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Building Stronger Foundations Consultation
Regulatory Policy, Better ReguationDivision
Department of Fiance, Services and Innovation
2-24 Rawson Place
HAYMARKET. NSW. 2000

Dear Sir/Madam

Building Stronger Foundations

I refer to the request for submissions in relation to the government's Discussion Paper "Building Stronger Foundations". I commend the government for its initiative in endeavouring to deal with this matter.

About me

Whilst I am a long-standing member of the Law Society of New South Wales Property Law Committee and support the submission which the Society has made, this submission is made by me personally and should not be taken to contain views shared by the Society except if expressly stated to be so by the Society.

The need to deal with significant failure, not just process

I have a particular concern about the approach to the problem which has manifested itself with the various and significant problems with the Opal Tower, Mascot Towers, Zetland, Erskineville and the Joshua Building, Alexandria developments, so much in the media of late.

It is not that I do not support stronger regulation both in the proposal to have a system of declaration of plans, closer supervision to ensure that construction is in accordance with declared plans or the extension of the tortious duty of care to catch

all those forseeably affected by a departure from the appropriate standard without limitation. I most certainly do support those endeavours.

The structural and safety failures which have manifested themselves in the developments referred to above can reasonably be called catastrophic, at least for those most closely affected. A person purchasing a home off the plan invests for the most part a significant part of their life savings, or future income, in the purchase. An investor relies for the success of the investment on the income which the purchase will derive. To lose the ability to be able to live in the property at any time after completion through shoddy building work can be called a financial catastrophe for those affected. The failure has the ability not only to deprive the purchaser of a home or a paying tenant; it may mean financial ruin. This is the area of my concern: what should the response of government be to catastrophic failure?

Therefore when I use the term "catastrophic failure" I refer to the circumstance where a building has to be evacuated in whole or in part because of a failure in design, in meeting accepted standards of construction, or to build according to a development consent or (now) a construction certificate or complying development certificate or (in the future) declared plans. It may not be catastrophic in the sense that the building needs to collapse and I therefore use the term subjectively – the catastrophe is that of the affected parties.

The problem

The problem I see is three-fold:

- First, there are very few developers who have the wherewithal to compensate for costly building defects of a catastrophic nature. Insurance against such risks may not be available;

- Secondly, most developments are undertaken by single-purpose vehicles, which are liquidated shortly after completion of the project making the lack of financial heft largely irrelevant; and

- Thirdly, the process of recovery inevitably requires those seeking compensation: Owners Corporations, apartment owners and tenants to go to law. Legal proceedings are known to be (and after more than 46 years of legal practice, and as a costs assessor for the last 20 years, this is something I can vouch for) costly and even those developers whose financial strength might not stretch to a $100 million for repairs and compensation, can afford a million dollars for legal representation. Those suing them however do not always have such deep pockets. As my father once told me: "the doors to the Courts of Law, like the doors of the Savoy Hotel, are open to all." To have an effective legal remedy is not of very great value without the financial ability to pursue it. This is particularly germane when it is put in the context

that failures are largel preventable by appropriate levels of governance significantly lacking as I write.

My attention is thus not addressed to remedying the process of certification and the development of declared plans – which, as I say, I wholeharted support on the basis that prevention is better than cure – but on what happens if the reforms contemplated by Professor Shergold and Ms Weir still leave us (as, sadly, our lived experience tells us is likely) with problematic and catastrophic building failure or safety issues.

A no-fault Building Compensation Fund

The thrust of my submission is that a no-fault, readily accessible fund should be established to meet the costs of such a catastrophic failure as those we have seen in the Opal Tower, Mascot Towers, Erskineville, Alexandria, and Zetland examples. The costs of rectification of poor building work is often mind-boggling and, on the prevention-better-than-cure principle, it is better to ensure that the buidling is built to known and clear standards enforced properly in the course of the construction. But if something goes wrong, the means of the most affected parties are simply not sufficient to deal with the effects, undertake the repairs and to seek compensation in a cheap and efficient manner.

A proposed model

I would model the fund, to a fair extent, on the New Zealand EQC model. This would mean that the fund would cover a first but significant level of the costs incurred in case of a catastrophic failure for all insured properties. This amount would need to be determined to fit the reality: it should be an amount which would be enough to substantially repair any defect, and meet specific expenses to which compensable parties would be entitled as a result of the failure of the buillding or any safety issue. This might be, in a large block, say, $300,000 per lot but this would, inb practice, likely be actuarially determined. Any insurance policy which responds to the risk would then pick up any difference.

Funding would, I suggest, firstly, be by way of a levy on developers. One model might be that this be paid out of the purchase price on completion of the purchase of each lot with any legislation specifically providing that this levy cannot be recovered from the purchaser. Secondly, the fund would be increased by a levy on all insurance policies taken out by Owners Corporations covering usual building risks. The amounts of these levies would need to actuarilly determined.

Subrogation of causes of action and "phoenixing"

Although the fund I envisage would operate on a no-fault basis, the fund would, I envisage, be subrogated to the rights of those to whom it had provided financial assistance. This would mean that the deep pockets of the litigation-willing developer

or builder would now be met by some equally deep pockets ensuring a fairer and more thorough outcome.

The model might also require the identification of a party with means to sue, rather than permit the present process of what is usually described as the use of a “single purpose vehicles” but might equally as accurately be described as “deliberate phoenixing to avoid liability”. As an alternative to making such a nomination, supported by evidence of financial standing, a developer might be permitted to supply a standard form of insurance cover noting the fund as having a statutory interest in the policy.

Use the existing structures?

I am aware that the Home Building Compensation Fund exists and it could be said to be adaptable to provide cover for just the purposes I have described. But that fund is not known for its ease of access, and the limitations on recovery are stringent. The fund which I am suggesting cannot deal with minor defects, does not depend for an answer to a problem on the status of the builder or developer nor require detailed evidence of the costs of the required repair, taking time to come to a conclusion.

Rather the fund needs to be more less instantly responsive , provide assistance on an as-needed, when-needed basis and have the technical wherewithal to assist with solutions, and provide expertise in realising those solutions at the least cost, minimum time and smallest amount of inconvcenience.

Thus, unless significantly restructed the Home Building Compensation Fund would not be a model that I would adopt.

Conclusion

I appreciate that what I have put is a very thin outline of the proposal, but rather than spend very many hours on the possible detail, I make this somewhat undetailed submission in the hope that it a fund along the lines suggested is found worthy of further consderation, development and establishment.

Yours sincerely
Rosier Partners

Peter Rosier