

REPORT ON PROCEEDINGS BEFORE

PUBLIC ACCOUNTABILITY COMMITTEE

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

CORRECTED

At Jubilee Room, Parliament House, Sydney, on Monday, 12 August 2019

The Committee met at 10:00

PRESENT

Mr David Shoebridge (Chair)

The Hon. Robert Borsak (Deputy Chair)

The Hon. Mark Buttigieg

The Hon. Scott Farlow

The Hon. John Graham

The Hon. Courtney Housoss

The Hon. Trevor Khan

CARMEL DONNELLY, Chief Executive, State Insurance Regulatory Authority, affirmed and examined

PETER DUNPHY, Executive Director, NSW Fair Trading Specialist Services, Department of Customer Service, sworn and examined

ROSE WEBB, Deputy Secretary, Better Regulation Division and NSW Fair Trading Commissioner, affirmed and examined

JOHN TANSEY, Executive Director Regulatory Policy, Better Regulation Division, Department of Customer Service, affirmed and examined

The CHAIR: Welcome to the first hearing of the Public Accountability Inquiry into the Regulation of Building Standards, Building Quality and Building Disputes. The inquiry is examining the adequacy of building construction regulation, including consumer protections, flammable cladding and the role of bodies like strata committees and private certifiers. Before I commence, I acknowledge the Gadigal people, who are the traditional custodians of this land. I pay my respect and that of the Committee to the elders past, present and emerging of the Eora nation and extend that respect to any other Aboriginal peoples present.

Today's hearing is the first of three hearings we plan to hold for this inquiry. We will hear today from the Government, the Owners Corporation Network, the Insurance Council of Australia, and Mr Michael Lambert, author of the independent review of the Building Professionals Act. We will also hear from a panel of individuals about their personal experiences. Before we commence, I will make some brief comments about the procedures for today's hearing. Today's hearing is open to the public and is being broadcast live via the Parliament's website. A transcript of today's hearing will be placed on today's website when it becomes available. In accordance with the broadcasting guidelines, while members of the media may film or record Committee members and witnesses, people in the public gallery should not be the focus of any filming or photography. I also remind media representatives that they must take responsibility for what they publish about the Committee's proceedings.

It is important to remember that parliamentary privilege does not apply to what witnesses may say outside of their evidence at the hearing. I urge witnesses to be careful about any comments they may make to the media or to others after they have completed their evidence, as such comments would not be protected by parliamentary privilege if another person decided to take an action for defamation. The guidelines for the broadcasting of proceedings are available from the secretariat. There may be some questions that a witness could only answer if they had more time or with certain documents to hand. In these circumstances, witnesses are advised that they can take a question on notice and provide a written answer within 14 days.

I also remind everyone here today that Committee hearings are not intended to provide a forum for people to make adverse reflections about others under the protection of parliamentary privilege. I therefore request that witnesses focus on the issues raised by the inquiry terms of reference and avoid naming individuals unnecessarily. Witnesses are advised that any messages should be delivered to Committee members through the Committee staff. To aid the audibility of this hearing, I remind both Committee members and witnesses to speak into the long microphones. The room is fitted with induction loops compatible with hearing aid systems that have telecoil receivers. In addition, several seats have been reserved near the loudspeakers for persons in the public gallery who have difficulty hearing. I remind everybody at this stage to please turn their mobile phones to silent for the duration of the hearing, including Committee members.

At this stage, I will express on behalf of the Committee our disappointment that the Minister has refused to appear. We again invite the Minister to come and put on the record and answer in a public manner what steps the Government has and has not taken. We note that instead the Minister has chosen to put senior bureaucrats in his place, and we apologise that some of the questioning may have a political tone to the bureaucrats. We know that many of the decisions are those of a Minister and Cabinet and that senior bureaucrats are responsible for implementation. That is, again, why we are disappointed by the absence of the Minister today.

The Hon. ROBERT BORSAK: I declare for the public record that I am a director of Australian Foundation Systems Pty Ltd. This company manufactures and installs steel screw piles, concrete foundation systems, which is relevant to this inquiry into the regulation of building standards in New South Wales. The company has made a submission to this inquiry.

The Hon. SCOTT FARLOW: I disclose that my staff member, Kevin Baker, is a councillor on Lake Macquarie City Council. We have witnesses with respect to the landmark development in Charlestown later today, and so I declare that interest.

The CHAIR: Thank you.

The Hon. TREVOR KHAN: Or non-interest.

The Hon. SCOTT FARLOW: Or non-interest.

The CHAIR: The Government has put in a 132-page submission, but the Committee invites our witnesses to make a brief opening statement if they wish.

Ms WEBB: Thank you, Chair, and Committee members for the opportunity to address you today. The regulation of the building industry involves multiple New South Wales Government departments, authorities and local councils operating under national and New South Wales laws, including the agencies appearing here today, NSW Fair Trading and the State Insurance Regulatory Authority. The submission we provided to the Committee on behalf of the New South Wales Government aims to provide the Committee with information relevant to the inquiry's terms of reference and to assist the Committee and other interested stakeholders in understanding the building sector, including the laws and codes, the role of relevant Government bodies and the responsibilities of building practitioners who operate within this framework. Fair trading is responsible for home building, certifier, product safety, consumer law and strata legislation as well as legislation related to plumbing, gas and electrical safety. This sits alongside the planning laws administered by the Department of Planning, Industry and Environment. The State Insurance Regulatory Authority regulates home building compensation insurance in New South Wales.

Building regulation standards quality and disputes have been the focus of ongoing improvement and reform for many years. Since Fair Trading became responsible for the Building Professionals Act, which regulates both council and private practitioner certifiers in 2015, it has been a major focus of reform. The Act was rewritten in 2018 as the Building and Development Certifiers Act. The new Act was assented to on 31 October 2018 and work is underway to develop the supporting regulations, which will be open for public consultation in coming months. To complement this law reform, on 30 December 2018 the New South Wales Government announced a four-point plan to improve the certification industry. In 2017 the Building Products (Safety) Act was introduced, rolling out a comprehensive scheme for unsafe building products. This created a framework and legislative powers for intervening in the supply and use of building products for the first time.

Under the provision of the Act, I, as Fair Trading Commissioner, issued a building product prohibition on the use of certain types of aluminium composite panels for certain multi-storey buildings in 2018. The strata building bond and inspections scheme commenced in January 2018. This scheme requires the developer of strata high-rise buildings to pay a bond into trust and introduced new processes for the mandatory inspection of multi-unit, multistorey strata buildings. This scheme aims to ensure that buildings are inspected and any defects identified and rectified early in the life of the building. Most recently, the Building Stronger Foundations discussion paper was released in June this year. It focuses on the reforms proposed in the New South Wales Government's response to the Building Confidence report by Peter Shergold and Bronwyn Weir. The department is currently considering the submissions received during that consultation, and the Government plans to introduce legislation into Parliament by the end of this year. The home building compensation scheme protects homeowners' statutory warrant rights if their builder is unable to complete building work or fix defects.

The department continuously supports compliance and enforces the law. We receive over 8,000 complaints a year in relation to the building sector and we resolve the overwhelming majority. In the past five years, we have conducted over 10,166 building inspections and 4,453 building investigations. We have had 488 successful prosecutions in three years. In addition to this, in the past three years the department has conducted over 38 audits and investigations of certifiers and issued over half a million dollars' worth of fines. In the past 12 months, six certifier's accreditations have been cancelled. When noncompliance is detected, a range of sanctions and remedies are employed to right wrongs, including directions, rectification orders, recalls, penalty notices, disciplinary actions and prosecutions. We continuously publicise the outcomes of our compliance and enforcement actions to deter other businesses from engaging in similar behaviour. Housing is one of the most important purchases a consumer makes, and we take our role in safeguarding consumer rights very seriously. Thank you very much, again, for this opportunity to address you.

The CHAIR: Thank you, Ms Webb. I assume you made that statement on behalf of the group?

Ms WEBB: That is correct.

The Hon. COURTNEY HOUSSOS: I am going to start with the most obvious question: Where is the Building Commissioner?

Ms WEBB: The Building Commissioner commences his engagement with the Government on Wednesday. I understand that arrangements have been made for him to appear before this Committee later this week.

The CHAIR: Yes. We will be seeing the commissioner on Friday.

The Hon. TREVOR KHAN: That was a zinger.

The Hon. JOHN GRAHAM: I welcome the remarks from the Chair in opening this inquiry that raised the concern about the Minister not appearing. Obviously there is a real public confidence issue with people's homes at the moment. I want to place on the record the Opposition's concern about the Minister not appearing and I call on him to appear.

The Hon. TREVOR KHAN: Is this a question?

The Hon. JOHN GRAHAM: I will move on to my first question. I want to ask about some comments made by the former Minister, Matt Kean. He indicated that the Lambert review was superseded by the Shergold Weir review. Is that also the view of the agencies?

Ms WEBB: I do not think it is correct to say "entirely superseded". Some parts of Mr Lambert's review have now been taken up by the Shergold Weir inquiry and we are pursuing them together. In my opening statement I did mention the reform of the Building Professionals Act. That was part of Mr Lambert's recommendations, which has been actioned on. Part of the review has been subsumed but part of it is ongoing.

The Hon. JOHN GRAHAM: Yes. What aspects of the Lambert review do the agencies believe do not need to be preceded with?

Ms WEBB: I might get Mr Tansey, who has been dealing with both the Lambert inquiry and the most current one, to answer that question.

Mr TANSEY: I would not say that it is about aspects that would not be preceded with. The Lambert review was a detailed review that culminated in about 150 recommendations, which covered certification and the broader planning system. Those reforms, and the themes of those reforms, continue to be a reference point for ongoing reforms. After Mr Lambert's report was released the Government released its response to the recommendations. We would continue to have reference to the Lambert review. But as Ms Webb said, this is an area of constant review and reform and we do now also have the Shergold Weir review, which is a new point of reference.

The Hon. JOHN GRAHAM: Some of those Lambert recommendations were recommended to be dealt with in the first six months, but have not been. Why is that the case?

Mr TANSEY: What particular recommendations are you referring to?

The Hon. JOHN GRAHAM: I am asking about the Lambert recommendations that called for implementation within the first six months.

Ms WEBB: I think we will have to take that question on notice. We do not have a timetable.

The Hon. JOHN GRAHAM: In October last year the Parliament passed the Building and Development Certifiers Bill. At the time we were told the bill was urgent and that it dealt with things such as penalties. At the start of the year former Minister Matt Kean said that bill would come into force in the next few months. Has that taken place?

Ms WEBB: No, it has not come into effect.

The Hon. JOHN GRAHAM: When will that take place?

Ms WEBB: Again, I will get Mr Tansey to talk to that question.

Mr TANSEY: The work to support the bill is ongoing. There is development underway for the supporting regulations to be made under the Act. We would expect that those regulations will be out for public consultation in the next couple of months.

The Hon. JOHN GRAHAM: We were told it would be in force by now. When will this Act actually be in force?

Mr TANSEY: We need to go through the process of consulting on the regulations and making sure they are effective and support the Act. The commencement of the Act would occur after the regulations are in place.

The Hon. JOHN GRAHAM: The Minister has been quite clear about a time line. You did not meet that time line. The public is concerned. When will this Act be in force? We were told it was urgent.

Mr TANSEY: I do not want to quote an ad hoc date to you, Mr Graham. We need to develop the regulations and we need to get those regulations right, in consultation with industry. Then, as would usually be the case with changes in law and regulations, there would also need to be a reasonable period of transition for people operating under those laws to make necessary adjustments.

The Hon. JOHN GRAHAM: Mr Tansey, I know this is not your fault, but we were given a date. The public was given a date by the Minister. We have passed that date. How wrong was the Minister when he said that this would come into force in the next few months?

The Hon. TREVOR KHAN: Point of order: That question has been asked in a variety of forms. The question has been asked and answered. I ask that the member move on, rather than engaging in what is a political exercise.

The CHAIR: We will give Mr Tansey one more opportunity to answer the question, and then the member may choose to take a different path. Mr Tansey?

Mr TANSEY: I think I have answered the question to the best of my ability. As I said, we need to develop the regulations under the legislation and then they need to be consulted on with affected parties. That is an absolutely appropriate and ordinary part of government business. Once the regulations are in place then the commencement of those regulations and the Act would take place, with a suitable period of adjustment for industry taken into account.

The CHAIR: Mr Tansey, you would understand the frustration with the fact that legislation that was hurried through Parliament in October with a degree of urgency is still not in effect, with no published draft regulations?

Mr TANSEY: I note your questions.

The Hon. COURTNEY HOUSSOS: Can I ask you this then: Is there a plan for the public consultation? You said that is going to happen in the next couple of months. Have you even got a plan for the public consultation?

Mr TANSEY: Yes, there is a plan and a time line. That is why I say to you that I expect we will be consulting on those. But we obviously need to have the regulations completely drafted, checked and available to be the subject of that consultation.

The Hon. COURTNEY HOUSSOS: What is the time line for the public consultation?

Mr TANSEY: As I said, we would expect that in the next couple of months—we are now in August, so by September—they will be available for consultation.

The Hon. COURTNEY HOUSSOS: So you are saying September for consultation. A full year after the passing of the legislation you will be doing the public consultation?

Mr TANSEY: We will be commencing public consultation in September.

The Hon. COURTNEY HOUSSOS: How long will the public consultation go for?

Mr TANSEY: It is typically open for a period of four weeks.

The CHAIR: Mr Tansey, rather than making it up in a general way, will you give us a detailed answer about the plan on notice?

Mr TANSEY: I am happy to take in on notice.

The Hon. JOHN GRAHAM: Have the agencies received representations to not proclaim aspects of the bill or to take this process more slowly? Have you received representations putting either of those views to the agency?

Ms WEBB: I am not aware of any such representations.

Mr TANSEY: Nor am I.

The Hon. JOHN GRAHAM: Thank you. After the Opal Tower incident became public the Minister also said the Government would move to 25 per cent to 35 per cent of the industry being audited. What is the time line for that?

Ms WEBB: I will get Mr Dunphy, whose team works on that audit process, to answer that question.

Mr DUNPHY: We developed the auditing plan, which was finalised in April. We have now commenced audits according to the four-point plan. We have targeted a range of high-risk individuals. We have already commenced those audit programs. We have conducted about eight audits so far, and there are another 10 to go. Our aim is to meet the target of 25 per cent to 35 per cent of all certifiers being audited by the end of September this year. We are close to meeting that target and we have been establishing a group—we have a team of seven auditors—that is working on it. It has taken a little while to develop the expertise and make sure we have got the audit tools right. But we are confident that by the end of September we will be able to meet that target of 25 per cent to 35 per cent of private certifiers being audited.

The Hon. JOHN GRAHAM: What is the cost of doing that on an ongoing basis?

Mr DUNPHY: The cost is the staff, essentially. It is the seven staff. We are focusing more on proactive investigations and proactive auditing. We are using some of the resources we previously would have used for the more—

The Hon. JOHN GRAHAM: Feel free to take this on notice, but could you tell us the cost that is associated with making sure that is ongoing? Unless you can tell us now.

Mr DUNPHY: I can tell you that it is the seven auditors who we are using. We will continue to use those resources on an ongoing basis. That unit has been established.

The Hon. JOHN GRAHAM: Could you take the cost on notice? Could you also indicate to us whether that money has been committed to in the budget?

Mr DUNPHY: Right.

The CHAIR: How many private certifiers are there, Mr Dunphy?

Mr DUNPHY: In terms of building surveyors, which are the A1 to A3, which are the ones essentially who do the principal certification work, there are just over 600, about 609 I think.

The CHAIR: And you have audited eight.

Mr DUNPHY: We have audited eight, that is correct, we have audited eight of those.

The CHAIR: And you are on track?

Mr DUNPHY: We are in the process of auditing another 10 and we will be aiming to audit up to 15 per month, which is what we believe we will be able to meet in terms of the target from the end of September.

The CHAIR: Sorry, it is August now. You are going to do 15 per month by the end of September and you are going to get to 25 per cent of 600. I do not follow your maths.

Mr DUNPHY: It is over 12 months, so we are aiming to—

The CHAIR: September 2020?

Mr DUNPHY: Sorry?

The CHAIR: You are going to get to a quarter by September 2020?

Mr DUNPHY: No, September of this year. We are aiming to do 15 audits per month and we are aiming to achieve that this year, which will mean then we would be on track to meet the target of 25 to 30 per cent per annum for this financial year.

The Hon. ROBERT BORSAK: What is involved in an audit of a certifier?

Mr DUNPHY: The audit of the certifier—and the reason why I guess it has taken us a while to do the first lot, which were the eight—is a very in depth audit. We actually call in information, all of the documentation in terms of audits or work that they have done. We will do a desktop audit. It may also include site visits to check particular issues. It is working with the auditor through the records of the approvals and the certificates that they have issued, looking at a number of sites where they have carried out work and confirming and verifying that the work has been done in accordance with the requirements. At the moment the audits that we have been doing have been quite detailed and comprehensive in terms of the nature and the scale of the assessment that we have been doing of those particular auditors.

The Hon. ROBERT BORSAK: As you say, it is a desktop audit. Once the concrete has been poured around the reo, you cannot tell what reo is in there or not, can you?

Mr DUNPHY: The audits are a desktop audit, but we also will actually go out and confirm, and we certainly as part of the complaints process—

The Hon. ROBERT BORSAK: Are they going to x-ray the beams?

Mr DUNPHY: If we require further information we may not do the x-rays ourselves, but we would certainly seek the furnishing of documentation that could include a compliance certificate where somebody would have done the x-raying of the structural members, so it would include all of that sort of evidence to ensure that—

The Hon. ROBERT BORSAK: So what are you doing to guarantee that subcontractors actually do what they are supposed to be doing?

Mr DUNPHY: You are talking about people who may be doing compliance work as part of the approval process? That we would be checking in terms of the certificates that have been provided or the expert advice that has been provided as part of the approval process, and we would be checking back to confirm and to validate that as well.

The Hon. ROBERT BORSAK: Let's just drill down a little bit further. On a day-to-day basis, reading your submission on page 17, it talks about the minimum critical stage inspections. They all seem to talk about "prior to" doing this, "prior to" doing that, "prior to" doing something else. At what stage does somebody stand around and actually watch that the builder is doing what he is supposed to be doing, not getting an inspection certificate sorted when he lays the steel out and as soon as the certifier disappears, because he is a very busy person who is running multiple jobs and running a private business, he takes half the reo out and says, "We don't need it", and then does the pour. I mean is there anybody standing around watching what these people—and in the case of some of these contractors, and I use the word advisedly, these crooks—are doing?

Mr DUNPHY: We also monitor and audit the licensed builders who do the work, so that type of work—

The CHAIR: Sorry, we are talking about things over four storeys in height. There is no requirement for licensed builders.

Mr DUNPHY: There are for licensed builders to carry out residential building work, no matter what height.

The CHAIR: We are talking about all the apartment blocks.

Mr DUNPHY: Yes.

The CHAIR: It is unhelpful for you to tell us about licensed builders who are not required to be on site and to be running multi-storey apartment blocks.

Ms WEBB: I might just clarify here: The requirement to have a building licence is not linked to the height of the building. The insurance requirement is, but not the requirement to have the licence.

The CHAIR: Correct. Mr Dunphy, you were answering Mr Borsak's question.

The Hon. ROBERT BORSAK: What you are attempting to do is deal with this on an audit by exception basis.

Mr DUNPHY: The audits are a proactive approach of actually checking to verify—

The Hon. ROBERT BORSAK: An audit can only be proactive if you are tipped off that something is going wrong.

Mr DUNPHY: We do also do—

The Hon. ROBERT BORSAK: And we do not find out that something is going wrong until the building cracks or something else happens.

Mr DUNPHY: That is why the audit program is designed to do that before we get complaints. We also receive complaints and we also do a range of—

The Hon. ROBERT BORSAK: Please explain to me how the audit practice drills down at that level that makes sure that things are not being done incorrectly during the process of building. We are talking about auditing certifiers, but you have just said that is a desktop process. What is actually guaranteeing that the concrete or other parts of the building are being built according to standards and codes?

Mr DUNPHY: As I mentioned—

The Hon. ROBERT BORSAK: Please don't tell me that the certifiers are there because your own table says that they are not there.

Mr DUNPHY: No, I was not referring to that. The certifiers certainly do the critical stage inspections, and that is the obligation which they have under the legislation, the EP&A Act, which sets out the critical stage inspections they need to do. The actual builder, which is licensed as well, has obligations and they need to conduct their building work in accordance with their licence.

The Hon. ROBERT BORSAK: Absolutely, the builder has an obligation, but he is paying the certifier.

Mr DUNPHY: Yes.

The CHAIR: How many builders have lost their licence because of failure to comply with the construction code as a result of any of these inspections that you have ever done?

Mr DUNPHY: We actually do a number of prosecutions of builders.

The CHAIR: Simple question.

Mr DUNPHY: And we do actually cancel a range of licences.

Ms WEBB: We might take on notice the exact question about numbers who have been disqualified for that particular reason and we will get back to the Committee.

The Hon. MARK BUTTIGIEG: Would there have been any, to your knowledge?

Ms WEBB: I think I need to take it on notice. I just don't want to hazard an answer. We have figures on disqualification.

The CHAIR: It has been in the news in the last six months.

Ms WEBB: Yes.

The CHAIR: Is there anybody in the last six months that you can think of, in a high-profile case where we have seen terrible building defects? Has anybody lost their licence in the last six months as a result of the terrible building defects we have seen?

Mr DUNPHY: Are you talking about builders' licences here?

The CHAIR: Builders' licences, people who actually did the shoddy work.

Mr DUNPHY: In terms of the builders' licences, we regularly cancel licences, and we can provide you with the data on the number of cancellations. That is for a whole range of particular matters that may relate to the builder. It could be to do with the way the work was carried out; it could be to do with some of the processes that they carried out, but it would be for quite a range of different activities, so we can certainly provide that on notice in terms of the cancellation of builders' licences, but that is a regular occurrence in terms of cancelling licences.

The Hon. COURTNEY HOUSSOS: You said in your opening statement there were 488 successful prosecutions. Do you know if any of those resulted in the cancellation of licences?

Ms WEBB: I would say in most cases where we conduct a prosecution we would be looking at the person's licence. I will get the actual figures on how many of those 486 were cancelled.

The Hon. COURTNEY HOUSSOS: I would also like to know how many you initiated.

Ms WEBB: Cancellations?

The Hon. COURTNEY HOUSSOS: No, how many prosecutions you initiated. If there were 488 successful ones, I would like to know how many you initiated.

Ms WEBB: So how many we were not successful in?

The Hon. COURTNEY HOUSSOS: Yes.

Ms WEBB: Yes, we can get that number as well.

The CHAIR: Could we go back to the audit because I think in many ways that uncovers the concerns many of the submissions have made. A private certifier's job for multi-storey apartment blocks is largely checking that all the other certificates are in place. That is the primary job. Would you agree?

Mr DUNPHY: There is a range of things that they do, as I have mentioned. They have to do critical—

The CHAIR: I know there are a range of things; I am asking you about the primary job, which is to check all the certificates are in place for the various levels and the various trades and the various electrical and other materials. That is the primary job.

Mr DUNPHY: That is one of their primary jobs. Their other primary job is doing the critical stage inspections.

The CHAIR: For a large apartment block there will be certification about the electrical wiring, maybe about the engineering elements, the civil engineering elements, the plumbing work and the concreting. There will be a whole series of certificates provided to the private certifier; is that right?

Mr DUNPHY: That is correct. They may be certificates, they may be advice from that expert, yes.

The CHAIR: Then the private certifier will gather them all together in a file, tick them off and ultimately sign off on the building, assuming it is all in order?

Mr DUNPHY: The certifier, whether it is a private or a council certifier, will issue an occupation certificate at the end of the process, yes.

The CHAIR: None of those certificates have any kind of statutory force. There is no requirement for insurance for any of those underlying certificates, there is no requirement for licensing to provide those underlying certificates. Is that right?

Mr DUNPHY: Except I think for fire certificates, there is not a mandate or requirement to have a specific certificate.

The CHAIR: An engineer coming straight out of grad school can get straight onto the site and start signing off on the civil engineering aspects of a building without insurance, without any licensing and without any regulation. Is that right?

Mr DUNPHY: They obviously need to be a member of the Association of Professional Engineers Australia.

The CHAIR: They need to be an engineer?

Mr DUNPHY: Yes, they need to be an engineer. That is part of the reforms and that is one of the things that will be picked up in the reforms, is the requirement to have designers, which includes architects and engineers to be—

The CHAIR: I am not talking about the design, but about what is built.

The Hon. ROBERT BORSAK: Accountability about what has been built. It is one thing to say we are doing detailed audits and what certifiers are doing. They are ticking all the boxes and we have got a pile of paper three feet high. A lot of this stuff is relying on insurance being put in place, the certifiers carrying a policy—if they can get one now—et cetera. Taking it from there to what happens on the site on a day to day basis, is there anything that the Government can do or the Government has done to ensure that that happens?

The CHAIR: Let us be clear, your reforms, the Government's reforms are about design, not the built outcome, correct?

Mr TANSEY: Chair, if I can assist; I draw your attention to the submission we provided to you, on page 59, which has some of the appendices. It sets out all of the different categories of certification. My colleague Mr Dunphy is answering your questions maybe particularly with reference to the principal certifier, who will sign off on the complete package of the building. But if you look at the appendices, it sets out all of the different specialities which go to your question around components of construction. There are different categories of certification that go to those different elements and capabilities. The people performing those parts of the total certification function are accredited under the law and do have qualifications in order to get those—

The CHAIR: You are saying now?

Mr TANSEY: Now, as certifiers. If it helps the Committee, there is that element of the principal certifying authority who is, as you have set out, responsible for the entire development or building, but then in support of that are the specialist categories of certification.

The CHAIR: There are, but most of the people providing the certification have not gone through the formal certification process because they are not obliged to, for these very sub-certificates that are being provided.

Mr TANSEY: Those are other persons who are required to be accredited under the same legislation that accredits the principal certifier. They recognise different specialities of construction. They are required under the law to be accredited also by the Building Professionals Board and there are skills and experience prerequisites for those. If it helps the Chair, it goes to the point that different elements of the construction can be themselves certified by specialists in that field, which contributes to the overall certification by the principal certifier.

The CHAIR: Are any of them insured? Is there a requirement for them to be insured?

Mr TANSEY: They would all have to have insurance to maintain their accreditation.

The CHAIR: Can I read to you a summary paragraph from Mr Lambert's submission. Do you know who Mr Lambert is?

Mr TANSEY: Yes.

The CHAIR: He knows a bit about this. In regard to the proposed reform for building designers, introducing building designers into the New South Wales legislation and registration he says:

The current proposal is deficient in that it only proposes self-certification of design and not building work and hence, does not include the range of building practitioners who design, construct and install the critical building systems and elements.

Are you saying Mr Lambert is wrong?

Mr TANSEY: No. I have had a quick read of Mr Lambert's submission to this inquiry, thank you. If I can explain, the current government reforms in response in particular to the Shergold Weir Report, do pick up, as you have referred to earlier, some of the themes that were in Mr Lambert's report, is proposing to require registration by a range of practitioners and while the broad colloquial term in the report is "building designers", it actually sets out, and what we are in the process of consulting on, is a much broader range of practitioners, all of whom would potentially be required to be registered to support the system of them having to positively declare that the plans, the designs, the specifications they provide comply with the National Construction Code.

The CHAIR: You have said you read Mr Lambert's submission, so I will read another passage from that and ask for your response.

This means (meaning the Government's reforms) it is a very partial approach, which leaves major gaps such as waterproofing, which is an area which generates major problems and complaints, as well as the installation of fire safety systems, which is critical for safety.

What do you say to Mr Lambert's concerns?

Mr TANSEY: Waterproofing already requires a licence. The Deputy Chair sked the question before about some of the subcontractors, so it is already an obligation and law to be licensed to undertaken waterproofing. Then the full scope of persons who might be required to be registered as part of the Building Stronger Foundations reform is still out for consultation or rather, we had industry consultation on that. That closed in the last couple of weeks and we are going through those nearly 200 submissions. They cover a very extensive range of building practitioners who may be required to be registered under the new reforms.

The CHAIR: We have had dozens and dozens of individual complaints about building defects, many of them waterproofing and you are telling me it is all okay because the current licensing system is in place? That cannot be your evidence, Mr Tansey.

Mr TANSEY: No, I merely said that in fact waterproofers now are required to be licensed.

The CHAIR: I will read you one of the concluding thoughts from Mr Lambert and perhaps get all of you to respond to this; speaking about his views about the absence of quality certification.

In turn, this partial approach to accountability and registration of building practitioners results in major problems for the building certifier, who issues an approval to build, construction certificate or CDC in New South Wales, based on documentation which is invariably incomplete, undertakes inspections of only some of the building work, relies on certification from builders and subcontractors and issues a certificate of occupation at completion of the project. This is the key regulatory agent in the building sector.

What Mr Lambert is saying in short is that the occupation certificate, based upon an array of documentation from subcontractors and others underneath which is substandard, is really not worth the paper it is written on. What do you say to that proposal?

Ms WEBB: Chair, I think we have canvassed already that there are a few reforms in process at the moment, including the rewriting of the Building Professionals Act and the proposed response to the Shergold

Weir Report, and as well, we are also doing our audit process at the moment. I think the whole package is designed to address some of those issues that Mr Lambert is raising.

The CHAIR: Will you get to the point where for each relevant building practitioner working on the building will certify that the building design and work they have carried out has been undertaken in full conformity with the Building Code of Australia or the National Construction Code and the building practitioner is fully accountable, by being registered, subject to professional standards audit and disciplinary action and hold a suitable level of insurance? Is that where we are going to get to?

Ms WEBB: That is the proposal in the Building Stronger Foundations paper, yes.

The CHAIR: Nobody who has made a submission says that your proposal in the Building Stronger Foundations gets even close to that.

Ms WEBB: As Mr Tansey has outlined, we have had many submissions in relation to it. It is still a work in progress, so we will certainly take those comments on board. I might also mention that in our preliminary discussions with the building commissioner, he has some views about how we can achieve some of that as well, which we will certainly be working closely with him.

The Hon. ROBERT BORSAK: We spent a lot of time talking about certification prior and then certification afterwards, the issue of occupation certificates and the like. Has the Government turned its mind to doing something to upskill builders, in other words, require qualifications for builders before you can be a builder?

Ms WEBB: There are certain qualifications that are required to get a building licence. They are under continual review.

The Hon. ROBERT BORSAK: I said upskill, I did not say there was no skill.

Ms WEBB: Yes, I understand that and I think that is an ongoing process, again something that we can keep looking at.

The Hon. ROBERT BORSAK: But they are the people with the primary responsibility, going by your own code, that actually have to see to it that it gets done, because if you have a primary building certifier, he is not standing there day in, day out to ensure it all happens. Who is guaranteeing that buildings are being built to spec and to code? Who is there doing it?

Ms WEBB: As I think you are implying, it is the builder who is responsible and they need to have the skills and also requirement—

The Hon. ROBERT BORSAK: So, who is holding the builder responsible on a day to day basis, not at the end of the project when the certifier sees a finished building and goes through the paperwork and ticks all the boxes?

Ms WEBB: So, there is—

The CHAIR: Who is watching the builder?

The Hon. ROBERT BORSAK: Who is watching the—

The Hon. TREVOR KHAN: Point of order: The questions are very valid but the witness is entitled to have sufficient time to answer and perhaps from one person at a time as opposed to a tag team.

The Hon. ROBERT BORSAK: To the point of order: We are not a wrestling team. What I am trying to do—

The Hon. TREVOR KHAN: Well, then let her answer the question.

The Hon. ROBERT BORSAK: With all due respect to you, I am trying to refine the question because to my way of thinking, from the evidence I am hearing, we are doing a lot of audit work on certifiers. Certifiers come in at the start of the build, they review all the documentation, this is a gross summary but they come in at the end and give us an occupation certificate. In the middle there is this thing, or entity, or person called a builder. They are the people out to make a profit. They are the people who pay the certifiers. Who is holding them to account on a day to day basis to see that the build conforms with the requirements of the certifier at the very start.

The Hon. TREVOR KHAN: I am not arguing.

The Hon. ROBERT BORSAK: And is the Government addressing that?

The CHAIR: I note the interjection.

The Hon. TREVOR KHAN: Just hold up please. Mr Borsak was asking a question and I took the point of order when Mr Borsak, having asked the question, you jumped in over the top of him. That is where I took my objection.

The CHAIR: I understand.

The Hon. TREVOR KHAN: I was not having a shot at anything that Mr Borsak had done. It was you teaming up on top.

The CHAIR: I understand. Which is why we are going back to the witness now to allow the witness to speak rather than you, Mr Khan.

The Hon. TREVOR KHAN: Thank you.

Ms WEBB: I am going to get Mr Tansey to answer.

Mr TANSEY: To go to the point the Deputy Chair was asking about builders, it is a further plank of the building stronger foundations reforms that builders as well those practitioners we have referred to in the very broad general terms of building designers, builders will also be subject to an obligation to declare that the building work they are doing is done in compliance with the various plans and specifications provided to them by the other practitioners. As well as that obligation to make those declarations a system of registration underneath it, the other limb of the government's reform is to introduce a duty of care so it is made abundantly clear that all of those practitioners in the contract network, if you will, are accountable to those people that they do the work for, or who later benefit from that work for the quality of their work and for the accuracy and truthfulness of the plans they do as well.

The CHAIR: Duty of care is great for a lawyer. At the end of the day when the building is substandard, defects happen, a lawyer can litigate on a duty of care, but it does not guarantee the building is built in accordance with the building standards. Particularly if the work is done by a \$2 company who does not care about a litigation risk, it does not help consumers; do you agree?

Mr TANSEY: The duty of care is there and I imagine it has both a serious deterrent effect, but it does, yes, is also intended to hold people accountable for the work they do.

The Hon. ROBERT BORSAK: Wouldn't it better to say there should be an "obligation" of care? A duty of care I understand. It is something you have to litigate on and how long is a piece of string. At the end shouldn't there be an obligation on a builder to build in accordance with the specifications?

Ms WEBB: That is the law at the moment. It implies various warranties into the building contract. That obligation is there. I think what the Committee's questions are getting at is a practical implementation of those warranties. The Building Stronger Foundation reinforces that obligation and those warranties by requiring registration of the parties.

The Hon. ROBERT BORSAK: Mr Tansey has mentioned this. What is the timing for the implementation of this process? After the next election?

Mr TANSEY: No, the Premier herself has given commitments of intention to introduce legislation in the current session of Parliament, so before the end of the year on the Building Stronger Foundations reforms.

The Hon. ROBERT BORSAK: In relation to builders too?

Mr TANSEY: Yes. The package of reforms, the four elements are: the new requirements on a range of practitioners, who we are for the moment referring to as building designers, to be registered and declare compliance of the plans, specifications and designs they provide. And that being married with a matching duty of the builders who build in reliance on those plans to declare that the building work is done consistent with those plans and the national construction code [NCC]. The duty of care is the other limit of those reforms.

The Hon. COURTNEY HOUSSOS: Are we going to have to wait another year for the regulations to be implemented before it gets implemented as well? Are there going to be regulations associated with this new legislation that will have to be consulted on as well?

Mr TANSEY: I imagine it would require regulation underneath, yes.

The Hon. MARK BUTTIGIEG: It seems to me that one of the problems associated with the size of the inherent conflict which many of the submissions touch on between the certifier being paid by the builder for an outcome, is the fact that the certifier is not able to be there at every stage of the job. It has been raised here by

several members. One of the short term recommendations of Lambert was that a chain of responsibility be formed. What has the department done in that respect? What does that mean in your mind as to how that is implemented?

Ms WEBB: I think the chain of responsibility might be another way of describing this idea that everyone who is responsible for the building should be registered, have an obligation to make a declaration of compliance, have insurance and be available to be sued and owe that duty of care. One way of looking at it is that everyone in the chain who is involved in building a building will now have clear responsibilities and liabilities. That follows that idea.

The Hon. MARK BUTTIGIEG: That is the idea, but what progress has been made in that respect?

Ms WEBB: This is the legislation that Mr Tansey was referring to that the Premier has indicated will be introduced this session.

The Hon. MARK BUTTIGIEG: We have an existential crisis in the building industry, home owners are being left out in the cold and we have to wait for legislation, consultation and regulation around that before we get any progress on this, notwithstanding the fact that you have had a subject matter expertise recommend this has to happen forthwith?

Ms WEBB: I think in terms of current buildings with issues people are taking advantage of the various legal resorts they and there are various pieces of litigation underway or planned. There is not a complete vacuum.

The CHAIR: A partial vacuum.

Ms WEBB: We are trying to explain there will be an improvement.

The Hon. COURTNEY HOUSSOS: Would you characterise the response as thorough?

Ms WEBB: The current response?

The Hon. COURTNEY HOUSSOS: Yes.

Ms WEBB: Yes, I think we have done quite detailed legislative proposals. We have also done the auditing process that Mr Dunphy talked about. We have an ongoing review of people's licenses. Our prosecutions and our building activity and then in relation to the particular concerns of the particular two buildings we have instantly taken action to assist the residents of those buildings.

The CHAIR: Ms Webb, the delay is not your fault. But, the disaster of the lack of standards in the industry was highlighted in the Campbell report 2002, nothing happened. In fact, further deregulation followed. We then had the Lambert report 2015 putting 150 recommendations and repeating most of what the Campbell report said. That is four years ago. We are now in 2019 and the Government might be bringing some legislation some time before the end of the year. The regulators have been asleep at the wheel in New South Wales and home owners have been paying. Do you accept that is what has gone on?

Ms WEBB: I think that is a very broad statement. We have endeavoured to show what we have been doing but we have acknowledged there is a need for law reform as well.

The CHAIR: Do you agree that the Campbell report 2002 said clearly: Terrible lack of building standards and private certifiers have a major conflict of interest. That is 17 years ago. Do you accept that is the thrust of the Campbell report?

Ms WEBB: Yes, I am aware that is what that report said.

The CHAIR: Do you know the Campbell report 2002 said there should be a building commissioner in New South Wales, and we might get one on Thursday, is that right?

The Hon. TREVOR KHAN: She can hardly be held responsible for what happened under the former Labor Government.

Ms WEBB: I can confirm that the building commissioner is starting on Wednesday, but that is all I can do.

The Hon. COURTNEY HOUSSOS: You characterised the existing Government response as thorough, what financial support is available for people coming to you for help?

Ms WEBB: As you aware the Government has announced a financial support package for the people concerned with Mascot Towers who did not have available accommodation. People are taking various actions

available to them under the law to take legal action and seek redress. I also note in the case of Opal Tower the builder, without anyone taking legal action, has paid about \$12 million in support for residents already.

The Hon. MARK BUTTIGIEG: Would it be fair to say this whole thing strikes me as an overly reactive approach. In other words, we find what the problems are after the fact and then the poor old consumer has to go through a bureaucratic legal process, often at great expense to themselves, to try and get recourse. Would it be fair in your mind that this is a reactive approach rather than what should be happening, which is a proactive approach and nipping these things in the bud before the building even gets put up, is it fair to say that?

Ms WEBB: There is a large range of regulatory controls from the planning system to requirements of the building code to the certification process and the other things that my colleagues have been talking about, all of which are up-front, designed to make sure that even before a building starts there is a whole lot of regulatory requirements. There are requirements on the way going through. However, if all of that does not succeed and there are some issues afterwards there is a process as well for consumers to seek redress.

The CHAIR: But Ms Webb, you are not suggesting that process is adequate, are you?

Ms WEBB: I think the fact that the Government has acknowledged the need for law reform suggests that improvements could be made.

The CHAIR: We have not had a single submission saying that the current redress arrangements are anything like adequate. Indeed, we have had multiple submissions asking why there is not home warranty insurance protection for multistorey apartment blocks. Is the Government proposing to put in place home warranty building measures for multistorey apartment blocks four storeys and above?

Ms WEBB: I cannot comment on whether the Government has that proposal in mind.

The CHAIR: Is it part of the Government's discussion paper? Has it been put forward as an option by the Government?

Ms WEBB: Not at this moment that I am aware of.

The Hon. Mark BUTTIGIEG: Why is there an incongruence between a home owner who has that recourse to six or seven years and a high-rise who has not?

Ms WEBB: I will just make sure I am understanding the question properly: All home owners have the six-year ability to get rectification of defects, regardless—

The Hon. Mark BUTTIGIEG: Yes, but my understanding is if you are a builder and it is multistorey—above a certain height—that consistency does not flow through.

Ms WEBB: I think the insurance scheme that offers insurance of last resort if the builder is unable to rectify does not apply. Ms Donnelly might be able to just—

The CHAIR: So under the scheme you are insured up to three storeys but you are uninsured after three storeys?

Ms WEBB: Under the last-resort scheme—

Ms DONNELLY: That is correct, Mr Shoebridge. That has been situation in New South Wales since the end of 2003.

The Hon. Mark BUTTIGIEG: And no-one has ever thought that this sort of glaring inconsistency should be rectified?

Ms DONNELLY: Particularly when the Opal Towers and Mascot Towers events occurred and I became aware of them, the first thing I did was have my officers look to see whether there was any recourse that those residents could have or any policy that could impact them. So that is first thing to assure you, because of my concern for the residents. To the Chair's earlier point, I have noted that there are a number of submissions that highlight areas where the current home building compensation scheme does not provide coverage—whether it is in the total amount or the period of time or for high-rise. I am preparing some advice with my officers around options and impacts there.

I note that the last time there was legislative reform to the Home Building Compensation Fund [HBCF] in 2017 there was a shift in the amount of concern being raised in submissions and consultation about high-rise. It is clearly a concern now, I understand that—less so in my experience than when it was removed in 2003 and I certainly was not directly involved at the time. My intention is to hold discussions with the Building

Commissioner once he commences, paying very close attention to the submissions and to what witnesses say before this inquiry.

The CHAIR: It is bizarre, isn't it, that there is statutory home building insurance for anything up to three storeys, but for anything four storeys and above there is no statutory home building insurance? It is a bizarre situation and the people who end up paying for that other people who get substandard apartments in any apartment block four storeys and above. That is the situation, isn't it?

Ms DONNELLY: In terms of commenting on that, the Chair alluded at the beginning that it is our job to deliver on the will of the Parliament, not to make the laws.

The Hon. Mark BUTTIGIEG: But as a department with resident expertise and experience in this industry on a day-to-day basis you must have an opinion that you would presumably would feedback to your Minister about the sort of things that need to be rectified to fix this sort of thing? Do you have a view on that?

The CHAIR: I will step in. I asked a question characterising it as "bizarre". It was unfair to ask bureaucrats to adopt my characterisation and I accept that. Mark, I think your question is going down the same path. They are not responsible for policy; the Minister is and the Minister is not here.

The Hon. TREVOR KHAN: Are you aware of the rationale adopted to remove the four storeys and above from the scheme?

Ms DONNELLY: I do not have direct knowledge but I thought you might ask that, so I have gone back and researched again. Obviously the Campbell report is one that does make some mention of the insurance conditions at the time. What is on the public record is discussions about insurance industry problems at the time, such as the failure of HIH, the fact that it was shortly after 9/11 and the concern about catastrophic claims. I do not have a complete knowledge at all.

The Hon. TREVOR KHAN: Can you take the question on notice? Plainly if what is going to come out of this inquiry are recommendations relating to a change in the scheme the Committee would be greatly informed by—

Ms DONNELLY: For some insight.

The Hon. TREVOR KHAN: —understanding the rationale for changing it in the first place. It does not have to be a political issue here on that sort of thing. There are going to be costs and benefits from any proposal and we need to work out what—

Ms DONNELLY: Yes. I am happy to take that on notice if that is useful.

The CHAIR: There was a public linking at the time between critical stage inspections and the removal of insurance saying, "Don't you worry about it, we've got critical stage inspections—you won't need to be insured". I think that was the political—

The Hon. TREVOR KHAN: Well that might be the answer, but let's see. Can I just ask a further question? These issues are not limited solely to New South Wales. Have you looked at the schemes in other States and are you able to identify for us what other States do and the implications of those schemes in terms of costs and the like?

Ms DONNELLY: The other States do generally also have a limitation on coverage for high-rise. My understanding is that that would have been introduced roughly around the same period in other jurisdictions—building above three storeys does not tend to be covered. Most of the other jurisdictions have mandatory insurance. In Tasmania it is voluntary, so it is quite different in that regard. Queensland has a first-resort scheme, which means it is more of a first port of call where you have a problem, you seek rectification of a defect, you go to the insurer and then the insurer recovers. But most of the other jurisdictions have schemes that are quite similar to New South Wales.

The Hon. TREVOR KHAN: Right. Are you able to do two things for me? One is to give us a table that sets out the various schemes in the various States so that we can—

Ms DONNELLY: Certainly.

The Hon. TREVOR KHAN: Perhaps you might like to make a comment with regards to the pros and cons. The further thing that I would ask, if it is within your gift to do, is if you could identify for us what you would call an exemplar scheme in one of the States? It may be that nobody has an exemplar scheme; nevertheless it would be useful to know if there is one that might act as a model for future developments in this State.

Ms DONNELLY: Happy to take that on notice.

The Hon. TREVOR KHAN: Thank you.

The Hon. ROBERT BORSAK: Can we just turn your mind to the HBCF scheme and its deficit situation? Have you any comment you want to make in relation to that?

Ms WEBB: Ms Donnelly will talk to that as well.

Ms DONNELLY: Yes.

The Hon. ROBERT BORSAK: Ms Donnelly?

Ms DONNELLY: Thank you for that question. Certainly before the last legislative reforms in 2017 that I mentioned earlier the Minister outlined that it was in a poor situation financially. Since those reforms the State Insurance Regulatory Authority has had a stronger role in regulating the provision of insurance. There is still only one provider, icare, the Government's insurance operator. There is still a time period needed until probably 2021 before all the premiums being charged are appropriate to the risk for the type of building. It is still not a fully funded scheme. The situation has improved financially, but it is still on a trajectory to get to a point where it is fully funding the liabilities. The particular categories of buildings where premiums are still going to need to increase reach break-even premiums are—

The Hon. ROBERT BORSAK: And that is only with a six-year coverage period, too.

Ms DONNELLY: That is with the six-year coverage period for major defects, too.

The CHAIR: Ms Donnelly, it is an economic basket case, isn't it? It went \$105 million into deficit in the 2017 financial year—the deficit picked up by taxpayers. Then it went into a \$135 million deficit in the 2018 financial year—the deficit picked up by taxpayers. Then Treasury had to kick in \$181 million just to keep the lights on in 2018. That is on the public record, from your annual report.

Ms DONNELLY: Yes.

The CHAIR: It is an economic basket case.

Ms DONNELLY: It is not functioning financially where it should be and where it would—

The CHAIR: It is an economic basket case. We are talking hundreds and millions of dollars.

The Hon. TREVOR KHAN: Do not ask—

The Hon. SCOTT FARLOW: Let her choose her words.

The CHAIR: It is not just not functioning adequately, it is functioning terribly.

The Hon. ROBERT BORSAK: You made a statement a few minutes ago where you said it was getting better or something to that effect.

Ms DONNELLY: The Treasury has been covering the cost, particularly for claims that are arising from years prior to those 2012 reforms where premiums were not adequate.

The CHAIR: The 2017 reforms?

The Hon. TREVOR KHAN: Please let her answer the questions.

The CHAIR: Ms Donnelly, 2012 or 2017 reforms?

Ms DONNELLY: 2017. Only in the last couple of years there is now an approach to setting premiums which, for most building categories, is setting premiums adequate to an appropriate assessment of what the risk is going to be of claims cost. That situation is not yet in place for multi-unit dwellings being constructed. That is given that they are three storeys or less, or multi-unit renovations. The full break-even premium is not yet being charged and that is being gradually implemented.

The Hon. TREVOR KHAN: Can I ask a question from that?

The CHAIR: Yes.

The Hon. TREVOR KHAN: Why not? That is not a criticism.

Ms DONNELLY: I think it is a good question. icare NSW has in place its own plan with its shareholder, minister and treasurer about what point it proposes to reach the break-even premium. It obviously needs support from Treasury for the funding to cover the shortfall.

The Hon. TREVOR KHAN: How much of an increase is required in premiums to cover—

Ms DONNELLY: And that is exactly the point, because we have principles in place which regulate premiums, in which we are balancing them being fully funded for the liability, balancing a fair price for the risk and also volatility and the rate of increase. It is being planned over a period of a few years.

The CHAIR: Ms Donnelly, because building standards are so low, because nobody knows what the final building quality is, all of the private insurers have exited the market. There is no private insurer willing to write a policy for New South Wales multi-storey buildings. That is right, is it not?

Ms DONNELLY: There is no other private insurer at the moment.

The CHAIR: And it is because building standards are so low that nobody is willing insure the risk, because you write a policy and you might end up having to pay out a \$2 million claim to fix up the waterproofing or the fire safety or the plumbing or the electrical. That is why private insurers pulled out, is it not?

Ms DONNELLY: I think it is a fair point to say that the amount of uncertainty means that it is hard for an insurer to have a fair price for risk. I think there are also building and economic cycles that play a factor in that.

The CHAIR: What was the deficit of the scheme in the most recent financial year?

Ms DONNELLY: In the most recent financial year—I am happy to take that on notice—I believe more like a figure of around \$40 million, 43, 44.

The Hon. TREVOR KHAN: Chair, I am not trying to cut it off, what time are you intending to go to?

The Hon. ROBERT BORSAK: Quarter past 11.

The CHAIR: Quarter past, maybe 20 past 11.

Ms DONNELLY: I am happy to confirm that figure.

The CHAIR: What is accumulated deficit in the scheme then?

Ms DONNELLY: I will take that on notice and check with icare.

The Hon. ROBERT BORSAK: In 2018 \$204 million worth of net claims with an underwriting loss of \$139 million, are you saying that things are going to get better in 2019?

Ms DONNELLY: What I would say is the latest year of which we have completed analysis of the data, \$132 million in premium was collected and \$55 million was paid out in claims. However, my officers are working through analysis of the most recent year. Our preliminary sense is that the trend is that claims are increasing.

The Hon. ROBERT BORSAK: That is right. Your claims may be \$50 million-odd but what is the unexpired risk?

The CHAIR: It is the tail you have not factored in yet.

The Hon. ROBERT BORSAK: It is the tail.

Ms DONNELLY: Well, the tail certainly is—going back to my earlier comments where Treasury has needed to effectively underwrite.

The Hon. ROBERT BORSAK: Is that still working on a six-year coverage period? Is there any thought of increasing that to 10?

Ms DONNELLY: That would be a matter for government policy. I am not able to comment on this point.

The Hon. TREVOR KHAN: With regard to the perception or more of an increase in claims, are you able to segment where that perception of increase of claims is coming from?

Ms DONNELLY: Not for the most recent analysis that my officers are undertaking, but what I can say for the prior year, where we have done full analysis, the first this is that about 95 per cent of claims arise because the builder is insolvent. In terms of the kinds of defects, the top three defects that we see are around masonry and brickwork, external rendering and waterproofing.

The Hon. TREVOR KHAN: Are those claims that are coming in the area of one storey residences, detached residences or are the claims relating to up to three storeys?

Ms DONNELLY: The highest risk category is the multi-storey dwellings. Single detached and even duplexes are lower risk.

The Hon. SCOTT FARLOW: Just on that, in terms of the increase in claims, we have seen an increase in building activity over recent years. Are we seeing that increase in claims as a percentage or is it an increase in the total number?

Ms DONNELLY: Again, I want to couch it as preliminary because we have only just seen the end of the year. We are looking through the data, but I have asked my team to give me what they are seeing. The trend is actually in a reduction in the number of policies issued, but an increase in claims.

The CHAIR: That is a particularly troubling trend, is it not?

The Hon. ROBERT BORSAK: That says it all.

The CHAIR: Fewer policies, more claims is a particularly troubling trend. It does not sound like it is getting better, it sounds like it is getting worse—fewer policies, more claims, it sounds worse. Ms Donnelly?

Ms DONNELLY: I think we have to take care to understand that the claims are not necessarily related to the policies taken out in that year.

The Hon. SCOTT FARLOW: There is a lag effect.

Ms DONNELLY: But if you understand the economic cycles, what it would mean is that there are less building commencements that are covered by the scheme. An increase in claims may relate to insolvencies of builders for work completed in prior years.

The Hon. TREVOR KHAN: Are the increases in insolvencies identifiable by type of dwelling? For instance, are the insolvencies greater in multi-storeys than they are in single detached dwellings? Is there some form of characteristic?

Ms DONNELLY: Firstly, what I would say is I am not sure that there has been an increase in insolvencies. If you go back sometime, it has been hovering around 94 or 95 per cent over my time involved in the scheme.

The Hon. TREVOR KHAN: My apologies, I misstated.

The CHAIR: Claims related to the builder having disappeared.

Ms DONNELLY: I might take that on notice, if you do not mind.

The Hon. TREVOR KHAN: Sure. With more claims relating to multi-storey than single detached dwellings, have you done an analysis as to why? I could potentially think of a couple of reasons why, but if there are more claims with regard to buildings up to three storeys, which are not particularly amazing engineering structures, why there would be more claims with regard to those buildings?

Ms DONNELLY: I am happy to take that on notice as well. There are more dwellings involved.

The Hon. TREVOR KHAN: True, that might be the answer.

Ms DONNELLY: And therefore the amount of potential claims cost would be higher.

The Hon. ROBERT BORSAK: Can you take on notice too whether you can break it out on a table as to where the claims come from? In other words, are they foundations related, are they cladding related, are they electrical related?

Ms DONNELLY: I can tell you that my latest advice is that there are none that are cladding related. As I said, the top three are related to masonry and brickwork, exterior rendering and waterproofing. I can give you more detail about the types of defects.¹

The Hon. ROBERT BORSAK: Can you give us more detail on that, please.

Ms DONNELLY: Yes.

The CHAIR: Before we move off this, I will ask if you can take on notice the provision to this Committee of the full flammable cladding register.

Ms WEBB: We will take that on notice as well. Although, the register itself is with the of Planning, Industry and Environment department.

The CHAIR: You may have to ask them.

Ms WEBB: We will.

The Hon. TREVOR KHAN: Are you telling us you cannot provide the information?

Ms WEBB: I am not saying that, I am just explaining that we may have to consult with another agency.

The CHAIR: I understand it is with Planning.

The Hon. TREVOR KHAN: I accept that, but it just becomes a question that if you come back in 14 or 21 days and say, no, cannot give it, then we have to issue summonses, so we just need to know.

Ms WEBB: We will find that out directly. Chair, I have been called to give evidence at the inquiry into the late night economy at 11.15 a.m. I wonder if you could allow me to leave now? I will be coming on Friday with the Building Commissioner.

The CHAIR: Yes. On behalf of the Committee, thank you very much.

(Ms Webb withdrew.)

The Hon. COURTNEY HOUSSOS: How many inspectors do you have in total in the fair trading department for the building sector?

Mr DUNPHY: In terms of staff who look after building services, we have over 200 staff. In terms of particular types of inspectors, there are different inspectors for different areas. For building inspectors who look after the home building legislation, there are 20 staff in the building investigation team. We have another 23 staff in the dispute resolution and inspection branch. In the building professionals group we have a team of 27 staff who provide services. They are not all inspectors, but, as I mentioned, there are seven auditors who carry out the inspection functions in the audit team. We have another team of about 10 staff who also carry out the investigations in that area as well. On top of that we also have a plumbing service, which includes our plumbing inspectors. We have 33 inspectors who carry out plumbing inspections and direct site inspections. They carry out over 30,000 inspections across that area per annum. In the electrical and gas safety area we also have 14 inspectors who provide services around both gas and electrical safety. That is the full range of resources that we have.

The Hon. COURTNEY HOUSSOS: How many of those people are conducting inspections on the ground? You said there were 14 in electrical and gas, 33 in plumbing, and 20 in building?

Mr DUNPHY: That is right, yes. All of those staff will be conducting inspections on the ground. They are all able and capable of doing site inspections and they do in fact do those inspections.

The Hon. COURTNEY HOUSSOS: So that is it? The 20, the 22 and the 14 is the total number of inspectors on the ground?

¹ In correspondence to the Committee received on 29 August 2019, Ms Carmel Donnelly, Chief Executive, State Insurance Regulatory Authority, clarified the following:

Having reviewed the data table I was referring to at the hearing, I have identified that I mistakenly reported one of the top three as exterior render cracking instead of external balcony waterproofing ... I would also like to clarify that in my response above I was referring to flammable cladding.

Mr DUNPHY: No. I said there are 23 from building services, who are the building inspectors. There are another 33 plumbing inspectors, who carry out on-the-ground inspections. There are another 14 electrical and gas inspectors. Then there are another 17 inspectors in the building professionals team, who also carry out inspections.

The Hon. MARK BUTTIGIEG: Is that enough? Given the quantity of work going on in New South Wales and given the state of the industry and the reports we have been hearing, do you think there are adequate resources to carry out your functions?

Mr DUNPHY: As with all regulators, we take a risk-based approach. We use the data to prioritise what areas are most important. We cannot go out to every site. It would not matter how many inspectors we had; we could not go to every site on the ground. So it is really important to focus on the areas of importance. A risk-based approach will target the highest risks and we use that as a means of working within the resources that we have.

The Hon. TREVOR KHAN: Can you tell us what the highest risk is?

Mr DUNPHY: The highest risk would be major defects, risks to safety, non-compliance and gross negligence.

The Hon. COURTNEY HOUSSOS: Sorry, we have really limited time. I am going to put some more questions on notice to you on this particular issue. In terms of line reporting, do those inspectors report to you?

Mr DUNPHY: Some of the inspectors do. The building professionals inspectors, the plumbing inspectors and the gas and electrical inspectors report through to me. The building inspectors that administer the building licencing and all of the trades licencing report through to the Executive Director for Operations of Fair Trading.

The Hon. COURTNEY HOUSSOS: Like I said, we have to end here. But would be able to speak to the Sydney Olympic Park Authority to produce the project delivery agreement between the Sydney Olympic Park Authority and Ecove? If you would like some further details the secretariat will be able to provide them for you. I would like to foreshadow that I did give notice for a Standing Order 53 call for papers on this last week and if that is not able to come forward then the Committee will consider all of the options at our disposal.

The CHAIR: I assume you will take that on notice, Mr Dunphy?

Mr DUNPHY: I will take that on notice.

The Hon. COURTNEY HOUSSOS: That is fine. I understand that it is not to them directly, but they are here on behalf of the New South Wales Government.

The Hon. TREVOR KHAN: I am just wondering if Mr Dunphy is the appropriate person. Is what you are taking on notice a matter that you can respond to?

The CHAIR: The Committee will formalise this in a request to the Minister. That is the way we will go.

The Hon. ROBERT BORSAK: Ms Donnelly, I have one quick question before we wrap it up. I see that there was significant underwriting losses in 2018 in relation to the icare scheme that supports the Home Building Compensation Fund business. Is there any business in any private market anywhere in the world that would be prepared to cop some of this risk, or is this just straight out a government lender of last resort situation?

Ms DONNELLY: That is a very fair question. Apart from other reasons, it is important to get the premiums to break even so that it is a fair playing field for new entrants. What I can say is that there are now a number of the building projects types where that is the case, and where the premiums that are being charged by icare would fund the projected liabilities. We have had some interest from potential providers in the scheme.

The CHAIR: We have run out of time. I am sure we could have had another hour of question. It may be that we invite you all back, hopefully with the Minister, to answer to some of the issues that arise in the submissions that occur from here on in. On behalf of the Committee, I thank you all for your attendance today.

Ms WEBB: You are most welcome.

Mr DUNPHY: Thank you.

(The witnesses withdrew.)

TERRY JONES, Long-term Strata Committee Member, sworn and examined

ALTON CHEN, Owner, Mascot Towers, affirmed and examined

VIJAY VITAL, Owner, Mascot Towers, sworn and examined

RICHARD DEVON, Owner, The Landmark, Charlestown, sworn and examined

The CHAIR: Thank you for attending. Now is an opportunity for each of you to give us a short summary, if you choose. We will start with you, Mr Vital.

Mr VITAL: I have been living in Mascot Towers for 10 years. Similar to any other Aussie family, when I bought the property I validated every document and went through all the legal requirements. I pay my taxes; I pay my rates.

The Hon. ROBERT BORSAK: Excuse me, Mr Vital. Will you please talk into the microphone? It is voice-activated, so if it does not hear you, we do not hear you.

Mr VITAL: Similar to any other Aussie family, I have been paying all of my taxes, rates and all my due payments. This instance of me buying this property 10 years ago—we found nothing defective, so we then moved in. We have been fixing defects for 10 years because we engaged engineers as well as builders, trying to get them to take responsibility for what they have done. They have had limited liability in what they have done. We have had higher fees compared to the neighbouring buildings and we are constantly fixing defects. Some of these defects are due to substandard materials that they have used. Some of them are due to negligence and because they have not been doing the right thing—to make small profits, I would imagine.

This has caused a lot of trauma in the last two months because we were evacuated, the reasons for which we do not know. Some of the reasons for identifying these root cause has been delayed because of various permits that have not been provided to the engineers. We have insurance, but we cannot claim any of it until we know the root cause. Recently, we have been given a \$10 million levy which I am pretty sure not all of us can pay. That has been a huge financial liability for us. We still have not accounted for what is in the future, what is the additional insurance that we might have to pay and other costs that have not been accounted for. I stand here as a parent as well. My daughter asked me, "When can I go home?" It's hard. I'm sorry.

The CHAIR: It is okay, Mr Vital. You can take your time.

Mr VITAL: I have done things that are right. And we shouldn't be accountable for it. I'm sorry.

The CHAIR: We can come back to you, Mr Vital, in questioning. Thank you for that. Mr Chen?

Mr CHEN: Sure. We purchased a property, I believe, about five years ago. It was still under warranty, I believe, then. Like many other lot owners, we have done our due diligence; we went through every single page of the strata report and we found no fault. Now, fast-forward that to five years later. On 14 June, we were all forced to evacuate under very short notice. Some of us were only contacted via email. It was a Friday evening, and that was on 14 June. Almost two months later now, we were not told in any way—no particulars were provided to us in relation to the root cause of that evacuation.

We were utterly grateful for the support of Fair Trading in providing us with an assistance package now, but also on the same token in my view that is truly just a temporary relief. Not only are we facing this \$10 million bill, but also as I understand it that is only one of the four stages that we are looking at. So we are actually looking at tens of millions of dollars. From a lot owner's perspective, we have done all we can. We have done all we should as a law-abiding citizen. A lot of us were not investors; this is not the case where this is my fifteenth investment property. For a lot of us this is the only place that we have that we call home. We do not know when we can go back. A lot of uncertainties are right in front of us. We do not know when we can go back. We do not know how much we are in or how much we need to pay for in the future. If that assistance package stops then a lot of us will have to pay mortgages for a place that we cannot live in. At the same time, we have got to pay for the alternative accommodations. And at the same time, there is going to be a possible or quite likely increase in our insurance premium. Now, lawyers, they cost—if we are going to go down that track, that is going to cost a lot of money as well.

As I understand it, developers and builders are protected by a limitation period. They are protected by this seven-year warranty period. Limited liability protects the companies—what about us? Where is our protection? We pay our tax. We pay stamp duty. We have done everything to work hard to save up, then this is where we are. There are a whole bunch of uncertainties. We do not know when we can go home. We do not know

how much liability there is right in front of us. It is not as simple as, "Oh, we just go bankrupt," because that does not solve the problem. A lot of us cannot afford to go bankrupt. I think this is really a situation where we would need the Government's support. If the Government is motivated to boost the economy by encouraging builders and developers so that they can do all these projects, perhaps some recourse should be provided to end consumers, lot owners like us.

The CHAIR: Thank you, Mr Chen. Mr Jones?

Mr JONES: All right. First of all, thanks to the Committee for looking into this matter. It is long overdue. Thanks for the opportunity to be here as a witness. My story is going to seem very tame compared to these poor guys sitting on my right. I have to say that in my view the recent spate of major structural problems in apartments has been predictable for a number of years because for a number of years all of the regulations and controls on the building industry have been successively watered down to the point where something like this was inevitable. I really feel for them, so if I can contribute something to helping resolve this then I would be very happy.

My background is that I have experienced 27 years of apartment living in two different apartments. The building size in both those cases was relatively small and low-rise, and they were relatively simple buildings by today's standards. Just to give you an indication of what the impact of watering down these controls and regulations has been, the first building was built in 1981. The second one was built in 2000. I can tell you that in the 13 years we lived in the 1981 building, there was one instance where we had to spend a significant amount of money—I think it was about \$10,000—rectifying a construction defect. We moved into that building when it was already 10 years old, so there were a few other problems that has been rectified under warranty previously.

By contrast, in the second building by the time we moved out in 2017 we had spent hundreds of thousands of dollars on rectifying straightforward construction defects. We had a very unsatisfactory experience trying to get repairs done in the remaining warranty period when we moved in. The last three years we lived there, well over 50 per cent—in fact, I think about 70 per cent—of our sinking fund expenditure was still being spent on rectifying construction defects. And it seemed that previously undiscovered defects were coming up at about the same rate as we were fixing the ones we knew about. So we just did not seem to be making any progress. I have to say, despite the fact that I would regard myself as probably better equipped to deal with negotiating over warranties and managing repairs, I found it a very frustrating and at times very stressful experience.

I forgot to mention, by the way, in those 27 years that I lived in an apartment I served on the executive committee for 25 years as treasurer, secretary or chair. I was really pretty heavily involved in all of it. I think the frustration and stress was a significant factor in us finally deciding to give up on apartment living and unfortunately that is not an option for a lot of people. Every aspect of the regulation compliance regime from the national construction code down, seems to have been directed at reducing initial construction cost with no regard for quality or fitness for purpose of the end result, the lived experience of those who have to live there and the whole of life costs.

I would like to mention some of the stressors that come on residents are pretty obvious. We had the experience of having for nine months with two unusable rooms because they got flooded and it took that long to organise getting the drainage fixed and carpets replaced and all that stuff. There are some other non-obvious impacts. I think it would be fair to say that in the time we lived in that building virtually all, if not all, disputes and disagreements either between owners or between owners and the owners' corporation had as their root cause a construction defect in the building. It is not only the stress of having all those problems, living with them and getting them fixed, it is also the discontent it sows within the community.

If the objective of all of this was to increase productivity then in my view it was both misguided and counterproductive because the amount of money and resources tied up in fixing these defects is at least two or three orders of magnitude bigger than the cost of doing it right in the first place. I am sure those financial and economic resources could have been better directed somewhere else in the economy other than fixing up a job someone could not be bothered doing right in the first place. I think the most critical issue here is the issue of the way the private certification regime works. Having the builder or the developer make a decision as to who is going to certify a building is compliant is a clearly obvious conflict of interest. To be quite blunt, I cannot imagine how anyone ever thought it would result in a compliant outcome.

There are lots of other problems, some of which I have highlighted in my submission. I do want to go back to the issue these people have raised of the insurance because that is a really big issue. This has the capacity to ruin people's lives. It is not acceptable that there is effectively no protection from shoddy building for apartment dwellers. In conclusion, I thank the Committee for looking into this and I hope their deliberations and the

information they gather during this exercise will result in some improvement in the lives of people who live in strata property.

The CHAIR: Mr Devon, could you give us your position: home owner or apartment owner?

Mr DEVON: I am an apartment owner in the Landmark at Charlestown. I have actually owned two units there. I currently own one.

The CHAIR: Did you want to give a brief opening statement?

Mr DEVON: I will. I endorse what Mr Jones has said and I understand the problems of these people. Our building is not exactly falling down but just about every facet that I have heard here this morning we have been affected by. Apart from the over three storey business the 2 per cent bond in our case is totally inadequate. I have been at the pit face with this. In our building there are 59 residential and there 56 against three of us in trying to create the remediation. One of those three is now deceased. I do not know if it has been in the press, the poor lady passed away. There are two of us left. We have been to council, we have been to private certifiers, we have spoken to insurance, we have spoken everywhere.

Another thing that is bugging me is that people are selling or attempting to sell units in this place and passing on this problem of remediation to buyers and the material fact is not coming out with lawyers and with real estate agents and we have evidence of all this. The 56 people who seem to vote against us three do not understand or do not want to understand what common property is. In other words, I have a unit on the seventh floor but the ninth floor is the really bad floor. Apart from what is inside the paint work we all own that and they have not been willing to address that adequately. Because of all the facets here I do not want to go on and on, I would sooner take some questions. Because I have been involved in a lot of this I would like to stay connected with this Committee if I can help in any way down the track.

The CHAIR: Thank you, Mr Devon. We have had the benefit of your submissions.

The Hon. COURTNEY HOUSSOS: I thank all of you for sharing your personal experiences with us today, in particular Mr Vital and Mr Chen. We cannot imagine what it was like for you to be forced out of your homes and we really appreciate your coming here and sharing that with us today as upsetting as it clearly is for you. I am interested, Mr Jones and Mr Devon, what assistance has been given to you by the New South Wales Government or its departments in grappling with the issues? I am interested particularly around rectification works and what support has been provided to you?

Mr JONES: I think in summary the answer to that in my case is very little. We did contact the Department of Fair Trading on a few occasions and most of the conversations seemed to end up with, "You should seek legal advice", which is not particularly helpful.

The Hon. COURTNEY HOUSSOS: Absolutely.

The Hon. MARK BUTTIGIEG: Mr Jones, you gave us a snapshot of your historical experience from 1980 through to 2000 and something, which is an interesting timeframe because it encapsulates two different regimes. What would have happened under the old regime?

Mr JONES: I am not probably well qualified to answer that because we did not move into the first building until after the warranty period had expired. From what people in the building told me I gathered something done about warranty issues seemed to be a bit easier than it was for us.

The CHAIR: I thought the thrust of what you said earlier was it was just built better.

Mr JONES: Yes, that is the basic story, you are quite right. The 1981 building was simply better built. As I said in my submission, one of the reasons for that is that when we started looking into the warranty issues in that building I went to the council and got out the original plans that had been submitted. There were things on those plans that bore no relationship to what was actually built and nobody in the certification process apparently even picked that up. As I said in my submission, the impression I got is that the certification process, such as it was, was here is a letter from the water proofer saying all the water proofing has been done to AS whatever. Done that, tick, move on.

The Hon. MARK BUTTIGIEG: Tick and flick, no proactive approach, reactive approach?

Mr JONES: Correct.

The Hon. COURTNEY HOUSSOS: Mr Devon, did you have anything to add?

Mr DEVON: Yes, two things. In our instance we did end up in fair trading and an agreement was made, there was some sort of mediation where all parties signed to push on with the remediation as per a BAM report. The signatures were all there. At our AGM in November 2016 it was passed and very shortly after they called for an EGM, this is the 56 people and on 24 January 2017, a month or so later, they rescinded the six motions that they had agreed to to fix the place. The other problem I have had with local government private certifiers is trying to get some as built plans out of everyone because our level 9 was totally changed three times after approval. It was built with James Hardy panels, which were installed incorrectly, two inches into the concrete instead of two inches above. Plus a lot of other things. There are areas which were not on the original plans on one of the units, 904. We have been trying to get as-built plans. We get funny letters back from the private certifiers and no-one will take responsibility for anything.

The CHAIR: It is that falling between the cracks that people keep referring to. They do not know whether Fair Trading NSW is there to help or the NSW Civil and Administrative Tribunal [NCAT] or their lawyer or the Department of Planning and Environment or the certifier or the council. Mr Chen and Mr Vital, you are living this now, where are you going to get support?

Mr CHEN: I do not really know. I do not really know the answer to that. My understanding is that in relation to the defects that led to the evacuation, in my personal view, there was a big, big question mark there. We do not know what the actual cause is. There are guesses but in terms of commencing any legal proceedings against any particular defendants or parties, I do not think we are at that stage yet.

The Hon. TREVOR KHAN: Because you do not know what the underlying cause of the failure in the building is.

Mr CHEN: Correct. That is so and it has been two months.

The CHAIR: Was it your evidence that you still do not even know the fundamental reason why the evacuation order was made on 14 June?

Mr VITAL: That is right. We have paid a \$1.1 million levy but we still have not got the cause of the thing. It is pending some of the permits that need to be provided, as well as the drilling works that need to be done.

The Hon. SCOTT FARLOW: Who was the evacuation order issued by?

Mr VITAL: We are not sure.

The Hon. TREVOR KHAN: But you do know that the reason for the evacuation was the building was unsound. That much we know, do we not?

Mr VITAL: That is right, yes.

Mr CHEN: Yes.

The Hon. TREVOR KHAN: We just do not know why the building is unsound.

Mr CHEN: Correct, yes.

Mr VITAL: That is right.

The CHAIR: It is pretty hard to fix it then, is it not?

The Hon. TREVOR KHAN: I think we are all in agreement here, Chair.

Mr CHEN: I guess to put it simply, I think to me is that all we know, all we were told was really, the results. We do not know what happened before these results occurred.

The Hon. TREVOR KHAN: It is something to do with the foundations, I take it we can go that far? That is, there has been some failure of the underpinnings of the building.

Mr CHEN: Yes.

The Hon. TREVOR KHAN: The question is whether it is subsidence of some sort beneath the building or whether it is something else.

Mr CHEN: Yes.

The Hon. TREVOR KHAN: I am only relying on what has been reported in the press, but it is not a complete mystery. Again, I am not excusing it in any way, there is some basic knowledge of what has happened in terms of the structural deficiency or a structural failure, I will put it that way.

Mr CHEN: Correct.

Mr VITAL: Mascot Towers has been one of the early buildings in that area. There have been other buildings that have come up, escalations that have happened. We have reported vibrations to the strata, as well as the councils on various occasions. We are not sure about the cause. They are doing some drilling work to find out the root cause of the water table underneath the building as well.

The CHAIR: Who did that initial investigation and gave the notice to suggest it was unsafe and the evacuation notice? Who did that initial work and who gave the notification?

Mr VITAL: 24 hours before the evacuation we were told that we might have a partial evacuation because of some cracks that are showing up.

The Hon. TREVOR KHAN: By whom?

Mr VITAL: By the—

The Hon. TREVOR KHAN: Strata managers?

Mr VITAL: Strata managers, yes. I found out through my neighbours that we had to evacuate. We were given less than two hours to evacuate. When I went down, I told my family to take one suitcase each, throw it in the car, because we did not know whether we had to evacuate. When I went down I could get a notice from one of my neighbours saying that my unit was to be evacuated. We went out, parked the car in the street, trying to figure out what needs to happen next.

The Hon. MARK BUTTIGIEG: What about recourse from the Government after the fact, what is your impression of how that was handled? This is a major issue, you have been evacuated at short notice without fully being availed of all the facts, what was the response from departments and government in respect of compensation, alternative accommodation and all the rest of it?

Mr VITAL: On the first meeting, Fair Trading provided us with temporary accommodation on a loan basis provided we had insurance claim from other means, that we would have to pay them back. In terms of engineers, I think—

The Hon. MARK BUTTIGIEG: Was there an application process for that that you had to go through? Was it difficult to organise all that or how did that all work?

Mr VITAL: I think it took about a month for them to go through—

The Hon. MARK BUTTIGIEG: A month?

Mr VITAL: —to go through the paperwork.

The Hon. SCOTT FARLOW: But you were in accommodation before that, is that correct?

Mr VITAL: Sorry?

The Hon. SCOTT FARLOW: You were in accommodation before that?

Mr VITAL: I had paid my own accommodation before that.

The Hon. MARK BUTTIGIEG: You paid for your own accommodation?

Mr VITAL: That is correct.

The Hon. MARK BUTTIGIEG: So, there was a month delay between when it happened and when you finally got relief accommodation that was footed by the Government? You had to pay in the meantime for that month?

Mr VITAL: That is right, we had to sign off—

The CHAIR: Take us through in your own time, Mr Vital, what happened and then Mr Chen, you might too, rather than us continuing to interrogate you. Take your time and tell us what happened.

Mr VITAL: Sure. So, after we got evacuated, we had a subsequent EGM meeting where they had asked us to pay an extra levy for \$1.1 million to find out the root cause and to pay because the emergency fund pretty much—the sinking fund was spent on emergency. So, there was a huge bill to pay. So, we had to go through an EGM to vote against the \$1.1 million and the reason for us, from my terms, find the root cause so that we find out what went wrong. Subsequent meeting we were informed that the subsequent EGM, I think two, three weeks later, I could come back to you on the timeframe, we had another EGM where Fair Trading came in and said they would

provide us assistance but they had to go through paperwork that had to be signed by the strata committee or the owners corporation, as well as the individual owners. So, that probably took a month before we started.

The Hon. MARK BUTTIGIEG: That month where you were out of pocket, was that ever recompensed?

Mr VITAL: Yes, they backdated to 15—the day after this evacuation.

The CHAIR: Mr Chen, what has been your experience and what is happening now?

Mr CHEN: I am happy to adopt Vijay's position and I think in relation to Fair Trading's assistance, we are really grateful for what we have been provided with. Yes, there were lead times but I understand things do take time. But I guess a lot of owners concern at this stage really is about this question: When can we go back? Talking about root causes, talking about who are the defendants, who should be held accountable, in my eyes it is not as pressing as the question of—

The CHAIR: When can I go home?

Mr CHEN: —when can I go home? How long am I going to stay in a serviced apartment for, which is probably half the size of my apartment. I think it is a fair question to ask, especially from an owner's perspective, where you have done literally nothing wrong to deserve any of this.

The CHAIR: Before you bought these apartments, you would have got your lawyers to do all of the appropriate searches, search the title, search the strata committee records, they would have looked in detail—

The Hon. TREVOR KHAN: No, they would not have, Chair.

The CHAIR: Did they do that search of the strata committee minutes and did anything show up in those preliminary searches before you bought the property?

Mr CHEN: Not in my case, not in my case, because as I understand, it is called the evacuation defects, it actually happened after the—it is actually outside the warranty period, so outside the limitation period, the 10-year stop, where it really left us at a very awkward position in terms of suing people, and that's my understanding at that stage.

The Hon. TREVOR KHAN: Can I just correct you, Chair? As a lawyer your obligation is not to do an inspection of the strata records; your obligation at common law is to recommend that the search be obtained. A lot of people would not get them done because of the expense.

The CHAIR: Did your lawyers get a search of the committee records? You often get a report about the committee minutes as part of your conveyance.

Mr VITAL: That is right. When I bought the property there was no defect log. Since we came in we started the defect log because the initial strata management company was appointed by the builder itself. We had to change some of those because we wanted to do the right thing fixing all the defects.

The Hon. TREVOR KHAN: Sure.

The Hon. ROBERT BORSAK: Mr Vital, you say you are out of the building now. Are you still paying strata levies?

Mr VITAL: Yes.

The Hon. ROBERT BORSAK: You are paying strata levies?

Mr VITAL: I am paying the strata levy. I am paying—

The Hon. ROBERT BORSAK: And obviously you are paying rates on the building to the local council—

Mr VITAL: Yes, I requested for deferred rates. I do pay rates.

The Hon. ROBERT BORSAK: I suppose it is the same for you, Mr Chen?

Mr CHEN: That is correct.

The CHAIR: And a mortgage.

The Hon. ROBERT BORSAK: And a mortgage, of course.

Mr VITAL: And a mortgage.

Mr CHEN: Yes.

The Hon. MARK BUTTIGIEG: On a building that you can't avail the use of.

Mr CHEN: That is the case.

The Hon. COURTNEY HOUSSOS: I go back to Mr Chen. You spoke about the notice of the evacuation order. You said some people only emailed.

Mr CHEN: Yes. I was given a text message because it all happened so quickly. I do not think it is adequate at all. Something that I want to add is that when I purchased the property I heard that perhaps it was not my lawyer's job to go through every single page of the strata meeting reports. I went through every single page myself and nothing really flagged—well, not to this magnitude. What we are talking about today is a structural defect. It is not something that is merely cosmetic. It is not something that can be done with 500 bucks, \$20,000. We are talking about tens of millions of dollars that we are facing here.

The CHAIR: Of course, you cannot see those structural defects when you go and do your own inspection. If it does not appear in the minutes of the strata committee meeting you walk in as an innocent and then find yourself with a \$10 million collective liability.

The Hon. TREVOR KHAN: No, that is the first phase.

The CHAIR: Yes, well, starting with a \$10 million collective liability. You do everything right but because building standards have been so low you end up paying the cost.

Mr VITAL: I add that we used to pay strata higher than most buildings in Mascot because we were fixing defects. I used to be proud of us fixing defects. As you would know, the engineers have gone under; so has the builder. So there is limited liability for them—

The Hon. MARK BUTTIGIEG: So you knew the building was substandard by the quantum of levies you were paying to make good on what was already apparently a shoddy building to start with?

Mr VITAL: It looks like that.

The Hon. MARK BUTTIGIEG: Yes.

The Hon. SCOTT FARLOW: So just to that point, Mr Vital, when did you first learn of defects in the building? When did that defect log commence?

Mr VITAL: We started looking into defects in 2011. We appointed an engineer to go through—

The Hon. SCOTT FARLOW: Were defects these minor defects or were they substantial defects in the building's construction?

Mr VITAL: There was a whole bunch of defects highlighted. The hot water system was substandard—it took four minutes for hot water to come through. It was not built to handle 131 units so we had to replace it. There were other defects that we had to fix throughout the building. In terms of major structural issues, those were not highlighted until we had to evacuate.

The Hon. SCOTT FARLOW: Mr Vital, you mentioned before that the developer had its own strata manager for the building up to a certain point in time. Is that right?

Mr VITAL: I think the developer appointed a strata manager. I do not know whether they work for them but—

The Hon. SCOTT FARLOW: Okay.

Mr VITAL: —we know that the strata manager was there.

The Hon. SCOTT FARLOW: Were any defects highlighted during that time, or was it only once that strata manager moved on and there was a different strata manager appointed that the defects were highlighted and brought to your attention as an owner?

Mr VITAL: One of the reasons we moved over strata management was to do the right thing of fixing the defects.

The Hon. ROBERT BORSAK: Mr Vital, if the Premier were here what would you be saying to her right now?

Mr VITAL: I think this is much more than what you guys can probably think. There are a lot of underlying things we are not aware of—what would it cost, how do we get back and who is responsible for it. At this stage insurance will not stand up for it until they know the root cause. If I finish off this defect is there anything lying underneath it? What is the guarantee on my building if I were to fix all these defects?

The Hon. TREVOR KHAN: Mr Vital, I can understand why an insurer would be interested in seeing who they can in a sense join in subsequent proceedings. However, if I had a car that was burnt out on the side of the road I would expect my insurer to pay for the replacement of my car before they found the rat who burnt my car out. Why should an insurer that has been receiving your premiums be entitled to delay until somebody else is found to take responsibility for it? It seems to me to be contrary to why we all take out insurance. I have a unit down in Sydney so I am somewhat sympathetic to your position—what is my body corporate paying for if it is not to spread the risk? Do have an idea as to what these insurers are doing?

Mr VITAL: Based on my knowledge we have applied for insurance, which has been rejected. We are led to believe that until we know the root cause we cannot claim insurance.

Mr JONES: My impression was that insurance—you are talking about the insurance on the building?

Mr VITAL: Building insurance, yes.

Mr JONES: But that does not cover building defects.

The Hon. TREVOR KHAN: Well that is assuming that it is a defect, isn't it?

Mr JONES: Yes. Presumably they are saying they will not pay out because they are not sure whether it is a defect or due to some other cause.

The CHAIR: Yes. You may well have statutory limitations as well, in terms of the time at which you make the claim. Meanwhile you are trying to find out whether the builder had insurance and if you can succeed against the builder's insurance whether the engineer had insurance. But they have both gone into liquidation—they have disappeared, is that right?

Mr VITAL: That's right.

Mr JONES: Often they have. Just to comment about the warranty insurance, there was something that came up in the discussion taking place before we were called and I think it is a good point. In Queensland the insurer is the first resort; here it is the last resort if the builder goes bankrupt. Otherwise you are still stuck with trying to twist the builder's arm getting it to fix the defects. Believe me, I know from personal experience that they have lots of ways of delaying and frustrating that process.

The CHAIR: That is assuming you have got protection.

Mr JONES: Yes.

The CHAIR: For anything built after 2003 that is four storeys and above—

Mr JONES: You don't have it, yes.

The CHAIR: —you do not even have that.

The Hon. MARK BUTTIGIEG: There is obviously the inconvenience, the stress of having to go through trying to sort all this stuff out, the dislocation—what about the future value of the property? Has anyone discussed that with you and the fact that it may be devalued? Has any compensation has been offered or thought about? Presumably it will affect your capital gain on these properties.

Mr CHEN: I do not know if there is going to be a gain at all.

The Hon. ROBERT BORSAK: Capital loss.

Mr CHEN: Perhaps then what we all should have done is to invest in a caravan, because if it was burnt down at least it would be covered by the insurance. From my point of view, it seems that we owners are picking up the aftermath and we happen to be the ones to pay all the bills while developers and builders have got all these protections—limited liability company, they have gone into liquidation, or they have got an insufficient insurance policy.

The Hon. ROBERT BORSAK: Has the bank come to you and asked for any further information in relation to the mortgage payments you are making?

Mr CHEN: In my case, no, not yet.

The Hon. ROBERT BORSAK: Mr Vital, has your bank been near you anywhere?

Mr VITAL: My bank offered me a deferred payment; however, they would not defer the interest. So it was more liability rather than adding value.

The Hon. ROBERT BORSAK: So they have not come to you and said, "Now that your asset has been depreciated by 50 per cent to 60 per cent, pay the difference back."

Mr VITAL: Not yet.

The Hon. MARK BUTTIGIEG: So no discussions have been had between you and the government agencies about possible compensation for capital loss?

Mr CHEN: In relation to capital loss, no, we have not reached that stage yet. I guess most of the owners are still traumatised by the question of when we can go back.

The CHAIR: Can I ask you what it means in terms of an individual levy? We talk about a \$10 million levy for the building. What is that going to mean in terms of individual unit holders? How much are you looking at?

Mr CHEN: If it is \$1 million then it is about \$8,000 per lot. If it is \$10 million, you would multiply that by 10, so it would be \$80,000. That is only one stage out of the four. If you multiplied that by a factor of 2.5 it would be—

The CHAIR: Hundreds of thousands of dollars.

Mr CHEN: Correct.

Mr VITAL: And that is not including the insurance or other services that will go to a premium.

The CHAIR: If the Committee concludes that this experiment with privatisation and deregulation has been a failure by the Government to protect individual home owners, as individual home owners who have paid the cost, do you think the Government should have an obligation to help you out financially over and above just paying your rental?

Mr CHEN: Of course.

Mr VITAL: Absolutely.

The CHAIR: If the Government creates the mess, surely it has a responsibility to go at least some of the way to help you recover from it, rather than just see you drown financially?

Mr CHEN: Yes.

Mr VITAL: That is what a common person like me—I am not an engineer who can take care of the building or anything—pays people to do. If that is not good enough where does it stop?

Mr CHEN: Frankly speaking, without that assistance or government intervention, there is only one way we can go, which is down.

The Hon. MARK BUTTIGIEG: Your direct experience of this whole mess is that the whole regulatory environment has been pushed onto the consumer, rather than people taking responsibility who are actually in the industry and/or government. The whole thing has been pushed onto the consumer for you to sort out their mess. Then of course people scurry around trying to pick up the pieces but—

Mr CHEN: I would say that is a major driving force and contributing factor, yes.

The Hon. COURTNEY HOUSSOS: Is this your major financial investment?

Mr CHEN: It is our only property.

The Hon. COURTNEY HOUSSOS: This is the biggest financial decision that you will make?

Mr CHEN: Yes, it is our sole primary residence.

The Hon. SCOTT FARLOW: I have a question with regard to the point the Hon. Mark Buttigieg raised in terms of fixing up the mess. Has there been any settlement at all with developer at any point in time to repair the defects? Has there been any agreement between the owners corporation and the developer to cover any of those bills?

Mr VITAL: Initially we had a detail defect that we found and we went against the builder. There was a settlement with the builder.

The Hon. SCOTT FARLOW: Was that within the statutory warrantee period?

Mr VITAL: Yes, that was within the warrantee period. But that was very limited compared with the bills that we are actually paying.

The CHAIR: And the builder has now disappeared?

Mr VITAL: Yes, the builder has now disappeared as well.

The Hon. ROBERT BORSAK: Mr Devon, earlier you talked about the many people against the three. What were you actually talking about—there was 36 against three or 56 against three?

Mr DEVON: One of your terms of references talked about the role of strata committees in responding to defects and the protections around that. A lot of the defects in the building I am in did not come to light to most of the owners initially, but they were known. I went through the minutes. I was charged \$150 by the strata managers to sit in their office and go through the minutes. A lot of things came up in 2009 that were not really passed on. There is this secrecy thing where they try to say there is nothing wrong so you can sell your unit. Another chap—another unit owner—and I have spent over \$100,000 out of our own monies trying to keep the bastards honest, if we want to use that sort of terminology.

The Hon. ROBERT BORSAK: That is perfectly relevant terminology and you can use it under oath. There is no problem with that.

The CHAIR: It is relevant.

Mr DEVON: The thing that really disturbed us was that we would go to the NSW Civil and Administrative Tribunal—and we have spoken to other people in worse situations so I am not trying to make comparisons—but when you get a ruling in NCAT if the body corporate or the strata committee wants to ignore it they can and there is virtually no way you can make them carry out the changes. You can keep going to court over and over again, but at the moment we have had to draw a line to see where we can go next with our building. Remediation is being done but it is not necessarily being done properly. Most of the owners in our building are mums and dads—it is where they do live—and most of them are 70-odd. If they have to go into a nursing home how the hell are they going to sell their unit. It is \$400,000 to \$500,000 per person to go into a nursing home. There are a few widows and widowers. The whole thing is a mess. In my opinion they have been misled by certain members of the strata committee who have been there since day one. They think we are nasty people because we are trying to get the building fixed up. That is where we are at.

The CHAIR: Mr Jones, a breakdown in relations inside the strata can occur when a minority of unit holders who are facing the brunt of the issues—whether it is water penetration or other building defects—are trying to get the majority on board to pay a considerable amount of money to fix the issues. Not only is it a financially crippling issue, but also it can cause a breakdown in relations in the building. Do you have any awareness of that?

Mr JONES: It can, obviously. I do not think, in our case, we had a situation like the one that has just been described where there is an impasse. But there were cases where certain individuals were resistant to having certain work done. There were other cases where people were asking for work that might have needed to be done but was not as pressing as other work that needed to be done somewhere else, if I can put it that way. There were some disagreements about what the right thing to do was. You have to remember that a lot of people who live in strata buildings have no idea about building or engineering and do not want to have to know about it. For example, we would get two quotes, one for \$2,000 and one for \$8,000, to nominally do the same job. But when you actually went through the details you would think, "Hang on, the guy who is going to do the \$2,000 job is only going to do half of it." Sometimes you will get people who say, "We should take that quote; it's cheaper", while other people will say, "No, we want to get it done properly." That does cause disagreements.

The Hon. TREVOR KHAN: You raised a point earlier about buildings being built by developers to sell the first time round—that is their priority. I am interested, by way of an example, because we are now seeing buildings that look somewhat like the Hanging Gardens of Babylon.

The CHAIR: You must be in a different city to me.

The Hon. TREVOR KHAN: Go down Broadway. It interests me in terms of what the long-term effects are on strata fees when you have a building that has been all tizzied up to sell. The ongoing costs of that can be extraordinary.

Mr JONES: Yes, that is a good point. It is true that developers, as you say, design buildings to present well. You have triggered one of my pet hates, which is planter boxes. I am all in favour of greenery but—

The CHAIR: It is the waterproofing associated with it.

Mr JONES: The waterproofing is an issue. The other issue that people do not think about is that some people move into those units and cannot be bothered maintaining them. Then they just end up as a weed-infested mess. But the waterproofing is the big issue. As I understand it, it is virtually impossible to plant anything bigger than about this in a planter box and expect the waterproofing to last longer than about 10 years.

The CHAIR: Mr Devon, the building you have moved into was an award-winning building. We are talking about buying something to sell, and they sold that building as an award-winning building. But your lived experience has been somewhat different?

Mr DEVON: It certainly has. I think I am reasonably educated, but I bought my second unit without getting a strata check because I was in a building—I was using it as a base for when I was in town and I was not paying attention to what was going on, but it was not all being declared. I bought a second unit in there at a reduced price. I should have smelled a rat, I suppose. But yeah, it is more than an award-winning building, and the interesting thing is no-one really knows who owned the thing. Well, we do, in fact, who owned—who the person was—but the building name kept changing in different adverts. When it was first advertised it was one entity, and then it was another entity.

When it got down to suing an entity for remediation, the lawyer that the body corporate had selected sued a company that was actually owned by the original developer, but it had nothing to do with the building. It was one of his maintenance companies. And I stood up the night before a round table meeting, the night before a Supreme Court thing was supposed to happen. I pleaded with this lawyer not to go ahead with that action because the entity did not really exist. And that is exactly what happened. That cost our body corporate the best part of \$14,000 for that round table meeting that the owner walked out of after about a 10-minute exercise. So it is very hard to get through to people what the actual facts are, but all these things have happened. So that is why I say I have been at the pit face for a lot of this.

The Hon. MARK BUTTIGIEG: Can you just detail some of those defects in that building? The extent of them and the costs involved, and whether or not the subsequent strata levy fund was enough to cover it?

Mr DEVON: Nowhere near. I mentioned the 2 per cent earlier. That was a \$20 million, award-winning building. Two per cent of that is \$400,000. We had a litigation compliant report that came in at 3.3 million with remediation. When the first quotes were obtained, to do half of that came in at two-point-something million. And that was what was agreed to at Fair Trading and then rescinded. There are a lot of minor defects up to level 9, like water proofing, et cetera. I believe maybe this has not come out yet, but the concrete on all the decks is the wrong concrete. When they got to level 9, they did this in-house review and changed from blockwork and concrete to James Hardie panels. It was incorrectly installed. The top four units—I call them a chook pen. We have got videos of water pouring in through windows, et cetera. And the lawyer that the body corporate engaged talks about the Rolls-Royce finish up there and why should these people have it fixed up? Now, one of the owners up there is on the body corporate and he had a massive rain damage there a couple of years ago and he got his carpet and everything replaced under insurance. And he says there is nothing wrong with his unit, but next time we get an east coast low, it is going to happen again and that would become insurance fraud if he went into it again.

It just goes on and on. They are working—they have done one unit there, and that is the lady who is now deceased, unfortunately. She was under a lot of pressure. The autopsy has not come out, but there are some indications there. And the other unit they are working on, they have got it half pulled apart at the moment and they still have not come up with a scope of works as to how they are going to fix it. Our biggest complaint is that there are four units on that top level and you cannot fix one or two without the four, and the body corporate is totally resisting addressing the four units.

The CHAIR: You are having a battle with your own body corporate and the builder and the insurer all at once?

Mr DEVON: Exactly.

The CHAIR: We have run out of time. I am really sorry. I thank all of you for your testimony today. I will give you this opportunity, though: If there is any final message any one of you wanted to give to the Committee, feel free to do so now.

Mr DEVON: I am just pleased that the Strata Act and the building legislation both have to be addressed, and I think it is a Pandora's box. I really feel sorry for these blokes. I do not see how Mascot can be remediated if it has sunk and they have just got a massive mortgage and another rebuild. I do not see how there is any answer to that, but hopefully the Committee can come up with something.

The CHAIR: Mr Vital, Mr Chen, Mr Jones?

Mr JONES: I just want to reinforce the fact that I think this really needs to be addressed and it really needs a good, hard look at every aspect of the regulation and inspection regime. People referred to the insurance problem before, that people will not insure because they do not know the risk. The best way to fix this is to make sure the buildings get built right the first time. That does not mean that there will be zero defects, but there has to be some level of defects beyond which builders, certifiers, architects, God knows who else loses their licence if they do it too often.

Mr DEVON: Or even once.

Mr VITAL: From my perspective, I agree with Mr Devon. There have been people saying that one tower is built totally different from another tower. So they are not consistent in their building as well. But in terms of holistically looking at it, it has cost the Government a lot. It has cost these people a lot. It is paying taxpayer's money for someone who has taken a profit and ran away. That is how I see it. So many people that are impacted because of things that they have done.

Mr CHEN: Lastly, I want to say something I think I might have mentioned in passing already, which is that if the Government is minded to encourage all these builders and developers then on the same token there should be corresponding policies in place or laws in place to protect us end users. We do not really need to know anything about architecture. We should not be held liable. Yet, we are paying all the prices here. So corresponding laws and legislation policies are required.

The CHAIR: Again, on behalf of the Committee, thank you all for your evidence today. We will now adjourn for lunch.

(The witnesses withdrew.)

(Luncheon adjournment)

JANE HEARN, Director, Owners Corporation Network, affirmed and examined

KAREN STILES, Executive Officer, Owners Corporation Network, affirmed and examined

The CHAIR: Thank you both. We have had the benefit of your submission, but if you would like to give a brief opening statement now is your chance.

Ms HEARN: The fire at the LaCrosse building in Melbourne and the catastrophic Grenfell tragedy of course brought cladding issues to the fore and the very public evacuation of the Opal Tower and Mascot Towers, which we are going to focus on as case studies, has put a public spotlight on the entire industry. But the independent evidence on building defects has shown for some time that defects in residential—that is, not commercial—multi-unit buildings is endemic. This, I am afraid, must draw us to the conclusion that it is self-evident that in New South Wales we are facing a systemic failure in the industry and in the regulatory system. There are now over 80,000 strata schemes in New South Wales; 38 per cent of them have been registered since the year 2000. We have rapid urban development and more and more people living in taller, far more complex residential and mixed-use buildings. It is a far more complex market than it once was. At the same time, the level of consumer protection has been wound back.

Home warranty insurance for buildings over three-storeys was removed in 2003 and there have been various amendments to the home warranty provisions, which make it extraordinarily complex and difficult to use. In short, the risk of costly defects has been shifted away from developers, builders and government to the innocent purchaser. These buyers have no bargaining power in the market and little more than a glossy brochure on which they rely for their award-winning luxury apartment. New strata owners—that is, in a new owners' corporation—are at a significant disadvantage. They don't know each other, they have very little information, they have little knowledge, they have no funds and some of them have limited English. The handover of a building is very easily exploited to cause delay and avoid warranty obligations. The strata manager is appointed by the developer and many of them are very good, but they tread a very fine line. They also get a substantial volume of business from new buildings. Proving a claim is a long, technical process and the use of \$2 companies and phoenixing leaves them with an expensive pyrrhic victory and they have nowhere to turn. The evidence that you have already taken I think demonstrates that very well.

Living with defects can be devastating and it is a recipe for conflict, especially if it is a minority of owners that are affected. The impact on people's health and wellbeing while living with defects, as well as the protracted process of actually proving a claim, is the least researched part of the defects story. And we must not forget people who are currently living with cladding. The Opal Tower and Mascot Towers have expanded this public debate, a much needed and long overdue public debate, to the entire defects story, but we must not forget that where this started was actually with cladding. Those people are living with flammable cladding all around them and many of them are on fixed incomes. In New South Wales the legal obligation and financial burden has been imposed entirely on those innocent owners.

We welcome the Premier's commitment to introduce urgent reform as the first step to deliver a higher construction standard. Owners Corporation Network [OCN] is part of a key stakeholder group working to agree on the first tranche. We must prevent defects in the first place. That is self-evident. Licensing builders with extra requirements to build above three storeys would be a good start. It would also help to deal with some of the issues I think that you took in evidence this morning from the government insurer. Protection for the interests of ultimate owners needs to be embedded earlier in the construction process.

We were heartened to see that the Insurance Council of Australia has recommended that States and Territories adopt a 10-year defects liability. That is an Australian standard, it should be an Australian Standard—it certainly is a global standard. We must move towards that. But when we have this mood of reform and an opportunity to fix the system, we need a more effective, less conflict-ridden process for when defects do occur, because they are going to continue to occur; we just need to make sure that the risk of them occurring is greatly reduced and is not the certainty that it currently is.

I would refer you to a research paper on decennial liability insurance that has been included in our submission as a possible model for the future. We realise that that is probably a longer-term goal, but it is time to do some blue sky thinking and New South Wales has an opportunity to lead the way. One of the problems is that this has got a very long tail. There are a lot of buildings—we do not know how many but it will probably be thousands—with defects problems. There are owners in fact who do not know they have defects problems yet. We are talking—and you are talking—to the owners who know they have defects problems. So OCN has recommended to the New South Wales Government that it develop a strategy to finance and ensure rectification

of buildings with flammable cladding as a priority and that it look into funding options for owners with significant defects and no-one to sue, such as long-term, no-interest or low-interest loans. Seven per cent is simply not acceptable.

In closing, defects issues are just one of dozens of issues—and they are complex issues—facing strata schemes. It is not small scale. About 20 per cent of the population live in strata and some predict it will be 50 per cent by 2040. The vast majority of schemes are actually 20 units and less, but, as we said, more and more schemes are in taller, more complex buildings housing larger populations. In the last 12 months alone 18,000 high-rise, that is four-storey-plus buildings, have been approved. That is 18,000 in the last 12 months. The resources of the department for better regulation and innovation have not kept pace with this growth and OCN would recommend that, in addition to a building commissioner and a statutory and well-resourced building commission, New South Wales creates a role for a strata commissioner and funds a strata committee support service. We are happy to answer questions.

The CHAIR: Thank you, Ms Hearn. Ms Stiles, I will take that as the opening on behalf of both of you.

Ms STILES: Yes.

The Hon. COURTNEY HOUSSOS: Thank you very much for your time and for your submission. I want to ask you, first of all, how widespread do you think the issues are within the building industry?

Ms HEARN: I think the most recent research actually says that 97 per cent of buildings have one or more defect, and that research from Deakin University was released quite literally—and quite fortuitously, I think—virtually on the day that the Mascot Tower issue came to public light. That, of course, was not planned, that was a coincidence, but that is the most recent research.

The Hon. COURTNEY HOUSSOS: Could you characterise the Mascot and the Opal Towers as the tip of the iceberg?

Ms HEARN: Yes, and I think that that has been widely acknowledged.

The Hon. COURTNEY HOUSSOS: What then can the Government be doing, because a lot of the discussion we had this morning was around certification and building better buildings, and that is obviously an important thing going forward, but this emerging problem of how to address defects is going to become one that we need to grapple with. What does the Government need to do to be able to address those defects properly?

Ms HEARN: This is root-and-branch reform. I do not think this is tinkering around with a few amendments to a few existing provisions. This is actually putting rigour back into the system so that you have independent oversight of construction projects. I think the evidence that you have already taken, and what you know from the submissions that have been provided to you, is that you can see that there has been, in a sense, a shift towards self-regulation and it has been done in the name of housing affordability, but there has not been any actual consideration of what the cost of rectification is. So having rigour in the system—and in fact people are now talking about returning to something like a clerk of works. That detail I think still needs to be worked out, but there is a stakeholder group actually working on that at this very moment, and the licensing or creating a category of licensed builders for multi-unit high-rise buildings so that they are scrutinised—you have licensing and you can impose certain requirements. That is an upstream measure which then means that you do not have some of the least skilled and least solvent builders building buildings that they are just not skilled to build.

The Hon. MARK BUTTIGIEG: Is that clerk of works concept someone who would oversee the whole project and make sure that the individual input trades are doing the right thing and that that relationship, which I think is now problematic in terms of the relationship between the certifier and the builder, is broken because the clerk of works has independence? Is that the idea of it?

Ms HEARN: Effectively, I think the idea is to ensure that you have somebody who is independent and who has a responsibility to do point-in-time inspections to ensure that the construction is happening in a way that meets the building code and, if there are errors or work that is substandard, that is corrected as the construction process goes on. We are not saying there should not be private certifiers—in fact we are really not commenting on certifiers at all at this point—but I think there is a totally understandable misconception that is widely held across the public, and I think across some government agencies, that private certifiers actually perform that role, and they do not. In fact they probably should not be called "certifiers" because that word itself tends to convey a meaning which says that they have looked at every step of the construction process and that they have signed off that work as being compliant. It is my understanding that is not how private certifiers or any certifier works.

The Hon. JOHN GRAHAM: Jumping back to defects briefly, for certain buildings the Government has introduced a 2 per cent defects bond. Is that an adequate amount?

Ms HEARN: In a word, no. The Insurance Council of Australia has said, and we totally agree, that it is manifestly inadequate.

The Hon. JOHN GRAHAM: You have talked about the complex interaction between strata committees, developers and defects. Can you just give us some more concrete examples about how this is working—

The Hon. TREVOR KHAN: Sorry, just before you ask that question, if the 2 per cent is inadequate, if an amount other than the 2 per cent is to be recommended, what amount is appropriate and who is going to pay?

Ms STILES: I will answer that question. Taking that a step further, the system that has been developed by New South Wales Fair Trading is destined to fail. Putting aside the percentage, it is utterly destined to fail. The developer engages the inspector. They are not even an expert. There are no minimum requirements. The developer actually agrees the scope of works with the inspector.

The Hon. TREVOR KHAN: With respect, I have asked a question with regard to the percentage. I might not argue with everything you are saying. Ms Hearn raised the issue of the inadequacy of the 2 per cent. If it is not 2 per cent, what amount and who is going to pay?

The CHAIR: Ms Stiles, you can answer the question as you see fit provided you address the question.

Ms STILES: Certainly. I lived in a building that cost 56 per cent of the build cost to fix.

The Hon. TREVOR KHAN: Are you saying the amount therefore that should be withheld is 56 per cent?

Ms STILES: I am saying that prevention is far cheaper and better than cure.

The Hon. TREVOR KHAN: I really do not wish to quibble, but if you are saying there should be no amount that is fine. I understand the proposition with regards to a well-built building is a much better outcome. Let's all agree on that. If there is to be an amount like the 2 per cent, and again if you say it is nothing that is fine, but if there is to be a scheme that involves essentially withholding an amount, what amount is more appropriate and who pays it?

Ms STILES: It is typical in commercial construction for the developer to retain 10 per cent from the builder.

The Hon. TREVOR KHAN: Who pays it?

Ms STILES: The builder.

The CHAIR: Ms Stiles, you are not putting that percentage model forward as the solution?

Ms STILES: No.

The CHAIR: You think that is wrong in principle, is that correct?

Ms STILES: Correct.

The Hon. TREVOR KHAN: Nor am I.

Ms STILES: Correct, I am not putting that forward.

The CHAIR: Mr Lambert, in his submission, said that the preferable scheme was to have a single insurance scheme applying to both. Is that model you would be putting forward?

Ms HEARN: I think it is very difficult to adjust or fine tune the current system. That is a legitimate question: What is the amount, is it 5 per cent for example? How would you model it? We have been introduced to the idea of decennial liability and insurance, which is a completely different approach. It is where everybody is on the insurance policy, I mean everybody, and in fact if there is a defect claim that needs to be made it is actually made to the insurer. The insurers fight it out between themselves. That is it in a nutshell. I do not know how widely known that is in Australia. It is extremely common overseas. That was why we included in our submissions recent research that very ably sets out the very sad story and whole history of home building warranty and the insurance. It makes an argument for a different approach. In fact, that paper argues that you could keep the 2 per cent bond and just slot the decennial insurance model into major defects. Having said that, there are issues with the current provisions in relation to minor and major defects. Perhaps that is a different more technical point.

The CHAIR: What is the experience since those 2017 reforms into minor and major defects, has any of that played out to your awareness as the network?

Ms STILES: The definition of "major defect" is almost impossible. It is a two-step process and it is almost impossible to jump the second bar, which is that it must render the building unusable, uninhabitable or threaten destruction. Except for a couple of glaring examples like Opal and Mascot, people are forced to live through these things like black mould. Health and life safety issues they have to live through.

The Hon. JOHN GRAHAM: To the Chair's question: You are aware of examples of that already taking effect since those laws have changed?

Ms STILES: The litigation normally takes five to seven years, so it is going to take a while to see how that plays out. But, basically I think you would find that a lot of owners' corporations could decide that it was just too difficult.

The CHAIR: You could have major waterproofing issues?

Ms STILES: Yes.

The CHAIR: Provided you could still live in it, although with smell, stink and inadequate bathroom, if that happens outside the two-year period, because of those changes you cannot claim against it?

Ms HEARN: That is how the provision has in fact ended up. I have to say that looking at this from a legal policy background surely that could not have been the actual intention. I think there is confusion between what is minor and what is major. Something could be classed as minor but actually be complex and very expensive and have very significant effects on the people who live there. As Ms Stiles has pointed out, in relation to things like waterproofing unless it is so extreme that it renders the building uninhabitable it is not classified as a major defect.

The CHAIR: But waterproofing can cost you hundreds of thousands if not millions of dollars to fix?

Ms HEARN: Yes, and it is the most common and the effects of it go on for a very long period of time. It has real health impacts. If you cannot address under the current provisions one of the most common defects which has significant health impacts on innocent consumers, who are living with it, then you have to go back and look at these home warranty provisions again and look at defining in a more exhaustive way what a minor defect actually is. Now, if that is the wrong paint, the wrong door, that is minor and you can fix it, and you would know about those things within the two-year period. If you have a problem in the membrane you may not know for two years, because it will not be until there is the storm that it actually becomes apparent.

The CHAIR: And unless it makes the building unliveable you cannot claim against it anyhow?

Ms HEARN: That is right.

The Hon. TREVOR KHAN: Or, as has been suggested, is that the failure of the membrane may take longer than the two years?

Ms HEARN: Quite right.

Ms STILES: And it might take the engagement of a new fire safety certifier to discover that there is no dampers or that there is no fire collars. A lot of fire safety system issues are hidden in walls and ceilings.

The Hon. TREVOR KHAN: Indeed.

The CHAIR: I heard a case that was in the *Newcastle Herald* over the weekend where they removed the plaster from between two walls of a newly constructed landmark building and there was no concrete, just reinforcing.

Ms HEARN: Yes. I think the two-year period in a commercial world might be acceptable but in a residential environment where a building is being handed over, in a sense, almost progressively owners' corporation can take that time or the majority of that time to actually form as a group. The strata committee is elected and we have heard quite a bit about strata committees. It is a profoundly disadvantaged position.

The CHAIR: Could you give further detail about the circumstances in which the developer chooses the strata manager and perhaps ties the building to a strata manager for a contract that lasts the length of the statutory insurance scheme and then steps away? We have had a number of those cases identified in submissions.

Ms STILES: The developer will naturally engage a strata manager to set up the strata titling, the strata scheme.

The Hon. TREVOR KHAN: That is the answer, isn't it? They have to.

Ms STILES: They do. OCN managed to get in in the last tranche of strata schemes management act reforms 2015-16 that the first contract for a strata manager had to be maximum one year and after that it could be three years. Before that you had situations where they had 25-year contracts and then it was a maximum of 10. It would be very tempting to not find defects or think that they were maintenance issues if you were looking to a certain developer for more work. That is on a number of levels.

The Hon. TREVOR KHAN: But if you have a long term contract like that the likelihood is that your commitment to serving the body corporate is going to be somewhat underwhelming.

The CHAIR: It will not be highly incentivised.

Ms STILES: Yes, we would agree with that.

Ms HEARN: It is a very fine line that they tread.

The CHAIR: I would imagine in practice, even if you have a one-year contract, it is highly unlikely that a majority of unit holders in that first year will gather together as a collective and decide to go to a new strata manager.

Ms HEARN: Yes.

The CHAIR: Highly unlikely.

Ms STILES: Yes, that is right. Really when you think about it owners are deer in the headlights. These are a disparate group of unskilled people who in the majority now have never lived in strata. They do not understand that they are executives managing a medium to large size business. They have bought a home but what they have got is a whole lot more and they are ill-equipped to deal with that.

The Hon. TREVOR KHAN: It is more than that, though, isn't it? In my body corporate for my unit down here, you have worked all day, you walk into the building and they are holding a strata meeting, essentially, in the front foyer.

Ms STILES: Yes.

The Hon. TREVOR KHAN: The quickest thing you do is head for the lift and out of there because really the last thing you want to do is get involved in the fracas of the goings-on in the building. At least in my case, you are just hoping that somebody else is going to take responsibility.

Ms STILES: For the greatest—

The Hon. TREVOR KHAN: And that, I think, is probably not an uncommon response to these things, is it?

Ms STILES: It is not uncommon, but it is often the greatest asset of people's lives. They would be far more interested if it was a share portfolio.

The CHAIR: Perhaps one of the options might be to actually not allow the developer to ever appoint or choose the strata manager and actually require the strata manager to be appointed by, I don't know, maybe the building commissioner or the department of Fair Trading? Maybe some Government entity should appoint the strata manager so we break that nexus between the developer and the strata manager?

Ms HEARN: A strata commissioner?

The CHAIR: A strata commissioner. I have heard people suggest we should have a strata commissioner, Ms Hearn. Yes.

Ms HEARN: OCN would urge that.

The CHAIR: I have read your submission.

The Hon. COURTNEY HOUSSOS: So we have talked about the issue of defects and we have talked about the possibility of moving to a 10-year insurance cycle. What are the other things the Government can be doing to provide assistance to owners to defects? How is this huge problem going to be addressed?

Ms HEARN: I think you have a number of submissions or, certainly, evidence that deals with the issue of cladding and the fact that Victoria has gone ahead and made commitments, set up an agency and has a strategy in place for progressively working through the rectification of the buildings affected by cladding. Although

New South Wales states that it has a cladding task force, with respect, I think this is little more than an interdepartmental committee. Councils and various witnesses before you, I think, will all say that there needs to be a focal point within Government where there is clear information, there is guidance about what replacement cladding will actually be compliant—

The Hon. JOHN GRAHAM: How do you explain the difference between the speed of the response in Victoria and in New South Wales? Why are we off the pace in the way you are describing?

Ms HEARN: I think that this is possibly cultural. It is the way that New South Wales seems to do business. It has effectively vacated the field. And our Chair said some time ago that Government has forgotten how to regulate.

The Hon. MARK BUTTIGIEG: When you said that this is the tip of the iceberg and there are many more things to come out, presumably there have been communications with government over a significant period of time prior to Opal and Mascot and yet there seems to be this big delay. Can you just outline to us what sort of dialogue has been had in terms of making it clear to the Government that there were problems prior to this?

Ms STILES: Well, we can go back to the 2002 Campbell report. There have been, I don't know, a dozen reports over the past 20 years. Certainly the OCN has spoken out publicly since it was formed in 2002. We were at the Senate inquiry into building quality, I think, in 2004. The problem has been that until Opal—and I feel for those people, but they may very well be the saviours for the rest—people either were not prepared to speak up and devalue their building or they were so utterly traumatised and depleted from the fight that has to go on to get justice that they just cannot speak.

The CHAIR: There is a perfectly understandable conspiracy of silence, because if you go out publicly and speak about the defects in your building—

The Hon. TREVOR KHAN: You devalue it.

The CHAIR: Yes. You devalue your home, the value of your home and you also face the difficulties of devaluing all of your fellow occupants' homes. And that can be a very socially isolating moment, can't it?

Ms STILES: Absolutely. And also when you are going through the protracted years and years and years long of litigation, the lawyers are advising you not to say anything.

The Hon. ROBERT BORSAK: We have actually seen that in this inquiry so far.

Ms STILES: Okay.

The Hon. ROBERT BORSAK: The Opal people have been advised not to give evidence.

The Hon. MARK BUTTIGIEG: What seems to be emerging from the hearing to date is that there seems to be two different philosophies. One is that it is not necessarily there is an issue with the existing infrastructure of regulation. You know, we will put a commissioner in place and he or she will send all these people out to inspect and it will all be fixed up. That is one philosophy. The other philosophy is, "No, no. There needs to be root and branch reform at every single level to fix this." What is your view on that debate?

Ms HEARN: They are not mutually exclusive. The point of putting a building commissioner in place is for him to lead a reform process. Once he is in place—and I am sure that he has some fairly clear ideas of where he wants to take it all—he will be in a position then to work through all of the proposed reforms. So when we say "root and branch", we do mean—and it is difficult to settle on a language, but there does need to be a tightening of registration and licensing right through this system and a system for independence, inspections and oversight so that—and that is actually root and branch, because what we have is self-regulation. And it is sort of people make declarations and they certify things and then other people certify the declaration. It is like a sort of paper trail without—

The CHAIR: Or a castle built on sand?

Ms HEARN: It is a house of cards.

The Hon. MARK BUTTIGIEG: A Ponzi certification scheme?

Ms HEARN: Yes.

The Hon. JOHN GRAHAM: So that new commissioner has said that there is enough regulation at the moment. Do you agree with that statement?

Ms STILES: The Home Building Act has been amended something like 100 times. I nearly brought a packet of Band-Aids today to display. So there might be enough, but it may not be adequate.

The CHAIR: There is a lot, but it is inadequate? Is that the answer?

Ms STILES: Yes.

The CHAIR: A lot of useless regulation?

Ms HEARN: Yes. And it does not achieve the stated intended purpose. And we have a system where the bottom line is that the people who are building the high-rise apartment buildings are not necessarily the most qualified people to do it. They have no consequences; there is no home building warranty insurance, so there is no consequence for them. And the insurer reinsures builders that have had repeated claims. So there is a tightening up. When I say "root and branch", there is a sort of tightening up through the whole system. I think you took evidence this morning from the government insurer. How do you get to a position where even without multiunit high-rise buildings you are running at a deficit of—I think she took it on notice.

Ms STILES: I can answer that.

The Hon. COURTNEY HOUSSOS: Hundreds of millions of dollars. Can I ask—

Ms STILES: It is hundreds of millions of dollars.

The CHAIR: Ms Stiles, I think we will go to you.

Ms STILES: Thank you. When we did a submission on the Home Building Compensation Fund when it was first brought in, we found at the time—and that was 2017—that although 18 per cent of home building contractor licences in New South Wales are companies, they accounted for 85.6 per cent of the accepted insurance claims. What we need is a licensing system that licences or accredits every practitioner in the industry. It needs to be tiered for builders and developers, and it needs to be only a licence for a natural person.

The CHAIR: So to go back to that data, what it shows is that when a corporate entity holds the licence and they can no doubt put themselves into liquidation if things become problematic, that is pretend regulation. The actual individuals involved need to be the focus. Is that your point?

Ms STILES: I can give you 42 anonymised examples of repeat offenders from when we did that research. I can table that.

The CHAIR: Consider this a question on notice.

The Hon. TREVOR KHAN: Can I just ask in terms of that—I am not doubting your figures—is it because where it is a natural person and what we will call a claim or a defect arises, many of the builders will take the view of "Rather than a claim being made, we will go out there and fix the problem before it all turns to absolute custard"? Whereas where you have got the corporate entity, particularly where a corporate entity has been set up for a particular development, their response is if they have not already done it, they wind up the company so there is nobody else to go to, so you end up with a claim being lodged. That is really what is happening, is it?

Ms STILES: Correct.

Ms HEARN: We have actually institutionalised the use of \$2 companies phoenixing. There are many reasons it is institutionalised but one of them, when you follow the trail, is if they are exempt from having to get home warranty insurance, there is nobody assessing the risk. There is nobody assessing their quality and the skill or the solvency of those particular builders to build these complex buildings. These are riskier buildings. It is no accident that consumer protection has been wound back. They are building riskier buildings. The risks and the defects that are being found are serious, they are endemic, they are a threat to health and welfare, they put people into financial distress. There is a level of incredulity in the submissions that the committee has received, because ordinary members of the public believe that government is there to govern and they cannot believe that they have been left in this situation. It is a massive breach of trust.

The CHAIR: It has been a two decade-long dangerous experiment with deregulation and privatisation, has it not?

Ms HEARN: Yes and it is life-threatening. You do not build a 20-storey building with significant defects and not—if it is fire safety system, these defects are life-threatening.

Ms STILES: These owners have been sacrificed at the altar of neoliberalism.

The Hon. COURTNEY HOUSSOS: I return again to the question of how to address the defects. One of the proposals that has been put forward is long-term, for example, 20-year low-interest loans provided by the Government to strata schemes in order to address the defects. What is the Owners Corporation Network's view on that?

Ms HEARN: That is actually not about addressing defects upstream, that is about trying to address the very significant problems that people who are living with defects have now.

The Hon. COURTNEY HOUSSOS: That is right.

Ms HEARN: The people that were before you this morning illustrate the case very well—

The Hon. COURTNEY HOUSSOS: That is the obvious example.

Ms HEARN: —that they are not in a position to carry that kind of financial liability. I might add that in this sorry story, as a matter of law, it is only the owners corporation, that is the owners themselves in strata law that have a strict duty to repair and maintain the common property. They have unlimited liability. This is not known by most people who move into strata. These are not incorporated entities like an ordinary company, so they have unlimited liability, they have strict duties and it is a recipe for conflict. There needs to be a strategy. We do not have all the answers, but we are happy to work with government on working out what those funding options should be.

The CHAIR: Going forward, the fundamental focus is building quality, adequate insurance, proper licence and regulation holding individuals accountable. I think Ms Houssos was asking what about all the people who have been collateral damage between this experiment of deregulation and when we finally get it back on track. How do we pay for that? It may be billions and billions of dollars, who pays?

Ms HEARN: I think you go to the people who have taken most profit out of the industry over the last 20 years.

The CHAIR: That is a nice answer—

Ms HEARN: But it is an industry levy.

The CHAIR: —and I agree with you emotionally. But if they have done it through \$2 companies and removed the profits away, how do we fund equitably this mess because we would all agree just leaving random individual homeowners to be economically destroyed is an appalling outcome? It is billions and billions of dollars, so how do we fund it?

Ms HEARN: One of the arguments that has been made is that every one of these lot owners has paid a very significant amount of stamp duty for an apartment on a valuation that is in fact not true. One of the things that people have argued is that some of that stamp duty should be returned to allow them to pay for the defects that need to be paid for, but it cannot be that source of money alone. There does have to be a way of levying the industry itself.

The Hon. TREVOR KHAN: If you returned to the owners of Mascot Towers the entirety of the stamp duty that they paid on each of those units, that would not be enough.

Ms HEARN: No, that is quite right.

The Hon. TREVOR KHAN: So, that is not going to provide the answer.

Ms HEARN: No, so there is a role for government. It is government that failed to regulate the industry. It is government that has an ambitious—successive governments.

The Hon. TREVOR KHAN: Let us be in agreement here. I do not think either the Coalition members or the Labor members can start throwing rocks at each other here because we have got a problem.

Ms HEARN: Quite right.

The Hon. ROBERT BORSAK: I am happy to throw rocks at you.

The CHAIR: But you probably should, given the twenty years of dangerous experiment with privatisation.

The Hon. TREVOR KHAN: Chair, if you go to Grenfell Tower, that was not a dangerous experiment in privatisation and there was a problem there.

The CHAIR: It was, because Margaret Thatcher privatised building inspectors.

The Hon. TREVOR KHAN: It was social housing. I suppose the question is, simply returning stamp duty is not is not going to do it. It suggests it is a wider responsibility than simply that, I take it?

Ms HEARN: Yes, absolutely, I think so. Self-regulation has been pursued in the name of affordable housing without costing in the cost of the defects rectification. The goal for urban consolidation has been across successive governments and it has enabled taller, more complex buildings. We are at the end of a global supply chain. We have the importation of products that are clearly dangerous and we have allowed \$2 companies and phoenixing to become institutionalised. I think there is a broad responsibility for finding a way through this. We do not have all the answers.

The CHAIR: Going forward, some of it being met by the industry?

Ms HEARN: Yes.

The CHAIR: Perhaps some of it being met by the State Government?

Ms HEARN: Yes

The CHAIR: And almost certainly, some of it will have to be met by the home owners, but that is a far more equitable outcome than 100 per cent being met by the home owners.

Ms STILES: The Federal Government has a part to play here. They were warned by industry in 2015 that there was a tsunami of non-compliant products coming into the country and to my knowledge, nothing was done about that. I am happy to table that letter.

The Hon. ROBERT BORSAK: That whole process is an exercise in risk avoidance by governments, is it not? It is pretty clear that there is a failure in regulation, whether at a State or Federal level.

The Hon. TREVOR KHAN: Or both.

The CHAIR: Or both.

The Hon. ROBERT BORSAK: Or both, that is right, I agree with that. As the Chair was saying, it is certainly not correct or right that the final liability for these things should be left in the hands of the people who bought these units. It goes to the banking system as well, undermining the valuation of these properties. That creates uncertainty. It goes to the insurance industry. The private market for insurance, despite what some of the late evidence we got this morning showed, does not want to be involved with it because it has got too many hairs on it. I do not see that changing. What was it, \$150 million worth of underwriting losses in 2018 and now we are being told it is getting better. I cannot see how it is getting better.

Ms HEARN: On that point, it does mean that homeowners in apartments in high rise buildings are unlikely to see the return of the home warranty insurance any time soon, because the fund clearly cannot sustain it. You can make changes to building licensing and you can start trying to weed some of the cowboys out of the industry, but it is going to take some time. The question is what amount of time is an acceptable amount of time to start seeing a downward trajectory in defects? How will it be measured and tracked and how will it be publicly reported?

The CHAIR: If the private insurance industry will not step in because they are unable to effectively price the risk or if pricing the risk would make the insurance product unattainable, we then may get to the point where taxpayers continue to subsidise the industry, as they have been doing to date, by underpricing the statutory home warranty insurance.

Ms HEARN: Yes, that is right. In fact, taxpayers are already bailing out the industry.

The Hon. ROBERT BORSAK: On listening to the bureaucrats this morning, they were talking about comprehensive reviews of certifiers' activities and auditing 15 per cent per annum of what certifiers do does not go to the point of the problem.

Ms HEARN: No, it is almost irrelevant.

The Hon. ROBERT BORSAK: The problem is the build, is it not, not the certification?

Ms STILES: Certifiers are on site about 0.5 per cent of the time. They are too little, too late. The system was only partially set up, from my understanding and so it does not have the checks and balances. It has left them in a vulnerable position, because really they are just ticket collectors for people who self-certify.

The Hon. MARK BUTTIGIEG: If you were to have a three or four dot-point prescription of the main things that need to be addressed to fix up the whole thing, what would it be? Obviously I am summarising talking about conflict of interest and all the rest of it. What are the main things Government needs to address to fix it?

Ms HEARN: It is so huge that it is very difficult to put that into three or four dot points. Certainly there needs to be rigorous registration and licensing with proper eligibility requirements for people to build over three storeys. There needs to be rigorous independent point-in-time inspection as the construction project progresses. There needs to be an embedding of the interests of the ultimate owners in the construction process. We really need to do blue-sky thinking about the insurance and accept that insurers and consumers have a similar coincidence of interest.

We need to look at the independence of strata managers, perhaps at the beginning of a strata scheme—that is probably a little bit more difficult. We also need to support new owners' corporations with independent information right at the very beginning so that they are not sort of submerged within this environment of conflicted commercial interests, so that they have genuine independent information to assist them. That is why we have talked about a strata committee support service, not just in relation to defects and new owners' corporations but a plethora of issues in strata schemes. It needs a better focal point in Government to look at it from their perspective. Strata owners are literally treated as consumers of property services with very minimal servicing from government.

The CHAIR: I assume from that that you believe the current regulation by Fair Trading has been inadequate?

Ms HEARN: Yes.

Ms STILES: We would love to see strata in a senior ministry with dedicated expertise in the bureaucracy.

The Hon. COURTNEY HOUSSOS: The Government characterised its response as "thorough". Would you agree with that?

Ms HEARN: No.

Ms STILES: The submission was very detailed.

Ms HEARN: Actually, I might just take the opportunity at this point to comment on something I believe was in the Government's submission in relation to the application of consumer law generally. I believe the submission suggested that general consumer law was of use to owners' corporations. This is just simply inaccurate. We are happy to provide some additional information to clarify that point. However, essentially an owners' corporation is not a customer of a developer or even a builder. The individual lot owner might be able to be the consumer that uses consumer law, but you would have to join all of the lot owners together and it does not apply to the common property. It is just misleading. I am sorry, but it is just misleading to suggest that that is of any value at all.

The CHAIR: Ms Hearn, I think we will be getting them back.

Ms HEARN: Yes.

The CHAIR: So it is all right. If you give us that detail on notice we would appreciate that. We have unfortunately run out of time.

Ms HEARN: Thank you.

The CHAIR: I think you might have taken a couple of questions on notice.

Ms HEARN: I am sure we did.

The CHAIR: Even if only that last one. The secretariat will contact you.

Ms HEARN: Thank you.

The CHAIR: They are much more professional at that than us. You have 14 days to provide that answer.

Ms HEARN: Thank you.

Ms STILES: Thank you for having us.

(The witnesses withdrew.)

KARL SULLIVAN, Head of Risk and Operations, Insurance Council of Australia, sworn and examined

The CHAIR: Welcome, Mr Sullivan. Do you have an opening statement?

Mr SULLIVAN: I will be very brief. Insurance finds itself, as it always does in these circumstances, the end of the risk management chain. Insurers are responsible for setting a price around an insurable event. In the context of cladding and building quality issues, that is exactly what we are trying to take into case. From the insurance industry's perspective there have been some miscommunications and misrepresentations about what has unfolded—I think that is probably the best thing I can clarify before moving to your questions.

When it comes to certifiers, insurers have not left the market—they have simply introduced an exclusion relating either directly to any work to do with cladding, or a slightly broader one used by some insurers regarding any work to do with nonconforming building products. As with surveyors and other building professionals, certifiers are still able to take professional indemnity insurance for their work; however, there is almost globally an exclusion around work pertaining to those two issues. That has arisen because of a broad global failure to really tackle that issue in a comprehensive way. I am happy to take questions.

The CHAIR: We might start there. When did the insurance industry first become aware that there was this cladding issue and this large, unknown risk that insurers were not willing to insure? Can you tell us when that happened?

Mr SULLIVAN: Certainly we started to become aware at an industry level of cladding as a potential issue in the year leading up to Grenfell, where we had a number of commercial insurers globally starting to present this as a material of some concern. The particular concern was in how it was being used in complex buildings and high-rise buildings. After Grenfell occurred is when a lot of activity from a lot of different stakeholders started to bear down on the insurance industry. It would be in the year following Grenfell that insurers started to try and understand how governments, who have responsibility for planning and the built environment, would respond to the cladding issue. That has run for a number of years and it is fair to say there has been no clear resolution of that at a national or State level that would allow insurers to hold the confidence that is being dealt with comprehensively.

That means insurers going forward do not understand how individual States will regulate or require the remediation of these buildings. As a result it is very much uncapped liability. It is almost impossible to calculate a probable maximum loss as insurer. This comes off the back of a professional indemnity insurance environment that has been unprofitable for some time. Recently there has been some work done on the industry numbers. Professional indemnity insurance for certifiers has not been a profitable product since 2011. With that as a background, putting in there and an uncapped liability or a liability that cannot be calculated going forward you leave insurers in a very awkward position where that residual risk at the end of the risk management chain is almost incalculable. Therefore insurers need to stop their losses.

The CHAIR: So even with the moves that the New South Wales Government has made—the industry task force, the cladding register—there is still an uncapped liability that your members are unwilling to insure because you cannot be satisfied that there will not be a hugely expensive problem associated with flammable cladding?

Mr SULLIVAN: The moves that have been made in New South Wales are in the right direction. However, we still do not have any data from Government about how many buildings have been assessed, how many have dangerous cladding, how many may ultimately require remediation. In the absence of information—and I stress that is not New South Wales alone but all States and Territories—it is impossible to calculate the losses going forward. While there has been strong language, regulation proposed and measures put in place, these will take time before they start to result in more confidence returning to that end of the risk management chain, to those risk insurers.

The CHAIR: The Government has a register; it just will not give it to you. Is that right?

Mr SULLIVAN: That is correct.

The CHAIR: How would you describe that response from the Government? The Government has a register but it will not publish it, and because you do not know what the buildings are you cannot work out where the liability is. How would you describe that aspect of the Government's response?

Mr SULLIVAN: I would say that it is the result of a very complex set of reasons, not least of which is that the Government wants to prevent arson, which is something that insurers, as you might understand, are very

keen to prevent as well. These are not simple matters. We would not expect to see a register published on the internet, for example, and there are sensitivities around that. But we are calling for all States, including New South Wales, to be more forthcoming with that information so that we can start to analyse what the probable maximum losses may be and can start to look at, down the track, how that will influence products and their prices.

The CHAIR: The Government has not required building owners with flammable cladding to put a remediation plan in place. That is not part of the New South Wales Government's response. It says that is because no certifier or building professional can get private indemnity insurance [PII] to put together the plan. That is what the Government states on its website. Is that right?

Mr SULLIVAN: That is correct. Again, it is complex. When the insurers introduced exclusions that prevent claims from being able to be made around the cladding it became obvious to us very quickly that that would in fact inhibit remediation work as well. That is why the steps taken by Queensland, Victoria and New South Wales to exempt certifiers from having to hold unrestricted PII should alleviate those concerns. As I understand it though, many certifiers are still uncomfortable operating in the remediation environment without some kind of professional indemnity insurance that will cover them specifically for that work.

The CHAIR: It is almost certain they will not because your members will not insure them for the risk and your industry has said the risk is so large that you are not even willing to run a product. It is a pretty big ask to say to the personal certifiers, "Will you go in and deliver the remediation action plans uninsured?", knowing full well that insurers will not touch it because it is so dangerous.

Mr SULLIVAN: Yes. A big part of that is that there has been no agreement from any taskforce in any State on what the remediation standards are and what needs to be achieved, by whom and in what manner. That is a fundamental step that needs to be achieved before insurers can even begin to assess whether they can insure the risk of people signing off on those plans.

The CHAIR: Have you told the State Government this?

Mr SULLIVAN: Yes.

The CHAIR: What was the response?

Mr SULLIVAN: Again, we have been interacting through this complex situation with the taskforce. We are looking forward to some meetings with the Building Commissioner to work through those issues.

The CHAIR: But the Grenfell disaster was in June 2017. You are still stuck at a taskforce level without a formal policy response from the State Government.

Mr SULLIVAN: Save for what it has done with the Building Commissioner, yes.

The CHAIR: The Building Commissioner starts on Wednesday. Do you find it surprising that two years on we still do not even have the remediation standards put in place? We have not even got that first part done. Do you find that surprising?

Mr SULLIVAN: I find it disappointing. But this, I should stress, is a national problem. It is not a New South Wales-alone problem. We have been calling for a number of years now for a national response to this. By that we mean setting a national remediation standard, starting with auditing of the entire problem and setting out what needs to be achieved in a measurable way so that insurers, at the end of the process, can satisfy themselves that these buildings are safe to insure.

The CHAIR: It sounds to me like if we go down that path we could be months or years away from getting a resolution on cladding.

Mr SULLIVAN: It will take some time to remediate some of these buildings. The problem that my industry has is that we do not know how many buildings there are and what standard they would need to be remediated to. The insurance industry has developed its own risk-assessment protocol that we have published for use by all paths of all industries and government. That has started the work, if you like. But as yet there has been no national agreement on what needs to be achieved.

The Hon. COURTNEY HOUSSOS: At the same time the insurers do not have access to this information, neither do consumers. Is that correct?

Mr SULLIVAN: Individual insurers, depending on what jurisdiction they are in, have been asked by government to undertake a risk assessment and determine whether they need to remediate the building. Much like the Owners Corporation Network expressed, that raises a range of issues for an owners corporation and a body

corporate. How? To what standard? Who? There are a lot of question marks there and those question marks can be very expensive to answer. Again, we keep coming back to the need for a national standard around the remediation of cladding as an issue.

The CHAIR: If we wait for a national standard we could be waiting years. Victoria has moved. Do you think that has been a positive response in Victoria from an insurance industry perspective?

Mr SULLIVAN: I think it is a positive response for the owners of buildings. There is a lot of detail to be worked out there. Again, we do not know how many buildings there are or where they are in Victoria, despite there being those taskforce arrangements, and we do not know the standards to which buildings will be remediated.

The Hon. SCOTT FARLOW: You are effectively in the same position in Victoria as you are in New South Wales.

Mr SULLIVAN: From a philosophical point of view they have gone a few steps forward in outlining how they will assist building owners to remediate their buildings.

The CHAIR: But you still do not know the standards?

Mr SULLIVAN: No, we do not.

The CHAIR: From an individual's perspective at the moment, people could be buying into residential properties that may have extremely expensive liability for flammable cladding. But there is no way they can find that out at the moment, is there?

Mr SULLIVAN: They have to conduct their due diligence. If they are using a conveyancer you would expect that they would be looking at the body corporate's minutes to see what examinations have been done and where they are in the process. For example, if the New South Wales Government had written to the body corporate to say that they should conduct an audit or safety assessment of the cladding on their building, you would expect that to be in the body corporate minutes. Is that adequate enough to make a decision? I would suggest that it is probably not. But it red flags the need to undertake further investigations.

The CHAIR: But if the government has the information about all the buildings on a register surely before you buy a building you should be able to search the government's register for a building to find out if there is cladding on it? Just from the perspective of doing a decent act for a fellow citizen, surely we should be doing that so people do not innocently step into a hugely expensive remediation problem.

Mr SULLIVAN: Yes, but I suspect we are all overestimating what is on this register. As we understand it, there were letters written to a number of buildings where cladding may exist. I do not know if on the register there is now a response from every one of those buildings with a report saying, "We have assessed it and this is the type of cladding we do or do not have."

The CHAIR: They cannot get a report because insurers will not insure the building inspector to write the report. It is a terrible, non-virtuous cycle, is it not?

Mr SULLIVAN: The reports through the industry protocol are not done by building certifiers or surveyors; they are done by fire protection engineers or fire safety engineers, who are insured for this type of work. So on the industry protocol we have six different agencies that have gone through blind testing by the industry to determine whether they can detect what type of cladding is on the side of a building. Then there is a 10-step process to go through to determine whether the building is high risk, medium risk or low risk. From there it becomes a decision for the body corporate on how they are going to go about remediating that risk. The difficulty we have is: what is the standard from a State perspective? Do they need to remediate a low-risk building, a medium-risk building or is it just the high-risk buildings? That is a critical piece of work that needs to be done.

The Hon. ROBERT BORSAK: Picking it up there in relation to the insurance industry, you have talked about exemptions that are now being put on policies in relation to cladding. What is your outlook for the industry in the next 12 months to 24 months in the face of the current inadequate response from this Government?

Mr SULLIVAN: In terms of?

The Hon. ROBERT BORSAK: In terms of the appetite for that type of risk, the pricing of that risk or further exclusions.

Mr SULLIVAN: We have seen nothing to date that would encourage professional indemnity insurers to recommence the writing of professional indemnity insurance for certifiers themselves.

The Hon. ROBERT BORSAK: For certifiers themselves? Are you saying they have withdrawn from the certifier market?

Mr SULLIVAN: No, I mean the exclusions, sorry. I have seen nothing to date that would encourage insurers to remove those particular exclusions around cladding or non-conforming—

The Hon. ROBERT BORSAK: Do you see other exclusions coming in?

Mr SULLIVAN: Not at this stage.

The Hon. ROBERT BORSAK: We have heard a fair bit in the media about certain certifiers complaining that they have seen their premiums go up twofold, threefold, fourfold, obviously there is a repricing going on. Do you see that working its way through the system for builders, strata units and everybody in the market?

Mr SULLIVAN: Certainly for building professionals. As I said at the start, professional indemnity insurance has not turned a profit in a number of years in Australia. Even before Grenfell occurred there was a gradual stepped repricing of the product going through. Adding in cladding on top of that and now potentially other large building defect issues is going to put more pressure on that repricing. I am not surprised to hear certifiers, surveyors or other building professionals suggest their premiums are escalating in cost, they absolutely will be. That is a reflection of the risk and the number of claims coming through and the number of claims we predict may come through.

The Hon. ROBERT BORSAK: Risk is normally price based on experience and/or prediction of what you think is going to happen. I have an example of an engineer that one of our companies works with and has been in the business for 35-40 years, has never had a claim as far as I am aware of in relation to the work he has been doing and he has just seen his premium go up from \$50,000 a year, which was bearable, to over \$200,000 a year. Have you got any comment to make in relation to that? That is hardly experience based risk assessment, is it?

Mr SULLIVAN: Individuals may find that some insurers will offer them discounted premiums based on their past performance, others may find they are caught in a category of building professional. Some of the key recommendations coming out of Shergold Weir around professional development schemes, categorisation of building professionals will address that issue going forward, but again these are complex matters that are going to take some time to implement. With the building ministers forum having told the ABCB to implement these at a national level we expect that work is going to take a minimum of 12 months and from there we may start to see the claims experience and the claims projection change.

The Hon. SCOTT FARLOW: To that point, how do you base your premiums? Are they based on the safety experience aspect or is it on the liability you may potentially face?

Mr SULLIVAN: I am not an insurer or an underwriter myself, but I can give you a general view on how that is done. It is a combination of both. They look at the experience of the individual, both their claims experience, their work experience, their qualifications, the types of work they are saying they will be involved in for the duration of the liability contract. They then look at what is the environment at the moment for claims going on against the class of buildings or the class of work that individual may be involved in. For example: If you are a building professional saying that you are going to be involved in cladding work going forward you are going to be caught by those exclusions because the insurers have said the claims environment around cladding is too unsure and we cannot calculate our maximum losses.

The CHAIR: At the moment we are talking about apartment buildings four storeys and above, your industries involvement is insuring private certifiers but then those other building professionals who choose to get insurance. There are not a lot of compulsory insurance schemes out there you are involved in.

Mr SULLIVAN: No, it is really for the certifiers and mandatory strata insurance for the building itself once it has completed.

The Hon. COURTNEY HOUSSOS: Can we move on to the strata insurance. One of the residents from Mascot Tower raised this morning that they are really concerned about the insurance premiums going forward. Can you give us a general idea what is going to happen to their insurance premiums?

Mr SULLIVAN: It will be very general, of course.

The Hon. COURTNEY HOUSSOS: Of course.

Mr SULLIVAN: And perhaps it is easier to use Opal as an example because that has already occurred. In order to insure a building of any substance, a multiple storey building, the insurer goes ahead and assesses the risk of failure of the building against all of the insurable issues they will be looking at. In the case of Opal you had a building that was seriously defected and well publicised and being seriously defected and they have struggled to find insurance. In fact, as I understand it, no Australian insurer would even offer terms. They went to the international market for that and the terms offered, the only terms I believe they could get, were a tenfold increase at least in the premium and a vast restriction in what they would insure the building for.

For example: Most of the natural perils that most buildings would be insured for were ruled out and essentially the building is insured for fire only and at a reduced sum insured. If we translate that to what might happen to other buildings that have very serious well publicised defects you may find again there is a contraction in the market from those who are willing to offer them very unrestricted terms.

The CHAIR: And at an increase in price?

Mr SULLIVAN: Yes.

The Hon. COURTNEY HOUSSOS: Essentially what you are seeing is that there is a very strong incentive, something the Chair called earlier today a "conspiracy of silence", and it is in the interests of an owners' corporation not to publicly disclose if there is a significant liability. First, they are going to have a significant devaluation on their major financial asset, in most cases, and secondly, because they are unlikely to get insurance in the future?

Mr SULLIVAN: Of course, if they are aware of a defect or they are aware of any risk circumstances for the building then under every insurance policy, certainly in Australia but I suggest globally, they are obliged to disclose that. It would be a false economy for them to withhold the information because if a claim came about and it became obvious those defects were there and those defects were known about then not only have they put at the worst case the lives of their occupants at risk, they have also endangered their insurance cover.

The Hon. COURTNEY HOUSSOS: What happens in a situation like Mascot where they are being told there are four tranches of defect rectification works that are going to have to happen. The first tranche they said could cost anywhere up to \$10 million. The other three tranches have not even been scoped yet. What is going to happen to their insurance premium? Is there an insurance company who is going to be able to provide them with insurance in the meantime?

Mr SULLIVAN: I would suggest that they are going to find less choice in the market from insurers who would be willing to take that risk on. However, given that works are actively underway when they are doing it there are other types of insurance. They may find that they need to put together what is called an industrial and special risks policy where one part of the risk is covered by this insurer, another by this insurer. I would suggest they need to be working on that problem now rather than waiting for 30 days before their insurance is up for renewal: Getting a good broker and working through the permutations of what they will need to carry them through the remediation period and then potentially the cover over the building once it is fully remediated.

The CHAIR: There is something deeply wrong with building protection in New South Wales if the owners of the Opal Tower have to go on to the global insurance market to just get a premium to fix up future building defects or fire risk. If the owners of the Mascot Tower need to get a broker to get a complicated industrial style insurance policy just to insure their home—I am not saying it is the industry's fault—but from an industry perspective you could see that is a totally unreasonable set of obligations to put on ordinary mums and dads who have bought into an apartment complex?

Mr SULLIVAN: I disagree with that characterisation of it. These are large buildings, very substantial sums insured, there is a very active process of brokers, risk specialists, strata professionals who advise in this space. This is not a matter of jumping on to the internet and insuring with your average internet based insurer. These are complex policies. These are complex buildings. There is a large industry outside of the insurance industry that services those risks. I would agree thought that there is more to be done to educate owners' corporations and body corporates around that process. I agree there are steps that can be taken to make it more transparent around how insurance is placed and by whom when you look at the relationships that strata managers have.

The CHAIR: You said in relation to the Opal Tower a tenfold increase in insurance premiums to not cover most of the basic risks, just cover fire, that is a scheme that is fundamentally broken?

Mr SULLIVAN: Yes.

The Hon. MARK BUTTIGIEG: At the end of the day you are an insurance company, you are not a benevolent society, you are there to make money, let's face facts. This is symptomatic of at the root cause where the government should be responsible for ensuring that the majority of these things are nipped in the bud at the building and inspection stage. What has become apparent is that they are slipping through the net and as a result the insurance market is not willing to insure it because it is not fixed up at the beginning and it is all getting through to the keeper and you are the keeper. In the insurance industry's view is the current system of enforcement and regulation working or not?

Mr SULLIVAN: I believe the current system of enforcement is not working. We are looking forward to working with the Building Commissioner to see how that can be improved. You are right to characterise it as the insurance industry being at the end of the risk management chain. We are not involved in design and construction and planning. We do not get involved until right at the end when people are living in the building and a strata product needs to be taken out. If the risks are too high at that stage then those—

The Hon. MARK BUTTIGIEG: The market collapses.

Mr SULLIVAN: Or it is those apartment owners who are facing very restrictive insurance conditions. If we move out of New South Wales and go to Far North Queensland, you find that the average apartment owner in a strata building up there might be paying \$6,000-10,000 annually for their insurance. In the south we may see heavily defected buildings starting to suffer the same sort of fate. The only way to fix this is prevention—a tightening of the regulation, perhaps, but certainly better enforcement around design and construct documentation and a raft of other matters mostly addressed by Shergold and Weir.

The CHAIR: Some people have suggested a return to the clerk of works model, where you have somebody on site the great majority of the time actually watching the build who is responsible for build quality and coordination of trades. If that was reinstated in New South Wales would that give the insurance industry a level of comfort so that it might start writing some more reasonably priced policies?

Mr SULLIVAN: It would certainly help, provided that position was backed by appropriate regulation, independence and enforcement. For example, if they required a slab to be lifted so that something could be checked or re-done, that would need to be part of their powers. I have heard the same suggestion from a number of stakeholders around the industry. I would not classify it as a panacea but it is one element of independence around certification that could assist in making sure that as has been designed equals as has been built.

The Hon. MARK BUTTIGIEG: We have talked about Opal and Mascot and Landmark as the emblematic issues that have highlighted the canary in the coal mine. Presumably the Insurance Council would have had data on this problem bubbling away for quite a significant amount of time. Have there been discussions between the council and the Government regarding this time bomb ticking away? If so, what has been the response?

Mr SULLIVAN: Particularly around cladding or general building defects?

The Hon. MARK BUTTIGIEG: Cladding and general defects.

Mr SULLIVAN: I started in the industry 13 years ago. It would have been on day two in the industry that I had industry risk professionals come to me with building products, for example, putting them quite literally on the table and saying that this is being used in a number of buildings and it is manifestly wrong to do so. We have been engaging with the National Construction Code over a number of years to get some of these things addressed. It is extremely difficult at every stage to do that. Again, insurance is at the end of the risk chain; we do not have buy-in at the front of it, at the construction end of it. There has been a great deal of new and exotic building materials brought into the market for energy efficiency, to make lightweight construction and 99—

The CHAIR: Rapid construction.

Mr SULLIVAN: Yes, and 99 times out of 100 they are going to perform the job and perform it well. Occasionally an insurer will look at it and say that that is a bad risk from an insurance perspective—not necessarily because it will put life at risk but more because it complicates the rebuild of the building or makes it too expensive to do so.

The CHAIR: Could we explore the home building warranty scheme for a little bit?

Mr SULLIVAN: Yes.

The CHAIR: At the moment none of your members are willing to write a policy for the statutory home building warranty scheme—is that right?

Mr SULLIVAN: In New South Wales, yes.

The CHAIR: In New South Wales.

Mr SULLIVAN: Yes.

The CHAIR: Why is that?

Mr SULLIVAN: There were scheme changes, as I understand it—and please appreciate this is not particularly my field of expertise—but a number of years ago there were changes around the scheme that made it difficult and challenging for insurers to continue operating in that space.

The CHAIR: The only insurer in the market at the moment is the Government insurer run by icare.

Mr SULLIVAN: Yes.

The CHAIR: It was selling premiums in the 2016-17 year that saw it run a \$106 million loss. It was selling premiums in the 2018 financial year that saw it run at a \$139 million loss. That is effectively the State taxpayers subsidising the construction industry, isn't it?

Mr SULLIVAN: Yes.

The CHAIR: I assume private insurers are not willing to subsidise the construction industry in the same way by selling under-priced products?

Mr SULLIVAN: Well, in this State they would not be able to anyway because the scheme is underwritten by Government.

The CHAIR: What do you think it would take to get your members to engage in a home building warranty scheme that did not just cover buildings up to three storeys in height but covered all residential buildings? What would your industry need to get that kind of insurance scheme up and running?

Mr SULLIVAN: For a start, ideally it would have to be done at a national scale in order to make it feasible. If we narrowed down to New South Wales you would need to look at a range of measures, perhaps mirroring what has been done in other jurisdictions such as France with the decennial types of products. But insurers would need to be involved in the design and construct process, as would a number of other stakeholders other than the developer and the approver. This way insurers would have the confidence right from the plan and approval stage through to what's been built stage that they understand the building, they understand the risks and if something is likely to be incorporated into the building that puts it beyond their risk appetite that they have a seat at the table to say this will not be acceptable.

The CHAIR: In your understanding, is that how it works in France?

Mr SULLIVAN: As my understanding—again, I am not an expert on this type of insurance in France.

The CHAIR: In some ways that is a bit of a "back to the future" model, isn't it? If you talk to people from the industry they say that 30 years ago the bank, the council and sometimes a State Government representative would all be on the site during the construction of a project making sure that they were satisfied as the building was constructed—otherwise the bank would not lend the money and they could not get finance. That kind of multiple layers of quality assurance is what is needed, isn't it?

Mr SULLIVAN: That's right. You could certainly over-engineer that and push costs up, because there would be a cost involved in doing that. Insurers used to be far more involved in, for example, the design of fire sprinkler systems for a room such as this and they would set a rate around that. Over time that has left the market and you have performance-based solutions.

The CHAIR: Could we just talk about the risk around performance-based solutions?

Mr SULLIVAN: Yes.

The CHAIR: Most build solutions are "deemed to satisfy" under the National Construction Code. There is a standard solution for building problems. However, when a developer does not want to adopt the standard solution, the deemed to satisfy, it can do a performance-based solution. As I understand it, a developer can get literally any engineer to write the performance-based solution. There is no requirement for professional indemnity insurance and no one checks that performance-based solution. Is that what is happening now?

Mr SULLIVAN: I could not comment on the actual requirements in there. The insurance industry certainly does not want to see performance-based solutions leave the market. They are needed to encourage

innovation in the market and to achieve things at a price point that works for all stakeholders. What we are concerned about with performance-based solutions is primarily the design and construct side of it and the documentation. Quite a few insurers will come into a building at the end of the risk management chain and be asked to quote on insuring the building. The first thing they will note is that there is a performance-based solution, for example, for the fire protection system and documentation—if it is available at all—will often be sadly amiss.

Quite often we have had stories about insurers being handed shoeboxes full of documents and receipts about performance-based solutions by the owners' corporation or the body corporate. So they themselves have been put into a bad position to understand what it is about the building. One of the key recommendations from the Shergold Weir Report is about a building manual—a suite of documents that adequately describes all of the performance-based solutions that went into its design, who designed it, who approved it, how you maintain it. That would put insurers in a position to be able to adequately insure these.

The CHAIR: But surely there should be somebody independent checking on the performance based solution? Just having it signed off between an engineer paid for and chosen by the developer and the developer is not an adequate protection, is it?

Mr SULLIVAN: No and again, I think there are a number of recommendations in the Shergold and Weir report about the independence of who is signing off on performance based solutions. I think that is a question tomorrow for the building commissioner when he starts work.

The Hon. MARK BUTTIGIEG: In my mind, it is clear from your testimony when you have a private market that works on economic signals like yours does and the market essentially collapses, it is indicative of a systemic failure at the front end on regulations. That is the point to come out of all this. What this committee would like to understand is what the insurance council thinks should happen on that front to fix it.

Mr SULLIVAN: There is a great deal of work involved in an answer for that. You are right to characterise it that the industry's response around this introduction of this exclusion in professional indemnity is symptomatic of our view that the regulation and enforcement has not worked. That over a number of years it has introduced a range of risks that are beyond their appetite to be able to underwrite. How to fix that? Introduction of all 24 recommendations for Shergold and Weir in a very comprehensive way and a number of other measures that we have advocated in our submission, particularly around documentation of buildings.

The CHAIR: What about getting rid of that fundamental conflict of private certification where the developer chooses and pays for their own certifier? I know it is not the beginning and the end of it, there is vastly more to be done, but that has got to be a significant risk, has it not?

Mr SULLIVAN: Certainly the independence of who is signing off on the work is critically important. I cannot remember the precise recommendations of Shergold and Weir but there are a number of them that touch on the fact that the building certifier needs to be independent of the architects, the developers and the builders.

The CHAIR: Mr Sullivan, thank you for your evidence today. For the record, I do not think we blame the insurance industry for the mess, I think the blame lies somewhere else, but we have appreciated your evidence today.

Mr SULLIVAN: Thank you. I do not often hear that comment. Thank you very much.

(The witness withdrew.)

MICHAEL LAMBERT, Author, Independent Review of the Building Professionals Act 2005, affirmed and examined

The CHAIR: Did you want to give a brief opening?

Mr LAMBERT: Yes, if I could. I appreciate very much the opportunity to speak today to you. I have been involved in this now for five years and increasing frustration felt with the lack of progress in this area. The core problem is that there is very poor regulation or regulation is inadequate to this situation. That is because the whole change in the industry occurred in the 1980s with the shift from the architect, combined with the chartered engineer, combined with the clerk of works, to design and construct model. Design and construct model is where the builder runs the show and of course, there was a move to a private certification. That could have been addressed if the regulation had become stronger and more effective, but it did not. It did not adjust to that circumstance and that is the fundamental problem that we have—inadequate regulation.

New South Wales is, in my view and I am reported as saying this, has the poorest regulatory system of the major States. I have surveyed them all. It is the poorest because it has the most fragmented, poorly constructed building regulation structure and in my opinion, it is located totally inappropriately in Fair Trading, that has the philosophy of low, minimalist regulation, reactive in approach and has not got the professional skills. I had recommended and the Government was going to put it in a regulatory hub within Finance, but they chose to put it in Fair Trading. There is no single magic solution. You could go back to council certifiers but there are real problems in doing that. It is not certification which is the sole problem. It is a problem, but there are many other problems, about eight of them which I have identified in my report and in my submission, that need to be addressed.

In the period that I have produced the report, New South Wales has done very little at all in the way of meaningful reform. It has made a few minor gestures, but the two core areas they were going to address in the first year was the practice guide for certifier to hold them accountable and to the issue of fire protection safety. It failed in both approaches and did not do anything much else as well. The current proposals before us in the discussion paper, Building Stronger Foundations, are totally inadequate and are quite clearly written by someone who does not know building regulation. In my view there is a fundamental pre-condition for progressing reform in New South Wales. Establish not just a building commissioner but a building commission, a building agency directly accountable to the Minister, fully resourced, as is Queensland, as is Victoria, with the powers and necessary skills involved, supported by a building regulatory advisory committee drawn from industry and the community, which occurs in every other State but New South Wales. Failure to act in this area will lead to a continuing decline in confidence, continuing increase in insurance premiums and a collapse of building certification as certifiers reach the age of 50 and leave the industry and or will not have insurance going forward.

The Hon. COURTNEY HOUSSOS: Mr Lambert, I thank you very much for your submission and for your time today. It is incredibly value for us as a committee. It paints a particularly damning picture for building regulation in New South Wales. Do you think that there is a reluctance on behalf of the Government to implement your changes?

Mr LAMBERT: I think it is a combination of at the ministerial level not a complete confidence and understanding of the complexities involved. But at the level of the public service, in particular Fair Trading, it is an ideological viewpoint that there is a hostility towards effective regulation; a view that you do not need regulation, you just need to basically have reaction to consumer complaints and that is sufficient. In my mind, you have to get on the front foot and address the fundamental problems in the construction and building industry and improve the quality there—not at the back end and try and clean up consumer problems once they occur. There is an ideological viewpoint, which is why there has been such frustration and such little progress over the last four years.

The Hon. MARK BUTTIGIEG: Just to follow-up on the Hon. Courtney Houssos' questions, do you think is more a creature of the department than the Minister?

Mr LAMBERT: I think that is the case. I have met the current Minister and I am working him and his staff to try and address the issue. But I have done this with three other Ministers, so I begin to wonder.

The Hon. COURTNEY HOUSSOS: We all are.

Mr LAMBERT: I hope that there is a recognition now with the range of problems that have occurred and with the commitment now for the Shergold Weir Report, which I fully support, that there is a way forward in this area.

The Hon. COURTNEY HOUSSOS: You said that if there is a building commissioner to be established, then they need to be suitably resourced and tasked.

Mr LAMBERT: Yes.

The Hon. COURTNEY HOUSSOS: Notwithstanding the fact that they are missing a commission and as you outlined, they need to have an independent building authority and a building regulatory advisory committee, do you think they have got what they need to implement your recommendations?

Mr LAMBERT: No, they don't. The commissioner is one person. He has to rely upon some resources. Even if he can rely upon Fair Trading, they have not got sufficient skills or expertise. He talked about going and making inspections of building sites. He could do that because of his background. There is no-one in Fair Trading who would be able to inspect a building site and form a view about it, full stop.

The CHAIR: There were 18,000 strata schemes registered in the last 12 months.

Mr LAMBERT: Yes.

The CHAIR: He is going to be busy, isn't he?

Mr LAMBERT: Extraordinarily busy. He needs a commission. In Queensland they have got 400 people working in the commission. It is similar in Victoria. In New South Wales, it is mainly a consumer protection unit.

The Hon. MARK BUTTIGIEG: And those 400 people are out on the ground inspecting?

Mr LAMBERT: Not all of them, but a significant number of them are out inspecting sites and checking up on building certifiers.

The Hon. MARK BUTTIGIEG: And is the evidence that the Queensland system has been successful as a result of that?

Mr LAMBERT: Look, all the approaches have problems, as Shergold-Weir said. But I would say Queensland is the best of the systems in place in Australia and it has the resources and the general mindset and philosophy that make it reasonably effective.

The Hon. COURTNEY HOUSSOS: We heard this morning that—I asked for a breakdown of the number of inspectors. It was a number well under 100. Perhaps between 50 and 100, doing some quick maths.

The Hon. TREVOR KHAN: No, it was closer to 100 on the numbers that were given.

Mr LAMBERT: In Fair Trading?

The Hon. COURTNEY HOUSSOS: Within Fair Trading across the different—

Mr LAMBERT: Most of those are involved in plumbing inspection.

The Hon. TREVOR KHAN: Indeed.

Mr LAMBERT: Very few of them are involved in the actual building inspection, so they have not—I do not think they have got anyone in building inspections, or very few.

The CHAIR: So they all flush well?

Mr LAMBERT: Yes.

The Hon. COURTNEY HOUSSOS: Yes. But no water pressure, apparently.

The Hon. TREVOR KHAN: It did strike me that so many of them were in plumbing. Why?

Mr LAMBERT: They have the Plumbing and Drainage Act and they are responsible for that Act, and that has been their main focus. So there are licensed plumbers and therefore they are required under the Act to check up on them. So that has been the main focus of the Fair Trading.

The CHAIR: It is because there is actual regulation over plumbing, unlike in multistorey apartment blocks where there is next to nothing?

Mr LAMBERT: Yes. Well, there are some fundamental problems. I do not think you can necessarily rely on government inspectors alone. You do need to rely upon the building certifiers, and there is a problem there with building certifiers which I am happy to elaborate on.

The Hon. TREVOR KHAN: Please do.

Mr LAMBERT: Okay. Look, the fundamental problem is that the certifiers are—be they council or private, are given an impossible role. In a commercial building, say a multistorey strata development, there are about 20 of what we would call critical building systems and elements. Waterproofing, hydraulics, fire protection systems, structural, et cetera, et cetera. Each of those is a highly technical area and the certifiers cannot be an expert in each of those areas. They have a broad understanding and an understanding of the building construction code, but they cannot be accountable for the individual designs and the individual construction. You need the people who are designing to sign off on their design and you need people who are putting that design into practice to sign off together with the designer. They should go back in and check. There is none of that occurring, so when you sign off with an occupation certificate, you are signing off that they can occupy it. You are not signing off that they actually meet the actual building code, which is extraordinary. There is no test for that.

The CHAIR: So the Government, in answer to some questions I put to it earlier today, said—when I put that proposition to them, they said, "Oh, no. There is the appendix that there is a series of certifiers, whether it is building certifiers grades A to A3, or it is subdivision certification or structural engineering compliance." And they pointed to their list of certifiers and they said, "They are all licensed, they are all insured. That all covers all the paperwork that private certifiers get." What do you say to that?

Mr LAMBERT: Very few of those categories have people that are licensed for them and none of them actually provide compliance certificates. Compliance certificates are allowed under the Act, but they are never used because they are legally onerous. So people choose not to supply those. And so the only effective certifier operating at the moment is the building certifier. And therefore they need to have the building, the designers and the constructors certify the work they have done and inspect it, but then they need those people to be accountable, not themselves alone.

The Hon. TREVOR KHAN: Is it that it is legally onerous or is it that the—I will call it the onus—creates in a sense a potential insurance liability and therefore people avoid doing it?

Mr LAMBERT: I think it is the latter. I think that there is a desire to avoid any insurance liability. Yeah, yeah.

The Hon. TREVOR KHAN: So for instance, lawyers had it with regard to signing declarations with regards to explaining mortgages to clients. Everyone got to the point of saying, "No, we will not sign them," because it created a potentially liability that the banks would rely upon if there was default under the terms of the mortgage. It is all the same thing. Everyone is trying to avoid getting bunged with a liability.

Mr LAMBERT: So the first major problem with building certifiers is that there is no accountability of the people who have designed and done the work at all in the project, so you are stuck with the certifier. Secondly, the certifiers have no support. There is no basic support. There are no expert panels they can draw upon and no way that they can draw upon experts for performance-based solutions, which are very complex.

The CHAIR: And they are often sole traders. They do not even have a structure.

Mr LAMBERT: Yeah. Usually they are sole traders. So they have got no support. There is no continuing professional development requirements. And in addition to that, there is an issue there about accountability. You do need to have accountability because they are private. Most of them are well-motivated, but you do need to have an ongoing audit program which checks up on them on a regular basis.

The Hon. COURTNEY HOUSSOS: On the certifiers?

Mr LAMBERT: On the certifier's work and the work being undertaken. So you need occasional inspectors going out there, checking that they have certified correctly, that the work that they have done is correctly certified, and picking up on where it is not correct. But there is also in this State no practice guide. Therefore there is no basis on which a certifier really knows what work they are supposed to undertake. That was drafted when I was actually doing my report. It has never been released. It is a fundamental basis of accountability to have the practice guide and to hold them accountable for undertaking the practice guide.

The CHAIR: Particularly if—I mean, on multilevel apartment blocks there are some mandatory inspections?

Mr LAMBERT: There are mandatory inspections on all buildings, but not sufficient on high-rise developments. My recommendation was that there be a risk-based approach on high-rise developments. That has not been implemented, and that is unfortunate.

The Hon. TREVOR KHAN: Sorry, what does that mean? What is a risk-based approach?

Mr LAMBERT: Well, it depends on the complexity of the building and the systems in place, but effectively you would identify all the critical building systems and identify which ones need inspection. So in a major building you want to look at it structurally, you want to look at the fire protection systems—active and passive—you want to look at waterproofing. There are a whole range of things that you would not do, necessarily, in a residential one-storey building. So that was a requirement, that they do a risk assessment and that they be accountable for the risk assessment that they did.

The CHAIR: But that has not happened?

Mr LAMBERT: That has not happened.

The Hon. MARK BUTTIGIEG: Can I ask you, Mr Lambert, in the short time that I have been involved in the lead-up to this Committee, you seem to be the resident expert and the Government has sort of backed in your submission and your recommendations at least rhetorically. Were you approached or did you apply for the commissioner's job?

Mr LAMBERT: No, it is not an area that I believe I have got the necessary experience and skills in. No, I have another role anyway.

The CHAIR: Careful what you ask for.

Mr LAMBERT: I know what the problems are.

The Hon. COURTNEY HOUSSOS: Given your testimony this afternoon, we might take a different—

The CHAIR: You have written a report about why you would not take the job, from what I can tell.

The Hon. COURTNEY HOUSSOS: Coming back to this question of auditing certifiers, we heard this morning that the Government has announced a somewhat ambitious target. They have audited eight, they are planning on doing 10, and they think they are going to be doing 15 a month. Is that enough?

Mr LAMBERT: They said that they were going to do 25 per cent of certifiers every year. Now, there are a couple thousand certifiers. So that is not enough so far.

The CHAIR: And they have reduced it to just, I think, categories A1, A2 and A3.

Mr LAMBERT: They are the major categories.

The CHAIR: Yes. They say there are about 600 of them.

Mr LAMBERT: That is right. No, it is not enough. They need to do far more than that. But I do not believe they have got the skills in that organisation to actually undertake that role in the first place.

The Hon. COURTNEY HOUSSOS: Let me say this. Do you think the Government is taking this problem seriously?

Mr LAMBERT: I think they are serious that they want to do something about it. I think there has been a long hiatus when they have not understood how to proceed and they made a couple of changes. One of the classics was that they put out a regulation for fire protection certification, so that with the design of a fire protection system, it required a competent person to certify. Now, what is a competent person? It is defined as a person who is felt to be competent by the owner or who is accredited.

The Hon. MARK BUTTIGIEG: I do not understand, the problems seem fairly well enunciated. There has been your report, then the Shergold Weir report, you have a Minister who you think is serious about this stuff, a department allegedly still keen on light touch regulation; why do you think there has been a lack of will power to actually get this stuff going? It is not like we do not know what the problem is, it is not like there has not been enough time elapse, there has been any number of disasters?

Mr LAMBERT: You would need to ask that question of the Government, I cannot hazard a guess other than I think there has been at the public service level a reluctance to change the existing model to one that is more fit for purpose. That is the fundamental problem. I think they have persuaded successive ministers that there is no need for major changes.

The CHAIR: Before we leave the fire issue, since the delivery of your report the Government has reduced the consumer protection for fire safety because fire and rescue used to have a mandatory position of assessing all applications to see if they met fire safety standards and it is now discretionary. Fire and Rescue may assess development applications to see if they are compliant. Are you aware of that change? It has gone backwards.

Mr LAMBERT: It has but I did visit the fire brigade and talk to them. They had a vast room full of these documents that have been sent to them. They rarely, if ever, inspected. They did not have the resources to inspect. Occasionally they did but not very often. There was never really an inspection regime in place in the past. I think they have a role with respect to performance based solutions. They should have a role there mandatory to basically at least review those.

The CHAIR: At a minimum?

Mr LAMBERT: At a minimum.

The CHAIR: If a developer is getting rid of the second set of fire stairs at a minimum that should be signed off by Fire and Rescue?

Mr LAMBERT: I think in that particular case it should be. But more generally I think with fire safety systems the installation and the design should be signed off by an expert in that area and that expert be accountable for their signoff. That does not occur. With the Bankstown fire the signoff was by a person who had no registration and still practices to this day and has no registration or qualifications.

The CHAIR: That was actually quite frightening, Mr Lambert.

Mr LAMBERT: Yes.

The Hon. TREVOR KHAN: How much of today's evidence and musings have you heard?

Mr LAMBERT: I heard the insurance, that is all.

The Hon. TREVOR KHAN: There seems to have been a great deal of discussion from some at the table that this is all caused by neoliberalism or the privatisation of certifiers and the like. If I could go back to the previous exercise of the councils signing off on construction work: Am I right in saying there were a couple of problems with that model?

Mr LAMBERT: Yes.

The Hon. TREVOR KHAN: One of them was that the people who were doing the signoff often had fairly limited skill set, did they not?

Mr LAMBERT: I do not think there is a panacea to go back to the council based certification for two reasons: Councils generally have lost their expertise in that area, but even when they had the sole role they found it very difficult to attract and retain skilled people, so there were very long delays. I think it would be very difficult to go back to the old system, you have to make the new system work.

The Hon. TREVOR KHAN: I was not suggesting that.

Mr LAMBERT: I am sure you were not.

The CHAIR: But many submissions have.

The Hon. TREVOR KHAN: One of the problems was this skill issue in getting people into these jobs?

Mr LAMBERT: Yes. The only area in New South Wales where they can functionally do it is the country areas where they can attract and retain people; not in the metropolitan area at all.

The CHAIR: It is hard for private certifiers to compete out there in terms of the distance travelled.

Mr LAMBERT: That is correct.

The Hon. TREVOR KHAN: Can I go on? There was another problem with using say the council model and that was councils were getting bunged with a lot of legal actions, were they not, because of building defects that were then arising?

Mr LAMBERT: Yes.

The Hon. TREVOR KHAN: I am not promoting the council model. In 2002 one of those bodies that was pushing for councils to get out of it was essentially the local governments themselves, they did not want to be involved in it?

Mr LAMBERT: They have been very strongly supportive of getting back involved in it since that time.

The Hon. TREVOR KHAN: I am talking about 2002.

Mr LAMBERT: I am not certain about that.

The CHAIR: The Local Government Association, the Mayors Association, the Shires Association, the Professional Builders Association, every single part of the local government sector opposed the reforms in 1998, Mr Khan.

Mr LAMBERT: That is right.

The Hon. TREVOR KHAN: If we went to another form of direct government involvement, got rid of the certifiers—and maybe that is the way—what is the liability issue that arises from that approach in terms of government?

Mr LAMBERT: Effectively it is the liability now with residential buildings already in place. Currently the government has the home warranty insurance scheme. It does impose on other strata consumers a separate scheme which is quite deficient, as my submission says. It will continue to have a liability, as it has now, in terms of its insurance scheme. It does not have a liability in respect of the commercial sector at the present moment. Its liability would be expanded quite significantly. I think the better solution is for the government to basically make certain the regulation works. I think the regulation can work with private certifiers. Reverting back to council certifiers is a very difficult exercise and would take decades to do.

The Hon. COURTNEY HOUSSOS: What would it take for the private certification model to work?

Mr LAMBERT: They need to be accountable. They need to be subject to a practice guide that sets out the requirements. They need to be audited regularly. They need to be subject to a professional organisation process which is oversighted by the Professional Standards Authority of Australia. They effectively need to be accountable. That is the fundamental word, "accountable".

The CHAIR: They need to have all the features of a public official?

Mr LAMBERT: They are. They are a regulatory agent. The only trouble I have got and I do not have a solution to it: How do you avoid the sense of compromised independence by being appointed by the builder?

The CHAIR: If they need all the features of a public official, surely one of the most simple way of doing that is to employ them publicly and make them publicly employed officials?

Mr LAMBERT: I think that is a perfectly reasonable solution.

The Hon. SCOTT FARLOW: With respect to being appointed by the builder, there are a lot suggestions that you could use a cab rank model or you could have a list by which the developer could choose but the list to be chosen by council: What do you think of those suggestions and are there any challenges that you see?

Mr LAMBERT: I saw that in the consultation paper. I think they are not particularly effective because they do not address the fundamental problem of poor certifiers who still practice. You could have them part of the casino wheel or picked out of a box. You fundamentally need to address the underlying problem which is certifiers who are not professionals. They are a small minority but they keep on happening as recent press statements indicated. You need to get rid of the people who are inappropriately undertaking their job, which requires auditing.

The CHAIR: That is currently being done by planning, who are overseeing certifiers.

Mr LAMBERT: No, that is Building Professionals Board.

The CHAIR: It is the Building Professionals Board which is oversighted in turn through the Minister for Planning, not through Fair Trading.

Mr LAMBERT: No, it is the Minister for Better Regulation. It was transferred from planning.

The CHAIR: Do you think having a building commission and a building commissioner having control of the regulation of certification, building standards but also dispute resolution: Do you see a building commissioner having all of those roles?

Mr LAMBERT: Yes. I do. That should be outside Fair Trading and it does need to take the building policy unit out of planning and put it into that unit. That building policy unit handles building standards and it should be under the building regulator.

The CHAIR: We have a bit in planning, we have a bit in Fair Trading, we have a bit down in NCAT, we have a bit off in finance and SIRA in home building insurance scheme: You would not design this system if you wanted to have standards or a navigable system?

Mr LAMBERT: No, it should be combined into building commission or one building agency and have all the functions in one area with one senior Minister responsible.

The CHAIR: It should be taken away from Fair Trading?

Mr LAMBERT: Yes, it cannot be in Fair Trading. It could be the finance portfolio, but it cannot be in Fair Trading, no.

The Hon. TREVOR KHAN: Can I just ask—and, again, I am not in any way being critical of what you are saying—what is the problem with the Fair Trading Minister having the gig?

Mr LAMBERT: It is not the Fair Trading Minister; it is Fair Trading as an organisation. Fundamentally, Fair Trading is about consumer protection and it has no understanding or knowledge of regulation, per say. It has a reactive approach to informing consumers of their rights and to investigating problems. But this requires you to be very much involved in regulating the industry on a hands-on basis. That is not in Fair Trading's DNA.

The CHAIR: It is designed to deal with a dodgy fridge, rather than designing an apartment block so it does not fall down.

The Hon. TREVOR KHAN: I think it is bit more than that.

The Hon. COURTNEY HOUSSOS: You have more consumer protections on your fridge than you do on your apartment block.

Mr LAMBERT: Philosophically it is very light-handed regulation. For example, I had a debate with Fair Trading staff when it was given the responsibility for building certifiers. The staff said, "We licence other professions; we do not need to have an accreditation scheme where we check up on them and educate them or have an audit program." I said, "These are public officials and you do need to do that. They are not like plumbers; they are public officials. They are the core of your building regulation system."

The Hon. COURTNEY HOUSSOS: What was their response to that?

Mr LAMBERT: They shrugged their shoulders and walked away.

The CHAIR: And implemented four out of your 150 recommendations.

The Hon. COURTNEY HOUSSOS: Mr Lambert, you talked about the need for an independent authority and an independent advisory board. That was in your report. What was the Government's response back to you about that?

Mr LAMBERT: It simply said that it would find a suitable position for it. I had originally agreed with the Minister that it would be in the finance portfolio in a new, separate regulation hub. That was the original plan. But what happened between us agreeing to that and the change of Minister was that it was decided to put it into Fair Trading because there was a home building unit in Fair Trading. They thought that the two would go together quite well.

The Hon. COURTNEY HOUSSOS: Do you think four new admin staff supporting the new Building Commissioner is appropriate?

Mr LAMBERT: No. The Building Commissioner needs to be the head of a building commission or building office—it does not have to be a statutory authority—and has to have responsibility for all the building functions. That is the case in Western Australia, Queensland and Victoria. That is the mature system.

The CHAIR: At best the charitable view of what the Government has done with the Building Commissioner is that it put the commissioner in with four admin staff hoping that the commissioner will come up with a bunch of recommendations to save the industry. That is kind of what it appears to be at the moment. Or maybe I am being a little bit unkind.

Mr LAMBERT: The reality is that the Shergold Weir report and my report very much overlap in terms of recommendations. The Government already has a blueprint. It said that it has signed up for a nationally coordinated approach. However, the consultation paper it put out, *Building Stronger Foundations*, is not in accord with a nationally consistent approach, which it has agreed to.

The CHAIR: Do you find it remarkable that the Government is now going through what will probably be a six-month consultation process on its discussion paper, which does not actually do the thing the Government has committed to, which is to implement the Shergold Weir report?

Mr LAMBERT: I was quite surprised when I read it. I thought, "This can't be it." All it does is establish a Building Commissioner; allow legal rights of action, which people do not want because it is extremely

expensive; and a couple of other minor changes. The one thing it does do is bring in a requirement for registration of people who design building systems.

The CHAIR: But not construct them?

Mr LAMBERT: But not construct them. The Government completely missed out on the most important aspect, which is the actual construction; not just the design. These days architects do design buildings. But the designed building is approved at the DA stage and then a draftsman takes it and gives the plan to the builders and then they build on it. What happens in terms of the final building and what was in the approved building are usually quite different.

The CHAIR: The construction certificate, which is ultimately much more important than the DA approval, ends up being the building. And that can be a negotiation between the builder and a variety of engineers and architects that the builder brings on to try to deliver the project.

Mr LAMBERT: While trying to minimise costs.

The CHAIR: What would it take to have a system in New South Wales where we had that consistency and independent oversight for the actual construction of buildings?

Mr LAMBERT: You would establish a fully resourced building commission that had the power to inspect and hold to account. It would be responsible for overseeing building standards, which is a national responsibility. In addition to that you would have certifiers who were effectively public officials and who were accountable as public officials. You would also have enhanced consumer protections. At the present moment it is ludicrous. Buildings are failing because of ineffective building regulations but also because people are not protected from that and the financial consequences of that. You would also have each of the building professions registered and accountable. They would be required to certify their work and would be legally accountable and have insurance policies. You would have a digitally based information system that captured information on the plans, procedures and approvals, which could be checked.

You would have a building manual for all commercial buildings. That was in both my report and the Shergold Weir report. You would have the whole history of that building, including all the materials and cladding used, available. That information should be established. Finally, you would need an effective relationship between councils and certifiers. We have that in regional New South Wales but we do not have it in metropolitan New South Wales. What that means is that a certifier can tell the council there is a non-compliance problem—it is a rare for them to do it, but if they do—and the council will invariably say, "That is your problem; not our problem." It needs to be that the certifier has a mandatory responsibility to report to the council, if it is council approved, and the council must be responsible for the enforcement of compliance, because they have the powers in that area. That should be overseen by the building regulator to ensure it works. I proposed a partnership between the councils and certifiers that has not been enacted upon. That is a fundamental problem.

The Hon. MARK BUTTIGIEG: Given the recent history we have had and the total loss of confidence in the building industry, if, hypothetically in an ideal world, all of your recommendations were implemented tomorrow, how long would it take before the industry recovered and public confidence was restored?

Mr LAMBERT: The industry itself and major builders—who do self-regulate quite effectively—are calling for reform because they can see that their reputation is being impacted upon by the problems in the industry. If the Government was to announce a comprehensive approach and commit itself, within a one-to-two-year period, to implementing it, there would be a very strong improvement in confidence. You would still have problems of the past reoccurring, because there are lots of smaller versions of Opal Tower around. But you would have a functioning system that would work effectively. Within that two-year period you would have good quality buildings coming through the system, a reduction in insurance premiums and an improvement in confidence in the industry. You would also reduce the flow out of building certifiers who are leaving the industry and retiring at the present moment because they are in an impossible position, quite frankly.

The CHAIR: The Government tells us not to worry. Its quite long submission states, "The combined benefits of recent and current reforms to the building industry and regulatory frame work will transform the building industry and help to restore community confidence." Should we rest assured with that?

Mr LAMBERT: No. It needs a comprehensive reform package along the lines of my report and the Shergold Weir report. It needs to be broadly nationally consistent. Fundamentally, New South Wales is behind the eight-ball because it does not have a functioning building commission to start with. That is the first step.

The CHAIR: The solutions do not start at the door of Fair Trading?

Mr LAMBERT: No, it does not start there at all.

The Hon. COURTNEY HOUSSOS: This morning we heard that more legislation is going to be introduced, which is also going to require a consultation period, when the previous legislation that was passed in October last year still has not been proclaimed and looks like it will not be proclaimed until at least the end of this year. This continues the piecemeal approach.

Mr LAMBERT: Yes, the legislation in New South Wales is appalling. It is very hard to understand; it is very fractured; it is very inflexible. But it is not the fundamental problem. The fundamental problem is effective regulation. That needs to be addressed. The only legislation they have done—what they did was consolidate bits and pieces in the Environmental Planning and Assessment Act into one part, but it was as incomprehensible in one part as it was in ten parts. Then they changed the Building Professions Act to a new Building and Development Certifiers Bill. It did not change or fundamentally alter things, it just was a new Act. They need to go beyond that, to put in place an effective resourced regulatory scheme, and also allow councils to have the resources, because councils need to have resources in this area because they are the provider of approvals and compliance enforcer, so they probably do need to put some levy on DAs to give them a funding source because they are pretty lean in terms of the people they dedicate to this function.

The CHAIR: You can understand why councils are not keen to get into a mess created by private certification because they have not been paid a fee and they just have all the costs of enforcement when things go wrong. There clearly needs to be a revenue stream for Local Government, does there not?

Mr LAMBERT: It is not just a problem of private certification, it is a problem of building regulation in general. Most private certifiers are trying to do a good professional act, but they have not got the support and they have not got the powers required of them to undertake their function effectively and there is no accountability for the range of building professionals who work on a site. So that needs to be resolved. They cannot be the sole expert on site. They need to have the people who are doing the work—the critical elements—accountable and who will sign off certificates for which they are legally liable.

The Hon. MARK BUTTIGIEG: And this is where the clerk of works concept might help.

Mr LAMBERT: It might, but the clerk of works was basically in the old system which involved an architect as the overall project designer and supervisor, and the architect then appointed a chartered engineer who could handle the structural side and appointed a clerk of works who handled day-to-day inspections and management of the system. You have a whole new system called "design and construct". It is very hard to go back from design and construct to the architect-led system. The architect is now just simply an employee of the builder.

The Hon. ROBERT BORSAK: If you have good design and construct, who ensures compliance in the construct phase on a day-to-day basis?

Mr LAMBERT: The builder is supposed to—

The Hon. ROBERT BORSAK: The builder has a conflict of interest.

Mr LAMBERT: But the builder needs to be made accountable for that and for his subcontractors, which requires all the people who are doing particular key elements to be responsible and accountable and to certify their work—and that is not happening.

The CHAIR: And to be insured?

Mr LAMBERT: And to be insured and to be registered and to be subject to audit.

The CHAIR: And not through a corporate entity.

Mr LAMBERT: No.

The CHAIR: But personal professional insurance.

Mr LAMBERT: As an individual. And that is another problem with builders. Builders create special purpose companies which they wind up quite often after they have undertaken the work and therefore there is no party that you can go to legally to seek recompense for defective works.

The Hon. TREVOR KHAN: It is not often; it is almost their invariable practice now, is it not, that some very big construction companies in New South Wales were set up with their name followed by "1", "2", "3", "4" or "6", "7", "8 Pty Limited"?

Mr LAMBERT: Yes.

The Hon. TREVOR KHAN: It is a special purpose vehicle for each building, is it not?

Mr LAMBERT: That has to stop. You have to require people individually to be accountable.

The CHAIR: Of course they will do that because then they can just step away from the liability and it is the job of Government to make that not happen.

The Hon. ROBERT BORSAK: Going back to what you said before, the builder is not required to get a certification from the subcontractors that they did complying works—is that what you said?

Mr LAMBERT: That is the current situation.

The Hon. ROBERT BORSAK: Isn't that a major problem?

Mr LAMBERT: It is a major problem.

The Hon. ROBERT BORSAK: What if I put a pair of shoddy foundations in a building, just enough to get through, and I do not have to give you a certificate as a builder to say that I have done the right thing?

Mr LAMBERT: You can give a certificate, and occasionally they do, but they have no legal impact or meaning. You need to have the person who has done the concrete laying to be registered, to be accountable and to be subject to insurance and subject to audit. That does not occur at the present moment. And the builder has got an incentive largely to minimise cost.

The Hon. ROBERT BORSAK: That is exactly what does happen. He goes for the lowest cost quote from one subcontractor to the next.

Mr LAMBERT: That is right.

The Hon. ROBERT BORSAK: Because he has no regard in relation to the quality of the work that is being done.

Mr LAMBERT: Yes.

The Hon. ROBERT BORSAK: This is a great situation to find yourself in.

Mr LAMBERT: Yes.

The CHAIR: We have a system designed to sell shiny buildings, but not actually to ensure that they can be lived in safely, or actually resolve the needs of homeowners in the long run. It is all designed for that moment of sale.

Mr LAMBERT: Yes. Some of the major builders—Multiplex for example—have a very professional system. They have a laboratory where they take all their subcontractors and they train them in the best standards. But at the present moment you have no licensing for builders who are commercial builders, which is a crazy system. That means there is an encouragement for people who are poor or shoddy builders to go into the commercial area because there is no licensing requirement.

The CHAIR: You make a mea culpa in your recommendation to our Committee in that regard.

Mr LAMBERT: I do, yes, I made an incorrect judgement based on a recommendation from a Fair Trading person.

The CHAIR: Fair Trading said, "Don't you worry about the commercial sector, they will self-regulate—they are all very professional and capable."

Mr LAMBERT: Which is nonsense, as I have discovered.

The CHAIR: So the idea that you would have a building commissioner only looking after the residential network is just going to be kicking the problem down the road for the commercial sector, is it not?

Mr LAMBERT: I think in certain classes of building such as, generally, hospitals—there are some exceptions—construction work, bridges, et cetera, they work quite effectively because you have a very informed buyer and a very informed provider of the service. But most of the commercial area, particularly in strata development, you have developers whose sole interest is in building and selling, and the person who is the ultimate consumer has no role in oversighting the work. They simply buy it off the plan or they buy it after construction, and they have no idea what they are buying.

The Hon. MARK BUTTIGIEG: And when you are buying something like that we all know you are paying a myriad of professional people to do what you are not capable of doing, and that is vouch that it is going to be habitable and safe to live in.

Mr LAMBERT: Yes. The building industry needs effective regulation. It is a very complex area. Each product is designed for a particular purpose. The owners, the consumers, are not informed, do not have knowledge, and there are environmental and safety issues that traverse an initial building and cover a community. So you do need effective building regulation—not light-handed regulation.

The CHAIR: At the same time as we have gone through an experiment with deregulation, buildings have become vastly more complex with novel building materials, novel building methods, and it is almost the worst time to go through a period of deregulation.

Mr LAMBERT: Yes. I could add to that because I have not mentioned it already: You talked about cladding to the person from the insurance area. My report and Shergold Weir have taken this up. You do need to have a national compliance system for risky building products. Cladding is in that case, but for higher-risk products you need it. Currently, you have a code mark system, which is a voluntary system and you look at what is covered. It is very minor bits of material, it does not cover the major areas of building materials. Now a builder gets cladding on to a site, but they cannot do a scientific test of that cladding to see if it meets certain criteria. It needs to be assessed on import or manufacture by a national scheme, and be certified for a national scheme. That is one of the recommendations I have made and Shergold Weir made as well.

The CHAIR: We could probably spend another four hours on the failures and the need for reform, but on behalf of the Committee I thank you for your time today and also for your submission, which I personally have found extremely helpful and useful in understanding the scope of the challenges ahead.

Mr LAMBERT: I made a slight correction, I found a little error, but that has been taken care of.

The CHAIR: I do not know if you took any questions on notice.

Mr LAMBERT: No, I did not.

The CHAIR: Thank you very much for your time today.

Mr LAMBERT: My pleasure.

(The witness withdrew.)

The Committee adjourned at 15:03.