# SUMMARY OF MDC FORMAL SUBMISSION MADE JUNE 2013 TO NSW GOVERNMENT

**INDUSTRY WIDE REVIEW OF THE PROCESS OF CERTIFICATION**

## PART 2

## A SELECTION OF CASE STUDIES
## by Owners Corporation Network

**BRIEFING PAPER**

**FIRE DEFECT ISSUES - GOLDSBROUGH MORT BUILDING 29 APRIL 2012**

On 9 May 2012, works are due to commence at the Goldsbrough building located at 243 Pyrmont Street, Pyrmont ["the Building"].

These works will represent the most extensive works undertaken since the Building was refurbished in the mid 1990's as part of the conversion of a structure that has a long history and was used by the Goldsbrough Mort company to conduct wool store operations, into a building which Is now comprised of 530 strata lots, comprising commercial suites and residential/hotel accommodation.

It is estimated that the costs of the works to be undertaken will be approximately $11.5 million. The works have been planned (in order to minimise the inconvenience to occupiers and also having regard to the need to find alternate accommodation for occupiers while the works are under taken on their lots) to take 4 years.

In summary, the fire upgrade works consist of the following for Levels 1 to 7 inclusive of the Building;

- Removal of the existing ceiling linings and replacement with, a new fire rated ceiling system.
- Installation of fire stop baits at the dividing walls between units located above the ceiling line.
- Where required, the installation of additional sprinkler heads specifically for the protection of exposed timber columns.
- Installation of surface mounted light fittings to ensure that the new fire rated ceiling is not penetrated.
- Painting of replacement ceilings, existing walls. skirtings, entry doors and frames

These works represent the culmination of efforts on behalf of the Owners Corporation and its advisers to ensure that the Building is fire compliant.

**History of the Building**

The Goldsbrough building was first erected in 1883 for the purposes of a wool store. It was Australia's first wool store.

Due to extensive fires in 1935, the Building was required to be re-built. At the time of re-building, the property was seven storeys high and comprised extensive use of heavy iron bark timber beams and tallow wood flooring in its construction.

In the 1990's, a developer acquired the by now derelict Building and proposed to convert the property into a mix use property, comprising commercial suites and residential accommodation. The developer also proposed to increase the height of the Building by constructing a further 8 storeys on top of the existing structure. The builder was retained under a "design and construct" contract to undertake the relevant refurbishment and extension works.

At the time of refurbishment of the Building, the relevant consent authority for the purposes of the works was the Darling Harbour Foreshore Authority [“the Authority']. The authority did not employ its own personnel for the purposes of certifying that construction works were carried out in accordance with the relevant building codes but rather sought to utilise independent certifiers, as was permitted at that time.

In the case of the Goldsbrough works, the Authority retained a certifier in relation to the fire safety works. The certifier was, in turn, retained by the builder to advise It In relation to fire safety issues within the Building.

The certfier ultimately signed off to the Authority as to compliance with the relevant building codes relating to fire safety issues. Given the previous construction of the Goldsbrough building and its heritage significance, the Authority determined that compliance with the relevant building code was to be achieved by a 'deemed to satisfy' rather than strict compliance with the terms of the relevant building codes.

In 2000, the Owners Corporation as a result of various building defects that had been discovered in the late 1990's, commissioned a review of the fire safety issues generally within the Building. As a result of this review, the Owners Corporation was advised that there were substantial fire safety design defects apparent in the Building. The Owners Corporation sought to address these issues with the builder but ultimately was forced to commence litigation against the builder and the certifier, alleging negligence in the design and construction of the fire safety features within the Building.

This litigation ran for almost 10 years with the matter being referred to a court appointed expert, who conducted an expert conclave to review the lire safety issues within the Building.

This litigation was ultimately settled in early 2010 prior to a finding by the court appointed expert being handed down and is subject to a confidentiality agreement.

## 14 UNITS IN CHIPPENDALE

Here is our home owners warranty saga.

Our converted warehouse in Chippendale has 14 units and was completed in late 2004.

In January 2006, at the AGM, several owners compared notes about problems and we decided to collect all the problems into a "report' and seek rectification from the development company. The development company consisted of three people; a lawyer, a project manager who has a building license, and another person who provided additional finance. The report was delivered to the three directors and duly ignored. Over a period of time one director tried to work with us to resolve issues but for the most part he failed, being out voted by the other directors.

By August 2006 we started talking to the OFT who advised we should go after the builder and not the developer so we wrote to the builder and, getting no reply, we filed a Home Building Complaint al the end of August.

On the 4" December we had an OFT building Inspector on site with representatives from the developer and the builder and 26 items were found against the builder and a required rectification date of the 3/7/2007 given. Early April still nothing had been done hilt eventually some minor repairs were completed.

With the majority of the work outstanding we decided that we would progress to the CTTT and so consultants were engaged to complete a defects report which was submitted as evidence to the CTTT along with quotes for much of the work. After several directions hearings we arrived at the final directions hearing on the 15th Aug 2007 when we received a letter from the tribunal telling us that they had been advised that XYZ Pty Ltd had ceased trading and thus we had wasted nearly a year.

On the 20th Aug 2007 we wrote to HIA Insurance at the address from the certificate of Home Warranty Insurance. We received no reply so wrote again beginning of November only to have our letter return as not known at this address. We looked up HIA on Ile internet and wrote to offices in North Ryde. To this letter we received a response from VERO in Chatswood advising us that we had no claim as XYZ Ply Lid was still registered even though the status on the ASIC database was "Under external administration and/or controller appointed'. It took till the 19' May 2008 before re heard that a court appointed receiver had been appointed and we wrote to VERO asking them to please open a claim.

On the 4" June 2008 VERO wrote advising that for common properly claims they required evidence that all owners had been consulted, but still not accepting that we had a claim. On the 15th January 2009 VERO accepted that we had a claim and we got a massive list of required documentation that we spent months trying to get, including original building contracts and the like. Having been worn down and in order to get the claim moving we started to talk to lawyers In April in 2009 and eventually engaged a firm in June 2009. This got things moving and was some of the best money we spent.
We were still pursuing VERO in November after the 60 days within which they were supposed to reply when they finally contacted us to arrange an inspection. The inspection happened on the 10th December 2009 and an agreed scope was agreed and finalized on the 24th May

2010. We thought we were there and had visions of a panel of builders coming in to quote and the work being completed by Christmas 2010 but ... we didn't factor in VERO.

On the strata roll a couple of the apartments were listed as being owned by the development company. In reality the development company held them in trust for one of the developers but VERO decided that 2/14 (actually by entitlements) would be disallowed, as the developer could not benefit from the policy. At this point we again found ourselves having to go to the lawyers, who started for us in June 2010 and we're still going.

We are due at the CTTT for our final directions hearing on 30 July 2012 but for the last couple of months the developer has been attempting a direct settlement as it appears that the development company guaranteed the home warranty insurance so anything VERO pay out they will become liable for, by settling they avoid VERO's legal fees.

The first attempt to settle was a proposal under which the director used his building license to come to site to fix the defects but his license is a personal license and apparently this prevents him for doing this. They suggested another one-man band friend of the developers whose only real experience was the occasional bathroom and commercial shop fit outs. We rejected both of these but as the final CTTT hearing got closer they relented and settled on a builder who did some emergency work to stop part of our building facade from leaking and they also agreed to the full scope that they had been challenging.

This we thought was the right direction, and we only needed to agree reimbursement of money already spent/legal and professional fees and details of critical point inspections. Then we got an email confirming that they had agreed these items but that the builder had pulled out. We were startled to say the least - the builders are a reputable and well-regarded remedial building company and we had a project that required such a company, why would they not be interested?

I called them only to discover that they had been invited to quote by the developers, not on the entire scope of works but only on the installation of a damp proof membrane in our courtyard area, and the developer was planning to have someone else remove the tiles and then put new tiles down. Needless to say if the tile installers were to damage the membrane then the builder would be liable, so they declined, but when I emailed them the full scope of works they were happy to come and quote.

On a purely personal note, in addition to being the chairman of the strata, I'm also the owner of unit I where three out of four walls are affected by damp and finally In April this year my partner and I got sick of the damp problems and the delays and we commissioned a mould report only to discover that our apartment is uninhabitable.

Since April we have been staying with family and friends and for the last six weeks neighbours in our block have lent us their apartments whilst they are away but in a week or so we are again homeless and are looking for a properly finder as we are sick of being itinerate. If possible we wanted a settlement in place before we started to incur costs so we can pass the costs back to the developer but really we're just sick of it all. Hopefully the finish line is in sight.

We believe that we had a fair and justifiable claim against VERO on the 2d' Aug 2007 when the ASIC database listed our builder as under administration and here we are nearly five years later and much grey hair still with no resolution.

What have we learnt?

- Get lawyers and building consultants involved early
- Don't change Strata Managers in the process
- Don't trust the builder/developer/insurance company
- And this will cost a lot of money start raising money early

## BUILDING DEFECTS CLAIM – COMMENTARY

This strata plan was "fortunate" in that it was one of the last strata plans to have the benefit of a "First Resort" Home Owners Warranty Insurance i.e. a policy under which a claim could be made on the insurer by the Owners Corporation even while the Builder was still solvent and operating.

Nevertheless, the experience of the Owners has been traumatic and weaknesses in the system have been exposed. The major issues are:

**Financial and other losses**

1. A "near miss" in that the Owners Corporation could well have been out of time for the purpose of both claiming under Statutory Warranties and its "HOW" policy, since it received no advice from its strata manager or any other source as to the applicable time limits for claims.

2. The claim has been outstanding some 2.5 years. Some of this time relates to inspection by experts for the insurer and builder but during much of the time little progress was made. There is no statutory time limit within which the insurer/builder has to decide whether they will or will not remedy the defects claimed.

   It appears that only a letter campaign and the insolvency of the builder (not required for a first resort policy) made the insurer finally address and crystalize the issues.

3. The prolonged nature of the claim process has meant
   - Ongoing anxiety for owners and residents
   - Continuous debate as to which defects can be left until the claim is resolved and which have to be attended to as emergency repairs
   - Owners having to fund repair works and costs associated with litigation and the claim
   - Negative impact on the sale ability of apartments in the complex whist the claim remains unresolved
   - Being overtaken by events such as the Fire Order served by Council

4. The options open to the Owners Corporation were to have its solicitors write continuously to the insurer or to commence proceedings in the District Court. The latter course of action, whilst possible, would have involved Owners in further expense.

5. The defects claim process has already involved Owners in costs in excess of $150,000 in legal fees and the fees of building, engineering and fire consultants.

6. The Owners Corporation had had to fund from its own resources emergency repairs to those defects where repairs could not wait and the amenity of owners was being seriously impacted e.g. by leaks.

7. The Owners Corporation remains liable for timely repair and maintenance of the buildings irrespective of the fact that defects requiring attention have been identified as relating to original structural work by the builder.

8. A Fire Order has been served on the Owners Corporation which obliges it to take immediate action to remedy Fire Defects.

   The Owners Corporation is liable to comply with the Fire Order by paying for further reports by its fire consultants and contracting for the work to be done in the timeframe set by Council, despite the existence of an ongoing claim against the HOW insurer.

9. The insurer continues to question its liability under the HOW policy in respect of many fire safety measure that it deems to be non-structural and therefore outside the scope of its cover, despite these defects relating to fire safety measures mandated in the original design of the building and required for

the safety of occupants.

**Failure of the Certification Process**

1. The existence of building defects on the scale identified, the failure to install mandated fire safety systems point to a failure of the certification process for new buildings.

2. The Fire Order includes non-compliance with both Australian Standards and the BCA as well as failures to implement "Alternative Solutions" submitted as part of the building's original certification process. *In other words, alternative solutions were documented at the time of construction to deal with prima facie non-compliances. These "alternative solution" measures were intended to allow the building to be "deemed to satisfy" the statutory requirements. However many of the works required were never implemented by the builder (e.g. smoke alarms in car park, thermal detectors in apartments, sprinkler protection etc.) but it still passed.*

3. For 5 years, every year, the Owners Corporation obtained the necessary assurances form a fire certifying contractor to enable it to sign its Annual Fire Safety Statement, until it engaged consultants who identified extensive non-compliance. This must call into question both the qualifications of those performing annual inspections and the requirements placed upon them.

## RESIDENTIAL STRATA SCHEME

## DEFECT CASE STUDY – BASED ON EXPERIENCE

The following is a chronology of ***a fully residential strata scheme's experience*** in attempting to rectify defects it and its experts have noted and referred to the relevant building and/or developer.

1. The strata scheme had an interim occupation certificate submitted to the Local Council by a private certifier to allow original owners to occupy lots (units) under license. This certificate was accompanied by incomplete/illegible certifications from plumbers, electricians etc.

2. A final occupation certificate was subsequently submitted to Council by the private certifier based on the previous incomplete/illegible certifications attached to the interim occupation certificate. The OC understands from discussion with Council Officers the Local Council does not review the content of occupation certificates and/or the completeness and accuracy of the certificates attached thereto as it has no responsibility for this. It also understands from its experts that many private certifiers do not visit building sites to ensure building works are completed in accordance with Australian Building Standards as they rely on certifications provided by tradesmen, architects, engineers and the like. Verbal legal advice has also indicated that private certifiers do not have the same level of professional standards applied to them as would an architect, plumber, builder, electrician or engineer, which makes it more difficult to claim damages for poor performance against them.

**Recommendations:**

- Interim and final occupation certificates must be issued to the relevant Local Council who is to be required to review the certificate for completeness, accuracy and compliance of relevant certified documents from tradespeople, builders and developers to ensure corks are of the required standard.
- Private certifiers should have the same professional standards applied to them as plumbers, developers, and builders architect etc. to ensure works they certify via an occupation certificate are of the required standard.
- Private certifiers should be liable at law for ensuring building works meet the required standards as prescribed by relevant legislation.
- Final occupation certificate should be registered with the strata plan at the Lands and Titles Office.
- The title of the strata plan should bear reference to the completion date as defined by the legislation to ensure there is no confusion for successive owners in relation to warranty periods etc.
- Consideration should be given to unequivocally defining the completion date for all strata plans. This should be the registration date of the plan in the interests of the developer, builder and owners.

3. The developer appointed the initial strata manager who was a relation of the builder and also had little or no previous experience as a strata manager. Defect noted by owners and the Executive Committee (EC) were initially referred to the strata manager, at the manager's request, for referral in good faith to the builder in expectation that appropriate remedial action would be taken in a timely manner.

4. At the first AGM the OC was not apparently presented with all the required documents as prescribed by Schedule 2 to the Strata Schemes Management Act. That is, when the OC was dealing with defects it became aware that it did not have access to all of the relevant plans and documents required. When these were requested from the strata manager, developer, builder and private certifier, they indicated they did not have them and referred the OC to architects, plumbers, engineers and electricians involved with the construction of the scheme. This complicated and delayed matters considerably when the OC engaged an expert to provide a Defects Report within the Building Warranty period (refer 9. Below).

**Recommendations:**

- Regulations need to be in place to ensure no person with a relationship and/or perceived relationship with the developer or builder should be appointed as a Strata Manager.
- The developer should not appoint the first strata manager. The first strata Manager should be appointed by the owner's corporation within a month of the first AGM.
- The regulations should specify the documents that should be presented by the first owner (e. g. developer) to the first AGM to be retained as part of the strata plan's records for perpetuity. These should in dude the following:
    - The development consents
    - Occupation certificates
    - Compliance certificates
    - Construction contract
    - Fire safety certificates
    - As-built drawings, particularly for services
    - Sewerage line diagrams
    - Maintenance and service manuals
    - Warranties for plant and equipment
    - Depreciation schedules (if any)
    - Any valuation of the building

5. During the first five to six years after the complex was completed the builder returned to rectify defects in the scheme. However, the rectification work was generally of an unsatisfactory standard to the owners and the Executive Committee (EC). Other work was promised to owners and EC but never eventuated.

6. Matters reported to the builder as soon as the EC or relevant owners/residents became aware included fire safety matters such as having fire sprinklers adjacent to the main electrical switch board. The EC in frustration took action itself to rectify this matter in the interests of safety soon after the defect was confirmed as a safety concern by the defect report.

**Recommendations:**

- Owners and owner's corporations should receive education on matters which are indicative of problems with strata managers and steps to take to improve performance and/or terminate their contractual arrangements.
- The construction contract should be one of the documents required to be presented to the owner's corporation at the first AGM.
- The construction contract should unequivocally define the completion date(s) for the strata plan in accordance with the legislation.
- The original fire safety certification should be performed by an independent competent person such as a Fire Safety Engineer and/or qualified Local Council employee.

7. After approximately five years after completion of the scheme the EC took action through an AGM to terminate the services of the first strata manager due to doubts on the standard of their performance in looking after the interest of all owners.

**Recommendations:**

- EC needs to be responsible for exercising the owner's corporation's rights and obligations in ensuring strata managers and relevant contractors (including the builder/developer) are performing in accordance with their responsibilities as specified by relevant contracts.
- The EC should be required to tender for a strata manager with written fully costed proposal for services to be provided by at least three (3) prospective strata managers being discussed with the EC.
- The EC should then be responsible for recommending the appointment of a strata manager to a general meeting of the plan.

- Financial reporting should be on an accrual accounting basis providing monthly reporting of the bank reconciliation, actual revenue and expenses against budget and financial position consistent with best financial management practice.

8. The EC also became dissatisfied with the builder's rectification work; and, when the work the builder had agreed to remediate was not being performed.

9. The EC then recommended a full defect report be performed before the Building Warranty period of seven years expired. There was some owner resistance to this at the relevant AGM where the relevant motion was put and passed.

10. The resistance, the EC understands, was due in part to the general lack of understanding by owners of the implications for them in respect of the Owners Corporation (OC) obligation to maintain and repair common property to a proper and serviceable standard under section 62 of the Strata Schemes Management Act. The owners were also unaware that the cost of rectifying defects outside the warranty period would be their collective responsibility.

11. The EC and owners also became aware around this time that Home Warranty Insurance did not apply to their strata scheme as the ***all residential complex*** was of more than three storeys. Some owners at the time indicated they would undertake repairs to their own lots at their cost without understanding the full implications to them and successive owners being responsible for future maintenance and repair of what actually was common property (e.g. shower hobs, waterproofing to common walls etc.) This confirmed the EC belief that most owners in the strata scheme did not understand the relevant legislation and/or its implications and relied heavily on the EC to ensure their collective interest are safeguarded.

**Recommendations:**

- Owners and owner's corporations should receive education on the legislation and best practice in living in and managing a strata scheme.
- All conveyances/solicitors should be required to provide the relevant home building warranty insurance policy to prospective purchasers of properties and provide them with written notification of their rights and obligations in respect to or lack of home building warranty insurance.
- Home warranty insurance should be compulsory for all residential dwellings to provide ready recourse to owners for defective building works without the need for expensive negotiation and/or litigation processes.

12. The OC was advised by lawyers it was able to make a claim within the Building Warranty period of seven years.

13. The defects and expert reports received at significant cost to owners (through special levies) indicated to the EC many defects required rectification across the strata scheme of up to $2m including the following types:
    a. Fire Safety – including fire sprinkler installed adjacent to main electrical switch board not allowed under AS3000; utility pipes not fire sealed in a bulkhead in a common area; fire doors not installed correctly (i.e. jamming and/or with large gaps under them; mechanical ventilation ducting not installed with fire dampers; sprinkler pipes protruding through the ventilation ducting; penetrations through concrete slabs not fire sealed; and, fire sprinklers not installed in accordance with relevant standard.
    b. Waterproofing failure – including water penetrations in bathroom shower hobs and walls; water penetration through lot walls to common hallways; no waterstop at the balcony slab edge leading to efflorescence and tile bed delaminating from the slab below, and, lack of flashing and/or weep holes leading to damp and mould in lots.
    c. Sewer pipes not installed to required fall with the risk of flooding to ground floor lots. There was no sewer drawn for one building on the required sewer diagram.
    d. Many sliding door frames not properly fixed. Doors as a result didn't open smoothly, didn't lock

and/or have large gaps at the top.

e. Many floor tiles on balconies, in bathrooms, in ensuites and laundries are due to lack of expansion joints.

**Recommendations:**

- The original fire safety certifications should be performed by an independent competent person such as a Fire Safety Engineer and/or qualified Local Council employee.
- Private and Local Council Certifiers should take and be responsible for ensuring dwellings are built in accordance with the BCA and be able to be held accountable for defects through their professional indemnity insurance.
- All conveyancers/solicitors should be required by legislation to advise prospective purchases in strata schemes that they may be required to pay special levies for legal fees and/or defects and/or maintenance of common property where the sinking fund is insufficient to meet maintenance costs.
- All conveyancers/solicitors should be required by legislation to obtain the construction contract and/or the completion date (for building warranty purposes) for provision to prospective purchases in any strata scheme, as it should form part of the documentation retained by a strata scheme (References under 4. above bears reference).

14. The original lawyer's fees had to be paid in full before the relevant file would be released to their replacement in accordance with the agreement.

15. The OC negotiated with the original lawyers for a reimbursement of the fees considered unreasonable and/or referring the matter to an appropriate authority for arbitration. After negotiation about 10% of the original lawyer's fees were received in an ex gratia payment to the OC.

16. A Supreme Court Order was issued in June 2012 to ensure the developer's experts received access to all of the property (i.e. units and common property) to assess the accuracy of the OC's expert's defect report.

17. In arranging this access there have been difficulty in the defendant's expert gaining access within the time constraints of the Supreme Court Order. This has mainly been due to that expert not being available in a date/time schedule organized by the Strata Manager on behalf of the OC. This may result in further delay in resolving the defects in a timely manner.

**Conclusion**

When asked by anyone of our friends as to whether we like our new unit we reply as follows;

1. We like the unit and the ability to just lock it up and travel – the reason we downsized from a 4 bedroom house.
2. We thought as we would be moving into a "new" house we would be moving to a building built properly and of good standard without any need for repair or renovation- thus saving costs.
3. Also we thought that the new building would be under a warranty period and poor building would be covered by a Builder's Warranty Insurance.
4. We were wrong on counts 2. To 3. Above and as such could not recommend any person to downsize into an apartment in New South Wales.
5. Our experience has been with defects and the continual need for special levies to pay for defect reports, expert reports and legal fees to protect our right to live in a building of the required standard and safeguard the value of our home.

Therefore, firstly the regulation and then the education related to strata developments needs to be strengthened to ensure potential and current owners are fully aware of the issues, limitations and their rights when/if they contemplate buying into a strata plan.

We have only learnt the lessons we have through an unpleasant and stressful experience over approximately seven years because we were interested in protecting our asset.

Most of our education in relation to strata has occurred through experience which has been enriched through membership of the Owners Corporation Network (OCN) and discussion with the experts involved in providing reports on various defects. It is sincerely recommended all strata owners consider joining the OCN to keep abreast of ever evolving strata issues affecting strata life. In this regard attached also is a submission made to the OCN by us in March 2012 on the same subject.

## 137 APARTMENTS IN WATERLOO

## BUILDING DEFECT CLAIM

Date of Practical Completion: 28 May 2003

HOW Insurance Policy: First resort

### CHRONOLOGY

**2003 to 2008**

Builder attends site from time to time to make repairs, many ineffectual.

Annual Fire Safety Certificate is signed each year after inspection by Certifying Contractor that building is compliant (after rectification of maintenance matters relating to operation of detectors, exist signs, fire door clearances etc.).

**2008**

EC chair proposes that a Defects Report be prepared as statutory warranty and HOW periods are about to run out (no initiative from strata manager)

Building consultant engaged

Fire Services Consultant engaged

**October 2008**

Building Consultant submits first Defects Report to Owners Corp

**November 2009**

Building Consultant submits second Defects Report to Owners Corp

Structural defects identified include:

- Numerous failed balcony membranes
- Multiple control joint leaks in podium slab
- Roof leaks
- Spalling concrete
- Swimming pool tiling
- Multiple leaks to lift lobby glazing at all levels

Fire Safety Consultant submits report on Essential Fire Safety Measures

Non compliances with Australian Standards and BCA identified including failure to implement "Alternative Solutions" documented at time of construction and issue of occupation certificate include:

- Fire dampers and fire collars incorrectly installed in the majority of apartments
- No access panels in apartments for inspection of Fire Dampers
- No smoke alarms installed throughout the basement car park
- No thermal detector units at entrances to apartments
- No fire seals on fire stair doors
- No sprinkler system installed to protect fire shutter
- Fire stairs shared with hot water services

**December 2009 Claim lodged with insurer**

Lawyers engaged and first report served on insurer.

Lawyer files proceedings against builder in District Court, Proceedings kept on hold.

**January 2010 to July 2012 – 2.5 years**

Negotiations between lawyers for the Owners Corporation and lawyers for the insurer.

Site visits by insurer and builder's consultants but extended periods of inactivity.

District Court proceedings remain on hold as Owners Corporation does not have funds to initiate further action.

**February 2012**

Owners Corporation is served with a Fire Order by City of Sydney Council. The Fire Order identifies the defects previously identified by the OC's consultants together with additional fire non-compliance not detailed in the consultant's report. Time frame allowed for compliance ranges from 3 months for the most serious defects to 12 months for the least.

**May 2012**

Builder placed in Voluntary Administration

**July 2012**

Letter writing campaign by Executive Committee to the insurer's HOW insurance manager highlighting the failure of the insurer to determine issues.

**Aug 2012**

Round table meeting with insurer agrees on a Scope of Works for insurer to tender out.

Scope of Words does not include all the defects claimed and negotiations will continue on some others.

Most conspicuously absent from the agreed Scope of Works are many of the Fire Defects identified by the fire services consultants and the subject of a Current Fire Order from Sydney City Council.

## 34 UNITS IN WAHROONGA

The building consists of 34 units. All except one is owner-occupied. It is an over-55 development. There are two floors of residences with garages in the basement.

The building was completed in June 2005 and certified accordingly.

The Body Corporate was formed in September 2006. The first AGM was held in that month.

Reports of water ingress in unites and/or garages were reported by a number of residents, and problems with the electrical system became apparent.

In July 2007 one of the residents commissioned an independent report of the water ingress in his unit. This report was forwarded to the builder. The Office of Fair Trading was also notified.

On 6th August 2007 a consultant wrote that he had been appointed by the builder to review and respond to the issues raised in this report.

This inspection was done on 29th August 2007 and he notified us that the builder was prepared to rectify all items that he the consultant considered to be legitimate defects.

He also advised that he had been contacted by the OFT and arranged to meet their representative (Mr Jack Horsfall) on 9th October 2007. We engaged a consulting engineer to represent us at this meeting.

This meeting resulted in an order from the OFT for the builder to rectify the problems outlines in the engineer's report. A scope of works was drawn up and the completion date was set for 14th December 2007. We also pointed out to the builder a number of electrical defects and their consultant agreed to ask Energy Australia to do a full audit of the electrical work. The builder would then contact the original electrician to rectify any defective work.

At our AGM in November 2007it was resolved to ask the consulting engineer to carry out a detailed inspection of the property and produce a report on building defects in Common Property and in individual lots. This report would for a basis of a claim on the builder.

The work ordered by the OFT was not completed by the due date and at the ECM on 19th May 2008 I proposed that we seek further advice from the OFT. This motion was carried and it was agreed that if no progress was made in the next fortnight we would do so. We were subsequently advised (on May 28) that the rectification works had been completed. On advice from our engineer, who was not satisfied that this was so, we did not "sign off" as requested.

The minutes of the ECM on 19th January 2009 revealed that the survey of building defects report (prepared by our consulting engineer and forwarded to the builder) had "received" a very negative preliminary response from "the builder's representative". Our consulting engineer was asked to revise and edit the report and remove all items that are not building defects.

At the ECM (March 11 2010) it was resolved that we have prepared a budget estimate costing report (Scott Schedule) of the building defects and electrical defects, and this to form the basis of a claim with CTTT. A hearing was scheduled for May 17th 2010. This postponed, due to the builder being ill, to 26th July 2010.

At an EGM held on 22nd July 2010 we appointed Solicitors to act on our behalf at the CTTT hearing.

The matter progressed through the Tribunal. First with negotiations with the builder, and then after his bankruptcy, with Allianz Insurance. They prepared and independent report on the defects. This report agreed on most aspects with the Scott Schedule prepared by our engineer. In May 2011 we agreed to accept their offer of $450,000 to cover our costs of engaging a remedial builder to rectify the defects and an electrical contractor to rectify the faulty electrical work.

While not fully covering the cost of the repairs and our legal costs we considered that this was a good outcome after nearly five years of negotiations. Special Levies raised during the period amounted to less than an average of $1,000 per unit.

The repairs to the electrical system have now been complete. They resulted in the switchboard being virtually rebuilt and a number of potentially dangerous problems being eliminated. The contractor has expressed his amazement that the original work was certified.

The builders are now rectifying the water ingress problems. These have been mainly to very poor sealing and drainage of planter boxes. The problem was magnified by a poor choice of plants in the planter boxes. Once again the builders have commented on the poor workmanship of the builder.

The whole process has been a long one. This has been due to;

1. The pretense by the builder to rectify the problem.
2. The willingness of residents to believe that he would eventually do so.
3. The reluctance of owners to spend money on legal advice.
4. The lack of experience on executive committees. Fortunately we were successful in our dispute as we had chairmen who were prepared to do the hard yards.

This is not surprising as very few residents had any experience of Strata living. What does surprise me is that they make no attempt to educate themselves. They take a position on the Executive Committee without any idea of the responsibility involved.

Strata managers are of little help when it comes to legal questions and it is essential in a defect dispute that the advice of a strata solicitor is sought sooner rather than later.

Finally, my thanks to your organization for the help I have received in the past five years. It is comforting to know that the problems we have had are not unique.

## 134 UNITS IN KINGS CROSS

This building was finished in 2001. It won a number of awards for design, including Best Residential Apartment Building in the World, in the annual awards held by World Architecture magazine.

As soon as Owners bought and moved in, a number of building defects became apparent. The building was also managed by the developer, whose building manager said there were no defects at all. When pressed he wrote down, on the back of an envelope, that a door to the car park didn't close properly. Developers also refused to concede there were any defects in the building at all and it was subsequently found that they were in secret talks with the Chair of the Executive Committee (EC) to cover up the defects.

The EC Chair was deposed and developer related management was sacked from the building - despite an agreement signed by the strata management company they'd appointed (unknown to the EC at the time) that, under no circumstances, could their tenure be broken. They threatened legal action.

Experts were brought in to assess the defeats and they estimated that they would cost around $6 million to fix. These included water penetration through block cavity walls; car park louvers breaking and falling apart; extensive water leaks on the podium level; carpark floor cracking; building facade spalling; the failure of many units' sliding doors on the balconies as the doors were too heavy for the tracks; the premature degradation/defective installation of paved floors (internal common areas and externally; ceiling failures in a number of apartments which led to either their collapse or their imminent collapse through defective fixing/ceiling section collapses; building air pressurisation defects leading to excessive noise emission and defective operation of elevators; the defective installation of windows covered by external louvres; and balustrade framing on the balconies the wrong size for the panes of glass used -which led to panes of glass falling out in the wind and smashing on to the ground far below, a massive safety risk both to pedestrians and to the unit residents. (See Appendix)

The developer refused to negotiate on every occasion they were approached. Finally, the decision was taken, reluctantly, knowing the huge costs it would entail, to start legal action to force the developer to fulfil its duty of rectifying the defects in the building.

In February 2007 the Supreme Court of NSW appointed a Referee to inquire into all questions of liability for the alleged defects and the costs of rectification. The owner’s corporation and developer appointed expert engineers to jointly assist them and the Referee.

In November and December 2007 and April 2008 the Referee reported to the Court that Australand was liable for almost all of the defects.

Settlement discussions broke down when the developer refused to fund engineer independent of their company to monitor the performance of the work. It was now dear that the owner’s corporation should seek a sum of money to carry out the rectification work as there was no trust between the parties.

At the end of 2008 the developer resisted the return of the matter to the Referee to make recommendations to the Court on the amount of money to be awarded to the OC. The owner’s corporation had difficulties with the experts it engaged to prepare detailed cost estimates. Many delayed and then finally refused to give quotes for the work as they said they had other contracts with the developer that might be put in jeopardy were they to supply such figures. Others then had to be briefed and contracted in their place. Other companies were also approached by the developer directly and then withdrew from the process. An apparently simple exercise needed to conclude the matter then became a lengthy, and almost impossibly difficult exercise. The developer also tried legally to prevent the costing evidence from being admitted into evidence.

On 6 February 2009 the Court ordered that the issue of the cost of the rectification works go 10 the Referee immediately and that the owners corporation's costing evidence be admitted.

The OC expert estimated the cost of the work at $5,394,541.70 (including GST, Home Owners Warranty Insurance, site facilities) plus project management of $647,345.00 (12%), a total of $6,041,886.71.

The developer's lawyer advised the Court on 6 February 2009 that the developer estimated the cost of the work to be about $1,600,000.00.

At mediation, the developer made a verbal offer to the OC to rectify the defects, which the OC accepted to finish the matter. When the offer was finally produced in writing, it was significantly different to the verbal offer made. The OC was left instead to seek a sum of money from the developer to carry out the rectification work.

Prior to the final hearing before the Referee, the OC's lawyers were able to look at the developer's estimate of costs. This had now risen to $2.2 million. The developer's lawyers were able to look at the OC lawyers' expert report with its $6 million estimate. On seeing the report, the developer's lawyers said they were willing to enter into immediate negotiations with the OC before the Referee's hearing began in the hope of settling. At this stage they were clearly alarmed at the potential cost to them if the report was adopted in full. There was no hint that they saw weaknesses in the report.

Having reviewed what was needed to rectify defects (rather than a best-case 'wish list') the OC's lawyers suggested that $4 million would be a reasonable offer for the developer to make which would mean the OC would be able to cover the costs of rectifying most of its defects. Anything less would mean a substantial special levy. The developer made a much lower offer.

At the hearing, the expert chosen and appointed by the OC's lawyers broke down under cross-examination by the developer's counsel. His report was then dismissed. The Referee said he wasn't happy with the processes of the Report.

The OC's lawyers then asked the judge to accept a contract as proof of costs. He awarded the OC the $819,000 the two sides had already agreed upon, but dismissed the rest of the case, saying that delays in the case on the part of the 0C's lawyers were to blame. The lawyers explained those delays as having been caused by the experts engaged to provide costings, and in having those costings constantly checked and rechecked.

After independent legal advice, the owners, exhausted and broke from all the legal costs of the process, agreed not to try to appeal the judge's ruling. The case had ultimately been lost because of delays in its presentation, with the lawyers saying all the delays caused by the developer were the cause.

Owners voted for 2 special levies to pay for the defects rectification to add to the $819,000 awarded by the court for a series of rectifications that are very different to the original solutions that had been costed.

Defects rectification work started in February 2010, fully funded by owners. A number of owners in other Sydney buildings by the same developer, alarmed and despondent at this failure to have the developer fix its building, dropped their own legal cases and settled out of court. The developer was understood to have celebrated.

**Appendix: Detailed Breakdown of Defects and Experts' Costings**

1. Block cavity walls (water penetration)
   The Referee has concluded that water is ponding in the cavity block walls and that there was a failure to complete the render to the external walls in a proper and workmanlike manner so that the weep-holes in the external block perpends were able to function as intended. The Referee has recommended that the repair specification developed by the joint experts be implemented. [$517,916.67]

2. Car park louvres (premature degradation)
   The Referee noted that [the developer] had agreed to undertake the complete replacement of the car park louvres in accordance with a proposal reviewed by the joint experts. [$710,050.00]

3. Podium level leaks (leaks by pool and from podium level down into car park)
   The Referee noted that as at December 2007, the joint experts had identified some likely sources of the water leakage and in April 2008 he noted there were further agreed recommendations for rectification measures. [$374,961.26]

4. Pool pavers - paint spatters
   The Referee found that the pavers are in for purpose, replacement is not justified and recommended that no award of damages be made for this item.

5. Cracking of car park floors
   The Referee noted that [the developer] had agreed to undertake repairs to the cracks in the car park floors in accordance with the repair specification provided by the joint experts. [$108,951.76]

6. Spalling of the facade
   The Referee noted that [the developer] had agreed to undertake the work recommended by the joint experts. [$18,200.00]

7. Failure of Ile sliding door rollers
   The Referee has recommended that the rectification work sought by [the OC] be undertaken- inspection of every sliding door, replacement of rollers with roller type DR233/5, and repair of damage to seals or tracks attributed to failure of the original rollers. [$583,569.66]

8. Internal and external tiling (foyer and retail area)
   The Referee noted that [the developer] had agreed to replace the existing internal tiling to the entry foyer, concierge area and corridor to apartments 101,102 and 103 with a tile as selected by the OC (EG-0035). The Referee also noted that [the developer] had agreed to undertake the replacement of defective external tiles in the retail area and to make repairs to the external tiling to apartment 1901. [$128,299.32]

9. Failure of ceiling firings
   The Referee found that there is a building defect in respect of the glue fixing of the ceilings to the underside of the downturn ceiling beam which occurs in areas of the building where ceilings approach glass sliding doors or windows. The Referee has recommended that all such ceilings require rectification, whether they have already failed or not. Several alternative methods of rectification have been proposed.
   [$1,764,362.64]

10. Elevators/building pressurization
    The Referee noted that [the developer] had agreed to rectify the pressurization problem by blanking off the top vent to each lift shaft and construction of air locks at the elevator entry points at car park levels 2 and 3. [$99,465.00 or $106,665.00 depending upon whether the doors are hinged or automatic].

11. Facade louvres and sliding windows (non-motorized louvres and inability to clean windows safely)
    The Referee has recommended that external anchorage points be installed for the sliding windows which sit behind fixed horizontal louvres - to enable window cleaning to be safely carried out. [$9,984.00]

12. Balcony balustrades
    In early 2007 the OC became aware of five defects in the installation of the balcony balustrades and the summons was amended to include a claim for their rectification. The

Referee has recommended that the defects be rectified in accordance with the recommendations of the joint experts. [$491,360.33]

The above figures are exclusive of GST and preliminaries including site facilities, Home Owners Warranty Insurance and project management.

| | |
|---|---|
| The total of the cost estimates, including GST is | $5,394,541.70 |
| The cost of project management at 12% is | $647,345.00 |
| Giving an overall estimated project cost of | $6,041,886.71 |

## 200 APARTMENTS IN ST LEONARDS

The "high quality" development (over 3 storeys) was occupied in February 2004.

The builder of record was xxx (I say off record because it transpires that it was built almost entirely by contractors). xxx was the developer.

Building defects became evident in 2008 and a building audit conducted which was completed in January 2009.

The builder responded to the building audit report by saying in a brief email that they would address the issues when they were in a better financial position. Nothing more was heard from them.

The EC investigated "next steps" and sought legal advice eventually employing a Strata Lawyer to advise on the issue. The lawyer recommended more professional reports which were obtained including:

- Another full building audit
- Fire & Safety
- Rust and Corrosion Specialists
- Water Ingress Specialists

The matter is now before the Supreme Court. Professional and legal costs are in excess of $500,000 to date.

The defects have been valued on a Scott Schedule at $36M.

Examining this many units is extremely difficult, costly and time consuming and it appears that the builder has used every possible delaying tactic.

Other buildings in the general area that were constructed around the same time had better responses from their builders but with a not very good outcome - repairs which were carried out in response to a building defects claim have proved to be superficial and the Strata Plans are now having to repair their buildings at their own cost as their seven years have expired. This appears to be quite a common practice amongst some building companies - to offer fairly prompt repairs which last long enough to ensure that the period of claim has passed.

April 2012

## 339 APARTMENTS IN WAITARA

**Scope of the problem**
Total estimated rectification cost approx. $11,500,000. Major items include (approximates provided):

- Defective membrane $2.5m
- Lack of membrane balconies $2.75m
- Water penetration bathrooms $3m
- Water penetration to exterior walls $93,000
- Deteriorated masonry joints $400,000
- Slab movement $130,000
- Cracked, chipped, drummy tiling $45,500

It has been a struggle to have these issues accepted as defects, with the developer claiming they are maintenance. Where they have accepted responsibility, they are only willing to do what I call band aid repairs. They only seem to take you seriously when you can demonstrate the resolve to fight them all the way.

Without 339 lots we could not have possibly funded this litigation without special levies. Most owner's corporations would have taken whatever they were offered as they would not have had the resolve to fight on. This would have left the OC liable for millions of dollars of repairs further down the track.

**Legal Expert Fees**

$750,000+ and increasing. Estimated total $1,000,000+.

**Cost in human terms**

How do you measure the pressure on the EC as well as the inconvenience to owners/occupiers of the countless visits by experts from both sides and owners living with water ingress for a period of 5 years? Then we are still to go through the repair stage.

**Was complaint lodged with Office of Fair Trading?**

Yes, but moved to the Supreme Court list as over $500,000.

## 12 UNITS IN COLLAROY NSW

| | |
|---|---|
| Year Occupied: | 2006 |
| Lots: | 12 |
| Units: | 12 |
| Levels= | Three above ground. (5 levels in total – Basement Car park B1 & B2, Ground, Level 1, Level 2, Level 3) |
| Developer | |
| Builder: | |
| Strata Manager: | |
| Insurers | HOW - VERO |
| Scope of the problems: | • 2010 Engineers report to advise on defects to be included in Owners Corporation claim.<br>• 23.02.2010 Vero Assessment Summary Report.<br>• Majority of rectification works related to water proofing and corrosion issues. Basically the original builder used substandard angles that were not installed correctly for a property in such close proximity to the ocean, resulting in significant corrosion/rust. Other significant issues relate to incorrect installation of membranes at time of construction.<br>• 14.09.2011 Defect Rectification works scheduled to commence. Still ongoing as at September 2012 (works based off original assessment summary February 2010).<br>• 09.05.2012 Application to CTTT to contest VERO Assessment Summary denying 7 defects noted within the Report.<br>• 02.07.2012 Owners Corporation attended CTTT hearing, and successfully argued 7 additional defects to be included within the Warranty and rectification works required to be covered by VERO. Note that this would not have eventuated if not due to the diligence of the individual Owners on the Executive Committee - Rectification works are still subject to a further inspection and report from VERO.<br>• As at September 2012, inspection yet to take place. However it is scheduled to take place 14.09.2012, subsequent to this inspection the Owners Corporation will have to wait for VERO's determination, then wait for tenders on proposed scope of works, then wait for builders to be engaged by VERO, then wait for successful builder/tender to schedule in works. |
| Cost of Rectification | $340,000 to date (approximately $100,000 being argued with VERO at present). |
| Cost o1 Legal and expert reports | $9,000 |

| | |
|---|---|
| Cost in human terms | It has been comparable to a full time job, it has taken three years of committed follow up to get to the stage we are at now. The problem with this is that the original progression of the defect claim inspections / assessments commenced two and half years prior to the warranty period expiring, however due to the time frames in which it took to schedule in Vero, obtain relevant reports, allow times for access to individual units, have follow up inspection via the Home Owners Warranty regarding tile same, then receive their assessment summary, the warranty period expired. Meaning that any further variations that arise during the course of works are not covered (we can argue that similar defeats have been proven and accordingly should be covered, however this is an arduous process). This is an all too common scenario, although it is not stated, It is as though the HOW Insurer uses these stall tactics so as to remove the liability of further rectification works being claimed under warranty due to the warranty period expiring. Three years is a long time to progress defect rectification works, however based on the statistics of turnaround time, this may be considered quiet a fast turnaround which is a separate problem in itself.<br><br>We note that a very high percentage of new developments (i.e. constructions within the last 10 – 15 years) are subject to defect claims, and defect rectification works requiring to be addressed. The core problem relates to the minimum building standard required to be complied with being too low. If builders & developers were required to construct new developments to a higher minimum standard, the resulting defects in the years to come would be far less. We expect that finalisation of all building defects and associated variation works will not eventuate for at least a couple of years. The bulk of the rectification works have been addressed, however it is disappointing that the saga continues. Ultimately the individual Owners are the ones that lose out. This is due to the substandard works, there is seemingly no enforcement action to prevent builders/developers from declaring bankruptcy registering new business/trading names and continuing the same with new developments, there is a need for significant changes allowing recourse and accountability to builders &developers, not legislative changes imposing the burden onto individual Owners. |