

A Better Deal for Strata Consumer Protection – Building Defects

Background

Building defects remain a major issue for strata lot owners in most new buildings. The University of Sydney City Futures research published in 2012 estimated that 85% of new apartment buildings post 2000 have defects after occupation.

The April 2020 report of the NSW Upper House Inquiry into the regulation of building standards, building quality and building disputes concluded that:

“There are a significant number of strata homeowners out there today dealing with the cost of rectifying major defects in their buildings, who have nowhere to turn. These problems were created by decades of deregulation by the state government, which has stepped away from its responsibilities to ensure homes are built to an acceptable standard and are fit for occupation”.

Presently new apartment buildings are not required to have defects insurance and the prevalence of “\$2 companies” carrying out such developments often leaves owners of defective apartments with no recourse.

Confidence in strata living as a housing option is being undermined by building defects at a time when it is critical to delivering much needed new homes. In NSW over 1.1 million people live in strata schemes. Around 70% of new dwellings being built in Sydney are strata lots.

In August 2019, following a series of high profile building defects cases (including Opal Tower and Mascot Towers), the NSW government appointed David Chandler OAM as the state’s first Building Commissioner. The Building Commissioner has been tasked with “restoring confidence” to the NSW residential apartment construction sector in a “customer facing” way.

The Building Commissioner, who operates out of the Department of Customer Service within the Office of Building Commissioner, has set up six working groups (“pillars”) under the name of “Construct NSW” to progress separate areas of building reform, as follows:

1. Regulation
2. Ratings
3. Skills and capabilities
4. Digital transformation
5. Better procurement systems
6. Research

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OCN is involved in these working groups, (together with the overarching “steering committee”) along with organisations that represent key players in the apartment construction sector including developers, builders, architects, engineers, certifiers, insurers, financiers and strata managers.

OCN is the **only** consumer-based organisation involved in these working groups.

In June 2020 the NSW parliament passed two important pieces of legislation.

1. The *Residential Apartment Buildings (Compliance and Enforcement) Act 2020* which gives the Building Commissioner wide ranging investigative and enforcement powers in relation to new apartment buildings and those in the course of construction, including the power to issue building rectification orders and the power to prevent the issue of an Occupation Certificate, which is the pre requisite to registering the strata plan. Registration of the strata plan is the prerequisite to requiring settlement of off the plan purchases.

This Act commenced operation on 1 September 2020.

2. The *Design and Building Practitioners Act 2020* which includes a retrospective statutory duty of care enabling owners of defective apartments to sue builders and others involved in the design and construction of those apartments for damages. This provision (which overcomes a High Court decision a few years ago) was agreed to by the NSW government after a concerted campaign by OCN and is a major achievement by OCN.

Policy and Strategy

Whilst the above are positive developments, there is much more to be done in terms of consumer protection for purchasers of new residential apartments. The following additional measures are needed:

1. Legislation to remove existing loopholes in the statutory warranty regime under the *Home Building Act 1989*.
2. Amendment of the *Building Products Safety Act 2017* to bring it in line with the corresponding Queensland legislation.
3. If the 2 year warranty for “minor “ defects is to remain, it should be strictly limited to an exhaustive list of “minor” defects like internal painting, internal fittings, internal doors – things that do not affect waterproofing or slabs.
4. All remaining defects to be covered by a 10 year warranty period.
5. A 10 year warranty period for non minor defects backed up by compulsory first resort insurance for apartment buildings with a more cost effective, less conflict riddled solution for when defects occur must be instituted.
6. A requirement that to build over 3 storeys in NSW the builder must be licensed personally with licensing criteria at the very least in line with the NSW Home Building Compensation Fund criteria (solvency and integrity) and the qualifications and skills needed to build high rise structures.
7. A single unique ID for the building licence holder that is traceable across all corporate entities.
8. A licensing presumption that a residential licensed builder will operate through one company.
9. A licensing scheme for developers to ensure solvency and integrity and to remove poor performers from the market. This system exists in other jurisdictions including Singapore.

10. Financial assistance for owners of buildings with flammable cladding and other buildings with catastrophic building defects.
11. Establishment of a properly resourced Building Commissioner as an independent statutory authority reporting directly to a senior minister.
12. A new senior Ministerial portfolio “Minister for Housing and Building Quality” with responsibility for housing policy, building quality regulation and strata housing policy and services.
13. An independent programme to measure and track the pattern, prevalence, and trends in building defects so the public has a trustworthy source of data and the effectiveness of government reform can be evaluated.

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