OCN ANNEXURE D

Closing the Gap

Decennial Liability Insurance - the solution to the Strata Living Crisis in New South Wales

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I. INTRODUCTON

1. There are more than 80,660 strata schemes worth $366 billion in building assets in New South Wales (**NSW**)[1] housing over 1.1 million people. In fact, within 20 years, half of NSW's population is expected to be living or working in a strata or community scheme.[2] While strata living is considered the way of the future, what is concerning is that over 85% of apartments built since 2000 have had defects in construction, materials or design, with leaks and water damage being by far the biggest problems.[3] One only needs to look at recent evacuations of the Mascot and Opal Tower to see the severity of this issue.

2. The problem at its core is that apartment buildings over three stories do not attract the protection of the State's mandatory homeowners warranty scheme and fall into what is known as the "*multi-storey insurance exemption.*" Without the protection of a mandatory home warranty scheme, strata title owners and owners corporations, are left to pursue those responsible for the defective work themselves. The stark reality however is that by the time defects start appearing in the building, owners find themselves without any redress because the developer has deregistered his development company, the directors of the building company have either disappeared or the company has become insolvent or everyone concerned becomes embroiled in an expensive and lengthy litigation.

3. It is clear from the historical changes to the building insurance scheme over the years (explained in the next section of this research paper), the State has no intention of bringing multi-storey developments within the purview of the mandatory insurance scheme - not because they don't want to, they simply cannot afford it. Already the scheme is running at a significant deficit and adding multi-storey residential building to the mix

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1 UNSW Sydney and Strata Community Association , *Australian National Strata Data 2018 <https://apo.org.au/sites/default/files/resource-files/2018/05/apo-nid174131-1184756.pdf >*.

2 NSW Government, *Strata Law Reform, Strata and Community Title Law Reform Position Paper* (November 2013).

3 City Futures Research Centre, *Strata Data 2015 Residential Strata in NSW - A summary analysis*, 6 June 2016.

would quickly send the entire system into turmoil. This begs the obvious question - *What is the solution to NSW's strata living crisis? How can the Government give apartment owners the same level of protection against shonky construction work as homeowners?* While there has been some reform over the years, that reform has been piecemeal and ineffective. What is needed is dramatic change. Not simply a change to parts of the existing legal framework in a piecemeal fashion.

4. **I advocate in this paper that the solution to the strata living crisis in NSW is to press the restart button and introduce a holistic solution , i.e. decennial liability and decennial liability insurance.**

II. THE EVOLUTION OF THE NSW BUILDING INSURANCE SCHEME

5. Over the years, the building insurance scheme in NSW has continued to undergo significant change, transitioning from a government-run scheme in 1972 to a privately administered scheme in 1997 and back again to a state run "Last Resort" scheme in 2002. Today, the government-run scheme is known as the Home Building Compensation Fund (**HBCF**) and is underwritten by a branch of NSW Treasury in accordance with the requirements of the *Home Building Act 1989 (NSW)* (**HBA**) and the Home Building Regulations 2014. The purpose of the HBCF is to provide a safety net for purchasers and subsequent successors in title for incomplete and/or defective residential building performed by contractors through mandatory insurance. However, apartment owners in multi-storey residential buildings over three stories are excluded from the benefits of this insurance scheme.

6. The mandatory insurance scheme was first introduced in NSW in 1972 and continued to operate until 1997. That scheme was run by the Building Services Corporation (**BSC**), a government agency until 1987. The insurance cover that is available for homeowners for defective building work was set at $40,000. This amount increased to $100,000 in March 1990. Under this scheme, claims could be made regardless of whether the builder was insolvent, had disappeared or died. Currently, there were no exemptions for insurance of apartments in multi-storey residential buildings

7. In 1993, the NSW Government initiated an inquiry into the BSC chaired by Peter Dodd. One of the key findings of the Dodd Report was that: *"The current 'one stop shop' approach is inappropriate. There is a need to separate the key functions of industry regulation and consumer advice, dispute resolution and insurance.*[4] The report made a number of recommendations, including that the insurance scheme be privatised.[5] In short, Dodd Inquiry recommended that Government move away from underwriting home warranty insurance in NSW and to allow the privatisation of the home building insurance market.

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[4] P Dodd, *Inquiry into the New South Wales Building Services Corporation* (1993) 4.
[5] Dodd, n 4 p4,6.

8. In 1997, the government-run scheme was replaced with a privately operated insurance regime for builders under what can be termed 'normal insurance arrangements.' This scheme commenced under the HBA. Any loss that arose from incomplete work was required to be covered for 12 months or more commencing from the time of the failure to complete the work. [6] All other losses were required to be covered for seven years from completion or the end of the contract (whichever was later).[7] The minimum insurance cover was $200,000.[8] As an insurance claim for breach of a statutory warranty could be made to an insurer directly, the scheme was partially 'first resort.'[9] However an insurance claim for non-completion could only be made if the builder was insolvent, dead or could not be found.[10] Again, there were no exclusions under the scheme - all types of residential building work was covered. Out of all insurance providers at the time, HIH had between 30% and 40% of the market share and offered, in many cases, the lowest premium. They were recognised as one of the largest builders' warranty insurers. In 1998, the requirement to take out insurance under section 92 of the HBA was extended to owner builder work.[11] In 1999, the insurance provisions at section 92 of the HBA were further amended to require a contractor to provide a certificate of insurance to the owner before demanding any payment.[12] In 2000, section 96A was introduced to prevent developers from entering into contracts to perform building work unless a certificate of insurance by the contractor performing the work is attached to the contract.[13] Developers however were exempt from the requirement to take out insurance.[14]

9. In March 2001, HIH collapsed with debts of about $5.3billion and almost $2 billion of construction activity placed on hold as thousands of builders were left without insurance cover.[15] The remaining insurance providers then started to charge higher premiums which then led to builders being unable to get insurance. This instability in the marketplace resulted in the Ministerial Council on Consumer Affairs commissioning a national review of home warranty insurance and consumer protection, the Allen Inquiry. The review considered insurance as well as licensing, contracts, dispute resolution and compliance. Its core recommendation was to *'put less emphasis on insurance and give more attention to strengthening the regulatory framework'.* [16]

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6 *Home Building Act 1989 (NSW)* (Historical Version for 5 July 2000 to 29 June 2001), s 103B(1).
7 *Home Building Act 1989 (NSW)*, s 103B(2).
8 *Home Building Act 1989 (NSW)*, s 102(3).
9 *Home Building Act 1989 (NSW)*, s 99(1)(b).
10 *Home Building Act 1989 (NSW)*, s 99(1)(a).
11 *Home Building Amendment Act 1989 No 56,* s 3, Schedule 1.
12 *Home Building Amendment Act 1999 No 26,* s 9, Schedule 1.
13 *Home Building Amendment Act 2000 No 56,* s 4, Schedule 1.
14 *Home Building Act 1989 (NSW),* section 99(2) of the HBA enacted by *Home Building Amendment Act 200 No 56,* s 5 of Schedule 1
15 Australian Government, The Treasury, *Aftermath of the HIH collapse* <https://treasury.gov.au/publication/economic-roundup-issue-1-2015/economic-roundup-issue-1/the-hih-claims-support-scheme/3-aftermath-of-the-hih-collapse/#P112_19024>.
16 P. Allen, *National Review of Home Builders Warranty Insurance and Consumer Protection - Report to Ministerial Council on Consumer Affairs,* (June 2002) vii.

10. In 2002, Dexta Corporation Limited withdrew and Allianz followed suit on 31 December 2002 even after attempts were made by the NSW Government to implement the necessary arrangements for reinsurance. Royal & Sun Alliance Limited (known as Vero Insurance Limited from November 2003) and Reward Insurance Limited were the remaining insurers providing home building insurance to builders.

11. In on around July 2002, the NSW Government introduced the 'Builders Warranty Insurance'(**BWI**), which subsequently became known as the "last resort" regime available to consumers only in the event of "*insolvency, death or disappearance of the contractor.*" The reference to 'insolvency, death and disappearance' was later clarified to mean "*disappearance of a contractor, supplier or owner builder after due search and inquiry, the contract, supplier or owner-builder cannot be found."*[17] The threshold amount of a contract which required insurance increased from $5,000 to $12,000, [18] while the period of cover was reduced from seven years for all major events to six years for structural defects and two years for non-structural defects. [19]

12. On 30 September 2003, the Inquiry into the NSW Home Warranty Insurance Scheme, chaired by Mr Richard Grellman (**Grellman Inquiry**)[20] was published arising out of concerns about timely access to insurance by industry participants and the dissatisfaction with home warranty insurance by consumer advocates. The Grellman Inquiry found that home warranty insurance should continue to be provided by the private sector and that high-rise buildings be exempt from this scheme. The rationale for this view was that high-rise constructions are commercial projects and the risks involved are materially different to those of individuals who are building a home. The real reason in the author's opinion however was that reinsurance in the global insurance market for work on multi-storey buildings was simply not available and if insurers were required to cover multi-storey buildings, they would unlikely be able to operate viably.[21]

13. The Government accepted most of the recommendations of the Grellman Inquiry and in December 2003, announced that high-rise residential buildings with a rise of more than three storeys would be excluded (**Exemption**) from the mandatory insurance requirements of the HBA.[22] As a result, the total size of the insurance market was greatly reduced as a large proportion of new housing being built in NSW at this time fell within this category of work.

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17 *Home Building Amendment (Insurance) Act 2002 No 17*, s 1, Schedule 2, Part 10.
18 *Home Building Amendment (Insurance) Act 2002*, s 9, Schedule 2, Part 10.
19 *Home Building Amendment (Insurance) Act* 2002 No 17, s 2, Schedule 1.
20 R Grellman, *Final Report of the NSW Home Warranty Insurance Inquiry* (October 2003).
21 *Home Building Regulation 2004* - Regulatory Impact Statement, 84.
22 *Home Building Act 1989 (NSW),* s 57BC enacted by the *Home Building Amendment (Insurance Exemptions) Regulation 2003.*

14. On 1 March 2007, the minimum cover provided under the home building insurance scheme increased from $200,000 to $300,000.[23] In or around November 2008, owners could start making insurance claims on a contractor's insurance policy if a contractor's licence was suspended.[24]

15. In May 2009, several amendments to the HBA immediately introduced onerous tasks on owners to ensure claims were made on time. Specifically, owners were required to make a claim on a contractor's insurance policy when the loss became apparent and notified to the insurer during the period of insurance or when the loss became apparent during the last six months of the period of insurance and is notified within six months after the loss became apparent.[25] These changes gave rise to the opportunity of insurers to refuse many claims when they were not made in time. The Government also introduced new regulations to the effect that an insurer's liability to pay any amount may be reduced if the owner fails to take action to enforce a statutory warranty.[26] The rationale was that "*a homeowner needs to actively enforce their rights. They cannot sit back and simply do nothing, waiting for a builder to die or go out of business before making an insurance claim*".[27]

16. In July 2009, Lumley General and CGU Insurance Limited announced their respective intention to withdraw from the home building insurance market. In response, the NSW Government announced on 8 November 2009 that it would underwrite the home building insurance scheme. [28] By late 2009, Calliden Insurance Limited, QBE Insurance (Australia) Limited and Vero Insurance Limited were the remaining home building insurers and they continued to provide home building insurance until 30 June 2010.

17. On 1 July 2010, following the global financial crisis and the withdrawal of private insurers from the home warranty insurance market, SICorp became the NSW Government's sole underwriter/provider of home warranty insurance in NSW. Residential Builders Underwriting Agency Pty Ltd and QBE Insurance (Australia) Limited became authorised agents to provide insurance under the Home Building Compensation Fund. The 'last resort' warranty scheme implemented through the private regime continued under this government funded scheme with the core focus being the provision of "*a safety net for consumers when a builder does not, or cannot, honour their commitments due to insolvency, death, disappearance, or licence suspension*".[29]

18. In June 2010, the benefit of a contract of insurance extended to successive owners in title.[30]

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23 *Home Building Amendment (Minimum Insurance Cover) Regulation 2007* (NSW).
24 *Home Building Amendment Act 2008 No 93,* s 5, Schedule 1; *Home Building Act 1989 (NSW),* s 99(3) – (5).
25 Amendment to *Home Building Act 1989* (NSW), section 103BA by the enactment of the *Home Building (Insurance) Act 2009* (NSW), s 3, Schedule 1.
26 *Home Building Act 1989 (NSW),* s 103C.
27 NSW, *Parliamentary Debates,* Legislative Assembly, 13 May 2009, (Hon. Penny Sharpe).
28 NSW Office of Fair Trading, *NSW Government steps in to protect $20 billion building industry*', Media Release.
29 NSW Office of Fair Trading, *Reform of the Home Building Compensation Fund* (December 2015).
30 *Home Building Act 1989 (NSW),* s 92C enacted by *Home Building Amendment (Warranties and Insurance) Act 2010*, s 4.

19. On 19 October 2011, developers became liable to a successive owner in title for breach of the statutory warranties, even where they did not perform the residential building work.[31] The definition of 'developer' was also redefined to include the owner of the land who also owns, or will own four or more units in the development, regardless of whether they entered into the contract with the builder, whether or not they were also in fact the developer. The threshold requirement for insurance increased from $12,000 to $20,000 and increased the minimum insurance to $340,000.

20. In 2015, further legislative and administrative changes were made which saw the Home Warranty Insurance Scheme renamed as the HBCF. An online register of certificates was also implemented allowing owners to check the validity of their builder's insurances. Owner Builders also became exempt from the requirement to take out insurance. SICorp's functions were transferred to the Insurance and Care NSW Board and the State Insurance Regulation Board.[32] SICorp then became part of icare which became the single provider of services for NSW insurance. Under this current regime there is a legal requirement for builders to take out insurance for any residential home building work valued over $20,000 before commencing work. A certificate of insurance must also be issued for the building project before commencement of work and the minimum cover that must be provided is $340,000

21. In 2016, the Government announced yet another overhaul to the HBCF to enable private insurers to return to the market and improve protections for consumers against incomplete and defective work.[33] A year later, on 20 June 2017, the NSW Parliament passed the *Home Building Amendment (Compensation Reform) Act 2017* which meant that from 2018, insurers are able to apply to the State for a licence to sell home building compensation products.

III. THE MUTLI STOREY BUILDING INSURANCE EXEMPTION

22. As noted above briefly, the Grellman Inquiry expressed the view that high-rise construction developments were fundamentally different to stand alone housing because they were commercial projects, generally undertaken by consortiums. Rightly or wrongly, the Grellman Inquiry also found that consumers faced minimal risk during the construction period. These reasons led them to recommend to the NSW

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31 *Home Building Act 1989 (NSW),* s 18(C)(2) enacted by *Home Building Amendment Act 2011* (No 52), s 12, Schedule 1.

32 These changes were implemented through the *State Insurance and Care Governance Act 2015 (NSW).*

33 State Insurance Regulatory Authority, NSW Government *"Greater choice and transparency for homeowners*, (online) Ministerial Media Release, November 2 2016 **<https://www.sira.nsw.gov.au/news/media-release/greater-choice-and-transparency-for-homeowners>.**

Government that multi-storey construction projects be exempt from the mandatory insurance requirements provided for in the legislation.

23. Adopting the recommendation of the Grellman Inquiry, the NSW Government enacted the Exemption on 31 December 2003 through section 57BC of the *Home Building Regulation 1997*.[34] From then on, developers and contractors were no longer required to take out home warranty insurance when carrying out residential building work over three stories. The Mutli-Storey Building Insurance Exemption is now found in section 56 of the HB Regulation 2014 and provides (relevantly) as follows:

> "56 Exemptions from insurance for multi-storey buildings
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> (1) A person who does, or enters into a contract to do, residential building work relating to the construction of a multi-storey building is exempt from the requirements of Part 6 of the Act in respect of that residential building work.
> (2) A developer who enters into a contract for the sale of land on which residential building work relating to the construction of a multi-storey building has been done, or is to be done, is exempt from the requirements of section 96A of the Act in relation to that residential building work.
> …….
>
> (9) In this clause:
> "multi-storey building" means a building:
> (a) that has a rise in storeys of more than 3, and
> (b) that contains 2 or more separate dwellings.
> "rise in storeys" has the same meaning as it has in the Building Code of Australia of the National Construction Code Series.
> "storey" has the same meaning as it has in the Building Code of Australia of the National Construction Code Series." (Emphasis added).

24. Sixteen years on, poor quality of construction, contractor insolvencies 'friendly' certifiers and no consumer protection have become the major on-going concerns for apartment owners and owners' corporations. This should be extremely alarming for the State given that during the same period, NSW has seen a steady increase in the number of people choosing to live in medium to high rise apartment buildings due to various factors such as housing affordability, proximity to work and transport. The trend is set to continue over the next decade with predictions that over half of the new dwellings that will be built in the metropolitan area of Sydney will be strata titled.[35]

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[34] The amendments were enacted through the *Home Building Amendment (Insurance Exemptions) Regulation 2003*.
[35] City Futures Research Centre, *Strata Data 2015 Residential Strata in NSW - A summary analysis* (June 2016).

A. An illustration of how concerning the issue really is

25. The lack of consumer protection stems from the fact that by the time owners and owners' corporations discover major defects in their apartments or in common areas three or four years after occupation and try to enforce statutory warranties under the HBA against the developer and the builder, more often than not, the builder and/or the developer have become insolvent, disappeared or have deregistered the special purpose vehicle company used to deliver the project. In these circumstances, owners are left without a remedy and have no choice but to pay for the defective work themselves or in the case of owners' corporations, raise special levies to rectify common area defects. [36]

26. In 2012, research conducted by the University of New South Wales found that 72% of all property owners surveyed and 85% of property owners in buildings built since 2000 said that one or more defect had been identified in their buildings.[37] The most common defects identified were internal water leaks, cracking to internal or external structures and water penetration from the exterior of the building. The long-term cost implications of defects in apartment buildings are potentially significant. The cost of rectification could also be up to 50 or 100 times more at occupation stage than during construction.

27. In 2013, the NSW Government released a White Paper, A New Planning System for NSW White Paper"[38] **(White Paper)** and found that "waterproofing defects in internal wet areas in high-rise buildings are one of the biggest causes of financial and emotional concern for owners and occupiers".[39]

28. The national survey on strata-titled property conducted by Queensland's Griffith University in September 2016[40] found that building defects are the primary challenge of unit owners' due to poor construction and building quality. Professor Guiding has been quoted as saying *"It is striking how strongly building defects comes through as the biggest concern. The qualitative survey was conducted across different states so I would have to say this is such a pervasive issue, it should be the subject of a federal government inquiry. Such a strong reaction from all the key players in the industry means this is of profound importance."* He then went on to *say, "I get a sense these problems are worse in Australia than overseas, so we need an inquiry to look into what's happening."*[41]

29. In 2012, the City Futures Research Centre conducted the Equitable Density Research finding that the most common defects were internal water leaks, cracking, and water penetration from the exterior of the building

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36 City Futures Research Centre, n 38.
37 UNSW, *Governing the Compact City: The role and effectiveness of strata management* (2012).
38 Department of Planning & Environment, NSW Government, *A New Planning System for NSW White Paper* (April 2013).
39 Department of Planning & Environment. n 42.
40 Griffith University, Inquiry into Key Challenges In Australian Strata Title (2015).
41 Professor Guiding made these statements at the Strata and Community Title in Australia for the 21st Century Conference held on 2nd - 4th September 2015 at the Surfers Paradise Marriott Resort & Spa.

resulting in negative impacts on the health and safety of residents and a financial burden on owners to cover emergency and other repairs, investigations, legal costs, and re-housing residents and a decrease in property values and rental incomes. [42]

30. In terms of real life cases where owners and owners' corporations have had to battle it out for years in court, there are hundreds. One that sent shock waves through the industry was the case of *Brookfield Multiplex Ltd v Owners Corp Strata Plan 61288 [2014] HCA 36.* The case related to the construction of a 22-storey apartment building in Chatswood by Brookfield in 1997 on behalf of Chelsea Apartments Pty Limited, the owners. Upon completion of the building, separate strata plans were registered for the residential apartments (floors 10 – 22) and the serviced apartments (floors 1 – 9), such that both Owners Corporations were subsequent owners of the building. The serviced apartments were sold to investors as a hotel venture, originally as the 'Holiday Inn' and then rebranded as the 'Mantra Chatswood Hotel.' The original owners of the apartments were the investors in the hotel venture but by the time the defects emerged, many had sold. Five years after registration of the strata plans, latent defects in the building began to appear. The Owners Corporation for the residential component of the building had the benefit of statutory warranties against Brookfield under the HBA and thus the case subsequently settled out of court. However, the Owners' Corporation for the commercial component of the building was not covered by the statutory warranties and consequently was left with no choice but to assert that Brookfield owed them a duty of care. The Full Bench of the High Court found that no duty of care existed as between Brookfield and the Owners Corporation. Specifically, it was held that due to lengthy contract negotiations between Brookfield and Chelsea and the fact that the investors had a six month maintenance period under their sale contracts, the Owners Corporation was not 'vulnerable.' Put another way, the High Court held that there was no room for the law of negligence to step in and protect investors from a bad bargain. The consequence of this decision means that where defects arise in commercial parts of a residential building over three stories or in work forming part of a residential building that is excluded from the definition of '*residential building work*' in the HBA such as lifts, an owner will not be covered under warranty insurance or have any redress against the builder in negligence.

B. Are certifiers adding fuel to the fire?

31. Building certification is part of this regulatory framework and ensures that buildings meet the strict requirements of the Australian Standards, Building Code of Australia and building legislation generally. Since 1928, there has been some form of statutory regime in New South Wales for the issue of a 'certificate'

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[42] Easthope, H., Randolph, B. and Judd, S. *Equitable Density: The place for lower income and disadvantaged households in a dense city: Report 1, The Building Scale* (2012).

in respect of a building.[43] The requirements within those certificates and their effect have varied over the years but have all had the overriding purpose of ensuring that buildings are constructed in accordance with the relevant legislation, regulations, codes and standards.

32. In 1997, before the Insurance Exemption, the NSW Government issued a White Paper on Integrated Development Assessment,[44] advocating for the introduction of private sector involvement in the development assessment process as part of its policy to encourage competition, remove unnecessary regulations and streamline the assessment process. It was hoped that this in turn would result in reduced approval response times, reduced holding costs, and improvements in the service provided to applicants. Shortly thereafter, on 1 July 1998, a new system private certification in competition with certification by council officers was introduced into the *Environmental Planning and Assessment Act 1979*.

33. Five years later, in parallel with the introduction of the Insurance Exemption, the Government introduced the following changes to the certification regime in the *Environmental Planning and Assessment Act 1979* (**EPA Act**) hoping that changes would encourage better quality construction in residential high-rise buildings:

(a) the introduction of mandatory inspections for all classes of buildings;

(b) fines of up to $1.1 million and two-year jail terms for building certifiers guilty of improper conduct, and for those who attempt to corrupt a certifier;

(c) the introduction of clearer provisions governing the role and responsibilities of principal certifying authorities;

(d) ensuring compliance with development consents before occupation or subdivision certificates are issued; and

(e) requiring the principal contractor and principal certifying authority (**PCA**) to place a sign at development sites, giving their name and contact telephone number.[45]

34. While the private certification system may have improved approval response times and reduced holding costs, it has caused other problems, which in turn has only exacerbated the issues which apartment owners and owners' corporations now face. Some critics say that the private certification regime has generated an era of "*friendly certifiers"* because developers and builders choose, appoint and pay an accredited certifier

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43 Refer s 317A of the *Local Government Act 1919 (NSW).*
44 Department of Primary Industries, *Integrated Development Assessment Process White Paper* (1997).
45 These recommendations stemmed from the Grellman Inquiry.

to complete the role of PCA on their developments. In other words, where consultants are being paid by developers, it is obvious that they will, even unconsciously, bear in mind the necessity to produce "positive" results if they wish to secure future work. This was certainly the view of Chief Justice McClelland in the case of *Burns Philp v Wollongong City Council (1983) 49 LGRA 420* where his Honour said *"The point is that a consultant who is responsible to, and reporting only to, the council is much more likely objectively to approach the question than a consultant who is dependent upon the developer.*

35. The Government recognised the problem of private certification in 2012 when it issued its Green Paper [46] but concluded that the problem stemmed from the lack of proper education and accreditation. One of the conclusions reached was that "*Building regulation and certification have been subject to criticism in recent times. Instances of fire protection system failures and inadequate maintenance, common building defects including waterproofing and fire safety non-compliance, and* ***mistakes made by some accredited certifiers have reduced the quality and safety of buildings****, and consequently, the community's confidence in building regulation and certification."* [47] (emphasis added). Some three years later, when the Government commissioned the Lambert Report, the final report of the statutory review of the Building Professionals Act 2005, the private certification issues were attributed to the *" lack of clarity about the roles, responsibilities, functions and accountability of private certifiers.*[48]

36. A case that clearly demonstrates the private certification problem is the newly constructed 39-unit apartment complex, Northpoint Rise in Castle Hill. Northpoint Rise was the subject of a vigorous marketing campaign where apartments were being sold off the plan to buyers as "luxury living". The target market being older retired couples looking to downsize and units were subsequently sold for over $2 million. The development was completed in December 2016. When the residents moved in, major defects associated with water proofing, ventilation and fire safety quickly became apparent to them. The author was appointed to represent the Owners' Corporation and individual owners to require the developer and contractor to rectify the defects. Unfortunately, but not surprisingly, the builder was nowhere to be found. After the imminent threat of litigation however, the developer reluctantly agreed to step in and assist the residents with rectifying some but not all of the defects. What was extremely alarming in this development was the series of life -threatening fire safety deficiencies that were found by the Hills Shire Council and the Fire and Rescue NSW after the development was certified as fit for occupation by a private certifier. Deficiencies included a fire hydrant system had been installed backwards, numerous fire hose reels were not commissioned and door handles on fire escape doors were capable of falling off which would prevent persons from evacuating the premise in the case of a fire. It became obvious to Fire and Rescue that the

46 Department of Planning, *A New Planning System for NSW Green Paper, Sydney* (2012)
47 Department of Planning, n53.
48 NSW Government, *Independent Review of the Building Professionals Act 2005* (2016)

certifier had not undertaken any proper fire safety inspections at the development but instead chose to sign off the development as being BCA compliance based on paperwork furnished to him by the builder. Stephen Netting, manager of fire safety compliance at Fire and Rescue NSW, described the non-compliance issues at Northpoint Rise as "life-threatening", and something that was quite common in buildings across the state: *"We see a lot of buildings like this. We have in the order of about 350 fire safety concerns at the moment."* [49]

IV. RECENT GOVERNMENT REFORMS

37. In its White Paper issued in 2013, the NSW Government stated that "changes are being made to the building regulation and certification system to rebuild confidence in the quality and safety of buildings."[50] Since then, persistent lobbying has led to reforms of the certification regime in the EPA Act and strata laws set out Part 11 of the Strata Schemes Management Act 2015. These reforms are designed to fill the void created by Insurance Exemption and are an attempt to place stringent checks and balances on certifiers undertaking the level of fire safety and compliance of multi-storey developments.

A. Developer bonds

38. On 28 October 2015, reforms to the Strata Schemes Management Act 2015 (**SSM Act**) received royal assent. These reforms included the introduction of developer bonds and compulsory post completion inspections (**Developer Bond Scheme**) through Part 11 of the SSM Act. The Developer Bond Scheme was originally due to commence on 1 January 2017 but was pushed back to commence on 1 January 2018. In short, for all construction contracts entered after 1 January 2018, the inspection and bond process will be as follows.

(a) ***Building Bond*** **-** Prior to the issue of an occupation certificate, developers will be required to give the Secretary of the Department of Finance, Services and Innovation (**Secretary**) a building bond in the amount of 2% of the contract price of the building work.[51]

(b) ***Appointment of a Building Inspector*** **-** If the initial period of a strata scheme ends up to 12 months after completion, the developer must appoint a qualified building inspector (not connected to the developer), to carry out an inspection of the building work. [52] The inspector is to be approved by the Owners Corporation in a general meeting. [53] If this is not done, the Owners Corporation can

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49 Lisa Visentin 'NSW government fails to act on proposed building industry reforms for almost two years' the Sydney Morning Herald (online), 22 June 2017 <http://www.smh.com.au/nsw/nsw-government-fails-to-act-on-proposed-building-industry-reforms-for-almost-two-years-20170620-gwutt5.html>

50 Department of Planning & Environment, NSW Government, *A New Planning System for NSW White Paper* (2013)

51 *Strata Schemes Management Act 2015,* s 207(1).

52 *Strata Schemes Management Act 2015***,** s 194(1)(a).

53 *Strata Schemes Management Act 2015,* s 195(1).

notify the Secretary of the Department of Finance, Services and Innovation (**Secretary**) [54] and the Secretary will appoint the inspector.[55]

(c) ***Mandatory Inspections and Reports -*** The building inspector must inspect the works between 15 months and 18 months after the completion of the building work and give an interim building inspection report. [56] The contractor that performed the works must then return to the site to carry out any rectification work identified in the interim report prior to the final inspection. Between 21 to 24 months after completion of the works, the inspector is to carry out a final inspection and generate a final report detailing any unrectified defective building work that was identified in the interim report and the scope of works required to rectify the building work.[57]

(d) ***Rights to use Building Bond*** – The obvious purpose of the bond is to secure funding for the payment of the costs of rectifying defective building work identified in the final report.[58] Accordingly, the Owners Corporations will be able to use that building bond for fixing defective building work identified in the final building report.[59] Excess money must be paid back to the developer.[60]

(e) ***Release of the Bond -*** the developer bond must be realised or claimed within 2 years from completion of the works or within 60 days of the final report being provided to the Secretary.[61]

39. Importantly, these new laws do not apply to construction work for which home owners warranty is required.[62] The legislation is designed to fill the void created by the Insurance Exemption but will clearly not address latent defects that appear two years after completion.

B. Fires safety laws

40. On 21 September 2016, the Government released its final statutory report of the review of the Building Professionals Act 2005 (**Lambert Report**), setting out their response to 150 recommendations and the action plans it will take to establish improvements in NSW within the building and development certification.[63] The Lambert Report sets out the ways the Government would strive to strengthen fire safety certification for new and existing buildings and allow only persons with appropriate qualifications and

54 *Strata Schemes Management Act 2015*, s 194(1)(b).
55 *Strata Schemes Management Act 2015,* s 196(1).
56 *Strata Schemes Management Act 2015,* s 199.
57 *Strata Schemes Management Act 2015,* ss 200 and 201.
58 *Strata Schemes Management Act 2015*, s 207(3).
59 *Strata Schemes Management Act 2015,* s 210.
60 *Strata Schemes Management Act 2015*, s 201(3).
61 *Strata Schemes Management Act 2015,* s 209(3).
62 *Strata Schemes Management Act 2015*, s 191(3).
63 Local Government NSW, *The Lambert Report - Final statutory report of the review of the Building Professionals Act 2005*, September 2016

certifications to design, install, instruct and maintain fire safety systems and reinforce site inspections for certain building types.

41. Approximately a year later after the Lambert Report, and some three months after the Grenfell Tower fire in London[64] on 1 October 2017, the *Environmental Planning and Assessment Amendment (Fire Safety and Building Certification) Regulation 2017* (**Fire Safety Regulations**) was enacted under the EPA Act to introduce stringent requirements around fire safety design, construction and certification. The changes include the following:

(a) plans for certain fire safety systems need to be signed off by the certifier;

(b) Fire and Rescue NSW must complete fire safety inspections for multi-unit residential building projects;

(c) new critical stage inspections targeting apartments and other buildings where people sleep; and

(d) assessment of the ongoing performance of essential fire safety measures must now be undertaken by *'competent fire safety practitioners'*.

42. While there is no doubt that the new fire safety laws and developer bonds are a step in the right direction in dealing with the strata living crisis, these reforms are piecemeal and ad hoc. This view is shared by Professor Ian Bailey, SC, a barrister specialising in construction disputes and chair of the Society of Construction Law Australia who has been quoted to say that the government's piecemeal approach to reform was "*incomplete and ill-considered*" and would do little to fix the systemic problems which had led to a "*forest of defective buildings.*" [65] Apartment owners deserve the same level of protection as home owners and the reality is that piecemeal reforms will not give them this protection. Perhaps it is time for the Government to rethink its approach to the strata living crisis and consider decennial liability and decennial liability insurance administered by the private sector.

V. THE CASE FOR DECENNIAL LIABILITY

43. In France, insurance for contractors in the construction industry is regulated by statute through concepts known as "decennial liability" and "decennial liability insurance". France was the first country to

64 Nick Miller, London fire: Building safety under the spotlight after deadly blaze engulfs Grenfell Tower, *Sydney morning Herald* (online), 15 June 2017 < http://www.smh.com.au/world/london-fire-building-safety-under-the-spotlight-after-deadly-blaze-engulfs-grenfell-tower-20170614-gwrdky.html>

65 Lisa Visentin 'NSW government fails to act on proposed building industry reforms for almost two years' *the Sydney Morning Herald* (online), 22 June 2017 <http://www.smh.com.au/nsw/nsw-government-fails-to-act-on-proposed-building-industry-reforms-for-almost-two-years-20170620-gwutt5.html>

implement this regime and since its inception, many countries, such as Belgium, Canada, Spain, Sweden, United Arab Emirates and Qatar, have seen its success and implemented similar regimes. [66]

A. France

44. France enacted the Spinetta Statute in 1978 to protect the interests of building owners and purchasers. Specifically, under Articles 1792 and 1792-4-1, builders, architects, designers and engineers can all be found liable for up to ten years. This liability is referred to as *assurance décennale*, or decennial liability. The Article, translated to English states as follows: *"All Constructors of works are strictly liable towards the principal or the purchaser of the works, for damage, including that resulting from a vice of the soil, which compromises the solidity of the works and which, by affecting one of their constitutive elements or part of their equipment, renders them improper for their intended use."* The term "*constructor*" is widely defined to include architects, contractors, technicians, or other persons bound to the building by a contract of hire of work, any person who sells, after completion, a work which he built or had built, and any person who, although acting in the capacity of agent for the building owner, performs duties similar to those of a hirer out of work.[67]

45. One of the key concepts of the model is that builders will be jointly responsible with engineers, architects and the like whom performed work on the project. Equally important is the notion that liability is strict and cannot be excluded as a matter of public policy.[68] Owners do not have to prove that the contractor was negligent in or failed their contractual obligations, all that is required is physical damage.

46. Decennial liability is based on a tiered system of contractor responsibility. Greater responsibility is imposed in the first years and less in later years. By way of example, in the first year after completion, contractors are mandated to guarantee complete performance of the work, or "*la garantie de parfait achèvement*."[69] In addition, for the first two years after completion, contractors guarantee that all of the fittings of the house are in good working order, "*la garantie de bon fonctionnement*."[70] For the 10 years after completion, liability arises where there is damage to the building which relates to the strength of the building (or one of its constituent parts) and renders the building unfit for purpose. There is ample case law which defines "strength of the work" and "unfit for purpose." The ten-year guarantee includes claims for soil defects, weatherproofing, and waterproofing.[71] Moreover, the regime covers both latent and patent defects.

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66 Other countries include Algeria, Angola, Argentina, Bahrain, Bolivia, Brazil, Cameroon, Chile, Colombia, Egypt, Finland, France, Gabon, Indonesia, Italy, Iraq, Jordan, Kuwait, Lebanon, Mali, Malta, Morocco, Netherlands, Oman, Paraguay, Peru, Philippines, Republic of Congo, Romania, Saudi Arabia (on Government contracts), Senegal and Tunisia

67 *Article 1792-1 of the French Civil Code.*

68 *Article 1792-5 of the French Civil Code.*

69 *Article 1792-6 of the French Civil Code.*

70 *Article 1792-3 of the French Civil Code.*

71 *Article 1792-6 of the French Civil Code.*

47. The ten-year liability period from major defects, damage or even partial or total collapse commences on the date the owner accepts the construction works and the benefit of the liability is transferred to any subsequent owners of the building during the ten-year period. Minor defects are not covered by decennial liability as they are more likely to be easily remedied.

48. Since decennial liability was enacted, France saw many owners being unable to utilise the full benefit of the ten-year liability for various reasons. The most obvious reason being that by the time the defects manifest themselves, the building company does not exist or simply does not have the asset backing to cover the cost of rectification. This problem led to the introduction of compulsory decennial insurance provisions added to Article L.241-1 of the Insurance Code, making it mandatory that those who assumed decennial liability were also required to take out compulsory decennial liability insurance known as "*assurance de responsabilité obligatoire*." The failure by contractors to take mandatory insurance attracts a criminal penalty of up to 6 months' imprisonment or a €75,000 fine (approximately AUD$120,000). Insurance companies are also obligated to offer decennial liability insurance and if their premium pricing as compared to the construction risks is too high, they can also be exposed to government penalties.

49. Decennial liability insurance must be taken out before any works commence. In this regard, the Insurance Code provides for the obligation of the '*builders'* to prove to the owner upon commencement of the works, and at any time during the performance of the works, that insurance is current. The scheme is based on a single premium principle, i.e. the insurer collects a single premium at the outset of construction from each person or business involved in the construction of that project. Insurance premiums range from 0.8 - 2% of the cost of the works. In terms of a policy amount limit, there is none as the law in France does not allow a liability limit. If a claim is made against the insurance, it is usually for the cost of repairing the building work, as determined by the insurer. Importantly, the policy is assignable between successive owners and tenant's interests are usually noted on the policy.

50. Building owners are also required by the French Insurance Code to take out a type of decennial liability insurance.[72] Some may say that this is akin to 'double insurance' as both owners and contractors are insuring the same building but the purpose of equally requiring both owners and contractors to obtain insurance is to avoid having the owners involved in lengthy, protracted litigation during which they must continue to wait to be paid for their claims.

51. When an owner decides to lodge a claim with the insurer, the process is simple. The owner notifies the insurer of the defective work, the insurer investigates the matter within a period of sixty days, usually by engaging a loss adjuster to inspect the extent of the defects. Naturally, for more extensive defects, insurers

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[72] Article L242 of the French Insurance Code

can seek extensions. The insurer is then required to either accept or reject the claim in ninety days. If the claim is approved, the insurer will make the owner an "offer of indemnity" to cover the cost of the rectification work. If accepted by the owner, payment is paid within 105 days. Once the owners are paid out, the owner's insurer will pursue a subrogated claim against the contractor or design professional's insurer. This model of insurance allows for fast payout of claims and the ability of owners to repair the defect quickly so that the building can be used more expeditiously.

52. Decennial liability insurance is advantageous to both owners and contractors. For owners, the decennial liability insurance scheme gives owners a sense of comfort knowing that their building is going to be insured for defects for a long period of time. In addition, when claims are made, they are assessed and paid out quickly so that defective rectification work can occur promptly. Put another way, the uncertainty and unpredictability of litigation is removed through the concept of "strict liability". Owners are not left waiting until the end of a lengthy and protracted litigation to learn their fate at which time the defects may have significantly worsened. The French model ensures that when major structural damage is uncovered, owners are paid under their own policies and insurer then has the choice of suing in a subrogation action. Such a scheme is more efficient than the drawn-out fights over interpretations of the CGL policies.

53. Having a ten-year insurance policy on buildings can also increase the value of the building for investment opportunities. The scheme would also mean that the need for collateral warranties may also reduce, which in turn would save time and expense for those in the contracting chain.

54. As decennial liability insurance is mandatory in France, the insurance problem of "adverse selection" is eliminated. This problem arises when potential insureds, i.e. contractors and engineers, who have the highest risk of loss or who are the most likely to cause the types of injuries covered in the policy are more likely to buy the insurance than those who are less likely to need the insurance. Theoretically, this tendency could put an insurer in a risky financial situation if there are not enough low-risk policyholders purchasing insurance. However, as all contractors and design professionals in France must obtain decennial liability insurance, the problem of adverse selection is eliminated as the scheme ensures a fairly large premium pool for insurers, reducing the likelihood of financial demise for insurers.

55. For contractors, the strict liability scheme also provides advantages. Simply knowing that contractors owe decennial liability to owners may in itself incentivise contractors, engineers and designers to work together to ensure that the design and construction of the building is fit for its intended purpose.

56. In terms of the disadvantages of the decennial liability insurance, there are few. One worth noting is the ability of insurers in that market to collude with each other to fix the minimum price for insurance policies. This potential situation arose in Spain during 2008 – 2009 when the National Markets and Competition Commission (NMCC) issued fines amounting to a total of €120 million on several insurance and

reinsurance companies for alleged anti-competitive conduct in fixing minimum prices for decennial liability insurance policies. Fortunately for those companies, the Supreme Court overturned the NMCC's decision on the basis that there was simply not enough evidence to find the companies liable for anti-competitive behaviour.[73] These issues are fairly easy to manage if stringent surveillance and auditing measures are put in place to monitorcompliance.

57. Some may also say that the premiums and deductibles make the regime expensive. However, the cost of the insurance is reasonable when broader factors are considered. For example, parties would be spared from spending hundreds of thousands of dollars on litigation and contractors would be spared from paying more than the cost of the rectification work. Owners would avoid costs associated with loss of use of the property, the delay in the future use of the property and corresponding loss of profits that could be generated from the property. These cost savings outweigh any perceived disadvantage of high premiums and deductibles.

B. Spain

58. Decennial liability was introduced in Spain on 6 May 2000 [74] after ongoing complaints about the quality and safety of buildings during the 1980's and 1990's. The legislation imposes a ten-year liability on developers for any harm resulting from the building's foundation and other structural elements of the building.[75]

59. The extent of decennial liability includes material damage arising from inherent vices or defects in the masonry, supports, beams, framework, load-bearing walls or any other structural elements that threaten the building's solidity, mechanical resistance and stability.

60. The Act makes the purchase of decennial liability insurance mandatory and makes the owner of the home the beneficiary. Specifically, the Spanish regime provides for three types of insurance policy to mirror the three types of decennial liability, i.e. physical damage insurance to cover physical damage:

(a) resulting from flaws and defects affecting detailing elements for a period of one year;

(b) of the building caused by flaws or defects affecting its habitability for a period of three years; and

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73 Francisco Marcos, The Spanish Property Insurance Cartel (2012), 2011-2012, 18 *Connecticut Insurance Law Journal,* 509

74 Ordination and Edification Act (Ley 38/1999, de 5 de noviembre, de Ordenación de la Edificación.

75 *Article 1591 of the Spanish Civil Code*.

(c) of the building deriving from flaws or defects affecting the foundation, supports, beams, load bearing walls, or any other structural element, and that form part of the resistance and stability of the building.

C. British Columbia, Canada

61. The decennial liability insurance regime has also been successfully implemented in Bristish Columbia, Canada under Part 8 of Home Owner Protection Act 1998. Specifically, section 22(1) prohibits home building work being performed without warranty insurance. Section 22(2) goes on to provide that home warranty insurance for a new home must provide coverage for:

(a) defects in materials and labour for a period of at least 2 years after the date on which the warranty begins,

(b) defects in the building envelope, including defects resulting in water penetration, for a period of at least 5 years after the date on which the warranty begins, and

(c) structural defects for a period of at least 10 years after the date on which the warranty begins.

D. New Jersey, United States of America

62. In the state of New Jersey in the United States, contractors and developers are also subject to a ten year statutory warranty period for major structural defects in new homes[76]. Shorter warranties of one and two years apply for other non-major defects. Prior to commencing home building work, developers and contractors are required to enrol in a State Warranty Plan, which provides two year insurance cover to home owners, and a Private Warranty Plan, which will provide home owners with insurance protection for ten years if the builder does not remedy the defects.[77]

E. United Arab Emirates

[78] *Articles 880 of Law No. 5 of 1985.*

63. In the UAE, decennial liability is mandatory and found in Article 880 of UAE Civil Code as follows:

> (1) if the subject of a contract is the construction of buildings or other fixed installations, the plans for which are made by an architect to be carried out by the contractor under their supervision, they shall both be jointly liable for a period of ten years. During this time, they must compensate the employer for any total or partial collapse of the building or installation that they have erected and for any defect that threatens its stability or safety, unless the contract specifies a longer period. This law will apply unless the contracting parties originally intend that the installations should remain in place for less than ten years.
> (2) The said obligation to make compensation shall remain notwithstanding that the defect or collapse arises of a defect in the land itself or that the employer consent to the construction of the defective buildings or installations
> (3) The period of ten years shall commence as from the time of delivery of the work. [78]

64. Decennial liability is strict liability and any clause that purports to exclude or limit the contractor's or designers' liability is void.[79] All project participants are jointly liable for damage and major defects in the building. Liability is for the whole or partial collapse of the construction work and any defect threatening the integrity or safety of the building, even where the defect or collapse is due to soil subsidence. There is also a time bar embedded in the regime which has the effect that no claim for compensation will be heard after three years from the collapse of the building or the discovery of the defect. [80] Interestingly, decennial liability insurance in UAE is not mandatory meaning that the requirement for insurance is governed by the relevant contracts.

F. Qatar

65. Qatar has a similar decennial liability system as the UAE, where the legislation provides that "The contractor and architect/engineer will jointly guarantee against total or partial collapse or flaw that occurs within ten years in buildings they have constructed, or fixed installations they have erected, even if that collapse or flaw arises from a defect in the land itself, or the employer for the work has allowed the defective buildings or structures. This guarantee includes defects that appear in the buildings or structures that pose a threat to their strength and safety". [81] Like UAE, there is no mandatory insurance to work hand in hand with the decennial liability regime.

VI. WHAT WOULD DECENNIAL LIABILITY INSURANCE LOOK LIKE IN NSW?

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78 *Articles 880 of Law No. 5 of 1985.*
79 Abdulaziz Al-Mulla, James Bremen, Simon Halliwell Decennial Liability: The Case for Harmonisation, *International Bar Association;*
80 Articles 883 of Law No. 5 of 1985 Abdulaziz Al-Mulla, James Bremen, Simon Halliwell Decennial Liability: The Case for Harmonisation (2012) *International Bar Association.*
81 Qatari Civil Code, Articles 711-715.

66. There are variances in the decennial insurance model around the world, both in the period of cover and the period of liability. In NSW, where there is a significant gap in consumer protection for those living in multi-storey developments, decennial liability insurance regime would be a natural solution which could be seamlessly implemented to close that gap. It is therefore submitted that that decennial liability insurance should be introduced in NSW to cover "major" defects in multi-storey buildings and be offered and managed by the private sector.

A. Changes to the Statutory warranty periods under the HBA

67. Under the HBA, contractors are currently liable to owners and successors in title for defects for a period of six years for "*major*" defects. [82] "*Major defect*" is defined under the HBA to means a defect in a major element of a building that is attributable to defective design, workmanship or materials that causes or is likely to cause:

(a) inability to inhabit or use the building for its intended purpose;

(b) the destruction of the building or any part of the building; or

a threat of collapse of the building or any part of the building[83]

(c) two years for "non-major" defects, i.e. those defects which do not fall into the "major" defect category. [84]

68. "Major element" is defined to include an internal or external load-bearing component of a building that is essential to the stability of the building, including foundations, footings, floors, wall, roof, columns and beams, or a fire safety system and waterproofing. [85]

69. Not surprisingly, the six-year liability on contractors for "major" defect is consistent with the decennial insurance regime in France where owners are only entitled to make a claim on decennial insurance policies for defects that render the building unsafe for occupation or have been partially or completely destroyed.

70. It is submitted that to apply the decennial liability insurance regime to multi-storey residential buildings in NSW, the six-year statutory liability period for major defects should be extended to ten years across the board, i.e. for residential building work covered by the home warranty scheme and multi-storey buildings. The concept of a ten-year liability is not foreign to NSW as section 109Z of the EPA Act already specifies a capped ten-year period after approval of a final occupation certificate within which a building action can

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82 *Environmental Planning & Assessment Act 1979* (NSW), s 18E(b).
83 *Home Building Act 1979* (NSW), s 18E(4)(a).
84 *Environmental Planning & Assessment Act 1979* (NSW), s 18E(b).
85 *Home Building Act 1979* (NSW), s 18E(4)(a)-(d).

be started against builders and designers. Moreover, recent cases have confirmed the courts continued willingness to recognise and uphold such liability if claims are brought within time.[86]

71. No changes would be required to the existing two-year statutory liability period because the developer bond scheme will afford apartment owners protection from non-major defects.

B. Changes to the insurance requirements in the HBA

72. For decennial liability insurance to apply to major defects, changes would also be required to section 56 of the Home Building Regulation 2014. Section 56 contains the Exemption and would therefore need to be repealed and replaced with the obligation for contractors performing residential building work in a multi-storey development to take out decennial liability insurance. The specific requirements for taking out decennial liability insurance can then be specified in a new section in Part 6 of the HBA where all the other insurance requirements are currently contained. The reference to the long-stop limit on claims at section 103BC of the HBA can then apply to both claims under the home warranty insurance scheme and the Decennial Liability Insurance scheme.

73. As the extension of the statutory warranties for major defects would most certainly increase the burden on the existing home owners warranty scheme which, as at 30 June 2016 the scheme was $375.8 million in deficit, perhaps the solution here is to return back a home building insurance scheme run by private sector insurers.

C. Introducing the concept of joint responsibility

74. The concept of joint responsibility between contractors, architects and engineers would need to be introduced into legislation. Currently, the statutory warranties are imposed on only "*the holder of a contractor licence."*[87] That obligation can remain for residential building work covered by the mandatory home warranty regime. For multi-storey residential buildings covered by decennial liability insurance, a new section 18BB can be introduced in words to the following effect, "*statutory warranties in respect of major defects in multi-storey developments are imposed on the holder of a contractor licence and all relevant professionals associated with the design and construction of a mutli-storey development."* The concept of "relevant professional" is already in the HBA at section 18F(4) of the HBA and perhaps would require a slight modification.

75. Imposing joint and several liability on designers and engineers will also eliminate the need for them to take out separate professional indemnity insurance for seven years and for contractors to take out contract works

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[86] *Owners Corporation SP 76841(Owners) v Ceerose Pty Ltd & Anor* [2016] NSWSC 1545.
[87] *Home Building Act 1989* (NSW), s 18B(1)

insurance. Accordingly, the money for premiums that would have otherwise be used to pay these insurances can be used to pay for the premium to take out decennial liability insurance. Amongst other things, having one single policy reduces the risk of gaps between insurance while at the same time, reducing the blame culture that can arise between parties under those policies.

76. The concept of joint and several liability between the contractor and relevant professionals is also consistent with the government's decision to exclude the proportionate liability provisions of the *Civil Liability Act 2002 (NSW)* to apply to residential building work. [88]

D. Changes to the EPA Act

77. As matters presently stand, developers choose, appoint and pay accredited certifier to complete the role of PCA on their developments. The problems with this have been highlighted above. To avoid these problems, and for decennial liability insurance to work, there would need to be a change in the way the PCA is appointed. We would also need absolute clarity about their role during the construction process. In fact, to give insurers comfort and to encourage them to stay in the decennial liability insurance market, it is only natural that they have control over the appointment of the PCA. This would remove any concern that the certifier is taking "short cuts" in the certification of the building.

78. Slight amendments would need to be made to section 109E of the EPA Act as follows:

(a) amend section 109E(1), 109E(1AA) and 109E(1)(A) so that it refers only to development consents and complying development certificates for residential building work for which mandatory home warranty insurance is required; and

(b) introduce a new section 109E(2)(A) \which provides that where a developer is constructing a multi-storey development, the insurer that is appointed under Part 6 of the HBA for that work is responsible for appointing the PCA.

79. It is hoped that this change, in conjunction with the new fire safety certification laws will provide insurers the necessary incentive to enter and stay in the decennial liability insurance market once established in NSW.

VII. CONCLUSION

80. It is acknowledged that no insurance scheme is perfect, but NSW is far from perfect. The mandatory government-run home warranty scheme is currently sitting on a $375.8 million deficit and 85% of all newly

[88] This change was introduced in or around October 2011

constructed residential apartment buildings with insurance contain defects. What more needs to be said on the topic to justify major reform? It is not enough to simply try and close the gap in consumer protection by forcing developers to stump up with 2% building bond, requiring certifiers to physically inspect work at certain stages of construction. Rather, it is advocated in this paper that the Government adopt decennial liability and decennial liability insurance as being the holistic solution to the strata living crisis and at the same time revert back to a privately-run home warranty scheme for all other residential building work. As highlighted in this research paper, there are many advantages in the decennial liability insurance model. It provides the necessary protection needed for those living in strata title developments while at the same time protects contractors from facing bankruptcy when major damage in a high-rise development is discovered. From a policy perspective, decennial liability insurance also offers cost savings in the form of less litigation and increased efficiency through owner's insurance and subrogation suits, relieving the pressure off our court system.