, Mr Ian Robertson, Secretary, Development and Environmental Professionals' Association, 27 August 2019, pp 28 and 32.

¹⁹⁹ 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 55.

²⁰⁰ Evidence, Ms Weir, 27 August 2019, p 56.

- 3.51** At a hearing the committee probed the newly-appointed Building Commissioner on his views as to the need for a building commission. Mr Chandler indicated that a building commission was not needed at this time:

On the face of it, I do not believe we need that at the moment. I think the first thing we need is to be very clear about what leadership we need to start turning this industry around. This is not a bureaucratic solution; this is not going to require a heavy hand of government; this is not going to require a huge amount of legislation.²⁰¹

Committee comment

- 3.52** It is clear that the newly appointed Building Commissioner has not been provided with sufficient resources and funding to undertake the huge task of reforming the building and construction industry. The committee considers the four to five staff provided to the Commissioner from Fair Trading grossly inadequate and believes that to be successful in this role the Building Commissioner requires greater powers and authority, a sufficient number of staff and appropriate funding.
- 3.53** The committee acknowledges that the Building Commissioner appeared at this inquiry in the first week in his new position. At that time, Mr Chandler told the committee that he was formulating a work plan and that this would be made available within three months. We are disappointed to see that this commitment by the Building Commissioner was not met and that the Building Commissioner expects the committee, as well as industry, to wait until next year to see this work plan. We also question the autonomy of the Building Commissioner given he is unable to sign off on his own work plan without going through the departmental approval process.
- 3.54** This work plan should be made available much sooner than next year and should consider the staffing, funding and powers needed for this role, as well as the powers: the minimum required goes beyond the 'leadership' identified by Mr Chandler as the bedrock of his reforms. We therefore recommend that the Building Commissioner finalise his work plan as soon as possible, at least by the end of the 2019, setting out the requisite powers, staffing and resources, and make this document publicly available.

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.

- 3.55** The committee is disheartened by the government's response to the Shergold Weir report to establish only a Building Commissioner and not a fully resourced commission to tackle the issues that have been evident in the building and construction industry for decades. Industry has been calling for a building commission for almost two decades. New South Wales is now significantly behind Queensland and Victoria in effectively regulating this major industry.

²⁰¹ Evidence, Mr Chandler, 16 August 2019, pp 5-6.

- 3.56** The committee agrees with stakeholders that the Department of Fair Trading is not the most appropriate agency to oversee the reforms and notes the inadequacy of Fair Trading's response to date. Indeed, this impression was only strengthened by the evidence given by those officers who appeared and gave evidence to this inquiry.
- 3.57** The committee finds that regulation has failed to date, and that Fair Trading is ill-equipped to lead reforms moving forward. The committee strongly recommends that the NSW Government consolidate the fragmented building regulation and policy functions by establishing a Building Commission as an independent statutory body that is headed by a Building Commissioner and is provided broad powers and sufficient resourcing and funding to oversee and regulate the building and construction industry in New South Wales.

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.

- 3.58** The committee notes stakeholders' calls for better industry engagement through the establishment of an industry advisory committee. We note that Mr Chandler has taken steps to establish a building and construction advisory committee, however, this body does not have the standing required to perform this important role. The committee therefore recommends that the Building Commission be supported by a statutory industry advisory committee to strengthen industry ties with government and guide the strategic direction of the commission.

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.

Chapter 4 Insurance protections for consumers

As shown by the many building failures discussed in chapter 2, New South Wales is currently experiencing a crisis of building defects. This chapter will examine how this is impacting the insurance protection for consumers. In particular it will consider statutory warranties for residential buildings, professional indemnity insurance and the Home Building Compensation scheme. The chapter will finish by discussing the introduction of the Strata Building Bond and Inspection Scheme and its adequacy in addressing the current crisis.

Statutory warranties for residential buildings

4.1 This section will look at the statutory warranties that apply to residential buildings to protect consumers for the work carried out by a licensed contractor. It will then consider stakeholder concerns in relation to the time period to claim for major and minor defects and the practice of developers and building companies phoenixing to avoid being held liable under these warranties.

Overview of statutory warranties

4.2 The *Home Building Act 1989* stipulates a number of statutory warranties for contracts that apply to all residential building work carried out by a licensed contractor in New South Wales.²⁰² These include a warranty that the:

- work will be completed with due care and skill and in accordance with any plans and specifications set out in the contract
- materials supplied will be new (unless otherwise specified) and will be suitable for the purpose for which they are to be used
- work will be done with due diligence
- work will be done within the time stated in the contract
- work and any materials used in doing the work will be reasonably fit for the specified purpose
- work will result in a dwelling that is reasonably fit for occupation
- work will be done in accordance with the *Home Building Act 1989* and or any other law.²⁰³

4.3 If any of the above warranties are breached, proceedings against a builder can be initiated. Any such proceedings must commence before the end of the warranty period, which is 'six years for a breach that results in major defects in residential building work, or two years in any other case'. The warranty period begins on completion of the work to which it relates or for incomplete work, the date to which either the contract was terminated or work was ceased.²⁰⁴

²⁰² Submission 132, NSW Government, pp 22-23.

²⁰³ Department of Finance, Services and Innovation, *Building Stronger Foundations, Implementing the NSW Government Response to the Sbergold Weir Building Confidence Report*, discussion paper, June 2019, p 24.

²⁰⁴ Submission 132, NSW Government, p 23.

4.4 The primary means of redress for breaches of the warranties are to:

- have the work rectified by the responsible builder or developer, or
- seek financial compensation for the cost of rectification.²⁰⁵

4.5 The NSW Government's submission details the role of Fair Trading in managing building complaints and disputes and the role of the Tribunal in determining claims made.²⁰⁶

Time period to claim

4.6 As noted earlier the time period for claiming a breach of warranty is six years for major defects and two years in any other case. Inquiry participants argued that the timeframes for claiming for a breach of warranty are too short.

4.7 The City Futures Research Centre at the University of NSW commented that the timeframes in which a claim must be brought are 'inadequate' and 'can be a major challenge'. It explained that 'defects may not become apparent immediately, meaning owners may not even know they have a problem until well into the six-year period for major defects and well beyond the two-year period for other defects'. It also highlighted that the fragmented nature of strata ownership creates obstacles for bringing a claim forward within these timeframes.²⁰⁷

4.8 Some of the comments made by submission authors included:

- 'I purchased a new Hyundai a while ago and it came with a 5 year warranty. Most people would not expect a car to last more than 20 years. And yet when you buy a new apartment it only comes with a 2 year warranty for minor defects and a 6 year warranty for major defects in circumstances where I would have expected the apartment building to last for at least 100 years'.²⁰⁸
- 'In terms of providing protection to consumers the warranty periods should be considered to be ludicrous. Six years for a breach of warranty that results in a major defect in residential building work or 2 years in any other case is a relatively short period in the life cycle of a building'.²⁰⁹
- 'The sunset clause identifying the timeline for defect action by the builder under his/her home warranty insurance requires reviewing. At present builders send in unskilled workers to do patch-up work and delay the required rectification work until the warranty timeline has lapsed. When an Owners Corporation challenges or takes legal action against the developer/builder/certifier, responsibility for the timeline inaction seems to fall on the Owners Corporation for not identifying the defect in a timelier manner'.²¹⁰

²⁰⁵ Submission 132, NSW Government, p 23.

²⁰⁶ Submission 132, NSW Government, pp 24-25.

²⁰⁷ Submission 79, City Futures Research Centre, UNSW Sydney, p 2.

²⁰⁸ Submission 22, Name suppressed, p 2.

²⁰⁹ Submission 101, Mr Jan Luikens, p 5.

²¹⁰ Submission 43, Residential Strata Committee, p 3.

- 'The two year period is particularly problematic as many serious defects that may not be classified as major are hidden from sight at project completion and can take more than two years to reveal themselves'.²¹¹
- 'At minimum, the regime should reflect the length of time which it would take for structural defects to become apparent, which may be as long as six-ten years'.²¹²
- 'Two years is inadequate for the building warranty period. This allows the developer to keep the apartments for two years then on sell them just as the faults become evident. The new owners are then left to deal with the problems out of the warranty period. This can be very costly. A neighbouring building had to wait for an expert report to claim under warranty. By the time the report was finalised the 2 years had lapsed'.²¹³

4.9 Many inquiry participants called for the statutory warranty periods to be extended. The City Futures Research Centre advocated for 'a reconsideration of the limitations on the period in which claims can be brought for all defects', cautioning that 'otherwise, it is likely that many owners will still find themselves unable to claim by the time their building's defects become apparent'.²¹⁴

4.10 Mr Michael Lambert, author of the Lambert report, recommended that 'the two year and six-year period for notification of minor and major defects should be extended to a common seven years which until recently was the claim period'.²¹⁵

4.11 The Strata Community Association NSW called for the two year statutory warranty period to be extended to at least three years.²¹⁶ At a hearing, the Chief Executive Officer, Ms Alisha Fisher clarified that the 'three years would have to be the minimum that we would hope the government moved towards' and they would expect more, suggesting that it would be 'fantastic' to have a 10 year warranty period even for the minor defects or at least six years.²¹⁷

4.12 Ms Jane Hearn, Director, Owners Corporation Network, gave evidence that a 10 year defects liability period should be an Australian Standard, noting that this is already a global standard that New South Wales should be moving towards.²¹⁸

4.13 Stanton Legal called for the return of a single warranty period for all defect issues, stating that 'the warranty periods that currently apply are not just unfair to consumers, they also make the resolution of building disputes much more complex than they need to be' and add unnecessary time and cost to the process of fixing defects.²¹⁹

²¹¹ Submission 117, Owners Corporation Network, pp 7-8.

²¹² Submission 12, Name suppressed, p 4.

²¹³ Submission 108, Name suppressed, p 1.

²¹⁴ Submission 79, City Futures Research Centre, UNSW Sydney, p 2.

²¹⁵ Submission 56, Mr Michael Lambert, p 11.

²¹⁶ Answers to questions on notice, Strata Community Association NSW, 9 September 2019, p 1.

²¹⁷ Evidence, Ms Alisha Fisher, Chief Executive Officer, Strata Community Association, 16 August 2019, p 70.

²¹⁸ Evidence, Ms Jane Hearn, Director, Owners Corporation Network, 12 August 2019, p 32.

²¹⁹ Submission 70, Stanton Legal, p 3.

4.14 The newly appointed NSW Building Commissioner, Mr David Chandler OAM told the committee that one of his goals would be that 'from 2023 on we have created a situation where an option is available to the quality developers to actually offer a 10-year guarantee on the structure, the envelope, the waterproofing of a building and the fireproofing of a building'. Mr Chandler pointed to the model in the UK where insurance can be offered at the completion of a building for a period of 10 years or more. He explained that this is not legislated but has been taken up by the industry, in particular some of the banks who will not lend to the developer unless a 10 year guarantee is on the table. Mr Chandler envisaged that this could be implemented in New South Wales without legislation and noted there are already a number of developers who are very supportive of this model.²²⁰

Definition of major and minor defects

4.15 The committee heard that the definition of a 'major defect' triggering the six year warranty period is adding an extra level of complexity to the process for rectifying defects under the statutory warranties. Another issue raised during the inquiry was the impact of the change in definition from structural defect to 'major defect'.

4.16 The NSW Government submission provides the following definition for a major defect:

A major defect is classified under the legislation as a defect in a major element of a building that is attributable to defective design, defective or faulty workmanship, defective materials, or a failure to comply with the structural performance requirements of the National Construction Code (or any combination of these), and that causes, or is likely to cause:

- the inability to inhabit or use the building (or part of the building) for its intended purpose, or
- the destruction of the building or any part of the building, or
- a threat of collapse of the building or any part of the building, or
- if the external cladding of a building causes or is likely to cause a threat to the safety of any occupants of the building if a fire occurs in the building.²²¹

4.17 Associate Professor Hazel Easthope of the City Futures Research Centre argued that this definition has reduced consumer protections because 'many defects that are common and can have a significant impact on a building could fall outside of that definition'. Associate Professor Easthope commented it is very difficult to address even 'minor' defects within a two-year timeframe:

Major defects have six years and everything else has two. If your defects do not fit within the very narrow definition of major defects, you have two years. As I have said before, two years is an inadequate time to address defects in a strata building.²²²

²²⁰ Evidence, Mr David Chandler OAM, NSW Building Commissioner, 16 August 2019, p 17.

²²¹ Submission 132, NSW Government, p 23.

²²² Evidence, Associate Professor Hazel Easthope, City Futures Research Centre, 16 August 2019, p 40.

- 4.18** Stanton Legal also highlighted the complexity of differentiating between major and minor defects, stating that it undermines the objective of an efficient dispute resolution process because it leads to the need 'to assess how a complex and convoluted definition of "major defect" applies to every separate defect issue'. Stanton Legal expressed the view that it is a recipe for a 'lawyers' picnic' where disputes will be about what the builder or developer can get out of, and not what repairs need to be done.²²³
- 4.19** The Strata Community Association NSW highlighted that 'the change in the definition of structural defect to major defect affects the ability of owners in apartment buildings to arguably make a claim for rectification'. The Association explained that 'the definition when reviewed as a whole lends itself to a position where practically no building would be able to make a claim for defects except where the building or apartments within it were totally uninhabitable (for example Opal towers and Mascot Towers)'. Given this, the Association recommended that the provisions be amended 'that where a structural element of a building is defective in construction it is a defect and not that the second limb requires it also to affect habitability'.²²⁴
- 4.20** The Owners Corporation Network explained that a 'major defect' is not clearly defined and recommended further clarification. It noted that the changes to the statutory warranties continue to impact on consumer protection for new apartment owners, stating that the current arrangement 'leaves vulnerable consumers exposed to current exploitation practices and provides no driver for the construction industry to lift its game'.²²⁵
- 4.21** Ms Karen Stiles, Executive Officer, Owners Corporation Network told the committee that 'the definition of "major defect" is almost impossible', explaining that to get to that point it must 'render the building unusable, uninhabitable or threaten destruction'.²²⁶ Ms Hearn added that 'something could be classed as minor but actually be complex and very expensive and have very significant effects on the people who live there'. Ms Hearn used the example of waterproofing, where unless the issue is 'extreme' it is not classified as a major defect and explained that waterproofing issues are very common, it impacts over long periods of time and has 'real health impacts'.²²⁷
- 4.22** At a hearing, Ms Hearn highlighted that there is an opportunity for reform to put in place a more effective system in rectifying defects:

But when we have this mood of reform and an opportunity to fix the system, we need a more effective, less conflict-ridden process for when defects do occur, because they are going to continue to occur; we just need to make sure that the risk of them occurring is greatly reduced and is not the certainty that it currently is.²²⁸

²²³ Submission 70, Stanton Legal, p 4.

²²⁴ Answers to questions on notice, Strata Community Association NSW, 9 September 2019, p 1.

²²⁵ Submission 117, Owners Corporation Network, pp 7-8.

²²⁶ Evidence, Ms Karen Stiles, Executive Officer, Owners Corporation Network, 12 August 2019, p 35.

²²⁷ Evidence, Ms Hearn, 12 August 2019, p 35.

²²⁸ Evidence, Ms Hearn, 12 August 2019, p 32.

Illegal phoenix activity

4.23 Another issue raised with the committee was the practice of building companies setting up what is known as a \$2 company and undertaking illegal phoenix activity once the construction of a building is complete to avoid the responsibility of rectifying defects later down the track. This is leaving homeowners with no-where to go to rectify defects.

4.24 Illegal phoenix activity is defined by the Australian Securities and Investments Commission as an activity 'where a new company is created to continue the business of an existing company that has been deliberately liquidated to avoid paying outstanding debts, including taxes, creditors and employee entitlements'. Usually a company director will transfer the assets of an existing company to a new company without paying true or market value, leaving debts with the old company, and then liquidating this company with no assets to sell, leaving creditors unable to be paid.²²⁹

4.25 A number of inquiry participants spoke about builders and developers that regularly undertake in this concerning practice.

4.26 For example, Stanton Legal stated that the building of high-rise buildings by \$2 companies has led to the increase of building defects:

The most significant systemic factor behind the steep increase in residential unit block defects is that the persons profiting most from the construction (the builder and developer for each project) control the quality of the construction and are generally well aware that there will be no consequence for them if the work is done defectively. That is due to loopholes in the law and the ability since late 2003 to build and develop residential buildings higher than 3 storeys (multi-storey buildings) via \$2 companies.²³⁰

4.27 Mr Lambert highlighted this problem of builders and developers creating special purpose companies that they can wind up after they have completed the work, and therefore there is no party that people can go to legally to seek recompense for defective works. Mr Lambert stated that this 'has to stop, you have to require people individually to be accountable'.²³¹

4.28 Mr Ian Robertson, Secretary of the Development and Environmental Professionals' Association, told the committee that it is 'appalling' that builders and developers are setting up \$2 companies to avoid liability:

But, clearly, what is going on now is not working. The idea that you can set up a \$2 company, make some profit and then be out of there is just appalling. It is hard to imagine anything you do in life where you are more vulnerable financially than in getting caught up in property transactions.²³²

²²⁹ Australian Securities & Investments Commission, *Illegal phoenix activity* (3 July 2019), <<https://asic.gov.au/for-business/small-business/closing-a-small-business/illegal-phoenix-activity/>>.

²³⁰ Submission 70, Stanton Legal, p 1.

²³¹ Evidence, Mr Michael Lambert, author of the *Independent Review of the Building Professionals Act 2005*, 12 August 2019, p 59.

²³² Evidence, Mr Ian Robertson, Secretary, Development and Environmental Professionals' Association, 27 August 2019, p 31.

4.29 Associate Professor Easthope described the use of \$2 companies as 'quite widespread', noting that this practice effectively leaves it to the builders and developers to decide if they want to rectify issues:

The fact that that is allowed is problematic. In many cases developers and builders will come back and make right defects, and that is how it should be. The problem is at the moment that it is kind of on the goodwill of those developers and builders to do that.²³³

4.30 Long standing industry professional, Mr David Dickson, Consulting Engineer, Brooker Group, reported that he is seeing a lot of developers opening specific companies for each development, instead of one holding company across multiple developments, 'for the very reason that if something goes wrong, even half way through, they can just pull the pin and walk away'. Mr Dickson added that 'by the time a lot of the problems are found the developer has closed that two-dollar company and he is already onto another one that is doing something else'.²³⁴

4.31 Ms Hearn also expressed the view that the structure of the insurance system has created an environment conducive to \$2 companies, particularly on buildings over three storeys that are exempt from the Home Building Compensation scheme as there is no risk assessment of these builders and developers:

We have actually institutionalised the use of \$2 companies phoenixing. There are many reasons it is institutionalised but one of them, when you follow the trail, is if they are exempt from having to get home warranty insurance, there is nobody assessing the risk. There is nobody assessing their quality and the skill or the solvency of those particular builders to build these complex buildings.²³⁵

4.32 In addition, Ms Hearn highlighted that in the end it is the consumer that is left to deal with a long, technical and expensive process in trying to pursue a developer or builder where the company no longer exists.²³⁶

4.33 At a hearing, the committee raised the prospect of attaching liability to directors of companies with Ms Alisha Fisher, Chief Executive Officer, Strata Community Association. Ms Fisher supported this being considered, as 'anyone who runs any business, the directors are liable, why is this able to occur in construction when we are talking of multiple, hundreds of millions of dollars' and repeated cases of 'construction companies that are setting up, building and running away'.²³⁷

Professional indemnity insurance

4.34 This section will detail the requirement for private certifiers and other industry professionals to hold professional indemnity insurance and recent exclusions relating to flammable cladding.

²³³ Evidence, Associate Professor Easthope, 16 August 2019, p 39.

²³⁴ Evidence, Mr David Dickson, Consulting Engineer, Brooker Group, 16 August 2019, pp 63-64.

²³⁵ Evidence, Ms Hearn, 12 August 2019, p 32.

²³⁶ Evidence, Ms Hearn, 12 August 2019, p 32.

²³⁷ Evidence, Ms Fisher, 16 August 2019, p 73.

It will also consider the significant increase in premiums and calls for all building and construction industry professionals to be required to hold professional indemnity insurance.

Overview of professional indemnity insurance and exclusions relating to flammable cladding

- 4.35** Under the *Building Professionals Act 2005*, an accredited certifier or building surveyor must hold professional indemnity insurance.²³⁸ Due to a number of recent high profile building failures in New South Wales (as outlined in chapter 2) and following the Grenfell incident and global concerns relating to the use of flammable cladding on buildings, New South Wales has seen insurers who provide professional indemnity coverage losing confidence in the system and changing their insurance products by increasing exclusions and prices.²³⁹
- 4.36** In June 2019 the NSW Government received advice that all providers of professional indemnity insurance for certifiers in Australia were intending to exclude building work relating to non-compliant and non-conforming cladding for new policies entered into from July 2019. The NSW Government subsequently announced that it has allowed the Building Professionals Board to accept insurance policies with conditions or exclusions to ensure certifiers can still be accredited, in order to prevent the halting of building and construction work in New South Wales. The NSW Government has stated that this change is a short-term fix and will be removed once reforms are put in place to improve the insurance market situation.²⁴⁰ No timetable is set for this.
- 4.37** At a hearing the committee heard from Mr Karl Sullivan, Head of Risk and Operations, Insurance Council of Australia, who spoke about the introduction of exclusions relating to flammable cladding:
- When it comes to certifiers, insurers have not left the market—they have simply introduced an exclusion relating either directly to any work to do with cladding, or a slightly broader one used by some insurers regarding any work to do with nonconforming building products. As with surveyors and other building professionals, certifiers are still able to take professional indemnity insurance for their work; however, there is almost globally an exclusion around work pertaining to those two issues. That has arisen because of a broad global failure to really tackle that issue in a comprehensive way.²⁴¹
- 4.38** Mr Sullivan went on to explain that the industry started to become aware of the cladding issue in the year leading up to the Grenfell fire in London, where there was concern from a number of commercial insurers globally on how it was being used in complex and high-rise buildings. Following the Grenfell incident, Mr Sullivan said that insurers started to look towards government in how they would respond to the cladding issue, stating: 'there has been no clear

²³⁸ Submission 132, NSW Government, p 10.

²³⁹ Submission 134, Insurance Council of Australia, p 1.

²⁴⁰ Media release, Hon Kevin Anderson MP, Minister for Better Regulation and Innovation, 'Statement on NSW Certifiers Insurance', 26 June 2019.

²⁴¹ Evidence, Mr Karl Sullivan, Head of Risk and Operations, Insurance Council of Australia, 12 August 2019, p 42.

resolution of that at a national or state level that would allow insurers to hold the confidence that it is being dealt with comprehensively'.²⁴²

- 4.39** Mr Sullivan advised that given insurers do not understand how the individual states will regulate and require remediation of impacted buildings, it results in an uncapped liability that makes 'it almost impossible to calculate a probable maximum loss as an insurer'. Mr Sullivan added that 'this comes off the back of a professional indemnity insurance environment that has been unprofitable for some time', for example indemnity insurance for certifiers has not been a profitable product since 2011. Mr Sullivan observed that insurers are reluctant to enter the market in the event of 'incalculable' potential losses:

With that as a background, putting in there and an uncapped liability or a liability that cannot be calculated going forward you leave insurers in a very awkward position where that residual risk at the end of the risk management chain is almost incalculable. Therefore insurers need to stop their losses.²⁴³

- 4.40** Further, Mr Sullivan noted that insurers have not been provided with a register of buildings containing flammable cladding. Mr Sullivan called for all states 'to be more forthcoming with that information so that we can start to analyse what the probable maximum losses may be and can start to look at, down the track, how that will influence products and their prices'.²⁴⁴ The issue of flammable cladding will be considered by the committee in its final report.

Increase in premiums

- 4.41** Inquiry participants spoke of the impacts to the industry from the significant increase in insurance premiums stemming from a loss of confidence in the quality and product of the building and construction industry. As the committee heard, this did not just impact on certifiers but also the broader industry profession.
- 4.42** For example, Mr Jonathan Russell, National Manager of Public Affairs, Engineers Australia claimed that 'it is very well documented and known that within the current building confidence crisis, insurers are less willing to provide coverage, and where they are, the premiums are much higher'. Mr Russell indicated that the increased cost of insurance is 'significant' and is causing their members to re-think the viability of their businesses.²⁴⁵
- 4.43** Mr Greg Ewing, General Manager for the Sydney Division, Engineers Australia, also highlighted that professionals are rethinking the viability of their businesses and the types of projects they will work on:

²⁴² Evidence, Mr Sullivan, 12 August 2019, p 42.

²⁴³ Evidence, Mr Sullivan, 12 August 2019, p 42.

²⁴⁴ Evidence, Mr Sullivan, 12 August 2019, pp 42-43.

²⁴⁵ Evidence, Mr Jonathan Russell, National Manager for Public Affairs, Engineers Australia, 27 August 2019, p 8.

But the feedback is that viability of their business, and also projects they are willing to expose themselves to, because they have to think about that sustainability of their business should something go wrong in the chain that may or may not necessarily be of their making, but they could get embroiled in a situation that can be very costly to them.²⁴⁶

- 4.44** Mr Dickson provided a personal example of the increase in costs related to insurance. He told the committee that he was informed by his insurer that they will no longer be in business next year and when he has enquired with another insurer the cost to take out a policy was triple what it is today. Mr Dickson explained that this puts him in a position where he is going to have to pay \$150,000 in insurance and would mean increasing his fees by a minimum of 30 per cent that would probably price him out of the market. Mr Dickson said that his 'farm is looking very pleasant and very enjoyable in comparison' and although he has the choice to retire at this stage in his career, young engineers do not:

But, again, younger engineers who I have mentored over the period are telling me that they are just closing up and going and getting a job in advertising because there is no risk, which leaves the industry very vulnerable to a lack of good skills over the next few years.²⁴⁷

- 4.45** Mr Brett Daintry, Director, Daintry Associates, observed that building surveyors and certifiers are part of an ageing industry and may be considering exiting the industry. Mr Daintry suggested that the insurance problems 'has encouraged many of them down that pathway already' particularly given the increases in premiums – some at 'big six-figure amounts'.²⁴⁸

- 4.46** The Australian Institute of Building Surveyors indicated that industry professionals are experiencing 'vastly increased prices' for insurance policies and 'big increases in excesses to the extent that one or two claims could wipe out a business completely'. The Institute advised that it has warned governments, industry and the public on numerous occasions about the impending failure of the market and it is 'deeply concerned' that the measures to date will not 'provide immediate relief for building surveyors faced right now with unworkable professional indemnity insurance renewals'.²⁴⁹

- 4.47** Further, the Australian Institute of Building Surveyors reported that it has 'received notifications from a number of building surveying firms who are closing their doors due to the impossibility of continuing to work with inadequate and unaffordable insurance cover'. The Institute provided an example of one medium sized building surveying firm that was unable to access any professional indemnity insurance, and the impact this type of case will have on the industry:

Once again, this stems from a lack of confidence in building regulations and quality around high rise projects and will most certainly mean fewer building professionals will be available in future to carry out work on buildings over three storeys, including cladding rectification works.²⁵⁰

²⁴⁶ Evidence, Mr Greg Ewing, General Manager for the Sydney Division, Engineers Australia, 27 August 2019, p 8.

²⁴⁷ Evidence, Mr Dickson, 16 August 2019, p 61.

²⁴⁸ Evidence, Mr Brett Daintry, Director, Daintry Associates, 16 August 2019, p 81.

²⁴⁹ Answers to questions on notice, Australian Institute of Building Surveyors, 9 September 2019, p 3.

²⁵⁰ Answers to questions on notice, Australian Institute of Building Surveyors, 9 September 2019, p 3.

4.48 The Association of Accredited Certifiers highlighted the 'sky-rocket' increase in premiums due to cladding issues, with almost all insurers pulling out of the industry, and a risk that this 'will lead to the construction industry grinding to a halt'. The Association commented that without insurance to cover work related to cladding this has left certifiers unable to 'advise building owners on what should happen to the cladding on their building nor on its removal', essentially leaving the issue of cladding 'unresolvable'.²⁵¹

4.49 Mr Sullivan also noted the impact on the ability for remediation work to be undertaken due to the exclusion of insurance relating to cladding work. However, Mr Sullivan advised this has been partly addressed by the changes announced by the NSW Government to enable this work to be undertaken without insurance:

When the insurers introduced exclusions that prevent claims from being able to be made around the cladding it became obvious to us very quickly that that would in fact inhibit remediation work as well. That is why the steps taken by Queensland, Victoria and New South Wales to exempt certifiers from having to hold unrestricted PII [professional indemnity insurance] should alleviate those concerns. As I understand it though, many certifiers are still uncomfortable operating in the remediation environment without some kind of professional indemnity insurance that will cover them specifically for that work.²⁵²

Extending professional indemnity insurance to other building practitioners

4.50 Inquiry participants called for all building professionals across the chain of responsibility to be required to hold professional indemnity insurance, to ensure that those responsible are held to account, and also drive down the cost of premiums by increasing the pool of policy holders. This supports a deeper and more sustainable pool of insurance premiums, greater spread of the risk in the industry, more levels of accountability and proportionate liability.

4.51 For example, Hornsby Shire Council suggested that all building practitioners should be 'appropriately accredited and have professional indemnity insurance'.²⁵³ Willoughby City Council also made this suggestion, stating that 'consideration should be given to the accreditation and professional indemnity insurance of every individual trade ensuring that those trades that sign off work are appropriately skilled and accountable for their work and trade'.²⁵⁴

4.52 The Association of Accredited Certifiers advised that central to restoring confidence is ensuring accountability of all building practitioners, by requiring more practitioners to be licensed and hold professional indemnity insurance:

Currently, only Accredited Certifiers are required to be accredited and hold Professional Indemnity Insurance. This means that those who carry out specific construction work are not as accountable as they should be for that work. Additionally, it skews the liability towards Accredited Certifiers, which has contributed to the current PI [professional indemnity] insurance crisis facing the industry today.

²⁵¹ Answers to questions on notice, Association of Accredited Certifiers, 6 September 2019, p 2.

²⁵² Evidence, Mr Sullivan, 12 August 2019, p 43.

²⁵³ Submission 33, Hornsby Shire Council, p 1.

²⁵⁴ Submission 44, Willoughby City Council, p 2.

To deliver the desired accountability across the entire sector, AAC strongly believes that more practitioners must be accredited or licensed and required to be covered by PI insurance.²⁵⁵

4.53 Commenting on builders in particular, Mr Lambert underscored that it is the builder that needs to be held responsible and accountable for their work and as an individual they need to be professionally insured, registered and subject to audit. He observed that this is not currently happening.²⁵⁶

4.54 Mr Dickson told the committee that by requiring all persons responsible for signing off the work to hold insurance it will increase the pool of insurance and split the cost, which could solve some of the current insurance market problems:

That chain of command and responsibility needs to involve insurance for not only the developer, the builder, the building foreman and the trades underneath that so that they are personally responsible for the work that they sign off and do. That then increases the pool of insurance, it splits the PI cost and it ensures that those people who are running the building industry all the way down the chain have an involvement that keeps them looking at the way they are doing the job and the way that the job is performed. I think that would go a long way to solving some of the problems that we are going to see in the future because of the way things are run at the moment.²⁵⁷

4.55 Further, Mr Dickson explained that in the end those seeking a remedy for building defects are trying to chase anyone that holds professional indemnity insurance, which then falls to the engineer or private certifier, and this is what is driving up the cost of insurance in this space. Mr Dickson suggested that each person at each part of the chain should be held responsible and should hold insurance and that directors should not be able to hide behind a company but personally hold that insurance.²⁵⁸

4.56 Ms Kathlyn Loseby, President NSW, Australian Institute of Architects, supported proportionate liability. However, Ms Loseby was of the view that professional indemnity insurance should be held against a company not just the individual as the cost of taking out this insurance is significant. Ms Loseby said that this is currently the case for architects where the insurance is held against the company who then nominates the architects who are held responsible, stating 'we actually think that that is better because the whole company, then, is responsible rather than an individual'.²⁵⁹

4.57 Mr Daintry stated that 'everybody has sought to avoid and duck liability in the process for two decades' which has left only the certifiers really accountable. Mr Daintry agreed that 'professional indemnity insurance should cover the company but it should also cover the individuals in the company' who 'should be personally liable through that process'.²⁶⁰

²⁵⁵ Submission 74, Association of Accredited Certifiers, p 2.

²⁵⁶ Evidence, Mr Daintry, 16 August 2019, p 78.

²⁵⁷ Evidence, Mr Dickson, 16 August 2019, p 61.

²⁵⁸ Evidence, Mr Dickson, 16 August 2019, p 63.

²⁵⁹ Evidence, Ms Kathlyn Loseby, President NSW, Australian Institute of Architects, 16 August 2019, pp 52-53.

²⁶⁰ Evidence, Mr Daintry, 16 August 2019, p 78.

4.58 Further, Mr Daintry expressed the view that the issues we are currently seeing regarding insurance with private certifiers 'was inevitable' given the amount of building defects arising. Mr Daintry added that back in 1998 he believed that the system 'would implode under the weight of insurance within a decade' and was surprised that 'it has stumbled on for 20 years – only because of multiple legislative amendments that have propped it up'.²⁶¹

4.59 When asked whether the Urban Development Institute of Australia supports an extension of the requirement to hold insurance including professional indemnity insurance, paid for by their members, Mr Steve Mann, Chief Executive Officer, Urban Development Institute of Australia, advised:

I think there needs to be the right balance in that piece but there needs to be certainty and the developer is ultimately responsible, together with the practitioners that have helped and the construction, to deliver the product that he said he was selling. Absolutely.²⁶²

4.60 In its *Design and Building Practitioners Bill 2019*, the NSW Government has included the requirement that design practitioners, principal design practitioners and building practitioners (as stipulated in the bill and regulations) are to be 'indemnified by insurance that complies with the regulations against any liability to which the practitioner may become subject as a result of providing the declaration or doing the work'.²⁶³ The *Design and Building Practitioners Bill 2019* is discussed further in chapter 6.

Home Building Compensation scheme

4.61 This section discusses the Home Building Compensation scheme, which is the scheme of last resort for homeowners if they are unsuccessful in claiming against statutory warranties. The scheme currently does not apply to multi-storey buildings that are higher than three storeys and contain two or more dwellings. Inquiry participants raised concerns relating to the absence of private insurers in the scheme, the exclusion of high rise buildings and the current deficit leading to higher premiums.

Overview of the Home Building Compensation scheme

4.62 The Home Building Compensation Fund is a statutory insurance scheme for residential building work in New South Wales. As mentioned in chapter 2, it was first introduced as a government-run scheme in 1972 and was then privatised in 1997 under the Home Warranty Insurance Scheme. In July 2010, as a result of private insurers withdrawing from the market the NSW Government resumed management of the scheme. Currently the regulatory functions of the scheme are managed by the State Insurance Regulatory Authority (SIRA)

²⁶¹ Evidence, Mr Daintry, 16 August 2019, p 77.

²⁶² Evidence, Mr Steve Mann, Chief Executive Officer, Urban Development Institute of Australia, 27 August 2019, p 39.

²⁶³ NSW Government, *Design and Building Practitioners Bill 2019*, public consultation draft, 2 October 2019, pp 7-11.

which oversees Insurance and Care NSW (icare) as the single insurance provider for the scheme.²⁶⁴

- 4.63** Insurance under the scheme is compulsory for certain classes of residential building work with a contract price exceeding \$20,000.²⁶⁵ It is the responsibility of the holder of the contractor licence to take out a policy of insurance and this must occur before a contractor requests or receives any payment for the work, including a deposit, and before any work is undertaken. A certificate of insurance must be provided by the licensed contractor to the home owner or consumer requesting the work.²⁶⁶
- 4.64** There are a number of exemptions to the scheme where work is not required to have a policy of insurance and this is detailed in the NSW Government submission. In particular, since 2003 construction of multi-storey buildings that are higher than three storeys and contain two or more dwellings are exempt from insurance under the scheme. This exemption also applies in other states and territories in Australia.²⁶⁷
- 4.65** Since 2002, claims against the Home Building Compensation scheme are made as a last resort when the holder of the contractor licence is unable to compensate or rectify work under statutory warranties as they have either died, disappeared (cannot be found in Australia), become insolvent, or their licence is suspended for failing to comply with a court or tribunal order to compensate the home owner that is making the claim.²⁶⁸
- 4.66** During the financial year of 2017-18 the total number of certificates of insurance issued under the scheme was 78,440, a seven per cent increase from the previous financial year. The total premium reported in the 2017-18 financial year was \$132 million. In this period there were 762 notifications of loss²⁶⁹ and 316 claims lodged, with \$55 million in payments made on approximately 700 claims. Of all claim payments made, \$32 million related to major defects.²⁷⁰ However, despite paying out only \$55 million last financial year the scheme also reassessed its liability for past claims years and future costs for premiums sold in the last financial year. As a result it reported a record deficit in the 2019 financial year of \$201.6 million.²⁷¹

²⁶⁴ NSW Fair Trading, *Reform of the Home Building Compensation Fund*, discussion paper, 2015, pp 7, 10 and 47.

²⁶⁵ The contract price of \$20,000 includes GST and if a contract price is not known than insurance is required if the reasonable market cost of the labour and material exceeds \$20,000 including GST. Submission 132, NSW Government, p 26.

²⁶⁶ Submission 132, NSW Government, p 26.

²⁶⁷ Submission 132, NSW Government, p 26.

²⁶⁸ Submission 132, NSW Government, p 27.

²⁶⁹ Not all notifications of loss become a claim. Notifications of loss can be finalised with no claim lodgement, for example if a home owner succeeds in obtaining remedy from their builder while they are still solvent. Submission 132, NSW Government, p 32.

²⁷⁰ Submission 132, NSW Government, pp 31-32.

²⁷¹ Answers to questions on notice, Ms Donnelly, 29 August 2019, p 6.

- 4.67** The scheme is currently in deficit: in addition to the most recent 2018-19 deficit total of \$201.6 million,²⁷² the accumulated deficit of the scheme is \$636.9 million (\$201.6 million plus an accumulated loss of \$435.3 million to 30 June 2018).²⁷³
- 4.68** At a hearing, Ms Carmel Donnelly, Chief Executive, SIRA, indicated that the scheme 'is still not a fully funded scheme', however advised that since the last legislative reforms of the scheme in 2017 the financial situation has improved. Ms Donnelly explained that they are gradually implementing appropriate assessments for setting adequate premiums for building categories in line with the risk for the type of building and the potential claims cost. Ms Donnelly advised that this will take a number of years and currently Treasury is covering the cost, particularly for claims arising from the years prior to the 2017 reforms where premiums were not adequate.²⁷⁴ Ms Donnelly indicated that icare expect to reach break-even premiums for post reform policies by 2021.²⁷⁵ This evidence was given before the record 2018-19 deficit was announced. The scheme is currently designed to sell Home Building Warranty insurance below cost as a subsidy to the construction industry.

Participation of private insurers

- 4.69** There are currently no private underwriters operating under the Home Building Compensation scheme and icare is the only insurer providing this service. Inquiry participants discussed the barriers to private insurers re-entering the scheme.
- 4.70** Ms Donnelly, Chief Executive of SIRA, advised that icare is the only provider in the market as the commercial market is not willing to underwrite that risk, commenting that 'it is a market failure ... in that sense'.²⁷⁶
- 4.71** Some inquiry participants had the view that restoring confidence in the quality of buildings will fix the issues with the insurance market. For example, Mr Robertson underscored that high-risk construction is 'fundamentally uninsurable' and that 'people are focusing on resolving the wrong thing, trying to make insurers insure the uninsurable, rather than making sure that something is done about construction into the future that makes claims on insurance less likely'.²⁷⁷

²⁷² Approximately \$104.6 million of the \$201.6 million loss in financial year 2018-19 relates to policies that icare inherited and remain under-priced from inception. The remaining \$97 million loss is on the portfolio that was partly repriced during financial year 2018-19 and further price increases are scheduled to be enacted in 2019-20 and 2020-21. Answers to questions on notice, Ms Donnelly, 29 August 2019, p 6.

²⁷³ Answers to questions on notice, Ms Carmel Donnelly, Chief Executive, State Insurance Regulatory Authority, 29 August 2019, p 6.

²⁷⁴ Evidence, Ms Carmel Donnelly, Chief Executive, State Insurance Regulatory Authority, 12 August 2019, pp 15-16.

²⁷⁵ Evidence, Ms Donnelly, 12 August 2019, p 15.

²⁷⁶ Evidence, Ms Donnelly, 27 August 2019, p 76.

²⁷⁷ Evidence, Mr Robertson, 27 August 2019, p 31.

- 4.72** Similarly, Mr Terry Jones, a long term strata committee member, commented that the best way to fix the insurance problem 'is to make sure the buildings get built right the first time'. He noted that this 'does not mean that there will be zero defects, but there has to be some level of defects beyond which builders, certifiers, architects ... loses their licence if they do it too often'.²⁷⁸ Licensing is discussed in chapter 5.
- 4.73** When questioned as to what would encourage the insurance industry to re-engage with the scheme, Mr Sullivan responded that a range of measures would be needed, including enabling insurers to be involved at the planning stages of a construction project:
- But insurers would need to be involved in the design and construct process, as would a number of other stakeholders other than the developer and the approver. This way insurers would have the confidence right from the plan and approval stage through to what's been built stage that they understand the building, they understand the risks and if something is likely to be incorporated into the building that puts it beyond their risk appetite that they have a seat at the table to say this will not be acceptable.²⁷⁹
- 4.74** The committee heard a range of evidence as to whether private insurers are likely to engage with the scheme. In evidence, Mr Chandler told the committee that 'the insurers are lining up to come back in' to the scheme.²⁸⁰
- 4.75** When Ms Rose Webb, Deputy Secretary, Better Regulation Division and NSW Fair Trading Commissioner, was asked to respond to this comment, she stated: 'I cannot agree with it. I do not know for sure'. Ms Webb advised that she understood 'Mr Chandler to be talking from his experience more generally in the market before he had joined the government, because he had been doing some work in that area'.²⁸¹
- 4.76** Mr Peter Dunphy, Executive Director, NSW Fair Trading Specialist Services, Department of Customer Service, clarified that from meetings with the Insurance Council of Australia 'one of the things that they did say was that the insurance industry still had an appetite for building insurance in the more general terms', however there are pockets where there is no appetite, such as for private certifiers (as discussed earlier in this chapter).²⁸²
- 4.77** Ms Donnelly gave evidence that 'there are some interested parties in terms of the Home Building Compensation Fund', given the trajectory for icare to be charging break-even premiums. Further, Ms Donnelly advised that the government has introduced legislative reform to make the scheme attractive to new entrants, including removing the ban on private underwriters to enter the scheme, working on bringing the scheme back into surplus and having it priced at a 'fair rate' for the different types of projects.²⁸³

²⁷⁸ Evidence, Mr Terry Jones, long term strata committee member, 12 August 2019, p 31.

²⁷⁹ Evidence, Mr Sullivan, 12 August 2019, p 48.

²⁸⁰ Evidence, Mr Chandler, 16 August 2019, p 18.

²⁸¹ Evidence, Ms Rose Webb, Deputy Secretary, Better Regulation Division and NSW Fair Trading Commissioner, 27 August 2019, p 71.

²⁸² Evidence, Mr Peter Dunphy, Executive Director NSW Fair Trading Specialist Services, Department of Customer Service, 27 August 2019, pp 71-72.

²⁸³ Evidence, Ms Donnelly, 27 August 2019, pp 72 and 77-78.

Exclusion of high-rise buildings

- 4.78** As noted earlier in the chapter multi-storey buildings that are higher than three storeys and contain two or more dwellings are exempt from the Home Building Compensation scheme.
- 4.79** Ms Donnelly provided the history as to why insurance of high-rise buildings were removed from the scheme. In 2002 following a number of global issues, such as the collapse of HIH Insurance and the terrorist attacks of 11 September 2001, a number of states introduced an exemption for insurance on high-rise multi-unit developments. However, New South Wales did not proceed with the exemption as other states did and decided to underwrite private insurance. Across 2002-03 private insurers started to exit the market, leaving only one insurer. Subsequently an exemption was introduced in 2003 for insurance on the construction of residential buildings more than three storeys high and containing two or more dwellings. This issue was revisited in 2012 where stakeholders were divided as to whether this exemption should be continued. In response, the NSW Government introduced the Strata Building Bond and Inspections Scheme, discussed later in this chapter.²⁸⁴
- 4.80** Many submission authors expressed alarm at the exemption of high-rise buildings. Comments include:
- 'Under the current regime, the construction of multi-storey buildings, which is the most complicated and risky construction, is the least regulated construction'.²⁸⁵
 - 'Currently, developers can employ unlicensed, uninsured, unqualified people to construct multi-storey buildings and therefore have less insurance and quality control than single occupancy dwellings'.²⁸⁶
 - 'It seems extraordinary that given the government's reliance on the residential development market (especially the hi-rise residential market) to meet our growing housing needs and as a generator of economic wealth and state revenue; we find that buyers of hi-rise units have little consumer protection'.²⁸⁷
 - 'The fact that home building compensation cover is no longer required for buildings of four or more storeys is inequitable and erodes the confidence of purchasers in the residential apartment market ... The home building compensation cover (as a last resort insurance) for all residential property (i.e. to remove the exclusion for properties of 4 or more storeys) should be re-introduced'.²⁸⁸
 - 'The purchasers of apartments in building complexes greater than three storeys in rise have been left completely unprotected since 2003'.²⁸⁹
 - 'I believe that owners of apartments in buildings of above three storeys should have the right to safely built buildings and the same insurance rights as any other home owner'.²⁹⁰

²⁸⁴ Answers to questions on notice, Ms Donnelly, 12 August 2019, pp 1-4.

²⁸⁵ Submission 70, Stanton Legal, p 5.

²⁸⁶ Submission 44, Willoughby City Council, p 2.

²⁸⁷ Submission 73, Shelter NSW, p 3.

²⁸⁸ Submission 79, City Future Research Centre, UNSW Sydney, p 1.

²⁸⁹ Submission 130, SecureBuild, p 1.

²⁹⁰ Submission 89, Mr Aidan Ellis, p 2.

- 'The removal of statutory requirements for developers to provide insurance for all buildings over three storeys in height in 2002 has had serious, and in some cases, catastrophic effects on the lives of many apartment owners'.²⁹¹

4.81 Associate Professor Easthope emphasised that 'the consumer protections on a four-or-more storey, multi-unit strata title housing in New South Wales are terrible' and are poorer than other products, for example used cars and toasters.²⁹²

4.82 According to Associate Professor Easthope, the only reason she can see that buildings of four or more storeys are not required to have insurance 'is that no one is willing to underwrite that insurance'. Associate Professor Easthope told the committee that the government can't 'expect private insurers to underwrite that insurance when that risk is not a risk that is feasible for them to take' and that the solution to ensure private insurers come back into that market would be 'to reduce the risk by reducing the incidence of defects and, therefore, claims'.²⁹³

4.83 The Strata Community Association NSW proposed a seven-point plan to restore confidence in the system and address the impacts of past failures. One of the Association's recommendations was the 'reintroduction of a robust and accessible Home Owners' Warranty Insurance scheme for all levels of strata development, removing the current four-storey exclusion'.²⁹⁴

4.84 However, Ms Hearn highlighted that 'homeowners in apartments in high rise buildings are unlikely to see the return of the home warranty insurance any time soon, because the fund clearly cannot sustain it'.²⁹⁵ Ms Hearn highlighted that the ongoing changes to the scheme effectively shifted the risks away from builders and developers to 'innocent' consumers:

Home warranty insurance for buildings over three-storeys was removed in 2003 and there have been various amendments to the home warranty provisions, which make it extraordinarily complex and difficult to use. 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.²⁹⁶

4.85 During a hearing, Ms Donnelly noted the concerns from stakeholders that the Home Building Compensation scheme does not provide coverage for high-rise buildings. Ms Donnelly indicated that she intends to hold discussions with the Building Commissioner on this issue, 'paying very close attention to the submissions and to what witnesses say before this inquiry'. Ms Donnelly further highlighted that 'most of the other jurisdictions have schemes that are quite similar to New South Wales', however noted that in Tasmania it is a voluntary scheme and in Queensland it is a first-resort scheme.²⁹⁷

²⁹¹ Submission 142, Better Planning Network Inc, p 7.

²⁹² Evidence, Associate Professor Easthope, 16 August 2019, p 36.

²⁹³ Evidence, Associate Professor Easthope, 16 August 2019, p 35.

²⁹⁴ Answers to questions on notice, Strata Community Association NSW, 9 September 2019, p 1.

²⁹⁵ Evidence, Mr Hearn, 12 August 2019, p 40.

²⁹⁶ Evidence, Ms Hearn, 12 August 2019, p 32.

²⁹⁷ Evidence, 12 August 2019, pp 13-14.

Increase in premiums

- 4.86** Another issue raised by stakeholders is the significant increase in premiums under the Home Building Compensation scheme.
- 4.87** The Housing Industry Association noted that changes to the Home Building Compensation scheme to date 'have done nothing to encourage the scheme to break even' and 'as a result, from November 2016 significant and consistent increases to premiums have been imposed on the industry'.²⁹⁸
- 4.88** SecureBuild compared the Home Building Compensation scheme in New South Wales to the schemes in Victoria and Queensland, attributing the high premiums to the 'poorer performance' of the New South Wales scheme. SecureBuild indicated that:
- the New South Wales scheme is generally 'performing poorly'
 - the average claim costs in both Victoria and Queensland are significantly lower than New South Wales
 - there is a much higher level of claims attributable to 'major defects' in New South Wales compared to the other two states
 - as a result of the scheme's comparatively poorer performance, the premiums for consumers in New South Wales are substantially higher than the other two states.²⁹⁹
- 4.89** SecureBuild advised that Home Building Compensation premiums in New South Wales now represent over one per cent of the contract price for a single dwellings, and in excess of three per cent for multi-dwellings. It reported that 'premiums have risen by 60 per cent over the past two years with icare indicating that a further premium increase will occur by the end of the 2018-19 financial year'.³⁰⁰ The committee did not have the benefit of evidence comparing the less comprehensive building regulation environment in New South Wales and its impact on the different insurance outcomes in these two other states which both have more robust regulation and more robust insurance markets.
- 4.90** Mr Brian Seidler, Executive Director, Master Builders NSW, reported to the committee that they have seen 'massive increases' in premiums over the last few years, where they are seeing prices drop for standalone homes and duplexes and an increase in premiums for multi-storey buildings (up to three levels) where the issues are occurring:

Over the last few years we have seen massive increases. In the last adjustment I think we have seen a reassessment of risk, where standalone homes and duplexes have been reduced for what we call medium density—the three-level walk-ups where a lot of the problems are occurring, particularly if you take Zetland into consideration—they are increasing. Certainly the premiums are increasing to at least look after the payouts—and we have a lot of payouts.³⁰¹

²⁹⁸ Submission 140, Housing Industry Association, p 6.

²⁹⁹ Submission 130, SecureBuild, pp 5-6.

³⁰⁰ Submission 130, SecureBuild, p 7.

³⁰¹ Evidence, Mr Brian Seidler, Executive Director, Master Builders NSW, 27 August 2019, p 46.

- 4.91** When questioned as to how to address increasing premiums, Mr Seidler suggested that those who are causing the problems should attract some sort of extra payment. He said that at the moment it is the good builders who are penalised and who have to pay the higher premiums.³⁰²
- 4.92** Ms Donnelly from SIRA explained that icare has been taking a more granular approach to pricing projects and this means that for some projects the premiums have been adjusted downwards to reflect the lower risk, and for projects where the risk is higher, the premiums are going to continue to increase. Ms Donnelly added that this risk-based pricing approach aims to ensure that builders fully carry the risk, and have incentives to manage that risk.³⁰³
- 4.93** Ms Donnelly provided further information to the committee on the scheme's anticipated financial performance over the next few years and how this is expected to impact premiums. Ms Donnelly advised that essentially the scheme can be viewed as two portfolios: pre-reform portfolio being insurance written between financial years 2010-11 to 2017-18, and post-reform portfolio being insurance written in financial year 2018-19 and onwards. In looking at the pre-reform portfolio, Ms Donnelly advised that \$583 million of its \$636.9 million accumulated deficit arises from anticipated future liabilities of icare's pre-reform legacy portfolio. Ms Donnelly told the committee that the NSW Government has provided some funding to help manage this shortfall.³⁰⁴
- 4.94** In terms of the post-reform portfolio, it is intended that this portfolio will operate on a break-even basis by 2021 across all classes of constructions (that is classes under four storeys) without the need for further support from Treasury. At the moment the majority of construction projects are being charged break-even premiums and icare plans to raise rates for multi-storey units under four storeys through four tranches across the two financial years to June 2021.³⁰⁵ Ms Donnelly advised that this staggered approach would be 'the reason why there would be some builders who are noticing pricing increases'.³⁰⁶
- 4.95** Ms Donnelly provided the following figure that shows the change in premiums across the pre-reform and post-reform portfolios, that is June 2015 to June 2019.

³⁰² Evidence, Mr Seidler, 27 August 2019, p 46.

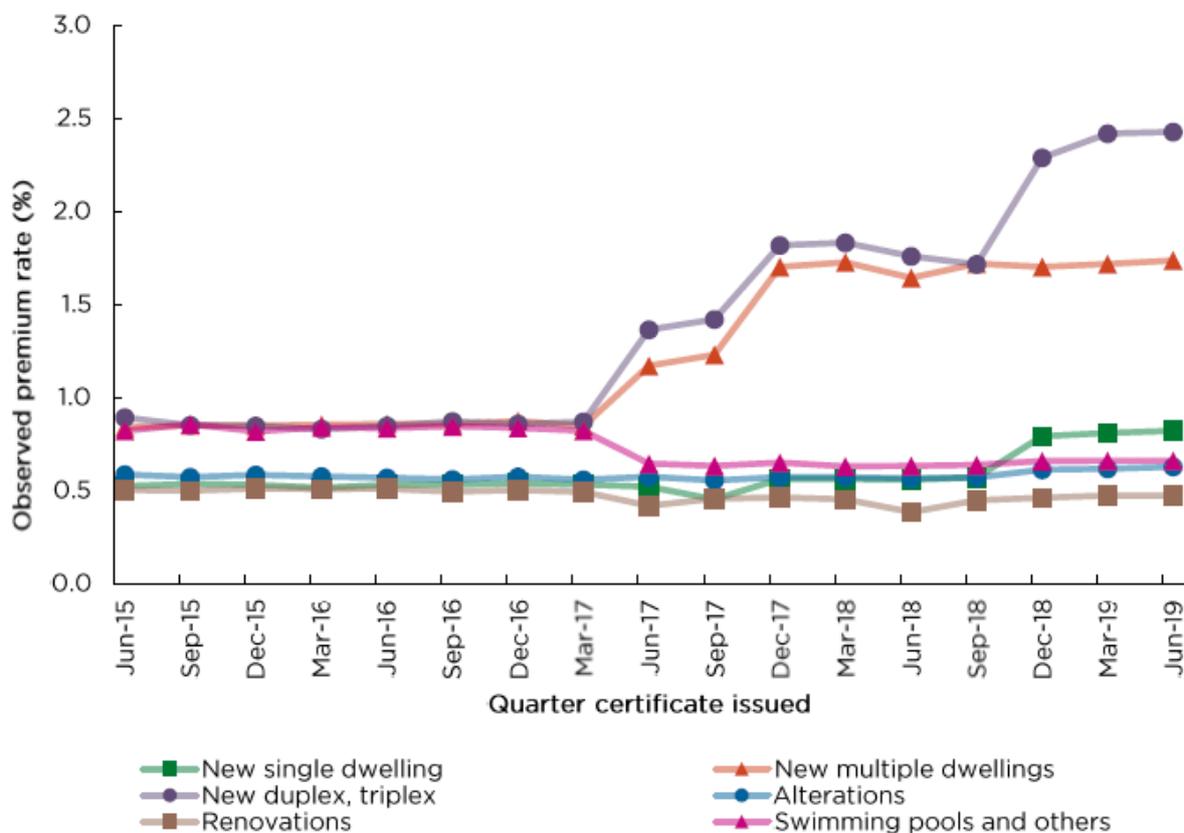
³⁰³ Evidence, Ms Donnelly, 27 August 2019, p 75.

³⁰⁴ Answers to questions on notice, Ms Donnelly, 6 September 2019, p 2.

³⁰⁵ Answers to questions on notice, Ms Donnelly, 6 September 2019, p 2.

³⁰⁶ Evidence, Ms Donnelly, 27 August 2019, p 76.

Figure 1 Premium changes between June 2015 and June 2019



Answers to questions on notice, Ms Donnelly, 6 September 2019, p 3.

Strata Building Bond and Inspections Scheme

4.96 This section outlines the Strata Building Bond and Inspections Scheme, as mentioned in chapter 2, and stakeholder concerns that the defects bond as it currently stands is inadequate.

Overview of the Strata Building Bond and Inspections Scheme

4.97 The Strata Building Bond and Inspections Scheme commenced on 1 January 2018 and applies to buildings over three storeys. The scheme is designed to incentivise developers and builders to build correctly and to rectify any issues early in the life of the building. The NSW Government advised that the scheme is intended to assist owners' corporations, builders and developers to work collaboratively to rectify defects early with the aim of reducing costs to all parties involved, minimising time delays and reducing the incidence of drawn-out and expensive legal action.³⁰⁷

³⁰⁷ Submission 132, NSW Government, p 37.

- 4.98** The scheme does not replace the rights of owners' corporations, developers or builders to pursue legal action under any other law. It also does not apply to building work that is required to obtain insurance under the Home Building Compensation scheme (buildings that are under four storeys). The scheme only applies to building work carried out for the purpose of, or contemporaneously with, the registration of a strata plan or subdivision of a development lot.³⁰⁸
- 4.99** Under the scheme, the developer of any new high-rise strata building must pay a bond of two per cent of the contract price of the building work to the Secretary of the Department of Customer Service. This bond is held in a Trust until building inspections are undertaken to detect any defects and commence rectification.³⁰⁹
- 4.100** A developer is required to appoint and pay for an 'independent building inspector'³¹⁰ to undertake an inspection of the building work and provide an interim defect report, no earlier than 15 months and no later than 18 months after completion of the building work. If defects are identified in this report then the builder can meet with the owner's corporation to attempt to rectify them if they so choose.³¹¹
- 4.101** The developer is then required to arrange a further inspection of the building work, no later than 18 months from the date of completion. This final inspection and report will assess any defects identified from the interim report and whether these have been rectified. The report cannot assess any building defects not already identified in the interim inspection report. The Secretary of the Department of Customer Service considers the final inspection report to determine the amount of the bond to be released, in whole or in part, either back to the developer or to the owners' corporation, depending on whether there are any outstanding defects. As at 12 July 2019, two building developers had lodged building bonds under the scheme.³¹²

Adequacy of the scheme

- 4.102** Inquiry participants raised a number of concerns with the Strata Building Bond and Inspections Scheme, including the time period for identifying defects and adequacy of the two per cent bond.

³⁰⁸ Submission 132, NSW Government, p 37.

³⁰⁹ Submission 132, NSW Government, p 38.

³¹⁰ The owners' corporation must meet to decide whether or not to agree to the proposed appointment of the inspector by the developer. The developer, if they are an owner in the strata scheme cannot vote in any meeting of the owners' corporation if a matter relates to building defects. If a developer is unable to appoint a building inspector, then the Secretary of the Department of Customer Service will appoint the inspector. Submission 132, NSW Government, p 38.

³¹¹ Submission 132, NSW Government, p 38.

³¹² Submission 132, NSW Government, pp 38-39

- 4.103** Ms Stiles pointed to several deficiencies and told the committee that the scheme is 'destined to fail':

Taking that a step further, the system that has been developed by New South Wales Fair Trading is destined to fail. Putting aside the percentage, it is utterly destined to fail. The developer engages the inspector. They are not even an expert. There are no minimum requirements. The developer actually agrees the scope of works with the inspector.³¹³

- 4.104** Associate Professor Easthope commented that although the requirement for an initial defects inspection is excellent, the time period for identifying defects is too short and may rely on a visual inspection:

But the problem is that not all defects will become apparent at that point and that is likely to be a visual inspection. Many defects are not picked up during a visual inspection. They are also unlikely to be picked up within two years of completion of the building. We are not talking two years from when someone buys, we are talking two years from completion of the building ... The time frame is too short ...³¹⁴

- 4.105** Further, Associate Professor Easthope reported that in many cases the two per cent bond is inadequate, 'especially where there is a systemic defect that repeats across the development'.³¹⁵

- 4.106** The inadequacy of the two per cent amount for the bond was raised by several other inquiry participants. For example, Mr Richard Devon, an owner in The Landmark building in Charlestown, commented that 'the two per cent bond in our case is totally inadequate'.³¹⁶ Mr Aidan Ellis also commented on the situation faced by owners in the Landmark Building, particularly the inadequacy of the bond:

The proposal for a 2% bond to be placed to rectify defects occurring in the first two years of occupation is inadequate. The quote for rectification in The Landmark Building was over \$5,000,000.00 in 2016 which was nearly 25% of the build cost and other buildings are similarly and more seriously affected. Also, many large buildings are only partially occupied at the end of two years and it often takes longer than this for serious defects to manifest.³¹⁷

- 4.107** Ms Hearn from the Owners Corporation Network stated that the two per cent defects bond is 'manifestly inadequate'.³¹⁸ In its submission, the Owners Corporation Network argued that it is not uncommon for rectification costs to be as high as 10 per cent of the contract cost. It highlighted that 'such a scheme would have been useless protection for the owners of Opal Tower if the builder was not financially strong enough to survive claims against the statutory warranties'.³¹⁹

³¹³ Evidence, Ms Stiles, 12 August 2019, p 34.

³¹⁴ Evidence, Associate Professor Easthope, 16 August 2019, p 34.

³¹⁵ Evidence, Associate Professor Easthope, 16 August 2019, pp 32 and 34.

³¹⁶ Evidence, Mr Richard Devon, owner, The Landmark Building, Charlestown, 12 August 2019, p 22.

³¹⁷ Submission 89, Mr Aidan Ellis, p 2.

³¹⁸ Evidence, Ms Hearn, 12 August 2019, p 34.

³¹⁹ Submission 117, Owners Corporation Network, p 9.

4.108 The Owners Corporation Network concluded that 'clearly, if this scheme is to be retained then the size of the bond and length of time for defects to be identified should be significantly increased'.³²⁰

4.109 The National Fire Industry Association also noted that the two per cent bond 'may not be enough to cover costs of correcting core defects of a building that are not evident in the interim and final reports'. The Association highlighted that 'certain defects may get magnified over time through wear and tear' and may not be evident at the time of the initial and final report.³²¹

4.110 Willoughby City Council contended that the two per cent bond is inadequate and called for an increase to 10 per cent to act as a 'strong deterrent' to substandard work:

The State Government recently required a modest 2% of building costs to be kept as a bond for the repair of building defects. Recent reports of serious structural and life threatening defects in multi storey buildings highlight the deficiency of a 2% bond. The bond should be an active and very strong deterrent to substandard building work and the subsequent disruption and rehousing of occupants, significant repair/rebuilding work and loss of investments by owners. A figure of 10% would not be considered unreasonable.³²²

4.111 When questioned on what amount would be appropriate and who should pay, Ms Stiles highlighted that in commercial construction the developer typically retains 10 per cent from the builder. However, Ms Stiles emphasised that they are not putting this model forward for residential buildings. Ms Hearn clarified that 'it is very difficult to adjust or fine tune the current system' and suggested a different idea of decennial liability and insurance where everybody involved in the construction is on the insurance policy and when a defect claim is made, it is made directly to the insurer who then considers who is liable. Ms Hearn added that under this model 'you could keep the two per cent bond and just slot the decennial insurance model into major defects', although noted there are currently issues with the definition of major and minor defects (discussed earlier in the chapter).³²³

4.112 Commenting on the burden on developers and builders of requiring a 10 per cent bond, Ms Fisher argued that you should not be building if you are not able to put aside at least 10 per cent of the property value of construction:

I think people should not be able to build if they cannot put 10 per cent away of the property value of the construction. What is it at the moment? 2 per cent. Then you should not be building. I read an article the other day that for someone to build an apartment complex you need to sell 80 per cent of the apartments before you can even start getting finance. Well, hold on. If you have not got the finance up front you should not even be building. I think that is where it comes down to.³²⁴

³²⁰ Submission 117, Owners Corporation Network, p 9.

³²¹ Submission 61, National Fire Industry Association, p 12.

³²² Submission, Willoughby City Council, p 3.

³²³ Evidence, Ms Hearn and Ms Stiles, 12 August 2019, p 34.

³²⁴ Evidence, Ms Fisher, 16 August 2019, p 73.

- 4.113** The Building Commissioner, Mr Chandler, described the two per cent bond as a 'get out of jail free' card for the substandard developers that this scheme is trying to target. However, he noted that it is a burden for those developers that continue to do the right thing and 'are really great developers'.³²⁵

Committee comment

- 4.114** The committee believes that the problems in the residential building insurance market are a consequence of a fundamental failure of building standards. It comes down to a failure of government to regulate. We are deeply concerned that the current insurance market environment is already unsustainable – and potentially we have only just scratched the surface of the magnitude of building defects across New South Wales.
- 4.115** What is so concerning is the number of issues across all elements of the insurance market involved in the building sector. It is clear that a coordinated approach by government is urgently needed to fix the failures of the statutory warranty, professional indemnity and Home Building Compensation schemes.
- 4.116** In terms of the statutory warranties, the committee believes that the two year timeframe for minor defects, and six years for major defects are grossly inadequate, particularly when it can take many years for some of these defects to appear. We also note that the definition for 'major defects' is causing difficulties and creates a window for more disputes between a homeowner and developer or builder.
- 4.117** The committee notes the evidence from the Building Commissioner that he plans to create a situation in New South Wales where there is an option for developers to offer a 10-year guarantee on a structure by 2023, without making any legislative changes. The committee questions why such a model cannot be implemented now.
- 4.118** While the goal must be to rapidly arrive at an industry with sufficient quality assurance and standards that all homeowners, regardless of whether they are in a stand-alone dwelling or a multi-storey high rise, will have the benefit of a sufficient warranty period for all building defects this will clearly take time to implement. Simply mandating this now will see not a single private insurer enter the market and the inevitable expansion of the state-subsidised Home Warranty scheme run by icare. This will either cripple icare (and ultimately New South Wales taxpayers) with multi-billion deficits to meet the claims for the defects that are so endemic in the industry, or see premiums being offered at cripplingly high rates that will halt a significant part of the residential construction industry. Indeed it may do both.
- 4.119** The answer to this dilemma is to tackle both construction quality and insurance coverage as two parts of the one puzzle. This will require immediately moving to increase building standards by implementing the recommendations in the Shergold Weir and Lambert reports and as those improvements flow into the industry systematically increasing the level of insurance coverage. Done well with a government genuinely committed to the task, this can be achieved for all buildings three stories and below as the Shergold Weir report recommendations are implemented. Given the scale of the task it will likely take additional time to ensure there is sufficient confidence in the high rise sector for these insurance benefits

³²⁵ Evidence, Mr Chandler, 16 August 2019, p 17.

to be mandated for residential towers greater than three stories. This should be achieved as soon as reasonably practicable.

- 4.120** The committee therefore recommends 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. We also recommend that the NSW Government consider amending the definition of 'defect' to provide more clarity for home owners.
-

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:

- 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.

- 4.121** What is clear to the committee is that the industry is stuck in a vicious cycle, with some operators setting up \$2 companies that build as cheaply and quickly as possible and then phoenixing once a building is complete. What is left is a defective building: it falls to those with professional indemnity insurance, such as private certifiers, to pay the bill.
- 4.122** The committee notes the suggestion put forward by inquiry participants that all professionals involved with construction of a building be held to account by holding professional indemnity insurance. This was recommended in the Shergold Weir report and we acknowledge this is one of the proposals put forward by the NSW Government in its *Design and Building Practitioners Bill 2019*. The committee strongly agrees with this suggestion and this is considered further in chapter 5.
- 4.123** In relation to the Home Building Compensation scheme, the committee notes that the scheme has had a long challenging history. Private insurers lost confidence in this scheme many years ago. The scheme's failure is reflected in its deficit, which is now sitting at \$636.9 million.
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- 4.124** As mentioned we believe the pinch point is multi-storey buildings. We are currently in a position where private insurers and even the government are not willing to take on that risk. This leaves innocent homeowners bearing all of the risk and the financial cost when things go wrong, as we have seen with the Mascot Towers incident. We believe that Recommendations 7 and 8, if implemented well, will provide the protection that homeowners deserve.
- 4.125** We note the government's evidence that there is some interest from private insurers to re-enter the scheme, however we cannot see how this would be the case given the current failures. It is difficult to see the scheme reach a sustainable or break-even basis without huge increases in premiums and continual funding from taxpayers.
- 4.126** The committee acknowledges that the government is attempting to rectify some of the issues undermining the insurance market for the residential building and construction industry with the introduction of the Strata Building Bond and Inspections Scheme. 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.
- 4.127** We strongly agree that builders and developers should not be in the game if they cannot afford to put aside an adequate bond. We have seen the consequences where dodgy developers are building complex multi-storey apartment blocks. It is unacceptable that those with the least skills and experience could be attracted to these high-risk projects given they are not required to take out Home Building Compensation insurance.
- 4.128** We believe that a defects bond of two per cent of the contract price of building work is inadequate. Therefore the committee recommends that the defects bond be increased. 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.

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.

- 4.129** The committee believes that the fundamental issue that is causing the failure of the insurance market for residential buildings is a lack of building quality, 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. The first step is fully implementing the recommendations in the Shergold Weir and Lambert reports, as discussed in our final chapter, chapter 7.

Chapter 5 Regulation of building practitioners

This chapter considers licensing and registration of the building and construction industry and the role of government in regulating this area. The chapter focuses on the concerns raised by stakeholders regarding the inconsistent requirements for building practitioners to hold a licence, be registered and be held to account, and calls for a universal registration scheme. Finally, it outlines the government's proposals in addressing these issues.

Adequacy of the current licensing and registration system

5.1 Concerns were raised by inquiry participants regarding the inconsistent licensing and registration requirements across the various professionals involved in the building and construction industry, and the impact on accountability within the industry. This section outlines the concerns raised by key stakeholders relating to electrical, plumbing, fire safety, engineering and building practitioners. The term 'building practitioners' is used to refer to all personnel involved from the start to the end of the building construction process.

Electricians

5.2 The Electrical Trades Union provided a submission to this inquiry and appeared before the committee raising its concerns with substandard regulation and licensing.

5.3 In its submission, the Electrical Trades Union stated that 'a major flaw in the current NSW system is a lack of any statutory authority assessing the skills of licence applicants, relying instead upon information from the licence's employers and past educational institution/s'. It stated that there was no rigorous or independent assessment in place to check if licensees were suitably qualified. This, it argued, 'exposes serious loopholes' so that employers may overstate an employees' abilities on a licence application or private educators could apply less rigorous standards in assessing students. The Union also noted that this was particularly concerning as the sort of work that requires a licence under the *Gas and Electricity (Consumer Safety) Act 2017*, such as electrical wiring work, was highly hazardous and complicated.³²⁶

5.4 Further, the Electrical Trades Union highlighted that 'when the regulatory enforcement and standards of licensing for electricians are compromised, we see the building industry try to game the system to cut corners', which 'leaves consumers, strata committees and the public with inferior and, at times, dangerous and costly outcomes'.³²⁷

5.5 The Electrical Trades Union outlined the following key points:

- there are risks to the public and individuals which are inherent in electrical products and installations and central to the safety and quality of any building is the effectiveness and safety of these products

³²⁶ Submission 77, Electrical Trades Union of Australia, NSW Branch, pp 5-6.

³²⁷ Submission 77, Electrical Trades Union of Australia, NSW Branch, p 1.

- the best way to manage those risks and hazards is to ensure that only individuals that are trained, skilled and licensed carry out electrical installations, however, currently in New South Wales there is no independent safety regulator overseeing the state's electrical industry
- licensing and other regulatory measures only mitigate risk effectively through proper oversight and enforcement by an adequately resourced and dedicated regulator
- a lack of quality assurance in the private training sector, accompanied by an absence of examination in the electrician licensing process pose a significant threat to future safety.³²⁸

5.6 In terms of the oversight role of the industry by Fair Trading, Mr Justin Page, Secretary of the Electrical Trades Union of Australia, NSW Branch, highlighted that they do not inspect a large part of the electrical sector:

The concern we have with Fair Trading, I think it has been highlighted to us that there are 14 inspectors in Fair Trading that do gas and electricity. All they inspect is advanced metering ... Our understanding is they do not inspect any electrical installations, any infrastructure, any domestic, commercial.³²⁹

5.7 Overall, Mr Page expressed the view that 'Fair Trading and Safe Work are deficient in properly regulating the dangerous and hazardous work performed in the electrical industry' and they have also noticed a decrease in inspectors and inspection regimes.³³⁰

5.8 In relation to its regulatory responsibilities, the NSW Government advised that in 2017-18 Fair Trading received 19 complaints concerning alleged electrical work and for 2018-19 there were 24 complaints. Of the 43 complaints received in those two years, alleged breaches were identified in 37 complaints. During this period Fair Trading issued 19 trader education letters (warning letters) for various breaches and cancelled 119 contractor licences. In 2018-19 Fair Trading brought forward four prosecutions against individuals relating to unlicensed electrical work.³³¹

5.9 The Electrical Trades Union recommended that New South Wales adopt a new system for licensing electricians and electrical work based on an independent examination process, and that a single government agency be established with responsibility for licensing electricians and auditing and inspecting electrical work.³³²

Unlicensed electricians

5.10 Representatives from the Electrical Trades Union brought a particular issue to the committee's attention; the extent to which unlicensed electricians are working, particularly in Sydney, on large government projects.

³²⁸ Submission 77, Electrical Trades Union of Australia, NSW Branch, pp 1-2.

³²⁹ Evidence, Mr Justin Page, Secretary, Electrical Trades Union of Australia, NSW Branch, 16 August 2019, pp 20-21.

³³⁰ Evidence, Mr Page, 16 August 2019, p 19.

³³¹ Answers to questions on notice, NSW Government, 6 September 2019, pp 7-8.

³³² Submission 77, Electrical Trades Union of Australia, NSW Branch, p 7.

- 5.11** Mr Page said that the current infrastructure boom in Sydney has led to an 'influx of unlicensed electricians, overseas electricians and trades assistants and backpackers into our industry'. Mr Page claimed that unlicensed electricians are working on major government-funded projects and contractors and labour hire firms are 'blatantly advertising' for these unlicensed workers. Mr Page told the committee in his evidence on 16 August 2019 that in the two weeks preceding the hearing the Union identified 19 companies and labour hire firms sending out 28 advertisements in breach of the legislation.³³³
- 5.12** Mr Page advised that the Union notified Fair Trading and Safe Work on several occasions of the instances, but had not received a response or seen a single prosecution or removal of a licence as a result of these complaints. Mr Page described the response by Fair Trading as 'totally inadequate'.³³⁴
- 5.13** Mr Page's evidence relating to unlicensed electricians operating in New South Wales was put to the government representatives who appeared before the committee.
- 5.14** Ms Rose Webb, Deputy Secretary, Better Regulation Division and NSW Fair Trading Commissioner, confirmed that they are aware of the concerns raised by the Electrical Trades Union, commenting:
- We certainly have had some contact from the Electrical Trades Union, both in Fair Trading, but also SafeWork about unlicensed electrical activity. We have certainly taken away some licences from some people and we have certainly investigated some issues where there have been allegations of unlicensed work.³³⁵
- 5.15** Ms Webb also advised that there is some debate between Fair Trading and the Electrical Trades Union as to what work is required to be licensed under the legislation: 'there is a matter of a grey area where they do not agree with our interpretation of the law and they think we should go further'.³³⁶
- 5.16** Ms Webb told the committee that she was unaware of the specific case of 19 companies advertising for unlicensed workers and undertook to provide further information.³³⁷ In its further response, the NSW Government advised: 'Fair Trading has not been able to identify any record regarding the Electrical Trades Union's allegation of 19 companies advertising for unlicensed electricians'. The committee was told that Fair Trading has investigated one allegation received from the Union for unlicensed work on the Northconnex Project, but a site visit didn't detect any offences. In further written answers, the NSW Government advised that representatives from Fair Trading and SafeWork NSW were scheduled to meet with the Electric Trades Union in late September 2019 to discuss collaboration on alleged unlicensed activity in the industry.³³⁸

³³³ Evidence, Mr Page, 16 August 2019, pp 19 and 22.

³³⁴ Evidence, Mr Page, 16 August 2019, pp 20-21.

³³⁵ Evidence, Ms Rose Webb, Deputy Secretary, Better Regulation Division and NSW Fair Trading Commissioner, 27 August 2019, p 70.

³³⁶ Evidence, Ms Webb, 27 August 2019, p 70.

³³⁷ Evidence, Ms Webb, 27 August 2019, p 70.

³³⁸ Answers to questions on notice, NSW Government, 6 September 2019, pp 6-7.

Plumbers

- 5.17** The committee heard that only parts of the plumbing sector are required to hold licences.
- 5.18** Mr Chris Seet, Assistant Secretary, NSW Plumbing Trades Employees Union, advised that plumbing, drainage and gas fitting work requires a licence in New South Wales, however 'mechanical services work, a major part of plumbing which involves heating, cooling and ventilating residential and commercial buildings, does not'. Mr Seet pointed out that 'this work is highly specialised and technical' and 'the failure of these systems can lead to things like legionella outbreak, major flooding and flammable explosions'.³³⁹
- 5.19** The NSW Plumbing Trades Employees Union and Plumbing Industry Climate Action Centre emphasised the high risk of defective plumbing work in buildings that can take many years to surface:
- Plumbing products can be ticking time bombs. Plumbing product related risks, associated with things like lead poisoning, or asbestos in products, is that the associated impacts or illnesses may take years, sometimes decades, to be detected. In this context, plumbing products that are installed, and then leak, break or otherwise cease to be effective, can be causing damage today which we may not know about for many years.³⁴⁰
- 5.20** In terms of regulating those practitioners that are required to hold a licence, Mr Seet reflected on his 20 years in the industry where he has not once been asked to show his licence or seen an inspector on a worksite:
- In the 10 years I was on the tools ... I have never been asked before, first of all, by an employer to see my licence. I know all the people I have worked with have never been asked. Also, I think there are 33 inspectors in New South Wales for plumbing. I have never, ever seen an inspector come on and look at any form of work, and I am talking major government jobs to small construction jobs.³⁴¹
- 5.21** Mr Seet argued that 'all plumbing and fire protection work needs to be carried out by licensed professionals from start to finish', with professionals engaged in continuous high-quality training to 'keep up to date with ever-changing systems, modern standards and public safety'.³⁴²
- 5.22** Mr Seet highlighted that 'licensing and training is only an effective risk mitigator if it is properly oversighted and enforced' and recommended an adequately resourced building industry regulator. This should include a legislated plumbing trades council, which would be the licensing authority for plumbing and fire protection.³⁴³

³³⁹ Evidence, Mr Chris Seet, Assistant Secretary, NSW Plumbing Trades Employees Union, 16 August 2019, p 19.

³⁴⁰ Submission 63, NSW Plumbing Trades Employees Union and Plumbing Industry Climate Action Centre, p 2.

³⁴¹ Evidence, Mr Seet, 16 August 2019, p 24.

³⁴² Evidence, Mr Seet, 16 August 2019, p 20.

³⁴³ Evidence, Mr Seet, 16 August 2019, p 20.

5.23 The NSW Plumbing Trades Employees Union and Plumbing Industry Climate Action Centre in its submission emphasised this point, arguing that the skilled, qualified and competent practitioners and fit for purpose, certified products can prevent large-scale disasters and reduce the likelihood of localised failings. It advised that this would involve licensing all aspects of fire protection work and all mechanical services work, introducing an industry training model, and establishing a dedicated building regulatory body, including a legislated 'Plumbing Trades Council' that would be the authority for licensing the industry.³⁴⁴

Fire safety practitioners

5.24 As with plumbing, a key stakeholder within the fire safety industry informed the committee that only some fire safety work is licensed and regulated.

5.25 Mr Wayne Smith, Chief Executive Officer, National Fire Industry Association, explained that there are two key elements of fire protection: wet fire protection, and elements of this work is legislated, and electrical fire protection, which is not legislated. Mr Smith commented that 'in New South Wales today, for electrical fire protection, there is zero requirement for qualifications or licensing or regulation that calls for the right people to do that work, so anyone can walk in off the street'.³⁴⁵

5.26 Further, Mr Seet from the NSW Plumbing Trades Employees Union noted that in New South Wales, although a licence is required to install fire protection systems, 'no licence is required to inspect, test and maintain those installations'. Mr Seet stated that given the complexity of the design, construction, service and testing of these systems 'it is imperative that all aspects of fire protection work be carried out by competent practitioners with the appropriate qualifications and credentials'.³⁴⁶

5.27 The National Fire Industry Association asserted that 'fire safety systems in a significant number of buildings in New South Wales are non-compliant and are at high risk of not protecting the occupants of a building in the event of fire'. The Association indicated that 'the biggest impediments to ensuring NSW fire protection systems are properly designed, installed, inspected and maintained is a lack of registration or licensing of fire protection practitioners and the lack of designer sign-off at the conclusion of the building work'.³⁴⁷

5.28 Mr Smith recommended that 'there should be stronger fire protection regulation in place supported by a regulated and licensed certification process, which enables informed and qualified assessment and sign-off of safety systems'.³⁴⁸

³⁴⁴ Submission 63, NSW Plumbing Trades Employees Union and Plumbing Industry Climate Action Centre, pp 2-7.

³⁴⁵ Evidence, Mr Wayne Smith, Chief Executive Officer, National Fire Industry Association, 27 August 2019, pp 62-63.

³⁴⁶ Evidence, Mr Seet, 16 August 2019, p 19.

³⁴⁷ Submission 61, National Fire Industry Association, p 3.

³⁴⁸ Evidence, Mr Smith, 27 August 2019, p 60.

Reforms to the fire safety practitioners framework

5.29 A particular issue raised by the National Fire Industry Association was the adequacy of the governments reforms to the framework for fire safety practitioners. These reforms came about in response to the Lambert report, to develop and introduce a co-regulatory accreditation framework for competent fire safety practitioners into New South Wales legislation. The NSW Government advised that the reforms aimed to improve quality assurance and establish formal requirements for practitioners:

This framework sought to improve the quality of checks made throughout the design, approval, construction and maintenance phases of work and establish formal requirements for competent fire safety practitioners. The introduction of this reform aligns with a number of recommendations of the BC [Shergold Weir] Report, including those relating to strengthening requirements for fire safety and performance solutions.³⁴⁹

5.30 The National Fire Industry Association supported the NSW Government for taking steps to address the issue of fire protection regulation, however it outlined concerns with the scheme.

- The scheme is essentially a member association regulating members. This creates a risk of conflict of interest. The scheme should be government run.
- The government should introduce a robust licensing system for the fire protection industry, underpinned by nationally recognised trade qualifications.
- At a minimum, the government should require nationally recognised trade qualifications to be accepted as sufficient evidence of competency for accreditation under the Fire Protection Association's Accreditation Scheme.³⁵⁰

5.31 Mr Smith observed that the new reforms are 'missing an important piece'. He explained that under the legislation, the fire safety practitioner must sign off on the design prior to construction, however there is no requirement for sign off at the end of construction. Mr Smith proclaimed that this is a major flaw especially when it is common that 'what happens in the construction phase can be different to what the initial design set out'.³⁵¹

5.32 Ms Anita Campbell, Executive Officer, National Fire Industry Association, told the committee that the requirement to sign off at the end of construction was initially included when the legislation was amended and was included all the way through the industry consultation, however it was removed before gazettal.³⁵²

5.33 The committee asked the NSW Government why this requirement was removed. The government advised that the removal of this provision 'was in response to key stakeholder feedback and concern on the practical complexity of certifiers determining the competence of practitioners in the absence of an accreditation scheme for installers'. The NSW Government

³⁴⁹ Department of Finance, Services and Innovation, *Building Stronger Foundations, Implementing the NSW Government Response to the Shergold Weir Building Confidence Report*, discussion paper, June 2019, p 10.

³⁵⁰ Submission 61, National Fire Industry Association, pp 4-5.

³⁵¹ Evidence, Mr Smith, 27 August 2019, p 66.

³⁵² Evidence, Mr Smith and Ms Anita Campbell, Executive Officer, National Fire Industry Association, 27 August 2019, p 67.

advised that 'the proposal for the involvement of accredited competent fire safety practitioners at the sign-off stage is intended to be revisited after a recognised accreditation scheme for installers is in place'.³⁵³

Engineers

5.34 Inquiry participants told the committee that currently there is no mandatory requirement for an engineer to be registered in New South Wales.

5.35 For example, the Institute of Public Works Engineering Australasia NSW Division (IPWEA NSW) advised that:

Currently, there is no formal regulatory regime that covers engineers in NSW. The existing registration system is ad hoc and largely voluntary. Engineers wishing to issue construction, occupation, subdivision, compliance and complying development certificates under the Environmental Planning and Assessment Act 1979 (NSW) must be accredited by the Building Professionals Board under the Building Professionals Act 2005 (NSW). Engineers who are registered on the NERB [National Engineering Registration Board] are taken to have satisfied all the specialty skills, specialty knowledge, specialty underpinning knowledge, specialty qualifications and experience requirements for the relevant accreditation statement and no further assessment of the applicant is required in relation to those requirements.³⁵⁴

5.36 IPWEA NSW commented that this accreditation system is limited as it only covers engineering for building construction and not 'the wide range of engineering services which are on offer in the State'. It also explained that under the current system competency standards cannot be enforced and 'engineers and others claiming engineering expertise cannot be prevented from providing services even when there is evidence of misconduct or incompetence'.³⁵⁵

5.37 Further, IPWEA NSW noted that engineers, unlike other professionals, do not have a mandatory registration scheme and are not effectively regulated:

Professional engineers are one of the only professions that do not have a mandatory licensing or registration scheme unlike other leading professions in NSW, such as lawyers, doctors, nurses, architects and teachers, as well as many trades such as electricians and plumbers. It does not make any sense that outside of the building industry, engineers who design the systems that these groups often work within, are not regulated.³⁵⁶

5.38 Engineers Australia had a similar view. Mr Jonathan Russell, National Manager for Public Affairs, Engineers Australia, appeared at a hearing and said that 'in New South Wales at the moment there is no requirement to be registered to provide any sort of engineering service'.³⁵⁷

³⁵³ Answers to questions on notice, NSW Government, 6 September 2019, pp 9-10.

³⁵⁴ Submission 174, Institute of Public Works Engineering Australasia Limited NSW Division, p 7.

³⁵⁵ Submission 174, Institute of Public Works Engineering Australasia Limited NSW Division, p 8.

³⁵⁶ Submission 174, Institute of Public Works Engineering Australasia Limited NSW Division, p 8.

³⁵⁷ Evidence, Mr Jonathan Russell, National Manager for Public Affairs, Engineers Australia, 27 August 2019, p 3.

Mr Greg Ewing, General Manager for the Sydney Division, Engineers Australia, added that unless you are a member of an engineering association, which is voluntary, then there is no requirement to undertake continuous professional development.³⁵⁸

5.39 Engineers Australia made three recommendations to the regulation and licensing of engineers in New South Wales:

- a new registration scheme be applied to all those who provide professional engineering services (other than those working under the supervision of a registered engineer) in the building sector
- creation of legislative mechanisms to fulfil the short-term goal of engineer registration in the building sector to enable later expansion of the scope of registration to all engineering occupations in all industries
- the proposed new registration scheme in New South Wales be aligned with the system already in operation in Queensland and proposed for Victoria.³⁵⁹

5.40 In this regard, Engineers Australia noted that registration of engineers is not a 'silver bullet' to address all the issues in the industry, however it is the first step to create 'a system to recognise people likely to perform competently, and a mechanism to exclude those found to be unsuitable to work as an engineer'.³⁶⁰

5.41 Engineers Australia outlined five key benefits of a registration system for engineers, including:

- providing industry and consumer information on the competence and experience levels of engineering practitioners
- reducing the risks to public health, safety and welfare by excluding those unqualified to work
- continual professional development and recognition in the industry
- enhancing international mobility and trade in engineering services
- creating legislative efficiency.³⁶¹

5.42 Mr Russell highlighted that while most practicing engineers are very competent in their own risk-management framework, 'there is no mechanism at the moment when someone is found to be wanting, to get them out of the system'. Mr Russell argued that New South Wales runs the risk of engineers coming to work in this state when they have been struck off registers in other states, such as Queensland which has a long-standing registration scheme, or Victoria which is in the process of introducing such a scheme. When asked if New South Wales has become the 'last refuge of scoundrels', Mr Russell agreed.³⁶²

³⁵⁸ Evidence, Mr Greg Ewing, General Manager for the Sydney Division, Engineers Australia, 27 August 2019, p 4.

³⁵⁹ Submission 125, Engineers Australia, p 4.

³⁶⁰ Submission 125, Engineers Australia, p 6.

³⁶¹ Submission 125, Engineers Australia, pp 6-8.

³⁶² Evidence, Mr Russell, 27 August 2019, pp 5-6.

- 5.43 On the other hand, IPWEA NSW advised that Queensland has a comprehensive registration scheme for engineers, which 'Victoria has recently adopted and Western Australia and the ACT are moving towards adopting'. IPWEA highlighted that this means that 'an engineer from NSW cannot seek employment in States where there is no mutual recognition of qualifications' and 'this restricts the capacity of our local engineers to move between states'.³⁶³
- 5.44 Mr David Dickson, a Consulting Engineer from Brooker Group, observed that each state in Australia has different rules in terms of registration for engineers. He explained that he pays and applies to be a registered engineer in each state, and called for this to be managed nationally under the one register.³⁶⁴

Builders

- 5.45 The committee heard from various stakeholders in relation to the lack of regulation of builders across the construction chain.
- 5.46 For example, Mr Michael Lambert noted that under the current system there are 'no licensing for builders who are commercial builders, which is a crazy system'. Mr Lambert said that this 'means there is an encouragement for people who are poor or shoddy builders to go into the commercial area because there is no licensing requirement'.³⁶⁵
- 5.47 Mr Brian Seidler, Executive Director, Master Builders NSW, provided the example of waterproofing where if it is done poorly can create a major structural issue. However, Mr Seidler confirmed that 'anyone can apply waterproofing products' and there are no requirements to engage a licensed or trade contractor with a waterproofing background. Mr Seidler suggested that all subcontractors, not just water proofers, should be licensed to undertake the work and be required to undertake continued professional development. Mr Seidler added that 'at the end of the day if you are not a contractor waterproof applicator, a bricklayer or carpenter doing his or her job properly the consumer is going to be dissatisfied'.³⁶⁶
- 5.48 Several inquiry participants lamented the lack of professional pride and personal accountability of each industry practitioner across the chain of responsibility.
- 5.49 Mr Dickson told the committee he is concerned about the lack of responsibility 'from the developer all the way through to the worker on the floor'. Mr Dickson indicated that the practice of relying on paperwork to tick off what has been built diminishes a builder's legal and moral responsibility for the work they do:

³⁶³ Submission 174, Institute of Public Works Engineering Australasia Limited NSW Division, pp 8-9.

³⁶⁴ Evidence, Mr David Dickson, Consulting Engineer, Brooker Group, 16 August 2019, p 66.

³⁶⁵ Evidence, Mr Michael Lambert, author of the *Independent Review of the Building Professionals Act 2005*, 12 August 2019, p 59.

³⁶⁶ Evidence, Mr Brian Seidler, Executive Director, Master Builders NSW, 27 August 2019, pp 47-48.

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.³⁶⁷

- 5.50** Mr Dickson added that 'builders these days have lost the skill of building' as they are now 'subbie managers' who rely on the skills of their subcontractors, who rely on the skills of their employees, and when the piece of paper says it was built as per the drawing than 'we do not have a way of checking'.³⁶⁸

Extending the registration system across the chain of responsibility

- 5.51** Inquiry participants called for a registration system for all building practitioners to ensure everyone involved in the construction of buildings is held accountable for the work that they do.
- 5.52** Ms Jane Hearn, Director, Owners Corporation Network, stated that there needs to be a 'tightening of registration and licensing right through this system and a system for independence, inspections and oversight', noting that currently the industry is self-regulating.³⁶⁹
- 5.53** In terms of the quality of the high-rise buildings being built, Ms Hearn told the committee that 'the people who are building the high-rise apartment buildings are not necessarily the most qualified people to do it'. Ms Hearn said 'the risks and the defects that are being found are serious, they are endemic, they are a threat to health and welfare, they put people into financial distress'. Further, Ms Hearn suggested that extra licensing requirements for builders who are building three storeys and above would be a good start to deal with some of the issues that we are now seeing in those buildings.³⁷⁰
- 5.54** Cr Linda Scott, President, Local Government NSW commented that they have continuously called on government to 'address the deficiencies with building and certifier regulation in New South Wales', including by instituting a strong regulatory framework to hold all practitioners to account:

As part of those repeated submissions, have called for New South Wales to develop a strong regulatory framework that ensures the building and certification system delivers well-built, safe and compliant buildings. This means having a system where all parties are responsible and accountable for their actions and the community and public interest is protected.³⁷¹

³⁶⁷ Evidence, Mr Dickson, 16 August 2019, p 60.

³⁶⁸ Evidence, Mr Dickson, 16 August 2019, p 62.

³⁶⁹ Evidence, Ms Jane Hearn, Director, Owners Corporation Network, 12 August 2019, p 37.

³⁷⁰ Evidence, Ms Hearn, 12 August 2019, pp 32 and 37-38.

³⁷¹ Evidence, Cr Linda Scott, President, Local Government NSW, 16 August 2019, p 41.

5.55 Mr Brett Daintry, Director, Daintry Associates, argued that 'the Act must be amended to provide that each tradesperson and persons on a site must issue compliance certificates for the work they do and they must be held accountable for that work'. Mr Daintry added that this needs to apply to all people within the building construction chain:

That permeates the whole system. It goes from design to the manufacturing and materials that go into buildings to the installation of building components or the building itself down to the fellow who puts the wet area in or paints the building. Unless you have a complete system in place and a complete and consistent approach to checking compliance at every stage there is no guarantee that you are going to have quality buildings at the end of the process.³⁷²

5.56 Ms Kathlyn Loseby, President NSW, Australian Institute of Architects, argued that currently there are not enough people in the system who are professionally trained, qualified and hold appropriate insurance. When asked to comment on whether a licensing scheme should be in place for all practitioners, Ms Loseby said that she 'absolutely' agrees and this needs to extend from practitioners in the upfront design stage to the sign-off stage.³⁷³

5.57 In addition, Ms Leanne Hardwicke, General Manager, Policy, Advocacy and Education, Australian Institute of Architects, pointed out that in the NSW Fair Trading Act there is an option to become registered to offer certificates that would then require the practitioner to be accredited and have insurance, however this is only optional, noting: 'nobody is becoming registered'.³⁷⁴

5.58 Further in its submission, the Australian Institute of Architects NSW noted that architects are currently practicing under a legislated registration scheme.³⁷⁵ The Institute suggested that this scheme could be a robust and appropriate model that could be introduced for building designers, project managers, professional engineers and other building professionals. The legislated scheme requirements among other things include requirements to follow a code of conduct, undertake continuous professional development, hold professional indemnity insurance and be subject to disciplinary processes.³⁷⁶

Government regulation

5.59 This section outlines what the NSW Government has done to date to address the concerns in the industry relating to the registration and ultimately the regulation of building practitioners. It begins by outlining the current compliance and enforcement system. This section then turns to the recommendations regarding regulation from previous reports and the government's proposals under the *Building Stronger Foundations* discussion paper on these issues.

³⁷² Evidence, Mr Brett Daintry, Director, Daintry Associates, 16 August 2019, p 76.

³⁷³ Evidence, Ms Kathlyn Loseby, President NSW, Australian Institute of Architects, 16 August 2019, pp 50 and 55.

³⁷⁴ Evidence, Ms Leanne Hardwicke, General Manager, Policy, Advocacy and Education, Australian Institute of Architects, 16 August 2019, p 54.

³⁷⁵ This scheme is legislated under the *Architect's Act 2003* and the *Architect's Regulation 2017* which align with Architects Acts in other jurisdictions. Submission 129, Australian Institute of Architects NSW, p 12.

³⁷⁶ Submission 128, Australian Institute of Architects NSW, pp 12-13.

Compliance and enforcement

5.60 The NSW Government informed the committee of the current regulatory functions in overseeing building practitioners, including the number of complaints NSW Fair Trading has received in recent years and the enforcement action it takes, as well as the number of inspections that are carried out.

5.61 Those responsible for the construction of buildings are regulated by several government agencies and departments, as well as local government under national and state laws that relate to construction and consumer protection. This also includes a national framework that sets out building codes and standards for construction. The NSW Government noted that only qualified and experienced persons are licensed to undertake residential building work in New South Wales and they have duties that are placed on them including to ensure they exercise due care and skill and the work they perform is fit for purpose.³⁷⁷

5.62 NSW Fair Trading is one of the agencies regulating the building sector and is responsible for licensing, authorising and registering specific businesses, practitioners and organisations in the industry, among other things.³⁷⁸

5.63 Ms Webb, Commissioner of Fair Trading NSW, informed the committee that the department 'continuously supports compliance and enforces the law'. Ms Webb provided the following data on complaints and enforcement action in the last few years:

We receive over 8,000 complaints a year in relation to the building sector and we resolve the overwhelming majority. In the past five years, we have conducted over 10,166 building inspections and 4,453 building investigations. We have had 488 successful prosecutions in three years.³⁷⁹

5.64 Ms Webb advised that when 'non-compliance is detected, a range of sanctions and remedies are employed to right wrongs, including directions, rectification orders, recalls, penalty notices, disciplinary actions and prosecutions', and the non-compliance will be publicised to deter others engaging in similar behaviour.³⁸⁰

5.65 In relation to the number of inspectors in Fair Trading responsible for the building sector, Mr Peter Dunphy, Executive Director, NSW Fair Trading Specialist Services, Department of Customer Service, provided the following numbers:

For building inspectors who look after the home building legislation, there are 20 staff in the building investigation team. We have another 23 staff in the dispute resolution and inspection branch. In the building professionals group we have a team of 27 staff who provide services. They are not all inspectors, but, as I mentioned, there are seven auditors who carry out the inspection functions in the audit team. We have another team of about 10 staff who also carry out the investigations in that area as well. On top of that we also have a plumbing service, which includes our plumbing inspectors. We have 33 inspectors who carry out plumbing inspections and direct site inspections.

³⁷⁷ Submission 132, NSW Government, p 5.

³⁷⁸ Submission 132, NSW Government, p 13.

³⁷⁹ Evidence, Ms Webb, 12 August 2019, p 2.

³⁸⁰ Evidence, Ms Webb, 12 August 2019, p 2

They carry out over 30,000 inspections across that area per annum. In the electrical and gas safety area we also have 14 inspectors who provide services around both gas and electrical safety. That is the full range of resources that we have.³⁸¹

- 5.66** Mr Dunphy explained that Fair Trading takes a 'risk-based approach' where they target the highest risks such as 'major defects, risks to safety, non-compliance and gross negligence'.³⁸²
- 5.67** The NSW Government provided further advice on the number of inspectors, noting that Fair Trading currently has 85 staff conducting inspections in the building sector who work on 'complaints, proactive inspections, audits, dispute resolution matters, disciplinary proceedings, and investigation relating to building work, electrical and gas fitting work, plumbing and drainage work, specialist building work and accredited certifiers'.³⁸³
- 5.68** In addition, the NSW Government advised that they have initiated a total of 524 prosecutions with 36 unsuccessful, and in the current financial year 2018-19 there have been 580 licences cancelled or disqualified.³⁸⁴
- 5.69** During a hearing, Mr David Chandler OAM, the newly appointed NSW Building Commissioner, was asked to comment on the current enforcement of licensing in New South Wales. He indicated that he will be reviewing the number of inspectors undertaking this work in Fair Trading. However, Mr Chandler made the point that there are a lot more people involved in observing the construction process than just the Fair Trading inspectors. Mr Chandler concluded that 'there is no way in the world, if we had 100 or 1,000 people, that we are going to observe all the construction'.³⁸⁵

Recommendations on licensing and regulation - Shergold Weir and Lambert

- 5.70** Both the Lambert and Shergold Weir reports make recommendations regarding the licensing and regulation of all building practitioners. The NSW Government's response to these reports will be comprehensively considered in the final chapter.
- 5.71** Mr Lambert, in his review, recommended that 'key categories of building practitioners involved in the design, construction and maintenance of buildings' be registered. Mr Lambert outlined that this registration should require building practitioners to undertake certified training, including continuing professional development on the National Construction Codes, obtaining compulsory insurance and being held accountable for their work through certifying the work conforms to the *Building Code of Australia*. Mr Lambert noted that the subsequent Shergold Weir report endorsed this recommendation, as well as recommending that the registration system be consistent across jurisdictions.³⁸⁶

³⁸¹ Evidence, Mr Peter Dunphy, Executive Director, NSW Fair Trading Specialist Services, Department of Customer Service, 12 August 2019, p 18.

³⁸² Evidence, Mr Dunphy, 12 August 2019, p 18.

³⁸³ Answers to questions on notice, NSW Government, 6 September 2019, p 1.

³⁸⁴ Answers to questions on notice, NSW Government, 28 August 2019, p 3.

³⁸⁵ Evidence, Mr David Chandler OAM, NSW Building Commissioner, 16 August 2019, p 12.

³⁸⁶ Submission 56, Mr Michael Lambert, p 7.

5.72 The Shergold Weir report made two recommendations relating to the registration of building practitioners. Recommendation 1 is as follows:

That each jurisdiction requires the registration of the following categories of building practitioners involved in the design, construction and maintenance of buildings:

- Builder
- Site or Project Manager
- Building Surveyor
- Building Inspector
- Architect
- Engineer
- Designer/Draftsperson
- Plumber
- Fire Safety Practitioner.³⁸⁷

5.73 In terms of this recommendation, the Shergold Weir report noted that 'each jurisdiction will need to have complementary provisions which provide that only registered practitioners can perform the work for which they hold registration'. The report also noted that 'further consultation should be undertaken with industry with a view to reaching agreement on the full range of appropriate disciplines to be included'.³⁸⁸

5.74 Recommendation 2 in the Shergold Weir report related to the registration requirements for building practitioners:

That each jurisdiction prescribes consistent requirements for the registration of building practitioners including:

- certificated training which includes compulsory training on the operation and use of the NCC [National Construction Codes] as it applies to each category of registration;
- additional competency and experience requirements;
- where it is available, compulsory insurance in the form of professional indemnity and/or warranty insurance together with financial viability requirements where appropriate; and
- evidence of practitioner integrity, based on an assessment of fit-and-proper person requirements.³⁸⁹

³⁸⁷ 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 15.

³⁸⁸ 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 16.

³⁸⁹ 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 17.

- 5.75** The Shergold Weir report stated that 'a nationally consistent approach to regulating building practitioners is vital'. The report noted that 'these expanded requirements could be implemented progressively based on categories of practitioners', with priority given to Building Surveyors.³⁹⁰
- 5.76** In addition, the Shergold Weir report suggested a collaborative approach to overseeing registration, where industry bodies and/or associations are responsible for registration and the state or territory licensing body have clear statutory responsibility for auditing performance and disciplining registered practitioners. The report also noted the importance of as many practitioners as possible holding professional indemnity and/or warranty insurance in order to support accountability.³⁹¹

Response to licensing and regulation recommendations

- 5.77** As mentioned in chapter 2, in response to the Shergold Weir report, the government released its *Building Stronger Foundations* discussion paper for stakeholder feedback in June 2019.³⁹²
- 5.78** The discussion paper outlines four key reforms with the aim of delivering a more robust regulatory framework for building and construction. This section will discuss two of these reforms relating to the accountability and registration of 'building designers':
- Requiring 'building designers', such as architects, engineers and other building practitioners who provide final designs and/or specifications of elements of buildings to declare that the building plans specify a building which will comply with building regulations, including the *Building Code of Australia*. These design practitioners would need to demonstrate how performance solutions would satisfy the requirements of the *Building Code of Australia*. Builders would also have to declare that buildings are constructed in accordance with building plans.
 - Introducing a new registration scheme for currently unregistered designers and commercial builders who intend to make declarations. Only authorised practitioners would be entitled to declare plans, how any performance solutions comply with the *Building Code of Australia* and that a final building complies with its plans.³⁹³

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 17.

³⁹¹ 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 18.

³⁹² Department of Finance, Services and Innovation, *Building Stronger Foundations, Implementing the NSW Government Response to the Shergold Weir Building Confidence Report*, discussion paper, June 2019, p 6.

³⁹³ Department of Finance, Services and Innovation, *Building Stronger Foundations, Implementing the NSW Government Response to the Shergold Weir Building Confidence Report*, discussion paper, June 2019, p 9.

- 5.79** In relation to the proposal for a new registration scheme, the NSW Government advised that the introduction of a registration scheme will 'enhance accountability by ensuring that practitioners have the relevant skills, hold appropriate insurance, and can be held accountable for their actions including being subject to appropriate disciplinary action'.³⁹⁴
- 5.80** The NSW Government provided the following explanation regarding the term 'building designer':
- The term 'building designer' is intended to represent a category of practitioners who perform similar or complementary functions in providing plans and specifications for buildings that are required to comply with the BCA [Building Code of Australia]. It is anticipated that there may be many interpretations of this category of work and multiple professionals who may be considered to be already performing some or all of these functions.³⁹⁵
- 5.81** The NSW Government indicated that the type of work undertaken by 'building designers' will dictate what practitioners are required to be registered under the scheme, and proposed the following types of practitioners:
- architects
 - builders
 - building designers
 - draftspersons
 - some categories of engineers.³⁹⁶
- 5.82** The discussion paper sought feedback from stakeholders as to what practitioners should be required to be registered under this scheme, as well as the minimum requirements to register, the types of insurance and the powers of the regulator to enforce compliance.³⁹⁷
- 5.83** On 23 October 2019 the NSW Government introduced in the Legislative Assembly the *Design and Building Practitioners Bill 2019* which delivers on the reforms proposed by the government in its *Building Stronger Foundations* discussion paper.³⁹⁸ The committee considered the bill extensively during this inquiry. The evidence received from key stakeholders on the bill is detailed further in the following chapter.

³⁹⁴ Department of Finance, Services and Innovation, *Building Stronger Foundations, Implementing the NSW Government Response to the Shergold Weir Building Confidence Report*, discussion paper, June 2019, p 19.

³⁹⁵ Department of Finance, Services and Innovation, *Building Stronger Foundations, Implementing the NSW Government Response to the Shergold Weir Building Confidence Report*, discussion paper, June 2019, p 12.

³⁹⁶ Department of Finance, Services and Innovation, *Building Stronger Foundations, Implementing the NSW Government Response to the Shergold Weir Building Confidence Report*, discussion paper, June 2019, pp 19-20.

³⁹⁷ Department of Finance, Services and Innovation, *Building Stronger Foundations, Implementing the NSW Government Response to the Shergold Weir Building Confidence Report*, discussion paper, June 2019, pp 17-22.

³⁹⁸ NSW Government, *Design and Building Practitioners Bill 2019*, first print, 23 October 2019.

Stakeholder views on the government's licensing and regulation proposals

- 5.84** The committee heard concerns from inquiry participants regarding the government's proposals to strengthen the licensing and regulation of building practitioners. A key voice on this issue, Mr Lambert provided in his submission the following commentary on the government's proposals. This was prior to the release of the *Design and Building Practitioners Bill 2019*, with Mr Lambert's comments on this bill documented in the following chapter.
- 5.85** Mr Lambert expressed the view that the proposals put forward by the NSW Government in its discussion paper continue the practice of 'piecemeal and partial' regulatory reforms that 'have not addressed the major problems afflicting the industry'.³⁹⁹ Mr Lambert noted that although the proposals are 'a step in the right direction it is only part of a more comprehensive reform that is needed'.⁴⁰⁰
- 5.86** Mr Lambert explained that it is essential that all building practitioners are registered, commenting that the proposal in the government's discussion paper is inadequate in addressing the major gaps across the industry:
- The current proposal is deficient in that it only proposes self-certification of design and not building work and hence does not include the range of building practitioners who design, construct and install the critical building systems and elements. This means it is a very partial approach which leaves major gaps such as water proofing which is an area which generates major problems and complaints as well as with the installation of fire safety systems which is critical for safety.⁴⁰¹
- 5.87** Mr Lambert further explained that this 'partial' approach results in major problems for certifiers which rely on the substandard documentation:
- In turn, this partial approach to accountability and registration of building practitioners results in major problems for the building certifier who issues an approval to build based on documentation which is invariably incomplete, undertakes inspections of only some of the building work, relies on certification from builders and sub-contractors, and issues a Certificate of Occupancy at completion of the project.⁴⁰²
- 5.88** Mr Lambert said that although the issuing of a compliance certificate is legally binding, it is rarely used, and the certifier must then undertake their own assessment of the building work which includes the building design and technically complex building work.⁴⁰³
- 5.89** Mr Lambert advocated that each building practitioner working on a building be required to certify that the building design and the work they have carried out conforms with the building codes. Further, he recommended that the building practitioner be fully accountable by being registered, audited and holding suitable insurance. Mr Lambert added that the building certifier should obtain certificates from each building practitioner, including the design professional, and be able to rely on these when issuing the final occupancy certificate.

³⁹⁹ Submission 56, Mr Michael Lambert, p 3.

⁴⁰⁰ Submission 56, Mr Michael Lambert, p 7.

⁴⁰¹ Submission 56, Mr Michael Lambert, pp 7-8.

⁴⁰² Submission 56, Mr Michael Lambert, p 8.

⁴⁰³ Submission 56, Mr Michael Lambert, p 8.

He commented that 'this creates a proper chain of accountability and is a fundamental requirement for effective building regulation and quality building outcomes'.⁴⁰⁴

- 5.90** Mr Lambert suggested a co-regulatory model for the registration of building practitioners, where established professional associations could administer the accreditation or registration process subject to its approval and oversight by a Building Regulator. Mr Lambert explained that 'the benefit of this approach is that it draws on the existing expertise and knowledge of the relevant associations but maintains an oversight role for government'.⁴⁰⁵

Response by government representatives

- 5.91** Prior to the release of the *Design and Building Practitioners Bill 2019*, the committee examined government officials across two hearings on the issues raised by stakeholders regarding the government's approach to licensing and regulation of the industry to date.

- 5.92** At the committee's first hearing, the committee questioned how the government is regulating not just the design aspect of construction but also the built outcome. In response, Mr John Tansey, Executive Director Regulatory Policy, Better Regulation Division, Department of Customer Service, referred the committee to the appendix provided in the NSW Government submission that, as Mr Tansey suggested 'sets out all of the different specialities which go to your question around components of construction'. Mr Tansey explained that 'there are different categories of certification that go to those different elements and capabilities' and 'the people performing those parts of the total certification function are accredited under the law and do have qualifications' as certifiers.⁴⁰⁶

- 5.93** When asked to clarify whether accreditation is required for practitioners who are providing the certificates to certifiers to review prior to issuing an occupation certificate, Mr Tansey provided the following advice:

Those are other persons who are required to be accredited under the same legislation that accredits the principal certifier. They recognise different specialities of construction. They are required under the law to be accredited also by the Building Professionals Board and there are skills and experience prerequisites for those. If it helps the Chair, it goes to the point that different elements of the construction can be themselves certified by specialists in that field, which contributes to the overall certification by the principal certifier ... They would all have to have insurance to maintain their accreditation.⁴⁰⁷

- 5.94** Mr Tansey was questioned again at a later hearing on this issue where he advised that he was trying to highlight to the committee the difference between those who are performing the certification function and the licensing of them as certifiers compared to those who are actually performing the building work.⁴⁰⁸

⁴⁰⁴ Submission 56, Mr Michael Lambert, p 8.

⁴⁰⁵ Submission 56, Mr Michael Lambert, p 8.

⁴⁰⁶ Evidence, Mr John Tansey, Executive Director Regulatory Policy, Better Regulation Division, Department of Customer Service, 12 August 2019, pp 8-9.

⁴⁰⁷ Evidence, Mr Tansey, 12 August 2019, pp 8-9.

⁴⁰⁸ Evidence, Mr Tansey, 27 August 2019, p 68.

- 5.95** The committee asked Mr Tansey to reflect on the conflicting evidence provided by Mr Lambert that very few of the categories listed in the appendix that Mr Tansey referred to 'have people that are licensed for them and none of them actually provide compliance certificates', which leaves the building certifier as 'the only effective certifier operating at the moment'.⁴⁰⁹
- 5.96** Mr Tansey took this question on notice and in the NSW Government's response, it advised that compliance certificates are one type of development certificate which confirms that the work or designs comply with the specified standards. It confirmed that under the legislation these certificates may be issued by a certifier, or person prescribed by the regulations, however non-accredited persons cannot issue a compliance certificate, only professional advice. It also highlighted that there are currently a number of licence classes required by law in New South Wales for trades undertaking residential and specialist building work. Although it did note Mr Lambert's evidence that for some installation work a licence is not required under the law, for example the installation of fire safety systems.⁴¹⁰
- 5.97** Further questioning of government representatives in relation to the requirements for a licence and/or to be registered proceeded at a later hearing. In particular, the committee discussed the proposal outlined in the discussion paper for the registration of 'building designers' and sought clarification on this term.
- 5.98** At this later hearing, Ms Webb acknowledged that the term 'building designer' has been used 'a little loosely' and clarified that the proposals are intended to ensure that any people who are not already licensed under the current licensing regime for builders in New South Wales will be licensed:
- To the extent that people are not already licensed under the current licensing regime for builders in New South Wales, the proposals that other people—I know we use the word "designer" a little loosely and sometimes people interpret that as just being the architects and designers, but it is also intended to scoop up anyone else involved in building the building who is not currently licensed. But a large category of people who are building buildings are currently licensed.⁴¹¹
- 5.99** Ms Webb indicated that the reforms will provide a chain of responsibility and explained what this means in practice:
- I think the chain of responsibility might be another way of describing this idea that everyone who is responsible for the building should be registered, have an obligation to make a declaration of compliance, have insurance and be available to be sued and owe that duty of care. One way of looking at it is that everyone in the chain who is involved in building a building will now have clear responsibilities and liabilities.⁴¹²
- 5.100** Mr Chandler also confirmed that the legislation proposed would ensure that 'everyone who should be licensed has a licence and that the people who get a licence are properly accredited for those licenses'. When questioned further on exactly who those practitioners will be, Mr Chandler provided the following response:

⁴⁰⁹ Evidence, Mr Lambert, 12 August 2019, p 52.

⁴¹⁰ Answers to questions on notice, NSW Government, 6 September 2019, pp 4-5.

⁴¹¹ Evidence, Ms Webb, 27 August 2019, pp 73-74.

⁴¹² Evidence, Ms Webb, 12 August 2019, p 12.

I believe everybody who is in charge of managing the building process at various stages should have a licence. Designers should have licences, people in charge of construction sites should have licences, people who are in charge of safety on construction sites should have licences, people who certify progress payments should have licences. There are a number of people who need to be licensed ... We are talking about including in that plumbers, electricians, people who are doing fire-rated work, people who are doing waterproofing—all of those people are in the line of sight to be licensed. You will see that in the draft legislation when it comes forward. I am not talking to a blank sheet of paper here.⁴¹³

- 5.101** In addition, Mr Tansey explained that the clear intention of the *Building Stronger Foundations* reforms is to link the design stage of construction with the final product, to build accountability along the chain:

That response is particularly dealing with reforms in New South Wales that will, for the first time, capture and require registration of people providing the designs and marry that up with the people doing the construction, and who rely on those designs, having to also declare that they have built according to those designs. If the building required variation, we want to ensure that the variations are documented, and if the variations are substantial enough, that they required changes to the approvals or new plans and designs, that those new plans and designs are declared again.⁴¹⁴

- 5.102** Further, Mr Tansey said that the reforms will specifically hold builders to account with the proposed obligation on builders to 'declare that the building work they are doing is done in compliance with the various plans and specifications provided to them by the other practitioners'.⁴¹⁵ The reforms are explored further in the following chapter.

Committee comment

- 5.103** It is clear to the committee that the current system of licensing and registration of building practitioners in New South Wales is woefully inadequate. The system is piecemeal and in some areas of the industry, non-existent.
- 5.104** We are extremely concerned that in some instances anyone can pick up the tools and work on a building site without being required to hold a licence or be registered. This is causing a huge oversight gap in the industry and has undoubtedly contributed to the problems we are seeing today.
- 5.105** It is not just the bulk of those who perform building work who are unregistered and unlicensed it is also the developers who conceive of and ultimately benefit from the various projects who are unregulated and unlicensed. Given these are the entities that take the most significant profits from the industry and who are responsible for the critical decisions about timeframes for construction, choice of builder and initial design work, it is remarkable that this aspect of the industry continues to be unregulated and unlicensed. This clearly creates a moral hazard that is open to exploitation by ruthless players in the industry.

⁴¹³ Evidence, Mr Chandler, 16 August 2019, pp 6-7.

⁴¹⁴ Evidence, Mr Tansey, 27 August 2019, p 78.

⁴¹⁵ Evidence, Mr Tansey, 12 August 2019, p 11.

- 5.106** This lack of regulation is particularly concerning in the case of fire safety. It is crucial to get this right for the safety of the community. We are perplexed as to why only certain elements of fire safety work are licensed and regulated.
- 5.107** The inadequacy of regulation is also clearly evident in the electrical industry. Although electricians are required by law in New South Wales to be licensed, the evidence shows that unlicensed electrical work is being undertaken. It would seem to the committee that this issue has not been adequately addressed by NSW Fair Trading. Furthermore, unlike other states, electrical tradespeople are not independently examined at the conclusion of their training.
- 5.108** The committee has not been assured by the evidence it has received that NSW Fair Trading have the appropriate resources to regulate this major industry. Again, we believe that a fully resourced Building Commission in New South Wales, established as an independent statutory body, as recommended earlier in this report, should be tasked with regulating the building and construction industry.
- 5.109** As the evidence shows, the certificates provided by builders and other practitioners to certifiers do not provide any guarantee of quality. We believe the only way to bring back confidence in the industry is to ensure each relevant building practitioner working on a building is held fully accountable, is registered, subject to professional standards, audit and disciplinary action, and holds a suitable level of insurance. We believe this will create an environment in which each building practitioner will be responsible for signing off the work that they do and will be liable if defects are found. We note this was recommended in both the Lambert and Shergold Weir reports.
- 5.110** The term 'building designers' used by the NSW Government has caused much confusion as to what building practitioners will be covered. We note there was also confusion when the *Design and Building Practitioners Bill 2019* was introduced by the government. This is discussed further in the following chapter.
- 5.111** The committee agrees with the recommendations in the Shergold Weir report to address these issues and therefore supports these recommendations being implemented in New South Wales. We urge the government to consider these recommendations alongside the commentary in the Shergold Weir report as to how they should be implemented, in particular the collaborative approach with industry bodies. We do not repeat these recommendations here deferring instead to the final chapter, where we call on the NSW Government to expedite the full implementation of all the Shergold Weir report recommendations.
- 5.112** As part of its work to implement the Shergold Weir recommendations, the committee urges the government to immediately investigate the current licensing system for building trades in New South Wales. In doing so, the government should give 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, and which additional building practitioners should be licenced, including, but not limited to, installation of medical gas and maintenance of fire safety systems.

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:

- 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.
-

Chapter 6 Design and Building Practitioners Bill 2019

The previous chapters considered evidence received by the committee during its first three public hearings. Subsequently the NSW Government introduced the *Design and Building Practitioners Bill 2019* to the NSW Parliament, a bill intended to address the issues raised in this inquiry and other forums. This chapter considers the evidence from stakeholders in relation to the bill, as well as the government's response to stakeholder feedback.

Background to the bill

- 6.1** As discussed in earlier chapters, following the release of the Shergold Weir report the NSW Government issued its *Building Stronger Foundations* discussion paper in June 2019, which set out the scope of the government's proposed response to the report and sought stakeholder feedback.⁴¹⁶
- 6.2** In October 2019, the NSW Government released a draft of the *Design and Building Practitioners Bill 2019* for public consultation. The draft bill is intended to implement the reforms to the building and construction sector as set out in the discussion paper.⁴¹⁷
- 6.3** After the close of the public consultation period, which ran from 2 October to 16 October 2019, the NSW Government on 23 October 2019 introduced the *Design and Building Practitioners Bill 2019* (the bill) in the Legislative Assembly.
- 6.4** The Hon Kevin Anderson MP, Minister for Better Regulation and Innovation, in his second reading speech said that 'the bill delivers on the NSW Government's promise to introduce a suite of new obligations on design and building practitioners to ensure that each step of construction is well documented and compliant'. The Minister advised that the bill is 'a priority for our Government' and 'is critical to support the building and construction sector, and provide New South Wales with a built environment where safety and quality is prioritised and where there is strong consumer confidence'.⁴¹⁸
- 6.5** The Minister explained that the bill sets out the framework for the government's reforms with further detail to 'be included in the supporting regulations that will be developed throughout 2020'. The Minister also advised that the 'bill reflects only the first tranche of reforms this Government expects to make as part of the biggest overhaul of the New South Wales building sector'.⁴¹⁹

⁴¹⁶ Department of Finance, Services and Innovation, *Building Stronger Foundations, Implementing the NSW Government Response to the Shergold Weir Building Confidence Report*, discussion paper, June 2019.

⁴¹⁷ NSW Government, *Release of the draft Design and Building Practitioners Bill 2019 for public consultation*, October 2019, Fair Trading, <<https://www.fairtrading.nsw.gov.au/consultation-tool/design-and-building-practitioners-bill-2019>>.

⁴¹⁸ Kevin Anderson, Second reading speech: Design and Building Practitioners Bill 2019, 23 October 2019.

⁴¹⁹ Kevin Anderson, Second reading speech: Design and Building Practitioners Bill 2019, 23 October 2019.

- 6.6 The Minister clarified that initially the bill will apply to class 2 buildings (multi-storey and multi-unit residential buildings), as well as mixed-use buildings with a class 2 component (such as residential units or office blocks that have residential apartments located above the block). He said that 'additional classes of buildings, such as hospitals, schools and other multi-storey buildings are intended to be included in the new scheme as part of the regulations over time'.⁴²⁰
- 6.7 Further, the Minister advised that the duty of care component of the bill will 'apply to construction work in a building that is a class 1, 2, 3 and 10 under the Building Code of Australia' and this will be set out in the regulations.⁴²¹
- 6.8 Minister Anderson concluded his second reading speech by stating that the reforms will commence a new stage of building regulation, that prioritises public safety:

This Government is taking a no-nonsense approach to regulation in this State. This bill will reflect a new era in the industry, and is about putting public safety first, to ensure that New South Wales has a leading system of design and building regulation that delivers well-constructed buildings into the future.⁴²²

Purpose of the bill

- 6.9 The purpose of the bill, as set out in the explanatory note, is to:
- require compliance declarations for regulated designs to be provided by registered design practitioners and principal design practitioners who provide designs for certain building work (applicable building work)
 - impose obligations on registered building practitioners who carry out applicable building work to take all reasonable steps to provide building compliance declarations and to obtain compliance declarations for regulated designs
 - impose on building practitioners who do applicable building work an obligation not to carry out the work unless regulated designs have been obtained and compliance declarations provided
 - impose on building practitioners who do applicable building work an obligation to take all reasonable steps to comply with the applicable requirements of the *Building Code of Australia*
 - establish a duty of care owed by persons who carry out construction work relating to certain buildings to take reasonable care to avoid economic loss caused by defects arising from the work

⁴²⁰ Kevin Anderson, Second reading speech: Design and Building Practitioners Bill 2019, 23 October 2019.

⁴²¹ Kevin Anderson, Second reading speech: Design and Building Practitioners Bill 2019, 23 October 2019.

⁴²² Kevin Anderson, Second reading speech: Design and Building Practitioners Bill 2019, 23 October 2019.

- establish a registration scheme for design practitioners, principal design practitioners and building practitioners who are subject to compliance declaration requirements and to establish insurance requirements for registered practitioners
- provide for enforcement of the requirements of the proposed Act, and establish a register of practitioners registered under the proposed Act.⁴²³

6.10 The full detail of the bill is outlined in the first print⁴²⁴ as well as in the Minister's second reading speech.⁴²⁵ Here we highlight key elements of the bill that have been commented on by stakeholders.

6.11 Firstly, the practitioners that the bill will apply to are defined as:

- design practitioner – a person who prepares regulated designs
- principal design practitioner – a person who co-ordinates the provision of design compliance declarations for the purposes of building work done by a building practitioner
- building practitioner – a person who agrees under a contract or other arrangement to do building work, or if more than one person agrees to do building work, a person who is the principal contractor for the work
- principal contractor – a person who agrees to do building work under a contract or arrangement (the head contract) and for whom work is to be carried out under one or more other contracts or arrangements as part of or incidental to the work carried out under the head contract.⁴²⁶

6.12 Minister Anderson explained that the role of the principal design practitioner is not mandatory, however could be utilised where multiple registered design practitioners provide declared regulated designs, and would assist in coordinating these documents. In this case it would be the responsibility of the principal design practitioner to ensure 'all necessary design compliance declarations have been issued and that such declarations have been issued by suitably registered design practitioners'.⁴²⁷

6.13 Secondly, the bill requires design practitioners, principal design practitioners and building practitioners to be registered. They are also required to be 'indemnified by insurance that complies with the regulations against any liability to which the practitioner may become subject as a result of providing the declaration or doing the work'.⁴²⁸

⁴²³ NSW Government, *Design and Building Practitioners Bill 2019*, First print, explanatory note, 23 October 2019.

⁴²⁴ NSW Government, *Design and Building Practitioners Bill 2019*, First print, 23 October 2019.

⁴²⁵ Kevin Anderson, Second reading speech: Design and Building Practitioners Bill 2019, 23 October 2019.

⁴²⁶ NSW Government, *Design and Building Practitioners Bill 2019*, First print, 23 October 2019, pp 2-4.

⁴²⁷ Kevin Anderson, Second reading speech: Design and Building Practitioners Bill 2019, 23 October 2019.

⁴²⁸ NSW Government, *Design and Building Practitioners Bill 2019*, First print, 23 October 2019, pp 7-11.

- 6.14** Minister Anderson advised that the registration of practitioners under the bill is in response to the recommendation in the Shergold Weir report to 'register a broad range of practitioners involved in the design and construction of buildings'. The Minister noted that the *Home Building Act 1989* already provides for a 'broad licensing system' for persons undertaking residential building work valued over \$5,000, including builders working on high-rise buildings. The Minister explained that this bill will extend the 'regulation to design practitioners and other unlicensed categories of builder'.⁴²⁹
- 6.15** Although the specific classes of practitioners that would be required to be registered are not detailed in the bill itself, the Minister clarified that this 'detail will be prescribed by the regulations' and at a minimum would include 'architects, engineers, draftspersons and various designers' who will need to provide the types of plans prescribed in the bill.⁴³⁰
- 6.16** Thirdly, the bill places greater obligations on building practitioners to take all reasonable steps to ensure that:
- regulated designs are prepared by a registered design practitioner and that a compliance declaration is obtained for those designs
 - variations to a regulated design are recorded and that any new design is prepared by a registered design practitioner and that a compliance declaration is obtained for those varied designs
 - building work relating to a building element or performance solution for which a regulated design is to be used is carried out in accordance with a design prepared by a registered design practitioner and where a compliance declaration has been obtained
 - the work complies with the *Building Code of Australia* and other prescribed requirements.⁴³¹
- 6.17** In this regard, Minister Anderson stated that this bill places 'additional, more stringent obligations on building practitioners'. The Minister said that 'for the first time in New South Wales registered building practitioners will be required to declare whether or not building work complies with the requirements of the Building Code of Australia'.⁴³²
- 6.18** Fourth, the bill stipulates that 'a person who carries out construction work has a duty to exercise reasonable care to avoid economic loss caused by defects in or related to a building for which the work is done, and arising from the construction work'. It notes that each owner of the land and subsequent owner is entitled to damages for the breach of the duty under the common law.⁴³³

⁴²⁹ Kevin Anderson, Second reading speech: Design and Building Practitioners Bill 2019, 23 October 2019.

⁴³⁰ Kevin Anderson, Second reading speech: Design and Building Practitioners Bill 2019, 23 October 2019.

⁴³¹ NSW Government, *Design and Building Practitioners Bill 2019*, First print, explanatory note, 23 October 2019.

⁴³² Kevin Anderson, Second reading speech: Design and Building Practitioners Bill 2019, 23 October 2019.

⁴³³ NSW Government, *Design and Building Practitioners Bill 2019*, First print, 23 October 2019, p 15.

6.19 Finally, the bill imposes a number of penalties for non-compliance by practitioners, for example a penalty of up to \$220,000 and/or two years imprisonment if a practitioner makes a false or misleading declaration.⁴³⁴

Stakeholder feedback on the bill

6.20 The NSW Government held public consultation on the draft bill between 2 October and 16 October 2019 and received over 80 submissions.⁴³⁵

6.21 In his second reading speech, Minister Anderson advised that a 'large amount of that feedback' as well as feedback through other forums had been incorporated in the bill:

This bill and its policy proposals have already been the subject of significant public consultation. The Government has facilitated the feedback of stakeholders through a series of targeted roundtables, public consultation through the "Building Stronger Foundations" discussion paper, and public consultation on the bill itself. We have carefully considered the feedback received and listened to the voices of industry and the public. And, importantly, we have actioned a large amount of that feedback directly through this bill.⁴³⁶

6.22 As noted by the Minister in his second reading speech, changes to the bill that were made following public consultation, as well as changes committed to be made in the supporting regulations, include:

- extending the reforms to apply to mixed-use buildings with a class 2 component, such as a shopping centre or office with residential apartments located above the block, and a commitment to extend to additional classes of buildings as part of the regulations over time
- excluding repair or renovation work that is valued under a certain monetary threshold
- a requirement that the building practitioner be notified of a person's intention to apply for an occupation certificate within a prescribed period of time (to be defined in the regulations)
- a defence mechanism for building practitioners in situations where they reasonably rely on and build in accordance with a regulated design and its declaration, that is provided by a registered design practitioner and that practitioner has declared that the designs comply with the code
- penalties for any person who unduly influences a practitioner, including by altering (or threatening to alter) the position of a practitioner to their detriment, or failing (or threatening to fail) to pay remuneration payable to the practitioner

⁴³⁴ Kevin Anderson, Second reading speech: Design and Building Practitioners Bill 2019, 23 October 2019.

⁴³⁵ Kevin Anderson, Second reading speech: Design and Building Practitioners Bill 2019, 23 October 2019.

⁴³⁶ Kevin Anderson, Second reading speech: Design and Building Practitioners Bill 2019, 23 October 2019.

- a requirement under the regulations for the principal contractor to provide a list of all subcontractors who performed building work on site as part of the building compliance declaration
- a commitment to 'consider' utilising existing inter-jurisdictional licensing frameworks for engineers to avoid duplication of registration and licensing requirements
- a commitment to 'consider' broadening the types of building elements to hydraulic, electrical and mechanical systems.⁴³⁷

6.23 Minister Anderson indicated that stakeholder feedback will also help to refine the regulations and committed to continuing consultation with key stakeholders as they are being developed. To enable this, the Minister has established a building reform expert panel to 'provide advice and industry insight to [the Minister], the Building Commissioner and the Department of Customer Service'. The Minister indicated that the panel will consider 'the existing reforms before us, including the development of the regulations and the agenda to come, ensuring we get these important reforms right'.⁴³⁸

Key issues

6.24 The committee invited key stakeholders to comment on the provisions of the bill by making further written submissions and appearing at a public hearing. This section details the issues that were raised by these stakeholders.

Overarching response to the bill

6.25 Stakeholders made a number of overarching comments regarding the bill. The majority of stakeholders expressed concern about the government's approach, while others were encouraged by the bill.

6.26 Mr Michael Lambert, in his submission, commented that 'what is notable about both the process and the actual reforms undertaken to date in NSW since both my report and the Shergold Weir report is how limited and piecemeal the "reforms" have been'. Mr Lambert said that what is missing is a clear vision statement from the government of its approach to building regulation.⁴³⁹

6.27 At a hearing, Mr Lambert said that 'this bill has lots of defects' and only slightly improves 'the status quo'. He added that it does not address historical defects or the crisis of confidence in the industry:

⁴³⁷ Kevin Anderson, Second reading speech: Design and Building Practitioners Bill 2019, 23 October 2019.

⁴³⁸ Kevin Anderson, Second reading speech: Design and Building Practitioners Bill 2019, 23 October 2019.

⁴³⁹ Submission 56a, Mr Michael Lambert, p 2.

Of course, finally, it does not address the current problems with the current buildings that are in defect, obviously, and therefore, by definition, it will not address the issue of confidence in the industry. And this bill is so flawed that it will certainly not provide any significant hope for the future.⁴⁴⁰

6.28 Mr Lambert noted that he was not consulted on the draft bill: 'I did see the Minister and I did see the Premier. They subsequently made available the bill once it was publicly released but there was no consultation about it at all'.⁴⁴¹

6.29 Engineers Australia was consulted on the bill. Mr Jonathan Russell, National Manager for Public Affairs, Engineers Australia, informed the committee that 'the consultation has been, I think, overall, decent consultation in the context of going very quickly'. Mr Russell went on to say that the government should slow down to make sure the reforms are right:

But acknowledging that the Government has been working very fast on this, our advice is to slow down a little bit so that we can get it right in the Act first time. Acknowledging that the community wants to see some evidence of action the Government has been moving pretty quickly.⁴⁴²

6.30 The Institute of Public Works Engineering Australasia NSW Division (IPWEA NSW) said that the government has a 'unique opportunity to correct the current flawed system and raise professional standards through meaningful reform measures', however concluded that 'we do not agree with the State Government's approach to piece-meal legislation'.⁴⁴³

6.31 Mr Brett Daintry, Director, Daintry Associates, stated that 'this bill does not fix the mess, it just adds another layer of complexity to the mess'. He added that 'this in my opinion is another Act that is put in place to prop up a fundamentally flawed and failed system', commenting that the 'whole thing is a kneejerk reaction to the Opal Tower, the Mascot Towers and other matters and it does not seem to me that there has been a cohesive approach to any of it'.⁴⁴⁴

6.32 Concerns were also raised by the Construction Forestry Mining and Energy Union (NSW Branch) (CFMEU NSW). The CFMEU NSW said that they are 'very disappointed that this is the response of the NSW Government' and that the bill 'fails to address the very real crisis in the building and construction industry in NSW in relation to building quality and fireproofing'.⁴⁴⁵

⁴⁴⁰ Evidence, Mr Michael Lambert, Author of the *Independent Review of the Building Professionals Act 2005*, 5 November 2019 (uncorrected transcript), p 43.

⁴⁴¹ Evidence, Mr Lambert, 5 November 2019 (uncorrected transcript), p 48.

⁴⁴² Evidence, Mr Jonathan Russell, National Manager for Public Affairs, Engineers Australia, 5 November 2019 (uncorrected transcript), p 3.

⁴⁴³ Submission 174, Institute of Public Works Engineering Australasia NSW Division, p 18.

⁴⁴⁴ Evidence, Mr Brett Daintry, Director, Daintry Associates, 5 November 2019 (uncorrected transcript), p 28.

⁴⁴⁵ Submission 173a, Construction Forestry Mining and Energy Union (NSW Branch), p 1.

- 6.33** Cr Linda Scott, President, Local Government NSW, told the committee they supported the 'proposals to register building designers and practitioners and require building practitioners to declare their plans and buildings are compliant with the Building Code of Australia'. However Cr Scott went on to say that 'the public trust in this system of construction in New South Wales will not fully be restored just with the passing of the bill'.⁴⁴⁶
- 6.34** The Australian Institute of Architects NSW was encouraged to see the NSW Government making changes, describing the bill as 'a first step towards rectifying issues around the quality and safety of complex buildings'. The Institute advised that they have been working closely with industry and government as the reforms progress, however, said that 'despite engaging heavily in the public consultations related to the development of the current Bill, some concerns remain'.⁴⁴⁷
- 6.35** Mr Barry Mann, appearing on behalf of the Urban Development Institute of Australia – NSW Division (UDIA NSW), told the committee that 'the bill is a step in the right direction to restore confidence by bringing about accountability and removing a small minority of rogues from the industry'. He confirmed that Urban Development Institute of Australia 'does not have any objections with the intent or the broad objectives of the bill'.⁴⁴⁸ Their evidence at the hearing and written submission detailed numerous concerns with the bill including that it appeared to duplicate existing regulations in the *Environmental Planning and Assessment Act 1979*.

Reliance on supporting regulations

- 6.36** Given that the NSW Government intends to develop the supporting regulations in 2020, a number of stakeholders advised that it was difficult for them to comment on aspects of the bill due to the lack of detail in the bill itself. Stakeholders also commented on the tight timeframes for consultation on the bill, and the lack of parliamentary oversight of regulations compared to legislation.
- 6.37** For example, CFMEU NSW said that it is difficult to comprehensively assess the bill without seeing the supporting regulations:

Without seeing the regulations, it is difficult to assess the utility of the Bill. The regulations are said to govern everything from definitions to requirement of insurance. We are concerned about having important matters of substance relegated to regulations that have not yet been drafted. Further regulations are much easier to change and could lead to a further watering down of already weak proposed legislation.⁴⁴⁹

⁴⁴⁶ Evidence, Cr Linda Scott, President, Local Government NSW, 5 November 2019 (uncorrected transcript), pp 11-12.

⁴⁴⁷ Submission 129a, Australian Institute of Architects NSW, p 1.

⁴⁴⁸ Evidence, Mr Barry Mann, Chair, Urban Development Institute of Australia NSW Building Regulation Industry Advisory Panel and former Chief Executive Officer, UrbanGrowth NSW, 5 November 2019 (uncorrected transcript), p 36.

⁴⁴⁹ Submission 173a, Construction Forestry Mining and Energy Union (NSW Branch), p 1.

- 6.38** Mr Philip Gall, Chairman, Owners Corporation Network, observed that the bill 'is a bit of a foundation perhaps—not a very solid foundation, it seems—for future regulations and associated ministerial arrangements'. Mr Gall said that without the detail promised in the regulations 'the full operation of the bill does not deliver much for consumers'. He expressed the view that 'even with the regulations in place, the time for this to work and to flow through to meaningful changes is many years'.⁴⁵⁰
- 6.39** The Property Council of Australia reported that 'there are industry concerns about the practical implementation of the proposals as much of the policy detail is yet to be made available'. The Council also noted that 'this is worsened due to the tight timeframes and the seemingly arbitrary deadline for introduction of the Bill'.⁴⁵¹
- 6.40** IPWEA NSW highlighted that the 'bill, in its current form, seems to be lacking in detail and instead leaves much of the work to be done through regulations which have yet to be developed'. It commented that this 'makes it difficult to provide feedback on whether the proposed legislation will indeed achieve what it is set out to accomplish', and raised concerns that the regulations will 'not go through the same level of scrutiny as an Act of Parliament'.⁴⁵²
- 6.41** Local Government NSW also noted the 'significant reliance' on the regulations to provide the detail and raised concerns that the regulations will not be 'subject to the same level of parliamentary process and scrutiny'. Given this, Local Government NSW stressed the importance of 'comprehensive stakeholder input' to develop the regulations and recommended that 'a minimum six-week period should be provided for detailed consultation on the regulations during 2020'.⁴⁵³
- 6.42** Similarly, the UDIA NSW said that it was 'challenging' to comment on the bill, as 'a substantial amount has been left to the regulation'. It suggested that a draft of the regulations be released to 'help inform debate in the Parliament', and if this is not possible requested that there be 'adequate consultation on the Regulations prior to the commencement of the Bill'.⁴⁵⁴
- 6.43** According to Engineers Australia, the 'nine business days' given to stakeholders to provide consultation specifically on the bill was 'incredibly short'. Engineers Australia recommended that the government 'allows more time for open, public, discussion' as it progresses with its reform program. Engineers Australia also recommended that the bill itself provide more detail:

The bill leaves a lot to regulations and it is recommended that it be amended to provide much more detail. Doing so would provide clarity to industry and the public as to what the reforms encompass. The reforms are important, so it is best to make the laws with the full scrutiny of Parliament, as opposed to leaving much of the changes to be defined by regulation.⁴⁵⁵

⁴⁵⁰ Evidence, Mr Philip Gall, Chairman, Owners Corporation Network, 5 November 2019 (uncorrected transcript), p 51.

⁴⁵¹ Submission 133a, Property Council of Australia, p 2.

⁴⁵² Submission 174, Institute of Public Works Engineering Australasia NSW Division, p 17.

⁴⁵³ Submission 145a, Local Government NSW, pp 6-7.

⁴⁵⁴ Submission 87a, Urban Development Institute of Australia – NSW Division, p 3.

⁴⁵⁵ Submission 125a, Engineers Australia, p 4.

6.44 At a hearing, stakeholders were asked if they were aware of when the regulations would come into place. Mr Russell advised that 'informally there is clear indication from Government that it is intending to get started on the regulation pretty quickly ... but I have not had a date'.⁴⁵⁶ Mr Greg Ewing, General Manager for the Sydney Division, Engineers Australia, added that the timeline for the regulations is 'an unknown length of string at the moment'.⁴⁵⁷

6.45 In terms of the impact of the bill not being implemented until the regulations are developed, Mr Darren Greenfield, State Secretary, CFMEU NSW, said that it will cause the industry to push through contracts and approvals to avoid the obligations under the bill:

It will just push a major issue and a major problem we have now to an even bigger problem 12 months, two years, three years down the track. It is going to get worse, because they will rush in to beat it and get in early and lock it away.⁴⁵⁸

Alignment with other Acts

6.46 Some stakeholders suggested that this new piece of legislation adds an additional layer to an already complex regulatory environment and that elements of the bill duplicate other Acts.

6.47 For example, Local Government NSW said that if the bill is passed it would 'introduce an additional stand-alone piece of legislation into an already-complex system of legal requirements for building and construction'. It explained that the *Environmental Planning and Assessment Act 1979*, the *Building Professionals Act 2005* and the *Home Building Act 1989* all 'play a key role in underpinning the design, construction and safety of buildings in New South Wales'. It suggested that the reforms be implemented instead through an amendment to the *Environmental Planning and Assessment Act 1979* as the provisions in this Act already allow for 'compliance certificates to be issued by building practitioners' and would just require an expansion of this Act to include, for example, the list of practitioners required to issue those certificates.⁴⁵⁹

6.48 In addition, Cr Scott questioned why the *Building and Development Certifiers Act*, introduced last year, and this bill 'are not forming part of the same bill' and did not link clearly with the *Environmental Planning and Assessment Act 1979*. She said that 'it is disappointing' that this is a separate bill and leads to 'unnecessary complexity and confusion for councils and the public'. Cr Scott indicated their support for a standalone Act that is closely aligned with the *Environmental Planning and Assessment Act 1979* 'to ensure that the definitions, for example, were consistent'.⁴⁶⁰

⁴⁵⁶ Evidence, Mr Russell, 5 November 2019 (uncorrected transcript), p 3.

⁴⁵⁷ Evidence, Mr Greg Ewing, General Manager for the Sydney Division, Engineers Australia, 5 November 2019 (uncorrected transcript), p 3.

⁴⁵⁸ Evidence, Mr Darren Greenfield, State Secretary, Construction Forestry Maritime Mining and Energy Union (NSW Branch), 5 November 2019 (uncorrected transcript), p 35.

⁴⁵⁹ Submission 145a, Local Government NSW, p 9.

⁴⁶⁰ Evidence, Cr Scott, 5 November 2019 (uncorrected transcript), pp 12 and 15.

6.49 UDIA NSW also highlighted its concerns 'about the possibility of two regimes for the regulation of buildings'. It pointed to the existing regime through Part 6 of the *Environmental Planning and Assessment Act 1979*, 'where consents require compliance with the Building Code of Australia, which is enforced by the certification process', and compared this with the proposed regime which 'has the same objective of compliance with the Building Code of Australia and provides a greater layer of regulation'. UDIA NSW commented that 'it is critical that both schemes speak to each other clearly, particularly as the regulatory authorities are different for each scheme; local Councils for the former and the Department of Customer Service for the latter'.⁴⁶¹

6.50 Mr Daintry asserted that that 'this proposed Act is not required' and is a 'further duplication and over complication for all stakeholders, [which] will confuse the public and not improve simplicity, responsibility, accountability and liability'.⁴⁶² At a hearing Mr Daintry further highlighted potential confusion by comparing the terminology across the various acts:

A "compliance certificate" seems to be a "compliance declaration", an "accredited certifier" seems to be a "registered designer practitioner". A "principal certifying authority" will be known as a "principal design practitioner". The Building Professionals Act, the Development Certifiers Act and this bill all seem to cross over and seek the same objectives. And they all do not talk to each other. It is a real mishmash.⁴⁶³

6.51 Mr Daintry called for 'a single cohesive approach to building in New South Wales' where all of this falls under its own building Act, noting that 'I have been saying this for decades'.⁴⁶⁴

6.52 Along similar lines, Mr Lambert expressed his disappointment at the 'very fragmented process' that the government has followed to progress the reforms, which he said 'has been done in little slivers that do not necessarily connect'. He explained that 'every time there is a building problem, a new bit of legislation gets established' and that since his report 'there has been three or four bits of legislation established, all of which do not link to each other'. Mr Lambert stated that the bill 'is actually making the legislative structure progressively more and more complex and difficult to navigate whereas it should be simplifying it'.⁴⁶⁵

6.53 Mr Lambert told the committee that what is required is 'one omnibus Act' that is 'principles-based plain English legislation supported by regulation underneath it'. Mr Lambert said he had hoped that the government would introduce a comprehensive reform package:

I had wished the Government, in view of the seriousness of the situation, would have come up with a comprehensive reform proposal with a stepped range of initiatives that would be taken that are coordinated, which they commit to on a definite time frame and which address each of the key problems ... It seems to me that you need a vision of the way you are heading and there is no vision ... If you had had that vision and a commitment to that, I would think it goes some way to giving assurance to the community that there was a commitment and a plan it was proceeding.

⁴⁶¹ Submission 87a, Urban Development Institute of Australia – NSW Division, p 2.

⁴⁶² Submission 8a, Mr Brett Daintry, p 1.

⁴⁶³ Evidence, Mr Daintry, 5 November 2019 (uncorrected transcript), p 25.

⁴⁶⁴ Evidence, Mr Daintry, 5 November 2019 (uncorrected transcript), pp 25 and 28.

⁴⁶⁵ Evidence, Mr Lambert, 5 November 2019 (uncorrected transcript), pp 43 and 47.

Simply releasing bits of legislation that are quite technical and narrow in scope does not give anyone assurance.⁴⁶⁶

Classes of buildings covered in the bill

- 6.54** As mentioned earlier, the government has said that the bill will initially apply to class 2 buildings and mixed-use buildings with a class 2 component and extend the provisions to other classes of buildings over time. Some stakeholders raised concerns with this approach.
- 6.55** For example, Mr Lambert noted that the bill does not clearly stipulate the classes of buildings that will be covered and suggested that 'there should be a time-based commitment to extend coverage of buildings beyond class 2 and mixed-use buildings'.⁴⁶⁷
- 6.56** While acknowledging the increased risk profile of class 2 developments compared with other types of buildings, Local Government NSW stated that 'there is a perception and expectation from the public that the promised tightening of regulation of building designers and practitioners will apply to all construction, not just to selected building forms'. Local Government NSW therefore requested an assurance that over time 'other forms of building where there is a risk to quality, safety and non-compliance will be captured ...'.⁴⁶⁸
- 6.57** IPWEA NSW also called for the reforms to extend to other types of construction:
- We contend that reforms should not be isolated and focused on just one class of building structure as there are many other structures (such as bridges, tunnels, roads, walls) that are beyond the remit of the Building Code of Australia that also need registered practitioners to oversee their design, construction and ongoing care.⁴⁶⁹
- 6.58** Engineers Australia noted that the bill is silent on the classes of structure it will apply to and argued that the bill 'risks merely transferring the problems that Class 2 buildings have experienced to other buildings and other major structures which rely heavily on engineering services'.⁴⁷⁰ It called for the bill to include more detail on the prescribed classes of building 'to ensure industry and public confidence that the reforms will in fact extend to all parts of the building sector, or do so within a prescribed timeframe'.⁴⁷¹
- 6.59** At a hearing, Mr Russell told the committee that they had been advised that the reason why the government is starting with class 2 buildings was to 'stage out and manage the implementation'. Mr Ewing went on to say that apart from the very public issues of Opal Tower and Mascot Towers, he could not see 'any justification to not broaden it out'.⁴⁷²

⁴⁶⁶ Evidence, Mr Lambert, 5 November 2019 (uncorrected transcript), pp 47 and 49-50.

⁴⁶⁷ Submission 56a, Mr Michael Lambert, pp 4-5.

⁴⁶⁸ Submission 145a, Local Government NSW, p 4.

⁴⁶⁹ Submission 174, Institute of Public Works Engineering Australasia NSW Division, p 17.

⁴⁷⁰ Submission 125a, Engineers Australia, pp 4-5.

⁴⁷¹ Submission 125a, Engineers Australia, pp 4-5.

⁴⁷² Evidence, Mr Russell and Mr Ewing, 5 November 2019 (uncorrected transcript), p 6.

- 6.60** By contrast, UDIA NSW held an opposing view and welcomed the announcement that the scheme would initially be limited to class 2 buildings:

The crisis in confidence that the community has been feeling in relation to building quality has also been limited to Class 2 buildings, therefore it is likely this response has been designed for this building type. Government, commercial and industrial buildings usually involve more sophisticated owners and tenants, who are better able to represent their interests in the legal system, so require fewer consumer protections. Class 1 buildings and homes are much simpler, so do not require the design certification process that is envisaged in this Act. It is also possible that many homeowners might be inappropriately captured through these provisions.⁴⁷³

Practitioners covered in the bill

- 6.61** Several stakeholders were concerned that not all practitioners involved in the design, building and construction of a building are captured under the bill.
- 6.62** Local Government NSW commented that 'the precise details about which practitioners will be registered are not known at this stage' and that 'there is a public expectation that announcements about stronger regulation of the building and construction sector will apply to all the key players'.⁴⁷⁴
- 6.63** According to Mr Lambert, the 'bill only covers builders and building designers and not other relevant building practitioners'. Mr Lambert pointed to the recommendation in the Shergold Weir report that 'each Australian jurisdiction require the registration of building practitioners involved in the design, construction and maintenance of buildings'.⁴⁷⁵ He noted that it was not clear if the bill's intent is to register and regulate the full list of building practitioners as set out in the Shergold Weir recommendation.⁴⁷⁶ Mr Lambert concluded: 'So it is a very partial approach, which is surprising, given the Government has endorsed that report completely, as all governments have'.⁴⁷⁷
- 6.64** Similarly, Engineers Australia stated that 'as a minimum, all areas of practice listed in the Shergold Weir report – civil, structural, hydraulic, mechanical, geotechnical, fire safety and fire protection system – should be subject to compulsory registration'.⁴⁷⁸ Likewise, IPWEA NSW called for the government to fully implement the first recommendation in the Shergold Weir report to register all building practitioners.⁴⁷⁹

⁴⁷³ Submission 87a, Urban Development Institute of Australia – NSW Division, pp 3-4.

⁴⁷⁴ Submission 145a, Local Government NSW, p 9.

⁴⁷⁵ The categories of practitioners included in the Shergold Weir recommendation include builder, site or project manager, building inspector, building surveyor/certifier, architect, engineer, designer/draftsperson, plumber and fire safety practitioner. Submission 56a, Mr Michael Lambert, p 4.

⁴⁷⁶ Submission 56a, Mr Michael Lambert, p 4.

⁴⁷⁷ Evidence, Mr Lambert, 5 November 2019 (uncorrected transcript), p 44.

⁴⁷⁸ Submission 125b, Engineers Australia, p 1.

⁴⁷⁹ Submission 174, Institute of Public Works Engineering Australasia NSW Division, p 18.

- 6.65** The UDIA NSW suggested that the term 'building practitioner' in the bill should also include 'subcontractors, suppliers and specialist installers, that currently provide certificates relied upon by a certifier'. UDIA NSW said that this would ensure 'true accountability' along the chain.⁴⁸⁰
- 6.66** The Australian Institute of Architects NSW observed that 'there are many practitioners besides architects, engineers and builders, who design, install, construct and manage aspects of the construction process that have not been considered by this Bill'. The Institute explained that 'the Bill focuses heavily on designers and design stages but fails to extend that focus to the building professionals doing the building work and the construction stage'. It went on to recommend that all building practitioners should be captured in the bill:
- The Institute believes that all building practitioners including professional engineers, project managers, building designers; drafters and a wide range of tradespeople need to be brought under a regulatory regime and level playing field where all are required to hold public liability and professional indemnity insurance and demonstrate appropriate skills in line with clearly defined competency standards ... The definition of building practitioner in the Bill should therefore be expanded from "principal contractor" to cover a wide range of building practitioners and tradespeople.⁴⁸¹
- 6.67** The Australian Institute of Architects NSW also pointed out that the bill treats design and building practitioners differently, stating that this is 'inequitable, and all practitioners should be held to the same standards'. The Institute gave the example of the principal design practitioner who must 'ensure' that design compliance declarations are given, whereas the building practitioner is only required to 'take reasonable steps to ensure' that regulated designs are prepared by a registered practitioner.⁴⁸²
- 6.68** When questioned as to what this issue means in practice, Ms Kathlyn Loseby, President, NSW Chapter, Australian Institute of Architects, said:
- In both circumstances, both are relying on the declarations by the design practitioners. For the principal design practitioner, they must ensure that everything is correct. Basically that means there are no excuses if anything is misaligned ... Similarly, for the building practitioners, they need to sign off their built works based on the documents provided by the design practitioners. But they can take reasonable steps to ensure, on the basis that they are relying on those documents, so if those documents are wrong, they cannot be held responsible if it was declared and certified previously.⁴⁸³
- 6.69** Ms Loseby advised that they raised this issue with the government and had expected it to be addressed in the bill that was introduced.⁴⁸⁴

⁴⁸⁰ Submission 87a, Urban Development Institute of Australia – NSW Division, p 5.

⁴⁸¹ Submission 129a, Australian Institute of Architects NSW, p 5.

⁴⁸² Submission 129a, Australian Institute of Architects NSW, p 2.

⁴⁸³ Evidence, Ms Kathlyn Loseby, President, NSW Chapter, Australian Institute of Architects, 5 November 2019 (uncorrected transcript), pp 18-19.

⁴⁸⁴ Evidence, Ms Loseby, 5 November 2019 (uncorrected transcript), pp 19 and 21.

- 6.70** Mr Daintry agreed that 'there needs to be a level playing field that everybody in the system needs to be equally accountable, and everybody needs to be registered'. Mr Daintry added that he preferred 'the word "accredited", because registered to me means you put your name down and you get a ticket', emphasising that 'everybody needs to be appropriately qualified, they need to have relevant skills and relevant practical experience'.⁴⁸⁵
- 6.71** Concerns were also raised that the bill does not seem to impose obligations on developers. The CFMEU NSW and Local Government NSW both highlighted that it was not clear if the bill covers developers, with CFMEU NSW stating that developers have been the 'group who have significantly profited from the crisis in the industry' and have 'overseen and benefited financially from the cutting of corners in construction'.⁴⁸⁶

Registration of engineers

- 6.72** In particular the committee heard from Engineers Australia and IPWEA NSW who called for all engineers to be registered and therefore regulated, noting that this is not currently the case in the proposed legislation. This was also discussed in Chapter 5.
- 6.73** Engineers Australia strongly advocated for compulsory registration of all engineers in New South Wales, stating that: 'It is unacceptable that at present virtually anyone in NSW can call themselves an engineer, even if they have no experience, no education, no credentials and no commitment to maintain competency'.⁴⁸⁷
- 6.74** When questioned on whether New South Wales will become the wild west in comparison to the legislative environments in Queensland and Victoria, Mr John Roydhouse, Chief Executive Officer, IPWEA NSW, said:
- It will become apparent and certainly within my membership it has already become apparent that people who do not have the qualifications are seeking to move into New South Wales because they can no longer work in other States.⁴⁸⁸
- 6.75** Engineers Australia explained that there are three major parties that are involved in the design and construction of buildings: engineers, architects and builders. It advised that architects are registered and regulated under the *Architects Act* and builders are registered and regulated under the *Building Professionals Act* and the *Home Building Act*. However, engineers 'are not presently registered and regulated' by the government in New South Wales.⁴⁸⁹
- 6.76** In its submission, Engineers Australia therefore called for the NSW Government to introduce a Professional Engineers Registration Act that would 'apply to all professional engineers working across any area of engineering, other than those working under supervision'. Engineers Australia said that it would be preferable for this to be introduced in 2019, however

⁴⁸⁵ Evidence, Mr Daintry, 5 November 2019 (uncorrected transcript), p 27.

⁴⁸⁶ Submission 173a, Construction Forestry Mining and Energy Union (NSW Branch), p 1; Submission 145a, Local Government NSW, p 9.

⁴⁸⁷ Submission 125a, Engineers Australia, p 7.

⁴⁸⁸ Evidence, Mr John Roydhouse, Chief Executive Officer, Institute of Public Works Engineering Australasia NSW Division, 5 November 2019 (uncorrected transcript), p 5.

⁴⁸⁹ Submission 125a, Engineers Australia, p 7.

if this is not the case, it 'strongly recommended that the Government makes a formal commitment, to Parliament, to do so in 2020'.⁴⁹⁰

6.77 Engineers Australia commented that it would be a missed opportunity to not extend registration to all types of engineers at this time:

The building industry reform process is necessarily focused on engineers in that sector, and the introduction of a Professional Engineers Registration Act would be the most efficient mechanism for improving standards. It would be a missed opportunity to not apply it more broadly. Engineers provide complex services in many industries, like public infrastructure, power generation, manufacturing and mining, where professional engineers provide critical services.⁴⁹¹

6.78 IPWEA NSW shared the views of Engineers Australia, and advised in its submission that it has 'repeatedly called for a registration scheme for all types of engineers combined with a formal cadet engineering program to be introduced into New South Wales'. IPWEA NSW stated that the 'registration of engineers needs to be a priority' and that this 'request has been strongly supported by industry bodies along with the broader community'.⁴⁹²

6.79 IPWEA NSW commented that the government's 'partial regulation' excludes the 'vast majority of civil construction in its scope', noting that the proposal only covers 'building designers' and 'some categories of engineers'.⁴⁹³ The Institute emphasised why a broader registration scheme for engineers is so important:

The State Government's response should not be limited to addressing the failures of the building sector alone. NSW needs a registration scheme that covers all disciplines of engineering, consistent with the other states. Every major engineering association in the country supports such a scheme. Registration ensures that competent and properly qualified engineers are approving plans for major projects and community infrastructure. This will not only ensure safety but will also help to protect the taxpayer from having to shoulder the consequences brought about by inadequate project scoping and waste.⁴⁹⁴

6.80 In addition, IPWEA NSW highlighted that 'engineering failures can result in devastating consequences', and pointed to Mascot Towers and Opal Tower as examples of 'how these failures affect consumer safety and confidence'. It noted that although engineering failures are 'low-probability events, the consequences are high-value', and stressed the importance of having 'statutory arrangements in place', where 'appropriate standards of competence can be set and assessed, and those found to be incompetent can be removed from the system, thus affording the public some form of protection and a system for redress'.⁴⁹⁵

⁴⁹⁰ Submission 125a, Engineers Australia, pp 7 and 9.

⁴⁹¹ Submission 125a, Engineers Australia, p 9.

⁴⁹² Submission 174, Institute of Public Works Engineering Australasia NSW Division, pp 4 and 8.

⁴⁹³ Submission 174, Institute of Public Works Engineering Australasia NSW Division, p 4.

⁴⁹⁴ Submission 174, Institute of Public Works Engineering Australasia NSW Division, p 18.

⁴⁹⁵ Submission 174, Institute of Public Works Engineering Australasia NSW Division, p 10.

- 6.81** Witnesses drew attention to the *Professional Engineers Registration Bill 2019* that was introduced by a private member in the Legislative Assembly on 24 October 2019. The bill is intended to establish a scheme for the registration and regulation of professional engineers and ensure that engineering services are provided by professional engineers.⁴⁹⁶
- 6.82** Mr Russell from Engineers Australia and Mr Roydhouse from IPWEA NSW appeared before the committee and commented on both the *Design and Building Practitioners Bill 2019* and the *Professional Engineers Registration Bill 2019* and how they will impact the engineering profession.
- 6.83** Mr Russell called for both bills to be passed together to ensure the loopholes in the regulation of engineers are addressed effectively:
- The reason for this is the two are very much complimentary. We do not see them as an either/or proposition but definitely the two need to work together. If we have just the Government bill passed there will be a lot of benefits for the building sector, but there will remain two things. One is some loopholes in regulating engineering practice. The second thing is that it could be a missed opportunity to broaden the benefits of what we are doing now to engineering practice in other industries, things like public infrastructure, manufacturing, electricity networks and the like, other things that the community also relies on.⁴⁹⁷
- 6.84** Mr Russell explained that 'if you combine the private member's bill with the Government's proposed reforms, we can actually reduce red tape and have one system for regulating engineering practice and get all the benefits'.⁴⁹⁸
- 6.85** Mr Roydhouse informed the committee that IPWEA NSW 'also supports that joint approach' and 'believe[s] that they are complimentary pieces of legislation and should be looked at and treated accordingly'.⁴⁹⁹
- 6.86** Mr Russell noted that while the Minister in his second reading speech committed to including other classes of engineers not specifically mentioned in the bill, some types of engineers were not mentioned. Mr Russell explained that 'to try to list everything out all at once just invites loopholes', and again called for comprehensive regulation of all engineers.⁵⁰⁰
- 6.87** In terms of the cost of a professional engineers registration scheme, Mr Russell advised that the budget for the set-up of the Victorian scheme was \$5.9 million, and that this 'equates to less than the cost of seven houses in Sydney'. Mr Russell highlighted this is minimal cost when looking at the benefits of such a scheme. In terms of the ongoing cost to government, Mr Russell reflected on the Queensland scheme and said that 'it is cost neutral, because the agency ... is funded through the fees that engineers pay'.⁵⁰¹

⁴⁹⁶ Hon Yasmin Catley MP, Deputy Leader of the Opposition, *Professional Engineers Registration Bill 2019*, First print, explanatory note, 24 October 2019, p 1.

⁴⁹⁷ Evidence, Mr Russell, 5 November 2019 (uncorrected transcript), p 2.

⁴⁹⁸ Evidence, Mr Russell, 5 November 2019 (uncorrected transcript), p 5.

⁴⁹⁹ Evidence, Mr Roydhouse, 5 November 2019 (uncorrected transcript), p 2.

⁵⁰⁰ Evidence, Mr Russell, 5 November 2019 (uncorrected transcript), p 8.

⁵⁰¹ Evidence, Mr Russell, 5 November 2019 (uncorrected transcript), p 4.

- 6.88** Ms Loseby gave evidence that the Australian Institute of Architects supported engineers being regulated under their own act, in a similar way to architects.⁵⁰²

Role of principal design practitioner

- 6.89** There was some confusion amongst stakeholders as to the role of the principal design practitioner and what profession would take up this role.

- 6.90** Mr Lambert advised that it is not clear whether the role of principal design practitioner is to be 'undertaken by the builder or is a separate position and who appoints the person and the skills and training required for the role'.⁵⁰³ He questioned how the new role would relate to the role of a building certifier:

What is the role of the building certifier? To supervise at a broad level, collect the certificates, but then you have got this new party who is called the principal design practitioner who is collecting certificates too. What linkage does that have to the building certifier? Who appoints the principal design practitioner? What are the skills required? What is the linkage to the building certifier? It is all missing from the legislation.⁵⁰⁴

- 6.91** Mr Lambert suggested that if this role is to be introduced 'it should be more than a collector of declarations and add value', noting that 'value could be added if the person holding the position were required to assess whether the designs fit together in a coherent whole'.⁵⁰⁵

- 6.92** UDIA NSW was also unclear on what the role of principal design practitioner entails. It suggested that the role is primarily to collect design certificates and audit compliance, commenting that 'therefore, this role could be carried out by the Certifier, in which case the process could be run in parallel to the building certificate process'. UDIA NSW also noted that in the context of residential building 'it may be intended for the Principal Design Practitioner to be the architect, however, this would not necessarily be applicable for other classes of building'.⁵⁰⁶

- 6.93** In this regard, the Australian Institute of Architects said that 'architects are already well positioned to take on the role of "principal design practitioner" as defined in the Bill'. It explained that as architects are already regulated, insured and required to have ongoing registration it 'makes architects particularly well placed to ensure design quality throughout the construction process, and ready to assist bring consumer confidence back to the building and construction sector'.⁵⁰⁷

⁵⁰² Evidence, Ms Loseby, 5 November 2019 (uncorrected transcript), p 19.

⁵⁰³ Submission 56a, Mr Michael Lambert, p 5.

⁵⁰⁴ Evidence, Mr Lambert, 5 November 2019 (uncorrected transcript), p 43.

⁵⁰⁵ Submission 56a, Mr Michael Lambert, p 5.

⁵⁰⁶ Submission 87a, Urban Development Institute of Australia – NSW Division, p 4.

⁵⁰⁷ Submission 129a, Australian Institute of Architects NSW, p 6.

Role of Building Commissioner

- 6.94** Some stakeholders commented that the Building Commissioner is not mentioned in the bill and raised concerns that this role without clear statutory powers and independence will not enable the enforcement that is needed to turn the industry around.
- 6.95** Local Government NSW highlighted that the 'bill is silent on the role and functions of the new Building Commissioner' and that the provisions in the bill 'will be ineffectual unless they are supported by a regulatory body that is independent, well-resourced and backed by the requisite statutory powers'. It recommended the NSW Government clarify the 'statutory provisions proposed for the Building Commissioner and commits to adequate funding and resourcing to support this critical role'.⁵⁰⁸
- 6.96** At a hearing Cr Scott advised that they have spoken with the Building Commissioner about their 'concerns about a lack of resourcing and an inability to use appropriate resources to do the enforcement that was needed—clearly, by anyone's measure, a huge task'. Cr Scott indicated Local Government NSW's disappointment that 'this bill has no reference to him or his powers', and advocated 'for much greater legislative clarity about that'.⁵⁰⁹
- 6.97** CFMEU NSW said that it is unclear who will register the practitioners stipulated in the bill and the resources that this body will have. Ms Rita Mallia, President, CFMEU NSW, gave evidence that the 'bill itself does not address the need for better enforcement' and called for 'the establishment of a building regulator with the proper enforcement powers. Ms Mallia argued that the existing penalties are not enforced, leaving consumers to pursue remedies through the courts:
- Lastly, we spoke to this in our submission, the penalties. To the extent we have just heard they are not enforced and they are not commensurate to the damage that is being caused. Those breaking the rules are left to break the rules leaving the consumers and others to pursue matters through courts, which is highly inadequate, or to pursue insurance companies, which does not solve the problem.⁵¹⁰
- 6.98** Mr Greenfield explained that the only avenue for the union to report problems on the ground is to SafeWork and Fair Trading, however their experience with the response from these departments is 'pretty poor', where they rarely see SafeWork on construction sites, except in the case of a death.⁵¹¹
- 6.99** Mr Greenfield contended that unless 'we get a decent building code in this State and a commission to enforce it,' problems will continue in the building and construction industry:

People have to be accountable for what they are building out there. We can see it happening in other States and we can see that it happened in New South Wales many years ago. There are ways to do it; the ways and means are known. It is just a matter of putting them in place and being serious about what needs to be there.⁵¹²

⁵⁰⁸ Submission 145a, Local Government NSW, pp 4-5.

⁵⁰⁹ Evidence, Cr Scott, 5 November 2019 (uncorrected transcript), p 15.

⁵¹⁰ Evidence, Ms Rita Mallia, President, Construction Forestry Mining and Energy Union (NSW Branch), 5 November 2019 (uncorrected transcript), p 30.

⁵¹¹ Evidence, Mr Greenfield, 5 November 2019 (uncorrected transcript), p 32.

⁵¹² Evidence, Mr Greenfield, 5 November 2019 (uncorrected transcript), p 33.

- 6.100** Along similar lines, Mr Daintry said that 'the biggest problem we have is we have a lot of people in government and an exorbitant amount of resources being put to writing acts and regulations and we actually have no enforcement'.⁵¹³ Mr Daintry said that the bill adds a lot of new offences, in addition 'to all of the existing offences under numerous acts that have tried to regulate development building and no-one has ever really enforced any of them'. He went on to say that he is 'not aware of anybody ever being prosecuted for breaching' the existing provisions, particularly under the *Environmental Planning and Assessment Act*.⁵¹⁴
- 6.101** Mr Lambert had a similar view, informing the committee that the 'fundamental problem in New South Wales ... is a lack of a robust regulatory approach' and that the 'building commissioner with four staff is not the party to handle it'. Mr Lambert said that New South Wales 'needs a building regulator who has the skills of a Queensland, say, building commission and the resources and the regime of inspections, review, interrogation that occurs in a robust regulatory system'.⁵¹⁵

Insurance provisions

- 6.102** As discussed in chapter 4, there are a number of issues with the current residential building insurance market that have made it difficult for practitioners to take out professional indemnity insurance. This bill requires design practitioners, principal design practitioners and building practitioners to be adequately insured. Stakeholders were concerned that the insurance market is not positioned to support this provision in the bill.
- 6.103** The Australian Institute of Architects noted that 'although practitioners must be insured, this insurance is becoming increasingly unavailable and insurers are, simply, withdrawing from the space'. Given the difficulty of finding appropriate insurance in the current market, the Institute recommended that 'liability for practitioners should be limited as contemplated in Part 4 of the *Civil Liability Act 2002*'. It stated that: 'A failure to provide for this may well see the application of the legislation fail, as well as the Building and Construction reform agenda for want of insured practitioners'.⁵¹⁶
- 6.104** UDIA NSW said that it is 'critical' for there to be an appropriate professional indemnity insurance product for the scheme to successfully operate. UDIA NSW was hopeful that the regulations would provide further clarity on the definition of 'adequately insured' and that the 'insurance market will have confidence in the regulatory regime and provide a degree of self-regulation to improve accountability and standards through offering differing premiums based on designer's track record'.⁵¹⁷

⁵¹³ Evidence, Mr Daintry, 5 November 2019 (uncorrected transcript), pp 25.

⁵¹⁴ Evidence, Mr Daintry, 5 November 2019 (uncorrected transcript), p 25.

⁵¹⁵ Evidence, Mr Lambert, 5 November 2019 (uncorrected transcript), pp 44-45.

⁵¹⁶ Submission 129a, Australian Institute of Architects NSW, p 3.

⁵¹⁷ Submission 87a, Urban Development Institute of Australia – NSW Division, p 4.

- 6.105** Ms Mallia highlighted that the adequacy of the insurance, as referenced in the bill, will be determined by the regulations. Ms Mallia said that the union is doubtful that there would be an insurer who would undertake to write that risk:

We are sceptical that there will be an insurance scheme that would be possible or put in place or even obtainable. I do not know what insurer would want to insure the sort of risks that we are seeing that would not come without a hefty price.⁵¹⁸

- 6.106** Mr Lambert also questioned 'whether in fact you can actually establish the insurance required to make a registration system work', noting that: 'If you do not have that insurance, what protection does the consumer have?'.⁵¹⁹

- 6.107** In its submission to the NSW Government on the consultation draft of the bill, the Insurance Council of Australia stated that 'its members support the objectives of the bill', however they were 'concerned that elements of the Bill may potentially exacerbate rather than address the lack of available insurance highlighted in the Building Confidence Report'.⁵²⁰ The Insurance Council of Australia quoted this section of the Building Confidence Report which states:

It is important that as many practitioners as possible hold professional indemnity and/or warranty insurance in order to support accountability. It is acknowledged that insurance is not currently available for the range of practitioners proposed to be registered. This weakness needs to be addressed. There should be ongoing discussion between governments and the insurance industry to ensure that the best possible insurance is available to all categories of registered practitioner.⁵²¹

- 6.108** The Insurance Council of Australia explained that 'professional indemnity policies typically contain exclusions relating to non-conforming products and practices, and certain other high risk exposures'. It noted that the bill requires practitioners to be 'adequately insured' against 'any liability' and said that this section 'precludes an insurer from offering policies that contain these exclusions'. The Insurance Council of Australia stated that given this 'insurers will not be able to participate in the market'.⁵²²

⁵¹⁸ Evidence, Ms Mallia, 5 November 2019 (uncorrected transcript), p 30.

⁵¹⁹ Evidence, Mr Lambert, 5 November 2019 (uncorrected transcript), p 47.

⁵²⁰ Submission to the NSW Government on the draft *Design and Building Practitioners Bill 2019*, Insurance Council of Australia, 16 October 2019, <http://www.insurancecouncil.com.au/assets/submission/2019/2019_10_16_%20ICA_SUB_Building_Practitioners_Bill.pdf>.

⁵²¹ 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 18.

⁵²² Submission to the NSW Government on the draft *Design and Building Practitioners Bill 2019*, Insurance Council of Australia, 16 October 2019, <http://www.insurancecouncil.com.au/assets/submission/2019/2019_10_16_%20ICA_SUB_Building_Practitioners_Bill.pdf>.

- 6.109** The Insurance Council of Australia called on the government to clarify the intent of the legislation in regards to the insurance provisions and work with insurers 'on the regulations and on solutions to address the lack of available insurance in this space'. It added that if this is not addressed it could lead to practitioners being unable to work in the building industry:

The experience of the Insurance Council in other areas is that if the causes of the high risk of providing indemnity insurance for a particular profession are not addressed, regulations requiring those professionals to hold insurance on terms which are not commercially realistic leads to the likelihood of the professionals becoming unauthorised.⁵²³

Duty of care provisions

- 6.110** The committee received evidence that detailed a number of issues with the currently drafted duty of care provisions in the bill.
- 6.111** A key voice on these issues was the Owners Corporation Network who called for several changes to be made to the duty of care provisions. Firstly, the Owners Corporation Network advised that the definition of 'building' in this section has been left to the regulations and this means that the 'duty of care provisions will not apply to any building affected by defects unless specified by the regulations'. The Owners Corporation Network was concerned that 'this definition could provide loopholes by not covering buildings that are mixed use'. In this regard, it recommended that the bill explicitly include 'apartments in the definition for buildings' and retain the ability to extend it through the regulations.⁵²⁴
- 6.112** Secondly, the Owners Corporation Network highlighted 'significant loopholes' under the existing statutory warranties (as discussed in chapter 4):

Developers who are not landowners currently avoid the section 18B Home Building Act statutory warranty obligations to owners corporations and lot owners as those future owners are not successors in title to a non-land owning developer. Development contract structures routinely take advantage of that. It was done at Opal Towers where the Sydney Olympic Park Authority engaged Ecove who then engaged the builder and carried out the role of a developer despite not being the landowner.⁵²⁵

⁵²³ Submission to the NSW Government on the draft *Design and Building Practitioners Bill 2019*, Insurance Council of Australia, 16 October 2019, <http://www.insurancecouncil.com.au/assets/submission/2019/2019_10_16_%20ICA_SUB_Building_Practitioners_Bill.pdf>.

⁵²⁴ Correspondence from Mr Philip Gall, Chairman – Owners Corporation Network, to committee, 5 November 2019, p 1.

⁵²⁵ Correspondence from Mr Philip Gall, Chairman – Owners Corporation Network, to committee, 5 November 2019, p 1.

- 6.113** The Owners Corporation suggested that this bill 'should be drafted to close these loopholes and to also provide a general anti-avoidance provision seeking to minimise the ability of parties to avoid the warranties by using creative contract arrangements'. It provided a number of suggested amendments to achieve this in correspondence to the committee.⁵²⁶
- 6.114** Thirdly, the Owners Corporation Network identified that the bill does not require copies of the final built design, the names of the person responsible for the design and the subcontractors undertaking that work to be provided to the owners corporation:
- This is highly problematic because owners' corporations that identify defects will have trouble knowing who is responsible to pursue under the duty of care obligations in relation to any design defects that are not defects in a regulated design and for installation defects – noting that in many instances, the main concurrent wrongdoer will be a subcontractor whose identity and/or required scope of work is not known to the owners corporation.⁵²⁷
- 6.115** In this regard, the Owners Corporation Network indicated that it 'weakens the prospect of accountability for all parties involved in a development', and proposed amendments to the bill to require contractors to lodge copies of all final designs and specifications, as well as the names of practitioners involved, will all building compliance declarations.⁵²⁸
- 6.116** Fourth, the Owners Corporation Network suggested that the definition of 'construction work' in this part should also include 'supplying or manufacturing a product that is intended for use in construction work'. It explained that 'not including them would leave a hole in the duty of care cover' as a builder may use a product for a particular purpose and rely on the information from a supplier or manufacturer that it is suitable for that purpose, however later it could be found that it is not. As it currently stands, the Owners Corporation Network highlighted that 'suppliers and manufacturers are unaccountable to end consumers for faulty products'.⁵²⁹
- 6.117** Fifth, in terms of the transitional arrangements for the duty of care provisions, the Owners Corporation Network described them as 'messy' and said they 'reduce(s) the effect of the consumer protections'. It outlined that the transitional provisions would mean that some parts of a project would be subject to compliance declarations and others would not, depending on when each party entered into their relevant retainer. It went on to say that this would challenge owners corporations in trying to ascertain if a particular party in a project owes a duty of care. The Owners Corporation Network suggested redrafting the transitional provisions so that:

⁵²⁶ Correspondence from Mr Philip Gall, Chairman – Owners Corporation Network, to committee, 5 November 2019, pp 2-3.

⁵²⁷ Correspondence from Mr Philip Gall, Chairman – Owners Corporation Network, to committee, 5 November 2019, p 3.

⁵²⁸ Correspondence from Mr Philip Gall, Chairman – Owners Corporation Network, to committee, 5 November 2019, p 3.

⁵²⁹ Correspondence from Mr Philip Gall, Chairman – Owners Corporation Network, to committee, 5 November 2019, p 4.

- The applicability of the duty of care provisions in relation to a building will turn upon whether the date of issue of an occupation certificate that authorises the occupation and use of the whole of the building is on or after 1 January 2021 with the duty of care provisions applying retrospectively to the extent needed to achieve that.
- The applicability of the rest of the bill for a building turning upon whether the date of issue of the first consent to construct the whole of the building was on or after a particular date to be prescribed by the regulations.⁵³⁰

6.118 Finally, the Owners Corporation Network recommended that the duty of care provisions be applied retrospectively, as well as the removal of warranty loopholes (as mentioned earlier). It stated that 'it is critical to achieve this because for every month that passes one thousand or more new apartment owners in NSW are expected to face costs and disruption caused by building defects'.⁵³¹

6.119 The Owners Corporation Network explained that by applying the provisions retrospectively it would provide certainty for owners/owners corporations 'as to whether a duty of care is owed by a party who has done construction work'. It noted that 'both builders and designers have expressed the view that their members already owe a duty of care', and so 'any argument that retrospective operation changes the goalposts upon which people have been operating in good faith is fragile indeed. The Owners Corporation Network stated that:

Having a duty of care that will start helping some consumers who end up buying buildings not yet under design or construction does nothing to address the current crisis ... The current crisis will not be addressed by passing a law that will start to help some consumers 5 years or more from now.⁵³²

6.120 Other stakeholders who gave evidence to the inquiry raised concerns in relation to the duty of care provisions in the bill. For example, the Property Council of Australia raised concerns that the section 'is ambiguous and will lead to uncertainty and will only promote litigation with all the accompanying costs and time delays'. The Council argued that the proposed duty of care provisions could have the following impacts:

- There is a risk that builders will stop building those types of buildings covered by the duty.
- A rational response to the measure would be for builders to add contingency to the contract price to protect against their liability being expanded. Our advice is that most builders contractually limit their liability and usually exclude liability for defined types of consequential loss, subject to the application of item 4 of Schedule 2 to the Home Building Act);
- The flow on impacts of the above such as a rise in building costs (due to the above), resulting in worsened housing affordability; and

⁵³⁰ Correspondence from Mr Philip Gall, Chairman – Owners Corporation Network, to committee, 5 November 2019, pp 4-5.

⁵³¹ Correspondence from Mr Philip Gall, Chairman – Owners Corporation Network, to committee, 5 November 2019, p 5.

⁵³² Correspondence from Mr Philip Gall, Chairman – Owners Corporation Network, to committee, 5 November 2019, pp 5-6.

- Increased pressure on the insurance market, at this stage it is unclear whether the insurance market will be willing to insure at a reasonable price this potential increase in risk.⁵³³

- 6.121** In its submission, the Property Council of Australia put forward amendments to the duty of care provisions. In regards to section 30(1), the Property Council of Australia highlighted that this section 'could be the subject of dispute as to its interpretation, and the remarks in the Second Reading Speech do not resolve this concern'. The Council called on the government to clarify its 'intended interpretation, so as to minimise future disputes'.⁵³⁴
- 6.122** Further, the Property Council of Australia recommended that the duty of care provisions 'be limited to residential classes of buildings only' and that 'the definition of owner should also ensure that it does not include tenants'. It also highlighted that there is a risk that the wording in this section 'could mean that neighbouring landowners are owed the duty' and suggested clarity on this point.⁵³⁵
- 6.123** The CFMEU NSW also raised concerns, stating that the 'extension of a duty of care to "exercise reasonable care" is weak and qualifies the duty unnecessarily'. It explained that this wording 'provides an out to non-compliant practitioners who have access to legal representation, unlike end consumers who end up owning a substandard property'. The CFMEU NSW said that the 'right to claim economic loss and damages ... are largely out of reach of ordinary people who have already suffered at the hands of developers, builders and subcontractors', adding that 'ordinary people cannot afford to litigate'.⁵³⁶
- 6.124** Ms Mallia emphasised this point at the hearing:
- Basically, good lawyers can drive a truck through those duties by applying the more diluted interpretations that come with those words. This should be a strict liability regime: You either have done the wrong thing or you prove you have not.⁵³⁷
- 6.125** When questioned as to whether the duty of care provisions should be made retrospective, Ms Mallia responded: 'absolutely, there needs to be some retrospectivity here for those who have caused the drama that we are at now, because otherwise they get away with it'.⁵³⁸
- 6.126** There was also some discussion in relation to proportionate liability. Ms Loseby told the committee that 'contracting out a proportionate liability is allowed in this bill', however it 'does not guarantee there can be no contracting out of proportionate liability through the application of the Civil Liability Act'. Ms Loseby explained the impact of this:

⁵³³ Submission 133a, Property Council of Australia, pp 2-3.

⁵³⁴ Submission 133a, Property Council of Australia, pp 3-4.

⁵³⁵ Submission 133a, Property Council of Australia, p 4.

⁵³⁶ Submission 173a, Construction Forestry Mining and Energy Union (NSW Branch), p 2.

⁵³⁷ Evidence, Ms Mallia, 5 November 2019 (uncorrected transcript), p 35.

⁵³⁸ Evidence, Ms Mallia, 5 November 2019 (uncorrected transcript), p 35.

Contractors and consultants will use the provision to ensure joint and several liability will instead apply. The flow-on effect is that insurance companies may not be able to offer professional indemnity [PI] or if they do there will be limitations. The impact on this is that PI insurance could rise in cost and in the end the consumer loses out.⁵³⁹

- 6.127** By contrast, Mr Barry Mann of the UDIA NSW expressed the view that it would be difficult to apply proportionate liability and could result in drawn out court proceedings:

I would have thought that if an engineering issue was the problem and the engineer was found to have done the wrong thing, and if I were the architect, then I would not want any liability for that. I would say, blame the engineer. If I were the builder, I would blame the engineer and expect that to be upheld. I do not know—how you do proportions would be the tricky part. Then if you do get proportions, does everyone end up in a big lawsuit for years and years, figuring out who is liable for what?⁵⁴⁰

Addressing illegal phoenix activity

- 6.128** As discussed in chapter 4, illegal phoenix activity is occurring in the residential building and construction industry and is leaving homeowners without recourse to rectify building defects. The committee heard from some stakeholders that the bill does not address this issue.

- 6.129** Mr Lambert stated that 'a major gap in the current regulatory approach is the presence of phoenix companies' and that 'this situation undermines the regulatory requirement for builders to make declarations about the building work conforming to the design and the building code and to the provision imposing duty of care on builders and designers'. Mr Lambert recommended that the bill address this issue, and pointed to Queensland as a model.⁵⁴¹

- 6.130** At the hearing Mr Lambert further emphasised this point:

Sure, corporate entities can be established for financing purposes, for business purposes, but they can also be established for avoiding legal liability purposes, and this legislation does not address that. Having phoenix companies in the wrong hands undermines certification and undermines the duty of care completely. Queensland, in its legislation, has addressed the issue of phoenix companies. The issue should be addressed in some form as well.⁵⁴²

- 6.131** Mr Greenfield told the committee that rather than being the exception, phoenixing is the 'common business model in New South Wales', where developers are setting up companies for specific projects and then shutting those down just before the end of the project.⁵⁴³

⁵³⁹ Evidence, Ms Loseby, 5 November 2019 (uncorrected transcript), p 18.

⁵⁴⁰ Evidence, Mr Barry Mann, 5 November 2019 (uncorrected transcript), p 42.

⁵⁴¹ Submission 56a, Mr Michael Lambert, p 6.

⁵⁴² Evidence, Mr Lambert, 5 November 2019 (uncorrected transcript), p 43.

⁵⁴³ Evidence, Mr Greenfield, 5 November 2019 (uncorrected transcript), p 31.

- 6.132** Ms Mallia emphasised that ultimately it is the consumer that is at a loss due to phoenixing activity:

If you are a home owner trying to work out who put in the faulty stairs or the plumbing that leaks or, God forbid, the cladding that is not going to prevent your building from falling down, you are never going to find those people. They are well and truly gone by the time those defects become apparent to the people who own those buildings. The whole system is designed to prop up bad behaviour.⁵⁴⁴

- 6.133** In contrast, Mr Barry Mann informed the committee that companies are not set up 'with the intent of going out of business' but are set up to be able to provide finance and ensure that whoever is providing 'the finance is only limited liability to that particular project'. He added that 'there are a lot of good, commercial reasons why those sorts of companies are set up, rather than them wanting to get out of an obligation'.⁵⁴⁵ Mr Steve Mann had the same view:

It is a special-purpose vehicle that is widely used across the industry, not just this industry, to drive project-specific development. As Barry said, it is part of the financing process and it is wound up when it has delivered its responsibilities in the normal course of business. Phoenixing is a completely different question. It is illegal and should be cut out of the industry wherever it is.⁵⁴⁶

Response by government representatives

- 6.134** Government representatives appeared before the committee and responded to the concerns raised by stakeholders in regard to the bill.

- 6.135** In terms of the practitioners covered in the bill, Ms Rose Webb, Deputy Secretary, Better Regulation Division and NSW Fair Trading Commissioner, advised that 'in general, building professionals, people doing building and building contractors are currently regulated under the Home Building Act' and that 'the intention of this current bill was not to replicate all of those provisions over again, but to add to the number of parties who are now going to be subject to some form of regulation'.⁵⁴⁷

- 6.136** When asked whether the 'status quo' under the *Home Building Act* can be relied upon, Ms Webb replied:

Yes. I absolutely admit that Fair Trading NSW can always do better, but we at the moment regulate under the Home Building Act. We put people in jail; we take their licenses off them; we do all the mediations ... So I think just a blanket statement that it is an unregulated area is unfair. I admit that we could always do better and we will always be trying to do better and we will be using Mr Chandler to improve how we do things, but to say that building is not regulated and the building contractor sector is not regulated at the moment, I do not believe to be an accurate statement.⁵⁴⁸

⁵⁴⁴ Evidence, Ms Mallia, 5 November 2019 (uncorrected transcript), p 32.

⁵⁴⁵ Evidence, Mr Barry Mann, 5 November 2019 (uncorrected transcript), p 41.

⁵⁴⁶ Evidence, Mr Steve Mann, 5 November 2019 (uncorrected transcript), p 41.

⁵⁴⁷ Evidence, Ms Webb, 5 November 2019 (uncorrected transcript), p 65.

⁵⁴⁸ Evidence, Ms Webb, 5 November 2019 (uncorrected transcript), p 65.

- 6.137** Mr John Tansey, Executive Director Regulatory Policy, Better Regulation Division, Department of Customer Service, further clarified this point, stating that 'the vast majority of people who are doing the work of building—whether they are a builder, plumber, electrician or painter—are already occupationally licensed in order to be able to do that work under the Home Building Act'. He went on to outline the class of practitioners who will be the focus of the bill:

The new ground here is that a whole range of people providing designs and plans and performance solutions who are not regulated will be under an obligation to be registered for the first time and will have explicit statutory obligations for the first time ... But it is absolutely the case that the people doing the work are already licensed, and in vastly greater number, than without this bill relates to people doing designs and plans.⁵⁴⁹

- 6.138** In relation to the role of the Building Commissioner, who is not mentioned in the bill, Ms Webb clarified that the powers provided to the Secretary can be delegated to the Building Commissioner by the regulation:

Just in relation to all of the building legislation that we currently and in the future administer, nearly all of it gives powers immediately to a secretary and they are delegated to all the Fair Trading officers and SafeWork officers as needed, including delegation to Mr Chandler. As we speak, any piece of building legislation that is within the Minister's portfolio, Mr Chandler has powers under the regulation.⁵⁵⁰

- 6.139** The Building Commissioner Mr David Chandler OAM further clarified that he will be administering and overseeing the operation of the legislation as it moves forward 'in conjunction with the Secretary'.⁵⁵¹ Mr Chandler explained how he intends to undertake his role:

My background has been one of being able to go in and look at situations that perhaps could work better and to make those changes to make them work better. That is the approach that we will take here. I expect that within not a long time you will start to see a completely different responsiveness, but that is only simply because we are looking to utilise our resources in a more dynamic way than perhaps may have been in the past. We will also make our team more properly emboldened by the fact that they have got a commissioner who will get out in the field and be seen at the front line. I intend to run this transformation process by being very visible at the front line, because we have got some great people out there and I just want them to feel very comfortable and confident that they are supported at the highest level of the organisation.⁵⁵²

- 6.140** In terms of resourcing, Mr Chandler advised that at this stage he does not see the need for more inspectors and his budget is 'currently being considered by the appropriate parts of Government'. He added that some additional staff would be needed to deal with the additional workload, such as with the lodgement of declared plans, however this will be assessed against the 'normalised level of demand and how, then, we might outsource a higher

⁵⁴⁹ Evidence, Mr Tansey, 5 November 2019 (uncorrected transcript), p 65.

⁵⁵⁰ Evidence, Ms Webb, 5 November 2019 (uncorrected transcript), p 61.

⁵⁵¹ Evidence, Mr Chandler, 5 November 2019 (uncorrected transcript), p 62.

⁵⁵² Evidence, Mr Chandler, 5 November 2019 (uncorrected transcript), p 64.

level of demand that may occur during the implementation period'. Mr Chandler stated: 'I believe that we can achieve an increased impact by the resources that we have and you will be able to observe that'.⁵⁵³

6.141 In terms of the insurance requirements under the bill, Mr Tansey said that there have been conversations with the insurance industry and there is still an appetite for insurance in the building sector, however noting the issues with certifiers:

We have had numerous discussions with representatives from the insurance industry in a range of forums about a whole bunch of building issues. What they have said to us is that there remains an appetite for insurance in the building sector. Obviously the Committee is aware of the particular contraction related to building certifiers at the moment. It has been put to us that that reflects a concern that certifiers could be considered to be disproportionately targeted on risk in the building sector.⁵⁵⁴

6.142 Ms Webb explained that the concerns of the insurance industry are 'that the risk is not spread amongst all the building and design professionals, that the certifiers are carrying some of the extra risk at the moment, and that they are disproportionately represented in claims'. Ms Webb argued that given the bill will require more parties to have insurance along the whole chain of building professionals this 'would actually help lay off some of the risk'.⁵⁵⁵

6.143 Further, Mr Chandler told the committee that 'the insurers are very keen to come back into the parts of the market that they have been walking away from but they want a new playing field to give them the confidence to come back into that market'. He advised that 'there is a number of things that need to be done to create that confidence' and this will be worked through 'with the players that are involved' as part of the development of the regulations.⁵⁵⁶

6.144 When asked if the government intends to address illegal phoenix activity, Mr Tansey advised that 'the work that we have been asked to do in developing policy was within the ambit of this bill' and 'it did not include dealing with phoenixing'. Ms Webb added that 'there is a lot of work being done at both Commonwealth and State levels on the issue of phoenixing more generally'.⁵⁵⁷

6.145 Some committee members raised concerns with the timeframes for developing the regulations under this bill, given the regulations to give effect to the *Building and Development Certifiers Act 2018* are yet to be finalised, more than a year after the legislation was passed (as discussed in chapter 2).

6.146 When questioned on this matter, Mr Tansey said 'the current resourcing, commitment and effort behind developing the regulations under the new bill are targeting having that in place during next year'.⁵⁵⁸

⁵⁵³ Evidence, Mr Chandler, 5 November 2019 (uncorrected transcript), pp 63-64.

⁵⁵⁴ Evidence, Mr Tansey, 5 November 2019 (uncorrected transcript), p 67.

⁵⁵⁵ Evidence, Ms Webb, 5 November 2019 (uncorrected transcript), p 67.

⁵⁵⁶ Evidence, Mr Chandler, 5 November 2019 (uncorrected transcript), pp 68-69.

⁵⁵⁷ Evidence, Ms Webb and Mr Tansey, 5 November 2019 (uncorrected transcript), p 66.

⁵⁵⁸ Evidence, Mr Tansey, 5 November 2019 (uncorrected transcript), p 71.

- 6.147** Further, Ms Webb declared that 'this bill is absolutely the priority'. She acknowledged that 'the certifiers bill and Act and the regulations thereunder were not done as speedily as they could because we had a large number of policy developments at the time' and it was unfortunate it was 'not given the priority it should have been'. Ms Webb reflected on the environment last year and the focus on this bill this year:

All I can say is I know the size of the policy team and the number of bills and pieces of legislation and regulation that they were dealing with this time last year and, unfortunately, I cannot say anything but something had to give and it was unfortunately the certifiers bill took longer than it should have. But we have made every effort and we will absolutely be making every effort to give this one priority over everything else we are doing.⁵⁵⁹

- 6.148** When asked whether the bill will address the legacy issues of historical defects, Mr Chandler advised that 'the bill is not going to be retrospective'. He however indicated that for the buildings that are currently in the system or will commence before the reforms are in place, officials are currently 'out there right now reinforcing to people that these buildings need to be built much better' and the practitioners 'need to be stepping up and performing a lot better'. Mr Chandler went on to explain that this bill 'resets the compass' moving forward:

The new bill resets the compass. It resets the public expectations, the way that buildings can be made going forward. It will reset the framework that banks should be starting to have a look at in the way that they loan into projects and the way that the pay for work for drawdowns by developers. It resets all of that. That is an industrywide response that is needed. It is not just going to simply happen in the next three to six months.⁵⁶⁰

Committee comment

- 6.149** The committee is disappointed that this bill continues the fragmented way in which the government is addressing the crisis in the building and construction industry. It is astounding that the solution put forward to us, as Mr Lambert put it, is merely to tinker with the 'status quo'.
- 6.150** There is no question that a standalone Building Act is both necessary and urgent. A standalone Building Act, as suggested by many of the key industry stakeholders, overseen by a single Minister and regulated by a properly resourced Building Commission, would ensure that a comprehensive regulatory regime is put in place to address the current building crisis. Instead, the government has taken a siloed approach: we are left with parallel regimes with similar sounding regulatory models that have no connection with existing arrangements.
- 6.151** The committee therefore recommends 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. It is important that this Act be principles-based and written in plain English.

⁵⁵⁹ Evidence, Ms Webb, 5 November 2019 (uncorrected transcript), p 71.

⁵⁶⁰ Evidence, Mr Chandler, 5 November 2019 (uncorrected transcript), p 60.

- 6.152** The committee also recommends 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, as recommended earlier in this report.

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.

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- 6.153** The bill as drafted is entirely dependent on the regulations that the government has said it will develop in the coming 12 months. Even if it was rushed through Parliament this year it will not contain a single new right, obligation or remedy until those regulations are in place. Given the extremely large number of concerns with the drafting and nature of the bill it is difficult to see how simply rubber stamping the bill by Parliament and hoping that matters will be addressed in the regulations would be an appropriate response. Indeed given the recent history of the same department concerning the laggardly implementation of the regulations following the passage of the *Building and Development Certifiers Act 2018* such a course of action would be placing hope before experience.
- 6.154** In the absence of a comprehensive reform package, and noting the urgency with which some form of regulation of the building industry must be put in place, the committee recommends that the NSW Government amend the bill to address the significant concerns raised during this inquiry.

Recommendation 13

That the NSW Government amend the *Design and Building Practitioners Bill 2019* to address stakeholder concerns raised during this inquiry, in particular ensuring that:

- 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.
-

6.155 It is extremely concerning that there is no current insurance product that would provide the kind of professional indemnity insurance that is required under this bill. As noted in chapter 4 this comes down to a fundamental failure of building standards across New South Wales.

6.156 The committee would have thought that there would have been some assurance that an insurance product would be available before legislating this requirement. Without that assurance we could end up in one of two situations: practitioners required under this bill to hold insurance are not able to obtain this and would therefore not meet the registration requirements and so the fundamentals of the bill fall over, or icare extends its insurance to support the bill and this adds to the already large deficit, with taxpayers picking up the bill. Neither option is acceptable.

6.157 Given this, the committee recommends that the NSW Government not proceed with the bill until it works closely with the Insurance Council of Australia to develop appropriate insurance products. The committee supports bringing forward the final implementation of the bill and the regulations to 31 March 2020.

Recommendation 14

That the NSW Government not proceed with the *Design and Building Practitioners Bill 2019* until it works closely with the Insurance Council of Australia and its members to develop appropriate insurance products. The committee supports bringing forward the final implementation of the bill and the regulations to 31 March 2020.

6.158 We concur with stakeholders that the bill is only a framework and lacks the detail to be able to determine if it will deliver what the government has promised. At this stage we can only hope that the regulations will fill the gaps in a credible and coherent way. We can also only hope that the regulations will be developed as a priority and not pushed to the side, as was the case with the *Building and Development Certifiers Act 2018*. As noted above, hope is not a good basis on which to legislate, especially given the recent experience with regulation of this sector.

6.159 We acknowledge the significant uncertainty outlined by stakeholders and stakeholders' calls for the government to consult with them on the regulations. This is imperative given the rushed approach to consultation on this bill. It is critical that all relevant stakeholders are engaged on the way forward to ensure we get this right for the sake of all those who live, work and play in the built environment in New South Wales. The committee therefore recommends that the government not proceed with the bill until the draft regulations are developed in close consultation with stakeholders, with their concerns addressed in detail, and the regulations are made available to the Parliament for scrutiny. Again, the committee supports bringing forward the final implementation of the bill and the regulations to 31 March 2020.

Recommendation 15

That the NSW Government not proceed with the *Design and Building Practitioners Bill 2019* until the draft regulations are developed in close consultation with stakeholders and made available to the Parliament for scrutiny. The committee supports bringing forward the final implementation of the bill and the regulations to 31 March 2020.

Chapter 7 **Blueprint for reform**

This final chapter considers the NSW Government's response to two key reviews of the building and construction industry: the Shergold Weir report and the Lambert report. A number of inquiry participants told the committee that together, these landmark reports set out a blueprint for reform of the building and construction industry in this State.

The committee agrees that full implementation of these reports is the way forward to address the deficiencies in regulation to date. This chapter assesses the NSW Government's progress in implementing the recommendations of these reports, and comments on two areas requiring further discussion in relation to the implementation of these reports.

NSW Government response to the Shergold Weir and Lambert reports

- 7.1 Two of the most recent reports into the building and construction industry in New South Wales and Australia have been discussed extensively in this inquiry, as providing a blueprint to resolving the issues facing the industry in New South Wales: the Shergold Weir and Lambert reports.
- 7.2 The 2018 Shergold Weir report examines shortcomings in the building and construction industry across Australia. The 2015 Lambert report specifically addresses issues in New South Wales.
- 7.3 The NSW Government advised the committee that it is progressing the recommendations in the Shergold Weir and Lambert reports, with a large number of recommendations of both reports being completed or in progress. This view contrasted with evidence from the authors of both reports, who questioned the extent and pace of progress against their recommendations.

Shergold Weir report

- 7.4 The NSW Government responded to the Shergold Weir report in February 2019 and supported the majority of recommendations.⁵⁶¹ The *Building Stronger Foundations* discussion paper released in June 2019 detailed progress against each of the 24 recommendations. The discussion paper indicated that New South Wales has completed or was progressing 20 recommendations, with the remaining four under active consideration.⁵⁶² The national implementation plan details the recommendations being progressed through a national approach.⁵⁶³
- 7.5 When questioned on the NSW Government's progress implementing the Shergold Weir report recommendations, Mr John Tansey, Executive Director Regulatory Policy, Better Regulation Division, Department of Customer Service, advised that 'a good number of them

⁵⁶¹ Submission 132, NSW Government, p 56.

⁵⁶² Submission 132, NSW Government, p 57.

⁵⁶³ Answers to questions on notice, NSW Government, 6 September 2019, p 10.

are completed'. Mr Tansey noted that some of the reforms are being progressed as part of the national implementation plan rather than by each state.⁵⁶⁴

7.6 However, there is a discrepancy between the government's assessment of its implementation of the Shergold Weir reforms and the assessment of the report's authors. In a submission to this committee, Ms Bronwyn Weir and Professor Peter Shergold provided an overview of progress implementing their recommendations. On their assessment, the NSW Government as at July 2019 partially met some recommendations but did not fully meet any.⁵⁶⁵

7.7 When appearing as a witness in August 2019, Ms Weir agreed that none of the Shergold Weir report recommendations had been fully implemented by the NSW Government half-way through the three year period set in the report.⁵⁶⁶ Ms Weir characterised the NSW Government's response as 'pretty typical' of the progress made across all the states and territories.⁵⁶⁷ Ms Weir informed the committee that if the NSW Government's only response was that which was articulated in the *Building Stronger Foundations* discussion paper, the government would be unlikely to implement all of the Shergold Weir report recommendations.⁵⁶⁸

7.8 Appearing in November 2019 in her capacity as Advisor to the NSW Building Commissioner, Ms Weir updated the committee on the NSW Government's progress in implementing the Shergold Weir recommendations. Ms Weir said that should the *Design and Building Practitioners Bill 2019* become law, it would implement three recommendations in full and a further five in part.⁵⁶⁹ Ms Weir explained that a number of other recommendations were addressed in part through means other than the *Design and Building Practitioners Bill 2019*, clarifying that 'it is not the case that there are only three' recommendations that had been progressed by the NSW Government.⁵⁷⁰

Lambert report

7.9 The NSW Government's September 2016 response to the Lambert report supported 72 of the 150 recommendations in full or in part.⁵⁷¹ In its response the NSW Government committed to implement a series of priority reforms, including addressing the regulation of certifiers, fire safety for new and existing buildings, clarifying ministerial responsibility and administration of building laws, and establishing a Building Regulators Committee to improve coordination across government. The government advised that those reforms have been implemented.⁵⁷²

⁵⁶⁴ Evidence, Mr John Tansey, Executive Director Regulatory Policy, Better Regulation Division, Department of Customer Service, 27 August 2019, p 73.

⁵⁶⁵ Submission 93, Professor Peter Shergold AC and Ms Bronwyn Weir, pp 2-3.

⁵⁶⁶ 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 54.

⁵⁶⁷ Evidence, Ms Weir, 27 August 2019, p 54.

⁵⁶⁸ Evidence, Ms Weir, 27 August 2019, p 54.

⁵⁶⁹ Evidence, Ms Weir, 5 November 2019 (uncorrected transcript), p 72.

⁵⁷⁰ Evidence, Ms Weir, 5 November 2019 (uncorrected transcript), p 73.

⁵⁷¹ Submission 132, NSW Government, p 54.

⁵⁷² Answers to questions on notice, NSW Government, 28 August 2019, p 1.

- 7.10** The NSW Government submission and answers to questions on notice provided examples of certain reforms that have been introduced or are progressing as a result of the Lambert report, noting that the remaining recommendations are still under consideration including as part of the response to the Shergold Weir report.⁵⁷³
- 7.11** The committee questioned government witnesses on the implementation of the Lambert report. Ms Rose Webb, Deputy Secretary, Better Regulation Division and NSW Fair Trading Commissioner, gave evidence that 'part of the review had been subsumed' following the recommendations in the Shergold Weir report.⁵⁷⁴ Mr Tansey elaborated: 'We would continue to have reference to the Lambert review. But as Ms Webb said, this is an area of constant reform and we do now also have the Shergold Weir review, which is a new point of reference'.⁵⁷⁵
- 7.12** When he appeared as a witness in August 2019, the report's author Mr Michael Lambert critiqued what had been done to implement his recommendations in relation to fire safety and the regulation of certifiers, observing that the NSW Government:
- ... had made a few minor gestures, but the two core areas they were going to address in the first year was the practice guide for certifiers to hold them accountable and to the issue of fire protection safety. It [the NSW Government] failed in both approaches and did not do anything much else as well.⁵⁷⁶
- 7.13** Mr Lambert's submission described the NSW Government's response to the recommendations made in his report and those in the Shergold Weir report as 'limited and piecemeal':
- What is notable about the reforms undertaken to date in NSW since both my report and the Shergold Weir report is how limited and piecemeal the follow up actions have been and in the case of the Shergold Weir recommendations, the absence of a nationally consistent approach.⁵⁷⁷
- 7.14** When appearing as a witness in November 2019, Mr Lambert was questioned further on the implementation of his recommendations. Mr Lambert agreed with the assertion that the *Design and Building Practitioners Bill 2019* did not significantly implement his report. Mr Lambert expressed disappointment that the bill did not advance the Shergold Weir recommendations, despite the report being endorsed by the NSW and all other Australian governments.⁵⁷⁸

⁵⁷³ Submission 132, NSW Government, pp 54-55; Answers to questions on notice, NSW Government, 28 August 2019, pp 1-2.

⁵⁷⁴ Evidence, Ms Rose Webb, Deputy Secretary, Better Regulation Division and NSW Fair Trading Commissioner, 12 August 2019, p 3.

⁵⁷⁵ Evidence, Mr Tansey, 12 August 2019, p 3.

⁵⁷⁶ Evidence, Mr Michael Lambert, author of the *Independent Review of the Building Professionals Act 2005*, 12 August 2019, p 50.

⁵⁷⁷ Submission 56, Mr Michael Lambert, p 7.

⁵⁷⁸ Evidence, Mr Lambert, 5 November 2019 (uncorrected transcript), p 44.

Stakeholder views on implementation of Shergold Weir and Lambert

- 7.15** The recommendations in the Shergold Weir and Lambert reports received near unanimous support from inquiry participants. Local Government NSW gave evidence that some of the current problems could have already been addressed, had the Lambert report recommendations been fully implemented since it was released in November 2015:

The Lambert review and the Shergold Weir report laid the groundwork for a program of change ... Had the New South Wales Government established and funded a solid program of reform at the time of the Lambert review some three years ago, we would claim that we would not be in the situation we are in today, which has been amplified by the rapid pace and scale of development in New South Wales.⁵⁷⁹

- 7.16** Inquiry participants were critical of the slow response not just to the Shergold Weir and Lambert reports, but to the multitude of earlier reviews. Several witnesses told the committee that they had given evidence to the Campbell inquiry in 2002. They lamented that 17 years later they were appearing before another parliamentary inquiry to discuss the same problems in the building and construction industry.⁵⁸⁰ Mr Craig Hardy, President, Association of Accredited Certifiers, gave evidence that:

Despite a string of reports ... these issues still exist. Therefore, we hold the view that it is hard to come to any other conclusion that all governments, successive governments, and relevant ministers have been asleep at the wheel while this has happened for the last 20 years.⁵⁸¹

- 7.17** Mr Tim Tuxford, NSW/ACT Board Director, Australian Institute of Building Surveyors, gave evidence that '... we would not be sitting here today if the Campbell recommendations had been taken up'.⁵⁸²

- 7.18** In terms of the issues discussed in chapter 4 in relation to the insurance market collapse, Mr Karl Sullivan, head of Risk and Operations, Insurance Council of Australia, highlighted that implementing the recommendations made in the Shergold Weir report is part of the solution:

You are right to characterise it that the industry's response around this introduction of this exclusion in professional indemnity is symptomatic of our view that the regulation and enforcement has not worked. That over a number of years it has introduced a range of risks that are beyond their appetite to be able to underwrite. How to fix that? Introduction of all 24 recommendations for Shergold and Weir in a very

⁵⁷⁹ Evidence, Cr Linda Scott, President, Local Government NSW, 16 August 2019, p 41.

⁵⁸⁰ Evidence, Cr Scott, 16 August 2019, p 41; Evidence, Mr Brett Daintry, Director, Daintry Associates, 16 August 2019, pp 77-78 and 82-83; Evidence, Mr Tim Tuxford, NSW/ACT Board Director, Australian Institute of Building Surveyors, 27 August 2019, p 17; Evidence, Mr Craig Hardy, President, Association of Accredited Certifiers, 27 August 2019, p 13; Evidence, Mr Ian Robertson, Secretary, Development and Environmental Professionals' Association, 27 August 2019, p 27.

⁵⁸¹ Evidence, Mr Hardy, 27 August 2019, p 13.

⁵⁸² Evidence, Mr Tuxford, 27 August 2019, p 17.

comprehensive way and a number of other measures that we have advocated in our submission, particularly around documentation of buildings.⁵⁸³

7.19 The committee notes the consistency between the reforms proposed in the Lambert and Shergold Weir reports: in his submission, Mr Lambert noted that all but one of the 24 recommendations in the Shergold Weir report were also addressed in his report.⁵⁸⁴

7.20 In addition to the Shergold Weir report recommendations, Mr Lambert supported NSW-specific reforms, as recommended in his report: 'I would argue that building regulation and building outcomes in NSW are poorer than in any other major Australian State and require reforms in addition to those recommended in the Shergold Weir report'.⁵⁸⁵ Mr Lambert noted that 'NSW significantly lags behind major states such as Victoria and Queensland in this area...'.⁵⁸⁶

7.21 Mr Lambert told the committee that the NSW Government already had a blueprint for reform, but that despite the government's public statements, it was not acting on that blueprint:

... the Shergold Weir report and my report very much overlap in terms of the recommendations. The government already has a blueprint. It said that it has signed up for a nationally coordinated approach. However, the consultation paper it put out, Building Stronger Foundations, is not in accordance with a nationally consistent approach ...⁵⁸⁷

Issues requiring further comment

7.22 The committee supports the blueprint for reform set out in the Shergold Weir and Lambert reports. Here, the committee will comment further on two areas covered in these reports:

- whether to reintroduce a clerk of works model, as recommended by some stakeholders, but which is not supported by the Lambert report
- how to improve the adequacy of records and documentation, as recommended in the Lambert and Shergold Weir reports, through online electronic lodgement.

Proposal to reintroduce clerk of works

7.23 One issue where the committee's view may vary from the conclusions of the Lambert report is in relation to the proposal for a return to the clerk of works model. A clerk of works is a full-time inspector of building works, who is on site throughout the build, and works on behalf of the owner and usually under the direction of a site architect.⁵⁸⁸

⁵⁸³ Evidence, Mr Karl Sullivan, Head of Risk and Operations, Insurance Council of Australia, 12 August 2019, p 49.

⁵⁸⁴ Submission 56, Mr Michael Lambert, p 2.

⁵⁸⁵ Submission 56, Mr Michael Lambert, p 2.

⁵⁸⁶ Submission 56, Mr Michael Lambert, p 3.

⁵⁸⁷ Evidence, Mr Lambert, 12 August 2019, p 56.

⁵⁸⁸ Submission 129, Australian Institute of Architects, pp 8-9.

- 7.24** A number of stakeholders, in particular the Australian Institute of Architects, supported this model for large and complex projects. Ms Kathlyn Loseby, NSW President, Australian Institute of Architects, gave evidence that 'we strongly recommend the appointment of a clerk of works'.⁵⁸⁹ The Institute advised that a clerk of works remains a key project role in the United Kingdom, USA, Hong Kong, Ireland and Spain.⁵⁹⁰ In relation to the model in the United Kingdom, Ms Loseby said: "They use it on their design and build projects and this is very similar to design and construct. It could very easily fit in. What they have found is it significantly improves quality on site".⁵⁹¹ The Institute's submission further noted that in the last three years, the number of clerks of works in the United Kingdom has doubled.⁵⁹²
- 7.25** In a later submission commenting on the *Design and Building Practitioners Bill 2019*, the Institute advised that it still supported the appointment of a clerk of works, to address '... the gap between when a design practitioner states that drawings and plans comply with the Building Code of Australia and when the building contractor declares that the building is built in accordance with the plans'.⁵⁹³
- 7.26** Evidence from the Association of Accredited Certifiers pointed the committee to the Singapore system, which mandates the inspection and full-time presence of engineers and other building professions based on the project cost of works.⁵⁹⁴ The Association further advised that the cost of an individual clerk of works could be between \$150,000 to \$200,000 per annum.⁵⁹⁵
- 7.27** Commenting on the costs of implementing this proposal, the submission from the Australian Institute of Architects stated: '... the British adjudicator and barrister Tony Bingham once declared that: "The cost of a clerk of works per annum is cheaper than a day in court"'.⁵⁹⁶
- 7.28** Mr Jonathon Russell, National Manager for Public Affairs, Engineers Australia, supported the clerk of works model, or something similar, noting that there is merit:

... having someone relatively independent to check that the reinforcing bar that comes onsite is what was specified in the original drawing, that the cement that comes in the bags is actually of the quality that was originally designed for a building. They call it a clerk of works. A role similar or like that has a lot of merit, I think, in being able to make sure that what is intended to be built is actually built.⁵⁹⁷

⁵⁸⁹ Evidence, Ms Kathlyn Loseby, NSW President, Australian Institute of Architects, 16 August 2019, p 49.

⁵⁹⁰ Answers to questions on notice, Australian Institute of Architects, 5 September 2019, p 1.

⁵⁹¹ Evidence, Ms Loseby, 16 August 2019, p 51.

⁵⁹² Submission 129, Australian Institute of Architects, p 9.

⁵⁹³ Submission 129a, Australian Institute of Architects, p 6.

⁵⁹⁴ Answers to questions on notice, Association of Accredited Certifiers, 6 September 2019, p 1.

⁵⁹⁵ Answers to questions on notice, Association of Accredited Certifiers, 6 September 2019, p 2.

⁵⁹⁶ Submission 129, Australian Institute of Architects, p 9.

⁵⁹⁷ Evidence, Mr Jonathon Russell, National Manager for Public Affairs, Engineers Australia, 27 August 2019, p 10.

- 7.29** In relation to those projects that would require a clerk of works, the Australian Institute of Architects noted that 'the definition of "large and complex" will require careful consideration, however as a default, the construction of all commercial and multi residential buildings over three storeys would benefit from an on-site Clerk of Works'.⁵⁹⁸
- 7.30** Inquiry participants spoke to the public misconception that private certifiers play a role akin to an onsite clerk of works who is on site throughout the build. Ms Jane Hearn, Director, Owners Corporation Network, observed that: '... In fact they probably 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 they have signed off that work as being compliant'.⁵⁹⁹
- 7.31** Mr Hardy on behalf of the Association of Accredited Certifiers corrected this perception, observing that on average, certifiers might be on site for 'less than 1 per cent, probably closer to half a per cent of construction time' for a residential dwelling.⁶⁰⁰
- 7.32** However, Mr Lambert did not agree with this proposal. He told the committee that it would be very difficult to reinstate a clerk of works into the new 'design and construct' system:
- ... the clerk of works was basically on the old system which involved an architect as the overall project designer and supervisor, and the architect then appointed a chartered engineer who could handle the structural side and appointed a clerk of works who handled the day-to-day inspections and management of the system. You have a whole new system called "design and construct". It is very hard to go back from design and construct to the architect-led system. The architect is now just simply an employee of the builder.⁶⁰¹
- 7.33** Mr Lambert instead favoured making the present system work as it was intended, telling the committee that under the current 'design and construct' system, 'the builder needs to be made accountable ... and for his subcontractors, which requires all the people who are doing particular key elements to be responsible and accountable and to certify their work – and that is not happening'.⁶⁰²
- 7.34** In support of Mr Lambert's position, Mr Tuxford gave evidence that the return to a 'clerk of works' model would not be a 'panacea'.⁶⁰³ Providing further comment on the clerk of works model, the Australian Institute of Building Surveyors advised that:

AIBS do not believe that a clerk of works will resolve the issues ... Making those who control and execute the work accountable is far simpler and a more economic means of improving construction outcomes which should be considered first.⁶⁰⁴

⁵⁹⁸ Answers to questions on notice, Australian Institute of Architects, 5 September 2019, p 1.

⁵⁹⁹ Evidence, Ms Jane Hearn, Director, Owners Corporation Network, 12 August 2019, p 33.

⁶⁰⁰ Evidence, Mr Hardy, 27 August 2019, p 26.

⁶⁰¹ Evidence, Mr Lambert, 12 August 2019, p 58.

⁶⁰² Evidence, Mr Lambert, 12 August 2019, p 58.

⁶⁰³ Evidence, Mr Tuxford, 27 August 2018, p 21.

⁶⁰⁴ Answers to questions on notice, Australian Institute of Building Surveyors, 27 August 2019, p 4.

- 7.35** When questioned on Mr Lambert's opposition to this proposal, Ms Loseby responded: 'I highly respect Mr Lambert, but I do have a different opinion. Maybe I should meet with him because I think if we could demonstrate how it works in the UK very successfully'.⁶⁰⁵

Improving records and documentation

- 7.36** Both the Shergold Weir and Lambert reports commented on the need to improve the adequacy of records and documentation. In this light, the committee considered the benefits of online, real-time lodgement of documentation, for example through the new NSW Planning Portal.

- 7.37** The Shergold Weir report observed that '... the nature of a design-and-construct project means that many aspects of the design change after the initial approval is obtained', which can often contribute to '... a significant difference between the as-designed building documentation and the as-built building'. Further, the report noted that in those jurisdictions 'whereas-built plans are lodged there are consistent reports that the adequacy of documentation is poor'.⁶⁰⁶

- 7.38** Similarly, Mr Lambert gave evidence that a key problem is the 'absence of a digitally based and accessible building information system that captures building plans, the nature of developments and approvals and, for higher risk buildings, records information on building systems products and maintenance'.⁶⁰⁷

- 7.39** Although the Shergold Weir report did not recommend a centralised online repository as did Mr Lambert, recommendations 13, 14 and 17 of the Shergold Weir report aim to improve the adequacy of documentation and record keeping.⁶⁰⁸

- 7.40** Mr Richard Devon, an apartment owner in The Landmark building at Charleston, near Newcastle, told the committee of his struggle to access as built plans of his building:

The other problem I have had with local government private certifiers is trying to get some as built plans out of everyone because our level 9 was totally changed three times after the approval ... There are areas which were not on the original plans on one of the units ... We have been trying to get as-built plans ... We get funny letters back from the private certifiers and no-one will take responsibility for anything.⁶⁰⁹

- 7.41** A submission from the Landmark's strata committee also recounted problems accessing information about the building, especially information on past building inspections.⁶¹⁰

⁶⁰⁵ Evidence, Ms Loseby, 16 August 2019, p 51.

⁶⁰⁶ 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, pp 10-11.

⁶⁰⁷ Submission 56, Mr Michael Lambert, p 6.

⁶⁰⁸ Peter Shergold and Bronwyn Weir, *Building Confidence: Improving the effectiveness of compliance and enforcement systems for the building and construction industry across Australia*, February 2018, p 11.

⁶⁰⁹ Evidence, Mr Richard Devon, owner, The Landmark Building, Charleston, 12 August 2019, p 23.

⁶¹⁰ Submission 43, Residential Strata Committee Strata 80605, p 1.

7.42 The committee was told that while accredited certifiers were legally required to retain documentation for 10 years, there was no requirement for them to provide that documentation to individual unit owners who may be experiencing problems with their building. Accredited certifiers are, however, required by law to provide that documentation to the council.⁶¹¹

7.43 Mr Brett Daintry, Director, Daintry Associates, called for the introduction of a centralised online repository of documentation, for example through the new NSW Planning Portal:

There is no excuse for us not having good documentation: good PDF copies of every plan, every report, every compliance certificate, the building manual, all in one place ... I have to give credit to the Department of Planning, this electronic DA system they are implementing at the moment has got real promise ...⁶¹²

7.44 Mr Daintry further called for online lodgement to be used in real time during construction:

Somebody could logon with a phone with their licence details connected, issue the compliance certificate for what they are doing. And geotagging on it too ... to prove he was on site the day he issued the certificate. We live in a lucky time where all of this technology is coming through and the documenting process should not be difficult.⁶¹³

7.45 While the Association of Accredited Certifiers supported an online centralised repository of documentation, they cautioned that immediate uploading of documentation may not be practical in all circumstances. Mr Hardy elaborated on the challenges of uploading documentation contemporaneously:

However, if you go to a building site where you have got complex things happening at a million miles an hour I do not know how practical it is going to be to get all that stuff back and put in on the portal. I am a big advocate of the portal. I have been pushing it in many other places. However, I just do not know if it as practical as that for complex projects.⁶¹⁴

7.46 Mr Robert Marinelli, Vice President, Association of Accredited Certifiers, emphasised that ultimately, 'the thing is you do want integrity in terms of what gets uploaded'.⁶¹⁵

7.47 Local Government NSW supported the NSW Planning Portal being used as the repository of online documentation, with particular reference to the requirement in the *Design and Building Practitioners Bill 2019* for electronic lodgement of designs and compliance declarations. Local Government NSW recommended that:

⁶¹¹ Evidence, Mr Robert Marinelli, Vice President, Association of Accredited Certifiers and Mr Hardy, 27 August 2019, pp 23-24.

⁶¹² Evidence, Mr Brett Daintry, Daintry Associates, 16 August 2019, p 81.

⁶¹³ Evidence, Mr Daintry, 16 August 2019, p 81.

⁶¹⁴ Evidence, Mr Hardy, 27 August 2019, p 22.

⁶¹⁵ Evidence, Mr Marinelli, 27 August 2019, p 22.

The draft Bill and/or supporting regulations must provide for the declared plans and compliance certificates required under the draft Bill to be lodged and stored in a single, central database, such as the NSW Planning Portal database, to ensure consistency and ease of access for all users (community, industry and government).⁶¹⁶

- 7.48** When asked to respond to stakeholder questions as to the location of the single, centralised repository for documentation required under the bill, the Building Commissioner Mr David Chandler OAM advised: '... the intention is to lodge the declared plans in the ePlanning portal and not build a new piece of architecture from the ground up'.⁶¹⁷

Committee comment

- 7.49** An issue raised repeatedly during this inquiry was why the significant issues in the New South Wales building and construction industry were not addressed sooner, not only in response to the Shergold Weir and Lambert reports, but going back to the Campbell report in 2002 – only four years after private certification was introduced. We underscore that this was a missed opportunity to rectify these issues almost two decades sooner, before the scale and severity of building defects reached the current crisis levels.
- 7.50** The committee supports implementation of the Shergold Weir report recommendations. We believe that this report provides a blueprint for resolving the current crisis plaguing the building and construction industry in New South Wales, and would go some way to restore plummeting public confidence in the industry.
- 7.51** We are disappointed that while the government says it is acting on the Shergold Weir report, the NSW Government is not in fact fully implementing the recommendations. Additionally disappointing is the evidence that even these weak efforts are taking too long. The committee calls on the government to fully implement the Shergold Weir report recommendations within the three year time period recommended by the report's authors, by February 2021.

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.

- 7.52** However, the implementation of the Shergold Weir report, while an excellent start, will not be enough on its own. The committee agrees with Mr Lambert that we need to address issues specific to New South Wales that exacerbate the situation in this State. We are disappointed that this was another missed opportunity to take action in 2015, and to prevent at least some of the significant and concerning building defects that have arisen in the intervening period.

⁶¹⁶ Local Government NSW, Submission 145a, p 7.

⁶¹⁷ Evidence, Mr Chandler, 5 November 2019 (uncorrected transcript), p 62.

- 7.53 We therefore call on the NSW Government to revisit the recommendations of the Lambert report, noting the consistent messages between that report and the Shergold Weir report, and taking into account the need to address additional issues specific to New South Wales.

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.

-
- 7.54 The committee draws particular attention to the recommendation made by several stakeholders for the return to a clerk of works model. The committee finds this proposal attractive, however we note that Mr Lambert did not support this recommendation. Key issues remain to be resolved, including:
- whether this model can be reinstated in the current 'design and construct' system, noting that overseas jurisdictions continue to use this (or a similar) model
 - the scale of construction that would justify the cost, and how to define 'large and complex' buildings, for example commercial and multi residential buildings over three storeys.
- 7.55 In revisiting the recommendations of the Lambert report, the committee recommends that the NSW Government consider the advantages and disadvantages of this proposal. The committee invites the NSW Government to respond to Recommendation 18 before the committee prepares its final report.

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.

-
- 7.56 The committee strongly supports the calls in the Shergold Weir and Lambert reports for improved records and documentation. It is unacceptable that there can be a significant difference between the as-built building and the available building documentation, and that where documentation is provided, it is of poor quality.
- 7.57 The evidence to this inquiry also shows that more needs to be done to make documentation publicly accessible. While this documentation has been held by councils, it can be very hard for an individual unit owner to access – with one inquiry participant telling the committee that he had struggled for 10 years to secure as-built plans of his apartment complex.
- 7.58 We note that the *Design and Building Practitioners Bill 2019* introduces new obligations on design and building practitioners in an attempt to address the discrepancy between building designs and as-built buildings. While the bill does require electronic lodgement, it does not specify where this documentation will be held, and does not introduce a requirement for

contemporaneous lodgement. The committee therefore recommends 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.

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.

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 Marosszeky
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 Divison
87a	Urban Development Institute of Australia - NSW Divison
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	Confidential
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
151	Name suppressed

No.	Author
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
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

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
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

Date	Name	Position and Organisation
	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
27 August 2019	Mr Jonathan Russell	National Manager for Public Affairs, Engineers Australia
Macquarie Room	Mr Greg Ewing	General Manager for the Sydney Division, Engineers Australia
Parliament House		

Date	Name	Position and Organisation
	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
	Ms Anita Campbell	Executive Officer, National Fire Industry Association
	Ms Rose Webb	Deputy Secretary, Better Regulation Division and NSW Fair Trading Commissioner

Date	Name	Position and Organisation
	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	Mr Jonathan Russell	National Manager for Public Affairs, Engineers Australia
Jubilee Room	Mr Greg Ewing	General Manager for the Sydney Division, Engineers Australia
Parliament House	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 Maritime Mining and Energy Union
	Ms Rita Mallia	President, Construction Forestry Maritime Mining and Energy Union
	Mr Steve Mann	Chief Executive Officer, Urban Development Institute of Australia NSW

Date	Name	Position and Organisation
	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

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 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 – Email from Ms Amanda Vries, Executive Assistant, Master Builders Association of NSW, to the secretariat, attaching documents to be circulated to the committee.
- 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. Consideration of terms of reference

The Chair tabled a letter proposing the following self-reference:

Inquiry into the budget process for independent oversight bodies and the Parliament of New South Wales

1. That the Public Accountability Committee inquire into and report on the budget process for independent oversight bodies and the Parliament of New South Wales, and in particular:
 - (a) Options for enhancing the process for determining the quantum of funding of the following bodies, including the transparency of this process:
 - i. Independent Commission Against Corruption,
 - ii. Law Enforcement Conduct Commission,
 - iii. Audit Office of New South Wales,
 - iv. NSW Electoral Commission,
 - v. NSW Ombudsman, and
 - vi. Parliament of New South Wales.
 - (b) Any other related matter.
2. That the committee report by the last sitting day in April 2020.

Resolved, on the motion of Mr Graham:

- That the proposed terms of reference be amended by inserting '(Legislative Council and the Department of Parliamentary Services)' after 'Parliament of New South Wales'.
- That the committee adopt the terms of reference as amended.

5. Conduct of the inquiry into the budget process for independent oversight bodies and the Parliament of New South Wales**5.1 Proposed timeline**

Resolved, on the motion of Mrs Houssos: That the committee adopt the following timeline for the administration of the inquiry:

- submission closing date – Sunday 17 November 2019 (five weeks)
- hearings – two hearing dates in the week of 9 December 2019, subject to consultation with members on availability.

5.2 Stakeholder list

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

5.3 Advertising

The committee noted that all inquiries are advertised via Twitter, Facebook, stakeholder letters and a media release distributed to all media outlets in New South Wales. It is no longer standard practice to advertise in the print media.

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 Kban*)

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

Draft 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

Appendix 4 Dissenting statement

The Hon. Trevor Khan MLC – On behalf of government members

Government Members dissent from the majority of recommendations in this report. Recommendations in this report, in general, are neither supported by evidence, nor economic analysis. Many also fail to recognise evidence provided to the Committee and the recommendations in their totality show a distinct lack of understanding by the Committee into the Government's reform process and the demand for urgent action from stakeholders and the wider community.

The Committee referred for inquiry the exposure draft of the *Design and Building Practitioners Bill 2019*, which was not in keeping with the standard protocol for reference of bills through the Committee on the Selection of Bills. Following feedback received on the exposure draft, a number of amendments were made before the Bill was tabled in its current form. As submissions made to the Committee were not prepared in response to the tabled *Design and Building Practitioners Bill 2019*, the Government strongly rejects any suggestion of sufficient evidence to delay passage of the Bill.

In contrary to suggestions made within the report, there is no evidence to suggest that the majority of stakeholders express concern with this *Bill*. More specifically, none of the witnesses called before the Committee suggested or recommended to the Committee that passage of the Bill be delayed for any reason at all. It is also concerning that the Committee recommends the delay of this Bill to allow for further consultation with the insurance industry as the Committee failed to inquire as to what engagement the Government has had with the insurance industry over the last three months. It should also be noted at the Committee's most recent hearing, which is where most evidence regarding insurance was sought, there were no insurance industry representatives called to give evidence.

Recommendation 1 fails to recognise that stakeholder consultation has already commenced on the draft regulations that support the Act. The Government has committed to stakeholders that this consultation process will be thorough, as such it would be improper for this process to be rushed, risking a poor outcome for all stakeholders.

Recommendation 3 is obsolete as the NSW Government currently provides centralised support and advice to consent authorities and owners on cladding through the Department of Customer Service. Government Members also note that detailed fire safety assessments for all buildings referred to consent authorities by the NSW Cladding Taskforce are progressing per the required process. The report fails to recognise rectification work that has been completed or is underway, and furthermore, the Committee did not inquire into existing compensation pathways that may be available to building owners. Given the final state-wide scope of any rectification is unknown it is not possible to establish any level of direct financial assistance.

Government Members support the public release of the Building Commissioner's work plan prior to the end of 2019, however Recommendation 4 does not take into account that the work plan will include a number of long term project proposals which are yet to be properly scoped, and have the ability to evolve over coming years. As such it may not be practicable for the Commissioner to release specific details of all the resources needed before the end of 2019.

Recommendation 5 is not supported. The Office of the Building Commissioner will lead the implementation of the *Design and Building Practitioners Bill* as well as leading the implementation of future Government reforms. This recommendation also fails to account for the endless testimony to the Committee criticising the separation of building regulation functions from the core operation of Government.

Recommendation 6 is obsolete as the Government has established the Building Reference Expert Panel, which includes broad representation from industry. This Panel will advise and report to the Minister and Building Commissioner.

The implementation of Recommendation 7 will not provide any additional assistance to owners without a corresponding insurance product. The Committee noted that such insurance products are needed before warranties are increased, and has not heard any reference that it is possible to ensure that there is a statutory, or other insurance product likely to be available in the timeframes referenced in the recommendation.

Recommendation 9, if implemented, is likely to have a major impact on the cost of new buildings and negatively affect housing affordability. There is also no evidence that suggests it would stop defects occurring in the first place. In contrast, the Committee recommends delaying the *Design and Building Practitioners Bill 2019*, which directly seeks to address this issue.

Recommendations 13, 14, and 15 are not supported, as the *Design and Building Practitioners Bill 2019* is required urgently in order to improve the accountability of practitioners and improve building standards. Delaying the *Bill* exposes consumers to further unnecessary risks and is not supported by key industry stakeholders or the wider community. The main provisions of the *Bill* provide sufficient detail to establish key requirements and to ensure that Parliament can be confident in the nature of the legislation that it is being asked to support. Passage of the *Bill* sends a strong signal to those working in the building and construction sector that new requirements and obligations will be imposed on them, and allows them to commence preparations to embed new processes and systems into their business, enabling the Government to expedite implementation of new scheme once regulations are finalised.

In respect of Recommendation 17, the NSW Government considered the findings of the Lambert report and has already announced its response. The Lambert Report was provided to the Government in 2015 and there have been significant changes in the sector since that time. The scope of the Building Confidence (Shergold-Weir) report, commissioned by the Commonwealth Building Ministers Forum, required the consideration of all previous reports and inquiries into the building and construction industry. The Building Ministers Forum reached a consensus that all jurisdictions would work towards harmonised regulation to and the Government is therefore focussed on implementation of the recommendations of the Shergold-Weir report

