

**Submission  
No 114**

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

**Name:** Mr Peter Conroy

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Mr David Shoebridge MLC  
Chair  
Public Accountability Committee

Dear Committee Chair and committee members,

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

I have read the terms of reference for the subject inquiry and wish to make a submission to assist the Committee in its work and the development of any recommendations.

I'm currently employed in local government. Over a period of some 35 years I have worked in several roles and positions including environmental health, building surveying, development control and specialty policy work in construction-related policy and practice. I am also an accredited building certifier under the Building Professionals Act.

My submission will address several of the Inquiry's terms of reference.

**(a) the role of private certification in protecting building standards, including:**

**(i) conflicts of interest**

The private certification system does suffer from a degree of what in my opinion is justifiable cynicism that arises directly from the real and perceived conflict of interest inherent in the current system of private certification.

Certifiers are legally defined as Public Officials and are bound by the provisions of the Independent Commission Against Corruption Act 1988. In other words as certifier they are charged with protecting and acting in the public interest. At the same time the certifier is also paid by and directly answerable to the developer, and this developer has a vested interest in the speed of construction and ultimate profitability of the development which the certifier is being employed to facilitate. Many certifiers are also reliant on maintaining cordial relationships with a particular developer to ensure future project work.

This duality of obligation is the root cause of the real and perceived conflicts of interest in the private certification system. This is currently manifesting itself in the level of community concern and cynicism about the building certification and construction process, but has more deep-seated implications for government policy, public safety and the viability of investment by small-scale purchasers in large strata developments approved by private certifiers.

There are limited means available to remove conflicts (real or perceived) whilst certifiers are paid directly by developers. A government discussion paper released early last year proposed a number of initiatives to break the nexus of certifier appointment and payment of fees however for a number of reasons the proposals failed to receive industry support and never proceeded to formal regulatory point.

In my opinion the only way to remove conflicts of interest both real and perceived, and reinstate community confidence in the building certification sector would, I believe, require the building approval and inspection processes to return to truly independent control (i.e. not paid by the

developer whose project is being approved). The most practical and experienced method would be to return certification to local government professionals. This would be a major step and have significant impacts for both the private sector and local government.

It may be possible to amend the system to retain certification by the private sector but only if there is a rigorous system of independent review of policy compliance and checking of details of construction and specification. This review process would most appropriately be done by a truly independent body such as local government. This is discussed further under (iv).

#### (ii) effectiveness of inspections

Under the legislation (Environmental Planning and Assessment Act 1979 and Regulations) there are a limited number of mandatory inspections. For the inspection of Class 1a buildings (single dwelling houses) the number of inspections currently required is considered adequate. For Class 2 and 3 buildings however (apartments and hotel-type buildings) the inspection regime should be enhanced, either by principal certifiers or other accredited persons as proposed in the recently released NSW Fair Trading *Building Stronger Foundations Discussion Paper*.

#### (iii) accountability of private certifiers

The certification process is an important component of construction and development activities and therefore certifiers, whether private or council, must be held accountable to the legislated responsibilities of the positions they hold and play in a complex process involving the work and contribution of numerous professionals and construction personnel.

The quality of buildings is not just dependent on the quality and integrity of building certifiers but on qualifications, skills and experience of every person involved in the process of producing sound and quality buildings and the close supervision of these during each stage of the process.

Given the scope and potential cost of repair and rectification works that will be required in recent well-publicised building failures, and the many likely similar major building defects yet to arise, in my opinion the current professional indemnity insurance requirements are significantly under-funded. If a certifier approves a sub-standard development he or she should carry a commensurate share of the financial cost of their level of accountability. The builder should still carry the major share, and the issue of builders winding-up companies to avoid their obligations etc. needs also to be addressed separately.

This must be considered in the Committee's deliberations and any recommendations made.

#### (iv) alternatives to private certifiers

The only outright alternative to the current private certification system is to disband it and return the process to the exclusive control within local government. This has been suggested by many commentators and the general public. However, to do so would not be easy and require a significant rebuilding of building control departments of many, if not, all councils as a result of the loss of experienced building surveyors over time to the private sector since the introduction of the private system in 1998.

Returning building certification to local government control has several benefits including importantly, addressing actual and perceived 'conflicts or interest' ie the direct payment of private certifiers by developers for certifier services as I have described above. This aspect was identified as a key issue in 1998 when the building approval process was opened up to the private sector. It remains an issue today.

The full return of building regulatory control to local government has many advantages however there are factors that need to be considered including the need for rebuilding council building control departments. This is set out in Option A below. There are several other options that could also improve the process and instill greater industry and community confidence. These are also outlined below (options B, C and D).

### **Option A Return building approvals (certification) and inspections to local government**

To remove issues of conflict of interest associated with the private sector and instill greater community and industry confidence in building certification and property investment, a return of the system to local government regulatory control would address many of the issues that compromise the integrity of the current system.

#### Advantages:

- (a) Instills greater community confidence through government regulation and control by removing current 'conflict of interest' issues (r or perceived) associated with private certifiers being paid directly by developers;
- (b) Persons impacted by development/construction activities (mainly residents adjoining sites), can deal directly with their local council rather than attempting to contact and deal with private certifiers (with whom they often do not receive any resolution or even an acceptable standard of service and response to their issues);
- (c) Council officers (certifiers) are accountable to the community through adopted codes of conduct and other formal adopted policies, practices and procedures that are made in direct response to the needs and concerns of the same community. This is additional to codes of conduct imposed by the Building Professionals Board to which both private and council certifiers must adhere to and increases the level of community confidence in the fairness and transparency of the development and building process;
- (d) Removes the competitive aspects associated with private certifiers undercutting fees for work which can be linked to poor outcomes associated with application assessment and construction monitoring including complaint investigation and actioning;
- (e) Will facilitate a rebuilding of local government-based skills development in all aspects of development control (all building classes) and building certification particularly for young graduates wishing to enter the profession of building surveying and building certification; and
- (f) May resolve the current issues with professional indemnity insurance (difficulties experienced by private certifiers obtaining insurance for various forms of work and issues associated with excessive and unsustainable premiums).

Disadvantages/issues:

- (a) Re-building, attracting and sourcing sufficient numbers of qualified certifiers to local government is likely to be difficult. A high proportion of private certifiers would be likely to change the focus of their business to building regulation consultancy and not be willing to return to local government. It may therefore require the extensive appointment and training of college and university graduates to rebuild the council system, with any such program likely to take a considerable number of years to see the required number of suitably trained and experienced certifiers in council roles; and
- (b) Attracting suitably experienced certifiers, particularly in the early years, will be costly for councils since the pool of potential applicants has been significantly reduced by the private certification system.

**Option B Mandate the separation of ‘*accredited certifier*’ and ‘*principal certifier*’ functions to prevent a single person certifying an entire building project (building approval, inspections and building occupancy approval)**

The Environmental Planning and Assessment Act 1979 permits for the splitting of certification functions through the use of:

**accredited certifiers** to issue construction certificates, compliance certificates, complying development certificates and other certificates; and

**principal certifiers** to carry out mandatory and non-mandatory inspections and the issuing of occupation certificates, and other certificates.

In the vast majority of cases the same certifier undertakes both functions. To improve the supervision of the building approval process (construction and complying development certificate stage) mandating the use of a different certifier to undertake the stage two (principal certifier) functions could improve the overall certification process and enhance community confidence. Some key advantages and disadvantages are set out below.

Advantages:

- (a) If the two certifiers were legally, financially and professionally separate from each other there could be a degree of cross-checking and professional review in this approach, particularly if one of the parties was the Council (see Option C below). This may reduce opportunities for real and perceived conflicts of interest;
- (b) May help resolve the certifier professional indemnity insurance issues and rising premium costs through introducing more rigour and secondary certifier involvement (greater oversight); and
- (c) Will enhance local government-based certification skills development and experience (a greater number of council principal certifier appointments) together with structured supervisory oversight which will advance the building certification system for all.

Disadvantages/issues:

- (a) Similar issues as per Option A – re-building to attract and source sufficient numbers of qualified certifiers to join local government is likely to be difficult. This could be averted through staged implementation;

- (b) A slightly more complicated process for proponents/applicants – need to use/appoint two certifiers (one for each role);
- (c) Issues associated with principal certifiers detecting design non-compliances (legislative and/or non-compliance with the Building Code of Australia) which may delay a project proceeding whilst design amendments are made and modified certificates approved to achieve compliance;
- (d) Could increase certification costs; and
- (e) Employment and business impacts for the private sector but less than a full transfer of certification functions to councils as set out in Option A.

**Option C Maintain the current local government and private sector ‘accredited certifier’ functions (building approval functions) however mandate the ‘principal certifier’ (inspections and building occupancy approvals) to councils**

This would achieve the same outcome as Option B however introduce mandatory local council control for the inspection stages and the building occupancy functions and the issuing of occupation certificates.

Advantages:

- (a) Benefits to be gained as set out under Option B;
- (b) Parties (community and public) affected by construction works have a single contact point ie their local council, to seek assistance and/or lodge complaints about development impacts;
- (c) Local council certifiers have a greater awareness of local issues and can respond promptly to complaints and attend site more quickly;
- (d) More accountable to the local community and the elected members compared to private sector; and
- (e) Addresses actual or perceived conflicts of interest.

Disadvantages/issues:

- (a) As pointed out in Options A and B, will require re-building of staff resources of many councils including increased expenditure until cost recovery through inspection fees is achieved and stabilised;
- (b) Impacts on the private certifier sector through reduced work resulting in employment and business impacts; and
- (c) May require cross-communication between private and council certifiers to clarify design/approval aspects of certificates issued.

**Option D Retain the current certification system however mandate that building occupancy approval (certificates) can only be issued by local councils**

This option would retain most of the current certification functions (private and council involvement) with the exception that occupancy certificates would be mandated to local councils exclusively.

Advantages:

- (a) An independent review and inspection of completed development to verify compliance with:
  - the approved development drawings;
  - relevant conditions development consent including conditions that affect local council infrastructure and public places;
  - fire safety documentation received and entered into local council's fire safety records;
  - all required public domain works and sign-off (council infrastructure assets handed over to council at completion of development);
  - all relevant documentation is received and checked; and
  - all other statutory matters checked and accepted as compliant;
- (b) Final check of all required certificates and other documentation;
- (c) Addresses some of the issues associated with conflicts or issues; and
- (d) The least number of adverse impacts (financially) on the private certification sector.

Disadvantages/issues:

- (a) A new mandatory exclusive function for councils to administer;
- (b) Likely to require the employment of additional certifier and non-certifier support staff;
- (c) Will add a significant workload on local councils;
- (d) Issues identified at such a late stage in the construction process will be likely to be costly and/or difficult to fix and cause delays in occupancy that will vex potential owners; and
- (e) Will increase operational costs which will need to be recovered (potentially greater costs for developers/homeowners).

**(f) 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

No comment.

(ii) the effectiveness and integrity of insurance provisions under the Home Building Act 1989

No comment provided.

(iii) liability for defects in apartment buildings

It is predicted that at least 50% of Sydney's population will be accommodated in multi-unit buildings by the 2030s. This indicates a significant potential risk to a very large sector of the State's residential population, both property owners and occupants renting such dwellings if the quality of building construction and certification processes are not adequately resolved to improve standards and confidence.

Many forms of building defects become evident many years after the current liability (insurance) provisions expire. For high-rise apartment buildings, particularly buildings that exceed 25 metres in effective height, the construction elements and services are more complex than low-rise buildings however high-rise buildings are not covered by the mandatory insurance provisions of the Home Building Act.

This area needs extensive detailed consideration in terms of potential future risks and impacts particularly considering the extent of this form of housing and corresponding risk and liability for future owners and occupants over the coming decades and how to prepare for this.

**(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**

To accommodate the State's growing population including the need to house more of the urban populace in apartment buildings there will be a critical need for greater and better management of such buildings through the Strata Schemes Management Act and regulations.

The legislation that created and permitted strata title living was developed in a time of small-scale building construction many of which were only up to four storeys. Today's strata scheme buildings are significantly larger, taller and more complex with some buildings accommodating a population the size of a traditional small urban residential suburb or rural town.

A review and rethink of the strata laws including importantly the standard of strata management, is considered essential to deal more effectively with this growing form of housing. Formal mandatory courses and qualifications in strata management should also be considered.

**(d) case studies related to flammable cladding on NSW buildings and the defects discovered in Mascot Towers and the Opal Tower**

No comment made other than to highlight the significance of this issue to building owners particularly apartment owners and the significant shared costs to correct non-compliant buildings that should never have been approved.



**(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**

No comment provided.

**(f) any other related matter**

No comment provided.

I hope my comments and suggestions are helpful to the Committee's work. Should you require clarification of any matters raised in my submission and/or further information please feel free to contact me.

Yours faithfully

**Peter Conroy**

28 July 2019