Submission No 142

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

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Better Planning Network Inc
www.betterplanningnetwork.org.au

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Submission

NSW Legislative Council Inquiry into

The regulation of building standards, building quality and building disputes

Better Planning Network (BPN) is a state-wide Not for Profit, grassroots volunteer-based organisation founded in 2012.
Our aim is for a robust and visionary planning system for NSW - one that fosters best practice environmental, heritage, social sustainability and design outcomes; and make sure best practice planning is achieved through a collaborative and authentic community partnership engagement approach.

Purpose of the Inquiry

> *That the Public Accountability Committee inquire into and report on the regulation of building standards, building quality and building disputes by government agencies in New South Wales, including: private certification, consumer protections, role of strata committees, case studies, implementation of recommendations*

Introduction

The building industry in NSW is in crisis**.** It has become clear from the burgeoning number of high-rise apartment buildings with serious design and/or construction-related faults that the current regulatory system in NSW has failed the people it is supposed to protect.
Indeed the failure to enforce building codes and standards in NSW has reached a point where public faith in building regulation in general has been severely undermined. Such a credibility loss has the real possibility of damaging the building industry as a whole. Clearly, the current regulatory system needs replacing in order to restore confidence to the whole industry, but more importantly, as a matter of government's fundamental duty to ensure that all necessary measures are taken to protect the public interest.

For most people, investment in their home is the single most important investment they will make in their lifetime. They need to be assured that the home they have purchased

is “safe, properly certified and built to satisfactory standards”[1]

As the 2002 Campbell *Report on the Quality of Buildings* stated:
Home building and purchase is a unique product:

- *it is the largest single consumer purchase;*
- *it has catastrophic risk factors – when things go wrong consumers can be homeless or financially destroyed;*
- *consumers are in a highly vulnerable situation; and*
- *There are significant social and emotional factors associated with home ownership.*[2]

Despite the clear warnings of the Campbell Inquiry, carried out shortly after the introduction of private certifiers and deregulation of the building industry, no action was taken to protect consumers. Indeed, even further protections were removed from building consumers when the requirement was removed for private certifiers to retain their indemnity insurance for 10 years after retirement[3].

A. The role of private certification in protecting building standards

What is the history?

The role of a building certifier is to ensure that the building is being constructed in accordance with planning approvals and policies, the regulations and in accord with building standards. Private certification was introduced in NSW in July 1998 under significant pressure from the building industry, who wished to be freed from what they saw as the shackles of state and local government rigid enforcement of building codes.

Robert Richardson, managing director of Xmirus, and construction industry insider of 50-years experience says, “The reason for private certification was because of the slowness of the council process, and because of lobbying by builders. But it has meant a drop in standards and some of that is to do with conflicts of interest.”[4]

Developers especially wanted the process of certification speeded up, effectively placing significant time constraints on the necessary processes of examination of building, heritage, geotechnical, remediation, electrical, plumbing and engineering plans by relevant qualified experts. Instead, overall certification has been handed to private certifiers or building surveyors who now had the task of determining, in quick time, whether all requirements specified in development approvals had been met.

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[1] David Campbell (chair) *Report on the Quality of Buildings,* Joint Select Committee on the Quality of Buildings, New South Wales. Parliament. Legislative Assembly. July 2002, p(i)

[2] David Campbell (chair) *Report on the Quality of Buildings,* Joint Select Committee on the Quality of Buildings, New South Wales. Parliament. Legislative Assembly. July 2002, p(i)

[3] SMH Editorial 5 March 2003 https://www.smh.com.au/politics/nsw/planning-to-build-watch-out-for-this-change-20030305-gdgdl8.html

[4] Mr Richardson, quoted in AFR Opinion “An Epic Industry Fail on all home buyers” Robert Harley, 25 July

The introduction of private certification has coincided with a burgeoning of construction of high-rise apartment buildings in NSW, with the ABS reporting almost 0.5 million high-rise apartments in the country. Geoff Hammer, from industry consulting firm Arina, predicts, "a large proportion of them are defective"[5].

The City of Sydney recently attempted to have an apartment development at 33-39 Euston Rd Alexandria partially demolished because the resultant structures did not comply with approved plans, and had significant fire safety defects in contravention of the Building Code of Australia. Yet the private certifier hired by the developer had already issued an interim occupation certificates three months earlier allowing residents to move in. This certifier has already had 11 complaints against him upheld by the Buildings Professionals Board.[6]

i) Conflicts of interest.

The clearest conflict of interest lies in the practice of developers being able to hire the private certifier, or "Principal Certifying Authority" to sign off the development and issue occupation certificates. All previous government inquiries into building regulations have heard the same from the beginning:

> *"The private certifier is not at arm's length from the developer. The private certifier has a direct and pecuniary relationship with the developer"*.[7]

The fact of private certifiers being employed by the builder/developer carries an inherent conflict of interest. Particularly in the case of developers who undertake numerous projects, a private certifier's best interest is contrary to provision of any negative feedback let alone refusal to certify a development. To do so would be to ensure no further work from that client. As a consequence of haste and the client's interest, reports and certifications often omit crucial information.

It would be beneficial for the Inquiry to explore past results of complaints to the Building Professionals Board to gain a perspective on the extent of the problem. Many private certifiers have had multiple complaints found against them involving repeated fines and sometimes suspension. Yet most if not all are still practising and councils are often unable to take action against their failures.

ii) Effectiveness of inspections

Principal Certifying Agents (PCAs) are not required to carry out regular inspections of the building work they are contracted to certify apart from the critical stage inspections required for certification. The requirement for critical

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[5] SMH 19 July "States face 410billion bill for 'legacy' building problems"

[6] See http://bpb.nsw.gov.au/sites/default/files/public/Disciplinary%20actions/Summary%20of%20Disciplinary%20Action%20No.429%20Stanly%20Spyrou%20-%20amended%207%20June%202017.pdf

[7] Mr Robertson (EHASBA) Transcript of Evidence 2002 Campbell Report, Chapter 1 – Building Quality and the Home Building Process in NSW, p 22

stage inspection does not specify what needs to be inspected. Among certifiers, Principal Certifying Agents (PCAs) occupy the most central role because they are required to certify that the overall building work complies with relevant development approvals or codes (DA, DCP, BCA, SEPP, LEP)

Recommendation
For complex constructions, critical stage inspection requirements should require that all works and materials used are to a satisfactory standard and meet all requirements set out in design specifications to allow the next stage to proceed.

The current regulatory regime does not require a PCA to inspect within a specified time when the PCA has advised a builder to rectify work that does not comply with conditions. The reforms proposed in the Lambert Report (p210) to the inspection regimes for different classes of buildings would certainly be an improvement on current lax requirements. However, as stated already, it is not in the commercial interests of a private certifier to diligently pursue a regime of regular inspections to ensure that building is proceeding according to Development Approval specifications.

Many of the current NSW building calamities involve engineering issues and questions have been raised about the adequacy of certification in cases where complex engineering issues have arisen, such as in the case of the Opal Towers. Yet, astoundingly, NSW has no compulsory registration system for professional engineers, despite the Australian Institute of Engineers and other Engineering Associations consistently recommending that such a certification/registration system is necessary and urgent.

A report compiled by Engineers Australia's (EA) Multi disciplinary Committee in 2015 noted that NSW had "Australia's worst building certification system". The same report noted that roughly "85 per cent of strata units were defective on completion". Robert Hart, one of the report's authors said at the time "There are something like 20,000 new units coming on stream over the next few years, and we know they are being done by developers who are totally inexperienced and [have] no real interest in anything other than making money and this is causing major concerns,"

Engineers Australia's submission to Building Minister's Forum (BMF) *Building Confidence* (Shergold and Weir) is emphatic about the need for urgent improvements to building inspections requirements:

> *The response to this from the NSW government should include a mandatory list of inspection points for certifying structural engineers (i.e. an engineer cannot sign off a building structure unless they have inspected X, Y and Z). This is currently open to interpretation and there are recorded cases of engineers certifying buildings when they have provided limited supervision of the construction.*

Engineers Australia's submission also strongly recommended third party reviews and a return to a system like the "clerk of works" system that operated decades ago. In this revised system the newly minted "clerk of works" would:

> *check that what is designed is built, that the products nominated by the designer are not substituted for inappropriate alternatives, and that Australian Standards and the Building Code of Australia are followed and*
> *[be] on-site every day. This is in contrast to certifiers who typically attend site for just a few days across a project's life. It would be in addition to improvements in third-party inspections at critical stages of the construction process—something that is also sorely needed.*[8]

It is instructive that a professional body such as Engineers Australia is strongly recommending a return to a firm regulatory regime for the building industry as the major credible mechanism to restore public faith in the industry. In contrast, the conclusions drawn by both the Lambert Review and the (2015) Shergold and Weir Report (2018) recommend tightening up here and there on certification requirements, but essentially remaining with the current system of "performance-based" criteria for building certification.

Recommendation

The system of inspections requires urgent review, particularly with respect to the record, degree of experience, training, qualifications and expertise in building codes held by those signing off on completed building works. The Better Planning Network endorses Engineering Australia's call for certification of engineers and the high level scrutiny of all critical stages of large-scale building constructions.

iii) Accountability of private certifiers

Private certifiers are hired to provide a service and therefore have a duty to provide certification services to the builder/developer who pays them. So, as in the context of all commercial transactions, they have a fundamental accountability to the firm or builder that has hired them. They are also accountable to the public through the Building Professionals Board, through which they are obliged to abide by a specific *Code of Conduct.*

There is a clear and obvious tension between these two accountabilities. In cases where a developer or builder wants variations from approved conditions, or there are complaints from the public about building practices, outright conflicts of accountability exists.

The fact that Private Certifiers are operating in a market system where their clients are builders/developers whose main goal is to obtain timely, even rapid, certification, compromises the certifier's accountability to the public good.

iv) Alternatives to private certifiers,

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[8] Engineers Australia, *Building Stronger Foundations Response to the NSW Discussion Paper*, July 2019, p.18

The justifications for the introduction of private certifiers are that they provide a "market mechanism" for speeding up the approval process and that in turn provides an opportunity for suitably qualified professionals to offer their services in the building/development marketplace.

Recommendation
Return Certification to public control
The clear alternative to private certifiers is to place certifiers under the direct employ of a government agency, which could mean a direct return to councils as the consent authority as happened in New Zealand where it continues to function, or through a building commission similar to the model proposed by the Campbell Inquiry.

Other potential alternatives include;

a. The 2002 Campbell Inquiry recommended that owners rather than developers directly employ certifiers. However, this system still leaves open the potential for conflict of interest because developers are often the initial owners of the building they are developing.
b. Councils or other appropriate government bodies maintain a list of well vetted, qualified and accredited independently operating certifiers. While builder/developers would continue to bear the cost of private certification, Councils should provide the details of the certifier to be used, the certifiers would be assigned not by the builder/developer, but by the relevant council or government agency on a rotational basis. If such a list were created by council, essential safeguards would include:
   i) Certifiers allocated on a rotational basis so as to ensure no perception of bias in the selection of certifier, and
   ii) *A strict ongoing vetting process such as a 3-strike rule.* Only the most competent certifiers with a good track record would then be able to practise in this capacity. Such a rotational system would establish the necessary separation between developer and certifier and go some way to restoring the public's faith in the building industry.

B. The adequacy of consumer protections for owners and purchasers of new apartments/dwellings, and limitations on building insurance and compensation schemes.

Government failure to strictly enforce building codes and ensure that imported materials are safe and fit for purpose has resulted in huge claims against builders who can be found to have used sub-standard building materials. However, the Home Building Compensation Scheme does not apply to buildings of more than 3 storeys making it difficult for owners to pursue claims. Moreover, the statutory warranty period is limited to six years for major (structural) defects and to only two years for minor defects from the date of work completion.

The NSW government has allowed this situation, where apartment owners have little statutory protection, to continue because they have become beholden to an industry that demands no impediment to its onward rush to throw up more buildings of questionable structural integrity.

The practice of “phoenixing” in the development industry whereby a developer forms a $2 company for as long as it takes to construct the development then dissolves the company because of bankruptcy or insolvency has become all too common in the industry. In these cases, owners, subcontractors and even the Australian Office are left with no one to take action against.

The taxpayer has increasingly had to foot the bill for compensation in both circumstances described.

i) The extent of insurance coverage and limitations of existing statutory protections

Current levels of statutory protections are currently so poor as to produce a national crisis for building owners who have little or no protection against building faults that are so serious as to make their homes uninhabitable. A large proportion of these owners have found themselves with inadequate or no insurance coverage.

A multitude of cases have been reported recently in the media where owners of buildings in multi-storey apartment buildings have had to evacuate their homes with no warranty or ability to claim compensation against the builders/developers.

The removal of statutory requirements for developers to provide insurance for all buildings over 3 storeys in height in 2002 has had serious, and in some cases, catastrophic effects on the lives of many apartment owners.

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

Insurance provisions under the Home Building Act are skewed to favour developers, and leave unit-owners in a highly vulnerable position. Despite an accumulation of cases which make clear that the current insurance provisions of the Home Building Act 1989 do not provide security to innocent parties, the provisions of the Act have been changed only to make innocent parties less secure.

iii)Liability for defects in apartment buildings,

Liability has become a significant and vexed question with the privatisation of so many functions within the construction industry. A significant proportion of tradespeople working on a site are now sub-contractors, rather than being directly employed by the builder. Each specialist skilled contractor is required to have liability insurance. Further complications to liability are added because of the limits of time in which claims against the Home Building Compensation cover may be made. Compensation against major structural defects operates for only six years and for minor defects, the time limit is only two years.

Homeowners in multi-storey complexes should have at least the same rights to protection against construction defects as any other homeowner.

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

Strata committees of high-rise apartment complexes are caught in a terrible bind when major defects occur. If they act promptly and publicly on defects that become apparent in the apartment complexes, they immediately place their own investments in their homes at risk. Any scandal such as that arising from the problems made public in the cases of the five Sydney complexes currently in the news has a real effect on the resale value of what is for most people, their most important asset. Yet the strata committee operates in the same manner and according to similar rules as any other voluntary committee. Given that the strata committee has power of decision-making in matters that have very significant bearing on other owners' financial interest, close attention needs to be paid to how decisions are conducted in times when the future of the entire complex of units is other threat.

How owners' corporations act to remedy serious defects is especially important when there are some owners who are more seriously affected by defects than others.

The Landmark development in Charlestown provides a pertinent example. The Landmark was a $24million commercial and residential building in a prime location in Charlestown that won a NSW Master Builders Association award for excellence in construction in 2009. Almost ten years later, very serious defects have made themselves apparent. Severe water, corrosion, noise, insulation and cladding problems affect the whole building but especially the penthouse apartments of the complex. The upper floors' wrap-around balconies have serious defects. These problems were beginning to show themselves at the time the MBA award for excellence was bestowed.

The developer wound up his two companies behind the project after legal action by its 59 unit owners shortly after the defects were discovered. Those owners are now left with repair costs totalling up to $2 million. So common is this practice, known as "phoenixing" in the industry, that the owners Corporation Network (OCN) is demanding that "The NSW government should also stop builders and developers from winding up project companies and require all builders, not just low-rise ones, to be covered by the Home Building Compensation Fund"[9]

The Landmark case is also illustrative of how expensive structural building defects can cause serious divisions among unit-owners who may be differentially affected by the defects. In the Landmark case, meetings were held once the extent of structural problems had been identified, between the Department of Fair Trading, the Owners Corporation and a reputable building consultancy. An agreed list of faults were registered and a plan of repairs and costs agreed to. Subsequently however, an extraordinary meeting of the owners' corporation scrapped the original plan for high grade repairs and opted for a significantly cheaper series of patch-up repairs. Needless to say, such a state of affairs is unsatisfactory, unfair and will

[9] Si-Lin Tan, Australian Financial Review, 28 July 2019

leave a legacy of ill will among owners, especially those whose homes are subject to sub-standard repairs.

D. Case studies related to flammable cladding on NSW buildings and the defects discovered in Mascot Towers and the Opal Tower.

Some examples reported to our committee include:

1. **Merewether** An owner/builder of a property in Merewether, and other properties in the Newcastle LGA, flouted development conditions with respect to stormwater drainage and other matters. The private certifier (Principal Certifying Authority) refused to communicate at all with neighbouring residents about how compliance with a development approval was to be ensured. Neighbours could find no remedy through Newcastle Council, Building Professionals Board or the Department of Fair Trading. The matter featured on Channel 9's "A Current Affair" under the title "The battle for Janet Street" on Wednesday 25 June 2014. The affected neighbours had to leave because the development went ahead despite clear evidence that the stormwater pipes and other infrastructure were shoddily installed and causing damage to their property. The worst the PCA had to endure was a $1000 fine from the Building Professionals Board, despite having record of breaches found by the Building Professionals Board.
2. **Parramatta** Another example of the need to strengthen procedures and product standards relates to stopping the use of potentially high fire risk building cladding that could be compliant. The Parramatta Advertiser's combustible cladding story of 24 July 2019[10] uncovering "The number of high risk buildings across the state" stated that

   > *Parramatta Rise apartment owners are suing Toplace Construction over the aluminium cladding on the 28-storey tower. The company is defending the action and argues its cladding is compliant with state laws. Toplace, owned by developer Jean Nassif, admits in its defence to the Supreme Court action that the cladding is Vitrabond FR, but it also claims that even if it does have a polyethylene core greater than 30 per cent, it can still be used under the 2017 Act.*

   Clearly, legislation regarding cladding and its installation, needs to be introduced as a matter of urgency.

[10] http://newslocal.smedia.com.au/parramatta-advertiser/

Design and Construct
A repeated theme in the Campbell, Lambert, Opal Towers and Shergold/Weir Inquiries is the use by builders of materials that are contrary or inferior to those specified in the building design.

Currently most buildings are built under a system known in the construction industry as "Design and Construct" or D&C.

Under this system, major engineering and architectural companies with expertise and experience complete the design work for a major development including all engineering specifications. The design is then handed to the developer who has no intention of employing those companies for the construction work. Those design companies, who specify all of the products down to the last detail, have no input into the actual construction.

The developer then puts tenders out to other companies. Crucially, current regulations (or lack of them) allow developers to substitute all specified products. Theoretically those substituted materials need to be of similar performance. In reality, they are far from it. For many services, the tenders are actually won by wholesaling companies with access to a wide range of cheaper products. Many of those products do not meet Australian Standards, but because of the system of "self-assessment", inferior products are too often self declared as compliant.

Recommendation
The Better Planning Network believes that builders should be obliged to follow approved design plans to the letter. The current practice where builders can in effect override designs and specifications should be outlawed. The plans should be certified and the build process should be a straightforward execution of the plans with little guesswork remaining.

The design process in a D&C should be a collaborative exercise where the builder has input into how they want to build and their requirements form part of the brief for the designers to create a holistic solution, not the current situation of builders dictating and overriding the expertise of designers. Builders would then need to answer to the designs at the end of their work with documented evidence.

The authors of the Opal Towers Investigation Report have come up with excellent recommendations to remedy the current malpractices associated with “design and build”.

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.

The four reports that are considered in the terms of reference for this Inquiry include the 2002 Campbell Report, the 2015 Lambert Report, the 2018 Shergold/Weir Report and the 2019 Opal Tower Investigation Final Report all contain timely and necessary recommendations for reform of building regulations in NSW and Australia (Shergold/Weir).

The Better Planning Network supports all recommendations that will result in tightening up regulations so that the public can have faith that their safety and their home building quality are properly protected. The BPN also supports the reorganisation of regulatory functions into the hands of government instrumentalities or commissions who can carry out those functions independently and more effectively.

The Better Planning Network particularly commends **recommendations 13, 14, 15, 16 and 17 of the *Opal Tower Investigation Report*:**

> *13. The creation of a government Registered Engineers database developed in partnership with an appropriate professional body.*
>
> *14. Independent third party checking and certification of engineering designs and subsequent changes to the design of critical elements by a Registered Engineer, including confirmation of what are the critical elements for all major construction projects.*
>
> *15. Critical stage, on-site checking and certification by a Registered Engineer that construction is as per the design for all major construction projects. All changes to identified critical structural elements that are proposed and made during construction should also be certified by an independent Registered Engineer.*
>
> *16. An online database be created, where all certifications may be viewed by a broad range of stakeholders including owners and prospective owners; before, during and after construction.*
> *The aim is to increase transparency of the approval and certification process.*
>
> *17. A Building Structure Review Board be formed, with the major purpose being to establish and publish the facts relating to structural damage of buildings arising from design and construction, investigate their causes and to recommend changes to Codes and Regulations where appropriate.*[11]

[11] Opal Tower Investigation Final Report, February 2019 p.2

The same recommendations are more comprehensively outlined at the end of the Report (p.15) to give a fuller context to what the authors clearly see as necessary “mechanisms to raise the overall standards of building design and construction and community confidence” .[12]

The BPN considers the following steps to be the minimum required to begin the process of restoring public faith in the building industry:

1. Improved training and education for all those involved in building construction work; including in the areas of compliance standards in all trades.
2. Comprehensive training and education for all construction-related disciplines through fully accredited TAFE course and apprenticeships.
3. A mechanism that ensures all Principal Certifying Authorities are fully accredited and have a comprehensive understanding of the complex requirements of large-scale building where relevant.
4. Any nexus of dependence between certifiers and developers be removed, preferably by returning the certification process to public/government bodies or instrumentalities.
5. Strengthening the powers of the Building Professionals Board and/or of Councils to take quick action against failures of certifiers to achieve timely rectification.
6. The enactment of legislation that effectively prevents the practice of developers being allowed to effectively rid themselves of liability for faulty construction by folding up their companies.
7. The enactment of legislation that protects the rights of all owners to fully rectify faults caused by shoddy construction methods to a high standard
8. The restoration of full Home Building Compensation cover to all high-rise buildings and that such cover extend to 10 years.
9. A system whereby architects and engineers, when required, continue to be engaged throughout the construction phase instead of the current "design and construct" model.
10. Significantly improved inspection and compliance enforcement, as strengthened and improved regulation is insufficient in itself unless also implemented.

The Better Planning Network believes that all the regulation in the world is worthless unless approved plans and conditions of consent conditions are strictly enforced.

Thank you for the opportunity to make this submission. We look forward to significant improvements to building industry regulations as result of this Inquiry.

[12] Opal Tower Investigation Final Report, February 2019 p.15