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Home Building Act Review
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17 August 2012

Review of Home Building Legislation

Thank you for the opportunity to comment on the Reform of the Home Building Act Issues Paper. We commend the Minister for Fair Trading for undertaking this long overdue reform.

About us

This submission has been prepared in collaboration with the Property Council of Australia , Urban Taskforce Australia and the Australian Constructors Association. As such, this is a consolidated industry submission .

The need to balance consumer rights and industry certainty

The Home Building Act 1989 is a vitally important part of the NSW legislative landscape, providing righ ts and protections to consumers for what is often the most significant financial transaction of a their life.

Consumer protection is a central component of the Act. It is critical that consumers are protected to maintain confidence in the sector and to ensure quality standards from builders.

It is equally critical, however, that the extent of liability faced by builders is clear, certain and appropriate . Certainty of liability is important to encourage developers and builders to take on new projects and assume the broad range of risks that are involved in such an enterprise.

Amendments to the Act should balance the rights of consumers with the certainty required by industry. In this submission, we propose changes that will preserve the appropriate rights and protections for consumers, while at the same time improving the efficiency in the sector. These amendments will strengthen consumer protection, provide certainty to builders, and minimise the time and costs wasted by both sides in resolving disputes.

Problems with the current scheme

The scheme is not working as intended, either for consumers or the industry.

(a) Defects are not rectified

The scheme is designed to protect consumers from bad workmanship. A central component of the Act is to ensure defects are rectified properly, but the current scheme undermines this goal. More and more claims are being made for financial gain, rather than specific rectification of works. When damages are awarded, they often remain in sinking funds and the benefit is not passed to the consumer.

(b) Costly disputes

Uncertainty in the definition of "structural defect", "completion" and other issues has led litigation lawyers or body corporates to lodge a multitude of claims. Many are ambit claims that are poorly specified and documented. Often, claimants add defects many years after the original claim.

This leads to legal disputes that cost millions in legal fees and drag on for years. In one case, the owners' corporation claimed 1,747 defects worth $1.4 million. The matter was eventually resolved by an independent expert, who concluded the builder was liable to rectify 260 defects worth $190,000. Legal fees were $270,000. More examples are contained in Annexure 1. The frustration of costly and time consuming legal proceedings is felt equally by consumer and industry alike.

(c) Increase in costs

The overly legalistic nature of the scheme has resulted in a dramatic increase in operating costs for industry. Companies need to provision for vast sums of contingencies to meet future claims. Money spent on legal fees and contingency funding has wiped out profitability, tied up capital that should have been spent on new investment, and tied up resources and people in claims.

(d) Construction costs are higher in NSW than other states

Construction costs for building residential developments in NSW are significantly higher than in other states[1]. This is not due to different work practices, lower productivity, the cost of materials or the building process – all these are equal across states. Rather, the cost differential is due to the need to provision for large legal claims under the Home Warranties Scheme. Some estimates put the additional cost in NSW solely attributable to the current scheme at around 10%.

(e) Reputable players exiting the market

Ongoing litigation has made it commercially unviable for many reputable players to build in NSW. Brookfield Multiplex exited the NSW residential market in 2006 yet continues to have over 2,000 apartments under construction in Victoria. While Meriton continues to operate in NSW, it is looking at additional opportunities in South East Queensland. Australand will only construct its own development projects and will not tender for third party construction work. Australand continues to develop residential projects in NSW but is primarily focused on land and medium density housing. These companies and others would be happy to elaborate on these commercial decisions directly with the Minister.

(f) Impacts on NSW

This is a serious public policy issue for NSW. Without reform, quality builders will continue to vacate the NSW residential market. Companies that operate nationally and internationally will focus on other markets. We emphasize that these companies are still active in other states. As an indication of the market currently there are about 6,500 apartments under construction in Melbourne. Sydney has about a third of that number.

As the reputable players exit the market, the void will be filled by phoenix operators who may not be around to meet future claims. The NSW Government, as underwriter of the scheme, may have to pick up such liabilities. Lower quality residential housing will be built and consumer protection will be further eroded. Housing targets will not be met and housing affordability will continue to decline.

Proposals to benefit consumers, the industry and the state

The proposals we set out in this submission will benefit consumers, the industry and the state, as follows.

[1] Tier 1 construction costs for one member are $2,800/m^2 in NSW compared to $2,200m^2 in Victoria.

Benefits to consumers:

(a) Reduced defects

The main purpose of the Act is to ensure that consumers are provided with homes that are not defective and that, when defects appear, they are rectified properly. Our proposal for the implementation of a mandatory maintenance regime will reduce the number of defects. The proper maintenance of works will reduce the defects for owners and will provide subsequent owners with better maintained homes. The return of reputable builders to the NSW market will also elevate the quality of stock.

(b) Quicker rectification of defects

When defects arise, consumers should be entitled to quick rectification. Too often, rectification is delayed by complex litigation. Our submission includes amendments that will expedite the rectification of legitimate defects. The maintenance schedule regime will reduce the time spent arguing over whether defects are due to inadequate maintenance, and will expedite the road to rectification.

(c) Quicker and less costly resolution of disputes

The cumulative consequences of our proposed legislative amendments will be faster and less costly resolution of disputes. Consumers will, of course, benefit by an expedited dispute resolution process with less stress and less cost.

Benefits to the construction industry:

(a) Greater certainty

The Act exposes the residential construction industry to significant uncertainty with respect to the operation of the statutory warranty provisions, the rights of claimants to continually expand claims, issues of unclear definitions and the rights of subsequent purchasers. Appendix 1 sets out several examples. Our proposed amendments seek to remove the uncertainty with respect to the operation of the Act, without adversely affecting the rights of consumers.

(b) Quicker resolution of disputes

As with consumers, the industry will benefit from expedited and simplified dispute resolution. Quicker resolution will be of major benefit to the industry. This will lead to cost saving that will ultimately benefit consumers through reduced 'pricing' of risk in new developments.

(c) The right of rectification

Our submission proposes that builders should have the right to return to properties to rectify defects. In almost all circumstances, the responsible builder can rectify the defects for a lower cost, in a shorter time and with fewer issues than a subsequent builder. Further, the rectification of defects is always a more efficient and appropriate remedy than the award of damages.

(d) Reduced legal fees

Expedited dispute resolution will reduce legal costs. The increased use of experts and the ability of builders to access buildings to rectify defects will enable more rectification awards. Rectification of defects by the constructing builder is a more cost efficient solution for all parties, and our proposed amendments will seek to facilitate this.

Benefits to NSW:

(a) Continued involvement of reputable companies

The current uncertainty has created reluctance from reputable builders to construct residential buildings in NSW. By reducing the uncertainty, reputable builders will be more likely to remain in the residential market. As a consequence, this will support the quality of residential construction in NSW and will also make it more difficult for 'phoenix' operators to win projects. This would reduce the Government's liabilities as underwriter of the scheme.

(b) Reduced burden on the court system

The expedited dispute resolution system and a focus on defect rectification will reduce the number of disputes that proceed to litigation. In addition to benefiting builders and consumers, this may also assist in reducing the demands on the court system in resolving defects cases.

(c) Stimulation of the home building market

Our amendments will stimulate the residential construction market in NSW by reducing the uncertainty and balancing the risks between the stakeholders. We emphasise that the home building market in NSW is at historic lows compared to other states. The stimulation of the market will bring greater economic contribution to the State and will indirectly benefit industries connected to the construction sector.

After all, the property sector underpins the health and growth of the economy. In NSW, the construction, rental and real estate sector contributes 7.4% of the state's annual GDP[2] and employs more than 350,000 people, constituting around 10% of the state's workforce[3].

Key Reforms

We recommend the following key reforms:

1. **Amend the definition of 'structural defect'** to exclude defects which are non-structural. Greater clarity around this definition would narrow the scope of litigation.

2. **Amend the definition of 'completion'** so that it clearly means the date from which the consumer first enjoyed the benefit of the Works. Greater clarity around this definition would reduce litigation and provide greater certainty to consumer and builder alike.

3. Create a process for **disclosure of the 'date of completion'** so that subsequent purchasers clearly understand the remaining period of the statutory warranties available to them. This will reduce litigation based on a misunderstanding of the completion date.

4. Stipulate that **subsequent purchasers** are entitled to the benefit of the statutory warranties, but only in relation to defects that were not apparent at the time of purchase. Subsequent purchasers should not be able to 'double dip' by reducing the purchase price on account of defects and subsequently seek rectification of the defects.

5. Legislate the requirement for **mandatory maintenance schedules** for all strata buildings, to be prepared by the builder, identifying the required maintenance. The creation of maintenance schedules would ensure buildings are properly maintained and would minimise the number of disputes.

6. **Clarify the defence** to a breach of a statutory warranty to provide protection to builders when the breach subsequently arises as a result of compliance with an instruction from the owner which the builder could not reasonably have expected would lead to the subsequent defect.

7. Require owners to provide **access to buildings** to enable the rectification of defects by the original builder. Access should be facilitated by law for builders who are willing and able to rectify defects, to increase efficiency and expedite the resolution of disputes.

[2] Australian Bureau of Statistics, 5220.0 Australian National Accounts: State Accounts, 2010 - 2011
[3] Australian Bureau of Statistics, 6291.0.55.003 – Labour Force, Australia, Detailed, Quarterly, May 2012

8. Simplify **dispute resolution procedures**, with increased use of expert determination to minimise the cost and delay in resolving disputes.

As stated above, we support the underlying rationale of the *Home Building Act*. We do not seek a wind-back of consumer protections, but rather an adjustment to balance the rights of consumers against the certainty required by the industry. Ultimately, the amendments we propose will benefit consumers and industry in equal measure.

We would be happy to discuss any aspect of this submission with the Minister. Please contact Mr Glenn Byres, Property Council of Australia, on 0419 695 435.

Yours sincerely,

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Industry Submission on the Review of the Home Building Act

Question 1: What aspects of the regulation of home building contracts could be improved?

Transitional provisions and commencement of amendments

The legislative amendments proposed in this submission should apply immediately to all new contracts signed and also apply retrospectively to all prior contracts. With respect to the new dispute resolution system discussed below, we recommend that it should be implemented immediately.

Recommendation: The amendments proposed in this submission should apply immediately to all new contracts signed and also apply retrospectively to all prior contracts.

Question 4: What items should be included in a termination clause?

Termination clauses should not be mandatory

We recognise the apparent appeal of introducing a statutory requirement for a termination clause into all home building contracts however we recommend a cautious approach with respect to the implementation of such an idea.

The existence of a contractual right to terminate is only one of a number of components that must all exist or be accurately satisfied for a contractual termination to be lawful.

In addition to the contractual right, termination can only be effected when the factual circumstances contemplated in the termination clause have arisen, when any necessary notices have been provided and when the stipulated timeframes have passed. Parties face significant risks in attempting to terminate when any of the above steps have not occurred.

If an owner purports to terminate under a contractual clause, and the relevant grounds do not exist or have not arisen, the action can be considered a 'repudiation' of the contract, allowing the contractor to accept the act of repudiation and on that basis, terminate at law. In such circumstances, the contractor may then elect whether to recover damages based on its lost rights under the contract, or on a quantum meruit, being payment of a reasonable value for the works performed, irrespective of the contract sum.

Every sophisticated construction contract will contain termination rights, typically carefully negotiated and well understood by the experienced, professional contracting parties. Given the risk of providing termination rights in all home building contracts, including those to be administered by less sophisticated and experienced participants, the NSW Government may create more detriment than benefit in mandating the inclusion of termination clauses in all contracts.

Recommendation: Termination clauses should not be mandatory in home building contracts.

Question 5: If cost-plus contracts are to be regulated, in what situations should they be allowed?

Cost-plus contracts are not, by their nature alone, intrinsically more risky than fixed price or lump sum contracts. Lump sum contracts almost always include 'price opening' clauses, which stipulate the circumstances in which the fixed price can be opened.

Lump sum contracts encourage the assumption that the total price at completion will be the lump sum which, given the existence of 'price opening' clauses, is very rarely the case. Cost-plus contracts do not invite such assumption.

Furthermore, the risk in pricing error of a lump sum contract rests with the tenderer, meaning the lump sum price will in all circumstances include a degree of 'contingency' incorporated by the contractor as insulation from errors in pricing the works the subject of the lump sum.

The size of the contingency will be determined by the amount of competitive pressure facing the contractor during the contract negotiation phase, and the perceived difficulty in accurately estimating the costs involved in meeting the contractual obligations.

Where it is very difficult to determine the cost and extent of work that may be involved a lump sum contract will likely contain a very large 'contingency.' While contingency recognises the risk assumed by the contractor, it is also paid by the owner irrespective of whether or not the risk events come to pass. This means that the owner may end up paying significantly more than is necessary for the works on account of contingency for risks that never eventuated.

Cost-plus contracts do not involve contingency, because the contractor is remunerated based on the actual costs incurred. Where potential risks on a project do not ultimately arise, a cost-plus pricing basis would deliver a cheaper outcome than a lump sum price, which would have included contingency for the risk events identified at the time of tender.

Accordingly, there are circumstances where cost-plus contracts deliver significantly more efficient prices and provide for a more acceptable allocation of risk between the parties. There are also, of course, situations where cost-plus contracts expose owners to much higher costs and uncertain total project budgets. While cost-plus contracts do carry a risk for consumers, lump sum contracts also contain potential risks.

Recommendation: We do not consider that legislating against 'cost plus' contracts will necessarily deliver benefits to either consumers or the industry.

Question 6: Should the definition of 'completion' include a specific definition for subsequent purchasers?

Multiple definitions of 'completion' and completion of multi-stage developments

The addition of a definition of 'completion' in the Act was a major success of the 2011 amendments. Given the consequences that flow from 'completion' for both owners and subsequent purchasers, it is vitally important that the definition in the Act is clear, appropriate and functional.

In that regard, the current definition requires amendment to address:

(a) multiple definitions of 'completion' that typically appear in construction contracts; and
(b) separate dates of completion for separate 'sections' or 'portions' (i.e. 'sectional completion').

Section 3B(1) of the Act currently states:

> *"The completion of residential building work occurs on the date that the work is completed within the meaning of the contract under which the work was done."*

While this seems to be clear, it is common for 'completion' to have multiple meanings under standard construction contracts. By way of example, under the Australian Standard construction works contract (AS4000-1997), 'completion' could refer to:

(a) Practical completion of the Works (AS4000, clause 34.6);
(b) Practical completion of a Separable Portion (AS4000, clause 4); or
(c) Final completion of contractual obligations (i.e. issuance of the Final Certificate under AS4000, clause 37.4).

Completion can also refer to occupation of the Works. In this regard, completion could be a reference to the issuance of the final occupation certification or an interim occupation certificate in respect of any part of a project.

Further to the above, there is current uncertainty as to whether or not the statutory warranties apply with respect to rectified works, so as to extend a further 6 year warranty to subsequently rectified works from the date of rectification. Such an interpretation is clearly inconsistent with the intention of the Act, and we recommend the inclusion of a statutory amendment to resolve the uncertainty.

To address these issues and give effect to the intention of the drafting contained in the 2011 amendment, we propose the modification to the definition of 'completion' as follows, with our changes identified in underline and strike through:

> *"**3B Date of completion of residential building work***
>
> *(1) The completion of residential building work occurs on the date that the work is completed within the meaning of the contract under which the work was done.*
>
> *(2) If the contract does not provide for when work is complete or contains more than one definition of completion or more than one completion event (or there is no contract), the completion of residential building work occurs on **practical completion** of the work, which is when the work is completed except for any omissions or defects that do not prevent the work from being reasonably capable of being used for its intended purpose.*
>
> *(3) It is to be presumed (unless an earlier date ~~for~~ of practical completion can be established) that practical completion of residential building work occurred on the earliest of whichever of the following dates can be established for the work, or for a part of the work:*
>
> *a. The date on which the contractor handed over possession of the work, or a part of the work, to the owner,*
>
> *b. The date on which the contractor last attended the site to carry out work (other than work to remedy any defect that does not affect practical completion),*
>
> *c. The date of issue of an occupation certificate, or an interim occupation certificate, under the Environmental Planning and Assessment Act 1979 that authorises commencement of the use or occupation of the work, or a part of the work,*
>
> *d. (in the case of owner-builder work) the date that is 18 months after the issue of the owner-builder permit for the work.*
>
> *(4) If residential building work comprises the construction of 2 or more buildings or if the contract describes two or more sections or separable portions, each of which is reasonably capable of being used and occupied separately, practical completion of the individual buildings, section or separable portion can occur at different times (so that practical completion of any one building, section or separable portion does not require practical completion of all the buildings).*
>
> *(5) This section applies for the purposes of determining when completion of residential building work occurs for the purposes of any provision of this Act, the regulations or a contract of home warranty insurance.*
>
> *(6) The date of completion of all residential building works shall be determined in accordance with the above. Rectification of any defects that may arise in residential building works shall not give rise to a new date of completion with respect to the rectified works."*

Recommendation: Amend the definition of 'completion' to address multiple definitions of 'completion' and completion of multi-phase developments.

Definition of 'completion' for subsequent purchasers

There is merit in introducing a legislative requirement to disclose the date of 'completion' to subsequent purchasers.

Currently, subsequent purchasers are entitled to "the same rights as the person's predecessor in title in respect of the statutory warranty." Accordingly, the date for commencement (and expiration) of the statutory warranty will be the same for the original owner and for the subsequent purchaser.

While there is no need to amend the definition or to make reference to 'subsequent purchasers' in the definition, there is merit in requiring the disclosure of the date of completion to subsequent purchasers who purchase residential real estate within 6 years of the date of completion.

In our experience, statutory warranties claims are sometimes commenced after the expiration of the statutory warranty period for reasons including the failure by subsequent purchasers to correctly identify the date of 'completion' and the resulting expiry of the statutory warranty period. While such claims are obviously time barred, the defence and strike-out of such claims still demands the investment of unnecessary time and costs. Any mechanism that reduces the frequency of time barred claims will aid the efficiency of the sector.

Accordingly, we recommend in amending the *Conveyancing Act 1919 (or the Conveyancing (Sale of Land) Regulations 2010)* to require the identification of the date of 'completion' and the expiration of the statutory warranty period in every contract for the sale of land entered into during the statutory warranty period. The inclusion of this information will help subsequent purchasers identify the date of 'completion,' without exposing the builder to any extended liability.

Recommendation: Introduce a legislative requirement for the disclosure of the date of 'completion' on every contract for the sale of land to enable subsequent purchasers to identify the date of completion.

Protection under warranties extended to 'subsequent purchasers'

Subsequent purchasers are in a materially different position from the original home owner with respect to the condition of the dwelling, the risks assumed with respect to the quality of construction and the options available to mitigate the risks.

A subsequent purchaser has the opportunity to review and examine the completed works, to obtain appropriate building inspections, to negotiate the purchase price in recognition of the standard of works or to walk away from the negotiations. Where defects in a residential property are apparent at the time of a subsequent purchase, a prudent purchaser will act in a way that recognises and takes account of the existence of the defects.

We consider that the rights of subsequent owners against the builder must recognise the ability of such owners to identify defects prior to purchase and act in a manner consistent with that knowledge.

A subsequent purchaser should not have rights against the builder in respect of defects that the subsequent purchaser knew of, or should reasonably have known of, at the time of purchase.

Such a qualification is consistent with the current approach in Queensland. The *Domestic Building Contracts Act 2000 (Qld)* extends to a subsequent purchaser the same rights for a breach of a warranty as are extended to the original owner, if "at the relevant time, the [subsequent purchaser] did not know, and could not reasonably have known, of the existence of the breach."

We propose the addition of a new section, Section 18D(3), as follows:

> *"Notwithstanding the above, this section does not give a successor in title or non-contracting owner of land any right to enforce a statutory warranty in relation to any defect, deficiency, breach or failure where such defect, deficiency, breach or failure, or the consequences of such, was apparent, or should have been apparent, at the time that the successor in title or non-contracting owner became the successor in title or owner of the land."*

Unless such an amendment is made, there exists the possibility of 'double dipping' by subsequent purchasers, being the negotiation of a lower purchase price on account of the defects, followed by a subsequent claim against the builder for rectification of the same defects. This is detrimental to the market and exposes builders to risks that are inconsistent with the consumer protection mechanisms in the Act.

Recommendation: Legislate to provide that a subsequent purchaser should not have rights against the builder in respect of defects that the subsequent purchaser knew of, or should reasonably have known of, at the time of purchase.

Question 7: Is it necessary to clarify whether sub-contractors are liable for statutory warranties?

We consider that the amendments to the Act, stipulating that a licensee cannot limit liability by reference to the *Civil Liability Act 2002*, are unreasonable and detrimental to consumers as well as the industry.

From a consumer perspective, the inability to apportion liability exposes the consumer to greater risk of licensee insolvency, and prevents the consumer from recovering parts of its loss from other concurrent wrongdoers in the event of licensee insolvency. While the home warranty insurance scheme provides some protection with respect to insured projects, the maximum recoverable is limited and the scheme is underwritten by NSW Treasury.

From an industry perspective, most works on residential projects are carried out by subcontractors and are affected by architects and engineers. At a practical level, subcontractors will invariably know more about the work they themselves have performed, and would be better placed to rectify that work. By preventing proportionate liability, the NSW Government is effectively protecting poorly performing subcontractors and consultants from apportioned claims.

Of course, the licensee still has the right to pursue a separate action against subcontractors, but by the time the original proceedings have finished, those subcontractors may be long gone.

We recommend that the Act be amended to allow apportionment of claims. This would benefit both consumer and industry. If statutory warranty claims were apportioned, concurrent wrongdoers would face greater consequences for their actions which would then demand an increase in the quality of performance of all participants in residential building works.

We recognise the public policy benefit that homeowners should not be required to pursue multiple parties. To address this, we recommend that in the event of a dispute, builders should have the right to enjoin subcontractors and consultants in the same proceedings. This would mean the homeowner still pursues one action against the licensee, but would ensure all the parties responsible are held to account.

From a dispute resolution perspective, the proper rectification of defects is more likely if the subcontractor is involved in the process with some potential pain for failing to assist in the rectification.

Recommendation: Amend the Act to allow the apportionment of claims to ensure sub-contractors are liable for statutory warranties. In the event of a dispute, licensees should have the right to enjoin subcontractors and consultants in the same proceedings.

Question 9: Should home owners' obligations relating to maintenance be further clarified in the legislation?

Introduce a mandatory maintenance schedule

We strongly support the proposal for the introduction of mandatory 'maintenance schedules' for all strata buildings.

Any amendments to the *Home Building Act* should balance the needs and interests of all stakeholders to ensure that the consumer protection provisions are appropriate, fair and effective. Owner accountability for the ongoing care and maintenance of dwellings, particularly strata buildings, is a logical centrepiece in fairly balancing the rights of stakeholders.

Building longevity and functionality is significantly affected by the quality and frequency of maintenance. Furthermore, the cost and difficulty of rectifying damage or defects to a building is often directly proportionate to the period of time that passes from the occurrence of the damage or defect and its rectification.

Implementation of a maintenance plan can only logically be effected by owners. Similarly, owners and daily users of a building will become aware of damage and defects almost immediately, and are therefore ideally placed to identify the issue and instigate the rectification process.

The inclusion of a requirement for maintenance schedules for strata buildings will go some way to creating a fairer and more efficient allocation of risks and responsibilities between owners and builders.

Recommendation: Introduce the requirement for a mandatory maintenance schedule for all strata buildings.

Process for establishing maintenance schedule

While building users and operators are best placed to implement and manage maintenance, the building contractor will typically be best placed to identify the appropriate maintenance required for the building.

On that basis, it is logical for building contractors be tasked with the preparation and issuance of a maintenance schedule for the initial term of the operation of a strata building.

The maintenance schedule should be structured as follows:

(a) Plant maintenance

(i) Schedule of maintenance tasks and indicative timing for servicing of lifts, air conditioning chillers/peripherals, any ESD/sustainability plant (photovoltaics, black water systems etc) and any other operational plant forming part of, or attached to, the building;
(ii) Schedule of consumable items and indicative date for replacement based on life expectancy of consumables;
(iii) Identification of any warranties issued by plant designers/suppliers/installers and the respective expiration dates for such warranties; and
(iv) Identification of any contractors/maintenance providers that must perform plant maintenance so as to maintain existing warranties.

(b) Building maintenance

(i) Schedule of maintenance elements and indicative timing for servicing, maintenance and cleaning of structural/building fabric elements including roof material, roof plumbing, awnings, louvres or attached moving components, windows, seals, external doors etc;
(ii) Detailed description of the nature of cleaning and servicing required, particularly with respect to moving components such as louvres, high maintenance components such as varnished timber finishes and particularly where buildings are located in harsh environments (for example, hot/cold climates, seaside locations etc); and
(iii) Schedule of consumable items and indicative date for replacement based on life expectancy of consumables;

(c) 'Soft' facilities management

(i) To the extent necessary, a disclosure of any information relevant to the provision of soft facilities management services that will improve the longevity or operation of the strata building. Such information may relate to the softness/sensitivity of finishes such as marble, issues with respect to the placement or operation of garden irrigation systems, operation or cleaning issues related to waste management/refuse systems etc.

Unless the owner disagrees with any component identified in the proposed maintenance schedule or the timeframes for provision of such services, the maintenance schedule should become binding for its term. We consider that a 6 year schedule would be appropriate, given the six year statutory warranty period.

Recommendation: Mandatory maintenance schedules should be structured as above.

Duty to comply with maintenance schedule

While the building contractor is best placed to draft and propose the maintenance schedule, the owner is best placed to oversee and manage compliance with the maintenance schedule.

The building owner is in constant contact with the building, is better placed to coordinate maintenance works and will be the party to suffer in the event that maintenance is not implemented.

To ensure compliance with the maintenance schedule, owner's corporations should be required by law to apply the accumulated proceeds from sinking funds to the provision of maintenance in accordance with the maintenance schedule.

Further, owner's corporations should be required to establish the rates of contribution to the sinking fund based on the estimated costs of compliance with the maintenance schedule, adjusted to take account of inflation and other factors likely to increase the cost of compliance with the maintenance schedule over time.

This makes sense for consumers in the event that a defect arises, and the building owner commences action against the contractor, the owner will only succeed against the builder if it can demonstrate that the defect is a consequence of a breach of contract or of a statutory warranty and is not a result of fair wear and tear. Accordingly, the building owner will be preserving its own interests and indirectly collating evidence of its adequate maintenance of the building, by complying with the maintenance schedule and retaining evidence of such compliance.

Perhaps most importantly, from a consumer perspective, the implementation and compliance with the maintenance schedule will reduce the number of defects that arise on strata buildings.

Recommendation: Owner's corporations should be required to apply the accumulated proceeds from sinking funds to the provision of maintenance in accordance with the maintenance schedule.

Maintenance schedule to be made public

The maintenance schedule and evidence of compliance should be available as a matter of public record, to enable prospective tenants and purchasers to establish the scheduled future maintenance and to ensure there has been compliance with the previously scheduled maintenance.

Public availability will also enable the contractor to quickly confirm the status of the maintenance schedule, in the event that an allegation of defective work is raised or a claim under a statutory warranty is commenced.

Recommendation: Maintenance schedules should be made public.

Use of rectification damages for rectification and maintenance

Owner's corporations that obtain damages for defective building works should be required to use the award for the purpose of rectification or building maintenance. Damages awards that are not allocated to the rectification of defects cease to serve a consumer protection imperative and instead impose a punitive function.

Recommendation: Owner's corporations and owners who obtain damages awards for defective building works should be required to use the award for the purpose of damage rectification or associated building maintenance.

Question 10: Should 'structural defect' be further defined in the Act?

The current definition of 'structural defect' is unsuitable due to the express inclusion of components, including weatherproofing, that form part of the external walls or roof of the building and that are not structural in nature.

Not only are such components not structural, but extending the 6 year statutory warranty period to all external, roofing and weatherproofing components will in some instances be inconsistent with the design life of components incorporated into these elements of a building.

There may be weatherproofing or external components that will require servicing or replacement within a 6 year period, and the inclusion of such within the 'structural defect' category will either expose builders to claims that are inconsistent with the scope or intended component design life, or require builders to over engineer/specify longer life components with a resulting increase to construction costs.

The definition of 'structural defect' proposed in the Issues Paper is much better and more appropriate. We also agree that the definition should be included in the Act, rather than the Regulations, so as to provide greater certainty.

Recommendation: The definition of 'structural defect' proposed in the Issues Paper should be adopted and should be included in the Act rather than the Regulations.

Question 11: In what ways could the statutory warranties be improved?

Statutory warranties

In their current form, the warranties are very broad and open to interpretation. The breadth of the warranties increases the scope for dispute as to their operation or application in specific circumstances and creates greater uncertainty as to consumer's rights and builder's risks.

We make the following comments with respect to the current warranties:

Section 18B(a) – warranty as to proper and workmanlike performance, in accordance with the plans and specifications set out in the contract.

The warranty as to performance in accordance with the plans and specifications set out in the contract is appropriate and reflects a sensible allocation of risk between the parties involved in residential real estate projects, however the warranty should also extend to changes to the plans and specifications during the course of the works.

A builder should reasonably be expected to deliver that which has been expressly required of him and as may have been stipulated by the owner or the owner's agent or consultants. Compliance with the plans and specifications and performance in a proper and workmanlike manner are therefore sensible warranties, however need to accurately reflect the nature of project delivery.

This could be addressed by amending the warranty as follows:

> *"(a) a warranty that the works will be carried out in a proper and workmanlike manner and in accordance with the plans and specifications set out in the contract, or as may be amended from time to time during the construction of the works, in accordance with the contract."*

Section 18B(b) – warranty that the materials supplied with be good and suitable for the purpose for which they are used, and unless stated otherwise in the contract, shall be new.

The warranty with respect to use of materials that are 'suitable for the purpose for which they are used' is problematic when specific materials are stated in the plans or specifications or required by the owner, however it becomes apparent that such materials were not, over time, suitable for the intended purpose. This is a particularly problematic warranty with respect to the use or incorporation of new technologies (such as sustainability technology) into residential buildings.

The statutory warranties defence (Section 18F) provides inadequate protection as it presupposes that the builder has a higher degree of experience or expertise with respect to the relevant materials than either the owner or the owner's consultant. While this may be the case in some situations, there will also be many situations where the owner or, more likely, the owner's consultant will specify materials in the contract and will have a higher degree of expertise than the builder with respect to such materials.

This risk could be addressed by adding the following sentence to the end of section 18B(b):

> *"Materials will be deemed to be good and suitable for the purpose for which they are used when such materials are consistent with any relevant specifications included in a contract or, in the absence of such specifications, where the materials comply with the requirements of the Building Code of Australia (in force as at the date of incorporation of the materials into the building) or another relevant, mandatory code (in force as at the time of incorporation of the materials into the building)."*

Section 18B(c) – warranty with respect to work being performed in accordance with and in compliance with the Act and any other law

The compliance with law is a sensible and appropriate warranty however it is necessary that the warranty identify a point in time for such compliance. As currently drafted, the warranty could be interpreted as requiring the works to comply with the Act and other laws for the length of the warranty period. Given the evolving nature of law, this exposes builders to indeterminate risks on all projects and is a very difficult risk to price.

This risk could be addressed by the insertion of the following to the end of section 18B(c):

> *"in effect as at the date of execution of the contract."*

Section 18B(f) – warranty that the work and any materials used will be reasonably fit for the specified purpose or result, if the owner expressly makes known to the builder the particular purpose for which the work is required or the result that the owner desires the work to achieve

The warranty does not specify what constitutes a requirement being 'expressly' made known by the owner. This lack of precision increases the risk of disputes arising in this area, and it is conceivable that disputes as to whether or not a particular purpose or result was 'expressly made known' would be complex, time consuming and costly to resolve.

This issue could be avoided by amending section 18B(f) to require the particular purpose or result to be expressly made known in the contract. In that way, the onus would rest on the party seeking a particular purpose or result to expressly include the required purpose in the contract and the builder would have the comfort of this purpose having been articulated and described. The contractor should be relieved of compliance with the warranty, where no such particular purpose or result is included in the contract.

Such a change would aid efficiency and would prevent complex and time consuming disputes.

Alternatively, this warranty could be deleted, so as to remove the uncertainty that is intrinsic within the warranty as currently drafted.

Recommendation: The statutory warranties should be amended as set out above.

Changes in use of a building

The statutory warranties under the Act relate exclusively to 'residential building work'. 'Residential building work' is defined to mean the construction of a dwelling, the making of alterations or additions to a dwelling and the repair, renovation, decoration and protective treatment of a dwelling.

Neither the Act nor the Regulations address the situation where a building is constructed as a 'dwelling' under the Act, however the use of the building changes during the statutory warranties term to a use that is expressly excluded from the definition of 'dwelling' under the Regulations.

In the event of a change in use, it is logical that the builder's liability for statutory warranties should come to an end upon commencement of use of the building for a purpose other than as a 'dwelling.' At such point in time, the statutory warranties are no longer providing a 'consumer protection' benefit but are serving to transfer commercial risk from the owner and operator of a commercial asset to the builder who constructed the building in contemplation of a different use.

The liability for statutory warranties in circumstances where there is a change in use is currently a troubling issue and it would be opportune to use this round of amendments to expressly clarify the issue in the Act.

Recommendation: Statutory warranties should be extinguished if there is a change of use such that the building is no longer a residential building.

Question 12: Are the statutory warranty defences adequate?

The current statutory warranty defence (section 18F) is inadequate and does not provide reasonable and necessary protection to the builder where a deficiency arises from instructions given by the owner or the owner's agent.

The builder only obtains protection where, following receipt of an instruction, the builder identifies a defect that will likely result from the instruction, pursues an adversarial approach and advises in writing that the instruction may lead to a defect or deficiency and states that the instruction is accordingly contrary to the builder's advice.

The requirement to notify in writing is so unwieldy and impractical as to render the defence effectively worthless. Many instructions received with respect to the performance of works or the selection of materials could, in the six years following practical completion, lead to a defect giving rise to a statutory warranty claim.

For a builder to secure protection under the defence, the builder would need to issue notices to the owner in almost every circumstance where materials are requested that are not the most durable or hard wearing available at the time, or where an instruction with respect to works proposes the performance of any work to a standard other than market best practice.

Not only would constant notification represent a significant administrative burden for builders and owners, but it would also create a highly adversarial relationship between the parties who are together seeking to deliver an asset.

Most construction projects demand compromises with respect to materials quality and construction methods to comply with budgets and schedules and to deliver the product that is required or desired by the market. Such compromises would technically require notification by the builder for the builder to preserve its 'statutory defence' rights.

To balance the interests of owners and builders, and to reduce the uncertainty faced by builders, we recommend that the defence section be amended as follows:

> *"**18F Defence***
>
> *In proceedings for breach of a statutory warranty, ~~it is a defence for the defendant to prove that~~ where the deficiencies of which the plaintiff complains arise from instructions given by, or on behalf of, the person for whom the work was done, the defendant shall be entitled to a defence in the following circumstances: ~~contrary to the advice in writing of the defendant or person who did the work.~~*
>
> *(a) where the deficiency was as a result of, or contributed to by an instruction or direction from the plaintiff, or its agent, or as a result of compliance with the plans or specifications in the contract, as may have been amended, and the resulting deficiency was not reasonably foreseeable at the time of the instruction or direction or contract execution, as may be appropriate; or*
>
> *(b) where the defendant could reasonably foresee, or ought to have reasonably foreseen, at the time of the instruction, direction or contract execution that the deficiency would arise from or as a result of compliance with the instruction, direction, plans or specifications, subject to the defendant having notified the plaintiff in writing of potential issues as a result of compliance with the instruction, direction, specifications or plans."*

Question 13: Should home owners be required to allow builders back on site to rectify defects?

The Act should be amended to require owners to provide access to builders to undertake any necessary rectification during the statutory warranty period, in an efficient manner and without any unreasonable conditions.

In almost all circumstances, the original builder will be able to rectify defects more quickly and for a lower cost than a subsequent builder. Despite this, owners are frequently unable to obtain the required access (as is often the case with strata buildings), owners refuse to provide the required access, or otherwise impose unreasonable conditions and requirements on the builder.

Absent situations of threats of violence, owners should be compelled to provide access to enable the rectification of defects to be undertaken by the original builder.

In the event that the owners are unable, or refuse, to provide access within a specified reasonable time, or the owner's seek to impose unreasonable conditions, the builder should be relieved of its responsibility to rectify and relieved of its liability for the defects under both the contract and the Act.

Without such an amendment, builders will remain at the mercy of owners and will be subject to piece-meal, partial access, or access subject to performance of a scope of work required by the owner, forcing the builder to incur significantly greater costs and suffer inefficiency in undertaking rectification works.

Recommendation: Amend the Act to require owners to provide access to builders to undertake any necessary rectification during the statutory warranty period, in an efficient manner and without any unreasonable conditions.

Question 16: Which option do you support for disputes over $500,000?

Expert referral determination

Disputes over $500,000 should be determined by an Expert Referee in a binding and mandatory scheme.

This would effectively amalgamate the expert referral service proposed by NSW Fair Trading with a reference procedure whereby the Court would refer out the proceedings to a referee to determine the dispute based on the evidence provided by an expert or experts.

We propose that the Court would still be involved in the case management of the dispute but would refer the matter out to the Expert Referee at the earliest possible time and would request the input of the Expert Referee in respect of either technical or contractual issues.

For the sake of cost and time, lawyer involvement would be minimized through the use of expert conclaves with the Expert Referee to identify areas of commonality and disagreement between the parties' experts.

All Expert Referees should be required to meet a NSW Fair Trading accreditation standard to ensure they have the relevant expertise, education and skills to adjudicate.

The referral process must be mandatory, with limited rights of appeal, if it is to be effective. An optional process with limited rights for enforcement may become a tool for delay and obfuscation, thereby increasing the time and cost of the dispute process without guaranteeing a final resolution.

The parties should have the option of appealing the decision of the Expert Referee, but on limited grounds. These grounds could be limited to jurisdictional error and procedural fairness, similar to grounds for appealing an adjudication determination made by an adjudicator under the *Building and Construction Industry Security of Payment Act 1999* (NSW).

To minimize the financial impact to the state, we recommend that the parties be required to initially share the costs of the process jointly. The Expert Referee may be empowered to make costs orders in circumstances where one party has acted in an unjustifiable or capricious manner.

Recommendation: Create a mandatory and binding expert referral process for the resolution of disputes over $500,000.

Question 18: Can the current dispute resolution process be improved?

The current process for resolving cases pertaining to rectification of defective construction work in New South Wales is imperfect. Despite the efforts of NSW Fair Trading, the Consumer, Trader and Tenancy Tribunal, and the District and Supreme Courts, there remains scope for improvement.

Mandatory inspection procedure

A mandatory inspection procedure should be created for all residential strata buildings to address defects at an early stage and seek to resolve issues more effectively.

An expert Building Inspector, with knowledge and experience of strata buildings, should be engaged towards the end of the two year period after completion of the works to examine the building and prepare a list of items requiring rectification.

The Building Inspector should be independent of the parties, accredited with NSW Fair Trading and be required to declare no conflict of interest with respect to the building, the defects or the defects rectification.

The Building Inspector would issue a Schedule of Defects which would distinguish between structural and non-structural defects. An owners' corporation would need to provide a statutory declaration to the effect that they have followed the approved maintenance schedule and that no items identified in the rectification schedule are, in fact, maintenance items.

The Schedule of Defects would constitute the total exposure of the builder for non-structural defects, and the rectification of the identified defects by the builder should constitute the end of the builder's liability with respect to the statutory warranties (excluding structural defects).

Mandatory inspection would substantially reduce the cost, difficulty and frequency of defects claims. It is likely that fewer cases would be commenced, as the inspection process would identify the defects and impose obligations on the builder to rectify.

The costs of this process could be jointly funded by the parties or allocated between the parties through the contract for residential building work.

Recommendation: Create a mandatory inspection scheme for all residential strata buildings to address defects at an early stage.

Initial issues hearing

We propose the establishment of an 'initial issues hearing' procedure. Prior to the CTTT or Court referring out the issues for reference as part of the alternative dispute resolution mechanism, the plaintiff should in all circumstances be required to satisfy the minimum 'initial issues' threshold.

An 'initial issues hearing' should consider whether:

(a) the limitation period for the statutory warranties has expired; and
(b) the owners' corporation has complied with the required maintenance schedules.

The initial issues hearing would enable the efficient resolution of matters where there could be a strike out any claims due to non-compliance with the mandatory provisions of the Act.

Recommendation: Create an 'initial issues hearing' procedure to minimise the cost and delay in striking out claims that are out of time.

Adequate particularisation and limitation on claims

It is a common strategy for owner's corporations to commence actions against builders at the end of the statutory warranty period with a small schedule of defects, and to subsequently amend the claim to introduce a significantly increased schedule of defects later in the proceedings and, often, after the expiration of the statutory warranty period.

Such a strategy is currently lawful, however is highly inefficient and exposes builders to uncertain and increasing exposure in litigation. We propose that, at least in the CTTT, claimants be required to adequately particularise their claims and incorporate all known defects at the time of commencing.

The CTTT should prevent claimants from repeatedly increasing the identified defects the subject of the claim, and claimants should be reasonably expected to have established the parameters of their claim before filing. New claims should not be capable of being added outside the limitation periods.

It is reasonable to expect claimants to adequately prepared their claim and identify the defects they require rectified before commencing the action. Where a claim is repeatedly expanded to incorporate additionally defects, a defendant is put to significant cost of reviewing further allegations. This is highly inefficient and costly.

We recommend that claimant's right to amend be significantly limited, so as to require the adequate preparation and particularisation of the issue in dispute before the commencement of proceedings.

Adverse costs orders should be made against owners/owner's corporations pursuing this strategy, and such costs orders should be payable immediately, rather than being 'costs in the cause.'

Recommendation: Require claimants to adequately particularise their claims and incorporate all known defects at the time of commencing proceedings. New claims should not be capable of being added outside of limitation periods.

Notice of Compliance

We propose the implementation of a 'notice of compliance' process for CTTT building disputes, whereby the Member is required to either issue or refuse to issue a 'notice of compliance' to the parties to a proceeding.

The notice of compliance would confirm that the party participated in the proceedings in an efficient and cooperative manner and in a manner that minimised the time and cost of the proceedings.

Where a party does not receive a 'notice of compliance', that party should be liable to pay the other party's costs on an indemnity basis. Such a process may motivate parties to manage the dispute resolution procedure in a more efficient manner.

Recommendation: Issue of a notice of compliance to confirm that a party participated in the proceedings in an efficient and cooperative manner.

Single Expert

The Courts should require the parties to jointly appoint a single expert to investigate defects and prepare a report. It is suggested that the parties be required to agree on an expert. Failing agreement, the expert should be selected and appointed by the Court or Tribunal.

The expert's report should be required to contain particulars of the defects and location of the defects, the scope of works for the rectification of those defects, the estimated cost of rectification, and a statement that the defects have not arisen as a result of inadequate maintenance or fair wear and tear.

Such a procedure will significantly reduce the time and cost of proceedings, and we expect that the issuance of the expert's report will likely lead to negotiated settlement of proceedings in many instances without the need for further court involvement.

Recommendation: Create a mandatory single expert process for disputes.

Question 27: Do you agree with the proposals on phoenix company activity?

We concur with the observations contained in the Issues Paper regarding the operation of 'phoenix' companies and the damage they cause in the industry. The proposal with respect to 'reaching back' to directors involved in the management of a company 12 months prior to its collapse, raises two concerns.

First, the successful management of a construction enterprise is a difficult and high risk undertaking and 12 months is a long time in the construction industry. The 12 month window may be too long and may end up catching too many individuals who have for valid reasons departed the management of construction companies, which have subsequently failed. A 6 month 'look back' right may be more appropriate.

Our second concern relates to the risk of genuine commercial restructuring and corporate failures that are not a result of business failure being caught within the ambit of the proposed new powers. The nature of the construction industry is such that corporate restructuring is quite common, profit margins are often thin and cash flow often tight. Genuine commercial failure is quite common and commercial restructuring often necessary.

Recommendation: Any new or additional sanctions that are imposed must be structured so as avoid punishing genuine corporate failure and avoid catching genuine commercial restructuring.

Question 28: Should building inspectors be able to issue Penalty Infringement Notices for non-compliance with a Rectification Order?

We support the proposal to enable NSW Fair Trading building inspectors to issue 'Penalty Infringement Notices.' The infringements and penalties that form part of the disputes procedure administered by the Queensland Building Services Authority may constitute a useful starting point for a penalties mechanism to be incorporated into the Act.

Section 48F of the Act provides that, except with respect to potential sanctions for 'improper conduct,' a rectification order does not give rise to any rights or obligations. As a consequence, it is difficult to compel compliance with a rectification order. The introduction of penalty infringement notices, with appropriate rights of appeal/review, may compel compliance with rectification orders.

Such an amendment would also be consistent with the mandatory inspection procedure we have proposed above.

Recommendation: Building inspectors should be able to issue Penalty Infringement Notices for non-compliance with a Rectification Order.

APPENDIX 1: CASE STUDIES

Case study No. 1

- Building was completed in 2002.
- Proceedings were commenced by the OC in April 2009 in the Supreme Court.
- In September 2009 a general defects report was served claiming 308 defective items.
- In March 2010 a fire defects report was served claiming a further 1,439 defective items relating to fire safety issues – these defects alone had a total value of approximately $1.4m.
- In September 2010 the general defects and fire safety experts met and agreed that of the 308 items claimed, the builder was liable to rectify 126 items – valued at approximately $70,000; and of the 1,439 fire safety items the builder was liable to rectify 134 items – valued at approximately $120,000.
- The OC's solicitors were on notice since September 2010 that the claim was only worth around $190,000.
- The OC's legal costs totalled $270,000 on a $190,000 claim.

Case study No. 2

- Building was completed in 2001.
- Proceedings were commenced by the OC in the Supreme Court in 2008.
- In February 2008 general defects reports were served, mainly claiming plumbing related issues. The Builder commenced rectification work shortly thereafter and works were completed in September 2008.
- In August 2008 a balustrade defects report was served. After protracted negotiations as to the appropriate scope of works to rectify the balustrade issue, work finally commenced in November 2010.
- In February 2010 a further general defects report was served claiming water ingress problems. Rectification works commenced in June 2010 and were completed shortly thereafter.
- In December 2010 the Builder was served with another defects report. At a settlement conference in March 2011 the Builder advised the OC that this

latest report contained new defects not previously identified and the Builder was not liable to rectify.

- On 31 July 2012 the Builder was served with a fire defects report containing 1189 new items of defects.

- The proceedings are still continuing with no sign of settlement. Builder tried to get a guillotine order from the Court to stop the OC from continuously serving new reports – unfortunately the Builder's two attempts this year were unsuccessful. The Court refuses to shut the door to the OC in raising more defects.

Case study No. 3

- Building was completed in 2003.

- In December 2007 the OC served a general defects report. The Builder returned to site in February 2008 and commenced rectification works.

- In June 2008 the OC served another report and further rectification works commenced in July 2008.

- In September 2008 the OC refused to give the Builder further access to the site.

- The OC commenced proceedings in the CTTT in November 2008.

- In June 2009 the OC retained a new expert and we were served with a further report.

- In December 2009 the OC served a Scott Schedule which valued the claim to $3M.

- In April 2010 the OC successfully made an application to transfer the proceedings to the Supreme Court.

- During March 2010 and September 2010 the Builder's maintenance manager met regularly with OC's expert and worked through defects list and agreement was reached on majority of items to be rectified by the Builder.

- In September 2010 the OC sacked their expert and retained new experts who proceeded to serve further reports.

- In May 2012 the OC served further reports and an amended Scott Schedule increasing the claim from $3M to $10.75M. The service of these further reports was in answer to the guillotine order imposed by the Court

precluding the OC from relying on any further reports served after May 2012. The increase in the claim excluded fire safety and balustrade works, which the Builder had already commenced to rectify.

- About $5M of the increased part of the claim related to technical defects of the BCA- however no or in some instances only minor damage was recorded.

- Another $3M of the increased claim related to 100% of the bathrooms being sought to be replaced due to the fact that some of the bathrooms leaked. Upon our expert examining over 170 wet areas, 7 were found to require some work – at a cost to the Builder of approximately $60,000.

- The matter is currently in Mediation and the Builder has demonstrated to the OC that its $10.75M claim plus $810K legal costs to date is actually worth approximately $350,000- $400,000. In response the OC's experts advised that they intend to serve further reports on us and claim further defects.

Case study No. 4

- A residential apartment building forming part of a large staged development achieved practical completion in July 2000.

- Proceedings were commenced against the builder in the CTTT in July 2007, just prior to the statutory warranty period expiring. The proceedings alleged various defects and identified the cost of rectifying those defects at less than $500,000. The proceedings remained in the CTTT until September 2009. During the CTTT proceedings, various expert conclaves were undertaken and no significantly different defects were identified.

- In September 2009, without notice, the owners served further evidence from the same expert identifying a number of new defects. In addition, the owners served a report from a quantity surveyor identifying alleged rectification costs of $3.31 million. The contractor was required to re-engage its expert to undertake further inspections of the building, at further cost to the contractor. The proceedings were transferred to the Supreme Court and orders for discovery of documents were made.

- In March 2010, the contractor's expert assessed the owners' best entitlement to damages at approximately $767,000. In order to place some pressure on the owner with respect to risk of an adverse costs award, the contractor served an offer of compromise under the Court Rules for $1.1 million plus costs. That offer was accepted by the owners on the last available day for acceptance. During the period when the offer was open, the owners ran an expensive notice of motion in court seeking to strike out large portions of the builder's defence. That motion was unsuccessful.

- Ultimately, the owners accepted an offer of less than one-third of the amount actually claimed in the proceedings. The builder's legal and consultants costs in resolving the claim exceeded $500,000. These costs do not include the many hundreds of hours of staff and management time spent by the builder's personnel reviewing documents and addressing the various allegations.

- Since resolution of the proceedings in March 2010, no rectification work has been undertaken in relation to the defects alleged in the proceedings.

Case study No. 5

- A large waterfront residential apartment building achieved practical completion in February 2000.

- Proceedings were commenced against the contractor in the Supreme Court by way of summons in December 2006 just prior to the seven year statutory warranty period expiring. The proceedings alleged various defects and identified the cost of rectifying those defects at more than $8 million. The primary claim related to alleged fire safety defects in the building, which were assessed at between $5.8 million and $6.5 million.

- After three years of litigation, at a cost to the builder exceeding $600,000, the owners agreed to have the fire safety experts meet without interference from lawyers. Having considered the matters, the fire experts concluded that the costs of alleviating the owners' fire safety concerns were approximately $320,000. Of this $320,000, $265,000 related to the consultants fee and only $55,000 was assessed as the cost to rectify.

- This matter has not yet resolved and discussions are continuing. It is however an example of how external advisers have led the owners down a litigation path on the basis that the claim is significant, where in reality any damages are likely to be less than 10% of the amount claimed by the owners.

Case study No. 6

- A residential apartment building comprising 140 lots and common property achieved practical completion in about December 2001 and was occupied from January 2002.

- Prior to the expiry of the original defects liability period, consultants and lawyers were engaged by the owners' corporation's executive committee to produce a defects schedule, which resulted in a list of around 2,500 alleged defects.

- During the next four years, the successor companies (which had subsequently

acquired all shares in the developer and the builder companies) sought to cooperatively work through the list – rectifying the items which it agreed were defects and resolving all other items. During this period, the body corporate changed lawyers three times, with the last set of lawyers appointed in about December 2004. Following this appointment, there were extensive meetings, inspection and negotiations, during which the bulk of the remaining defects were either attended to or dropped by the body corporate.

- In March 2006, prior to the seven year warranty period expiring, proceedings were commenced by the owner's corporation in the Supreme Court. The proceedings alleged various defects (10 to 12 defects) and claimed damages for the cost of rectifying those defects (not quantified at the time). The defendant successor companies admitted liability early and, in lieu of the traditional litigation model, proposed and implemented with the Court's consent, a structured reference process. This process was provided for the parties' technical experts jointly to inspect the alleged defects and jointly to prepare a report providing their opinion as to whether each item was a defect or not. If it was found to be a defect, the process allowed the cause and extent of that defect to be identified and the most appropriate method to rectify that defect determined.

- This process also provided for the referral of all issues in the proceedings to an independent referee (an engineer, not a lawyer) experienced in building technical issues, to inquire into matters that were not agreed between the experts and to prepare a report to the Court dealing with liability and (if necessary), quantum. Underlying this process was the expectation that the defendant successor companies would arrange for the rectification works to be done in accordance with the reports of the experts and the referee. Most of this work was done by agreement between the parties' technical experts, with the referee only having to determine six of the 12 defects (primarily due to the plaintiff's owners' corporation disagreeing with the findings and recommendations of the parties' technical experts, including its own expert).

- In mid-2008, the plaintiff owners' corporation substantially altered the way in which it engaged in the proceedings. Instead of wanting to engage in the process outlined above and have the defendant successor companies do the work, the plaintiff body corporate sought monetary damages in its favour. The plaintiff owners' corporation initially quantified its damages at about $4 million (after receiving tenders from the market). This amount was subsequently increased to $6 million (after the plaintiff owners' corporation engaged an expert to produce a report on the costs of rectification).

- The defendant successor companies successfully challenged the basis of the opinion given by the quantum expert for the plaintiff body corporate. This led to the referee rejecting the expert's report, the Court not permitting the plaintiff body corporate to adduce any new evidence, and the court awarding

the plaintiff body corporate limited damages in the sum of around $820,000 (being the sum of the rectification costs that the defendant successor companies had agreed to pay and not oppose at trial).

- Throughout the proceedings, the defendant successor companies had made appropriate offers of compromise. As a result of these offers being rejected by the plaintiff body corporate and the Court's judgement on damages, the defendant successor companies were awarded an indemnity costs order in their favour.

- The owners' corporation has incurred enormous costs and generated a completely unsatisfactory outcome through embarking on the litigation.

Case study No. 7

- A residential apartment building in Milsons Point achieved practical completion in October 1999. Proceedings were commenced against the builder in the Supreme Court in November 2005, six years after completion of the works. The Supreme Court proceedings alleged various defects and including claims in relation to tiling and air-conditioning.

- From the time the owners commenced the proceedings, the builder attempted to engage with the owners on rectification of the alleged tiling defects. All apartments were inspected and an agreed tiling rectification plan developed. Following development of the tiling rectification plan, the owners refused the builder access to the premises to undertake the rectification work and continued the litigation process.

- The air-conditioning claim was initially quantified by the owners at $1.3m. In September 2010, almost 5 years after commencing proceedings, the owners served expert evidence quantifying the air-conditioning claim in excess of $7m. At the same time, the tiling claim was quantified by the owners at approximately $8.5m. The owners' total claim was in excess of $20.6m.

- The builder engaged an independent consultant and contractor to price the air-conditioning rectification claimed by the owners. The independent contractor ultimately priced the air-conditioning rectification at less than $3.5m.

- The matter proceeded to hearing in the Supreme Court in April 2012 and a mediation occurred after two weeks of hearing. The claim resolved at mediation from $6.9m, inclusive of the Owners Corporation costs and disbursement which were claimed to exceed $2m. Following resolution of the proceedings, the independent consultant and contractor were advised by the owners that rectification of the air-conditioning defects would not be undertaken.