

## THE SOLUTION TO DEFECTS IN NEW RESIDENTIAL BUILDINGS – FROM A STRATA MANAGER’S PERSPECTIVE

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The current construction issues in new high-rise apartment buildings is no surprise to those, who, like me have been in the strata industry for decades.

The system that is meant to give the consumer protection and confidence has been slowly eroded over many years, since the introduction of Home Owners Warranty. This provision was watered down almost as soon as it was enacted. We have reached the crisis we now have, where the preventative measures, protections and liability for the defective product has been removed or made impotent.

This is not about laying blame. This situation has not happened on any one State Government watch.

In this article, we look at these failures and what measures are needed to rectify all the issues.

### **The government that does fix this will leave behind a great legacy.**

#### **What are the issues that need resolving?**

In summary, presently there is no true responsibility, liability or accountability for the buildings being produced. Those well-built properties have not occurred by accident, but because those companies are responsible about their reputation in the marketplace. Unfortunately, many developers and builders are only in it to make a quick buck and do a “runner” and the current legislation (ie amendments watering down the Home Owners Warranty) gives them the license to do just that. Only structural defects are now covered under the HOW Scheme - in a 3 storey walk up! So, if you purchase into a residential property that is more than 3 storeys’, counting the carpark, you have no protection at all from defective work.

Owners are thus left to pursue the builder through the courts, with the parties not held responsible (refer Brookfield’s case - *The Owners Strata Plan 61288 v Brookfield Australia Investments* (New South Wales Court of Appeal, 25 September 2013) – **where Justice McDougal in the Supreme Court** concluded that the builder did not owe a duty of care to the strata plan. His Honour suggests that the strata plan would have a better claim against the builder than the developer’s claim against the builder (which was limited to 52 weeks). His Honour also considered the negotiations between builders and developers, which, in this case, were based on the limited defect’s warranty period.

We don’t allow this lack of responsibility to the consumer in any other area in NSW. The builder completes and sells a defective product and the Government ensures no real protection due to the watering down of the legislation – protecting the builder and developer instead.

Presently there is nothing to force a builder to construct a property to the Building Code of Australia, and the Australian Standards – so why do we have them? Only if the builders become truly accountable – with the developer – will they be forced to produce a better product. There are tighter laws for Strata Managers and Real Estate Agents or even a shop than there are currently for the consumer when purchasing a strata residential property worth hundreds of thousands of dollars.

### **How did it go so wrong?**

- i) Builders who have little or no experience are building high-rise apartments.
- ii) Developers are often hard to touch – winding their companies up at completion of the project.
- iii) Private Certifiers are engaged and paid for by the builder and/or developer, so they are not truly impartial (he who pays the piper calls the tune).
- iv) Engineers who may not be sufficiently experienced or qualified are part of the design process and certification.
- v) Strata Managers often also have a long-term relationship with the developer and protects them to ensure they will be appointed to the next project. There is no separation to ensure the Owners Corporation have someone truly acting in their best interests when issues start to show up.
- vi) Builders are beginning to factor in defects and missing/leaving out items to the value of the 2% Building Bond under the new strata legislation. So that money will be insufficient to address either the defects that will still occur. This does nothing to ensure the builder has the relevant experience or education to build these multi-storey properties, more on this later).
- vii) Property owners – at their most vulnerable time – ie often having just taken out a loan for the maximum they can borrow to buy what they thought was their dream home - have no equity left in their property to access further funds. (Many banks won't lend based on the reduced property values and the Government requirement them to undertake "Responsible Lending"). The result will be that some owners will be declared bankrupt because they can't pay the levy in the short time the scheme requires to fund either repairs or litigation.
- viii) Often litigation against the builder or developer is as expensive as the repairs – and there is no guarantee the property owners will win their case. Furthermore, even if one were to have a 100% win, you never recover all your costs – so owners decide to repair things themselves, and the builder gets off "scot free" and learns nothing. The result is that these issues will continue to be perpetuated in their further construction projects.
- ix) Home Owners Warranty paperwork only drove good builders, who had many years of experience out of the industry. The same will happen again if the Private Certifiers insurers are now placed on the hook as the Government is proposing. Many will decide it is all too hard and get out of the industry. Many retire with all that experience being lost. Once the current situation is made worse – where can one to change/fix the system?
- x) Currently our buildings seem no better than an investment in property in a 3<sup>rd</sup> world country – a risk NSW consumers are not used to. The confidence in the industry once lost will take a long time to return even if a proper fix is achieved.

- xi) Home buyers and overseas investors will steer clear of our properties and this will impact on sales – affecting the developer, councils and the NSW Government financially (all of whom gather funds/profit – eg NSW Government receives stamp duty, and levies Fire/SES on strata insurance policies). Ultimately the construction industry will be impacted along with the greater Australian economy.
- xii) Australian consumers are ordinarily extremely well protected. Around the world we are known for being a nanny state. But when it comes to a “new building” the consumer is led to believe there is a warranty – and if they need to make a claim it is no harder than if you had an accident in your car. Lodge the claim and get paid out, your car is fixed within a few weeks. Instead under the Home Building Act the consumer, who was unaware of how things worked in the past, has been left to litigate in a system that favours the builder and developer. See comments by Justice McDougal on the first page. But now the public is starting to wise up that all is not as it would seem and it’s not safe to buy into a new building.

### **So, what is the solution?**

Without a doubt changes are needed long term – however that will take time and the short-term crisis can’t be ignored. Both are required to ensure a cost-effective outcome which will regain the faith of the consumer in Australian construction but also to fix the multitude of developing and evolving issues.

**Until now defects were never such that buildings were structurally failing, and people had to evacuate. It is hard to imagine things could get worse, but no-one expected the current scenario as has occurred at Opal and Mascot Towers. So how will it end? Without real change, the answer is “Not well for the consumer”.**

**In the next part to this paper we look at practical solutions, which require some short-term measures whilst the long-standing issues are addressed over the decade ahead.**

**[Continued in Part 2.](#)**