Introduction

The Owners Corporation Network of Australia Limited (**OCN**) is the peak independent consumer body representing residential strata and community title owners. Strata is the fastest growing form of residential property ownership in Australia. Over half the new dwellings to be built in our metropolitan areas over the next decades will be strata titled. The growth of this sector raises increasingly important questions over construction quality, property ownership and governance.

The Building Stronger Foundations discussion paper (the **paper**) announced 19 February 2019 and then released on 26 June 2019 was portrayed as taking "the first steps" in implementing the NSW Government response to the national report, Building Confidence: effectiveness of compliance and enforcement systems for the building and construction industry across Australia (the **Shergold-Weir report**).

OCN notes that it is likely to be the only true consumer group making submissions on this paper. OCN has been making submissions in this area for almost 20 years, and most issues now sought to be solved by this paper have been raised as concerns requiring action throughout that time by OCN.

OCN submits that the ultimate aims are to:

- Deliver buildings that comply with the Building Code of Australia (**BCA**)/National Construction Code (**NCC**) and are fit for habitation and purpose.
- Provide effective consumer protection for when this does not occur.

"First steps"

The current reform package under consideration by the government is clearly and self admittedly a first, and interim, measure. It deals only with certain parts of the Shergold-Weir report recommendations. It will not fix the fundamental problems in the system, and the industry attendees at the Minister's first discussion paper feedback forum on 2 July 2019 seemed to agree.

Apart from the statutory warranties in place for residential building work under the *Home Building Act 1989* (NSW), which still have loopholes requiring reform as raised below, that system needs to be completely rebuilt to provide confidence to everyone, including banks, insurers and consumers, that buildings built under that new system are to the required level of quality. Putting that new system in place will take several years, as the current situation has no easy fixes, and the new system needs to be carefully considered and planned. NSW cannot afford to get this wrong, again.

The process to work out that new system needs to start now, while the interim reform package is being put in place, to buy time to fully fix the system. The NSW Premier has admitted that the existing system is not working. This is a watershed moment for the state, and Australia is likely to look to how NSW deals with this because other states are facing the same challenges. The NSW government needs to lead by example.

Loss of Confidence

The Shergold-Weir report addresses the crucial issue of "building confidence".

NSW is now facing a loss of confidence in unit blocks built in the state. Insurers are recalculating their risk and premiums are understandably skyrocketing for buildings with defects. Insurers are refusing to insure private certifiers for cladding claims. Banks will be wary of loaning money for units in blocks with defects and face the risk of borrower owners stuck in defective buildings and defaulting. Purchasers are going to be wary of buying into units unless they can be sure they have a clean bill of health, to the extent that can be sure.

There are some 630 buildings in NSW with cladding alone where owners are faced with huge repair bills, suing builders and developers if still around and the costs and risks of litigation, and having to fund that from their own pockets or obtain strata finance and pay that back. The President of Strata Community Association, representing strata managers and other strata scheme service providers, recently estimated the possible cost at $1bn. In addition to cladding there are the "regular" defects such as in Opal tower, Mascot Towers, Campsie and Zetland. The system has failed these people, and the interim reform package is not going to help these owners or those who have purchased over the past 10 years or more.

The plight of current owners faced with defects and a poor consumer protection is what is causing the loss of confidence in the system. Because no one is really sure which blocks are defective and which are not. Good buildings are now going to be under suspicion until people satisfy themselves they are not defective. This is a GFC style situation, where credit ratings and the risk for financial products came into question. In that case loss of confidence in the financial system became a contagion. Here it is whether apartment buildings have been built properly and lot owners receive value that reflects the original purchase price.

The NSW government needs to step into the breach just as it did when HIH and FAI Insurance collapsed in March 2001, when it had to underwrite the various home warranty insurance (and other insurances) issued by those companies to avoid the collapse of the building industry at the time. It is not "hysteria" to suggest the current challenges are as great as in 2001. The current NSW president of the Australian Institute of Architects (**AIA**) indicated in an opinion piece in the Sydney Morning Herald on 20 July 2019 that she "*can't overstate how serious and urgent the situation has become*".

Three Step Plan

The current situation requires a 3-step plan as follows:

1. Fund the defect repairs, not just cladding, to restore confidence in the system in NSW;
2. Introduce the current interim package (with further required changes put in place as set out in these submissions), without waiting for the national approach to adopting Shergold-Weir announced following the Building Ministers' Forum on 18 July 2019; and
3. Build the system for the future, including as part of a national approach where possible, noting NSW cannot delay providing long term certainty while waiting for a national approach.

The government must now lead, and lead proactively and promptly, with input from the industry, consumers, and other stakeholders. This includes properly protecting the end consumer from the consequences of building defects as an essential step in restoring confidence in the property and building industries which are a very significant and important part of the NSW economy.

Each of these matters is discussed in turn, followed by further responses to the specific questions raised in the discussion paper.

Step 1 – Funding Repairs

Like in Victoria for cladding, the NSW government needs to step in and provide long term (10 to 20 years, noting current strata finance provides 1- 7 years loans), no or low interest rate loans to help owners get their buildings fixed (for defects generally, not just cladding).

Strata schemes not dealing with cladding would need to meet certain parameters, to avoid the funding being sought for minor defects (which can vary depending on the size of a strata, and the cost involved) or what amounts to refurbishment works. Reputable and vetted consultants and remedial builders need to be involved in that process, to stop another "pink batts" style fiasco, and the "cowboy" builders of yesterday becoming the "cowboy" remedial builders of tomorrow. This will provide confidence to consumers that this problem is going to be fixed, while the government also fixes the system in the medium to long term to make sure this never happens again.

NSW should also introduce a grant fund to assist strata schemes facing the costs of repairing cladding defects. Like Victoria that fund should draw monies from fees paid by developers, for example based on a per lot basis on the registration of a strata scheme (required prior to registration).

Such fees could be charged based on tiers of classification assessed on financial solvency and claims/complaints history. Better developers would be placed in a higher tier, with lower fees, while more risky developers would have a lower classification with higher rates. This will encourage developers to seek to achieve a higher classification. This will also discourage developers from using "special purpose vehicle" companies (which would by default be the lowest tier) which pose the highest risk for strata schemes having no developer to pursue under the statutory warranties.

Such loans or funds should <u>not</u> draw funds from strata schemes or lot owners, which would be punishing the very people the schemes are intended to assist. The burden should fall most heavily on those drawing the greatest profit from the property development process or contributing most to causing the problems. This is also consistent with the accountability for the problems, which clearly lies with the industry, and helps provide incentives for improvements by the industry over time.

Complaints or warnings such a levy funding system will affect the property market, such as have immediately been raised by Victorian developers for their proposed cladding fund, are with respect exaggerated. It is common practice for industries to approach government to create a levy to address market failures. It is also to be expected they will simply pass the cost onto purchasers of new units. It is worth noting the strata defects bond scheme under Part 11 of the *Strata Schemes Management Act 2015* (NSW) will anecdotally have the extra costs involved dealt with by developers simply adding the 2% bond to the price for each project.

Government funding is justified morally too, noting that the apartment owners paid stamp duty on their original purchases based on the full market price for a new and functional

home. The apartment owners most entitled to help now have seen this value reduced, sometimes very significantly, as a result of identified building defects.

Duty on residential property transactions delivers close to $6 billion per annum to State Government revenues and the stamp duty payable on a $1 million apartment is $40,449. This is very much in line with the typical costs per owner to repair common building defects and well below the costs to owners in the most extreme situations when apartments become unliveable and unsalable.

The government should also consider providing recovery rights for such funds similar to those it gave itself under Section 103M and 103N of the *Home Building Act* for underwriting HIH and FAI home warranty insurance policies in 2001, so as to reduce the burden on taxpayer funds and also ensure the relevant persons are held liable for their defects.

Step 2 – The "Interim Package" Dealt with in the Discussion Paper

OCN raises the following general submissions regarding the changes proposed in the discussion paper. In addition, the Supplementary Section – Additional Responses to Questions for Feedback in the Discussion Paper later in this submission sets out further specific responses to the questions in that discussion paper.

Registration of building practitioners

The discussion paper package calls for registering building practitioners such as engineers. Victoria is also seeking to plug this hole with the announcement of the *Professional Engineers Registration Bill 2019* in April. To the extent to which the registration of these practitioners removes rogue operators and ensures insurance is in place, then that can only be seen as a positive step. But the empirical data (see the recent paper of Nicole Johnston from Deakin University and Sacha Reid of Griffith University titled "An Examination of Building Defects in Residential Multi-Owned Developments" (**Johnston-Reid report**)) suggests that rogue designers are far from the cause of the current crisis.

The key will be ensuring minimum standards for those practitioners, and maintaining them, including requiring professional indemnity insurance or similar that will provide consumer protection (and protection to those practitioners) when they are sued for alleged liability for defects, often years after completion when latent defects have become apparent.

There is a compelling case too for registering and licencing developers, both individuals and their companies, given their crucial role in delivering new buildings. This is a vital first step in monitoring and controlling the performance of this sector and exposing their relative performance to prospective apartment owners. It is a key step too in reducing the prevalence of $2 companies that close down and move on to avoid liability for poor performance.

Plan & specification declarations

The discussion paper package focuses on building designers declaring that plans comply, and builders declaring they have built to plans. This already occurs under the present certification system. Although there are exceptions, design is not usually the main cause of building defects, poor quality construction is.

The government's own Interim Report into Opal Tower found the apparent issue was the work not following the plans and that not being identified during the work. Buildings can be built according to plans and still have extensive defects.

The current building certification scheme introduced in 1998 (under the *Environmental Planning & Assessment Act 1979* (NSW)) relies heavily on sub-contractors and consultants issuing compliance certificates for the quality and compliance of work. Private certifiers are entitled to and understandably rely on these certificates for work they have not inspected or cannot inspect (given they are not on site all the time and perform only limited inspections as required by law).

However, it does not appear those compliance certificates (apart from when they certify the compliance of plans, which is only part of what they deal with) will be covered by the proposed changes. The issuers of those certificates should not just be licenced, they must be regulated as proposed for building practitioners, and accountable if they issue a certificate that should not be issued.

If proposed reforms are to have a serious effect, the issuing of such compliance certificates must be subject to the proposed statutory duty of care to owners and be insured, and expose issuers to disciplinary steps including losing accreditation.

Role of private certifiers & compliance certificates

The paper seems to credit private certifiers with playing a greater role and exercising greater scrutiny over projects than is required or occurs under the current scheme. Private certifiers are not project managers or superintendents (who it is worth noting are not subject to the statutory warranties, and are not proposed to be subject to the statutory duty of care under the paper despite their crucial role in quality assurance for their client). Private certifiers are not the old "clerk of works" that used to monitor work sites. Far from it.

If the government wants certifiers to fulfil the old clerk of works role, then it should do that. The AIA has called for a new system in this way (alongside the private certification scheme), and OCN supports such a system being considered as part of long term and systemic changes to the regulation of the industry. In this regard the government would be better off requiring the incoming 2% strata defects bond scheme be spent on such a resumed system. However, that is an issue for discussion as part of the new system that needs to be introduced in due course, not the interim package currently being dealt with in the discussion paper.

It is also worth noting Clause 162A(5) of the *Environmental Planning & Assessment Regulation 2000* (NSW). A private certifier in NSW only needs to inspect 30% of fire rated construction and 10% of membranes. This reinforces certifiers are not the primary parties providing quality assurance.

The recent Johnston-Reid report found most common defects included water leaks and fire safety. Waterproofing and fire safety are two of the most underqualified and unregulated trades. There would appear to be a link, which the package does nothing to address. These specialities need to be as highly regarded and qualified as the traditional trades of electricians, plumbers and carpenters.

Fire safety system practitioners have only since 2017 been properly regulated (for Competent Fire Safety Practitioners (CFSPs), and not for system certification), and the

overall industry is still yet to see the benefits. The Master Builders Association of NSW (**MBA**) recently released its "Build Better" paper in April 2019, identifying fragmented regulation and accountability gaps, and calling for (amongst other things) equal regulation of all building practitioners. This aspect needs to be dealt with, especially given the contractors themselves are calling for better and more consistent regulation of their own industry.

Statutory duty of care

The introduction of a statutory duty of care is necessary to fill the gap left by the High Court in 2014. It is laudable that the Government has accepted this legal reform. The statutory duty of care creates a positive duty that will help drive cultural change and discipline in the industry. Furthermore, it is not tied to prescriptive defects but will have a general application promoting shared responsibility. OCN notes that the statutory duty of care has been endorsed by the Victorian Cladding Taskforce in both its interim and final reports, which also puts forward the benefits of a duty of care from a regulator's perspective.[1]

In summary, the proposed statutory duty of care is consistent with shared responsibility and it complements but does not replace other regulatory provisions. It would add to the incentives for all parties involved in the construction of building, including architects, designers, building surveyors, water proofers, fire engineers and builders to take reasonable, practicable safety measures. It also supports the efforts of regulators by moving from reactive regulatory actions to a proactive culture of preventing risks and prioritising the protection of occupiers and end consumers. This shift in emphasis is crucial if NSW is to change the attitudes and practices of the construction industry, which tends to cut corners in residential buildings where end consumers are unlikely to provide repeat business (as distinct from commercial or government clients).

"By its nature, this duty is overlapping, concurrent and non-delegable. It is a positive duty on all parties whose acts or omissions are capable of affecting the safety and health of others."[2]

In our view, the statutory duty of care must be provided with retrospective effect to provide additional consumer protection for those strata schemes already dealing with defects. This is a justified approach given that the statutory codification of the duty is a confirmation and clarification of the law that was presumed to exist until the High Court put it in doubt in 2014.

Need for Insurance

Requiring builders to declare works comply with plans, beyond often being required or done already, ignores that builders of residential strata buildings necessarily rely on specialist trades and consultants to do large parts of the work and certify to the builder that work was done properly. It becomes a series of certificates relying on each other with a clear potential for the cascading of concealed errors.

Making the builder liable for such a declaration also means nothing without insurance, if the builder becomes insolvent to avoid or as the result of any Judgement against it for damages. Most builders currently do not hold and are not required to hold insurance that would cover such a claim against them. It is worth noting section 103 of the *Home Building Act* when

[1] https://www.planning.vic.gov.au/building-policy/victorian-cladding-taskforce
[2] https://www.planning.vic.gov.au/building-policy/victorian-cladding-taskforce, p.40.

introduced in 1997 clearly envisioned such, but this never became mandatory and was never used.

Requiring insurance for the building designers and practitioners as proposed also assumes insurance can be easily obtained. The current insurance crisis facing the private certification industry across Australia, caused by the flammable cladding crisis, shows this cannot be assured. Insurers are understandably reluctant to insure an industry where the risk of claims is currently disturbingly high. Insurers insure against the risk of, not for certain, problems.

It is also worth noting that "high rise" (over 3 "rise in stories" per the BCA) units in NSW have not been required to have home warranty insurance since December 2003. The government currently underwrites home warranty insurance for houses and "low rise" units. It regulates the building and certification system in NSW, yet is unwilling to insure high rise units due to excessive risks and costs in doing so. It did so up to 1997, successfully. As the regulator and the underwriter, the government is in a position to control its risk and fix the current set of issues.

Flaws in the Home Building Act Statutory Warranties Require Fixing

The introduction of a statutory duty of care is of itself insufficient without other regulatory provisions and end consumer protections.

In particular, this package does not deal with a number of flaws and loopholes in the statutory warranty regime under the *Home Building Act*, which is the current and best protection for owners against builders and developers (and sub-contractors, if the issue raised below had not been allowed to occur). Some of loopholes go back to 2009 (*Ace Woollahra Pty Ltd v The Owners – Strata Plan No 61424* [2010] NSWCA 101; 77 NSWLR 613).

Developers can partially avoid the warranties by splitting the entities engaging the builder and owning the land (*The Owners - Strata Plan 81837 v Multiplex Hurstville Pty Ltd* [2018] NSWSC 1488 (4 October 2018), such as Ecove being engaged by Sydney Olympic Park Authority as "developer" for Opal Tower.

Sub-contractors were confirmed as liable under the statutory warranties in 2015 changes, but a court decision soon after (*The Owners – Strata Plan No 74602 v Brookfield Australia Investments Ltd* [2015] NSWSC 1916 (16 December 2015)) created real problems with owners corporations relying on this due to the statutory warranties being handed down through a concept of "succession of title".

Only recently a court decision (*The Owners – Strata Plan No 91322 v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2019] NSWCA 89) found leasehold strata schemes, which are rare but exist usually for government land, missed out on the statutory warranties completely again due to this succession of title flaw in the *Home Building Act.*

The *Home Building Act* should also include an anti-avoidance provision to ensure developers seeking to avoid their liabilities (in these ways) comply with the legislation and provide the courts with the ability to deal with such proactively.

Fixing these long-term problems with the statutory warranties would greatly strengthen consumer protection. Yet they are not mentioned in the paper. These statutory warranties

would be more effective for owners than suing the same persons under any statutory duty of care.

Further, doing so would strengthen the recovery prospects of HBCF indemnities paid for claims, where they may not be currently available against developers and sub-contractors.

See **Annexure A** to this submission which is a working draft of suggested changes to the *Home Building Act*, to provide a basis to consider the form of the necessary changes.

"$2 companies" & "phoenixing"

One of the biggest issues for holding builders and particularly developers accountable for defects, where they do not have insurance, is they are usually "$2 companies" or "special purpose vehicles" that become insolvent soon after projects are finished and that limit liability to the company which may have little or no assets to meet a Judgement. Victoria has recently flagged changing the law to ensure such companies are held liable for cladding defects in that state (https://www.afr.com/real-estate/commercial/victoria-to-commit-funding-for-cladding-fix-20190625-p5210z).

It is worth contrasting how contractors (and developers) requiring HBCF cover for work involving houses or "low rise" strata schemes compare with those doing high rise strata schemes. The former are subjected to stringent financial checks and solvency criteria, and scrutiny of their claims histories, to maintain their "eligibility" for HBCF cover. Those that build high rise are not. A "cowboy" builder wishing to be subject to less scrutiny is almost encouraged to build only high-rise units, where their poor conduct will have even more serious effects.

As a result, a new class or category of builder/contractor and developer licences should be introduced to build high rise strata schemes currently not requiring HBCF. To maintain that licence a contractor or developer should be required to be subject to the same HBCF eligibility criteria. This would be a relatively simple and low cost scheme, as it would only involve expanding the current eligibility criteria assessment scheme already in place, and any extra costs of same should be borne by charges to be assessed and/or increased licence fees. The projects involved are the larger ones undertaken in the industry, and arguably most require scrutiny giving the consequences when things go wrong (as seen in the media over the last 6 months). Alternatively, the price will simply have to be passed onto the developer clients, and thus the purchasers of units within the market as a whole. Quality costs money to ensure, or less profit to be taken to ensure it.

Proposed Building Commissioner

The Building Commissioner role will establish a senior position within Government with a focus on the industry, but unless that person has the funding, the will to be proactive, and political support to regulate an area that is a crucial part of the state economy, no substantive change will result. The OCN welcomes the public statements of the Premier, that the office holder will have additional resources and that this position and the reforms will not have to be funded from existing budget of the relevant Department.

The Commissioner should at least in part be funded by increasing licence fees for contractors and tradespersons, to pay for their own regulation. Licences should be renewed on an annual basis, both to ensure regular oversight and to ensure regular licence fee income, and also to spread the burden for such out regularly over time for contractors.

Licences should move to the model used in Victoria where the licence can only be held by a natural person not a company (even if a company enters into a contract), and that licence number held for life so the history of that person is tracked throughout their career.

Licence fees should be based on a percentage of turnover, with tiers of classification based on financial solvency and claims/complaints history. Better contractors will be classed in a higher tier, with lower licence fee, while more risky contractors will have a lower classification with higher rates. This will encourage contractors to comply and seek to achieve a higher classification. This will also discourage "phoenixing" for contractors to set up new companies with new licences, as that licence will start afresh with the lowest classification and highest licence fee.

Building Products (Safety) Act 2017

The discussion paper indicates that the government "*introduced a comprehensive building product safety scheme through the development of the Building Products (Safety) Act 2017*", essentially to deal with the current flammable cladding crisis. That Act was based heavily on similar Queensland legislation, but it is worth noting that provisions providing a "chain of responsibility" placing duties on building product supply chain participants were not replicated in NSW.

As such, NSW's scheme is not as comprehensive as Queensland's, although presumably those product designers, manufacturers, importers, suppliers and installers who operate in both states and already comply in Queensland could easily comply with the same requirements in NSW if applied. It is notable that, under the current NSW system, the cladding manufacturers who promoted non-compliant cladding products for profit are not only escaping any responsibility but now making further profit on providing replacement cladding products (which conceivably could also be declared illegal in the future).

Step 3 – Long Term Reform

As indicated above, and agreed generally within the industry, wider and longer-term reform to the system is required, beyond that proposed in the discussion paper (which needs to go further in any event, as outlined above).

Noting that the government has indicated the intent is for the current proposed reform package to be in place, or at least put to Parliament, this year, the government needs to be working to a medium term date to do the same with the wider and longer term reforms required.

OCN would suggest that date needs to be within 2-3 years, so by the end of about 2021 or 2022.

Focused Reform Enquiry

The government should appoint a properly qualified and experienced person to review the Shergold-Weir report and the current problems with the home building industry, seek input from stakeholders, including consumer groups such as OCN, and the industry as required.

This person would make recommendations as to a program of legislative reform to make changes that are required (beyond those in the paper, and also considering them), which the government can then take steps to enact. Whether that to be the *Home Building Act*, *Environmental Planning & Assessment Act*, or any other parts of the various overlapping

legislation that governs the industry and sits between government portfolios, this person should take a "whole of government" and holistic approach. Doing this would provide the focus and program necessary to enable those changes beyond the current "interim" reform package to be identified and enacted.

Ministerial Priority

The proposed establishment of a Building Commissioner is an appropriate first step. Presumably it is envisioned that the Building Commissioner will lead much of the further reform required in the medium to long term.

However, simply establishing the Building Commissioner will not be enough if that person is not independent, sufficiently funded and supported (as raised above), or there are not wider changes to how the building industry (and strata) are dealt with within the operations of NSW government.

OCN proposes the establishment of a new senior ministerial portfolio of "Minister for Housing, Strata and Building Quality", with responsibility for housing policy, building quality regulation and strata housing policy and services. This will allow these areas to be given due attention and focus given their importance to the NSW economy, industry and consumers. The rapid growth in apartment living and its increasing relative importance adds to the need for this reform.

OCN notes that the same call was made by the Master Builders Association in its "Build Better" paper issued April 2019. This is yet another area where different stakeholders within the industry agree, and it now falls to government to act on that consensus.

These arrangements within Government would also help improve timely decision making in relation to building reform and strata sector oversight, noting the time that has already passed in progressing building reforms announced in February this year.

High rise home owner warranty insurance

HBCF insurance should be required for high rise again, after having been removed in December 2003.

Alternatively, "decennial" insurance where the insurer covers defects up to 10 years after completion should be considered being made mandatory if there is a sufficient market for such policies. This is a significant area of reform that warrants serious attention for stabilising the industry in the longer term.

The 2% strata defects bond scheme, which will add extra compliance and process for little to no extra consumer protection, could be better used to fund schemes such as this.

Restoring statutory warranty period

The reduction of the statutory warranties in 2012 from 7 years after completion for all defects to 6 years for "major defects" and 2 years for all others has been an unmitigated disaster. It has increased the amount of litigation due to owners having to commence proceedings prior to 2 years to protect their rights. Significant and costly defects will not be major defects, with only 2 years cover and thus consumer protection.

The warranties should be restored to 7 years for all defects or, failing that, then 6 years in line with most limitation periods for causes of action.

Alternatively, the definition structure should be changed, to provide 2 years cover for an exhaustive list of defects being minor defects, such as internal painting, joinery and internal fittings, internal doors, internal linings not affecting waterproofing or slabs, and similar (which seems to have been what was intended by the original change), and all other defects having 6 years cover.

Regular Review of HBA

The *Home Building Act* is not currently subject to a regular 5-year review like the *Strata Schemes Management Act* or *Building & Construction Industry Security of Payment Act*. It should be, for the same reasons.

Conclusion

The current problems facing the building industry in NSW have at least 22 years of history, since the current home warranty scheme was introduced and an amendment act to the *Home Building Act* on average every 2 years. In addition, there have been material and questionable changes to the planning and private certification scheme.

There are no simple solutions to these problems. The government faces a challenge to provide those solutions. These problems will not go away. To the contrary, the government is dealing with a crisis decades in the making. We have an under-regulated, or badly regulated, industry potentially costing the economy billions of dollars in defects and reduced property values.

As the Premier recently stated "We allowed the industry to self-regulate and it hasn't worked. There are too many challenges, too many problems, and that's why the government's willing to legislate."

The Government must do this with urgency and a clear focus on achieving timely measurable outcomes for existing and future apartment owners and for a confident future for this vital sector of the national economy.

Supplementary Section – Additional Responses to Questions for Feedback in the Discussion Paper

Introducing 'building designers' into NSW legislation

"1. What kinds of plans should be signed off and declared by a statutory declaration?"

What is referred to by plans appears to be too narrowly understood. Plans are usually regarded as the drawings reflecting the design to be built.

> "*In a construction context, the essential element of the function of design is choice, that is, the selection of the appropriate work processes and materials to meet the indicated or presumed requirements of the Employer. The due discharge of the design obligation, therefore, will depend upon and be measured by the suitability of the work and materials for their required purpose once completed and in place*:"
>
> *Hudson's Building & Engineering Contracts* (12th ed, Sweet & Maxwell, 2010, London), para 3-084, p 463.

Accordingly, the choice of which nails to use can be part of the design process.

Design extends beyond drawings and the like, and also covers specifications, as well as details often provided on site by consultants, instructions from clients or their consultants or by builders to sub-contractors, and so forth.

As such, a wide and comprehensive definition should be applied to "plans", to cover any documents or similar whereby a decision about the design of the building has been made (especially by professional designers, the builder and/or specialist trades) and recorded in writing. All such documents should be required to be on the record as a result (see questions below relating to this issue).

With that in mind, plans needing to be signed off and declared should be dealt with as follows.

The *Environmental Planning and Assessment Regulation 2000* (**EPAR**), Schedule 1 provides what should be included for:

a) Part 1: Development Application (**DA**),

b) Part 2: a Complying Development Certificate (**CDC**)

c) Part 3: Construction Certificates (**CC**)

Clause 50 of the EPAR provides further detailed requirements. However, sufficient documentation is required at the CDC/CC stage to ensure safety and compliance risks are covered, which is more than the EPAR requires.

For the drawings to be accurately assessed as to compliance with the BCA/NCC all performance solutions need to be shown on the drawings. It is not acceptable that designs are still to be developed, or significantly changed with the risk of failing to properly consider the effects of those changes, while work is underway. Those plans and designs need to be obtained, certified and submitted prior to the CC/CDC being issued, and work being able to commence.

DA requirements and Development Consent Conditions can vary widely between Councils or consent authorities as to what plans or designs are required to be lodged and certified as compliant. Requirements for plans and designs should be standardised and made explicit and prescriptive, so there is no latitude for avoidance, and aspects are not missed.

The relevant plans and designs will include:

- Architectural:
  - Floor plans
  - Elevations
  - Sections
  - Reflected ceiling plans (RCP) showing lighting, mechanical services, fire sprinklers etc meet BCA/NCC
  - Fire compartmentation plans/Fire Door schedules
  - Fire rated construction/ compartmentation plans
  - Window and Room Schedules
  - Specifications
  - Wet Area details
  - Stair and ramp details
  - Balustrade details
  - External wall details
  - Roof details
- Architectural & key services
- Structural plans
- Mechanical plans
- Fire Services
  - Hydrant
  - Hose reel
  - Sprinklers
  - Detection zones
  - Smoke control zones
  - Passive/penetrations
- Hydraulics

- Drainage
- Water supply
- Sewer
- Fire seals/penetration
- Waterproofing

Noting the above, all plans must be submitted with an application for DA, CDC, CC or Occupation Certificate (**OC**) should be certified by a prescribed statutory declaration.

All variations wherever the changes materially affect the requirements as listed above need to be certified holistically, and retrospectively for the entire development, not solely for that variation alone. This is because there can be ramifications unknown if considered in isolation. If the designer to certify such during a project is changed, then they need to be retained to review and properly understand that overall design, to ensure they understand how a change operates within the overall design, without which they cannot properly certify such changes. This needs to be required to avoid developers or builders only retaining new designers on a narrow scope to save money, and thus not pay for the proper review required.

However, the real issue with building quality is usually the quality of construction, not design. The issue is usually compliance with design, not whether the design was appropriate. The current compliance certificate regime as part of issuing an Occupation Certificate will usually require certificates from designers or consultants, or tradespersons or sub-contractors that the work as constructed complies with the "plans" or relevant standards. It is worth noting that there is no prescribed form or wording, and such certificates often certify the work "generally" complies with the relevant plans, which can hide a multitude of sins. Work can "generally" comply, and still be defective and/or fail to fulfil the purpose of the plans or design. However, these certificates are then relied on by the builder and certifying authority as allowed under the legislation, and the underlying work not looked at further. This is part of the cause of the current systemic and recurring defects problems in the industry, and one of the issues needing to be fixed. However, it is not dealt with by the paper.

Finally, a full set of "as built" plans and documents must be required to be lodged for the public record, as a pre-condition to being able to obtain an Occupation Certificate. An Occupation Certificate should also be required prior to registration of a strata plan, which is not currently the case.

"2. Could plans be statutorily declared at the CC/CDC stages? If not, why not? "

Yes. See 1 above.

"3. To what extent should changes to plans be submitted to the regulator?"

See 1 above.

All changes to plans should be updated to the regulator. At the least a full set of "as built" plans for all disciplines and details should be required to be submitted to the regulator before

an Occupation Certificate can be obtained. This provides a full and proper record of how a building has been built, both for the regulator but also for the owners of the building, including if assessing and dealing with defects in the future.

"4. Should a statutory declaration accompany all variations to plans or only major variations?"

See 1 above.

"major" is a subjective term. Those parties requiring regulation and oversight are more likely to try to avoid such steps. All changes to scope, plans and design documents are usually recorded in revisions and updated to all relevant parties in the project. Those meeting a certain threshold require an amendment to the relevant approval from the consent authority (usual Council). Requiring an additional copy to be registered with the regulator, presumably electronically and via a web portal, will be simple and easy with little to no extra cost. All variations would presumably be part of any "as built" plans to be lodged at the end of a project.

"5. Are there any obstacles that would prevent a person from submitting a statutory declaration for variations? If so, what are those obstacles?"

See 1 above.

The main issue will be identifying who within a project or within a building company needs to be swearing as to the matters required, to avoid persons removed from the actual work and checking from saying they relied on others to check the truth or veracity of matters and thus avoid liability later, and/or to qualify such declarations as to be meaningless (as is currently part of the problem with certificates required to be issued for work now). The same problem applies for statutory declarations as to plans dealt with above in earlier questions.

Any builder or building practitioner declaring that the work complies with the plans will have difficulty in doing so if they have not checked or supervised every aspect of the construction, especially as on completion most parts of the construction are then covered over and unable to be viewed without destructive investigations if at all. This does not mean it should not be required. This poor level of oversight or checking is arguably what is causing the current low quality and defects occurring, when construction defects occur, they are not checked and are not identified and resolved early. The question will be to what extent builders or building designers are required to do so, or to rely on others declaring to them the same, while still retaining liability (but presumably having an ability to cross claim, or apportion liability, if sued later).

"6. What other options could be workable if there are variations to plans?"

See 3 and 4 above.

"7. How could the modifications process be made simpler and more robust?"

See 4 above.

"8. How should plans be provided to, or accessed by, the Building Commissioner?"

Electronically, by web portal presumably. Given such documents should also be submitted to the Council and certifying authority at the same time, such a portal would presumably be shared by all 3 for consistency and cost savings.

"9. What types of documents should 'building designers' provide to the Building Commissioner?"

All versions and revisions of plans or designs issued by them for the project. A certificate or statutory declaration that the plans or designs comply with the relevant provisions of the BCA/NCC or Australian Standards, and what they are (so there is no confusion later as to what those plans were). A certificate or statutory declaration that the work as constructed complies with the relevant plans or designs, although a program of mandatory inspections will often be required to ensure the building designer can do so, and should not be capable of being avoided (see 5 above).

"10. In what circumstances would it be difficult to document performance solutions and their compliance with the BCA?"

It is worth noting the BCA/NCC is a complex and voluminous document, and performance solutions can be subject to interpretation and debate even between experienced consultants in the same discipline. Developers and builders can and will seek out consultants whose opinion will suit their needs, to save on construction costs by providing a performance solution they desire.

This is an issue better dealt with by the relevant industry and consultant bodies in their submissions. However, see also 5 above.

"11. Would a performance solution report be valuable as part of this process? If not, why not?"

Yes.

For fire safety issues a performance solution report is already required to explain how the aims of the Deemed to Satisfy (**DTS**) provisions, by a fire engineer.

To the extent that a performance solution is to be relied upon in lieu of compliance with the DTS provisions, then a performance solution report should be provided by a suitably qualified consultant prior to construction and referenced in the construction consent. What comprises suitably qualified for what disciplines and trades should be made clear and mandatory. See 10 above in this regard as to the risk of consultants providing opinions on demand.

"12. Are there any other methods of documenting performance solutions and their compliance that should be considered?"

See 10 above.

"13. What would the process for declaring that a building complies with its plans look like?"

See 5 and 9 above.

Further, OCN agrees with indications from the Australian Institute of Architects (**AIA**) that:

- An independently engaged and paid site architect or equivalent registered and insured professional (being different to the novated design architect, but which could be resourced from the same office to be efficient with knowledge and with electronic plan sharing).
- Their role would be holistic to the quality of the project and to identify the risk management processes. Their role must be independently engaged and paid separately from the contractor. The Site architect would be responsible for:
  - Clerk of works (full-time on site);
  - Supply of 'as-builts/record drawings' throughout the construction process;
  - Checking all manuals and warranties are correct;
  - Co-ordinating the original design consultants/ engineers to confirm what is built matches the documentation;
  - Post Occupancy Evaluation.
- Their retainer would be to protect the interests of the ultimate owner, with the regulator fulfilling that role as a "nominal client" to the extent the client was not in existence during construction (i.e. the owners corporation had not been registered yet).

"14. What kind of role should builders play in declaring final building work?"

The head contractor responsible for supervising and undertaking the work under a contract should be responsible for declaring the final building work has been done in compliance with the plans and design, and generally being done with due skill and care, and in compliance with the BCA/NCC and relevant Australian Standards.

To the extent that the head contractor has sub-contracted the works, then the declaration should be required to identify who those persons are and their licence details (including if they have changed during a project and, if so, what person did what work). Those details should be required to be provided to the regulator and on the public record, along with a full set of "as built plans" and other documents as indicated above, as a pre-condition of obtaining an Occupation Certificate for a project.

The head contractor should be required to either declare it has suitably supervised and checked the work done by each so as to declare the works complies as required, or to the extent that it has relied on a specialist sub-contractor or tradesperson that it has done so and provide an equivalent declaration from that person (see also 5 above). Such specialists should be limited to truly specialist disciplines or trades, and be required to be licenced and insured to avoid head contractors seeking to delegate liability and responsibility to unlicensed and uninsured sub-contractors (which is part of the current reason for defects occurring).

Similarly, head contractors will presumably seek to and need to rely on consultants that have provided plans and designs that they have sought to comply with. However, when the head

contractor has been required under a contract to build in compliance with plans, it cannot and should not be entitled to offload responsibility to a consultant to check it did its own work correctly.

A head contractor should be limited in the ability to which it can rely entirely on specialists and consultants, as otherwise head contractors would seek to do so for most if not all of the work, and retain no responsibility for supervision or oversight despite that being the entire purpose and intent of retaining a head contractor.

Any failure to declare such exceptions to the supervision and undertaking should be deemed to be the responsibility of, and fall to, the head contractor. The system should provide overlapping responsibility for ensuring compliance with plans. If more than one person is responsible for doing so, throughout the construction process that will better ensure that the work is done properly.

"15. Which builders involved in building work should be responsible for signing off on buildings?"

See 14 above.

"16. Are there any circumstances which would make it difficult for builders to declare that buildings are constructed in accordance with their plans? If so, what are those circumstances?"

See 5 and 14 above.

Registration of 'building designers'

"17. Are existing licensing regimes appropriate to be accepted as registration for some builders and building designers, such as architects, for the new scheme?"

Only fully qualified and experienced professionals should be responsible for the delivery of design services and project management for "high rise" buildings. Different classes of licence could be issued according to building class and size.

Architects' licencing regime would appear to be sufficient for utilising as a registration scheme for them. The schemes should be as similar and standardised as possible.

An Act for professional engineers, building designers and other building professionals could be modelled on the *Architects Act*, and could require:

- Eligibility criteria based on assessment of accredited education and experience (mapped against competencies);
- Practical experience required before registration (nominally 2 years);
- Registration interview process;
- Registration process (documents and listing on register);
- Code of professional conduct;

- Offences;
- Publicly available register;
- Annual Continuing Professional Development requirements to maintain licencing or accreditation;
- Professional Indemnity insurance, preferably with run off cover rather than the more common annual claims made and notified policies which leaves the risk of claims not being covered by new policies, or if insurance is not maintained after retirement or ceasing operations (including due to insolvency);
- Annual renewal of registration
- Disciplinary process.

Hydraulics expertise is more difficult, as there is properly no "hydraulics engineer" qualification like a Bachelor of Engineering, and those involved essentially amount to highly qualified plumbers and/or draughtspersons. This area needs more transparency and clarity as to what qualifications are required, and a registration and licencing regime similar to the above put in place.

Fire safety system experts were the least regulated and least transparent until recently, but the steps taken since 2017 for Competent Fire Safety Practitioners (CFSPs) (although not system certification as originally indicated) provide a guide for what needs to occur across the industry for specialised trades and contractors outside architects and engineers, and especially for waterproofing.

To the extent that tradespersons or specialist sub-contractors provide designs or certification of such, such as for electrical, plumbing, waterproofing, fire safety, mechanical and so forth, then the CFSP scheme provides a guide for a suitable scheme, working in tandem with the scheme for professionals, although the two should be as similar as possible to ensure consistency.

Builders also need to be required to understand the various design areas in basic terms if they are to liaise with, coordinate and check work complies with their plans, which is an education and training issue. Similarly, builders need to properly understand all the trade areas they are supervising, including waterproofing and fire safety, which seems to be lacking at the moment. As such, builders' regulation and accreditation also need to move to reflect and be as similar as possible to the licencing regimes for professionals and specialist trades outlined above.

"18. What occupations or specific activities are involved in 'building design' and should be in scope for the registration scheme?"

As a minimum:

- Project Manager;
- Architect;
- Planner;
- Quantity Surveyor;

- Structural Engineer;
- Civil Engineer;
- Mechanical Engineer;
- Electrical Engineer;
- Geo-technical Engineer;
- Hydraulic design consultant (for both stormwater and plumbing services, including waterproofing, otherwise);
- Fire Services Engineer;
- Fire Safety Engineer;
- Acoustic Engineer;
- Facade Engineer;
- Vertical Transport Engineer;
- Traffic Engineer;
- Environmental Services Design / Sustainable Consultant / Engineer
- BCA/NCC Consultant;
- Disability Discrimination Act compliance consultant;
- Access Consultant;
- Landscape Architect;
- Competent Fire Safety Practitioner

"19. What should be the minimum requirements for a registration scheme?"

See 17 above.

"20. What form of insurance should be mandatory for 'building designers'? Why?"

Professional indemnity insurance covering them personally, and any company they are a director of or nominee for, for any civil liability in fulfilling their role under their retainers for a project.

Preferably required to be in place for up to 10 years after the completion of their last job, or failing that on a claims made and notified basis but with either requirements that such be in place for 10 years after ceasing operations, to have a "tail" policy in place on ceasing operations to cover that period, or a fidelity fund or "nominal defendant" scheme to be in place arranged by their industry body and registration scheme to cover "bad actors" that fail to have such insurance in place.

"21. What kinds of minimum requirements should be prescribed for the insurance policy (for example, value, length of cover, etc.)?"

See 20 above.

$5 million cover per claim should be the minimum, noting cover for higher amounts is possible but can be difficult to obtain for some operators. The preference would be that the cover be at least the replacement value of the project, and likely an equivalent additional amount for consequential loss, on the basis many disciplines or trades could in a worst case scenario cause the complete loss of a building. However, this may not be possible and would require discussions with the insurance industry as to applicability and availability, and commerciality.

The aim must be to as much as possible ensure claims against building designers (and certifying specialist trades & contractors) should be met by their insurance.

"22. What skills should be mandatory for 'building designers'?"

This is an issue best left to the relevant industry bodies involved. See 17 above.

"23. Should specific qualification(s) be required?"

This is an issue best left to the relevant industry bodies involved. See 17 above.

"24. Should there be other pre-requisites for registration?"

Insurance as dealt with above at 20. See also 17 above.

"25. What powers should be provided to the regulator to support and enforce compliance by registered 'building designers'?"

The regulator presumably will operate as a "back up" to registration schemes if they are being run by their own professional bodies, stepping in if it sees an issue or complaint has not been dealt with properly. It would also ensure that sanctions in the form of fines, compulsory remedial education, and suspension or banning, are enforced. It would likely also have to deal with any appeals processes.

Duty of care of building practitioners

"26. Which categories of building practitioners should owe a duty of care?"

See **Annexure B** to this submission which is a working draft of suggested changes to the *Environmental Planning & Assessment Act 1979* (NSW), to provide a basis to consider the form of the statutory duty of care.

The head contractor providing a declaration as indicated above.

Any licenced specialist trade or sub-contractor providing a declaration relied on by the head contractor.

All building designers (listed at 18 above) providing the relevant plans or designs, and thus a declaration the plans and designs comply with the BCA/NCC or Australian Standards.

All persons providing compliance certificates relied on by the head contractor or certifying authority.

The manufacturers and suppliers of products designed or marketed for use in construction.

The certifying authority issuing a Construction Certificate (CC), Occupation Certificate (OC) or Complying Development Certificate (CDC).

Any person making an application for a CC, OC or CDC, to the extent that they make any representation as to the quality of the work done or compliance with approvals, plans, designs and so forth, or is relied on by the certifying authority.

Representations by such persons in documents should also be capable of being relied on by consumers under the *Australian Consumer Law*, as an additional consumer protection right, as provided for in **Annexure B**. Currently there are concerns that consumers that are subsequent owners and that did not rely directly on representations do not enjoy these protections despite them being the parties who suffer from the representations being misleading or deceptive.

"27. What should be the scope of the duty of care? Should it apply to all or certain types of work? If so, which work?"

The proposed statutory duty of care must be provided with retrospective effect to provide additional consumer protection for those strata schemes already dealing with defects.

To the extent that the person has done work they have made a declaration about, or issued a certificate for, then that they have done the work with due skill and care, in compliance with the relevant plans and specifications, in compliance with the relevant provisions of the BCA/NCC and Australian Standards, and so as to be fit for purpose and result in a dwelling or building suitable for habitation or fit for use or purpose.

To the extent that the person is making a declaration that a plan or design complies with the BCA/NCC or Australian Standards, that it does.

To the extent that the person is making a declaration or certifying that work done by others complies with a plan or design or complies with the BCA/NCC or Australian Standards, that it does and that the person made all reasonable enquiries and had a reasonable basis to make the declaration or provide the certification in the terms provided.

To the extent that a person has manufactured or supplied a product, that it is good and suitable for its intended use.

"28. How will the duty of care operate across the contract chain?"

It should be provided to any person who is an owner of the land on which work is done, or a subsequent owner.

The law will tend to prefer the terms of a contract between 2 persons to any duty of care that might be said to arise. Subsequent owners will often be said by the law as unable to have

better rights than their predecessor. However, this then encourages persons to contract out of obligations. As such, there will need to be a ban on contracting out, and anti-avoidance provisions.

Proportionate liability under the *Civil Liability Act 2002* (NSW) will presumably apply. However, the ability to contract out (under section 3A) should be removed to ensure consistency especially for the purpose of enabling insurers to assess and insure risk, and also to be consistent with the *Australian Consumer Law* (and Part 7.10 of the *Corporations Act 2001* (Cth)). This bar on contracting out could be limited to building actions as defined by Section 6.20 of the *Environmental Planning & Assessment Act 1979*. This would obviously need to be discussed with the insurance industry.

It is worth noting that many insurance policies will exclude liability for liability arising purely under contract, that would not otherwise arise under the law generally (i.e. under a duty of care), as the permutations for contracts are endless while the duty of care common law provides a clearer basis to calculate risk.

"29. What types of consumers should be owed a duty of care?"

All. Attempting to differentiate or introduce thresholds will distort the market and create incentive to try to avoid the provisions and "game" the system. The suggestion that some consumers are better placed to protect themselves ignores that ultimately most consumers that did not directly contract with a head contractor or consultants are unable to find and protect themselves from latent defects, given they are by their nature latent and thus hidden.

It will also provide a standardised base line for insurers to calculate risk and exposure.

"30. On what basis should a particular consumer be afforded the protection?"

See 29 above.

ANNEXURE A – SUGGESTED CHANGES TO HOME BUILDING ACT

3A APPLICATION OF PROVISIONS TO DEVELOPERS

(1) For the purposes of this Act, where residential building work is done in connection with 4 or more existing or proposed dwellings or an existing or proposed retirement village or accommodation specially designed for the disabled, each person on whose behalf the work is done or who is an owner of the land at the time that the work is done, other than a company that owns a building under a company title scheme, is a developer on whose behalf the work is done.

18B WARRANTIES AS TO RESIDENTIAL BUILDING WORK

(1) The following warranties by the holder of a contractor licence, or a person required to hold a contractor licence before entering into a contract, are implied in every contract to do residential building work:

(a) a warranty that the work will be done with due care and skill and in accordance with the plans and specifications set out in the contract,

(b) a warranty that all materials supplied by the holder or person will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new,

(c) a warranty that the work will be done in accordance with, and will comply with, this or any other law,

(d) a warranty that the work will be done with due diligence and within the time stipulated in the contract, or if no time is stipulated, within a reasonable time,

(e) a warranty that, if the work consists of the construction of a dwelling, the making of alterations or additions to a dwelling or the repairing, renovation, decoration or protective treatment of a dwelling, the work will result, to the extent of the work conducted, in a dwelling that is reasonably fit for occupation as a dwelling,

(f) a warranty that the work and any materials used in doing the work will be reasonably fit for the specified purpose or result, if the person for whom the work is done expressly makes known to the holder of the contractor licence or person required to hold a contractor licence, or another person with express or apparent authority to enter into or vary contractual arrangements on behalf of the holder or person, the particular purpose for which the work is required or the result that the owner desires the work to achieve, so as to show that the owner relies on the holder's or person's skill and judgment.

(2) The statutory warranties implied by this section are not limited to a contract to do residential building work for an owner of land and are also implied in every subcontracting agreement under which a person contracts to do residential building work.

18C WARRANTIES AS TO WORK BY OTHERS

(1) Each owner of land is entitled to the benefit of the statutory warranties from each person who has done residential building work on the land (including all contractors, subcontractors, owner builders and developers) as if each of those persons were required to hold a

contractor licence and had done the work under a contract with that owner of the land to do the work.

(2) For the purposes of this section, residential building work done on behalf of a developer is taken to have been done by the developer.

18D EXTENSION OF STATUTORY WARRANTIES

(1) A person who is a successor in title to a person entitled to the benefit of a statutory warranty under this Act is entitled to the same rights as the person's predecessor in title in respect of the statutory warranty.

(1A) A person who is a non-contracting owner in relation to a contract (including any subcontracting agreement) to do residential building work on land is entitled (and is taken to have always been entitled) to the same rights as those that a party to the contract has in respect of a statutory warranty.

(1B) Subject to the regulations, a party to a contract has no right to enforce a statutory warranty in proceedings in relation to a deficiency in work or materials if the warranty has already been enforced in relation to that particular deficiency by a non-contracting owner.

(2) This section does not give a successor in title or non-contracting owner of land any right to enforce a statutory warranty in proceedings in relation to a deficiency in work or materials if the warranty has already been enforced in relation to that particular deficiency, except as provided by the regulations.

18F DEFENCES

Add to the end of the section:

(5) This section does not apply to provide any defence to a person who was, at the time that the work was done or arranged, a developer on whose behalf the work is done or a close associate of a developer on whose behalf the work is done.

18G WARRANTIES MAY NOT BE EXCLUDED

(1) A provision of an agreement or other instrument that purports to restrict or remove the rights of a person in respect of any statutory warranty is void.

(2) If a court or the Tribunal finds that any provision of an agreement or other instrument or any other arrangement was entered into or put into place with the intent to avoid any statutory warranty being owed by any person or class of person to an owner or subsequent owner that would have otherwise been owed the benefit of the statutory warranty, then the Court or Tribunal may find that the statutory warranties were owed by that person or class of person to an owner or subsequent owner.

SCHEDULE 1 – Definitions and other interpretative provisions

1 Definitions

(1) In this Act:

…

"non-contracting owner", in relation to a contract to do residential building work on land, means an individual, partnership or corporation that is the owner of the land but is not a party to the contract and includes any subsequent owner.

ANNEXURE B – SUGGESTED CHANGES TO *ENVIRONMENTAL PLANNING & ASSESSMENT ACT 1979* (NSW)

6.19A – Duty of care for defective building or subdivision work

1. Any person who carries out building work or subdivision work is deemed to owe a duty of care at common law to any owners, and future owners, of the land on which the building work or subdivision work is carried out to:

(a) exercise due skill and care in carrying out that work, including to the extent that such work involves providing a design, undertaking an inspection, or issuing a certificate;

(b) not issue a certificate when doing so would contravene any of the sections 4, 18, 29, 30, 33, 34, 151, 152, 155 and 156 of the Australian Consumer Law:

(c) take reasonable steps to prevent reasonably foreseeable risks of loss or damage to the owner or subsequent owners arising out of or in connection with the carrying out of the building work or subdivision work being defective'.

2. For the purposes of this section, a certificate or an application for a certificate is deemed to be made in trade or commerce for the purposes of the Australian Consumer Law.

3. For the purposes of this section, a compliance certificate under this Part includes:

(a) Any certificate that purports to be a compliance certificate;

(b) Any certificate provided by the issuer as a compliance certificate, or in response to a request for a compliance certificate, for the relevant building work or subdivision work;

(c) Any certificate reasonably capable of being relied on as a compliance certificate under this Part;

(d) Any certificate issued in response to a requirement under Section 6.16(3) of this Act;

(e) Any certificate issued by a person in relation to building work or subdivision work as provided for under Section 6.17 of this Act;

(f) Any certificate relied on as a compliance certificate as provided for under Section 6.29 or 6.30 of this Act;

(g) Any certificate prescribed as being such under the regulations.

4. An application for a certificate under this Part is deemed to be a representation relied on by any owner, and any subsequent owner of the land, with the reliance deemed to have been at the time of the relevant certificate subsequently being issued, for the purposes of the sections 4, 18, 29, 30, 33, 34, 151, 152, 155 and 156 of the ACL:

5. A provision of an agreement or other instrument that purports to restrict or remove the rights of a person under this section is void.

6. If a court finds that a contract was entered into or an arrangement was put in place with the intent to avoid the intent or operation of this section, then a court may find that:

(a) the duty of care intended by this section was owed by a person to an owner or subsequent owner; and

(b) a person, being an owner or subsequent owner, is entitled to the benefit of the rights intended under this section.

7. A duty of care arising under this section does not remove or affect any other rights or remedies an owner of land may have arising out of or concerning defective building work or subdivision work.

8. For the purposes of this section, the meaning of **owner** includes in respect of a leasehold strata scheme the owners corporation and each person who would be considered an owner of a lot within the strata scheme if it was a freehold strata scheme.