

**Submission
No 94**

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

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Introduction

As an engineer and a long time apartment dweller and strata committee member, I feel I am well qualified to address some of the issues within the committee terms of reference from an owner perspective.

I have spent 28 years living in apartment buildings in Sydney. For 27 of those years I occupied the position of chair, secretary or treasurer of the strata committee. I spent a considerable proportion of my time on committee matters dealing with building defect issues that would not have arisen in the first place with more adequate enforcement of building standards and quality.

I have also been involved in negotiating on behalf of the strata committee with building contractors and certifiers regarding non compliance with development application conditions relating to development of a neighbouring property. It became clear to me during this process that there is no accountability on the part of either building contractors or certifiers.

We moved into our first apartment in 1991. It consisted of 10 apartments and had been built in 1981, and although there were a small number of significant defects, it was by modern standards very well constructed, and there were no major structural issues.

In 2004 we moved into another apartment consisting of 22 apartments that was constructed in 2000. As soon as I became involved with the strata committee it became clear that the standard of construction was very much poorer than that seen in the 1981 building. Furthermore the committee found it extremely difficult to enforce adequate rectification even under the statutory building warranty that existed at that time, and a number of serious defects were never properly resolved. When I refer to “our building” in the rest of this document I am referring to my experience with this building.

As a result of my experience in this building, my advice for many years to anyone who asked has been “preferably don’t buy an apartment, and if you really must buy one don’t buy one built after the mid 1990’s”.

A substantial improvement in construction quality and consumer protection will be needed to restore public confidence. Such improvements will also bring about an increase in overall national productivity by making funds and resources available for more productive uses than fixing defects that should never have been allowed to arise in the first place. I have included 15 recommendations that I believe, based on my experience, would make a significant contribution to the required improvements.

I am aware that there are probably countless worse stories of the appalling consequences of shoddy construction for apartment owners, but for your information I have included a summary of the issues experienced in our building and my experience in dealing with the builder and certifier regarding the adjacent development before specifically addressing the issues you have asked for comment on.

Summary of Issues Experienced in our Building:

Defects Within Statutory Warranty Period

When we first moved into the building, the strata committee was grappling with the issue of how to get the builder to address the known defects within the statutory warranty period that then applied to strata buildings.

With the benefit of hindsight, the best course of action would have been to engage a competent structural engineer to properly assess the building and provide a report identifying the defects and preparing specifications as to what work was required to rectify them. This report could then have been used as a basis for warranty claims against the builder, with ultimate resort to legal action if

necessary. However the majority of owners were reluctant to go down this route because of the high cost to obtain such a report and the likelihood that it would ultimately have resulted in the necessity for court action against the builder and/or their insurer at a large and unknown cost with an uncertain outcome.

Instead the owners corporation decided to enter into negotiations with the builder, with facilitation and advice provided by an “industry expert”, who ultimately proved to be highly unsatisfactory in producing the best outcome for the owners.

Major problems identified and “addressed” during this process were:

- a) Leaking showers in almost every apartment.
- b) Extensive waterproofing failures on balconies throughout the complex.
- c) Inadequate roof and balcony drainage. (Examination of the building plans in council records revealed that drainage as actually installed bore no resemblance to that recorded in the plans)
- d) Defective and non fire safety compliant air conditioning system installations in several apartments
- e) Non fire safety compliant lighting installations and slab penetrations
- f) Structural defects and non code compliance in the roof structure
- g) Construction defects and poor quality timber in pergolas above balconies.

There was also major water penetration into the owner’s storage area and some garages, but our advice was that the building code does not require “non habitable” areas to be waterproof, so this would not be regarded as a defect.

It was ultimately discovered that the builder was not liable for the air conditioning defects, as these systems had been installed by an independent contractor engaged by the developer. Further investigation revealed that the developer was a \$2 company that had been wound up almost as soon as the last apartment was sold, and the contractor had been wound up due to bankruptcy. Furthermore, owners had not been provided with any contractor warranty insurance certificates for the air conditioning system. Because of this the owners had to bear the rectification costs, amounting to about \$20,000 per apartment.

Roof structural defects were “rectified” and certified by an engineer’s certificate provided by the builder. However subsequent experience as outlined later in this document suggests that the work actually performed was inadequate and that there may potentially still be structural defects in the roof.

With respect to the other major defects, none were really properly resolved. At best the remedies implemented were either partial, or temporary and designed to last out the remainder of the warranty period.

There were a number of other less serious defects, such as loose and fallen render, which were resolved with a negotiated cash settlement. This ultimately proved to be quite inadequate to cover the actual rectification costs, barely covering the consultancy fees of our “industry expert”.

Defects Outside Statutory Warranty Period

In the years following expiry of the statutory warranty period a number of ongoing and newly arising problems has plagued the building, including:

- a) Partial collapse of the roof due to inclusion of defective timbers in the structure
- b) Emergence of serious waterproofing failures on additional balconies, as well as re-emergence of waterproofing failure on balconies supposedly “repaired” by the builder during the warranty period. (At this stage we discovered that some balconies had never had any waterproofing installed!)
- c) Inadequate ground level drainage provision, resulting in the flooding of several apartments

- during heavy rain.
- d) Further apartment flooding due to inadequate balcony drainage.
 - e) Failure of (and lack of any) waterproofing above and/or below several sliding doors
 - f) Major sewerage blockage as a result of shoddy plumbing installation, resulting in flooding of several apartments with sewerage.
 - g) Lack of ventilation outlets in several totally enclosed bathrooms (exhaust fans were installed, but no ducting to carry the exhaust air outside).
 - h) Groundwater penetration to some apartments where floor level is below ground level.

The cumulative cost to the owners of rectification of the most immediate problems has so far amounted to some \$400,000-\$500,000, and history suggests that more issues related to defective construction will continue to arise over time. Some of the remaining drainage adequacy problems, which could have been resolved at minimal cost during construction, can probably never be realistically resolved now the building has been built and occupied, as they would require a partial demolition and rebuild.

During our investigations into the building defects, it became apparent that this was in fact the first apartment complex the builder had ever constructed, and he appeared to be ill prepared for the additional complexities of constructing a multi storey apartment building.

Issues with Adjacent Development

Initially we established a good working relationship with the builder regarding this development. However later in the construction they demolished a section of our back fence without permission and carried out works in clear breach of the tree preservation order designed to protect the root system of large trees on our property. At our insistence they did re-erect the fence, but continued to breach the order. On contacting the certifier I was told that they would “discuss the matter with the builder”, but refused to conduct a site visit to inspect the breach. Nevertheless the builder continued to breach the order with apparent impunity, despite follow up complaints to the certifier.

After some further period with no action, I contacted the local council, and was surprised to learn that council apparently has no power to investigate any alleged non compliance on a site where they are not the principal certifying authority.

I was advised that the only avenue available was to refer a complaint to the “Building Professionals Board”, a process which would likely take weeks, if not months, and would probably result at best in a mild rebuke of the certifier.

Some 2 years after completion of construction, one of our trees had to be removed by the owners corporation at a cost of \$12,000, as it had become unsafe. In the opinion of the council tree protection officer who authorised its removal, the ultimate demise of the tree was most probably due to the construction works that had been carried out on the other side of the fence.

Submissions Regarding Terms of Reference

The Role of Certification in Protecting Building Standards

General Observations

Independent inspection and certification at critical stages of construction is critical to enforcing structural integrity, safety and compliance with the building code. The recent spate of building evacuations and serious safety non-compliances in strata properties is an inevitable end result of lack of adequate regulation and enforcement over recent decades. Furthermore my experience over the last 15 years leads me to believe it is only the “tip of the iceberg”. There will be many more “Opal Tower” and “Mascot Towers” disasters over coming decades, ultimately leaving owners to bear the brunt of incredibly expensive rectification works.

This is not only a disaster for residents, but also has a negative impact on consumer spending. It also impacts on national productivity by diverting resources that could be put to better use increasing housing supply or providing much needed infrastructure. As many of the building professionals I have had to deal with over the years have told me, the cost and resources required to rectify major defects in a multi-storey building are typically one or more orders of magnitude greater than the additional cost of “doing it right” the first time.

There is a strong financial incentive for developers to maximise profit at the expense of the ultimate purchasers by selecting building contractors solely on price without regard to quality or durability. There is a similar incentive for builders to employ the cheapest sub-contractors, which in my experience has often resulted in them selecting unqualified or under-qualified sub-contractors. There is no incentive for builders or developers to monitor construction quality during the project, as cost increases or time overruns will inevitably result if any defective work is discovered.

The Role of Private Certifiers

Conflicts of Interest

Private certifiers should be required to act in the interests of the ultimate purchasers of the property to ensure building code compliance and adequate construction quality. There are clear and unavoidable conflicts of interest inherent in the whole concept of private certification as it currently operates. Private certifiers for strata developments are selected and paid by the building contractor or developer.

It is clearly against the financial interests of private certifiers to impose cost increases or time delays to enforce compliance when their future business depends on the builder or developer selecting them to certify other projects. Furthermore since the builder or developer will inevitably accept the certifier who offers the cheapest price, there is an inevitable incentive for certifiers to cut costs by avoiding site visits to see first hand what is happening on the building site.

The same conflict of interest issue arises when other supposedly “independent professionals”, such as engineers and surveyors certify the works. All these people are selected, paid, and in some cases employed by the developer or building contractor and have no incentive to put the interests of ultimate purchasers ahead of developer and builder profits.

It became obvious during my examination of the council files regarding approval of the second apartment building we lived in that the certification process had amounted to little more than the certifying authority acting as a “postbox”, by accepting a statement of compliance prepared by the building sub-contractor performing the work. This represents another clear conflict of interest. Incompetent, under-qualified or straight out fraudulent sub-contractors will obviously quite happily

self certify their shoddy or non compliant work as compliant.

There can be no resolution of construction quality issues until these major conflicts of interest are removed. To do this, the system needs to be completely changed so that:

- a) The certifier is responsible for personally inspecting on site to ensure compliance at certain critical stages of construction, and
- b) Independence is ensured for all building certifiers and other certifying professionals, either by returning the responsibility for certification to local government or having certifiers assigned to construction projects by an independent government department or instrumentality.
- c) That there be a mandatory requirement for certifiers to promptly report any major non-compliance in approval conditions or building code compliance to local government or some other government authority with the power to issue a demolition order unless the non-compliance is rectified within a reasonable period.

Effectiveness of Inspections

As noted above, physical inspections at critical stages are essential to verify that there is real compliance with standards. However to be effective, these inspections must actually be carried out, and carried out by truly independent and appropriately qualified professionals. The present system clearly does not ensure that this happens.

Accountability of Private Certifiers

In my opinion there is effectively no accountability for private certifiers. This was clearly demonstrated by my experience dealing with the breach of the tree preservation order on the adjacent property.

I was advised that the only avenue available was to refer a complaint to the “Building Professionals Board”, a process which would likely take weeks, if not months, and would probably result at best in a mild rebuke of the certifier.

I have also become aware of other instances where certifiers have signed off on clearly non-compliant work and the consequences have been only a mild rebuke from the Professional Standards Board.

There have also been cases documented in the media where certifiers have signed off on buildings that clearly included blatant major breaches of development approval conditions. Furthermore when council issued a demolition order for the non compliant property this was ultimately overturned by the land and environment court. There were no serious consequences for either the certifier, the builder or the developer, so no doubt they will quite happily repeat this behaviour on their next development.

Clearly there needs to be more accountability placed on private certifiers, and there should be automatic disqualification for major breaches or repeated minor breaches of their responsibilities.

Recommendations

1. *That there be a clear requirement on certifiers to always act in the interests of the ultimate purchaser of the property.*
2. *That an independent government body be established to assign appropriate certification professionals to building projects and oversee certifier compliance to avoid the current inbuilt conflicts of interest.*
3. *That this body be funded by a levy on all multi-dwelling development projects.*

Adequacy of Consumer Protections

As has been mentioned repeatedly in the press recently consumers have less protection in the purchase of an apartment than they have in purchasing a toaster.

This situation needs to be rectified to ensure that builders and property developers are held accountable for shoddy and non-compliant construction.

Australian Building Code

Any changes to address the endemic problems in the building industry will be inadequate without also addressing the remit of the Australian Building Codes Board and the Code itself. As recently pointed out by Geoff Hanmer, Adjunct Lecturer in Architecture, UNSW in an excellent article [here](#), the current priorities of the ABCB as stated by the chair are that they must “reduce significantly red tape and have an over-riding focus of industry affordability”.

No mention of consumers. In other words, their primary focus is not on protecting the interests of consumers, but in reducing construction costs for developers, which are not even passed on to consumers in purchase prices set by the market. The inevitable result of this policy is the erosion of building quality and consumer protection.

Furthermore as he states in the article, there are no durability requirements specified in the building code, with most components only required to have a sample pass a single test in the lab. This is clearly inadequate to ensure durability in the real environment.

There is no reason why the building industry should be permitted to hide behind inadequate building codes to exempt itself from the general consumer guarantee regulated by the ACCC that requires that goods (such as toasters):

- are safe, durable and free from defects
- are acceptable in appearance and finish
- do everything that they are commonly used for

Recommendations

4. *The remit of the ABCB should be rewritten to make it clear that its primary purpose is to ensure adequate quality and durability.*
5. *That the construction code should require compliance with the ACCC general consumer guarantee.*
6. *That appropriately qualified, independent and effective consumer advocates be tasked with regularly reviewing the code to ensure adequate quality and durability requirements are included.*

Insurance Cover

It is essential that mandatory home owner’s warranty insurance be reintroduced for all residential developments. This is the only way that consumers can ultimately be protected against the common scenario where a company is wound up or goes into bankruptcy. It is simply unacceptable that the protection requirement be waived simply because the industry claims the costs are too high.

If private insurers are unwilling to accept the risk then government needs to step in and provide insurance. The unwillingness of commercial insurers to carry the risk is a market failure brought about by the failure of government to adequately enforce compliance, and government needs to step in to provide consumer confidence until the industry is convinced the construction quality issues have been addressed.

Effectiveness and Integrity of Insurance Provisions

This question is of largely historical significance, because for most buildings over three stories the

warranty period would have now expired, and more recent buildings in this class have not required insurance.

Liability for Defects in Apartment Buildings

All too often under the current system there are insignificant consequences for the builder or developer as a result of shoddy or non-compliant construction. Typically under the current system owners end up saddled with most of the cost burden, because owners are reluctant to incur the extensive and uncertain costs of pursuing legal action against the developer or builder. Hence there is no incentive for developers or builders to improve quality, and in fact every incentive to reduce costs at the ultimate expense of owners.

Many developments are undertaken by \$2 companies which are wound up as soon as all the apartments are sold. It is also common practice to “phoenix” construction companies. This common practice requires that liability be extended to directors of such companies.

To address this I suggest that the following actions are necessary:

Recommendations

7. *That mandatory warranty insurance be immediately reintroduced for all residential developments. In the interim until confidence in the industry is restored, the government may have to step in to provide this insurance if the insurance industry is unwilling to do so.*
8. *A more restrictive licensing system is introduced involving a different class of builders licence for building contractors to allow them to undertake construction of multi dwelling units. Furthermore this restricted licensing regime also be mandatory for sub-contractors employed in apartment construction.*
9. *That a similar licensing scheme also be introduced for property developers and directors of property development or construction companies.*
10. *That a documented publicly available quality standard based on industrial quality control methodology be introduced specifying an acceptable defect level for apartment construction.*
11. *That a clear criterion be established to result in automatic licence cancellation of builder, developer and director licences for multiple breaches of the quality standard or failure to adequately rectify defects.*
12. *That major non compliance with approval conditions or the building code that are not rectified in a reasonable time should result in automatic issue of a demolition order against the builder and developer.*

The Role and Status of Strata Committees

The biggest challenge facing strata committees is the fact that most owners and committee members have insufficient knowledge of building or the builders legal obligations to be able to effectively identify defects, understand what constitutes adequate rectification, or be clearly aware of their rights. Furthermore in my experience, most licensed strata managers do not have an adequate understanding of these issues to provide any meaningful support to the committee.

This means that owners are inevitably at a significant disadvantage in trying to get adequate rectification from builders or their insurers unless they engage independent engineering and legal professionals at substantial cost. Furthermore my experience, and other examples reported to me by strata managers lead me to believe that in most cases adequate restoration is never obtained without recourse to expensive and uncertain legal action. In fact in more recent buildings where there is no statutory warranty this is often the only option.

Owners are often reluctant to pursue this path because they fear that they do not have adequate financial resources to cover the costs, and committees are therefore only left with option of pursuing

token and inadequate rectification measures. I am convinced that this often means that although expended over a longer periods, the ultimate cost to owners if even greater.

There appears to be little practical support provided to strata committees by the Department of Fair Trading regarding disputes with the builder. In my experience any conversations on this topic simply end with the recommendation to “seek legal advice”.

The steps below would help to level the playing field between the strata committee and builders and developers.

Recommendations

- 13. That the Department of Fair Trading provide a once only initial consultation service on a fixed and reasonable cost per apartment basis, (say \$1,000 per apartment) and that this be made available to owners corporations to provide an initial identification of any building defects and recommendations as to adequate rectification measures.*
- 14. That the Department also provide at least some level of legal support for any issues arising out of this consultation.*
- 15. That any shortfall in funding this measure be obtained from a levy on all multi-dwelling developments.*

Summary

The current crisis in building quality and public confidence in the construction industry is the inevitable result of the lax regulation, ineffective enforcement and deregulation agenda pursued by both federal and state governments of both political persuasions over recent decades. This outcome was inevitable and foreseeable.

In fact it was our own experience of having lived in a more recently constructed apartment, and lack of confidence in the industry that led to my wife and I recently “upsizing” back to a free standing house, despite being in our early seventies. We did this because of our concern with the ongoing emergence of new previously unidentified construction defects in our own building, and our concern that a growing lack of confidence in apartment construction due to the inevitable emergence of major defects in newer buildings could lead to a significant decline in the value of our own property, a prediction that now seems to be coming true. Unfortunately this escape from the nightmare may be financially impossible for many apartment dwellers.

The situation demonstrates a clear disconnect between the stated government policy of promoting more high density living and better utilisation of existing homes and their policies on regulation and enforcement in the construction industry.

There is little that can be done about the large pool of already constructed buildings with serious defects that will inevitably come to light over the next few decades, but urgent reforms to both the building codes and the certification and enforcement regimes are necessary to restore any level of public confidence in the industry.

Without urgent implementation of recommendations 1-15 suggested earlier in this document, or similar changes, I see little prospect of a return of public confidence in the residential construction industry.