

Submission
No 155

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

Name: Name suppressed
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Partially
Confidential

Submission in response to the Public Accountability Committee's 'Inquiry into the regulation of building standards, building quality and building disputes'

General comments:

1. This inquiry is extremely timely and, in our view, absolutely essential given our family's recent horrific experience, in relation to the purchase and habitation of a recently built residential property in Sydney.
2. For two years our family of four lived in one bedroom of our four bedroom house. The other 3 bedrooms were mould infested from significant water ingress, with the carpets removed. The garage ceiling had collapsed due to water ingress and the waterproof membranes on both the front and back balconies failed, with water cascading through to the wooden floor boards below. We lived in perpetual fear of rain and subsequent water ingress damage and associated health ramifications to our two young children (under four years old). Little did we know but our property had no flashing around any of the windows, no cross cavity flashing and effectively no water proofing in any of the bathrooms. We engaged a Structural Engineer, Hydraulics engineer and a certified Building Consultant with the repair bills collectively estimated at \$750,000, more than the contract price the original owners paid the builders to build the property (\$480,000). We were advised to engage a microbiologist who recommended that, given the levels of mould, we move out of the property (which we eventually did). Even though it was only constructed in 2012, the house now has significant structural issues due to the wooden frame resting on the masonry (no gap like any other brick veneer constructed property) and will require extensive repairs.
3. Our experience clearly demonstrates how there are significant issues with the current state of the regulation of the residential building industry and provides an example of a situation where every single 'safeguard' that is currently in place in relation to the construction of, and sale of, residential properties, not only proved insufficient but indeed completely failed, with significant impact on our family. We have set out our submissions such that each "safeguard" or "step" and how it proved insufficient, is explained but in summary:
 - a. The main individual and shell company responsible for constructing the property we subsequently purchased do not appear to have had the appropriate builders' licence however he was able to set up an arrangement whereby another individual who was licensed took out the mandated home building insurance policy.
 - b. The main individual had a 'track record' of dodgy residential builds, all of which had waterproofing issues however due to the costs of seeking legal redress, other impacted families conducted rectifications at their own cost, leaving no public record of his sub-standard building history; the one recorded legal case (prior to ours) failed at the initial hurdle when the Judge refused to place a caveat on the relevant individual's assets.
 - c. The private certifier who signed off on each step of the construction and provided the final occupation certificate, was subsequently deregistered from his professional body and subject to numerous fines for failing to adequately do his job on a number of residential building certifications he conducted.
 - d. Our pre-purchase building inspection report (erroneously) indicated that there were minimal issues with the property when ultimately there were proven to be over 80 defects.
 - e. The Home Building Insurance policy for the property was only accessible if the individual named on the policy was dead, bankrupt or otherwise unable to be located. NSW Fair Trading located the individual in whose name the policy was in and it has then taken:

- i. almost three years since first contact with that individual, to try and seek redress from him together with the actual person responsible for construction; and
 - ii. over \$210,000 of our money on legal and expert fees.
 - f. For completeness, we note that regardless of sub-paragraph 3(e) above, even if the full amount had been recoverable under the Home Building Insurance policy, we understand that this amount is capped at approximately \$300,000, which would have been completely inadequate in terms of covering the extensive rectifications required to be conducted on the property (approximately \$750,000 at the time of the District Court hearing, excluding legal and expert costs).
 - g. The NSW Civil and Administrative Tribunal (**NCAT**), touted to us as the most cost effective and time efficient jurisdiction, simply allowed the main individual and the individual named on the insurance policy to delay the proceedings for almost a year with seemingly little progress. For example,
 - h. Only on the day that the matter was to commence in the District Court, did the individuals involved seemingly begin to take the matter seriously and decided to offer up terms of settlement (only after having failed in a last minute attempt to delay the commencement of the District Court hearing further by filing a notice to vacate the hearing date).
 - i. The Terms of Settlement agreed between the individuals involved in construction and us and terms that were “blessed” by the District Court provided that the individuals involved purchase the property from us and pay all our legal and expert costs. Some 12 months later and the matter has not yet eventuated and we are currently at the mercy of a third party costs assessor.
 - j. Meanwhile, the individuals responsible for building an almost uninhabitable property have just listed the property for auction and it is highly likely that over all they will still make a substantial profit from the entire saga. We therefore query whether there is any incentive for a builder to actually build a property correctly to begin with?
4. As set out briefly above and in further detail below, we also found the legal process, whereby consumers are meant to be able to seek redress, particularly the NSW Civil and Administrative Tribunal, completely weighted in favour of those building the property, rather than the end consumer. While certain aspects of our experience are unique, others are far more common and clearly demonstrate that greater regulation and oversight is required in the residential building industry and, that certain practices, such as the heavy reliance on private certifiers, needs to be either revisited or at the very least, more strictly regulated and subject to more detailed regulatory oversight.
5. We are happy to provide further information, including the names and details of those involved, if requested, on the basis that those details will not be made public.

Licensing and oversight of builders and shell companies

- 6. In late 2013 our family purchased what was to be our dream home in a suburb of Sydney (**Property**). The Property had been built as a brand new house several years prior to our purchase of the Property at auction, by the original owners (**Original Owners**) who had entered into a Home Building Contract with third party builders in relation to the construction of the Property.
- 7. We subsequently found out during the course of legal proceedings, that the Home Building Contract was entered into with a small shell company, with an individual builder as its sole

director. It was this shell company (**Company**) and its sole director (**Individual 1**) who were responsible for the day to day management and construction of the Property. Individual 1 was not actually a licensed builder at the time of the construction of the Property. The Home Warranty Insurance certificate was issued in the name of another individual, in his personal capacity (who did in fact have a builder's license) (**Individual 2**), however he seemingly did not have any actual involvement in the construction of the Property. Documentation showed a guarantee was in place between the Company and Individual 2, in relation to the construction of the Property.

8. Again, during the course of legal proceedings we discovered that Individual 1 had either been responsible for, or involved in, the construction of four other residential homes in Sydney and all four suffered from severe waterproofing defects, one of the main defects impacting our Property. One family, who Individual 1 had entered into an agreement so that they would be owner/builders and he and the Company would do all the work, were left in a dire state when severe issues arose during construction and they ended up having to begin construction of a new house again, with a third party, at significant extra cost. They had wanted to sue Individual 1, however they were concerned whether he would move all his assets and then declare bankruptcy. The family went to court to seek a caveat on certain of Individual 1's assets, however the Court was not convinced that there were adequate grounds for granting such caveats. With no guarantee that they would recover their losses, even if successful in a claim against Individual 1, the family did not seek further legal action.

Significant defects not identified by the private certifier:

9. Approximately 18 months after moving into the Property, a significant storm event caused water ingress and significant damage to the Property. Our home and contents insurer refused to cover our claim under our insurance policy, citing numerous defects in relation to the Property. A building consultant hired by us subsequently identified over 80 defects in relation to the Property. This was despite the fact that:
 - a. Prior to the auction date for the Property, we commissioned a pre-purchase building inspection report on the Property from a well-known home building inspection company. The building report indicated that there were minimal issues with the Property.
 - b. Also prior to the auction, we engaged an experienced conveyancer who reviewed the contract for sale, DA approvals, certifications (including the final occupation certificate) in relation to the construction of the Property. We were told that everything was in order and indeed all the requisite certifications and other required documentation in relation to the construction and completion of the Property appeared to have been obtained by the Original Owners, including the final occupation certificate issued by a private certifier (**Private Certifier**). During subsequent legal proceedings we discovered that shortly after issuing the final occupation certificate in relation to the Property, the Private Certifier was disbarred from his professional membership for years of misconduct, including being fined significant amounts in relation to numerous properties that he had erroneously provided certification in respect of.

Legal Proceedings:

10. While NSW Fair Trading were helpful in locating and putting us in contact with those responsible for the construction of the Property, given the number of defects and the quantum of the estimated amount for rectifications, they recommended that NCAT was the best way to proceed. We note that we only proceeded to NCAT once it became clear that Individual 1 and Individual 2 were unwilling to acknowledge the majority of the defects identified, let alone engage in discussions as to how to properly rectify those defects, in accordance with the recommendations of our building consultant. This is despite us going to significant expense in

having our building consultant attend a site visit with Individuals 1 and 2, to walk them through all the defects identified in his report in an attempt to resolve the question of rectifications.

11. Our experience at NCAT was extremely disappointing. We had initially elected NCAT as the jurisdiction for our claim on the advice of NSW Fair Trading but also as we thought it would be the most expeditious and efficient way of dealing with the dispute. At the time of lodging our claim with NCAT, we were restricted to living in one room of our property due to the health and safety issues caused by the building defects and mould arising from same. Our primary interest was therefore to have the matter resolved as quickly as possible, particularly in circumstances where we were residing in the property with our infant children.
12. Despite the Tribunal member at the very first NCAT hearing, informing Individuals 1 and 2 of the significance of the legal proceedings they were facing and strongly recommending that they seek legal advice and retain a legal adviser, they did not do so until **almost two years later**. Similarly, both we and the Tribunal member recommended that Individuals 1 and 2 engage an independent building expert of their own, given they were unwilling to agree to the existence and/or proposed rectification methodology for the majority of the 80 plus defects and they chose not to do for a long period of time, causing significant delay to the proceedings.
13. In our view, NCAT allowed Individuals 1 and 2 to effectively obfuscate and delay proceedings for over 12 months. A different Tribunal Member presided at almost every Directions Hearing which meant that everything needed to be re-explained. In our view, this also meant that Individuals 1 and 2 were continuously given further extensions of time, despite consistent failure to meet NCAT mandated deadlines. An example is that Individuals 1 and 2 continuously delayed providing us with essential documents (the Building Contract) and delayed engaging their own building expert to provide expert builder report in response to our report, with seemingly no regard for the original deadline set by NCAT or the fact that we were living in one room of a water damaged and mould infested house.
14. The Building Contract was an essential piece of evidence given they had claimed that they were not in fact responsible for constructing certain parts of the Property subject to defects. Not surprisingly, they were never able to produce the Building Contract or any of the other evidence they had promised to provide us and which they claimed showed they had not built certain parts of the Property, not even under subpoena. When the Original Owners produced the Building Contract and other documents such as progress reports, under a subpoena on them, it turned out that Individuals 1 and 2 were indeed responsible for the entire construction of the Property. It is frustrating that we had to incur additional legal costs to simply obtain these key documents in relation to the construction of the Property.
15. When Individuals 1 and 2 finally engaged an independent building expert to inspect the Property and provide an expert report in response, their expert's approach was to refuse to acknowledge the existence of certain key defects claimed by us without visible evidence. In particular, he would not accept the existence of those defects relating to structural and hydraulics issues, without the opinion of a structural engineer, a hydraulics engineer and a surveyor, as well as invasive testing. As a result, we were forced to retain a structural engineer, a hydraulics expert and a surveyor to address those issues. Invasive testing had to be conducted by two of our experts, in the presence of the expert engaged by Individuals 1 and 2. The results of both the invasive testing and the expert opinions of the structural/hydraulics experts confirmed the existence of **all the defects identified** by our expert and disputed by their expert.
16. The NCAT mandated expert conclave was similarly seemingly a waste of time and money. While we were not present at the expert conclave, our understanding is that despite all of the above evidence referred to in paragraph 15 above and despite being present during the invasive testing on the Property, Individual 1 and 2's building expert still refused to engage on the existence of the majority of the defects as well as the rectification methodology proposed by our building expert.

17. With hindsight, we were indeed extremely fortunate that the findings and proposed rectification methodology proposed by the structural engineer and the hydraulics expert, pushed the quantum of our claim over the NCAT jurisdictional limit because, as noted above, our experience at NCAT was extremely frustrating and seemingly designed to favour the party looking to delay proceedings for as long as possible.
18. Putting aside the additional costs inherent in that jurisdiction and the Court's busy calendar in terms of being able to secure an actual hearing date, our experience in the District Court was much better. Having the same Registrar at each Directions Hearing provided much needed continuity and ensured that the Registrar was well aware of Individual 1 and 2's continued inability to adhere to Court mandated deadlines as well as their continued refusal to engage a legal adviser.
19. It was only after several District Court Directions Hearings and under threat of a summary judgement in our favour, that Individuals 1 and 2 finally engaged a legal adviser and began providing Court mandated responses and evidence.
20. [We first sought to contact those responsible for building the property that we purchased, in December 2016. It took almost two years and approximately \$210,000 of our own money to get to the point (on the first day of the scheduled district court hearing), where individuals 1 and 2 realised (clearly on the advice of their barrister, who they had finally at that late stage retained), made a settlement offer to buy the Property from us and to pay all our legal and expert fees. Almost another year later and while the Property has passed to the builders, we are still trying to recover those legal and expert costs from them. The matter is currently with a costs assessor, despite the terms of settlement clearly stating they would pay those legal and expert costs.
21. Individuals 1 and 2 on the other hand, have just listed the property for sale at auction. We are aware that they started doing some work on the property approximately two months ago however we will leave it to your consideration as to whether they have adequately fixed all 80 of the identified defects or whether some other poor family is going to be as unhappy as we were, but without the benefit of the home building insurance, which is now out of time.
22. Just referring to the almost three years of trying to reach a resolution in relation to the significant defects in the Property and the sum of approximately \$210,000 of legal and expert fees in relation to which we are still out of pocket does not in any way do justice to the stress and emotional hardship suffered by our family during this time period. We had to take significant time off work, not only to be able to attend NCAT and later District Court hearings, but to try and reduce legal fees by liaising with building experts and actively working on other aspects of the proceedings ourselves. When it became clear that the levels of mould in the property were at a hazardous level, with significant impact on our family, we had to move out of the property, with all the emotional and financial hardship that entailed.
23. As noted at the commencement of our submissions, our experience seems to demonstrate a situation where every 'safeguard' in relation to the purchase of a (relatively) new residential property, failed. More specifically, however, in response to the specific Terms of Reference we note that our experience clearly demonstrates:
 - a. a significant issue in relation to the use of and sole reliance on, private certifiers. The private certifier responsible for inspecting the construction of the Property and for providing the final occupation certificate was clearly derelict in his duty. While this was seemingly identified and validated by his subsequent deregistration from his professional body and his receipt of significant fines in relation to his certification of a significant number of other residential properties, that in itself did not assist us or our legal claim in any tangible way; and
 - b. the consumer protections for purchasers of new residential properties are wholly inadequate. The Home Building Insurance scheme was completely inaccessible to us in

that it is only accessible in the person named in the policy is dead, bankrupt or otherwise unable to be located. While the Home Building Act 1989 gave us a cause of action under which to commence legal proceedings in firstly NCAT and then later to the District Court, we were required to spend a significant amount of both time and money, in order to pursue legal recourse. Many people would have either been unable to or have chosen not to take that course of legal action and with good reason. We simply cannot convey the emotional and financial toll that the past three years has had on our family. Even now, we are still in a position where we are significantly out of pocket and are having to fight to receive our legal and expert costs.