

Submission
No 12

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

Name: Name suppressed

Date Received: 10 July 2019

Partially
Confidential

Inquiry into Regulation of building standards, building quality and building disputes

Dear Committee

While there are some aspects of the private certification system that work adequately around exempt and complying development, unfortunately it does not seem that the overall focus on self-regulation in the industry is functioning well, particularly on larger scale developments where the stakes for structural defects are significant in terms of financial and personal costs. While it is unrealistic to expect the system will achieve a perfect result for every building every time, the system should guard against defects -particularly significant defects - being considered as 'normal'.

In particular, it is concerning to see the number of defects on new buildings, particularly significant structural defects. There are a number of media reports, anecdotal accounts, and litigation that suggests new large scale developments are not meeting the expectations of quality that consumers would expect. Indeed, there are some within the industry recommending friends and family only buy older apartments constructed during the 1990s or earlier, due to the perceived diminution of quality in new buildings.

The following comments are based on my experience as a planning and environment lawyer, and conversations with those working in the industry or who have purchased defective properties in recent years.

1)The costs of defects

Significant structural defects impose huge financial and personal costs on homeowners, businesses, builders, and insurers in remediation and legal costs. They also undermine confidence in the building industry. They take up the valuable time of Courts and regulators. They can have broader impacts on communities, for example in redevelopments of local mixed use developments, a delay of even months in opening new anchor retailers due to defects, can impact other smaller retailers in that precinct who rely on passing trade.

In the recent instances of Opal and Mascot Towers, they also imposed costs on taxpayers as forms of welfare were extended to homeowners. While the plight of homeowners is sympathetic, this represents public money being spent to subsidise the private profits of developers who have been prepared to take the profits of developments, but not incur the risks and costs associated with rectifying their own defective works.

2) Self regulation and deregulation is not effective

Increasingly the building industry has relied on private forms of regulation for quality control. There is increased options to use private certifiers, rather than independent government certifiers, for certain types and stages of development. Generally, trades have less independent oversight and inspection of works being completed.

Unfortunately, it is not clear that relying on professional standards, or even market competition, is adequate to ensure quality of buildings. A system where those overseeing works are paid by the very developers whose development they are overseeing invites potential for conflicts of interest. The building industry and trades are highly competitive, yet this seems to have resulted in lowering standards in order to remain competitive in tenders, rather than driving competition to carry out quality work. This is not to say that the entire industry is low quality, rather that the market is generally operating to put price before quality, including in government tendering practices. Some tradespeople consider a return to independent certification of work to only way to rid the industry of cowboy builders and developers.

Suggestions for improving certification and inspection of works

There has been some attempt at removing the conflict of interest for private certifiers. However, proposals by government to implement a "taxi rank" system of randomly allocating certifiers lack coherency. If the idea of having private certification in the first place is to allow contestability for certification works, a taxi rank system defeats the purpose of contestability if the underlying consumer has no choice who they engage, and there is no particular market driver on a certifier to function well. It introduces a profit margin to inspection costs, which might be performed at cost by government employees.

A more coherent alternative, if the government is minded to maintain contestability of certification, is to change who the underlying client of certifiers are. For example, if the paying client of certifiers was the Department of Fair Trading through a panel arrangement where Fair Trading approves a panel of certifiers, and choose the certifier for a particular project. Certifiers would have greater confidence to challenge the work or plans of developers, without fearing their livelihood would be under pressure, as they would be answerable to Fair Trading rather than the developer. The costs of this could be recovered from developers via inspection fees. Fair Trading could remove under-performing certifiers from their approved panel if necessary. Certifiers would compete amongst themselves to win tenders from Fair Trading.

However, the simpler solution is for an appropriate entity like Council or the Department of Fair Trading to simply employ its own staff to inspect developments, and remove the profit margins of private certifiers from the costs of inspection services. Such profit margins are ultimately passed on to the costs of the housing for the homeowner. The clearest entity to regulate and enforce building standards is the Department of Fair Trading, which regulates licencing of builders, plumbers, electricians and other trades.

Suggestions for improving the regulation of property developers

Ordinary consumers have little easy means to distinguish “cowboys” in the industry from reputable developers.

In contrast to many other actors in the property development space, such as builders, plumbers, electricians, etc who are required to be licensed, property developers themselves do not require any particular form of qualification or regulation. As such, it is possible for developers to participate in the property development industry through phoenix companies or subsidiaries without any underlying assets, and wind these companies up after a project. There are no minimum standards or qualifications to be a property developer. Consumers may have little information about the performance or track record of a particular developer.

There is an element of inequity that property developers can make profits from developing properties, apply pressure on their contractors or certifiers to cut corners, but currently face very little financial liability for any consequential defective work.

One way of improving this system is to require property developers to obtain a licence similar to a building or plumbing licence. The cost of such licence should not be used as a barrier to entry. Rather the point of the licence is for it to be attached to a company or person which can meet minimum standards. One such minimum standard should be that the developer has underlying capital, insurances, or bank guarantees enabling it to pay to rectify defective work which is identified during a warranty period.

As with trade licences or drivers licences, property developers could incur demerit points for defective building work or other breaches of planning legislation. Complaints and demerit points are publically available information which can be searched on the same public registers for electricians, plumbers, and builders. Loss of sufficient points can result in loss or suspension of a developers licence.

3) Challenges faced by homeowners in remediation costs.

Homeowners of defective building sites face enormous challenges to recover remediation costs from builders or insurers. Homeowners and owners corporations (generally with committees of inexperienced volunteers) may have to bring legal proceedings to recover these costs, facing years of uncertainty in structurally unsound and undignified living conditions. Anecdotally, I have heard one tradesman describe tenants living in a new development less than a year old, where they had stuffed a crack in walls with newspaper.

Suggestions for improving building warranty insurance scheme

These challenges have been faced in 'lock step' with changes to building warranty insurances, where the number of years and level of coverage has slowly been eroded. While the insurance industry wished to limit its exposure to the growing costs of insuring new buildings against defects, the pairing back of this regime has not been met by adequate changes to prevent defects in the first place.

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.

4) Challenges faced with the dynamics of strata committees

Strata committees for owners corporations are often inexperienced volunteers, which creates challenges in their effectively navigating the courts and legislation to achieve outcomes. In new buildings, the owners corporation rarely have the funds in their administrative or sinking funds to carry out remedial works or engage solicitors to pursue builders/insurers, necessitating the owners to raise hundreds of thousands in special strata levies. Difficulties in reaching a majority position, or for owners to raise the necessary funds, can in turn delay action being taken.

Homeowners contending with an ineffective strata committee can face huge challenges in forcing the owners corporation to rectify defects or otherwise carry out general repairs/maintenance. A frustrated homeowner may be required (for example) to bring proceedings in NCAT against the owners corporation or strata committee members, seeking orders for them to take action. Even a successful applicant can have huge difficulty in enforcing an order against the committee, as due to the way the Strata Management and NCAT legislation is framed, the homeowner has no way to compel the committee or committee members to action orders made by NCAT.

Homeowners engaged in litigation via NCAT have expressed their frustration as to how this jurisdiction operates, noting issues such as inadequate case management, and inconsistency of decision making.

5) Quality of trades generally

Often the focus on regulation examines how to improve oversight structures for the building industry. However, prevention is the best cure for defective works. We should strive for a building industry where defects are rare because the quality of workmanship is high.

Deregulation of independent oversight has also been in lockstep with the deregulation of technical training. More private, low quality, technical education providers are proliferating in the

trades. TAFE has suffered a series of funding cuts, and "streamlining" of the courses to remove much of the substance that the courses previously provided to young trades. There is strong reliance on "on the job" training of core trade skills.

It is questionable whether reliance on "on the job" training is adequate, when the commercial pressures of construction trades is for minimal supervision of apprentices. Anecdotally, one tradesman has told me that he has been hired to rectify defective works completed by unsupervised apprentice plumbers, due to their employers are cutting costs by not sending a second plumber to supervise the job. Such practices are driven by the focus in private and government tenders to reduce costs as far as possible. Lack of supervision denies young apprentices important development and mentoring required to complete quality work. In turn, consumers face sub-standard work by notionally qualified tradespeople who have not been properly trained in the first place.

Suggestions for improving quality of trades

Where apprentices are in private employment, it is perhaps appropriate for businesses to be financially supported to properly supervise junior staff. Apprentices are often a cost to trades, given the costs of paying their course fees, insurances and wages. Taking on these costs may only be profitable to private sector employees if the apprentice is not properly supervised, due to the costs of hiring more senior trades to supervise them.

Another alternative is to invest greater public money into direct employment and development of apprentices. Apprentices should have an opportunity to develop skills in an environment where there is not commercial pressure from their employer to complete unsupervised or "cost cutting" work, and where they will be taught by competent senior tradespeople.

Privatisation pressures within government have reduced the number of such meaningful opportunities for young people. In the past, state owned public utilities hired large numbers of young apprentices, and without commercial pressure to cut costs, could invest time and supervision into their education to learn the skills of their trade properly. With these utilities now in private ownership, private operators have profit incentives to hire as few apprentices as possible, and invest less in their supervision and development beyond what is necessary or profitable.

Government has the ability to shape the training of young trades, through how it tenders its work, whether it decides to tender work rather than hire employees to carry out work, and whether it continues to privatise its assets. Public subsidisation of the costs of developing junior apprentices to become skilled tradespeople could be treated comparably to how university courses are subsidised by public money.

Finally, the quality, rigour, and funding of technical education must be improved and maintained. Investing in institutions like TAFE is a safeguard for quality of building works, by ensuring junior

trades learn core skills, and all trades continue to have these skills enhanced through high quality refresher training throughout their career.