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**Mills Oakley**  
ABN: 51 493 069 734

All correspondence to:  
PO Box H316  
AUSTRALIA SQUARE NSW 1215

Building Stronger Foundations Consultation  
Regulatory Policy  
Better Regulation Division  
Department of Finance, Services and Innovation  
2-24 Rawson Place  
Haymarket NSW 2000

**Partner**  
Scott Higgins +61 2 8035 7872  
Email: slaycock@millsOakley.com.au

By email: [BCR@finance.nsw.gov.au](mailto:BCR@finance.nsw.gov.au)

Dear Sir/Madam

**Building Stronger Foundations – NSW Government Discussion Paper  
Submissions by Mills Oakley**

In its Response to the Shergold and Weir “*Building Confidence*” Report, the NSW Government has outlined four key reforms to deliver a more robust regulatory framework for building and construction:

1. *Requiring categories of building practitioners who are defined as ‘building designers’ to formally declare that plans, specifications and performance solutions they provide are compliant with the Building Code of Australia (BCA), and that builders declare that buildings are built according to the declared plans;*
2. *Introducing a new registration scheme for ‘building designers’;*
3. *Ensuring an industry-wide duty of care is owed to subsequent homeowners; and*
4. *Appointing a Building Commissioner to act as the consolidated regulator for building in NSW.*

Mills Oakley commends the NSW Government for driving reform that is intended to quickly reinstate confidence in our industry and for seeking comments to its Discussion Paper. A rare opportunity has been presented with industry and consumer groups all presently united in calling for change.

Our Projects and Construction team acts for clients across the whole sector of construction from institutional developer clients, major contractors to owners corporations, architects, engineers, subcontractors and suppliers.

We advise clients on the management of risk in their contractual dealings and represent clients in disputes regarding performance or allegations of defective works or services.

We keenly appreciate the myriad of practical, legal and technical issues that need to be considered in designing and implementing a set of effective reforms. Our expertise places us at the intersection of these issues and we are grateful for the opportunity to provide some commentary on the proposals for your consideration.

## **Building Commissioner**

In our view, the fourth reform is the most important and welcome change. The fragmentation of the building regulation system and relevant enforcement agencies has long been an issue (see for example the *Lambert Review*) and the consolidation and strengthening of our compliance and enforcement systems is essential. Put simply a tough 'cop on the beat' with jurisdiction across the industry sector is urgently needed.

Harmonisation of laws across all jurisdictions persists as a clarion call although we appreciate the constraints of our federal system of Government. Consolidation within NSW of the relevant Government functions for the construction sector is eminently achievable and desirable.

The Royal Commission into the banking sector exposed the dangers of excessive self-regulation and the problems that arise without robust enforcement of laws. It would be foolhardy to believe that the construction sector can function effectively without robust compliance and enforcement agencies. Recent events have surely removed any such preference.

The privatisation of building approvals and certification and the flexibility that is inherent in our performance-based BCA are vitally important to an efficient and modern building system. These matters are not inherently problematic, but they do require a better safety net and a more robust set of systems to manage and ensure compliance and best practice.

The current package is lacking on detail in this regard although it appears that the intended role of the Building Commissioner will largely be an administrative one – providing a repository for the certifications and declarations of compliance. There is little attention given to how the Building Commissioner might proactively prevent problems occurring and otherwise police and enforce non-compliance.

As ever, meaningful funding and resourcing needs to be allocated and maintained. This needs to be more than a mere press release.

We would welcome the opportunity to consider and comment on a more detailed proposal around the mandate and powers of the Building Commissioner and the funding allocation and resourcing allocation that is being provided.

## **Registration of building designers**

As a general proposition, the approach to licencing and accreditation of all building professionals in Australia (and particularly NSW) is unsatisfactory. Queensland is far from perfect, but it certainly does this better.

In particular, the present scheme of regulation of the professional obligations of engineers and architects is woefully inadequate. These professions remain largely self-regulated. Bringing them more into line with the standards of requirements of other professionals like lawyers or doctors (which are subject to detailed sets of rules enshrined in legislation – not simply industry codes of conduct) would only serve to improve standards and enhance the standing of these professions.

In our view, the current proposal is a promising start for achieving greater accountability of building professionals.

The skills and expertise of our building professionals should be valued and celebrated. If the old adage that 'prevention is better than cure' is going to be applied, then we need to devote sufficient consideration to ensuring that systems are in place to support the professional development of those on the 'front line' of designing, constructing, advising on and certifying our buildings.

Cultural change to strive for better quality in our building and construction practices can only result from better education and accreditation of competencies of building and construction stakeholders.

Registration is not enough. Policing of minimum standards of abilities can only be achieved through the establishment of peak industry bodies who are charged with the oversight of the registration of its members. In this way, only competent building designers and practitioners, who have demonstrated (on a progressive and recurring basis) that they possess requisite competencies and education, will be permitted to operate in the industry.

The new initiatives outlined in the Discussion Paper mention compulsory insurance for “building designers”.

This may indeed be required to overcome the current insurance predicament, whereby insurance companies have imposed significant hikes of premium charges and insisted on wide-ranging exclusions, making procurement of requisite insurance cover by practitioners either prohibitively expensive if not impossible.

However, in our view, it is vital that the Government does not rely solely on the ability to provide insurance as the determinant of eligibility for registration “building designers”. This misplaced comfort was evident at the commencement of the compulsory private Home Owners Warranty Insurance and the reform of building licensing as shown by the below extract from Hansard (27 Nov 1996, second reading by the Minister RD Dyer, for the *Building Services Corporation Legislation Amendment Bill*):

*“Privately run insurance has the potential and the means to change all of this. Bad builders will be able to be excluded – they will not get insurance and therefore will not work in the residential building industry.”*

Recent events have demonstrated the fallacy of that particular prediction. Evidently, less-than-scrupulous builders and developers have been able to circumvent the compulsory insurance schemes to still operate in the building industry, and that contrary to intentions at the time, “bad builders’ have not been weeded out. If anything they have simply been encouraged into the high-rise sector where they are exempt from such mandatory insurance requirements.

Instead, in any new registration scheme, eligibility should be linked to competency and accreditation by appropriate peak bodies who represent the “building designers” in question, such as Engineers Australia being responsible for registration of professional engineers, for instance.

But that is only a small part of the story. Unfortunately, improving the system for architects and engineers, will do nothing to arrest the perpetuation of common building defects caused by shoddy practices and corner-cutting by builders and trades. In our experience, the vast majority of disputes (and the greatest proportion of value) relate to instances of poor workmanship rather than underlying defects in design or even departures from design.

We implore the NSW Government to focus its intention on the registration and licencing scheme for builders and not just professionals such as engineers and architects.

The recent amendments to the private certification regime are crucially important, but the certifier is not akin to a clerk of works. They are not watching over the shoulder of the builders and trades doing their work.

It is simply not practical to suggest that they, or engineers or architects, should be primarily responsible for shoddy workmanship that they have not witnessed and which, may indeed, not be identifiable to them once the work has been ‘covered up’.

We can certainly improve the oversight at critical points in time (see our comments below), but in the absence of a clerk of works, there needs to be more accountability on builders and trades who are left to their own devices at all other times in the carrying out of the works.

### Declarations of compliance

The NSW Government will regulate building designers, architects and other building practitioners who provide designs, specifications or plans. Mills Oakley agrees with the intent of these proposed reforms, however, we are concerned that they will not achieve the underlying objective.

The Discussion Paper has focused on poor documentary evidence to demonstrate that the “as-built” plans reflect what was “planned”. The proposed regulations will require that building designers declare that their plans and performance solutions comply with the BCA. Builders will similarly be required to declare that the building was constructed in accordance with the compliant plans.

However, the Discussion Paper observes that practitioners are not always explicitly responsible for explaining how plans are compliant or stopping work from occurring if the construction of the building would lead to a non-compliant structure being erected.

The initiatives do not empower practitioners to “stop work occurring”. It is worth considering whether a certifier’s powers (or that of a Building Commissioner properly briefed by a certifier or third party engineer verifying critical element designs) should extend to allow more proactive oversight of the construction process.

Another concern is that the declaration of compliance by building professionals does not add much to existing obligations. Building professionals are already, almost always, contractually (and also probably under duties of care at common law) required to ensure that their designs comply with the BCA and other basic legislative requirements. This is a most basic requirement and if a design is not compliant there will, almost always, be an actionable claim. Codifying a duty of care or extending statutory warranties to other building professionals would further enshrine such requirements.

Most of the systemic defect issues across our apartment buildings have not been created by some failure or inability of parties to hold designers to account for non-compliances. Indeed, a design flaw is usually an easier route to recovery for plaintiffs because the prospect is enhanced of a successful claim on professional indemnity insurance held by that party (also a requirement certainly of commercial contracts).

Accordingly, the imposition of the need for a ‘signed declaration’ of compliance, does little to assist in solving the present problems. In fact, the reform might prove counterproductive. For example, should a party fail to produce such a declaration and should a client not act upon that, where does that leave the liability position as between those parties? Might it actually serve to weaken the standards expected of other pieces of advice where such a declaration is not attached?

Further, the use of statutory declarations as to payment of subcontractors has not assisted aggrieved parties in the Security of Payment arena, and the temptation should be avoided here. Whilst additional avenues of ‘misleading and deceptive’ conduct might be opened up, this won’t provide any greater protection to a client who can simply sue for the failure of the designer to comply with code requirements and basic professional standards in the first place.

In our view, a more effective approach, would be to simply codify the requirement that all designs must comply with the BCA. An extension of the statutory warranties in the *Home Building Act 1989 (NSW) (HBA)* would be an appropriate way to do this in respect of residential

apartments. For commercial contracts there is less of a need for intervention as such requirements are likely to be contractually required as a matter of course.

Reminding designers of this statutory obligation and requiring them to check a box or sign a form that they understand these requirements and have complied in the submission of these designs may indeed be a useful further step and reminder, but it is not the end in itself.

Recent history shows that countless fire engineers and certifiers signed-off on the use of combustible cladding without adequate performance-based solutions. The fact that they needed to provide signed declarations – which they did – provided little assistance in terms of avoiding the problem. The NSW Government should not perpetuate the misconception that declaring oneself to be compliant will make real inroads to avoiding (or even prosecuting) actual non-compliance.

We have provided further submissions on suggested reforms that we consider would promote a real improvement in terms of avoiding another ‘cladding crisis’ further below.

Even absent a ‘declaration’ requirement, the Building Commissioner ought still receive plans and designs and undertake audits of those plans and designs to ensure compliance with BCA requirements. The current reform plans are vague as to the auditing requirements. This should be corrected.

If designers knew that there was a real likelihood that their plans would be subjected to a randomised audit, and proper resources were allocated for this purpose, this would have a much better outcome in terms of driving best practice. It would also allow the Government (via the Building Commissioner) to properly gauge the level of non-compliance in the industry and target appropriate enforcement action, or further funding alternatives or further reforms.

In summary, it is the view of the author that declarations of compliance are of little meaningful assistance unless there is sufficient auditing of their correctness and robust enforcement of non-compliance.

### **The imposition of a new duty of care**

Mills Oakley agrees with the policy intent behind the proposal to codify a duty of care on building professionals that is owed to homeowners, owners’ corporations, subsequent title holders and potentially small businesses.

Much care should be taken, however, to thoroughly understand and analyse the problem that we are seeking to solve and to ensure that the solution that is proposed is the best and the most efficient one.

If a duty of care is to be imposed on building professionals, there are some very important qualifying provisions that are required in order to ensure it enhances rather than diminishes or complicates the single-point-of-recourse to developers and builders that is presently available through the HBA.

Thought should also be given to the interaction of limitation periods and whether something akin to the existing statutory warranties should be extended to building professionals rather than simply a ‘failure to take reasonable care’ test.

In our view, the imposition of statutory warranties (or a duty of care) in respect of commercial buildings is unwarranted. Buyers and sellers of commercial buildings are typically sophisticated commercial clients capable of negotiating comprehensive contractual provisions to maximise prospects of recovery from liable parties (see below).

## Understanding the problem

The Discussion Paper has identified that:

*Following the decisions in the Brookfield and Woolcock cases, if the protections in [the HBA, the EPAA<sup>1</sup> and the SSMA<sup>2</sup>] are unsuitable (for example, outside of the limitation period, owed to a different party etc) owners may have more difficulties in pursuing action to sue other building professionals for negligence or breach of contract related to building work. The likelihood of this option being available is further reduced where contracts have exclusions or limitations on liability.*

This statement might be correct however it is important to recall that in these cases it was the availability (at least up to a point in time) of strong and effective remedies in contract (in the case of *Woolcock*<sup>3</sup> and *Brookfield Multiplex*<sup>4</sup>) and under statutory warranties under the HBA (in the case of and the *Star of the Sea*<sup>5</sup>) that caused reluctance of the Court to find the existence of a further 'duty of care'.

Also, it has traditionally been difficult to establish duties of care against building professionals like engineers (see for example the case of *Ku-Ring-gai Council*<sup>6</sup>). The reluctance of the Court has primarily been around implying such a duty of care from builders and developers to owners and successors in title when there is already a very clear statutory scheme for such liability for residential building works.

The HBA provides a 'single source of liability' so that Owners can pursue the developer and the builder for the entirety of the loss as the proportionate liability regime in Part 4 of the *Civil Liability Act* is excluded from operation.

This has distinct advantages for property owners of residential buildings as they do not need to embark on the expensive and complicated process of suing all concurrent wrongdoers (likely to be a large number of parties including subcontractors and building consultants).

### The Lacrosse decision in VCAT: an example of the current model working well for purchasers and builders

The recent decision of *Owners Corporation No. 1 of PS6613436T v Lu Simon Buildings Pty Ltd (Building and Property [2019] VCAT 286 (Lacrosse Decision)* is a good example of this model's effectiveness in circumstances where the statutory warranties apply.

In the *Lacrosse Decision*, the Owners were successful in seeking complete recovery from LU Simon for breaches of statutory warranties under the equivalent legislation in Victoria. Under the proportionate liability regime, if the above breaches related to a failure to take reasonable care then LU Simon's liability to the Owners would have been diluted by reason of any contributory negligence of the Owners or the apportionment of that liability between concurrent wrongdoers.

However, the Tribunal was able to ensure that Owners received judgment wholly against LU Simon by reason of its finding that the above warranties were not qualified or limited by any obligation to use reasonable care and skill. Instead they were considered 'absolute'. LU Simon either complied or it didn't.

<sup>1</sup> *Environmental Planning and Assessment Act 1979* (NSW) (**EPA**)

<sup>2</sup> *Strata Schemes Management Act 2015* (NSW) (**SSMA**)

<sup>3</sup> *Woolcock Street Investments v CDG Pty Ltd* [2004] HCA 16 (**Woolcock**)

<sup>4</sup> *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2013] HCA 36 (**Brookfield Multiplex**)

<sup>5</sup> *Owners Corporation Strata Plan 61288 v Brookfield Multiplex* [2012] NSWSC 1219 (**Star of the Sea**)

<sup>6</sup> *Ku-ring-gai Council v Chan* [2017] NSWCA 226 (**Ku-ring-gai Council**)

LU Simon were then able to recover almost all of its liability from the architect, certifier and its fire engineer by reason of their respective breaches of the relevant contracts – the important thing to remember though was that proving this was LU Simon's problem – not the Owners.

This case therefore presents a very recent and clear example of the model working extremely well from the perspective of both the owners and LU Simon (noting that it was LU Simon's good contracting approach that ensured it was able to recover).

The 'single point of liability' approach in the HBA, sensibly, mirrors the approach that most commercial owners and developers take in their contractual arrangements, particularly under the Design and Construct model which provides a very clear and neat 'single source of liability' in the case of defects (whether in design or construction) for developers to pursue a single head contractor (and the for the head contractor to then cross-claim against liable parties that it has contracted with).

Recent commentary has tended to criticise these systems and called for greater accountability through the supply chain without recognising the benefits of this 'single source of liability approach'.

#### When does the 'single source of liability' approach fail?

One scenario is where the builder and developer are available to sue, but the owners are outside of the limitation periods that apply to actions of that kind (being 6 years for major defects and 2 years for minor defects).

Courts have, understandably, been reluctant to open up additional avenues of relief against a builder and developer, via duties of care in negligence, when the intention of the NSW Parliament was to put clear time limits on actions against those parties under the HBA.

If maintaining an avenue to claim beyond the limitation periods is the concern of the NSW Government then the more appropriate course of action would be to amend the limitation periods.

A further problem, of course, arises when the entities who are supposed to be the 'single source of liability' are no longer available through winding up or insolvency for example. For residential buildings under 4 storeys the compulsory insurance scheme will be available to ensure owners are protected.

However, the insurance exemption that applies for high-rise (4 storeys or more) apartments means that owners may be left without an avenue to claim under insurance and instead must look to whether there is any cause of action against other parties like certifiers, subcontractors, architects or engineers.

Only in this specific scenario (albeit one that is not that uncommon) is it necessary for owners to be concerned with duties of care from parties other than the builder or developer as this may present their only option for recovery.

In the commercial sector savvy owners or developers will usually procure things like Parent Company Guarantees to protect against solvency concerns of 'shelf companies' and will otherwise require Deeds of Warranty from subcontractors and suppliers that are available to provide a direct contractual cause of action in the event that the head contractor becomes insolvent. A statutory duty of care seeks to do something similar.

#### Is a statutory duty of care the solution?

Imposing a statutory duty of care on such parties is an available option to ensure that this potential 'liability gap' in the residential sector is addressed in such situations. If it is to be

adopted, it should be clearly set out so as to only apply in circumstances where the developer or builder is insolvent.

In all other situations, aggrieved owners should proceed against the developer and/or builder in the usual course and for the whole of the liability and leave the developer or the builder (as the primary defendants) to have to worry about seeking (and bearing the associated legal costs) liability contributions from the other entities that it contracted with.

Having said that, we do not consider the imposition of a statutory duty of care to be the best available option. Whilst it is true that establishing a duty of care is often the most difficult legal threshold, confirming which defects arise as a result of a want of reasonable care (ie as opposed to simple non-compliance) is another big issue in negligence cases involving building defects. One only needs to look to the Lacrosse decision where it was held that some of the warranties to ensure design and construction so as to be 'fit for purpose' was an absolute and was not qualified or limited by any obligation to use reasonable care and skill<sup>7</sup>

As lawyers we always prefer to argue on clearer contractual breaches and statutory warranties than via the more vague notions of failures to take reasonable care.

Also, if there is a concern about owners' rights outside of the limitation periods then this reveals a need to consider reform of the limitation periods – it does not justify adding further complexity to legal proceedings by including an additional duty of care layer that the Courts have worked so hard to remove so that parties and lawyers can focus on clearer contractual and statutory rights.

#### Adopting similar 'statutory warranties' for building professionals: an alternative to a new "duty of care"

Given the advantages to the current HBA model, it is our submission that the NSW Government should consider improving property owners legal rights (in the context of residential buildings), by extending the statutory warranties which exist in the HBA as follows.

1. Where the builder and developer are still in existence, a better solution to enhance consumer protections than proposed duties of care on other building professionals would be for the NSW Government to consider a further grace period for actions against developers and builders in the event that a major defect is latent and only becomes manifest after the 6 year period.

It might be appropriate for such a grace period to run from the time that the damage becomes manifest (ie in line with limitation periods for negligence) and noting the 10 year 'long stop' for all Building Actions under the EPA.

2. Where the builder and developer are no longer in existence, a better solution to enhance consumer protections than proposed duties of care on other building professionals would be for the NSW Government to:
  - (a) Enact an additional section of the HBA similar to section 18C, which entitles a person who is a successor in title to an owner builder, a holder or a contractor licence, a former holder or a developer who has done residential building work, to the benefit of the statutory warranties from the class of professionals specified in the regulations, as if those professionals had done the work under a contract with that successor in title to do the work;

The "class of professionals", should be those building professionals which are deemed to perform works of an influential or serious enough magnitude that

<sup>7</sup> See here for further discussion <https://www.millsoskley.com.au/thinking/liability-apportioned-for-combustible-cladding-vcats-lacrosse-judgment-will-impact-all-building-professionals/>

the public would expect that professional to carry out its works or services in a manner consistent with the statutory warranties in section 18B (for example, architects, engineers and other specialised professionals);

Such warranties could be more specifically targeted to design services (ie to mandate compliance with BCA requirements and performance solutions) or to oversight, verification and certification services as appropriate depending on the party concerned.

This has the benefit of precisely clarifying what the basic obligations and liabilities of each of these parties are rather than leaving it up to the Courts to determine what is 'reasonable'.

Properly drafted, it might also confirm, that liability for such matters cannot be contractually excluded or limited by those building professionals

Importantly, so as not to dilute the strong current 'single point of liability' provisions, these new warranties should only apply in circumstances where the owner builder, holder of a contractor licence, former holder or developer no longer exists.

- (b) Consider an expansion of the definition of residential building work to cover high-rise residential apartments and other particular buildings which are quasi residential and excluded, but which the NSW Government considers in the public interest to regulate (such as aged care facilities).

The insurance industry would no doubt resist such an expansion and consideration might be needed to creating some sort of fidelity fund (eg. from licencing and registration fees from builders and developers) to provide a safety net in such circumstances.

Such an organisation should be empowered to exercise rights of subrogation, in the same way that an insurer would, to step into the shoes of an insolvent developer or builder and pursue other third parties for liability under contractual rights etc.

This ensures the relevant liable parties have put some skin-in-the-game even where they may ultimately have wound up or disappeared and avoids concerns over industry 'bailouts' by taxpayers or the insurance industry.

### **The Opal Towers Recommendations**

When commissioning the Opal Towers Report, the Government issued three terms of reference (**TOR**), the third of which asked: "*How to avoid this type of incident in the future*". The recommendations made by the authors of the Opal Towers Report with respect to the third TOR are extracted below:

#### ***TOR – How to avoid this type of incident in the future***

*We recommend the following should be implemented:*

13. *The creation of a government Registered Engineers database developed in partnership with an appropriate professional body.*
14. *Independent third party checking and certification of engineering designs and subsequent changes to the design of critical elements by a Registered Engineer, including confirmation of what are the critical elements for all major construction projects.*

15. *Critical stage, on-site checking and certification by a Registered Engineer that construction is as per the design for all major construction projects. All changes to identified critical structural elements that are proposed and made during construction should also be certified by an independent Registered Engineer.*
16. *An online database be created, where all certifications may be viewed by a broad range of stakeholders including owners and respective owners; before, during and after construction. The aim is to increase transparency of the approval and certification process.*
17. *A Building Structure Review Board be formed, with the major purpose being to establish the facts relating to structural damage of buildings arising from design and construction, investigate their cause and to recommend changes to Codes and Regulation where appropriate.*

It appears that recommendations 13 and 16 align with the Government's proposed reforms. However, we believe that the Government should also ensure that recommendations 14 and 15 are adopted as well.

Recommendation 17 could ultimately fall within the purview of the Building Commissioner, and would ultimately facilitate the education of the industry so that it could learn from its mistakes. We suggest a broader focus of such a board or tribunal and this is set out below under the heading "An independent arbitrator of code-compliance issues".

### **Independent engineering verification of key components**

Appendix 4 of the Discussion Paper included a table of the status of the NSW Government's implementation of the Shergold and Weir Building Confidence Report recommendations. We draw attention to recommendation number 17, which states:

*"That each jurisdiction requires genuine independent third-party review for specified components of designs and/or certain types of buildings."*

This recommendation aligns with the Opal Towers recommendations 14 and 15 mentioned above. Mills Oakley supports the introduction of such a reform.

The practice of requiring independent verification by third party engineers is common practice for most large infrastructure projects in Australia, and is more widespread for most projects in European jurisdictions, especially in Germany.

It is common good engineering practice to require proof checking of designs and calculations, even if performed in-house by colleagues within a particular practice. Imposing a similar requirement with a later of independence would not involve a significant change to those good engineering practices, and as recommended, it could be limited initially to those critical design elements which the building designer has identified as critical.

In any such system, should a third party reviewer consider that further parts of the design warrant checking, then it should be incumbent upon the building designer to provide sufficient information demonstrating that all key, critical elements comply with NCC and Australian Standards.

This system could be administered as part of the purview of the Building Commissioner.

### **An independent arbitrator of code-compliance issues**

The cladding crisis is a very good example of what can go wrong when there is a lack of clear and coherent guidance on contentious points of interpretation as to the application of the BCA –

and more importantly – when practitioners simply get it wrong or don't avail themselves of available routes to obtain clarity.

Ultimately, regardless of what building practitioners may think at the time, whether or not something – including a performance-based solution – actually complies with the BCA will be a matter that a Court might ultimately determine.

The VCAT decision in the Lacrosse matter is the first judicial guidance that has been handed down regarding the interpretation of particular sections of the BCA. The decision suggests that whilst there was a significant cohort of fire engineers and other building professionals taking a more cautious – and it now seems correct – approach to interpretation – there were many more that were not.

Identifying the widespread misapplication of building standards and legislative requirements long after buildings are completed leaves us with a crisis in terms of the rectification cost bill which is now on an extremely large scale.

It is highly likely that if such matters had been put before a robust independent arbitrator or tribunal, properly utilised then the more cautious – and it now seems correct – approach to interpretation would have been identified and the poor practices stopped far earlier.

The following extract, from an article Mills Oakley published on the decision, highlights a number of key failings that provide strong justification for implementing a system where industry can obtain guidance or binding decisions on matters of interpretation under the BCA.

- Whilst His Honour described Mr Galanos as “an honest witness” his evidence was nonetheless very concerning in its descriptions of rather cursory treatment of important issues and did not demonstrate a great deal of professional diligence. If one wishes to get an insight into why there is so much consternation about the private certification regime, paragraphs [334]-[341] of the judgment present a rather troubling picture of what can go wrong under the current system.
- The surveyor sought to argue that the task of interpreting BCA C1.12(f) was “not straightforward” and that a “counsel of perfection” should not be imposed. The Tribunal emphatically rejected these arguments:

*“Indeed, a competent professional with experience in the building industry and a comprehensive understanding of the Objectives and Functional Statements in the BCA, was probably in the best position to land on the correct construction, without the need for “concentrated legal analysis based on statutory interpretation principles”. [14]*

- The surveyor sought to rely heavily on the alleged “industry wide understanding that ACPs were BCA compliant” and for the purposes of the “reasonable peer professional opinion” defence to negligence (a version of which is applicable in most Australian jurisdictions).
- After finding that surveyors were professionals (so that the defence could be utilised), the Tribunal then considered whether the ‘relevant practice’ was widely accepted in Australia as competent professional practice by a significant number of building surveyors. After analysing the evidence of multiple witnesses and notwithstanding the evidence of several of the respected fire engineering experts offering differing opinions, the Tribunal found that on balance the compliance of ACPs with the BCA was a widely held peer professional opinion amongst surveyors.
- However, the surveyor’s defence failed at the final hurdle – demonstrating that the peer professional opinion was “reasonably held”.

- His Honour drew upon well-established principles of behavioural science to describe the approach of the surveyor (and the expert witnesses it led) to the task of assessing compliance with the relevant sections of the BCA as being “*infected by confirmation bias*”.

*“Namely, that otherwise experienced and diligent practitioners were beguiled by a longstanding and widespread (but flawed) practice into giving insufficient scrutiny to the rationale for that practice.”[15]*

- Essentially, a ‘groupthink’ mentality had developed, and in the absence of any serious attempt to scrutinise, confirm or test the approach, it was not considered to be reasonable.
- The need to seek input from fire engineers was confirmed by the evidence that was provided by one of the experts who described the building surveyor’s role thus:

*“[A] building surveyor is more like a general practitioner doctor or an auditor. We ...know a little bit about a lot, but we don’t know a lot about anything in particular. Each and every one of those standards, codes, or 95 per cent of them have a discipline behind them – so the mechanical engineering standard has a mechanical engineer, four years’ training.”[16]*

- His Honour highlighted that no evidence was provided of any building practitioner ever “*seeking any kind of assessment or endorsement from a professional body or regulatory authority*” and that there was “*no evidence of any approach to the ABCB for guidance on the issue*”.[17]

The above passages highlight where things went wrong. Ensuring it doesn’t happen again requires a more robust and transparent system for determining questions of interpretation before the matter falls for a Court to determine when looking to apportion responsibility following some catastrophic event. It also highlights the limitations of certifiers, suggesting the need for independent engineering verification at critical stages.

We note with interest that the communique issued by the Building Ministers’ Forum on 18 July 2019 envisages that an implementation team will be established, for a period of time, as part of the Australian Building Codes Board.

Whilst these matters could certainly be administered through the Building Commissioner, the ABCB might have a view on how such issues might be better dealt with consistently on a national level and whether the ABCB’s remit should be expanded to accommodate a more proactive approach to ensuring consistency of application of contentious or subjective aspects of the code.

### **Low hanging fruit: Correcting the ‘information asymmetry’ in the market**

Policymakers should be asking themselves: How can we reform the system to promote, and provide a competitive advantage to, those professionals who adhere to best industry practice?

As a lawyer, specialising in the industry, I know that before making any sort of personal property purchase involving a new build, at a very minimum, I would identify the developer and the builder and undertake searches to ascertain their solvency, the strength of their balance sheet and to see how many times they have been sued for defects claims.

One might suggest that such steps are the minimum that should be expected of anyone making such a significant investment. However, is this placing too high an expectation on consumers?

It is fair to assume that most purchasers have been ignorant of, or at least somewhat naïve as to, the underlying importance of ascertaining who was responsible for the building and what is

their track record. Perhaps, rightly or wrongly, they have simply assumed that basic compliance with the BCA would be assured when buying a new apartment.

We do not purport to suggest that the age-old legal principle of 'caveat emptor' ('let the buyer beware') ought be undermined and buyer due-diligence should remain an important and necessary requirement. However, we consider that added protections for consumers are appropriate.

The capacity of the consumer to 'protect herself' in sales contracts by obtaining assignments or novation of specific contractual warranties and by carrying out pre-purchase inspections (both of which formed the underlying rationale of the High Court in *Brookfield Multiplex* and *Woolcock* in finding that the plaintiffs' 'vulnerability' for the purposes of a duty of care) has perhaps been overstated<sup>8</sup>.

This is particularly problematic for apartment developments where an Owners Corporation only comes into existence after a building (which may be rife with defects) is completed.

In any case, whether or not it is *possible* for consumers to protect themselves, putting all of the responsibility on the shoulders of the consumer to do so is not in keeping with our modern sense of how things should operate.

Within closed industry circles there are builders and developers who are infamous for their poor track records when it comes to claims and defects and even when it comes to winding up companies and becoming directors of new entities.

In a properly functioning market without information asymmetries one might reasonably expect that such poor form would eventually lead to commercial ramifications as owners simply stop buying from those companies. Unfortunately, this is far from the norm, and many of those operators with less than scrupulous practices have gone on to great commercial success whilst the defect cases pile up in Court and a 'cone of silence' descends with owners reluctant to publicise the issues for fear of devaluing their own asset.

Surely there must be a way to celebrate and promote those in our industry that produce quality products and to also identify the worst offenders in a way that is useful as a means of information sharing to prospective purchasers (and without directly targeting particular projects and undermining value).

We do this now in respect of energy efficiency and green ratings – the hyperbolic suggestions by some that the sky would fall in with the publication of lower 'star ratings' for existing buildings have not come to pass. Instead the purchaser or incoming tenant finds themselves armed with more information about the energy efficiency and green credentials of that building.

Is it time to arm purchasers (in a way that is easy to understand and recognise) with more information about the track records of developers and builders in delivering buildings that are free from major defects? Also, even, if a mandatory engineering verification scheme is not introduced for critical stages (see our proposal above) could it be available as an option with some improved marketability with some certification mark or rating to be attached to those buildings that have gone through the 'gold standard' of verification?

Whilst it wouldn't prevent defects, if such information was required to be published at the time of advertising or sale, then one could be satisfied that purchasers would at least be going into such transactions with 'open eyes and the differences between the good and the bad might become more obvious.

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<sup>8</sup> For an excellent discussion of the judicial consideration of these matters and useful commentary see Bell and Jovic *Negligence Claims by Subsequent Building Owners: Did the Life of Bryan end too soon?* (2017) 41(1) Melbourne University Law Review

A centralised Building Commissioner would be well placed to administer such a system and publish the requisite information.

Yours sincerely

**SCOTT HIGGINS  
PARTNER**