

**Submission  
No 140**

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

**Organisation:** Housing Industry Association (HIA)

**Date Received:** 2 August 2019

---



HOUSING INDUSTRY ASSOCIATION



# Housing Australians



Submission to the  
Public Accountability Committee

## **Inquiry into the regulation of building standards, building quality and building dispute**

2 August 2019

# contents



<b>ABOUT THE HOUSING INDUSTRY ASSOCIATION .....</b>	<b>3</b>
<b>1. EXECUTIVE SUMMARY .....</b>	<b>4</b>
<b>2. THE RESIDENTIAL BUILDING INDUSTRY .....</b>	<b>5</b>
2.1 CONSUMER PROTECTION AND BUILDING QUALITY .....	5
<b>3. THE ROLE OF PRIVATE CERTIFICATION IN PROTECTING BUILDING STANDARDS .....</b>	<b>7</b>
3.1 CONFLICTS OF INTEREST .....	7
3.2 EFFECTIVENESS OF INSPECTIONS .....	7
3.3 ACCOUNTABILITY OF PRIVATE CERTIFIERS .....	8
3.4 ALTERNATIVES TO PRIVATE CERTIFIERS .....	8
<b>4. CASE STUDIES .....</b>	<b>8</b>
4.1 NSW CLADDING REFORMS .....	8
4.2 OPAL TOWERS .....	9
4.3 MASCOT TOWERS .....	9
<b>5. IMPLEMENTATION OF OTHER INQUIRY RECOMMENDATIONS .....</b>	<b>9</b>

Housing Industry Association contact:

David Bare  
Executive Director  
Housing Industry Association

Brad Armitage  
Assistant Director, Building & Planning

## ABOUT THE HOUSING INDUSTRY ASSOCIATION

The Housing Industry Association (HIA) is Australia's only national industry association representing the interests of the residential building industry, including new home builders, renovators, trade contractors, land developers, related building professionals, and suppliers and manufacturers of building products.

As the voice of the industry, HIA represents some 40,000 member businesses throughout Australia. The residential building industry includes land development, detached home construction, home renovations, low/medium-density housing, high-rise apartment buildings and building product manufacturing.

HIA members comprise a diversity of residential builders, including the Housing 100 volume builders, small to medium builders and renovators, residential developers, trade contractors, major building product manufacturers and suppliers and consultants to the industry. HIA members construct over 85 per cent of the nation's new building stock.

HIA exists to service the businesses it represents, lobby for the best possible business environment for the building industry and to encourage a responsible and quality driven, affordable residential building development industry. HIA's mission is to:

*“promote policies and provide services which enhance our members’ business practices, products and profitability, consistent with the highest standards of professional and commercial conduct.”*

The residential building industry is one of Australia's most dynamic, innovative and efficient service industries and is a key driver of the Australian economy. The residential building industry has a wide reach into manufacturing, supply, and retail sectors.

The aggregate residential industry contribution to the Australian economy is over \$150 billion per annum, with over one million employees in building and construction, tens of thousands of small businesses, and over 200,000 sub-contractors reliant on the industry for their livelihood.

HIA develops and advocates policy on behalf of members to further advance new home building and renovating, enabling members to provide affordable and appropriate housing to the growing Australian population. New policy is generated through a grassroots process that starts with local and regional committees before progressing to the National Policy Congress by which time it has passed through almost 1,000 sets of hands.

Policy development is supported by an ongoing process of collecting and analysing data, forecasting, and providing industry data and insights for members, the general public and on a contract basis.

The association operates offices in 23 centres around the nation providing a wide range of advocacy, business support including services and products to members, technical and compliance advice, training services, contracts and stationary, industry awards for excellence, and member only discounts on goods and services.

## 1. EXECUTIVE SUMMARY

HIA appreciates the opportunity to make a submission to the Public Accountability Committee in regard to its inquiry into the regulation of building standards, building quality and building disputes (Inquiry).

Several matters to be addressed by this Inquiry have already been extensively considered through other work including the national Building Confidence Report prepared by Ms Bronwyn Weir and Professor Peter Shergold AM. The NSW Government has taken steps towards the implementation of a number of the recommendations arising from that Report through the release of the Building Stronger Foundations Discussion Paper.

HIA supports the Government's approach to take forward several of those recommendations, in particular measures to improve accountability and the compliance and accuracy of project documentation and addressing building design work. HIA has provided a detailed submission in response to the Building Stronger Foundations Discussion Paper. Within that submission HIA provides feedback on how the Government can most effectively implement the commitments outlined.

HIA does not consider that there is any need for regulatory reform which is outside the scope of the recommendations from Building Confidence Report and beyond the reforms which have been implemented over the last 2 years. Reforms currently in train must be given time to be fully implemented so that their effectiveness may be tested and confidence of the general public in construction practises is restored. In just the last 3 years, more than a dozen regulatory changes have been made that affect the NSW residential building industry. These range from a comprehensive overhaul of the regulation of fire safety practitioners to the introduction of new legislation to regulate building certifiers and building products. In addition the ABCB has implemented numerous reforms aimed at improving the safety of buildings.

Rather HIA requests that the Committee consider what the NSW Government could do to assist with improving building compliance without further regulatory reform. There is much that could be done to support building practitioners in the understanding and application of the myriad of building regulations, code and standards.



## 2. THE RESIDENTIAL BUILDING INDUSTRY

The residential building industry, including the home improvements and alterations market, is an integral sector of the Australian economy. The residential building industry is also the dominant sector in the construction industry.

The practice and paradigm in the residential building industry differs significantly from those businesses operating in commercial and civil construction. Unlike the commercial and civil construction sectors, the residential building industry is principally comprised of small businesses and self-employed independent contractors. HIA estimates that more than 90% of the residential building industry is comprised of small businesses and sole traders.

With such a high number of small businesses, this sector is particularly vulnerable to the negative impact of additional red tape and government regulation which is often cited by HIA members as the number one reason they leave the industry.

### 2.1 CONSUMER PROTECTION AND BUILDING QUALITY

The NSW *Home Building Act 1989* (HB Act) requires residential builders to incorporate a number of mandatory terms and conditions into their contracts for the benefit of home owners. Under the HB Act a contract for residential building work must include:

- mandatory terms and conditions such as the name of the parties, a description of the building works, the contract price and any plans and specifications;
- consumer checklists;
- implied warranties of materials and workmanship;
- limits on deposits and bans on up front progress payment;
- requirements that builders take out Insurance under the HBCF;
- restriction on the use of caveats without a court order;
- outlawing and/or voiding unconscionable contractual provisions; and
- a 5 day cooling-off period during which a consumer may withdraw from a contract without penalty.

A builder must also obtain all variations in writing and is required to have these signed by the parties. If these requirements are not strictly complied with, a builder may not be paid for the variation.

The industry also suffers under the weight of being required to interpret a myriad of NSW building regulations, the Building Code of Australia provisions and its approximately 140 referenced Australian Standards. Access to these standards is not readily available and there is very little support from government departments in interpreting building regulations.

In addition, the broader framework that regulates residential building work is targeted at ensuring that, consistent with the high court decision of *Bryan v Maloney*<sup>1</sup>, the builder of a dwelling house is held responsible for ensuring that a building, when built, is 'fit for purpose' and complies with the law including:

- Expansive statutory warranties that apply to all residential building work for six years for major defects and two years for other defective work. These warranties are owed by developers, builders and subcontractors to those whom they are carrying out residential building work including subsequent title holders and non-contracting owners, Owners Corporations and individual lot owners.
- A clear definition of a 'major defect' for assessing claims for breach of statutory warranty and claims for insurance under the Home Building Compensation Fund.
- Under the *Environmental Protection and Assessment Act 1979* (EP&A Act) building certifiers can be held accountable in a civil action for loss or damage arising out of or in connection with defective building work for up to 10 years.
- Other mandatory contract terms regarding building quality that requires compliance with the National Construction Code, plans and specifications.

---

<sup>1</sup> (1995) 182 CLR 609; [1995] HCA 17



- Obligations under the EP&A Act that set out what must be provided by an applicant and checked by a building certifier when issuing construction certificates, occupation certificate and other approvals.
- Mandatory critical stage inspections for residential building work.
- Disciplinary action via a comprehensive licensing and accreditation regime.
- Since 1 January 2018, strata developments that are not subject to the requirement to obtain insurance under the Home Building Compensation Fund must comply with a mandatory inspection and building bond regime (Inspection Regime).

Under the Inspection Regime a developer must, in order to obtain an occupation certificate, lodge a building bond equal to 2% of the contract price. The developer must also carry out an interim and final inspection, obtain an inspection report and carry out works to rectify any defects identified in those report. If a developer fails to carry out such works, the Owners Corporation can call on the 2% building bond in order to have rectification works carried out.

The Inspection Regime is comprehensive and targeted at providing additional recourse (in addition to existing recourse via the statutory warranties) for owners of new apartments in relation to the rectification of defective work.

- Implied guarantees in relation to the supply of goods and services under the Australian Consumer Law.
- Mandatory requirements regarding taking out of Insurance under the Home Building Compensation Fund for residential building work of up to 3 storeys and over \$20,000 prior to the receipt of money or the commencement of work (Insurance under the HBCF).

Since 2001 this scheme has been one of “last resort”. This means that a consumer can access the benefit of the policy of insurance for non-completion of residential building work or to rectify defective building work that is in breach of the statutory warranties, when the builder dies, disappears or is insolvent.

In New South Wales, there is also a fourth trigger that enables a consumer to claim on the policy of warranty insurance when a builder has their licence suspended due to non-compliance with an order by a Tribunal or court.

The operation of mandatory insurance under which the insurer provides a completion guarantee to a home owner in the event of a builders’ insolvency means that a builder’s financial position is consistently monitored by their insurer. This insurance operates as a ‘check and balance’ on the solvency and financial management of residential builders. Such measures do not exist in the commercial building industry. The scheme operates as a quasi-regulator and a significant barrier to entry, preventing those without the requisite financial circumstances from trading.

In June 2017 the *Home Building Amendment (Compensation Reform) Bill 2017* (2017 Bill) passed through the NSW Parliament. The Bill represented the culmination of many years of work examining the operation of the insurance scheme in NSW and was largely targeted at ensuring that the fund would be financially sustainable in the long term.

It has become clear that the 2017 reforms have done nothing to encourage the scheme to break even. As a result, from November 2016 significant and consistent increases to premiums have been imposed on the industry.



### 3. THE ROLE OF PRIVATE CERTIFICATION IN PROTECTING BUILDING STANDARDS

The residential building industry has always supported the changes made in NSW in 1998 to permit private certification of certain building approval functions. It is important to note that rather than referring to these changes as private certification, they should more rightly be referred to as 'building certification', particularly in NSW, where almost 50 per cent of councils continue to offer certification services.

HIA has long held the view that privatising building certification was a positive step and that competition has reduced approval costs and speed up approval times. This has been the experience particularly in those states that have introduced a full certification model.

#### 3.1 CONFLICTS OF INTEREST

In addressing the question of conflicts of interest for building certifiers it is important to consider the difference between perceived and actual conflicts of interest. Since introduced in 1998, the conflicts of interest provisions for building certifiers in NSW have been extensive. Changes made to these provisions in the last decade have served to clarify and strengthen these rules in relation to building design. HIA contends that the NSW regulations to address conflict of interest remain the strongest in Australia and that adequate penalties exist under the *Building Professionals Act* and new *Building and Development Certifiers Act 2018* (Certifiers Act).

New powers have been made available to the regulator under the Certifiers Act to deal with any actual conflicts of interest which do arise including:

- Penalties of up to \$33,000 for carrying out certification work despite a conflict of interest.
- Up to \$1,100,000 penalty and 2 years imprisonment for carrying out of any certification work on an understanding that the registered certifier will act otherwise than impartially for benefit of any kind.
- Registration may be cancelled.
- The Regulations may include a code of conduct for certifiers and penalties may be introduced for breaches of the code of conduct.

In late 2018 the NSW Government committed to auditing 25-30% of all certifiers work. If these audits find certifiers have acted improperly or have incorrectly issued certificates then other significant penalties may be applied including de-registration.

The Certifiers Act also makes provision for a register to be kept online and freely available to the public noting any relevant disciplinary action taken against a certifier. Residential building contracts will also be required to make a statement to the effect that the selection of the certifier is the sole responsibility of the owner.

Once these new measure are fully implemented they will assist with restoring confidence in the impartiality of certifiers.

#### 3.2 EFFECTIVENESS OF INSPECTIONS

Mandatory critical stage inspections were introduced into the *Environmental Planning and Assessment Regulation 2000* in 2005 following a Parliamentary Inquiry into the operation of building certification in 2002 (the Campbell Inquiry). The regulations mandate that these various critical stage inspections are undertaken by appropriately accredited building professionals including stages such as pre-concrete pour, frame inspection, waterproofing and more recently fire safety systems.

The approach taken to critical stage inspections varies across the building classes, with the most inspections being required for Class 1a residential building work. For larger buildings, the nomination of inspections stages is a matter for the principal certifier to determine prior to the commencement of work. In operating as a regulator, a building certifier, whether council or private, does not carry a responsibility to act on behalf of the builder or any other party in a role akin to a site supervisor. This responsibility rightly remains with the builder. On this basis, it is the responsibility of the building certifier to identify what inspection stages beyond any mandatory stages that they may wish to inspect, or have other building professionals inspect or verify, to give them sufficient comfort on completion of a project that the building can obtain an occupation certificate.





For class 1a residential buildings, HIA considers that there are appropriate critical stage inspections in place and that the building certifier has the appropriate discretion to request any additional inspections they may believe are necessary.

### 3.3 ACCOUNTABILITY OF PRIVATE CERTIFIERS

Building certifiers in NSW were originally defined under the EP&A Act as both public officials and public authorities, placing the same responsibilities on their operation as any employee of a local council in NSW. Significant penalties have always been available to the regulator to address any misconduct by a building certifier to ensure that those carrying out certification work can be held accountable for that work and their conduct while carrying out the certification work.

In addition, building certifiers are personally liable for their conduct and required to hold mandatory professional indemnity insurance to cover any potential errors, acts or omissions that may arise while operating. Building certifiers remain liable for their actions for a 10 year period after the issue of a relevant certificate.

### 3.4 ALTERNATIVES TO PRIVATE CERTIFIERS

Unlike other states, in NSW many local councils have continued to operate in tandem with the operation of private building certifiers. HIA has supported this competition in the market and it reflects the original intention of the move to permit private building certification. In particular for regional locations the local council is often the certifier of first resort.

There is no evidence to suggest that building defects are isolated to building approvals issued by private certifiers. In fact, it is understood that the former Botany Council was the Principal Certifying Authority responsible for Mascot Towers.

In line with the recommendations made by Shergold and Weir, consideration of ways to improve the operation of building certification must not be limited by the misconception that private certifiers are the root cause of building defects. Broader oversight, guidance and education remain a more critical aspect to improved performance and should be a focus for the Government.

## 4. CASE STUDIES

### 4.1 NSW CLADDING REFORMS

HIA is not in a position to provide any comments in relation to specific building defects or case studies. However HIA does believe the Committee should have regard to the significant body of work undertaken since 2015 to prevent the inappropriate use of combustible cladding on high-rise buildings. This work has occurred at a national level and through NSW actions including:

- NCC provisions for external walls and cladding and evidence of suitability requirements where both revised as part of Amendment 1 NCC 2016.
- Deemed-to-Satisfy provisions of the NCC continue to limit combustible items on external walls.
- A new façade testing standard (AS 5113) was developed and referenced in the NCC.
- A national advisory note regarding external walls and cladding was issued by the ABCB.
- The ABCB released further tools and supporting materials including; developing a new evidence of suitability handbook, improved Product Technical Statements and education material on appropriate selection and use of cladding.
- An amendment to the *Environmental Planning and Assessment Regulation* that requires where any combustible cladding is used on a high-rise building as part of a Performance Solution and the NCC verification method CV3 is not used in full, that performance solution must be referred to Fire and Rescue NSW for approval.
- The Secretary of Fair Trading issued a Building Product Use Ban under the *Building Products (Safety) Act 2017* for combustible cladding with a polyethylene core of greater than 30%. Breaches of the ban can result in fines of up to \$1,100,000 and 2 years imprisonment.

HIA considers that the above suite of measures will effectively reduce the risk that inappropriate cladding is used in new building work. However, HIA is also mindful that some of the reforms to date overlap and have created



unintended consequences for products which are not otherwise deemed inappropriate, particular for Class 1a dwellings.

## 4.2 OPAL TOWERS

Following on from an interim report released in January 2019 into the Opal Tower incident, in February the Government released its final report on the Opal Tower Investigation.

The independent inspecting engineers Professors Hoffman and Forster stated that they:

*‘Consider the building is overall structurally sound and the localized damage to the building can be rectified to ensure the building is compliant with the National Construction Code...it’s worth noting that this was a very rare occurrence and we are confident in the strength of the National Construction Code and Australian building standards in terms of building safety’.*

The final report outlined the causes of the damage which are summarised as follows:

- The as-constructed hob beam / panel assembly was under-designed according to the NCC and AS 3600,
- Design altered to grout only partially the joints between hob beams and pre-cast panels and,
- Construction and material deficiencies exacerbated the damage such as insufficient concrete cover, electrical conduit in the cover zone and lower strength concrete used than in other hobs.

The Opal Tower incident was considered as ‘very rare’.

## 4.3 MASCOT TOWERS

While it is inappropriate to comment directly on issues with Mascot Towers as there is no publically available report into the causes of the defects, Mascot Towers is evidence that building defect issues are not limited to buildings approved by private certifiers and the focus should instead remain on implementing the recommendations from Building Confidence Report.

## 5. IMPLEMENTATION OF OTHER INQUIRY RECOMMENDATIONS

HIA has actively participated in a number of inquiries in relation to building certification at both a national level and in NSW. HIA supported many of the recommendations arising from the Lambert Report in 2015, and since in the Shergold-Weir Building Confidence Report.

HIA has most recently responded to the NSW Government’s Building Stronger Foundations Discussion Paper and a copy of HIA’s submission is attached. This response reflects HIA’s support for reforms in relation to application documentation and the role of building designers in various forms.

The Discussion Paper also touches on the issues set out in the Terms of Reference for this Inquiry in relation to strata buildings, which goes beyond the recommendations of the Shergold-Weir and Lambert Reports. HIA’s position on those reforms is set out in the attached submission.

