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**Subject:** FW: Submission Building Stronger Foundations

**Categories:** Green Category

## **SUBMISSION to BUILDING STRONGER FOUNDATIONS**

Thankyou for the opportunity to contribute to the discussions on reforms to the building industry.

While the Shergold Report and Discussion Paper focus on issues associated with the regulatory framework for building designers, certifiers, and others it does not address the underlying issue of the required scope of consumer protection.

Buildings and residential buildings are generally built with a design life of 50 plus years. Many buildings fail to meet their design life due to a range of circumstances many of which are described in both the Shergold Report and Discussion Paper. Further due to the limitation of liabilities provided for in the Home Building Act and other legislation those in the building industry remain "protected" while consumers are exposed.

As examples:

### **Limitation of Liability – Statutory Warranty Periods.**

While a building should be designed such that it has a design life of 50 years, there is a limitation on liability for major defects of 6 years under Part 2C of the Home Building Act. Such defects are defined in the Home Building Act.

The legislation in NSW ,makes the builder liable for cosmetic defects for 2 years and structural defects for 6 years. Buildings and especially houses are supposed to be built with a design life of 50 years and built to withstand 1:50 year occurrences (such as cyclones etc). If a house is constructed such that it is incapable of withstanding say a 1:10 year cyclone and that cyclone happens 7 years after the house was constructed (and falls down) the owner has no recourse against the builder for defective workmanship

There are few records of such incidents, not because they do not happen, but because there is no avenue for redress and hence no records of that redress.

The situation can be compared to a car. If a car has a structural or safety defect, irrespective of the age of the car a recall can be applied with the liability to fix the car with the manufacturer responsible for that rectification. Air bags are a pertinent example.

Similar consumer law in NSW requires products such as cameras, ovens, TVs etc to work for a reasonable period of time after purchase. That reasonable time is based on what is the appropriate design life of the product. A high end TV that failed after 2 years would be replaced or repaired by the manufacturer. For a homeowner where a home that has a 50 year design life that suffers a structural failure after 7 years, even to the point where it is unliveable the homeowner has no recourse to have that home fixed by those who designed, built or certified the home.

It is suggested that the liability for structural damage to a home remain for the design life of the home.

## **Limitation of Liability – Financial**

Part 6 Division 3 of the Home Building Act defines insurance requirements. The supporting regulations limit the insurance cover required to be taken out by a builder at \$340,000. Although stated as the minimum cover no builder will take out additional cover if asked.

What this effectively does is cap the liability of the builder/insurer to \$340,000. There are many cases where the rectification costs and other costs required to be met from the insurance significantly exceed the \$340,000 (and previous determined amounts). The result is that when there are major defect that take both time and legal representation to pursue the amount is vastly inadequate leaving the home owner, through no fault of theirs with a financial loss

Corporation law works differently where a Director of a Company can be liable for liabilities incurred due to his or her actions. Due to the provisions of the Home Building Act directors of home building companies are excluded from liability.

If you compare that to a car (costing 90% less) if there is a defect with the car there is an obligation to fix it as evidenced by numerous recalls for vehicles even if they are more than 6 years old. The consumer protection provided to a car purchaser is far greater than the consumer protection provided to a home owner.

With a camera or TV, if after 2 years the TV still worked but the screen fell out it would be covered by Aust consumer law. If a door fell off its hinges or guttering fell of the roof (as long as no water entered the house) it is not covered by builders warranties. The purchaser of a TV in this case has more consumer protection than the owner of a house.

## **Dispute resolution**

In NSW the dispute resolution chain is

1. Try and address with builder. If that does not work.
2. Take the matter to Fair Trading. The builder may chose to ignore the directions from Fair Trading (as they did in my case)
3. Take the matter to mediation. Often no agreement can be found
4. Take the matter to NCAT. That will require the engagement of expert witnesses etc which both cost and take time. It may take NCAT up to a year of hearings etc before a decision is made. In its determination NCAT determine things as satisfactory even through they do not comply with the DA. NCAT often choose to place little or no weight on evidence based on pragmatic measurement such as gaps in brickwork. The builder may choose to ignore the directions from NCAT and set up a new company.
5. The next step is to take the matter to the courts to get an order to pay enforced. The builder may ignore that.
6. The next step is to the Supreme Court to get the builder wound up so you can liquidate the builder to seek payment from the liquidator.
7. On liquidation it is found the builder has no assets
8. Take the matter to the Home Warranty Insurances. Home Warranty Insurance tactics at this point are include matters being time barred, where the insurer finds something defective by the NCAT has not the insurer will not pay. If NCAT has found something to be defective but the insurer disagrees they will not pay. There have also been situations the initial insurers report agrees there is a defect they will get a further report to the contrary.
9. By this time the home owner has racked up legal costs, rental costs (in many cases for a number of years) and still has no resolution. Many give up.

The system of dispute resolution has been subject to about a dozen enquiries since 2000 including Upper House Inquiries and inquiries by the Productivity Commission. Nothing has changed and it is my opinion that this most probably because the advisory panels advising the

Minister are made up of industry representatives (to protect the builders) and lawyers (who profit from extending the conflict)

The aspects in this system that need to be addressed are

1. The time and cost required to get and outcome
2. The uncertainty of an outcome where non-professionals incorrectly determine pragmatic compliance matters
3. NCAT making determinations that abuse the EP&A and other acts resulting in home owners unable to get occupancy certificates without additional works and costs not awarded by NCAT.

Alternate systems have been proposed based in the QLD system. An example is

1. Try and address with builder using the reports from the Certifier. If that does not work;
2. Take the matter to Fair Trading using the reports from the Certifier. Fair Trading directs the builder to fix in accordance with the Certifier's report.
3. If ignored Fair Trading appoint a builder to fix the house in accordance with the Certifier's direction so the owner can get in as soon as possible to mitigate escalation of costs. The full cost of the rectification is met by the builders insurer.

In respect to disputes that may go to NCAT, NCAT are not builders or certifiers and have no powers under the EP&A Act to say what does or does not comply to DA's, BCA or anything else. NCAT has no power to issue an occupancy certificate. Only the Certifier has that authority. In all cases compliance as determined by the Certifier is based on a measurement which is a quantitative assessment, or a specified material. Therefore any report by the Certifier to NCAT must be taken as fact. In this matter a NSW Upper House Inquiry found the activities of the then CTTT so bad it warranted a separate Upper House Inquiry. That did not happen.

The other aspect of this is that the builder should carry the full liability for their work for the design period of the building as occurs in most other consumer protection areas.

Rob Siebert