

FIXING THE LOTTERY THAT IS BUILDING DEFECTS IN NSW STRATA BUILDINGS

We have all heard about the appalling building defects that have occurred in a number of new strata buildings in Sydney in recent years. Complexes such as “Opal Tower” and “Mascot Towers” are shocking examples of innocent mums and dads buying their dream residence, only to find that their unit and their complex were shoddily built and their dream has turned into a financial nightmare. Karen Stiles, from the Owners Corporation Network (which represents apartment owners) has said it “beggars belief that buildings so badly built received occupation certificates which allowed developers to settle on apartments.” How was this allowed to happen?

Design and Construct Contracts

Contractual arrangements for multi-storey projects differ, but commonly developers engage a builder to undertake a design-and-construct project. This means the builder is responsible both for the development of the design and the construction of the building. Whilst the developer might initially engage architects and engineers to prepare early designs to obtain planning approvals, these consultants then become subcontractors. Once contracted, the builder will work to find efficiencies and cost savings in the development of the design and construction of the building.

Although building approvals are required, the nature of a design-and-construct project means that many aspects of the design change after the initial approval is obtained. Many certifiers approve, allow, or are not aware of, variations that have been made. The result is that changes to approved design occur frequently, at the discretion of the builder, project manager and/or contractors and without independent certification.

The Shergold Weir Report commissioned by the NSW Government found that inaccurate designs mean that certifiers can never fully ensure compliance because they then must rely on inspections and some of the most important safety elements are hidden from view and a point-in-time inspection cannot properly assess essential construction processes.

Changes Implemented

The NSW Government has supported the vast majority of the Report’s recommendations and has (or is) implementing the following major reforms across the construction industry:

1. Appointment of an expert Building Commissioner to act as the consolidated building regulator in NSW;
2. Putting in place new laws that require building practitioners involved in designing buildings to submit building plans to the Commissioner (so that they may be audited), declare that the plans are BCA compliant and meet other relevant requirements and provide reports explaining why that is the case for performance solutions. Builders will also have to declare that their buildings are constructed in accordance with these plans. It will be an offence to knowingly or recklessly declare non-compliant plans or fail to lodge the documents on time. Disciplinary action will be able to be taken against practitioners who improperly make these declarations. The Building Commissioner will not need to sign off on building plans;

3. The Building Commissioner will register the building practitioners who can lawfully make a declaration that plans are compliant or make a declaration that plans accurately reflect a building's as-constructed design. These practitioners will have to maintain the necessary skills and insurance to meet the registration requirements and will be subject to disciplinary action for professional misconduct;
4. Ensuring that building practitioners owe a duty of care to Owners Corporations and subsequent titleholders of residential developments, as well as unsophisticated construction clients who are small businesses. This means that homeowners will have a right to pursue compensation when they suffer damage because of a building practitioner's negligence.

From 1 July 2021, most of these changes took effect for Class 2 buildings. These are typically multi-unit, multi-storey residential buildings where people live above and below each other.

The NSW Government see Class 2 as the highest priority right now, but the NSW Government will expand the reforms to other classes of construction in the future.

Also, previous changes to the Strata Schemes Management Act relating to residential strata properties that are four or more storeys now require that:

- Developers must lodge a building bond equal to 2% of the building contract price, before an application is made for an occupation certificate;
- Developers must give documents to the building inspector that help with their inspection;
- There is a means for the developer and owners to agree on the amount of the building bond to be released for repairs, if they can't agree;
- A debt recovery mechanism has been put in place that enables the recovery of unpaid or insufficient bonds from a developer.

Conclusion

Strata building defects have resulted in enormous extra workloads for Strata Committees and Building Managers – not to mention the emotional and financial hardship caused to unit owners. David Chandler was appointed the **NSW Building Commissioner** in 2019 after an impressive forty year career in the Australian construction industry.

Hopefully, he is the right man to clean up all of this shoddy construction, workmanship and design in strata buildings.

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