Supplementary Submission No 117a

INQUIRY INTO REGULATION OF BUILDING STANDARDS, BUILDING QUALITY AND BUILDING DISPUTES

Organisation: Owners Corporation Network

Date Received: 29 August 2019

Parliamentary Inquiry into Regulation of Building Standards, Building Quality and Building Disputes

SUPPLEMENTARY SUBMSSION

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"It is reasonable to expect that our home is constructed in a manner that, at the very least, is stable, safe, sheltered and fit for purpose. Unfortunately, new residential buildings in Australia appear to be plagued with defects. Although the building itself can be fractured by these defects, it is the residents living there who face the impacts. These include but are not limited to: risk to life, risk to personal safety, risk to health (physical and psychological), increased financial costs, and in some instances removal from the property. In the multi-owned property environment, those that govern (the owners corporation and its committee) and manage these buildings can be significantly impacted due to the complexities associated with rectifying defects"

Nicole Johnson, Sacha Reid, 2019

A. Introduction and recommendations

1. This is the supplementary submission of the Owner Corporations Network (OCN).

2. In the course of giving evidence on Monday 15th August, OCN was asked to itemise key reforms that it believes are necessary to improve the existing regulatory system. OCN reform positions are contained in the OCN submission to the Building Stronger Foundations Paper, which is incorporated as part of the submission to this Inquiry (Annexure B). The public may locate these documents on the OCN website.

3. The home warranty provisions of the Home Building Act were touched on during the hearing on 15th August 2019. OCN advocates that the existing definition of major defects must be corrected as a matter of urgency. This submission provides supplementary explanation about the definition of major defect including relevant case law. Please see page 7 of Annexure B for an explanation of other complexities and difficulties with the operation of those provisions. The amendments needed to overcome these issues are on page 24 of Annexure B.

4. In relation to a statutory duty of care, we would like it noted that OCN's proposal was accepted by the NSW Government early in 2019 post Opal. The scope and application of the statutory duty of care is subject to discussion of key stakeholder group in which OCN is the only consumer voice. OCN's proposed statutory duty of care provisions is included at pages 27 and 28 of Annexure B. Further explanation on why the duty of care must be non-delegable, retrospective and protected from strategies to limit liability are set out below.

5. The Shergold Weir Report recommendations should be adopted.

6. For clarification, OCN also recommends that NSW adopts the following measures:

   i. an independent Building Commission, properly resourced and separate from the Office of Fair Trading; should report directly to a senior minister, preferably a Minister for Building Quality and Housing. It is essential to end the fragmentation and bring together expertise. It is crucial that government have a source of expert information and advice about an industry that is complex and critical to the NSW economy and the wider public interests. The construction industry is not a mainstream 'consumer protection' subject matter and is outside the expertise of the OFT.

   ii. the introduction of a 'clerk of works' type role, namely, a suitably qualified professional who is responsible for point in time inspections as a construction project progresses. There must be an entity or role whose statutory obligation is the protection of the interests of the future owner.

iii. a requirement that to build over 3 storeys in NSW the builder must be licensed personally with licensing criteria that at the very least is in line with the NSW Home Building Compensation Fund criteria (solvency and integrity) and the qualifications and skills needed for building high rise structures;

iv. a single unique ID for the building licence holder that is traceable across all corporate entities;

v. a licensing presumption that a residential licensed builder will operate through one company;

vi. a model of developer licencing to ensure solvency and integrity and remove poor performers from the market and avoid creating a loophole for builders to re-invent themselves as a developer operating through a separate company. This is common in overseas jurisdictions, including, for example, Singapore and Malaysia.

vii. If the two-year warranty period for a minor defects is to remain it must be strictly limited to an exhaustive list of genuinely 'minor' defects, like internal painting, internal fitting, internal doors – things that do not affect waterproofing or slabs;

viii. all remaining defects to be covered by a 10-year warranty period;

ix. waterproofing and fire safety systems must de-linked from the threshold for major defect.

x. a 10-year home warranty period backed by compulsory first resort insurance for high rise residential buildings with a more cost effective, less conflict-ridden solution for when defects do occur must be instituted.

xi. a strategy to finance and ensure rectification of buildings with flammable cladding as a priority, including a single agency charged with developing a process to identify and remediate affected buildings and to provide clear information and guidance to the industry, local council and strata owners about what cladding is definitively compliant to enable remediation to take place. OCN supports the Victorian model and supports Commonwealth financial contributions to ensure a nationally consistent approach.

xii. the Commonwealth to take a leadership role in the identification and removal of unsafe building products from the Australian market in line with the proposal advocated by a coalition of industry groups in 2015 to Minister Andrews (answer to question on notice no.3)

xiii. the financial support for defects rectification for owners left with significant defects and no-one to sue which is funded by a combination of an industry levy, contributions from government and a component that is a long term no interest or very low interest loan. The punitive rate of 7% is unconscionable.

xiv. an independent program 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.

xv. an annual independent consumer satisfaction survey to identify end-consumer perspective and issues in relation to new residential buildings and building defects;

xvi. an acceptance of the importance of independent information and support for new owners in the early life of the scheme to ensure they are fully informed about their rights and obligations. The funding of an independent consumer-based organisation such as OCN from general revenue or via an alternative funding model to perform this role (and address wider strata related issues);

xvii. the recognition that strata home owners is a housing constituency with unlimited liability in a complex environment with a range of rights and interests and is not part of a 'strata industry'. The right of strata owners and residents to independent non-conflicted advice and information is of paramount and growing importance.

xviii. establish a Strata Commissioner to ensure there is an expert within government capable of responding to the plethora of practical and policy issues that arise from the strata housing sector. The treatment of strata owners as mere recipients of commercial "property services ignores their legitimate consumer rights and undermines the objectives of strata housing as a primary housing model for future generations.

B. Scale of the problem of defects in residential multi-flat buildings

7. As noted in the OCN's Opening Statement (Annexure 1) over 80,000 residential strata schemes are housing approximately 1.2 million people in NSW and this is growing rapidly. The Four Corners Program "Cracking Up" stated that over 650,000 apartments have been built and sold in Australia since 2000 with approximately 260,000 of those apartments being built and sold in NSW.

8. The expansion in strata housing will continue as urban consolidation remains a high priority for the NSW economy. The data published by the Department of Planning Housing Monitor for Greater Sydney Region shows 18,000 high rise apartment approvals in the 2018 - May 2019 in the Sydney are and for that year alone. The data for the entire state of NSW is available via the Department of Planning. For convenience we extract data for Greater Sydney Region on completions and approvals from 1998-1999 to 2017-2018.

Table 1. Greater Sydney Region Completions by FY

Year	Detached	Multi-Unit	Total
1998-99	10,730	**16,759**	27,489
1999-00	10,192	**20,417**	30,609
2000-01	9,927	**19,124**	29,051
2001-02	10,482	**17,241**	27,723
2002-03	7,358	**15,115**	22,473
2003-04	5,003	**17,581**	22,584
2004-05	3,997	**15,545**	19,542
2005-06	3,153	**14,460**	17,613
2006-07	3,952	**10,763**	14,715
2007-08	3,504	**10,358**	13,862
2008-09	3,855	**9,186**	13,041
2009-10	4,406	**8,887**	13,293
2010-11	5,095	**9,627**	14,722
2011-12	5,598	**9,506**	15,104
2012-13	8,523	**11,816**	20,339
2013-14	7,846	**14,904**	22,750
2014-15	8,948	**18,400**	27,348
2015-16	9,619	**20,572**	30,191
2016-17	10,752	**23,660**	34,412
2017-18	11,678	**30,790**	42,468

Table 2. Great Sydney Region Approval by FY

1998-99	14,566	**18,079**	32,645
1999-00	14,815	**15,185**	30,000
2000-01	9,266	**11,442**	20,708
2001-02	12,283	**17,574**	29,857
2002-03	10,195	**18,450**	28,645
2003-04	9,273	**18,210**	27,483
2004-05	6,943	**13,339**	20,282
2005-06	6,172	**10,494**	16,666
2006-07	6,353	**10,467**	16,820
2007-08	6,641	**11,091**	17,732
2008-09	5,960	**7,676**	13,636
2009-10	8,159	**11,151**	19,310
2010-11	8,393	**14,047**	22,440
2011-12	8,494	**15,966**	24,460
2012-13	10,420	**19,955**	30,375
2013-14	12,743	**26,347**	39,090
2014-15	15,410	**31,356**	46,766
2015-16	17,298	**37,556**	54,854
2016-17	18,015	**38,054**	56,069

9. The issue of building defects, declining building standards and the inadequate regulatory environment has been the subject of numerous inquiries. The latest independent research conducted by Nicole Johnston (Deakin) and Sacha Reid (Griffith) showed that in NSW over 90% of residential apartment buildings have defects in at least one construction system affecting multiple floors, apartment and parts of the building. This research identifies water and fire safety systems as comprising the bulk of the defects, which pose potentially serious health impacts (toxic mould) and threat to life and are costly repair.

10. The findings of the 2019 Johnston and Reid Report are consistent with previous findings of the City Futures Research Centre UNSW published in 2012 and widely quoted elsewhere. For the convenience of the Committee, a copy of the Johnston and Reid 2019 Report is Annexure 2 to this submission.

C. High costs of defect rectification in multi-flat residential buildings

11. The Four Corners Program “Cracking Up” was aired on Monday 19th August 2019. The same day Equity Economics published new modelling to estimate the total costs likely to result from building defects in apartments built in the last ten years on a national basis. According to Equity Economics, the estimate of the cost to building owners and State, Territory and Federal Governments of addressing the structural and safety defects in these buildings is approximately $6.2 billion nationally (sensitivity testing is $5.2-$7.2 billion).

12. The Equity Economics Report contains detailed estimates of the number of apartments effected in NSW and the cost of rectification of cladding, waterproofing and fire safety systems on a per lot basis. It does not take into account a full range of defects. The estimates per lot appear understated based on OCN’s own experience. The analysis also excludes several potential costs including: legal costs; jurisdiction wide building audit schemes; and increases in insurance and the time spent by strata committee volunteers and increases in strata management fees.

13. An example cited in the Equity Economics report is the rise in strata insurance premiums for owners of Anstey Square (Melbourne) which has increased from $29,000 to $134,000 following discovery of combustible cladding and their excess increased from $1,000 to $100,000. In addition, it excludes the cost of defects for apartments built before 2009. This is equally applicable to NSW.

14. OCN submits the Equity Economics report as evidence to the Inquiry. See Annexure 3.

15. Another recent national survey by Mozo estimates repairing building defects has cost Australians a staggering total of $10.5 billion over the past decade. The survey covers both houses and apartments. In relation to apartments, the survey found that 4% of new owners had to pay above

$50,000 to have repairs done, 23% paid $5,000 to $50,000 and 74% paid up to $5,000. The report can be access on line.1

16. The cost of defect rectification is high due to the complexity of multi-flat buildings and the long and complex process for identifying defects and proving a claim. The Owners Corporation of Mascot Towers (132 units), a building that is 10 years old, had to raise a special levy for initial costs of $1M. On 22nd August 2019 the owners voted to raise a further $7M for two stages of a four-stage rectification. The rectification is estimated to be between $10M and $20M. In the ACT, the Elara scheme of 118 lots has an estimated rectification bill of $19.4 M.2 These failed buildings appear to be at the worst end of the scale.

17. OCN is aware of defect rectification bills in order of $4M and $7M. The size of the rectification bill depends on the defect but in multi-flat buildings the complexity of the buildings makes rectification very expensive. Even the rectification of incorrectly installed hot water systems can cost over a million dollars. The Australian Financial Review (AFR) recently reported a $2.7M claim against developer Dyldam Developments and Merfad Capital.3

18. In our experience, waterproofing installed as part of the original build is typically 2% of the total cost but typically 10% to rectify after 'completion'; it is similarly the case with fire collars and fire dampers. It is necessary to do destructive work on balconies and bathrooms to access the membranes to fix waterproofing and ceilings and walls and reach fire collars and dampers. We submit that rectification costs are typically greater than 5% of capital cost and, often 10% or more depending on the specific building and exact rectification requirements. There is no simple formula. During the hearing Karen Stiles, Executive Officer, OCN testified that in her own case the rectification costs were 56% of the original cost of the build.

19. There are also additional costs incurred for the services of strata managers and strata lawyers, and the costs of expert and technical reports in preparation for a claim which are rarely factored in cost of building defects models.

20. This is why OCN argues that the developer bond scheme is manifestly inadequate.

21. The modelling for the scheme should be made public.

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[1] **https://mozo.com.au/home-loans/articles/property-pain-building-defects-report-2019**
[2] https://www.canberratimes.com.au/story/6317525/you-failed-us-elara-apartment-owners-compensation-plea/
[3] https://www.afr.com/property/residential/owners-claim-2-7m-in-building-defects-at-dyldam-towers-20190821-p52jc0

D. Residential multi-owned property environment

22. The vulnerability of the end consumer in the residential environment is the key difference between the residential building and the commercial construction industry. The asymmetry in information and bargaining power is stark. In practice, the principle of *caveat emptor* does not and cannot apply effectively in the residential multi-flat environment. The ability to mislead, delay and avoid accountability has been further facilitated by poor public policy which has failed to consider the social and economic impacts on the public.

Invisibility of Strata Housing

23. It is critical that government is capable of delivering informed evidence-based policy advice that has depth of knowledge, expertise in the relevant areas of law practice and is based on sound regulatory principles. This cannot be achieved without a complete understanding of the market, including the public interest and specific needs of end consumers.

24. There were five reason cited by Nicole Johnson and Sacha Reid for choosing the residential multi-owned property environment for the focus of their research:

(i) in urban areas of Australia, strata apartment buildings are becoming the dominant property form (over 2.2 million Australians live in this property type);

(ii) original purchases are usually off-the-plan (take it or leave it) sales contracts, so new owners provide little (if any) input into the design and construction;

(iii) size, height and complexity of this property type means more people are at risk or harmed in the event of significant system failures. As noted by Forcada et al. more defects are located in higher density housing as a result of inferior materials, a lack of worker motivation (due to repetitive work) and tighter time schedules forcing workers to rush;

(iv) collective action is required to commence legal proceedings against the responsible parties for rectification works to commonly owned property. As a result, it can be more difficult to hold builders and other professionals to account as more statutory hurdles are imposed. (p. 7)

25. Previous research demonstrates that:

> "… the rectification process for multi-owned properties is more difficult due to the associated costs and the common practices undertaken by property developers. Such practices attempt to stifle the ability of owners' corporations to seek legal recourse for the rectification of the defects.

They do this by: frustrating the decision-making process (by controlling the voting power of a committee), attending to minor defects only (showing that work is progressing while ignoring major defects), and ignoring their statutory duty to hand over construction related documents. As highlighted in the research, the rationale for disrupting the rectification process is to maintain profits, because building rectification is a costly game." (Johnston and Reid p.7)

26. The reaction to construction defects has been to wind back consumer protection in order to address the growing problem instead of seeing consumer protection one of the key drivers for raising standards. If NSW is to earn the trust of the public it must adopt comprehensive and effective consumer protections that protect the rights and interests of the public as part of holistic reform of the industry.

27. It is reasonable to expect that a developer and builder can deliver a residential building that complies with the building code of Australia and, if defects do occur, that consumers are protected by at least a 10-year warranty and first resort compulsory insurance consistent with global best practice.

E. Insurance

28. The Inquiry has taken evidence on the lack of any insurance available to provide either first or last resort compensation for owners of strata property in multi-flat building of 4 or more storeys. It has also taken evidence on the cost, complexity and stress involved for owners corporations in pursuing a remedy. In our original submission we attached a research paper outlining the history of home building insurance and the case for Australia to move ultimately to a compulsory decennial liability and insurance which operates in many overseas jurisdictions.

29. OCN is now aware that on 21 June 2019, Ensurance Pty Ltd launched a latent defects product on the Australian market. The product protects policy holders for structural defects for up to 10 years after a building is completed, including an owner's corporation. For convenience a copy of the company's information sheet is Annexure 4 to this supplementary submission.

30. OCN also refers the Committee to Mr Ian Bailey SC, an expert in construction defects. OCN is advised that the Society of Construction Law will be putting a proposal for a national insurance scheme to the Commonwealth. The Commonwealth has constitutional power in respect of insurance and consumer protection.

F. Water proofing and fire safety systems and the definition of major defect

31. This section provides further explanation as to how the express inclusion of water proofing and fire safety system into the definition of major defects provisions is undermining owner corporations.

There is detailed explanation of other flaws in these provisions in OCN's original submission, Annexure B.

32. In summary, the periods applicable to the statutory warranties are now:

- 6 years for "major defects": and

- 2 years for "minor defects".

33. To satisfy the definition of "major defects" a defect must cause:

- the inability to use or inhabit the building or part of the building for its intended purpose; or

- the destruction of the building or any part of the building or a threat of collapse.

34. The definition of major defect expressly includes waterproofing and fire safety systems. Consequently, the changes to the law appear to treat water proofing and fire safety system as more serious defect and attract the longer 6-year warranty period.

35. In fact, the majority of these types of defects would not reach the threshold test for 'major defect' because residents are still able to use and inhabit the building or part of the building. However, a defect in the waterproofing, for example, will eventually make an apartment uninhabitable or, if left untreated, will ultimately threaten the integrity of the structure.

36. In *Ashton v Stevenson* [2019] NSWCATAP 67 the Appeal Panel applied the sequence of analysis to decide whether a claim for a major defect was made that was set out in *Vella v Mir* [2019] NSWCATAP 28 and found that the following must be established for a defect to be a major defect:

a) That first step in the analysis is that the defect must be part of a 'major defect';

b) Inclusion in the definition of major element does not mean that the defect will be a major defect;

c) The extent to which a defect impacts on the habitability of the integrity of the building needs to be proved by the party alleging a major defect (referring to *Panchall v Jones Oz Style Hoes* [2018] NSWCATD 238]

d) The consequences of the defect must be shown to have, or probably have, a proven consequence for the habitation, or use, of the building or to the integrity of the building.

e) Section 18E(4)(a)(i) requires that there must be a proven, or probable, inability to inhabit, or use the building.

f) Section 18E(4)(a)(ii) and (iii) are at the more serious end of consequences or impact on a building. The reference to destruction does not mean minor process of deterioration, but evidence of a real possibility of destruction, not merely incidental damage or superficial deterioration.

g) These are matters for evidence as to the actual impact which must involve more than a speculative or pessimistic assessment of possibilities in order to prove that the defect will have, or probably have, the prescribed consequences.

h) The evidence must establish that the consequences are imminent or probable.

i) Whilst expert evidence may assist in this analysis, such evidence is not determinative of the issue and must rise above speculation and suggestions as to possibilities.

j) Evidence from the occupants or users of the building (as opposed to expert evidence) would be necessary to establish the claim.

37. In summary, a “major defect” will have to overcome the criteria that the defect renders a building (or part of it) uninhabitable or incapable of use, destroys the building (or part of it) or imposes a threat of collapse of the building (or part of it). These criteria all involve a significant degree of seriousness.

38. Establishing whether a defect is a major defect is not simply a matter for expert opinion and will require evidence from occupants of the building to establish the seriousness of the defect, particularly in relation to the ability to use the building or a part of it for its intended purpose. Unless a defect can be proven to be a major defect, the owners’ corporation will be out of time to claim for some very significant and costly rectification.

39. Consequently, the fact that a defect is in the waterproofing or fire safety system is of itself not enough to bring it within the 6 years warranty period. Strata lawyers now have to advise clients to bring a claim within the 2-year period.

40. It was no doubt the intention of Parliament to recognise that water proofing and fire safety systems are indeed serious, latent, common and have very significant impacts on people who must live it. In fact, the provisions thwart the efforts of owners’ corporation and their voluntary strata committee to obtain a remedy. In our view, this is the result of inadequate legal policy work and a lack of detailed understanding of the subject matter by a regulator that has responsibility for numerous pieces of legislation.

41. In relation to the statutory periods generally - the two-year period is far too short for a new owner’s corporation, which may only be formed toward the end of that period, and is easily defeated by developers, builders and strata managers engaging in delaying tactics. The six-year period is also

too short to allow for serious latent defects to manifest. It is common for a latent defect not to materialise until the warranty period has expired and even if it has manifested the developer and builder are still able to cause delay to defeat a claim within the warranty period. NSW is falling well short of the common global standard of 10 years.

42. OCN therefore recommends that:

    - If the two-year period is to remain it must be strictly limited to an exhaustive list of genuinely 'minor' defects, like internal painting, internal fitting, internal doors – things that do not affect waterproofing or slabs;

    - all remaining defects to be covered by a 10-year warranty period;

    - waterproofing and fire safety systems must be de-linked from the threshold for major defect.

G. Statutory duty of care to subsequent owners

43. In 2014, the High Court in *Brookfield Multiplex Limited v Owners Corporation Strata Plan 61288* [2014] HCA 36 ruled that the builder did not owe a duty of care to the subsequent owners. The case is an important one. It has cast doubt over whether a builder owes a duty of care to vulnerable subsequent owners of a residential strata scheme (the owners corporation).[4] In early 2019, the NSW Government agreed to OCN's request that a statutory duty of care be introduced to repair the gap in the law created by the High Court decision. This reform became increasingly important as statutory warranties were watered down.

44. As subsequent purchasers are not able to rely on a contract with a builder, they must look to the law of negligence for a remedy, making the decision from the Brookfield Case of increased significance in relation to all property. The statutory duty of care is therefore a necessary reform to fill the gap left by the High Court.

45. In the UK, Canada and Australia the courts have been cautious about extending liability in tort for negligence for defects in construction because of potential economic impacts, preferring the legislature to correct the obvious social injustice. The UK has had a statutory duty of care since 1974 (Defective Premises Act 1974 (UK).

46. The social injustice is obvious in the case of strata property owners who are unable to minimise their risk via the contract or otherwise protect themselves under the general principal of *caveat emptor*. They are not party to the contract between the developer (owner) and the builder (consumer) and have no influence over the terms of that contract, which may limit liability. The clock

4 **The Owners Corporation claimed that Brookfield had breached a duty under the common law to take reasonable care to avoid reasonably foreseeable economic loss to the Owners Corporation in relation to defects caused by the building's defective design or construction or both.**

for statutory warranties starts from the issuance of the certificate of occupation; it is time limited and may have expired or be close to expiry when the OC takes over the scheme. Defects are frequently latent and do not become apparent sometimes until years later.

47. The policy presumption is that builders (and others) have a social responsibility (housing building is not just a private matter) and, purchasers (original and subsequent) are entitled to rely on that presumption because of the skill and qualification of the builder and relative disadvantage in the bargain.

48. OCN submits that the statutory duty of care must be non-delegable, it must apply equally to all building practitioners and, preferably, the developer. This is necessary to ensure that responsibility is shared and that the positive duty not to be reckless or negligent is able to drive cultural change within the industry.

49. The statutory duty of care must also be retrospective. This is explained further below.

50. The following sections highlight important elements of the statutory duty of care.

51. Please see page 27 and 28 of Annexure B to OCN original submission for a fully prepared statutory duty of care provisions.

Developer to owe a duty of care to future owners

52. The developer should equally owe a duty of care to the future owners. A suitable description of a developer would be a person who is a developer for the purposes of the Home Building Act or who would be if the construction work was residential building work for the purposes of the Home Building Act. Consideration should also be given to deeming for the purposes of the duty of care that developers have done the construction work as per the Home Building Act.

53. The OCN does not have any objection to a builder and developer capping liability between themselves only. However, to allow them to cap the potential liability that one or both of them would have to future owners for their own breach would be completely unacceptable and enable them to avoid accountability – the very reason why the reform is needed in the first place.

Beneficiaries

54. In relation to the beneficiaries of the duty, OCN submits that beneficiaries should be described as the owner or future owners with the definition of owner being based upon the usual legislative formula that has stood the test of time. We suggest that the definition of ‘owner” (a)(I)-(iv) from the Local Government Act which is adopted by the EP&A Act be used for the statutory duty of care provisions.

Protecting consumers from contractual terms or settlements that restrict their rights

55. The statutory duty of care will require provisions to stop builders and developers being able to restrict consumer rights in the contract or agreement that 'settle' particular defect issues leaving the consumer with no remedy. The following type of provisions will be necessary:

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

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

        a. the duty of care intended by this section was owed by a person to an owner or future owner; and

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

Retrospective Application of Duty of Care

56. It will be necessary to include a transitional provision for the duty of care to provides future owners, in particular owner's corporations, with certainty as to whether a duty of care is owed by a party who has done construction work. An approach that has the application of the duty of care turning upon when the particular construction work was done or when a particular contract was entered into would be disastrous as a generation of owners corporations will simply not know whether they have duty of care rights or not as they will not have the relevant information or documentation.

57. The only way to give certainty is to make the duty of care apply retrospectively, either to disputes for which proceedings have not yet been decided, or disputes for which proceedings have not yet been commenced. Retrospective operation is also needed as the consumer confidence crisis has already happened and the state economy is already at risk of failure because of it.

58. Having a duty of care that will start helping some consumers who end up buying buildings not yet under design or construction does nothing to address the current crisis. The current crisis will not be addressed by passing a law that will start to help some consumers 5 years or more from now.

59. It might be argued by some professional groups that their members already owe a duty of care. This is in fact the longstanding expectation prior to the relatively recent cases and the implications of those cases becoming widely known. Industry argument against the retrospective operation of a statutory duty of care because it changes the goalposts is a fallacy. There is no unfairness in holding professionals accountable for loss caused by their own incompetence or recklessness.

Definition of Construction Work

60. The definition of construction work must include

    - Inspecting the construction work prior to its final completion;
    - Issuing a compliance certificate or any other document that is relied upon by a person seeking an occupation certificate;
    - Making an application for an occupation certificate;
    - Supplying or manufacturing a product that is intended for use in construction work.

61. Suppliers and manufacturers can reasonably be expected to, and do, provide instructions on the uses for which a particular product is suitable and installation instructions. This should be included in the duty of care otherwise there will be a gap and where a builder uses a product for a particular purpose in reasonable reliance upon information from a supplier or manufacturer that it is suitable for that purpose only for it to be later discovered that it is not suitable for that purpose.

62. The Australian Consumer Law (ACL) is not drafted with an owners' corporation in mind and simply does not provide protection to an owners corporation. Including suppliers and manufacturers would simplify a builder or developer liable for a product suitability issue under the Home Building Act being able to cross-claim for contribution against the supplier or manufacturer when the genesis of the problem was representations made by the supplier or manufacturer.

H. Commercial conflicts of interest and owner corporations

63. The Committee has received evidence of conflicted corporate interests that undermine the ability of owners to exercise their rights on the basis of non-conflicted information and advice.

64. Firstly, it is common for a developer to enter into contracts with a strata manager and building manager and present these arrangements as a *fait compli* to the first Annual General Meeting of the owners corporation. In NSW, the sale of building management rights for 25 years has now been reduced to 10 years. The sale of strata management rights has been reduced to an initial 1-year contract, but this is often renewed as a matter of course for a standard 3-year contract. In addition to issues like defects, the 'original owner' writes by laws, which set the parameters for residential living that may conflict with the developer's commercial interests or the interest of commercial lot owners.

65. Secondly, it is common for the developer and/or builder to retain lots in order to be part of the owners corporation. This allows them an extraordinary level of influence and voting rights that can be exercised against the interests of individual owners.

66. Thirdly, people are told not to report defects because it will damage the reputation of their building and affect the value of their property. In cases where a defect claim is eventually proved and settled the settlement agreement will usually have a non-disclosure clause that silences owners and prevents them from speaking out. This prevents other buyers from exercising due diligence.

67. Fourthly, sections of the strata industry earn a large volume of business from developers.

Conflicts of Interest and Industry Trend toward Diversification and Integration

68. This is part of a wider issue about the prevalence of commercial conflicts of interest and the lack of independent information and support to strata committees. The strata housing sector is a lucrative business environment for a range of suppliers and providers offering strata agency services, insurance, facilities management, financial services, defect management and remediation services, legal services, all types of trades, engineers and other professionals.

69. To put this into perspective, the estimated value of strata property in NSW is over $366 billion (insured). The 'economic value' is measured in employment of 1851 strata agents and 1675 other strata management employees (no values available). In 2017, there were 1,209,769 call outs to the value of $2,496,590,418 for various trades; and,187,991 professional services to a value of $410,984, 085.[5]

70. Importantly, there is a growing trend in the strata management industry for these companies to diversify their business offerings and increasingly adopt a 'integrated one stop shop' business model. The Macquarie Bank Strata Management Performance Benchmark Reports (2013, 2016, 2019) identify diversification (or integration) as a mark of the more profitable strata management companies. The Macquarie Bank survey of future intentions also clearly shows that this trend is increasing along with the massive expansion in strata housing and urban consolidation.

71. Owners corporations and their strata committees manage large capital works and administration funds. They have a multitude of obligations and little knowledge of how the "strata industry" operates. The integrated "one stop shop" business model poses potential conflicts of interest. It is difficult to see how a strata manager can instruct itself to take out insurance or effect building maintenance or restoration work without running into a conflict of interest. These industry trends have been allowed to grow with no regard to the impact on the client base, vulnerable consumers with little access to independent information and advice or proactive education to protect their rights.

72. The end consumer and strata housing generally is invisible across multiple portfolios at both the state and commonwealth level. This subject matter and cohort do not fit into mainstream of consumer protection; it is not included in the housing minister portfolio responsibilities and is not

[5] Australian National Strata Data, 2018.

part of the state industry portfolio or national forums. It is the case that OCN is most often the only consumer person in stakeholder meetings dominated by industry and commercial interest.

73. The need for a funded organisation like OCN to provide an identifiable and independent consumer-oriented information into the market place for strata housing owners and resident is clear. Like the Tenants' Union NSW some of the revenue generated by strata housing should be returned to a civil society organisation to fulfil that role. This is not an alternative to commercially purchased services. It is complementary and performs the role of empowering clients to be informed active consumers and to identify systemic policy issues across the sector. Funding a not for profit organisation is a cost-effective way of delivering such services.