1. **What kinds of plans should be signed off and declared by a statutory declaration?**

Any building work that requires Development Approval from the local council should undergo an easy to follow but co-ordinated sign off process.

Building works that require formal approval already undergo a review and compliance check or at least they are supposed to so getting a sign off is really recognising what should already happen and or exist so identify what already happens and exists under the approval process and adjust it so that it achieves the outcomes that are wanted.

Such applications and the plans relied on will involve in the majority of cases work and input from professional parties such as architects, drafts-people and engineers. So they have a duty of care as professional parties who are being relied on

As the reform debate which has led to this discussion paper and other reviews is aimed at proper accountability for one's own work and as these professionals are doing work which is critically important and which as a nearly universal rule builders and trade contractors cannot do by themselves then as a matter of first principle if a DA is needed or a Complying Development certificate is applied for then all parties whose work is used to allow actual building work to be carried out should be asked to verify that their work is site specific and NCC compliant.

Why is a statutory declaration required? Sounds nice and legal but if a duty of care is being imposed by statute then that duty arises from the fact that a party supplies work details which they know are to be used to obtain actual building approval so why is that any stronger if backed up by a statutory declaration. Works on paper but not administratively functional or necessary – especially if the "duty of care" is known and clear!

2. **Could plans be statutorily declared at the CC/CDC stages? If not, why not?**

Yes as this is when the application goes from what it will look like where on a site to "hey price and rely on these details to build it".

For years a builder has been required to build as per the contract plans and specifications and in doing so warrant that they are compliant with all laws which allows claims under the Home Building act statutory warranties against the builder even if they did ***not*** do the plans and specifications.

In reality parties such as architects and engineers are being paid to contribute a document or documents which they know will form part of a package of documents that are required to allow the construction certificate or CDC to be issued.

So they know from the minute they price a job and agree to do a job that their work will be relied on and consequently that their plans are to be signed off and will be reviewed by a certifying authority.

Presently there is a lot of speculation about what the actual role of a certifier is and this also needs to be made clearer.

Is a certifier acting as a reviewer of actual compliance with local conditions as well as the NCC and as such that what is before them is buildable at the specific site? If so do they have the actual base skills to determine issues such as structural stability, hydraulic functionality, acoustic rating

compliance, need for and functionality of mechanical services and fire safety measures as well as ingress egress issues – as examples.

The above is not a criticism of the skills required of and or actually available to parties who work as private certifiers. It is however a challenge to the perception that the certifying party is best placed to determine such critical individual aspects and whether there is an over reliance on these parties having professional indemnity insurance and being seen especially by legal parties – who operate ***in this area as a party who can contribute to settlement / resolution as they have a cheque book!***

3. **To what extent should changes to plans be submitted to the regulator?**

Why is the word regulator used when the discussion paper wording preceding q3 refers to consent authority and certifier whilst the underlying concept of a building commissioner being the regulator is in the discussion paper?

Working on the basis that the regulator in the context of Q3 is the party who is determining what is approved for a specific project then again noting that there already exists a process for changes affecting what is approved to be built in existence that needs to be identified and adjusted so that changes that affect as a general rule NCC compliance and or a projects specific outcome purpose should go back to the certifier whether that party is addressing the change request before or after the CC or CDC application is determined.

The Certifier would have a party independent obligation to determine if the change needs to go back to the party who has issued the DA for the work.

There needs to be a consideration of what if any work at the project affected by a "change application" can continue and the Certifier would need to issue a binding order as to what if any work was allowed to continue and what if any work was to be stopped until a decision on the change application was issued by the certifier.

4. **Should a statutory declaration accompany all variations to plans or only major variations?**

Why is a statutory declaration required if in the context of an application for a DA or a CC or a CDC or a "change application" the party who wants the approval issued knows that they have a statutory duty to "tell it as it is"?

Minor variations should not be included but until "major variations" are defined in building terms as opposed to statutory draft-person's language no clear answer can be given.

Is the change wanted or needed going to affect the structural or waterproof or acoustic or mechanical or fire or ingress egress integrity of what is to be built or what has been built? There must be certain aspects of work that the industry specifically relevant design parties, builders and relevant trade contractors can agree affect buildability, functionality and consequent compliance with the NCC's requirements – so they need to be asked rather than lawyers and strata representative groups!

5. **Are there any obstacles that would prevent a person from submitting a statutory declaration for variations? If so, what are those obstacles?**

Better starting point is "justify" why a statutory declaration is needed or put another way what does that achieve.

Noting the reference to a chain of responsibility and the introduction of a more broadly based statutory duty which will be set up to make access to a party responsible for the wrong found to actually exist easier for end users and as put forward other affected ***parties*** what more does a statutory declaration add – other than a paper based additional administrative duty?

A party submitting a document – for reward or otherwise – will in nearly all cases already be recognised as owing a duty to do their work properly to another party who is in the overall construction chain.

They can be sued if what they have presented is not done to the appropriate standard so if the statutory duty simplifies the ability to rely on the chain of responsibility and makes a party responsible for their work then requiring a statutory declaration does not add to that?

Q: Is there a lawyer or jp in the house? - Note they are not attesting to the documents being of the required standard and or properly detail***ed*** and or fit for purpose - they are attesting that "BOB" signed this in front of me and Bob attests that all is in order which is what the statutory and contract duty requires anyway.

Sounds good and may well work on paper only but does not add any value!

6. **What other options could be workable if there are variations to plans?**

The question is way too broad.

Variations initiated when and by who for what reason need to be known!

Based on having worked on site and in head office administration experience as well as having written and reviewed 1000's of construction contracts – head contractor, trade contractor, consultant services and supply – the need for changes to work occurs if the design details are changed by the client and or are in conflict between certain elements particularly service elements fitting into the building envelope and or complying with aspects such as ingress and egress requirements.

Defects on the other hand arise from either work done badly even if it looks ok at first blush or from buildability risks inherent in designs that are not properly risk assessed – such as flat deck balconies and the high level of waterproofing issues found in buildings with flat deck balconies.

Contracts between the parties actually involved in the design of, building of and inspection of what will be physically built at a site will have a process for changes to be made.

So is this existing regime covered by the question asked or is it directed to recording who changed what and who checked what so that the chain of responsibility and the liability that attaches from being responsible for one's own work is protected and traceable?

What is the change wanted or needed going to affect and how significant is it re the structural or waterproof or acoustic or mechanical or fire or ingress egress integrity of what is to be built or what has been built?

Or ***is*** the question put forward by the OFT relevant to changes to things like tiles used in bathrooms or type of hinge used in kitchen cabinets etc?

There must be certain aspects of work that the industry - specifically relevant design parties, builders and relevant trade contractors - can agree affect buildability, functionality and consequent compliance with the NCC's requirements and or the DA terms as to the appearance of the structure from the street, the size density and location of the building – so they need to be asked rather than lawyers and strata representative groups!

Without deliberately being too cynical it needs to be asked if the change requested relates to achieving a higher investment return for a developer and as such attempting to adjust the DA terms and or using private certifiers to change things like the location of walls adjacent to neighbouring properties or the number of and size of units?

Is the change required because the details underpinning the CC or CDC being issued have conflicts and without the change the buildability of what is approved or seeking to be approved so as to allow a CC or CDC to be issued is prejudiced by risk as to it being fit for purpose etc?

Industry needs to advise on these aspects and that means getting direct examples from actual builders and design parties to establish what works and what does not re time and cost as well as administrative aspects such as who pays for the change and if the bank actually paying for the work helps or hinders the change being accommodated.

Such examples could also help establish in real terms what are major and minor variations and ***what*** things, parties and events affect building as to time to do the work, the cost to do the work, programming with third parties, resourcing the works and quality completion are affected !

7. **How could the modifications process be made simpler and more robust?**

A good start would be for someone or even better some people in the present public service to have a better understanding of what actually happens in real world building matters so more accurate real world changes can be acted upon as opposed to asking everyone to put their 2 cents in and saying it will be analysed.

Then using real world examples and noting studies have determined that the better co-ordinated and risk checked the documents relied on to get a CC or a CDC are the less need for variations and the less chance for missed detail

8. **How should plans be provided to, or accessed by, the Building Commissioner**?

The Building Commissioner has what specific duties and functions concerning what work apart from a very generalised role to act as "the consolidated regulator of building in NSW"?

This needs to be explained in great detail noting someone will be appointed by the end of August 2019 noting there is no funding for the Building Commissioner let alone support staff and or facilities.

Once what actual roles, duties and functions a building commission has are agreed then what the commission requires and who they get it from can be workshopped so that the outcomes wanted have a better chance of being achieved.

Would the provision any documents to a Building commissioner in matters like the above be of any actual benefit other than for hindsight investigation and liability assignment as well as disciplinary considerations?

Further knowing that problems exist and need to be better controlled if not eliminated from yet to be built projects and resolved for existing buildings what documents in the context of what is to be done regarding the whole of the building parties chain of responsibility need to be provide or made available from where etc.

If the Building Commissioner has a co-ordinated whole of building process and whole of building industry role and is supported by resources and allowed to do things virtually independent of "political" issues than the Building Commissioner as the head of an independent building commission can improve outcomes for the Government, consumers and industry parties.

Overseas models verify that this can be done and should be reviewed as should other Australian jurisdictions.

Additionally some historical Australian administrative regulatory bodies as well as some existing administrative regulatory bodies, show that better results can be achieved than are being achieved in NSW in areas such as consumer builder warranty protection.

All such models can be improved but you don't need a model unless you know what you want to do and determine what it is allowed to do to achieve the required outcomes.

For those unfamiliar with the building world the basis of most government initiatives where the end user is a consumer is the protection of the consumer but consumer protection is an outcome of what is done not if itself something that is done.

Parliaments also have a tendency to impose things on parties under the banner of it being required to achieve better outcomes.

In building as a whole with aspects such as certification, home builder warranty cover, dispute resolution and security of payment what has been attempted is well intended and works to a degree but if it can be made to work better than it needs to be looked at and not blocked by "apostles" of we have a process / there is a process for that already and changes are not in our area of responsibility.

A Building Commissioner and IBC structure can remove these roadblocks and by better co-ordinating aspects with parties being deliberately ***aware*** of what is required problems can be reduced.

So not much more can be said until it is determined exactly what the Building Commissioner will do and be resourced to do.

The discussion paper and for that matter an Upper House Inquiry have been put forward in response to highly publicised issues involving some high rise and or multi residence works.

But has anyone yet actually determined what has gone wrong at each of these projects so as to allow it to be stated what was not done correctly by what party and what in the future should be done differently?

Opal Tower based on a seminar comment by a senior public works engineer suffered damage due to a metal work shop drawing not detailing what the structural design required and that omission not being picked up in the prefabrication review and sign off.

Mascot Towers involves a building allegedly even actually sinking but resting over what historically would have been a "wetland aka swamp" and which in a period of drought and variable rainfall with possibly the impact of other later developments has suffered damage.

Has the drought affected the hydrostatic pressure created by the underlying water-table and as a result of the water table rising and or falling caused the building to move over the last what 3, 5, 7 even 10 years?

Zetland units being well over 10 years old but as with Mascot Towers having already been through a review by expert lawyers even a Court case has water proofing issues but are such issues caused by a bad design which never worked as it was supposed to and or a design and work in compliance with that design that needed but did or did not get the required maintenance or was the material used to waterproof in the relevant areas only ever going to last a period which was always unsatisfactory or was it a combination of all such things?

Erskineville the contaminated site seems to be a matter which did not involve the builder but did require the developer do and or get something done but as administered by whatever parties was not signed off and declared safe for work to commence and be carried out let alone completed.

The media including so called professional social media platforms say that the above are but the tip of the iceberg yet despite asking existing Government agencies for detailed data and analysis of defects work claims nothing has been provided – apart from some generic but classified as commercial in confidence HBCF tables setting out the area of work in what of the 9 project classifications of HBCF covered work type and type of defect in year of policy issue.

Has any change to building and or design practices been implemented based on this data?

If not, why not?

If the data collected is not being used to identify risks and the causes of problems then what is being collected and what if any use is actually made of it?

Relevant data collection and analysis needs to be undertaken to identify and remove risks and this is clearly something the building commissioner's support administration should do.

Once a data base is collected and properly analysed it can lead to warnings as to "risk matters' being issued so that parties in the design stage, building stages and inspection stages can be aware of risks and act to remove them or at least minimise the impact of them.

9. **What types of documents should 'building designers' provide to the Building Commissioner?**

See answer to question 8 above.

Building designers are what specific parties doing what re a project and acting for whom?

When a DA is lodged and as partly acknowledged by the discussion paper the required to build details do not yet exist as what is submitted relates to what it looks like how high and other where it is and what it looks like details are supplied.

These details are provided to determine if the project will be approved to be built.

When a CDC or the CC is applied for and approval to build is obtained there should exist at the certifier a "complete set" of issued for construction documents and applicable specification.

Where aspects of work are to be finalised during the course of works ***then the duty owed to the "State" will be reported to the principal certifying party who will need to specifically determine if the DA terms need to be adjusted or the change is still consistent with the DA.***

If the DA needs to be adjusted then that will need to be done and if consequently the works are "stopped whilst a decision is made re the change" then where the client is the party responsible for the original design and it allowing the CC to be issued the client will be required to compensate for any impact on the progress of the works.

10. **In what circumstances would it be difficult to document performance solutions and their compliance with the BCA?**

This is an question where designers and builders as well as specific trades such as electrical, acoustic, and mechanical should be asked what aspects of work required or involved a performance solution to be used and how that was approved documented and certified. Real world work examples could be put forward to back up what was being discussed.

This is to reality test what is already done and have a firm understanding of what is relied upon.

Additionally a review of what worked and what did not so as to create a risk list of what has been done should be undertaken as such data would allow the Building Commission to remove types of work from the what will be done regime based on a known but objective risk analysis framework.

There is not much to be learned from parties who are not qualified to actually do the specific work in question being allowed to create a system of call it compliance checking, recording and review of proposed work.

Whilst no doubt compliance with the NCC underpins this question and as a result safe workable building elements more could be learned and from that understood if specific work aspects were identified and dealt with which is why relevant actual active building parties need to contribute.

11. Would a performance solution report be valuable as part of this process? If not, why not?

Is this to allow more consistent and reliable approvals to be issued in the case of works that alter the CC scope and or affect compliance with the DA terms or is this more about recording in support of the broader chain of responsibility evidence of who determined and who required what to be done?

If the report format is going to be a template created by non-work relevant building parties it risks not being as good as say an industry sector created content required check list which any performance solution details would have to accommodate so as to verify the performance solution would be fit for purpose, work as required and be buildable based on the actual site conditions.

Some have suggested aspects like fire safety regimes should be peer checked, so another consideration is if the "solution" is going to need acceptance by a certifier before work is done or if it is simply "hey builder" this is what you are required to do.

Accountability for the solution working as well as being built / installed as per the solution details is important so the design party should be retained and required to account for both aspects.

Industry participants should be asked to formulate a way forward but that needs to be done in response to the reason for requiring and the outcomes of requiring such a report or formal record to be created and stored ***and*** even made available to nominated parties.

12. **Are there any other methods of documenting performance solutions and their compliance that should be considered**?

See 11 above.

13. What would the process for declaring that a building complies with its plans look like?

Firstly establish who is certifying what when and how especially if the sign off is generic or peer reviewed or required from a design party as happens in many aspects where the builder is not the design party but the lead contractor for building.

If the design details under the chain of responsibility are to a clear and even of improved standard so as to be as designed NCC compliant then that design party could in most regards check what is done as a "quality control built as required regime" and in so doing maintain a direct link to what is designed being built on site etc.

If a builder is required to sign off that work is as per the design plans then perhaps that should be countersigned by the design party especially if that design party naturally or by direction under a revised chain of responsibility model inspects work undertaken at site.

Should the need for design parties to inspect be extended to high risk aspects of work and the fee incorporated into the fees the owner pays to get development approval, the CC or CDC and as part of a revamped mandatory inspection regime?

What party is getting the Occupation certificate affects who has to give what to the certifier. This will depend on the contract and to a degree who the "owner for whom the building work is being and at time of certification was carried out for".

If a specific party was declared the "captain of the project" with all others regarding certification reporting back to them then there could be a guide as to what form and when certification needs to be provided and the captain would have responsibility for lodging all certificates with the certifier.

The ***individual work aspect specific*** certifier would keep a copy and send all relevant documents to the certifier. If the Building Commission needs to or wants access to any project details then they can as first point of contact the certifier and from there the captain ***and work their way down the paper trail created by the chain of responsibility that is underpinned by everyone being responsible for their own work regime.***

14. What kind of role should builders play in declaring final building work?

The builder will already have contractual obligations as to sign off requirements ***and or will*** be provided with sign offs by certain other parties so before making a decision the "policy people" should see and understand what already happens and ensure that what they seek is consistent with ***what is done or can be done*** and if different understood by those who will be required to do something.

In other words do not just come up with a process which works well in a flow chart on a power point presentation but engage with the industry and explain what is being sort and see if industry does and or can supply what is needed.

15. Which builders involved in building work should be responsible for signing off on buildings?

See answers to 13 and 14.

16. Are there any circumstances which would make it difficult for builders to declare that buildings are constructed in accordance with their plans? If so, what are those circumstances?

Is the use of the words "their plans" deliberate as in intentional? In 90% or more of projects other than for small bordering on non HBCF requiring projects the Builder is given the plans and specifications issued for construction.

If this is inquiry aims to simply continue ***and support the existence of*** the chain of responsibility then it makes some sense to recognise and record – "Bob built this as per the contract plans etc".

A builder unless they have specialist additional licenses should not sign off on electrical or plumbing work as they are not licensed to do that work. ***Other trade work areas also need the specific party who did the work to sign off on that aspect.***

Other aspects where greater confidence is being chased that what ***was*** designed has been built could benefit from the design party having an ongoing inspection role during the course of construction and at the completion signing off that what was built satisfied the design requirements.

17. **Are existing licensing regimes appropriate to be accepted as registration for some builders and building designers, such as architects, for the new scheme?**

Does this question mean that a form of mutual recognition is being considered to accommodate the position said or at least thought to exist amongst some professional bodies that they already assess and approve who can call themselves for example a "green building designer".

Perhaps the simple way for ***this*** to be resolved is to set out what registration including any mutual recognition will mean ***as to capacity to work, liability and ongoing insurance requirements*** and then ask parties to verify that they and their members accept that. In the absence of that make it an all in model if a party wants to do residential building work.

That is said on the basis that commercial building is here and now not being actively considered for a licensing registration scheme!

18. **What occupations or specific activities are involved in 'building design' and should be in scope for the registration scheme?**

This question being asked highlights either the lack of actual building knowledge in the area of policy makers or is simply adopting a "we have a blank sheet of paper approach so help us fill it in" approach.

What risks need better management and control if not elimination or what aspects of work have the most direct connection to defects and or building projects not being completed properly?

What areas do builders and trades find affect their capacity to budget for and program work and what aspects lead to disputes over money and or time to complete and or quality of work?

If quality of work and or materials specified or used who did the work and or required the materials to be used?

Are materials which end up causing concerns as to quality and or which fail imported or locally produced and what quality standards to they supposedly come with especially if imported?

Structural, waterproofing, acoustic, hydraulic, electrical, hydraulic, mechanical services, ingress egress aspects and fire rating needs have a high quality of use and safety impact as does design issues from architects and drafts-people so they should be held accountable for what they do.

Builders and trades are already have s18B statutory warranties applied to them. Will the duty of care and being held accountable for one's work applied to a broader group of building parties be co-ordinated with the existing statutory warranties?

The present statutory warranties were deliberately written so as to enable an aggrieved consumer to only need to chase the "builder"?

This "one point of contact" is not a bad idea and it needs to be maintained as consumers already have to do too much when an actual problem exists.

The Building Commissioner (BC) or more accurately the Independent Building Commission (IBC) can be and should be the single point of contact for consumers and be there to be objective but personable when dealing with issues.

Flowing on from having a Building Commissioner – or with proper support an IBC – mandated to act as and actually acting as the consolidated regulator of building in NSW the IBC led by the BC is ideally placed to regulate and manage "building parties" including licensing, ***provide*** manage and run HBCF and carry out dispute resolution.

These aspects do not even get a direct let alone an indirect mention in the discussion paper which ignores other real world issues and administrative actions which affect who builds what and to what standard in NSW!

Whilst the reforms accepted as needed by the parliament are either works in progress, already acted upon or still under consideration without a consolidated approach as opposed to 1 thing at a time which is largely seen as the pace of responding to the Building Confidence report cultural change and in more direct terms less problems will not be achieved.

If the above type of changes are not taken so as to form a "package" how can the duty of care be properly accessed and applied by parties and the "hit the builder" first approach adjusted?

19. What should be the minimum requirements for a registration scheme?

Overseas and other Australian models should be reviewed and understood and the strengths and weaknesses of such programs and processes workshopped.

Further the existing licensing regime, which grants a license but does not except for CPD obligations for some but generally not those doing most of the work and audits conducted on a rare basis due to lack of resources, can be improved.

The IBC with a clear mandate and clear and accepted policy of prevention is better than cure could operate so it is seen as helping parties with a problem and whilst it would ***definitely*** still have a consumer protection ***by action and or as an outcome*** function it would also act to achieve better outcomes ***by acting earlier and*** by identifying and chasing as needs be the party responsible for causing the problem.

It has already been declared as a required outcome that parties from design through to inspection will be responsible for their work and owe a duty of care.

One hopes the specialist fee earning non risk taking professional service providers who use the current systems to make ambit claims and for balance unbalanced denials and delaying tactics will also be made accountable.

For example:

i. why is it that a builder can be licensed to in effect build anything but cannot provide evidence in a dispute as an expert;

ii. why can a party calling themselves an expert who may or may not have a license to do building work and may or may not have an insurance proffer an opinion to a Court or NCAT and not be liable if their opinion is found to be without foundation?

So for registration as is now done recognition of skills and or experience – being actual experience not just that accepted by RTOs – would be needed and subject to a reality check of the actual insurance market they may need to have a form of insurance.

If the insurance market remains "shy and or unwilling to provide cover" for parties who affect what is built then ideas such as an industry indemnity pool run so as to isolate the funds may need to be considered.

Private insurance cover can never be guaranteed to be available let alone able to or willing to provide cover so all the parties saying we need "insurers to re-enter the market" should take a ***deep*** breath and look at what can be done to remove risks and create better built outcomes which by reason of being properly ***carried out and*** completed do not need insurance to pay out.

20. What form of insurance should be mandatory for 'building designers'? Why?

As alluded to above the market may or may not provide insurance.

It has not and will not re HBCF and has restricted professional indemnity cover and availability. Insurance is an international business and Australia represents a small market so money goes where risks are less and returns are higher and sustainable.

That may be a bit blunt but any insurance expert would have trouble arguing it is not here and now accurate.

Risk reduction and better clearer ***earlier*** risk management needs to be part and parcel of the overall scheme.

Again the IBC has a much better chance to reduce and manage risks because it carries no baggage as to being required to follow existing ***un-co-ordinated*** and or inefficient processes of which there are many with 4 ministries affecting who builds what where for what cost etc!

So mandating something works on paper but may not work in the actual world.

21. What kinds of minimum requirements should be prescribed for the insurance policy (for example, value, length of cover, etc.)?

This is a vague question in context of the reluctance of the insurance market to cover even remain in building cover markets. Perhaps it is based on the dilemma created by professional indemnity policies being a "claims made" type of cover which now sees exclusions for prior work events ***with high risks*** being cut from cover.

If a building claim can be bought for up to 6 years under the Home Building Act and 10 years under the Environment Planning and Assessment Act and ignoring real world difficulties in the present

insurance market at least 6 plus say 6 months from completion and without wanting to be told I am dreaming 10 years would be ideal but impossible to get for an affordable price.

22. **What skills should be mandatory for 'building designers'**?

Buildings are not when it comes to CC or CDC details designed by a single party.

The skills required depend on the aspect of work being done by a specific design party but as an underpinning minimum standard they need to be competent and in away peer accepted and or accredited by way of education qualifications and relevant work experience and or tutoring by a senior party

23. Should specific qualification(s) be required?

Those arising from the answer to q 22 above plus recognition of work – good and bad to brilliant etc - so as to allow a grading to be developed in conjunction with the relevant work ***or design*** area professional bodies.

24. Should there be other pre-requisites for registration?

To be advised on but generally whilst a competitive market is required or desired skills and proper payment for work done and risks averted should be a first priority which may help determine what pre-requisite skills are required to be established maintained and updated.

25. What powers should be provided to the regulator to support and enforce compliance by registered 'building designers'?

By making the BC through the IBC the regulator of all things relevant to achieving better built outcomes the powers and duties need to include:

i. licensing and assessing of parties wanting to be building industry participant;

ii. the right to refuse a party being a building industry participant;

iii. provision and management of HBCF as this will allow earlier intervention and 'Street wisdom" by acting as an early intervener will the ability to help a party to reduce risk and bad outcomes affecting them and or others;

iv. running security of payment as this is not used enough as a source of problem identification and can be a guide to parties who are under pressure and or not acting in good faith;

v. being the first point of contact for all disputes with the power to make decisions which can be appealed but will be binding on parties if accepted coupled with the duty to indemnify a party who accepts the original decision;

vi. as the overall regulator engage and have report to them all license holders which would extend to certifiers and experts appointed to deal with disputes;

vii. collect data so as to be able to report on building issues such as defects and the cause of them as well as the real time cost of doing building work and present such data as a risk management tool and as a cost guide for council contribution fees and insurance costs;

viii. determine based on data collected and investigations of emerging issues and or new products CPD and deliver it through third parties as necessary so that the actual people doing the work or using the process are aware of what is in play; and

ix. conduct ongoing audits of license holders activities so as to recognise who is doing what where and when and also enable "dormant or dead licenses to be removed as appropriate.

26. Which categories of building practitioners should owe a duty of care?

All who affect what is approved to be built and what is built and inspected or challenged as to being built as needed.

27. What should be the scope of the duty of care? Should it apply to all or certain types of work? If so, which work?

To be held accountable for fixing what they have not done properly based on an early as possible risk removal risk reduction process so that as many as sensible risks are removed before work is commenced and that as a result of improved design details builders can concentrate on quality through better cost control and programming.

Start with the people who are directly involved in areas of work where defects and building issues are most common and or of greatest economic impact. Better data is needed or if it already exists it needs to be acted upon beyond being presented in tables in reports and power point presentations.

28. How will the duty of care operate across the contract chain?

Proportionality springs to mind but additionally if an early as sensible risk identification risk checking model which requires a party responsible for the risk to address it or verify that the risk can be managed is used then progressing further down the chain should see risks which that party is best able to handle only remain and by upskilling them and helping them – as would be done by the IBC – the chance of the risk causing harm will be reduced and at least better managed.

Prevention is better than cure especially if the cure involved litigation and an overtly adversarial process and parties. The IBC as a single point of contact operating with an early intervention and risk reduction from the earliest stage approach can achieve a reduced need for litigation ***and by outcome see less money and time taken to resolve issues which benefits consumers, industry parties and the Government!***

29. What types of consumers should be owed a duty of care?

Noting developers are covered by the Home Building Act duties individual non corporate owners and small businesses occupying and or using commercial property forming part of a mixed use structure should be offered assistance which would start with the IBC independently assessing and determining what is in issue and what party or parties are to address the issues found to be real.

30. On what basis should a particular consumer be afforded the protection?

Consumers are the party least likely to have caused the issue of concern to arise but they will in most cases be the least best equipped to deal with the issue.

If they allege suffering a loss then they go to the IBC not the OFT not a lawyer and not as of right NCAT.

The independent assessment by the IBC allows an objective determination to be made and acted upon with the IBC able to take action as necessary to maintain its decision and indemnify a party who accepts the IBC decision whereas if the other party or parties challenges the same and is process driven so as to delay resolution ***will face the IBC***.

The ability of a party to challenge the IBC and its decision will make the IBC well aware of whether what it is doing stands up to 3rd party review.

How many stories before warranty and building regulation as we know it falls over?

Story 1 Demolition of existing dwelling + construction new two story dwelling with basement garage

Background summary of what was done by what party to get approval and to build

New house built using plans and specification created by the client who used an architect and as it turns out a structural and hydraulic engineer.

Who actually engaged the engineers who carried out the design work looking back from where the matter ended up was not able to be confirmed by the client.

However what was totally clear was that the builder did not have any input into the design details submitted to the local council for approval of the DA and then the issuing by a private certifier of the construction certificate and therefore the "issued for construction drawings".

The property is located in Sydney and is 200 ms from a large ocean bay and 700 ms the other way from a lake. These features are in effect unmissable to anyone who visits the site especially the "bay water".

The DA terms are issued by the Local Council in the name of the Architect and are addressed to the architect's business address.

Clause 42 of the DA conditions included the following words:

" … The subsurface structure is required to be designed with consideration of uplift pressure and "floatation" (buoyancy) effects. …"

The DA at clause 36 required structural drawings to be signed off by a structural engineer before a Construction certificate would be issued but clause 36 did not cross reference the clause 42 needs.

The CC was issued by a Private Certifier - although in the name of the owners.

Therefore as the CC had been issued the terms of the DA must have been satisfied but there was no record of a hydraulic engineer's report received by the Owners post DA and pre CC ever being provided to the structural engineer nor the local council but it was made available to the Private certifier.

Builder completes basement slab and walls and continues to the raised ground floor slab stairs to and first floor slab and most of the walls but stops before windows are installed and roof completed due to dispute with owner about payment for work done and capacity to pay for remaining work.

The work of the builder is covered by builder warranty cover.

The Owners complete work as owner builder work.

The problem

Sometime after the project is completed with the owners occupying despite no occupation certificate being issued, a series of heavy rain events occurred in the suburb where the building is located.

The owners find that the basement, which as per the CC plans is recorded as a garage only area, flooded and as they understood it water was entering the garage from several points but of particular concern was water which seemed to be coming through the garage floor slab.

The Builder is advised and addresses areas other than the garage floor slab making that area the cause of the owners' anger and desire to have the same fixed.

The resolution process undertaken

Owners make complaint to OFT HBS and they attend and issue the builder with a work order.

Builder seeks advice and after 2 months of emails and phone conversations ending with the basis for the work order relied upon by the HBS shown to be incorrect, defective and misleading the work order is withdrawn and any action is suspended by the HBS.

The basis for the work order being withdrawn as put by the builder through his representative was that the design was provided to the builder and inspections and certification confirmed the design required to be built was as built and it was added that the slab as built in fact exceeded the design criteria of the approved plans so as to be better than designed.

The Owners are advised by the HBS that they need to take the matter to the Tribunal.

The Owners commence Tribunal proceedings. The Builders is granted leave to be represented.

Owners are asked what their basis is for saying "the builder is liable".

They are specifically asked if in summary they hold the builder liable because the builder built the basement slab, it has cracked therefore the builder must be liable.

They advise yes.

Tribunal member is shown and accepts at face value a comment made by the Builder based on the actual wording of the hydraulic engineer in his report.

This was a report by a hydraulic engineer made directly to the Owners which they had received before the issue of the construction certificate.

The Hydraulic engineer specifically raises issues about the impact of rain and the water table rising if heavy periods of rain are experienced.

The Tribunal specifically asked the Owners if they understand that the builder is saying the slab cracking was due to hydrostatic pressure caused by the water table rising after heavy rain caused that water to bank up as it was not able to escape into the bay and by consequence the slab to uplift and crack?

The owners do not agree that the comments of the hydraulic engineer and his warning in the report provided to them means the builder is not responsible.

The Tribunal member suggests to them that they need to seek advice on this issue and be clear as to why the builder is at fault if they want to continue action against the builder.

The Owners then become represented by lawyers who are based 160 odd kms from their house and from where the tribunal was located.

Discussions between the lawyers range from the owners joining to the proceedings the design engineer and after two or three tribunal mentions over several months end up agreeing on asking the tribunal to order a reference to an engineer for an independent expert opinion on why the slab cracked and if the design provided to the builder was sufficient to deal with the site conditions that existed.

The Owners' lawyer contrary to the Tribunal orders does not allow the builders position to be set out in the brief to the expert engineer and as such the Owners receipt of the hydraulic engineer's report and it being provided or not provided to the structural design engineer, the apparent failure of the structural design engineer to have the DA terms and attend the site so as to be aware of the site conditions were not agreed to be put forward to the reporting engineer.

The reporting engineer therefore receives the brief based on the Owners claim and positions and is not acting independently as proposed but solely for the Owners.

The Builder withdraws consent for the reporting engineer to be seen and accepted as being an independent expert.

8 months later after agreeing to consent orders in the Tribunal the owner's lawyer contrary to the last Tribunal consent orders transfers the case to the District Court and ultimately seeks leave to join the design structural engineer.

That is done now some 18 months after the owners were told they could join the engineer who as advised by the owners had already said to them that he was concerned they would take action against him.

All up by the time the dispute arose to the time it is actually first mentioned before the Court around 2 years had elapsed.

Additionally based on advice by the barrister and lawyer now representing builder it was decided that the certifying engineer used by the builder to provide certification that what was built by the builder complied with the design of the original structural engineer is joined to the court proceedings by the builder.

The builder does this simply because the adversarial system of Court proceedings makes it common sense to have another party who is said to have a case to answer simply by the way it was pleaded available, especially if that party has professional indemnity cover.

Making as many parties as possible available to contribute and take the blame is a simple risk sharing strategy which is not based firmly on identifying the cause of the actual building problem and from that who is responsible for that problem.

Judgement using hindsight is in play and from that many more parties can be assigned duties and alleged to be in breach of such duties.

Note the evidence was that what was built was at least equal to the design required by the CC drawings prepared by the design structural engineer who was retained by the client through the architect but with that design definitely having no association with the builder other than being given to him under the construction certificate.

Parties comply with District court case management procedures and experts are retained by each party and the two engineers use their pi insurance backed lawyers to deal with the matter.

Settlement conference is arranged by District court.

After discussions an offer of settlement that the owners be paid $170,000 by the insurers for the design and certifying engineers to end the matter against all parties was made.

This was considered a commercial outcome based on estimated 5 day trial costs etc.

Owners reject and builder via his legal team is asked to contribute $30,000 to make total payable $200,000.

Owners accept gross sum of $200,000 after builder contributes $30,000 to avoid trial and associated costs including 1 week away from work.

Costs to resolve

Builder overall spends on consultants, lawyers and settlement $80,000 ignoring that around $40,000 worth of work was done on a pro bono basis for the builder initially and through the Tribunal proceedings.

Insurers spend at least $220,000 including the settlement money they provided.

Owner would not disclose what they spent but as no work has been done to the house within approximately 4 months of the case settling there is a strong suggestion, even a clear indication that a large majority of the $200,000 paid to settle the case went to cover legal fees and report costs.

Issues affecting what was done to resolve the matter

Note the area affected by water entry was as per the CC a garage.

A section of the garage was changed by the owners and used as a “media room” by the owners whereas the whole basement was when being built by the builder marked and approved for use as a garage - car spaces only.

There was a high degree of personal animosity between the owners and the builder's director. This was exaggerated and or inflamed by the owners feeling their ability to use the theatre room had been destroyed by what was built not being water tight.

It was established that there was no record of the structural design engineer ever attending the site.

The architect and the owners despite requests to do so could not show that the structural design engineer received the DA conditions.

Why is it that the builder and then the second certifying engineer could not rely on the construction certificate establishing without question that the DA conditions had been met and therefore that clause 42 was satisfied.

Clause 42 and for that matter clause 36 of the DA was the Local Council saying to the architect who was retained by the Owners that the water table and its being subject to rain events had to be accommodated in the CC design details was in fact covered as to the risk?

Why was the first impression of the consumer and inadvertently the HBS that if Fred built a house and if there was a problem with the house it must be Fred's problem?

In matters where structural as opposed to less substantial issues are in play why isn't the first line of inquiry, what is causing the problem rather than who built the dwelling?

The consumers did nothing wrong but the system and the processes, procedures and practices that had to be used and were used were shown to cost and waste a significant amount of time and money and many of the parties involved in such processes, procedures and practices in blunt terms did not add value to the matter.

Story 2

A builder is voluntarily onsite doing work to address the specific water entry issue made known to him by the strata body.

With preparatory work completed and maintenance work to address the water entry issue scheduled to be done over the next 7 days he is asked to leave by the strata manager.

Many years later case discontinued by lawyers for the Strata Body but builder walks away $200,000 poorer for the cost of defending himself however without any work being required to be done by the builder and being released from all actions regarding the work issues raised by the Owners Corporation which had initially been one specific issue which was being addressed before work was required to cease to more than 30 alleged items of defective work.

Background information

Builder voluntarily onsite doing work to address a specific water entry issue made known to him by the strata body. The building had at this point of time been completed for around 4 years.

After setting up and doing prep work the builder is told to cease all work and vacate the building. This was advised by the Strata manager who had been advised by a specialist strata legal firm that the work was to stop.

Builder had received an engineer's report dealing with water entering in the uppermost fire stair landing. Builder asked the Engineer to explain what he thought the cause of water entering was and after being challenged as to knowledge of what was built and experience re water entering buildings was the Engineer ceased to respond to the Builder's inquiries.

The initial engineer relied on by the Strata Body was replaced with a building consultant who initially was prepared to and did seek to resolve issues with the builder.

The consultant prepares a report which was a whole of building review done without any input from the builder although subsequently the builder and the consultant met and discussed what was alleged to be work to be done by the builder.

Out of the 10 consultant identified work aspects and issues 4 were agreed with the builder as not being defects, 3 were under ongoing discussion and 3 were agreed to be addressed.

The builder up until this time had the first report was from an engineer which had 1 issue but the consultant's report repeated that issue and added 9 further alleged defects for the builder to address.

As this second report was done in isolation and without entry into each and every unit it should not be found surprising that it put forward issues never before raised with the builder, some which the builder had addressed previously including some that had been previously advised to unit owners as arising from what the occupier had or had not done and the initial water entering the fire stairs from the roof issue.

Builder and Consultant reach in principal agreement for work to be done and for investigations to be carried out on aspects that were not agreed as being a black or white builder issue.

Builder seeks access but after more than 14 months since being initially kicked off site access was not allowed because the Strata through their lawyer was not happy all 10 items were not included in the work to be done despite the work to be done and investigated being agreed to by the Consultant.

Strata lawyer commences Tribunal claim seeking money order for $500,000.

The strata's lawyer in response to the question of "what is the basis for the figure or is it simply an ambit claim" responds that they are not obliged to provide such details and will follow the Tribunal process.

Strata block practical completion had been achieved well before the occupation certificate was obtained and this bought into question whether the claim against the builder in the Tribunal was out of time.

The occupation certificate date of issue was post the builder leaving site as the developer had to address Sydney Water issues and took several months to do so.

The Strata was asked to show that it was not out of time and the builder was asked to show when the building work was finished. Neither party was able to answer this so it was 100% clear but the strata struggled and even based on their best case scenario they were 3 days within the period or from what the builder could show 5 months odd out of time

Result of tribunal proceedings some 3 plus years after the builder left the site whilst preparing to carry out work

Matter settled with each party paying its own costs and no work to be done by the builder with builder released from all work duties.

This site has been observed from the street in November 2018 and no work externally has been done.

The original water entering through hairline cracks – sometimes caused by settlement - in the roof stop stair exit wall may have been cleaned, resealed and painted as would have happened when the builder was voluntarily on site – which would be over 6 years ago now.

Cost to builder 4 years of anguish, 2 lawyers and expert retained to respond to case and $200,000 out of pocket. The Builder has left the industry.

The Strata following the directions of fee earning parties has either spent a lot to get to a stage where the case was so ill conceived that they released the builder.

Should professional fee earner running the case be entitled to retain fees or required to relinquish fees and cover the costs of the experts retained by the firm running the case as strata law experts?

Story 3 Tribunal claim against a builder where access denied to builder unless full legal costs paid

Claim concerned house in eastern Suburbs where tiles had cracked, a ceiling joint and painting of the ceiling showed joint line at certain times of the day and a cupboard door was said to be out of square. Claim by owner as pleaded by a tier 1 law firm had maximum value of $42,000.

Discussions before CTTT hearing were undertaken with Builder through his lawyer asking for all reports, Scott schedule and basically back up material relied on to come to the cost of $42,000 as claimed

Tribunal member on first review hearing said they had up to 4 hours to spare that day so let's see what we can do with this matter where by the claim is made and the builder says they are willing to do some work.

Tribunal asked the owner's barrister to explain why the tiles in issue were a problem. It was put forward by the builder that the issue was caused by the cold joint in place settling. The joint was completed as required by the architects for construction details.

The barrister for the Company that owned the dwelling had to have it explained to him what a cold joint was.

Issues were discussed and the Tribunal was pleased with progress and asked the parties to continue discussions as it looked like things could be resolved. The builder was basically prepared to do work and the owner through their lawyers had indicated that they could seek instructions to allow access for work to be done.

The parties left the tribunal undertaking to continue discussions and work on the basis that the Tribunal would in all likelihood make a work order as the builder had been prepared to do work.

Ongoing discussions concerned when work could be done, access being arranged noting the director of the Owner lived in WA and travelled overseas a lot but his children were often in Sydney so access should be possible.

The Owner as the applicant in the proceedings asked for costs to be paid. In response to the Builder saying some costs payment would be considered he was advised it was all costs or the matter falls over and will go to a hearing.

The costs claimed came to $88,000.

The builder offered to pay $5000 for the filing of the claim, the architect's report and the lawyer's time for preparation work and in effect one tribunal appearance.

This was rejected and the lawyer for the applicant said unless the $88,000 costs were paid no access would be granted.

Outcome - the builder ceased trading and closed the business.

Story 4 Townhouse project finished and just before the 2 year warranty period expired a claim is received claiming numerous defects with the claim made for the Strata by a specialist legal firm

The builder had already addressed issues raised pre settlement of purchases by incoming owners and things that he was not happy with.

Over the following 20 or so months the builder had addressed some issues raised by townhouse owners and the strata manager.

The receipt of a claim from a legal firm promoting itself as a strata defect specialist firm was a surprise as to both receiving it and the contents concerning alleged defects.

The central defect alleged was that the sliding doors as installed were not done as required by an Australian Standard referred to by the building consultant who prepared the defect work report for the legal firm acting for the strata manager as the agent of the strata plan.

The alleged breach was not that the doors and or waterproofing as carried out had allowed water to enter the townhouses but that in the future they would allow water to enter.

Discussions see builder and Strata Owners Executive speaking directly to each other as the lawyers had after receiving the builders response to their experts report ceased to act for the owners.

Builder had to spend over $50,000 defending an ambit claim whereby the report relied upon showed no water entry but alleged a risk of water entry from the balconies which were at the time of the builder responding more than 2 years old and therefore exposed to all sorts of weather events and simply by the passage of time shown to have been working as intended.

The builder and the Strata agreed that the builder would address some minor issues which collectively had a value of no more than $5000.

Story 5 CTTT proceedings against a builder trading in his own name chased by the Strata Body for correction of 25 defects including 9 alleged defects for work done directly by the developer independent of the builder

Strata through lawyers chased builder for all work items complained about.

Builder chased developer to address work done by the developer independent of the builders work.

Builder queried several of the issues alleged to be builder defects as being work not included in his scope so as to say of the 16 maximum that were builder alleged issues 11 were accepted and challenged as to value of work actually required to be done.

Builder is still owed $100,000 by the developer.

The strata's lawyer and barrister were specifically advised of the work done by the developer but in the Tribunal proceedings maintained all defects including any work by the developer was the work in issue.

After several CTTT directions hearings and the filing of a response to the claimed work items listed by the Strata which specifically identified what work was done by the developer and which identified what work items the builder was willing to do and what were not accepted as defects a hearing was set.

Pre hearing the builder met with a lawyer for the developer and was advised in short that the developer could not pay any more than $60,000 despite having not yet paid the builder over $100,000 with the units sold and occupied for several years.

Approximately 60% of the units had been resold and some were being offered for sale despite there being alleged issues about the building and the need for the common property to have work carried out.

No maintenance had been done since the OC was issued.

This should not be unexpected in light of the fact that for the 4 years that the overall complaint regime had taken to reach an actual hearing which was after being discussed with the developer, then the builder and the developer and finally into the tribunal for resolution of what was based on an OFT work order that was rejected by the Strata and the builder being denied access to do some work.

The CTTT Hearing

The claim was made against the builder and the developer.

The builder was represented for a short period at the hearing on a pro bono basis.

The Tribunal was advised by the barrister for the Strata that the developer and the owners had reached a confidential agreement and as such the claim against the developer was settled but the claim against the builder would proceed.

The builder asked for full details of the amount payable by the developer and for the owners to specifically identify what work items that money was payable?

The Tribunal member refused to direct the details be provided and whilst accepting that this may in some way lead to “double dipping” on work aspects said it was up to the parties to figure out what was to be disclosed. A short adjournment was allowed at which time it was disclosed that the claim settlement was irrelevant to the purpose of the claim against the builder as the aim was to get access to the warranty cover and they had to get as big a debt as possible to make sure the builder could not pay it.

The pro bono lawyer asked the Tribunal to reconsider its position which was refused so after taking the builder through his Scott schedule reply to emphasise what was and was not the builder’s work withdrew and the builder proceeded by himself.

Outcome – builder did not survive to hear the judgement which was reserved and declared himself bankrupt and thereby allowing warranty claims to be made.

Story 6 Site consisting of two 4 level blocks with mixed use businesses below who were also affected by cracking of the building.

Strata specialist lawyers act for the Strata Body and issue claim in Tribunal which sees onsite review by Tribunal member as an attempt at ADR. Claim handled by lawyers for one of the prior private insurers who had this project on their books.

3 engineers review the site – one for the strata, one for the builder and one for the warranty insurer.

Prior to lawyers being involved the builder went through the site with an OFT HBS inspector. Report issued and the builder sought access to do the work but was refused entry.

The builder made it clear that the movement causing cracks in the upper levels was in issue as he had built as per the plans issued under the construction certificate.

This in the bigger picture of the type and nature of the issues of concern ended up making sense.

The claim and engineering evidence referred to damage to level 3 units and cracks in stair wells, alleged failure to install windows securely, drive-way gradient being too steep for cars to enter or leave and fire safety services in basement being non- compliant with standards.

The main issue was the cracking in the upper levels and its impact on the units and to an extent the commercial premises below. Bricks at the ceiling joint with the roof slab were seen to be “popping” out and load bearing walls supporting the roof slab were cracked.

Cracking but to a lesser extent was also found on lower levels and some shops on the ground floor had cracking issues.

The Strata Plan takes action in Supreme Court against the builder and developer. The home warranty provider was also party to the proceedings and retained an engineer to advise on building defects.

The developer seeks to join the design structural engineer but they escape as the plans prepared by them and specifically used to build as they formed part of the “for construction” documentation had been issued more than 10 years earlier and as such as per the advice from a tiered legal firm no building action could be taken against them.

Developer goes into liquidation. Builder retains leading University lecturing structural engineer to review the cracking issue.

So 3 engineers are now looking at the same work and to a degree come up with similar issues but seek to lay responsibility with different parties.

The common agreed work as done fact was that the two roof slabs were 175 mm thick measuring 14 m x 40 m and were as per the design detail provided to the builder by the developer as part of the “issued for construction” details.

It was generally agreed that the roof slabs being poured as a one piece element were moving due to the heat variances and exposure they experienced.

A solid piece of concrete with no heat deflection detail and no control joint will expand and contract in response to the weather. In moving 18 to 25 mm it slides on the control joints but with that mass affects the load bearing walls holding it up.

The allegation was that the builder failed to install slip joint plates. At a dispute resolution meeting – one of many asked for by the builder - this was disputed as a slip joint plate was seen to be exposed and visible from the ground.

Q were the roof top slabs on both unit blocks moving a breach of warranty by the builder or was it in reality an outcome of the design given to him to build?

Hindsight showed that the design was defective and the engineer escaped because the 10 year cap on liability had for that engineer expired.

The design was reviewed by the Council but Council's for precedence avoidance don't readily entertain being sued by parties.

Should the as it turns out defective design have been picked up when the CC details were submitted as being compliant with the DA conditions? This was before the builder was involved and well before any building work had been commenced.

The dispute process relied on the warranty being specific to the builder and then that he can join other parties but if he is obliged to build as per the plans and specifications provided to him does he have the duty to question that those details are fit for purpose!

Similarly with the garage entrance steepness – was it bad building work or bad design where the site conditions and the design were incapable of achieving other than as existed and if so what should have been / what could have been asked and adjusted at the CC submission, review and approval stages?

Mechanical exhaust extraction from the basement was signed off and certified as built as per plans under the CC and fit for purpose. The Fire safety of the building was subsequently and independently certified as fit for use after the SP was created.

So if as alleged it did not work to the required standard was it because of what was installed or was what was installed compliant with a design which in reality was never going to do what is was required to do?

Story 7 Unit block inner city fringe precinct sees corner of building subside causing substantial cracks in building to arise. Additional items claimed included stairs to underground parking not complying with AS, Terra-Cota tiles in courtyards allegedly slippery due to not being sealed.

The developer has all the work done from DA being submitted and obtained through to obtaining the CC using design professionals chosen, retained and paid by the developer.

Builder carries out work as per the structural engineer's details on the "issued for construction" drawings which formed part of the CC.

Builder completes work, is paid and occupation certificate is applied for by the developer and is issued.

Approximately 18 months after work was finished complaints are made concerning cracking in units, efflorescence on balcony edges, stairs exit into basement allegedly too narrow and therefore non-compliant with AS and water leaking into basement carpark.

Supreme Court proceedings are taken by Strata Plan initially against the builder.

The builder joins the developer who joined the engineer so now there are many parties and many legal positions being put up and used to deflect the blame for the issues.

After 5 years the end result achieved with the developer going out of business was that:

1. the lack of 37 piers on the structural engineers details are found to be the cause of the building "sinking" which caused the cracking throughout the street front side of the building with consequential water entry and repair work being needed. Engineer's PI insurer to apy for work to be done to rectify this.

2. Carpark stair width was said to be non-compliant if measured a certain way and then compliant if measured another way. Stairs to remain as built.

3. Efflorescence caused by water washing minerals out of the balcony works leaving a white scale on surfaces which leaches out and down the face of balcony slab edges and the like but which can be removed with a firm brush and a mild acid water mix work – sometimes referred to as maintenance work – was alleged to be the builders responsibility as the allegation was that unwashed sand had been used in the works. Determined to be maintenance work as this is a result of what was correctly applied and could and should be dealt with through maintenance work required to be carried out by the Strata Plan.

4. Sealing of the specific Terra-Cota tiles was also unclear as the builder work scope was to lay the tiles specified by the client. Sealant specification required the tiles to be sealed every 12 months. This had not been done by the Strata Plan.

Story 8 mixed use development with units above businesses such as cafes and professional service suites with single level underground parking.

Owners get benefit of work order from HBS inspector. Builder present when inspection done but refuses to attend to other inspections(x 3) so final work order done in builder's absence.

Builder commenced some work on roof re waterproofing and tiling but stops and despite being asked to complete does not return and leaves the work directed to be done under the HBS work order part done.

Builder does no work on internal unit issues of cracked and missing tiles, water entering the garage and it flooding with water entering through control joints and penetrations or bathrooms leaking in some units.

Tribunal proceedings commenced by Owners seeking an order that the work under the HBS work order be completed.

Builder seeks time to respond and there are several more direction hearings.

However on an occasion where the matter is listed for directions Tribunal orders that as the Owners are not there they are present the matter be dismissed and removed from the list. The Tribunal does not seek to ring anyone but had the builder's lawyer there who had contact details for the Applicant owners.

Story 9 an old commercial building converted by Owner into luxury units. Builder retained and provided with full work scope details by the Owner. Tiles become the major issue with in substance tiles "popping" off the floors.

Builder attempted to fix concerns about tiling work at the units but ultimately relations breakdown and Tribunal proceedings are undertaken. Expert determination of tiling issue agreed after the Tribunal member walked through the units.

One unit owned by the widow of the person who developed the units. Expert determiner refused to allow builder to file an engineer's report that raised for the first time the nature of the pre-existing slab materials which was cinder ash and which the engineer said would when cut cause the stresses in the slabs to adjust and not settle for a lengthy period of time. The report being late was the reason relied on.

This report was the first time the pre-existing aspect of the original slabs stability being affected by the work required to be done under the approved scope given to the builder by the developer was raised.

The claimants as owners had no knowledge of this and the original issue was considered to be defective tiling.

Award made by Tribunal against builder based on expert determination.

District Court appeal sees a revised and lower figure by about 50% with each party paying their own costs entered as a resolution of the matter.

The Judge noted in words directed to both parties that neither party was in a position to know that they were 100% right and the other 100% wrong and that whilst the late engineering advice was late and for that reason only had been excluded from the Tribunal evidence by the expert and therefore had not been considered in the original decision, it did raise the critical question being was it the nature of the original slabs and or was it something the builder did or did not do that was causing the tile issue.

If it was something outside the builder's and for that matter the developers personal knowledge such as to be a latent condition not recognised by the original scope details that the builder was contracted to use then there is a direct line of reasoning that the tiling concerns whilst clearly not the fault of the owners was not related to the builder doing or not doing something where he had built as per the plans?