Submission No 8

INQUIRY INTO REGULATION OF BUILDING STANDARDS, BUILDING QUALITY AND BUILDING DISPUTES

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Mr David Shoebridge MLC
Chair
Public Accountability Committee

Dear Chair, Deputy Chair and Committee,

Re: Inquiry into the regulation of building standards, building quality and building disputes

I read the terms of reference for a further inquiry by the NSW upper house public accountability committee, to examine the role of private certifiers in the NSW building industry and whether consumer protection is adequate for building owners.

I am a town planner and environmental health and building surveyor. Past Chairman of the NSW Building Professional Board's Disciplinary Committee and have over 34 years relevant practical experience in strategic planning, statutory planning and environmental health and building ,having held several senior officer positions in Local Government including as a Planning Director. I am regularly giving expert evidence in the LEC, NCAT, District and Supreme Court on planning and building matters. I have sat on 6 local government Code of Conduct Review Panels and I am the current AIBS Representative to the NSW Complying Development Expert Panel.

I, among many of my peers, have, over the last 20 years made significant personal contributions to state government panels and committees, mostly unremunerated, trying to make this system work. The first in 1997 as the schedules to the EPA Reg were rewritten. The amendments to the EPA Act and Reg have since then been never ending. I sat on the NSW State Assessment Committee and chaired the Complaint Review Committee. I consulted to the Department of Planning over a period of a year between August 2013 and May 2014 assisting with the building regulation and certification reform project work under the Planning Bill 2013.

At its most simplistic level I simply believe that private certification has to go. Building regulation needs a total rethink. 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. The system has a lot of victims, irrespective of one's role or exposure to it.

Certifiers

In the first instance, in defence of accredited certifiers ,the vast majority of accredited certifiers are people of high standing that meet the Building Professional Act requirements for accreditation and indeed, the bar is reasonably high. It is like any profession; a small minority are the problem.

Many sole practitioners in particular go to university, most have limited experience and limited guidance from highly experienced practitioners. They then progress from level

to level and don't have adequate management support structures and no or very little peer review on a daily basis.

The only exceptions are a few larger and well-structured high end certification companies where high ethical standards are also applied. Maybe, if certification stays, it must be recognised that accredited certifiers need, as a minimum, structured management and support and inexperienced certifiers must have daily peer review and expert advice on hand. That is Levels 3 and 4 must be employed by or be partner of a firm with an unrestricted Level 1 providing daily supervision and support. Levels 2 may be able to function in a technical sense, but business acumen and a lack of systems support often left sole practitioners down.

I don't believe that sole practitioners, unless they have come through such structured backgrounds, have business and professional acumen and have the relevant qualifications, skills and relevant practical experience, such that they can function successfully, other within very narrow range of simple developments, at low volumes.

The structured fabric and management present in Local Government's management of environmental health and building prior to 1 July 1998 was not perfect. Nevertheless, it was better than what has developed since 1 July 1998.

A naysayer

I have said, for more than 20 years now that private certification would not work. I gave it a decade, when I said on 1 July 1998 (I clearly remember my words on that day, to Dennis Beaumont then Director of Planning at Hurstville), that insurance would kill off certification within 10 years.

Every government since has stated it is here to stay. That is probably the outcome of this inquiry.

The Environmental Planning and Assessment Act 1979 (EPA Act)

The system has staggered on for more than 20 years, propped up by hundreds of Act and Regulation changes to keep it going. The management of private certification has suffered from its inclusion in the *Environmental Planning and Assessment Act* 1979 (EPA Act).

As the Hon Paul Stein, AM, QC observed, in delivering the Mahla Pearlman Oration, March 2013:

> "*The EPA Act was an elegant piece of legislation and I pay tribute to the drafters and the Government of the day that steered it into law. As the Minister for Planning acknowledges in the 2012 Green Paper, the Act was reforming and innovative. However, it lasted intact only until 1985. Since then, there have been around 150 amendments, usually preceded by the pronouncement that the amendment would make planning decisions speedier, cheaper and easier and, of course, "cut red tape." We all know that the result was the opposite. The EPA Act has become such a complex web, such a mish-mash, that decisions have become more difficult, slower, and more expensive. The Act has become a*

statute as complex as the Income Tax Assessment Act. It is very difficult for participants and decision-makers alike to navigate. Kafka would be proud. Many consider the best path is to start again from scratch.

The O'Farrell Government set up an Independent Review Panel of Tim Moore and Ron Dyer to report, which they duly did, contributing a well-reasoned critique and a path forward for reform. The Government response to the Report was to issue a Green Paper on the 14th July 2012, which was open for public comment until late 2012. A White Paper is promised in "early" 2013, but to date it has yet to appear, which means that my remarks will be on the recommendations and suggestions in the Green Paper."

The Independent Review Panel of the Hon. Tim Moore (now Justice Moore) and Ron Dyer and their report was promising, but the push for code assessible development, that is the expansion of certification into more complex developments, was the demise of these reforms. A year's worth of work by teams of people at the Department of Planning including input from numerous consultant such as myself were discarded on the realisation of the government that it would not get through parliament.

I have also said, on numerous occasions to many, including on discussion panels at conferences, that it will take deaths or serious structural failures to turn the clock back to a system of government controlled building regulation.

The Bankstown fire death, the Opal and Mascot structural defects, the combustible cladding are telling. The defects affecting hundreds of strata schemes appears systemic, as recently observed by respected strata lawyer David Bannerman. These events, among many, quantitatively and qualitatively demonstrate systemic failures.

As the Chair's Forward to Report upon the Quality of Buildings [1] stated in May 2002:

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

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

The terms of reference for this new inquiry quote some of the investigations, inquiries and reports but Report upon the Quality of Buildings is not quoted. The Report upon the Quality of Buildings but remain very relevant. As do the transcripts and submission by those in 2002, as nothing has improved.

[1] Report on Inquiry into the Quality of Buildings, Joint Select Committee on the Quality of Buildings, Parliament NSW, Legislative Assembly. [Sydney, NSW]. Chair: David Campbell, "July 2002". ISBN 0 7347 6809 5

If nothing is better after 20 years then one should not have to contemplate, for too long, to make the reasonable observation that the experiment in private building regulation is a failure.

Many people have profited significantly from this system, mostly developers and those making a living from its complexities. However, equally, many mums and dads have had *the most significant financial decision* they will make, their home send them broke, destroy their families and adversely affect many more people around them.

The Report upon the Quality of Buildings sets out many of these storeys and in the 19 years since there have been many more to add.

How many inquiries and reports must be undertaken before it is acknowledged that the 1987 reforms, enacted 1 July 1998, are so fundamentally flawed.

We need proper regulatory separation between builders and building surveyors. We need critical hold points in statutory process to ensure Home Warrantee Insurance, relevant Development Levies and other statutory securities are paid. Owners must not be forced into appointing the Builder's chosen PCA.

The efficacy of private certification must be seriously questioned as an appropriate way to regulate building in NSW or nationally.

We must acknowledge that the inclusion of building regulations in the *Environmental Planning and Assessment Act* 1979 has not achieved the stated objectives of the 1997-1998 reforms.

What were the objectives in 1997?

In the Legislative Council Hansard – 05 December 1997, The Hon. J. W. SHAW (Attorney General, and Minister for Industrial Relations), on behalf of the Hon. M. R. Egan said within the second reading speech:

"The most often stated problems with the system are that:

- *it is over-regulated,*
- *it is full of duplication,*
- *separate approval processes sometimes conflict with one another,*
- *there is a lack of certainty,*
- *there is a lack of transparency,*
- *no-one's accountable,*
- *there is little coordination,*
- *the process and scale of assessment is often out of proportion to the environmental impact, and*

- *it all takes too long.*

Mr President, everyone has a story about some problem with State planning rules or their frustration with the local council.

It's not just developers either. Individual residents, builders, environmental groups, architects and ordinary people share frustrations about the lack of common sense in the system and the seemingly unnecessary layer upon layer of rules and regulations that get more complex every day."

Yes, this statement was made 5 December 1997!

The excuse for the need for privatisation building certification was a faster quicker more simple and certain approval system and outcomes. That has never happened.

The system is now more complex than ever, DA and CDC determination time are unacceptable and the quality of buildings, fire and life safety outcomes are often worse.

Your inquiry will probably not address application determination times for base development consents and CDC, unless your inquiry touches upon how efficient and effective the simple single council building approval process was, as it existed prior to 1 July 1998, for the large majority of building works.

What is clear from my experience, both within and outside of Local Government is that unacceptable assessment and determination time are a driver of unauthorised works.

Some developers and even mum and dad applicants, doing relatively minor works, are often willing to just undertake unauthorised works, and deal with the consequence later, as the complexity and the compliance costs have not decreased since 1 July 1998, they have risen significantly.

The second reading speech points above have always been and remain a real part of the problem.

Not Inconsistent with Consent

Cases have reinforced the primacy of the Construction Certificate (CC):

In *Bunderra Holdings Pty Ltd v Pasminco Cockle Creek Smelter Pty Ltd (subject to Deed of Company Arrangement)* [2017] NSWCA 263, where the Court of Appeal effectively held that, irrespective of the conditions of a development consent, where there is an inconsistency between those conditions and the approved construction certificate plans and specifications, the construction certificate plans and specifications will override any inconsistent conditions, and

In *Burwood Council v Ralan Burwood Pty Ltd (No 3)* [2014] NSWCA 404, where the Court emphasised that s 80(12) [now s 4.16(12)] has the effect that, to the extent that there is an inconsistency between the construction certificate plans and specifications and the plans and specifications approved in the development consent, those certified by the construction certificate will prevail.

The effectiveness of often hundreds of hours of design, assessment and determination effort at the DA stage is too often cast aside by Construction Certificates issued by Accredited Certifiers that, on their face, are not consistent with consents.

I see the Court's judgements in both Bunderra and Ralan as a clear invitation by the Court, to the Government, to review the whole certification system. I don't see these judgements as condoning the outcomes of the current system, they simply reinforce the system the government enacted 1 July 1998 and that successive governments have maintained for more than 20 years.

Clause 145 of the *Environmental Planning and Assessment Regulation* 2000 (EPA Reg) has always been necessary, as complex development consents are granted as developments consents lack building detail, as contemplated by clause 54(4) of the EPA Reg:

> "*However, the information that a consent authority may request does not include, in relation to building or subdivision work, the information that is required to be attached to an application for a construction certificate.*
>
> ***Note**. The aim of this provision is to ensure that the consent authority does not oblige the applicant to provide these construction details up-front where the applicant may prefer to test the waters first and delay applying for a construction certificate until, or if, development consent is granted*."

Despite this necessity and the words within clause 145 of the EPA Regulation, that seek to limit changes, significant changes are being perpetuated by a small minority of accredited certifiers, under construction certificates, that ought not occur.

Ralan was an especially heinous erosion of the quality of facade design at the construction certificate stage. From an urban design perspective, in my opinion, the resultant building, which will exist for decade, if not centuries, is one of the ugliest buildings in Sydney. Again, the Court in this matter, did not condone the ugly building outcome, it ruled upon the statutory system.

Once the CC is issued it has a significant statutory effect. The only deterrent and limit upon the application of clause 145 is a disciplinary proceeding against the certifier under the Building Professionals Act 2005 and that does not correct what has been approved or built. Class 4 proceeding seeking civil remedy (to void a certificate) are out of reach of most neighbours and most councils. Applying Bunderra and Ralan (which account for the current system), who would be game to take such action given the costs?

When do we get good quality buildings?

There are massive difference between build and keep and build and sell models.

When developers build and keep for long periods (not just to exert control over owners corporations and wait out defect periods), we get high quality outcomes. I won't name or slander the obvious opposites, but they were in 1997-1998, and remain today,

among the biggest supporters of the 1998 privatisation of building approvals and inspections in NSW.

Why? Because Council Building Surveyors were too hard on them! Hence, as evidenced by the issues in the terms of reference, we appear to have systemic problems, albeit serious structural defects are not common they are very serious.

Significant departures from development consents, unauthorised works and building defects are systemic.

Is privatisation better?

It seems that the building regulation and insurance lessons arising from the Great Fire of London 2 September to 6 September in 1666, essentially the base to modern building regulation in much of the old British empire, including NSW, was all but abandoned 1 July 1998 and with hundreds of changes since that date have entrenched the current system.

Why? It seems because we as a society, or at-least the powerful developers and the successive governments, were of the view that we could not afford the existing building regulation system, as in effect prior to 1 July 1998 and Council Building Surveyors were to blame for complexities, delays and costs in approvals processed.

The *Local Government Act* 1993 saw the final removal of the requirement for each Council to have a Chief Health and Building Inspector, after the earlier repeal of Clause 9B of Ordinance 4 (Qualifications). I need not restate the purported reasons dotted pointed above, that suggested these changes were necessary, except to observe and I agree with the Hon Paul Stein, AM, QC, as quoted, "*decisions have become more difficult, slower, and more expensive*".

Town planners should focus on town planning and building surveyors should focus on safe and healthy buildings. Building Surveyors should not be allowing significant changes to the design of buildings at the CC stage or during construction given the significant public investment in the DA process, including the extensive resource applied to Land and Environment Court appeals were required.

Architects must spend more design time to ensure that NCC-BCA compliance is possible, at the early design stages, not leave it to multiple DA amendments to achieve compliance or ask certifiers to allow significant design changes under CC's to address NCA-BCA issues. The use and abuse of section 4.55 of the Act is not within the terms of reference of this inquiry. I address the role of Compliance Certificates further below in far more detail.

The real outcome of taking building regulation away from Local Government is that the development application process has become even more complex, slower and costly, as information previously considered by Council's under the old Building Application has been dragged, often ignoring clause 54(4) of the EPA Regulation, from the CC process into the DA process. I have discussed the impacts of assessment complexity and delays below. The problems with the DA process, which remain many, are exacerbated by consequence of town planners having little trust in certification.

Assessment must be proportional to the environmental impact

On 1 July 1998, we took the simple building application and integrated building inspection regime, that dealt with the greatest volume of building assessment and approvals, and replace it with a very complex Complying Development Certificate (CDC) regime.

Initial, the uptake of CDCs was very poor in all but a few councils. Many councils sought to retain control of the assessment and determination of buildings through onerous controls constraining the process and directed people to a combined DA/CC process.

Eventually we saw the rise of State Environmental Planning Policies that forced councils to accept that CDC will increase in volume and scope. The current mechanisms for complying development are predominantly:

- State Environmental Planning Policy (Exempt and Complying Development Codes) 2008
- State Environmental Planning Policy (Affordable Rental Housing) 2009
- State Environmental Planning Policy (Infrastructure) 2007

The partly commenced "missing middle" (really the replacement for Code Assessible Development that saw the demise of real regulatory reforms guided by "The way ahead for planning in NSW? [2]" report, is currently subject to an independent review to assess progress on the Low Rise Medium Density Housing Code to date, identify impediments to the Code's delivery in deferred areas, and make recommendations on the appropriate pathway forward to finalise the Code's implementation.

In my opinion, there was never anything wrong with the simple Building Application lodged with the local council for mum and dads housing projects and other minor building works such as commercial fit outs. This system should be dusted off and return, even if it runs parallel to the existing system for some time.

The Government should let applicants vote with their feet as to whether they prefer dealing with Council's under a BA rather than dealing with the CC or CDC process.

The old BA system was so superior in terms of it lower complexity, assessment speeds and lower costs for most developments that is hard to reconcile how the private sector could carry out these regulatory functions more efficiently and effectively under the EPA Act than a Council delegate under section 68(A1) of the then *Local Government Act* 1993.

If the government and local government are likewise fearful of the impacts of the Low Rise Medium Density Housing Code, we will see the results of the independent review [3] that is running parallel to this inquiry, then there is no reason it could not, like all other

[2] https://www.planning.nsw.gov.au/-/media/Files/DPE/Reports/the-way-ahead-for-planning-in-nsw-issues-paper-of-the-nsw-planning-system-review-2011-12.pdf
[3] https://www.planning.nsw.gov.au/Policy-and-Legislation/Housing/Medium-Density-Housing/The-Low-Rise-Medium-Density-Housing-Code

complying development, be a simple building application integrated with building inspections undertaken by Council Planners/Building Surveyors.

It is my submission that a full blown environmental assessment under section 4.15 of the EPA Act with a Statement of Environmental Effects is, for most housing projects, not proportional to the environmental impact.

The repeal of the simple Building Application and the implementation of the convoluted DA/CC or CDC system has needlessly diverted resources away from more complex developments. Councils should look after general housing and things like shop and office fit-outs. A genuine effort needs to be made to apply assessment resources in a proportional manner.

The two-stage DA and CC must remain for more environmentally sensitive and complex developments, but the question is; should the CC remain a private certification process or should it, in the long term revert to local government as a more simplistic BA process?

In the alternative, should the system be completely deregulated and the owner of the land made responsible for ensuring through their own experts that the building is built in accordance with development standards and controls and in compliance with the NCC-BCA?

From a pure building regulation perspective the latter is not really practical under current laws for mums and dads, as these types of owners are locked out of their own sites under building contracts, even if they wanted an expert to inspect the works in addition to the PCA, they often have no right of access themselves or for independent expert inspection. They may own the land but the occupant is the builder.

Performance Based Alternative Solutions

Prior to 1998, the Applicant had to justify them, the Council had to concur and the Building Branch of the Department of Local Government had to authorise them.

These checks and balances were gutted from the law on 1 July 1998. The subsequent oversight of alternative solutions has been nowhere as rigorous. Many owners corporations have been left with massive fire upgrading as the result of subsequent fire orders issued by Councils.

Alternative solutions such as the removal of second fire exit stairwells from buildings with effective heights greater than 25m and even mistakes such as the incorrect measurement of effective height, have not improved life safety outcomes for future occupants.

A reduced reliance upon passive fire separation in favour of active systems has reduces costs for developers but, in the long term, the costs of maintaining active systems and the propensity of owners corporations or their building managers to fail to maintain them only increase the costs and risk to occupants.

Private and council certifiers have been sued alike.

A formal system for the oversight of alternative solutions, independent of accredited certifiers (irrespective of whether they are private or Council), is required, equivalent to the role of the Building Branch at the Department of Local Government under the *Local Government Act* 1919 and 1993.

What are we trying to achieve?

Irrespective of whether building regulation is returned to local government responsibility, accountability and liability across the whole of the building sector must be better regulated.

Mandating Compliance Certificates across the industry is necessary under Part 6, Division 6.5 of the current EPA Act to bring responsibility, accountability and liability to building.

The mandating of Compliance Certificates should have occurred 1 July 1998. Section 6.16(2) of the EPA Act exists because the Regulations do not prescribe sufficient persons or a class of persons, to issue a compliance certificate in relation to the matters a consent authority might wish to be certified. Clause 138 of the EPA Reg provides a framework but is not utilised. Schedule 1 of the EPA Reg does not set out any form.

Documents that fall within "*evidence of suitability*" under the NCC-BCA are all that accredited certifiers generally rely upon. There are a few exceptions, such as survey certificates from Registered Surveyors and design verifications from Registered Architects that to some extent are regulated by the professional standards under the Surveying and Spatial Information Act 2002 and Architects Act 2003, but these are not prescribed for the purposes of the Act or by Regulation as "Compliance Certificates".

For the sake of simplicity, responsibility, accountability and liability going forward, a single Compliance Certificate regime is required irrespective of whether private certification continues. For any certificate relating to a building to be accepted it must, in my opinion, be in the form of a Compliance Certificate.

A Building Commission

A Building Commission or similar might be coming! Really?

What would it do? What functions embedded in the EPA Act and Regulation would it take; how would it interact with the Building Professionals Act and the Home Building Act? How will every individual in the complex process of building any building be licenced? Will everyone have to issue Compliance Certificates for their surveys, design, building product and building work?

How will it bring **responsibility, accountability and liability** back to our building industry?

Recommendation 1 of the Report upon the Quality of Buildings recommended a "Home Building Compliance Commission". The reports final recommendations were not in my opinion sufficiently detailed.

This is about who is responsible, who must be accountable and liable for building works.

The Report upon the Quality of Buildings misunderstood the failing role of Compliance Certificates because it did not understand, that beyond Accredited Certifiers the EPA act and Reg did not authorise their issue by other person or class of persons.

Are Accredited Certifiers really the problem?

I note from the terms of reference the direct references to flammable cladding on NSW buildings and the defects discovered in Mascot Towers and the Opal Tower.

It must be observed that, professional building surveyors acting as accredited certifiers, do not survey the land, do not design buildings, do not manufacture building products, do not install building systems, do not construct buildings, do not inspect every aspect of a building under construction and do not, despite the title "principal certifying authority" (PCA) now "principal certifier", issue "Compliance Certificates".

When private certification commenced 1 July 1998, the intention was that the PCA would carry out some inspections and those doing the work, i.e. those doing designing and building work, would issue "Compliance Certificates". At that time and since insurers and lawyers for builders and others in the building industry advised that you should not issue Compliance Certificates as they attract liability, unless it is a statutory requirement. It never been a statutory requirement and as now one other than an Accredited Certifier can issue a Compliance Certificate and one certifier is highly unlikely to issue one to another, they are seldom used.

The reality of building inspection is that it is impossible for a Building Surveyor to even know if the paint has been applied in accordance with the manufactures specifications. So who is responsible?

In my opinion, everyone who picks up a pen, manufactures a building product, hits in a nail or applies a coat of paint, on a building project, is proportionally responsible for what the design, manufacture or build. The most responsible persons for complying with consents and building standards are those persons controlling the site and paying the bills.

Given the time consuming bureaucratic complexities of documentation under the EPA Act, EPA Reg, Building Professionals Act & Regulation and the very limited range of statutory critical stage inspections required, the PCA's direct oversite of the building process is very limited. Oversight has been further eroded, since 1 July 1998, as most PCA's offices are often more physically remote from their sites, than Council offices.

Building surveyors, acting as the PCA, now principal certifier, are in the majority of cases not responsible, accountable and liable for latent defects. Many defects related to building elements that they are note required to inspect, or damage occurs after inspections (a plumber and electrician cut through elements to install services) and they are covered up.

Yet, PCA are the "last man standing". With onerous professional indemnity requirements, more than most others involved in the building process, they are currently

bearing the brunt of the blame for design, manufacturing, installation and building defects arising from the current building regulation system.

This is not fair or reasonable, they are as impacted by the constraints of the system as anyone else.

Insurance

In my opinion, everyone must be insured on the same terms with the same run-off and this including large residential apartment builders. The removal of the requirement for Home Warrantee insurance on large residential development, on the pretence that the then new Critical Stage inspections would protect consumers was not sufficient grounds to remove the requirement for insurance.

If the builders cannot obtain insurance or it is too expensive, then how can anyone else be accountable. Those that undertake any work on any building site must in my opinion be required by law to be Accredited (licenced), be insured and required to provide a Compliance Certificate in a standard form.

Recording Certificates

One would think a web-based centralised database linked to the relevant development consent or complying development certificate and the land, similar to the BASIX Register, should be managed and held by the NSW Government.

This aligns well with the online DA/CDC process – see:
https://www.planningportal.nsw.gov.au/onlineDA

All development consents, CDCs, CCs, Compliance Certificates, Occupation Certificates, Fire Safety Certificates and Annual Fire Safety Statements, as well as the yet to be commenced Building Manual, and referenced documents must be upload to and publicly accessible as open access documents under the Government Information (Public Access) Act 2009.

Documents are the basis for **responsibility, accountability and liability.** That is why many in the industry will speak against this as another "big brother" approach. Many would prefer not to leave an audit trail. This is, however, exactly what we want from the system.

Those providing documents for the purpose of any of these processes must waiver copy right to allow these documents to be publicly accessible. If they are unwilling to do so they should be excluded from the system and by providing a document or by uploading a document they must in the process waiver copyright.

False and Misleading Information

One critical issue that has evaded regulatory reform is the propensity of many in the building industry to provide accredited certifiers with false and misleading information, even forged documents (less common but I seen them), as evidence of suitability (these documents are not equivalent to a Compliance Certificate). These documents

are used as *evidence of suitability* to procure Construction Certificates and/or Occupation Certificates.

Section 6.30 of the EPA and outcomes like *Bunderra Holdings Pty Ltd v Pasminco Cockle Creek Smelter Pty Ltd (subject to Deed of Company Arrangement)* [2017] NSWCA 263 and *Burwood Council v Ralan Burwood Pty Ltd (No 3)* [2014] NSWCA 404, demonstrate the benefits of attaining a certificate from an Accredited Certifier, as s6.30 provides:

> "**6.30 Satisfaction as to compliance with conditions precedent to the issue of certificates(cf previous s 109P)**
>
> (1) A person who exercises functions under this Act in reliance on a certificate under this Part or complying development certificate is entitled to assume:
>
> (a) that the certificate has been duly issued, and
>
> (b) that all conditions precedent to the issuing of the certificate have been duly complied with, and
>
> (c) that all things that are stated in the certificate as existing or having been done do exist or have been done,
>
> and is not liable for any loss or damage arising from any matter in respect of which the certificate has been issued.
>
> (2) This section does not apply to a certifier (other than a council) in relation to any certificate that he or she has issued."

Section 6.30 has a legitimate purpose to protect those relying in good faith upon certificates issued under the EPA Act, but the absence of a proper system for Compliance Certificates leaves everyone that does the right thing exposed to those that do the wrong thing.

I call this provision "*the developers get out of gaol free card*"; I am building in accordance with the CC! The CC allowed me to remove that trees! The CC shows that additional basement level! I have heard it all, time and time again.

I have over more than two decades argued for provisions that allow an Accredited Certifier to void their own certificates, with indemnity protection, where at any date they become aware that a certificate was procured from them on the basis of false or misleading information in a material respect.

I am not aware of a single prosecution in NSW, despite the section 10.6 EPA Act (cf previous s 148B) and previously within the EPA Regulation, providing that a person must not provide information in connection with a planning matter that the person knows, or ought reasonably to know, is false or misleading in a material particular, for this offence.

This reinforces why Compliance Certificates need to be:

- a statutory requirement,

- managed through a NSW Government Portal similar to BASIX,
- able to be created using an account that identified the user,
- an online open access document under GIPA, and
- linked to consents, CDC and land parcels.

If existing provisions for the provision of Compliance Certificates is not formalised, regulated through a secure portal (similar to BASIX Certificates) and mandated nothing will improve **responsibility, accountability and liability**.

Have the 1997 reforms as enacted 1998 worked?

Looking back at the purported reasons for the introduction of private certification, it is shameful where we are 20 years on.

In my opinion, the planning and building system:

- is over-regulated,
- is full of duplication,
- is full of separate approval processes sometimes conflict with one another,
- lacks certainty,
- lacks transparency,
- has no-one properly proportionally accountable (a failure of the intent of Compliance Certificates),
- has little coordination,
- processes and the scale of assessment is often out of proportion to the environmental impact, and
- it all takes too long.

Ironically, this list of reasons forming the basis of the 1997 reforms relates more to the existing complexities of environmental impact assessment process (i.e. hundreds of EPIs and thousands of pages of DCPs), convoluted development consents second guessing the multiple CCs and OCs that may follow, rather than the building assessment process (a single national construction code (NCC) the Building Code of Australia (BCA) assessment. Yet the inclusion of building regulation in the EPA Act remains.

The standout issue which applies to exempt, complying and other development is that the system has no-one properly proportionally accountable (a failure of the intent of Compliance Certificates).

The privatised building approvals and inspections system is, in my opinion, an ongoing failure of public policy.

Even with statutory independence from builders, higher levels of daily supervision and management support, local government's control of building assessment, approvals and inspections was far from perfect. Delays were creeping in. A case decided by the Chief Judge in Porter v. Hornsby Shire Council (1989) 69 LGRA 101, in which his Honour declared a building approval invalid because the council had failed to notify adjoining owners before granting building approval confirmed on appeal by the Court of Appeal (CA. No. 40650/90 15 June 1990) which resulted in blanket neighbour notification in many councils was among delays to building approvals

It was therefore with dismay that neighbour notification of CDCs was introduced in recent years. The important value of the CDC was that the scale of assessment was proportional to the environmental impact and it too less time.

Nevertheless, the historic publicly controlled building approvals and inspection regime was simple, reliable and cheaper. This in tandem with home warrantee insurance across all residential developments, was a better consumer projection outcome.

In Closing

This submission is generally the same submission I made 23 April 2002 and 23 May 2002 and generally the same as the evidence I gave to the Parliamentary Inquiry - Joint Select Committee on the Quality of Buildings on 24 May 2002. Some improvements were made following the Report Upon the Quality of Buildings, for instance critical stage inspections were implemented.

The consequences of the 1 July 1998 system, even with hundreds of amendments to the EPA Act and EPA Reg are antipathetic to the stated reasons for the reforms set out in the second reading speech above.

Irrespective of whether private certification is to be retained, a Compliance Certificate regime of rigour is required. This is a complex task.

At the date of this submission I presume the Department of Planning are writing new regulations to support the passing of the *Environmental Planning and Assessment Amendment Act* 2017 in the NSW Parliament in November 2017 and the un-commenced provisions in Part 6 of the EPA Act. I am not aware of the status or contents of any draft regulations.

Hopefully, someone in the Department is giving deep consideration to how Part 6, Division 6.5 of the EPA Act will operate in the future, in particular:

- the types of Compliance Certificates required,
- the persons or class of persons to be prescribed by the regulations as being authorised to issue a compliance certificate,
- how all certificates and related documents under the EPA Act can be created and lodged,
- how all certificates and related documents under the EPA Act will be related to parcel(s) of land and relevant consent(s).

- how all documents can be "open access", and
- how all documents can be publicly accessible.

I found nothing of further assistance on the following webpage other than initial priorities.

https://www.planning.nsw.gov.au/Policy-and-Legislation/Buildings/Building-Regulation-and-Certification-Reform

My submission touches upon part of the Government's stated current initial priorities:

The initial priorities are:

- a package of fire safety reforms for both new and existing buildings;
- consolidation of building provisions in the Environmental Planning & Assessment Act 1979;
- reform of certifier regulation by re–writing the Building Professionals Act 2005; and
- new measures to facilitate better use and sharing of certification data.

NSW should have a single consolidated Building Act and a Building Commission. The EPA Act, is, as observed by the Hon Paul Stein, AM, QC "..*a complex web, such a mish-mash, that decisions have become more difficult, slower, and more expensive*".

The renumbering and 2017 amendments to the EPA Act have not assisted anyone.

Ongoing education and accreditation must not be limited to Accredited Certifiers. All people designing, manufacturing, installing and carrying out building work (including each tradesman) should be accredited (licenced) competent people.

Everyone should be on a level playing field, subject to similar CPD requirements, insured with the same run-off requirements.

Everyone, through a Compliance Certificate regime, must accept responsibility, be accountable and liability for their work.

To the extent the Government want certain works double checked, the range of Critical Stage Inspection could increase and should be subject to the Compliance Certificate regime where the PCA does not have the appropriate skills or those skill are not demonstrated at the Level of Accreditation of a PCA or it is simply more efficient and effective for another accredited person to do that inspection and issue the Compliance Certificate. The latter should apply to all geotechnical, hydrogeological, civil, structural, windows, doors, wet areas, drainage and each essential fire safety measure within all developments and buildings.

Critical Stage Inspection's added will be more expensive for developers and builder, costs likely to be passed onto consumers, which previous governments have avoided.

Given the current hostile environment, our most competent people are exiting the certification system. I hold concerns that there will be insufficient competent building surveying resource to meet market demands in the future. I am certain that the AIBS and AAC will touch upon the issue of capacity with more rigour.

In concluding, the government and local government cannot heap all the blame of this failed system upon accredited certifiers. The 1 July 1998 reforms and the anti-certification reaction of local government has compounded the inherent failures in the system.

As stated at the start of this submission, the vast majority are accredited certifiers are people of high standing that meet the Building Professional Act requirements for accreditation and indeed, the bar is reasonably high.

Please don't hesitate to contact me

Yours faithfully,

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Director