

Submission
No 143

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

Organisation: City of Sydney

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City of Sydney
Town Hall House
456 Kent Street
Sydney NSW 2000

Telephone +61 2 9265 9333
council@cityofsydney.nsw.gov.au

GPO Box 1591 Sydney NSW 2001
cityofsydney.nsw.gov.au

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Mr David Shoebridge MLC
Chair
Public Accountability Committee
By email: public.accountability@parliament.nsw.gov.au

Dear Mr Shoebridge,

Inquiry into the regulation of building standards, building quality and building disputes

Council appreciates the opportunity to respond to the Inquiry and urges for definitive and timely action to address the serious shortcoming in the quality of apartment buildings over 3 storeys.

The City of Sydney is one of the most densely populated local government areas in Australia, with around 75% of residents living in strata titled dwellings. A City survey in 2017 found defects and maintenance as the primary concern of owner of apartments (City of Sydney/Woolcot Research and Engagement, *Research Report Short Term Letting Survey April 2017*). The concerns that continue to emerge relate to speculative multi-unit residential buildings and the major defects have harmed purchasers and occupiers. The construction side of the development process (following DA approval) for multi-unit residential buildings above three stories have been effectively deregulated over the last 15 -20 years following industry lobbying such that:

- the need for home owners warranty insurance for buildings over 3 storeys was repealed
- defect warranties are reduced
- sales brochures and contracts are riddled with disclaimers
- sales contract provisions are essentially one sided
- opportunities to rescind a purchase even when found defective are minimal
- consumer protection is below an acceptable standard when compared to other goods and services protection of equivalent value.

With multi-unit residential projects in current practice, there is no one to represent the purchaser's interests during the construction phase. This was previously done by a Clerk of Works, or the Architect in a full service engagement. Prior to former Minister Craig Knowles' 1990s reforms, the industry operated more traditionally with greater checks and balances.

The main construction side issues at present include (and these go beyond "Building Confidence"):

- registered architects (as required in NSW) who design multi-unit residential projects are generally not retained for full services during the construction phase by either the builder or the client/investor
- landowners, developers and investors generally do not retain their own professional independent inspector of works (architect, clerk of works or engineer)
- it has become standard practice to parcel up all the risks (and control) and transfer them to the builder in a 'design and construct' fixed price contract or guaranteed 'maximum price contract' with an invitation to make cost savings
- financiers and banks contractually require a Quantity Surveyor to account for materials on site before progress payments are released – they are not interested in whether work is defective
- cost savings are obtained through substitutions with cheaper than specified products and imported products that have unverifiable claims of meeting Australian Standards
- cost savings are obtained by using subcontractors that are unable to stand by their work
- cost savings are obtained by not having regular defect inspections and reporting as work progresses for fear that a discovery and rectification will delay the works
- certifiers are accepting self-certification by subcontractors and don't undertake complete inspections. They may inspect only a 10% sample of apartments for waterproofing, not 100% of apartments.
- Interim occupation certificates are being used inappropriately to allow occupation of buildings where there has been non-compliances with conditions of development consent.
- the BCA and NCC in the past has been weak on flammable cladding and the precise testing of it, and it has been suggested that some testing by suppliers has been falsified. The current NCC codes for home units allows too much flexibility which favours cost reduction over consumer protection. For example, the water proofing sections are weak and so it follows that the majority of apartment building failures relate to water proofing
- developers and developer/builders and builders can operate through \$2 companies without insurance compared to insurable professionals such as architects and engineers.

The most pressing issue for government is to return to quality control during the construction phase by an experienced professionals (engineers, architects) who are bound by a Code of Conduct that puts the public interest first. Quality control in the case of the Opal Tower would include on-site inspection of superstructure pours (where plastic sheet was found to be cast in) and subcontractor works (where the precast panels steel layout and sizing) was not inspected before they were cast. Currently one group that meets this requirement are registered architects (under the NSW Architect's Act) but their role in construction has been allowed to be diminished, and there is no NSW Engineer's Act.

The current focus on Certifiers needs to be broadened. The solutions proposed to date may provide an audit trail regarding the designers of buildings (engineer, architect) but it does not tackle the root cause of building construction risks and defect detection at a time that it can be rectified. It is not the design, it how a design is delivered during construction. To be addressed on site quality control is needed throughout the construction phase

beyond the role and function of a principal certifiers. The City's response to the Inquiry terms of reference are attached.

Should you wish to speak with a Council officer about Inquiry into the regulation of building standards, building quality and building disputes, please contact Andrew Thomas, Executive Manager Development

Yours sincerely

Kim Woodbury
Acting Chief Executive Officer

Attachment – City of Sydney response to the Inquiry terms of reference

Inquiry into the regulation of building standards, building quality and building disputes

1. 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:

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

- (i) conflicts of interest**
- (ii) effectiveness of inspections**
- (iii) accountability of private certifiers**
- (iv) alternatives to private certifiers,**

1. (a)(i) Conflict of Interest

The private certification system will continue to have a real and perceived conflict of interest which comes from being funded by the developer, whose interest is in the speed of construction and profitability of the development. Certifiers rely on maintaining amiable relationships with developers to ensure future work. More action is needed to address the inherent conflict of interest of the current arrangements. These arrangements are a significant element of the self-regulation the Premier states "hasn't worked".

The conflict of interest issue was addressed in the *Report Upon the Quality of Buildings* in 2002 ('Campbell Inquiry') which identified closer scrutiny of certifiers through a targeted auditing program. In September 2018 the NSW Government released an Options Paper to address concerns about the independence of private certifiers and perceived and real conflicts of interest. To date successive state government have failed to address this conflict of interest issue by following through on these reports and their recommendations. The private certification system since its inception continues with a deficient regulatory framework and fundamental flaws in protection of the public interest.

Recommendation: Introduce accountability at all levels of the certification process through an immediate overhaul of the procurement of private certification practices including consideration of fee reforms, independent peer review of alternative solutions, increased onsite and desktop auditing of private certifiers, as well as clear enforcement pathways and reporting obligations.

(a)(ii) Effectiveness of inspections

Certifiers whether in private practice or working for local government could not be onsite to inspect and oversee to the extent required to improve quality of construction practices particularly for large scale and complex buildings such as apartment buildings over 3 storeys. The current focus on certifiers needs to be broadened to address the quality of on-site building practices.

In order to restore confidence and address some of the outstanding issues it would be appropriate to consider introducing accountability at all levels of the certification process through an immediate overhaul of the procurement of private certification practices including consideration of fee reforms, independent peer review of alternative solutions, increased onsite and desktop auditing of private certifiers, as well as clear enforcement pathways and reporting obligations. For private certifiers these concerns and recommended actions are well known to government and it is disappointing that they have not been resourced effectively or acted upon in a timely manner to the detriment of apartment owners and investors.

While these suggestions will improve certifier practice further reforms are needed to address the root cause of building construction risks and defect detection at a time that it can be rectified. To restore confidence the government should progress reforms that address increased on-site supervision, defect detection responding to improved regulatory required oversight by independent professionals (not working for the contractor undertaking the work). More effort is required to embed quality in all aspects of the construction process, particularly in the case of apartment buildings where there is an extreme imbalance of knowledge and experience between the purchaser and the developer.

Cost-cutting and risk management strategies by developers and contractors lead to the widely used "design and construct" contracts that put the builder in charge of most contract elements and the client or developer responsibility is reduced to paying the bill and accepting the outcome. Substitution with inferior products from those specified is rife, and adherence to Australian Standards by cheap substitutions is questionable and virtually unverifiable.

Substituted goods and services, without adequate supervision during construction, can lead to defective workmanship which is transferred to the purchasers who also have to accept, often unknowingly, the outcome. Almost all multi-unit residential developments are permitted to be built this way, and the risk is, and the recent evidence shows, that a number are. The role of the client's site inspector (usually Clerk of Works or construction architect) has all but disappeared in Australia allowing this issue to spread.

Recommendation: Mandate the role of expert works inspectors who are independent of the builder (on-site Clerk of Works, construction architect and or suitably qualified and registered industry practitioner, and structural engineer) to rigorously check for building defects as they occur, before they are built-in and ensure appropriate construction quality, free of latent defects.

(a)(iii) Accountability of private certifiers

A major deficiency in the building regulation system continues to be a lack of enforcement of regulations and discipline by the NSW government which allows for a lack of accountability. Building defects and illegal work are a major and ongoing concern for the City which imposes significant repair costs on apartment owners and regulatory costs on the City. For example the City has cladding team of 3 full time staff to address the 349 buildings identified on the NSW Government's composite cladding list. Further details about council's response to the issues are outlined in response to Terms of Reference 1. (d).

As stated above the concerns and recommended actions are well known to government and it is disappointing to that they have not been resourced effectively or acted upon in a timely manner.

(a)(iv) Alternative to private certifiers

Any alternative approach to private certification should consider that over the last 10-15 years the City and other local government authorities have lost many highly qualified and experienced building surveyors to the private sector. The City maintains a team of up to 11 accredited certifiers ranging from A1 to A4 accreditations. These remaining certifiers work relates to relative minor construction projects including alterations and additions to single dwellings, commercial fit-outs and complying development certificates. It is reasonable to assume that most metropolitan councils would have even more limited numbers of remaining certifiers. It would take a multi-faceted strategy across industry, education institutions and

government and many years to build the capacity of the City and local government more broadly to take up an increased role in certification.

In addition the City does not have the flexibility or resources to appoint or engage additional certification staff. The City is concerned that if the number of qualified private certifiers available in the market diminishes as public trust in the private certifier market is further compromised, the volume of applications for certification work to the City could increase significantly.

Council is also cautious of reforms that could introduce a potentially expanded role in the private certification process. We concur with LGov NSW that any such proposal would raise the following concerns:

- May be considered as anti-competitive in the current system, where council is directly competing with private certifiers. Any fees charged by local government for services that are provided by others are to demonstrate competitive neutrality.
- Council staff should not become de-facto inspectors of private certification work – this should be the role of the NSW government regulator, not local government and would be another example of shifting costs to local government rate payers.
- Councils should not have to step in to fix problems with individual projects or take on projects that no competent certifier wants to accept or insurer will not cover.

Any move to expand the role of local government in regulating private certifiers would amount to a cost-shift and would need to be fully funded. Any funding strategy that takes into consideration the current private certifiers fees must be considered carefully as there is evidence to suggest that market power imbalance has led to cost cutting of fees that do not represent the appropriate cost of providing the service.

(b) 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

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

(iii) liability for defects in apartment buildings

(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,

The City does not have a specific response to these term of reference as stakeholders more directly involved are better placed to respond. See comments below as to the fact that the appropriate solution to these issues in the long term is to take steps to ensure buildings of adequate quality are being constructed, rather than deal with the issues downstream through insurance or special levies.

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

Flammable cladding: The potential fire risk of some combustible external wall facades was identified in Australia following a residential apartment building fire in Melbourne's Docklands in November 2014. The potential fire risk of some combustible external wall cladding was brought to the attention of NSW Councils in February 2016 by the NSW

Department of Planning and Environment. At the time, councils were advised that the risk was largely associated with buildings:

- Classified as Class 2 and 3 buildings under the BCA or NCC;
- More than 3 storeys in height; and
- Constructed in the last 10 years.

The following actions have been taken to minimise the risk to buildings located in the City of Sydney:

- reallocated existing resources to create a team of 3 building surveyors to conduct audits of the 330 buildings identified by the NSW Department of Planning Industry and Environment as potentially containing composite cladding
- prepared a standard development consent condition that reinforces the Act requirement that the external walls of buildings, including attachments, must comply with the relevant requirement of the BCA or NCC and that prior to the issue of a construction certificate (CC) or occupation certificate (OC) the certifying authority must be satisfied that suitable evidence is provided to demonstrate that the products and systems proposed for use comply with the relevant requirements. The intention of the consent condition was to raise awareness of the risks at development application (DA) determination stage.
- created a risk register to assess incoming enquiries and to effectively deal with investigations where potential issues are identified;
- conducted specific training for City building officers about the use of combustible cladding, the hazards posed by the use and the regulatory tools available for assessment and treatment where identified; and
- conducted a review of building projects where the City had been engaged to issue the Part 4A construction certificate for the past 10 years. This audit was intended to identify projects approved by the City where aluminium composite panelling (ACP) may have been used and any such concerns addressed by an appropriate regulatory response. No issues were identified during the audit.

Aluminium composite came into use in high-rise construction during the 1980s and spread of flame standards of materials is controlled through the Building Code of Australia (BCA) and National Construction Code (NCC). It is a requirement of the Environmental Planning and Assessment Act 1979 and the Environmental Planning and Assessment Regulation 2000 that building work is carried out in accordance with the Building Code of Australia or National Construction Code. The BCA or NCC include provisions for materials used in the construction of external walls and attachments to external walls. The principal obligations are on the contractor(s) and certifier. There is industry-wide reliance on manufacturer's ratings and test results.

Accredited certifiers who issue construction certificates must be satisfied that suitable evidence is provided to demonstrate that the products proposed for use in the construction of external walls comply with the relevant requirements of the BCA or NCC. In the City of Sydney, the large majority of construction certificates where external wall cladding is used on multi-story buildings are assessed and determined by accredited certifiers. It is at the construction certificate stage that specific details on building materials including their core components are provided - these details are not known at development application stage and cannot be assessed by City of Sydney staff.

Case studies: The following selected case studies highlight a number of the City's concerns and demonstrate the impacts on apartment owners and the City's resources: 1A Coulson Street, Erskineville (Sugar Cube and Honeycomb): Construction certificates for construction of above ground works issued by a private certifier without land contamination/site remediation having been fully completed and signed off by Council

and NSW EPA Site Auditor. Final Site Audit Statement was not received by Council prior to the construction of the building as required by the development consent condition. The buildings remain vacant while the City is attempting to resolve how they can be occupied in the face of the failure to comply with these conditions during the construction project and the consequent need for ongoing monitoring and maintenance of contamination issues on the site.

10-14 Hunter Street, Sydney: Demolition of State-listed heritage fabric contrary to the intent of the development approval. Stop work issued at the time, subsequently resolved by modification of the base consent in the Land and Environment Court as much of the significant heritage fabric had already been lost, currently in the Local Court for prosecution for non-approved works.

156 Botany Road Alexandria: Building completed in February 2018 was given an OC, by a private certifier despite numerous non-compliances. This matter was referred to Building Professional Board who advised that the certifier had already lost his accreditation (likely on another matter), and therefore further action could not be taken. Non-compliances related to a defective fire hydrant installation, smoke detection and alarm systems, and access and egress. These non-compliances were brought to the attention of Council by Fire & Rescue NSW. These deficiencies required Council to issue a fire order to the building owners to rectify it and make the building safe.

162-164 St Johns Road Glebe: Non approved works altering the internal layout of a local heritage item. The certifier was referred to the Board in May 2018 resulting in the certifier being reprimanded and receiving a \$25,000 fine. The Board dealt with this complaint concurrently with a complaint against this certifier in another LGA. Council issued a Court Attendance Notice upon the builder for works which took place prior to the issue of a construction certificate which were largely related to the non-approved works on the first floor. The extent of unauthorised works required council to take further legal action where the builder was subsequently fined \$13,500 based on an early guilty plea and \$5275 in costs.

Recommendation: Provide an efficient mechanism for the BPB to step in and revoke certificates issued by certifiers inappropriately rather than just fining the certifier sometime after the fact.

(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 reforms foreshadowed to date represent a fraction of the changes needed to fix the systemic problems in the building industry in NSW. The issues and recommended solutions have been identified in numerous reports over almost two decades. The reforms announced fail to address one of the key comments of Shergold and Weir, which is that their recommendations "form a coherent package" and "would best be implemented in their entirety".

To demonstrate appropriate commitment and address challenges faced by the NSW building industry the NSW government must prioritise sufficient funding and staff resourcing to support the proposed Building Commissioner to enforce the stronger powers and penalties provided for in the Building and Development Certifiers Act 2018 and deliver other promised functions.

Recommendation: The NSW Government immediately commit to a comprehensive set of reforms, with an implementation plan, meaningful, achievable timeframes, appropriate resourcing and balanced stakeholder input.

(f) any other related matter.

Recent Environmental Planning and Assessment Act amendments – yet to commence

Interim occupation certificates: A key concern is certifiers issuing interim occupation certificates to allow residents to move into buildings prior to compliance having been achieved with crucial conditions on the basis that these don't need to be complied with before "final occupation certificate". There is no imperative for developers to seek final occupation certificate once residents have moved in and so these conditions can on occasion end up not being complied with at all. The issue of the ability or otherwise to issue interim occupation certificates is one of the most controversial aspects of the new Part 6 of the Environmental Planning and Assessment Act (still not commenced) and the Department recently issued amendments to ensure that interim occupation certificates are clearly still able to be issued. This is a poor outcome. There needs to be an imperative on developers/certifiers to ensure that all conditions of consent are complied with prior to residents moving into a building.

Recommendation: Limit the use for interim occupation certificates to sites where a number of buildings are being built in stages. The current practice of using them to allow residents to move into incomplete/non-compliant buildings needs to be rectified.

Construction Certificate and Development Approval consistency: The approval of CC plans with significant inconsistencies with DA plans is causing significant issues in the buildings subsequently constructed. The amendments to the Act requiring greater consistency between CC and DA need to be commenced as a matter of urgency and there needs to be immediate education to certifiers as to the importance of complying with these requirements.

Recommendation: Urgently commence the EP&A Act amendments requiring greater consistency between CC and DA and implement an education program for certifiers as to the importance of complying with these requirements.

Owners Building Manual: The new provision regarding the requirement for owners building manual (s 6.27 of the Act, yet to commence) can be a mechanism for ensuring there is adequate awareness for incoming owners as to the specific measures installed in their building and the regulations supporting this should be developed and implemented as soon as possible. Included in that manual should be information about contact details for those involved in the creation of the building (building designers etc) which should be easily accessible in the event of an emergency to facilitate dealing with issues (as recommended in the Opal tower emergency response report).

Other matters

Ongoing liability: Ongoing liability for defects in buildings is legally complex and the issues of phoenix companies and chain of liability to subsequent purchasers will require careful consideration and potentially may not be adequately resolved. Care should be taken in assuming that insurance or ongoing liability obligations are the best way of resolving the issues – the focus of current reform efforts should be on addressing issues

up front through appropriate regulation to ensure the construction of safe and quality building stock. Pushing the issue down the line to future owners and relying on the private insurance market is not an appropriate response to ensure good quality outcomes.

Thermal Comfort: While not presenting as an acute building structural issue the City is concerned about significant flaws in compliance with NSW apartment occupant Thermal Comfort standards.

These standards are set through the NSW government's BASIX scheme. Design for thermal comfort relates indirectly to energy end use by apartment occupants, specifically mechanical space heating and cooling (air conditioning). The relevance of this to the current inquiry is that apartment plans submitted to consent authorities at development application and construction certificate CC stages are stamped, formally, by NatHERS Accredited Assessors – private sector service providers who are accredited by one of two private sector assessor accrediting organisations. Plan stamping is taken by planners, building certifiers and builders as evidence of compliance because the stamp is generated by an accredited person. Thermal Comfort assessors who stamp plans in NSW are not accredited under the Building Professionals Board and are accredited under the Federal Assessor program

Under NatHERS rules accredited plans must be annotated with thermal comfort design elements (including for example insulation R-values, glazing performance and window frame types) by the architect/building designers before plans are stamped and certificates issued for each and every apartment.

The concern is that architects and building designers are not annotating plans to enable a Thermal Comfort rating to be undertaken, but apartment plans are still being stamped as 'compliant'. This is leading to non-compliance with thermal comfort standards at the construction stage, and potential ongoing financial cost to occupants through higher heating and cooling cost and increased energy use. A common occurrence is of non-compliance is through product substitution, where lower performance materials are installed rather than those modelled by the Accredited Assessor.

The scheme requires increased oversight and governance including more effective and thorough auditing processes. The federal government's scheme administrators are aware of the need for significant increase in oversight.

Recommendation: The NSW government advocates for significantly improved governance of NatHERS Accredited Assessors.