Closing the Gap: Decennial Liability Insurance – The Solution to the Strata Living Crisis in New South Wales

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With the rising trend of apartment living in New South Wales, there is growing concern around the lack of consumer protection in strata housing against defective building work. This issue is highlighted by the recent Mascot and Opal Towers evacuations, which the author believes are just the tip of a very large iceberg known as the "strata living crisis" in NSW. This article analyses the State Government's current and past approach to consumer protection for defective residential building work, with a focus on the insurance exemption for residential strata developments over three storeys. This analysis will show just how fragmentated and ineffective consumer protection has been and continues to be in this area and will propose a major law reform underpinned by decennial liability and decennial liability insurance.

I. Introduction

There are more than 80,660 strata schemes worth $366 billion in building assets in New South Wales,[1] housing over 1.1 million people. Within 20 years, half of NSW's population is expected to be living or working in a strata or community scheme.[2] While strata living is considered the future way of accommodation, it is concerning that over 85% of apartments built since 2000 have defects in construction, materials, or design, with leaks and water damage being by far the biggest problems.[3] Further, strata buildings over three storeys do not attract the protection of the State's mandatory homeowners warranty scheme. Rather, they fall into what is known as the "multi-storey insurance exemption" leaving strata title owners with no remedy against defective building work if the developer or contractor is nowhere to be found.

Historical changes to the building insurance scheme over the years suggest that the State has no intention of bringing multi-storey developments within the purview of the government's mandatory insurance scheme – not because it does not want to, but because it simply cannot afford it. The scheme is already running at a significant deficit and adding multi-storey residential buildings to the mix would send the entire system into a turmoil. The obvious questions here are: *What is the solution to NSW's strata living crisis? How can the Government give apartment owners the same level of protection against shonky construction work?*

This article advocates that the solution to the strata living crisis is not to amend existing legislation but to start from scratch with an entirely different framework, a new holistic solution, that is, decennial liability, and decennial liability insurance.

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[1] UNSW Sydney and Strata Community Association, *Australian National Strata Data 2018* <https://apo.org.au/sites/default/files/resource-files/2018/05/apo-nid174131-1184756.pdf>.

[2] NSW Government, *Strata Law Reform, Strata and Community Title Law Reform Position Paper* (November 2013) 2.

[3] City Futures Research Centre, *Governing the Compact City: The Role and Effectiveness of Strata Management* (May 2012) 3.

II. The Evolution of the NSW Building Insurance Scheme

Over the years, the building insurance scheme in New South Wales has undergone significant change: from a government-run scheme in 1972, to a privately administered scheme in 1997 and back to a State-run "last resort" scheme in 2002. Today, the Government administers the Home Building Compensation Fund (HBCF), which is underwritten by a branch of NSW Treasury under the *Home Building Act 1989* (NSW) (*HBA*), and the *Home Building Regulation 2014* (NSW). The HBCF provides a safety net for purchasers and successors in title through mandatory insurance for defective building works if the builder no longer exists. However, the owners of multi-storey residential buildings over three storeys do not have this same level of protection. Set out in the following section of this article is the history and evolution of the building insurance scheme in NSW since 1972 until today.

The mandatory insurance scheme was operated from 1972 through to 1997 by the Building Services Corporation (BSC) and provided insurance cover for all homeowners to the value of $40,000 for defect rectification. This amount increased to $100,000 in March 1990. Under this scheme, there were no insurance exemptions for residential apartments in multi-storey buildings.

In 1993, the NSW Government initiated an inquiry into the BSC, chaired by Peter Dodd. One of the key findings of the Dodd Report was that: "The current 'one stop shop' approach is inappropriate. There is a need to separate the key functions of industry regulation and consumer advice, dispute resolution and insurance."[4] Commissioner Dodd went on to explain: "… I believe that the BSC is in an untenable position with the roles it is fulfilling. So long as it is both insurer and arbiter on disputes it must be susceptible to claims of conflict … More fundamentally, I can find no reasonable argument why the BSC should be provided with a Government sanctioned, monopoly position as insurer ... There is no reason a competitive, private sector insurance market cannot operate and there are examples in other States."[5] The Dodd Inquiry ultimately recommended that the Government move away from underwriting home warranty insurance and allow the privatisation of the home building insurance market.[6]

In response to Dodd Inquiry, in 1997, the government-run scheme was replaced with a privately-operated insurance regime for builders. Under this private scheme, loss from incomplete work was required to be covered for 12 months or more commencing from the time of failure to complete the work.[7] All other loss from defective building was required to be covered for seven years from completion or the end of the contract (whichever was later).[8] The minimum insurance cover was $200,000.[9] Since insurance claims for defective work could be made to an insurer directly, the scheme became known as the "first resort" scheme.[10] Insurance claims for non-completion, however, could only be made if the builder was insolvent, deceased or could not be found.[11] Again, there were no exclusions under the scheme, that is, residential dwellings and apartments were all protected. While the scheme was in place, HIH had between 30% to 40% of the market share and offered, in many cases, the lowest premium. They were recognised as one of the largest builders' warranty insurers.

In 1998, the requirement for builders to take out insurance under s 92 of the *HBA* was extended to owner-builder work.[12] In 1999, the insurance provisions under s 92 of the *HBA* were further amended to require a builder to provide a certificate of insurance to the owner before demanding any payment.[13] In

[4] P Dodd, *Inquiry into the New South Wales Building Services Corporation* (1993) 4, cited in Lenny Roth, "Home Warranty Insurance" (E-Brief No 7, Parliamentary Library, NSW Parliament, 2010) 3.

[5] Dodd, n 4, 37–38.

[6] Dodd, n 4, 4–6.

[7] *Home Building Act 1989* (NSW) s 103B(1) (Historical Version for 5 July 2000 to 29 June 2001).

[8] *Home Building Act 1989* (NSW) s 103B(2) (Historical Version for 5 July 2000 to 29 June 2001), (now repealed).

[9] *Home Building Act 1989* (NSW) s 102(3) (Historical Version for 5 July 2000 to 29 June 2001), (now repealed).

[10] *Home Building Act 1989* (NSW) s 99(1)(b) (Historical Version for 5 July 2000 to 29 June 2001), (now repealed).

[11] *Home Building Act 1989* (NSW) s 99(1)(a) (Historical Version for 5 July 2000 to 29 June 2001).

[12] *Home Building Amendment Act 1998 No 56* (NSW) Sch 1 s 3.

[13] *Home Building Amendment Act 1999 No 26* (NSW) Sch 1 s 9.

2000, s 96A was also introduced to prevent developers from entering into contracts without a certificate of insurance by the contractor performing the work.[14] Developers however were exempt from the requirement to take out insurance.[15]

In March 2001, HIH collapsed with debts of about $5.3 billion. Consequently, almost $2 billion of construction activity was placed on hold as builders were left without any insurance cover.[16] The collapse saw other insurance providers starting to charge higher premiums which in turn led to builders being unable to afford insurance. This instability resulted in the Ministerial Council on Consumer Affairs commissioning a national review of home warranty insurance and consumer protection known as the Allen Inquiry. The Allen Inquiry considered insurance as well as building licensing, contracts, dispute resolution, and compliance. The conclusion was to "put less emphasis on insurance and give more attention to strengthening the regulatory framework".[17]

In early 2002, Dexta Corporation Limited was unable to secure an underwriter and was forced to exit the home building insurance market. Allianz followed suit on 31 December 2002, even after attempts were made by the Government to implement the necessary arrangements for reinsurance. Royal & Sun Alliance Limited and Reward Insurance Limited were the last remaining insurers left standing.

In July 2002, the NSW Government introduced the "Builders Warranty Insurance" (BWI) allowing consumers to make claims if the builder became insolvent, died or disappeared. "Disappearance" was later clarified to mean disappearance of a builder after due search and inquiry.[18] The BWI scheme became known as the "last resort" scheme and increased the threshold amount of a contract of insurance from $5,000 to $12,000.[19] The period of cover was also reduced from seven years to six years for structural defects and two years for non-structural defects.[20]

On 30 September 2003, an inquiry into the home warranty insurance scheme was launched in response to concerns about the lack of timely access to insurance by industry participants and consumer dissatisfaction. The inquiry was chaired by Mr Richard Grellman and became known as the Grellman Inquiry.[21] The Grellman Inquiry found that the private sector should provide home warranty insurance to all consumers except those who had purchased apartments in multi-storey buildings; the rationale being that high-rise buildings were commercial projects with materially different risks compared to risks involved when constructing free-standing homes. It is the author's view, however, that reinsurance in the global insurance market for work on multi-storey buildings was simply not available at that time and if insurers were required to cover multi-storey buildings, such offering would not have been viable.[22]

The State Government accepted most of the recommendations of the Grellman Inquiry and in December 2003, announced that high-rise residential buildings with a rise of more than three storeys would be excluded from the mandatory insurance requirements of the *HBA*.[23] As a result, the total size of the insurance market was greatly reduced as a large proportion of new housing being built in New South Wales at this time fell within this category of work.

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[14] *Home Building Amendment Act 2000 No 56* (NSW) Sch 1 s 4.

[15] *Home Building Act 1989* (NSW) s 99(2) enacted by *Home Building Amendment Act 2000 No 56* (NSW) Sch 1 s 5.

[16] Australian Government, The Treasury, *Aftermath of the HIH Collapse* <https://treasury.gov.au/publication/economic-roundup-issue-1-2015/economic-roundup-issue-1/the-hih-claims-support-scheme/3-aftermath-of-the-hih-collapse/#P112_19024>.

[17] P Allen, *National Review of Home Builders Warranty Insurance and Consumer Protection – Report to Ministerial Council on Consumer Affairs* (June 2002) vii.

[18] *Home Building Amendment (Insurance) Act 2002 No 17* (NSW) Sch 1 s 1 (now repealed).

[19] *Home Building Amendment (Insurance) Act 2002 No 17* (NSW) Sch 2 s 9 (now repealed).

[20] *Home Building Amendment (Insurance) Act 2002 No 17* (NSW) Sch 1 s 2 (now repealed).

[21] R Grellman, *NSW Home Warranty Insurance Inquiry*, Final Report (2003).

[22] *Home Building Regulation 2004* (NSW) – Regulatory Impact Statement, 84.

[23] *Home Building Regulation 1997* (NSW) cl 57BC (now repealed) inserted by the *Home Building Amendment (Insurance Exemptions) Regulation 2003* (NSW).

On 1 March 2007, the minimum cover provided under the home building insurance scheme increased from $200,000 to $300,000.[24]

In November 2008, owners could start making insurance claims on a contractor's insurance policy if a contractor's licence was suspended.[25]

In May 2009, several amendments to the *HBA* introduced onerous obligations for owners to ensure claims were made on time. Specifically, owners were required to make a claim through the contractor's insurance policy for losses by notifying the insurer during the period of insurance, or when the loss became apparent during the last six months of the period of insurance by notifying the insurer within six months after the loss became apparent.[26] These changes gave the insurers the opportunity to refuse many claims when they were not made in time. New regulations also saw the insurer's liability to pay any amount reduced if the owner failed to take action to enforce a statutory warranty[27] on the basis that "a homeowner needs to actively enforce their rights. They cannot sit back and simply do nothing, waiting for a builder to die or go out of business before making an insurance claim".[28]

In July 2009, Lumley General and CGU Insurance Limited announced their intention to withdraw from the home building insurance market. Three months later, on 8 November 2009, the State Government responded to this withdrawal by announcing that it would underwrite the home building insurance scheme.[29]

By late 2009, Calliden Insurance Limited, QBE Insurance (Australia) Limited (QBE), and Vero Insurance Limited were the remaining home building insurers and continued until 30 June 2010.

On 1 July 2010, following the global financial crisis and withdrawal of private insurers from the home warranty insurance market, SICorp became NSW Government's sole underwriter of home warranty insurance while Residential Builders Underwriting Agency Pty Ltd and QBE became authorised agents to provide insurance under the HBCF. The "last resort" warranty scheme implemented through the private regime continued under this government-funded scheme with a core focus on the provision of "a safety net for consumers when a builder does not, or cannot, honour their commitments due to insolvency, death, disappearance, or licence suspension".[30]

In June 2010, the benefit of a contract of insurance extended to successive owners in title.[31]

October 2011 saw developers becoming liable to a successive owner in title for breach of statutory warranties even where they did not perform the residential building work[32] through amendments to the definition of "developer" in the *HBA*. Around this time, the threshold requirement for insurance also increased from $12,000 to $20,000 while the minimum insurance required to be taken out increased to $340,000.

In 2015, further legislative and administrative changes saw the Home Warranty Insurance Scheme renamed as the HBCF and an online register of building insurance certificates was implemented, allowing homeowners to check the validity of their builder's insurances. At this time, SICorp's functions were transferred to the Insurance and Care NSW Board and the State Insurance Regulation Board.[33] Later

[24] *Home Building Amendment (Minimum Insurance Cover) Regulation 2007* (NSW).

[25] *Home Building Amendment Act 2008 No 93* (NSW) Sch 1 s 5; *Home Building Act 1989* (NSW) s 99(3)–(5).

[26] Amendment to *Home Building Act 1989* (NSW) s 103BA by the enactment of the *Home Building Amendment (Insurance) Act 2009* (NSW) Sch 1 s 3.

[27] *Home Building Act 1989* (NSW) s 103C.

[28] NSW, *Parliamentary Debates,* Legislative Assembly, 13 May 2009 (Hon Penny Sharpe).

[29] NSW Office of Fair Trading, "NSW Government Steps into Protect $20 Billion Building Industry" (Media Release).

[30] NSW Fair Trading, "Reform of the Home Building Compensation Fund" (Discussion Paper, December 2015) 3.

[31] *Home Building Act 1989* (NSW) s 92C enacted by *Home Building Amendment (Warranties and Insurance) Act 2010* (NSW) Sch 1 s 4.

[32] *Home Building Act 1989* (NSW) s 18C (2) enacted by *Home Building Amendment Act 2011 (No 52)* (NSW) Sch 1 s 12 (now repealed).

[33] These changes were implemented through the *State Insurance and Care Governance Act 2015* (NSW).

on, SICorp became part of "Icare" and is now the single provider of home building insurance in New South Wales. Under this current regime, builders are legally required to take out insurance for residential building work valued over $20,000. A certificate of insurance must also be issued for the building project before commencement of work, the minimum cover being $340,000.

In 2016, the State Government announced yet another overhaul to the HBCF so that private insurers could return to the market.[34] A year later, on 20 June 2017, the NSW Parliament passed the *Home Building Amendment (Compensation Reform) Act 2017* (NSW) allowing insurers to offer split cover for defects and non-completion with homeowners. This means that homeowners will now have available a minimum cover of $680,000 in relation to defective and/or incomplete work.

III. The Multi-storey Building Insurance Exemption

As noted above, the Grellman Inquiry concluded that the construction of high-rise developments were fundamentally different from the construction of stand-alone dwellings because they were generally undertaken by consortiums, thereby reducing risks of incomplete and defective work during the construction period.

On 31 December 2003, the State Government endorsed this proposition by enacting cl 57BC of the *Home Building Regulation 1997* (NSW)[35] which had the effect of excluding multi-storey developments from the mandatory insurance scheme. From then on, developers and contractors were no longer required to take out home warranty insurance when carrying out residential building work on a development over three storeys. This multi-storey building insurance exemption is now found in cl 56 of the *Home Building Regulation 2014* (NSW) and provides (relevantly) as follows:

> **56 Exemptions from insurance for multi-storey buildings**
>
> (1) A person who does, or enters into a contract to do, residential building work relating to the construction of a multi-storey building is exempt from the requirements of Part 6 of the Act in respect of that residential building work.
>
> (2) A developer who enters into a contract for the sale of land on which residential building work relating to the construction of a multi-storey building has been done, or is to be done, is exempt from the requirements of section 96A of the Act in relation to that residential building work.
>
> …
>
> (7) In this clause:
>
> "multi-storey building" means a building:
>
> (a) that has a rise in storeys of more than 3, and
>
> (b) that contains 2 or more separate dwellings.
>
> "rise in storeys" has the same meaning as it has in the *Building Code of Australia* of the National Construction Code Series.
>
> "storey" has the same meaning as it has in the *Building Code of Australia* of the National Construction Code Series.

Seventeen years on, New South Wales has seen a continuous trend of strata developments suffering from major defective building work with no redress for many owners and Owners Corporations. It is the author's view that this problem has been caused by poor quality of construction and materials, the flawed certification regime (discussed below), contractor insolvencies and the sheer lack of consumer protection. Given the steady increase in the number of people choosing to live in medium to high-rise apartment buildings due to affordability issues, this problem will only get worse for apartment owners, Owners Corporations and the State Government. In this regard, it is predicted that over the next decade, over half of the new dwellings to be built in metropolitan Sydney will be strata titled.[36]

Based on the author's experience and research, Owners Corporations are discovering major defects in their developments some three or four years after occupation. However, when the builder or the

[34] State Insurance Regulatory Authority, NSW Government, "Greater Choice and Transparency for Homeowners" (Ministerial Media Release, 2 November 2016) <https://www.sira.nsw.gov.au/news/media-release/greater-choice-and-transparency-for-homeowners>.

[35] The amendments were enacted through the *Home Building Amendment (Insurance Exemptions) Regulation 2003* (NSW).

[36] City Futures Research Centre, *Strata Data 2015 Residential Strata in NSW – A summary analysis* (June 2016).

developer is approached to take responsibility to rectify those defects, they have either become insolvent, put the blame on each other, no longer retain a building licence, or simply do not have the balance sheet to sustain the cost of rectification. Furthermore, it is common for developers to incorporate new entities for each project. Those entities, that is, special purpose vehicles, are used to construct the project, sell the apartment and distribute profits. When this process is concluded, the entity has no purpose or value and is deregistered.

All of the above scenarios leave apartment owners and Owners Corporations without a remedy and they have no choice but to pay to rectify the defects themselves.[37]

In 2012, the City Futures Research Centre conducted the Equitable Density Research finding that common building defects result in negative impacts on the health and safety of residents and place financial burdens on owners to cover emergency and other repairs, investigations, legal costs, re-housing residents, and a decrease in property values and rental incomes.

In 2013, the NSW Government released a White Paper, *A New Planning System for NSW*,[38] (White Paper), and found that "waterproofing defects in internal wet areas in high-rise buildings are one of the biggest causes of financial and emotional concern for owners and occupiers".[39]

The national survey on strata-titled property conducted by Queensland's Griffith University[40] found that building defects are the primary challenge of unit owners due to poor construction and building quality. Professor Guilding has been quoted as saying: "It is striking how strongly building defects comes through as the biggest concern. The qualitative survey was conducted across different states … this is such a pervasive issue; it should be the subject of a federal government inquiry." He then went on to say, "I get a sense these problems are worse in Australia than overseas, so we need an inquiry to look into what's happening."[41]

In 2019, less than one week after the Mascot Towers evacuation, a Deakin-Griffith universities joint report revealed that defects were found in 97% of New South Wales buildings built between 2003 and 2018.[42] The most common defects were identified in the following order: building fabric and cladding (40.19%), fire protection (13.26%), water proofing (11.46%), roof and rainwater disposal (8.58%), and structural (7.25%) and other miscellaneous defects.[43] The long-term cost implications of defects in apartment buildings are potentially significant. The cost of rectification could be up to 50 or 100 times more at the occupation stage than during construction.

One of the many real-life cases that sent shock waves through the industry was *Brookfield Multiplex Ltd v Owners — Strata Plan No 61288*.[44] The case related to the construction of a 22-storey apartment building in Chatswood by Brookfield in 1997 on behalf of Chelsea Apartments Pty Limited, the owners. Upon completion of the building, separate strata plans were registered for the residential apartments (floors 10–22) and the serviced apartments (floors 1–9), such that both Owners Corporations were subsequent owners of the building. The serviced apartments were sold to investors as a hotel venture, originally as the "Holiday Inn" and then rebranded as the "Mantra Chatswood Hotel". The original owners of the apartments were investors in the hotel venture, however, by the time the defects emerged, many had sold. Five years after registration of the strata plans, latent defects began to appear. The residential Owners

[37] City Futures Research Centre, n 36.

[38] Department of Planning & Environment, NSW Government, *A New Planning System for NSW: White Paper* (April 2013).

[39] Department of Planning & Environment, n 38, 194.

[40] Griffith University, *Inquiry into Key Challenges in Australian Strata Title* (2015).

[41] Professor Guilding made these statements at the Strata and Community Title in Australia for the 21st Century Conference held on 2 – 4 September 2015 at the Surfers Paradise Marriott Resort & Spa.

[42] Deakin University and Griffith University, *An Examination of Building Defects in Residential Multi-owned Properties* (June 2019).

[43] Deakin University and Griffith University, n 42.

[44] *Brookfield Multiplex Ltd v Owners — Strata Plan No 61288* (2014) 254 CLR 185; [2014] HCA 36.

Corporation had the benefit of statutory warranties against Brookfield under the *HBA* and thus the case subsequently settled out of court. However, the commercial Owners Corporation, who was not covered by the statutory warranties, was left with no choice but to assert that Brookfield owed them a duty of care.

The High Court of Australia ultimately found that no duty of care existed between Brookfield and the Owners Corporation. Specifically, the Court held that due to lengthy contract negotiations between Brookfield and Chelsea and the fact that the investors had a six-month maintenance period under their sale contracts, the Owners Corporation was not "vulnerable". In other words, there was no room for the law of negligence to step in and protect investors from a bad bargain, meaning that where defects arise in commercial parts of a residential building over three storeys or in work forming part of a residential building that is excluded from the definition of "residential building work" in the *HBA*, an owner will not be covered under warranty insurance or have any redress against the builder in negligence.

IV. Are Certifiers Adding Fuel to the Fire?

Building certification is part of New South Wales' regulatory framework and was implemented to ensure buildings meet the strict requirements of the Australian Standards, Building Code of Australia and building legislation generally. Since 1928, there has been some form of statutory regime in New South Wales for a "certificate" in respect of a building.[45]

In 1997, before the multi-storey insurance exemption was enacted, the NSW Government issued a White Paper on Integrated Development Assessment,[46] advocating for the introduction of private sector involvement in the development assessment process as part of its policy to encourage competition, remove unnecessary regulations, and streamline the assessment process. It was hoped that this in turn would result in reduced approval response times, reduced holding costs, and improvements in the service provided to applicants. Shortly thereafter, on 1 July 1998, a new system private certification in competition with certification by council officers was introduced into the *Environmental Planning and Assessment Act 1979* (NSW) (*EPA Act*).

Five years later, the following changes to the certification regime in the *EPA Act* were enacted with the hope that changes would encourage better quality construction in residential high-rise buildings:

(1) the introduction of mandatory inspections for all classes of buildings;
(2) fines of up to $1.1 million and two-year jail terms for building certifiers guilty of improper conduct, and for those who attempt to corrupt a certifier;
(3) the introduction of clearer provisions governing the role and responsibilities of principal certifying authorities;
(4) ensuring compliance with development consents before occupation or subdivision certificates are issued; and
(5) requiring the principal contractor and principal certifying authority (PCA) to place a sign at development sites, giving their name and contact telephone number.[47]

The private certification system may have improved approval response times and reduced holding costs, however it has caused other problems. Some critics say that the private certification regime has generated an era of "friendly certifiers" because developers and builders choose, appoint, and pay an accredited certifier to complete the role of PCA on their developments. In other words, consultants that are being paid by developers, would consciously or unconsciously, bear in mind the necessity to produce "positive" results if they wish to secure future work. This was certainly the view of McClelland CJ in *Burns Philp Trustee Co Ltd v Wollongong City Council*[48] where his Honour said: "A consultant who is responsible to, and reporting only to, the council is much more likely objectively to approach the question than a consultant who is dependent upon the developer."[49]

[45] Refer *Local Government Act 1919* (NSW) s 317A (now repealed).

[46] Department of Primary Industries, *Integrated Development Assessment Process White Paper* (1997).

[47] These recommendations stemmed from the Grellman Inquiry.

[48] *Burns Philp Trustee Co Ltd v Wollongong City Council* (1983) 49 LGRA 420.

[49] *Burns Philp Trustee Co Ltd v Wollongong City Council* (1983) 49 LGRA 420, 442.

The State Government recognised the problem of private certification in 2012 when it issued its Green Paper[50] but concluded that the problem stemmed from the lack of proper education and accreditation. One of the conclusions reached was that: "Building regulation and certification have been subject to criticism in recent times. Instances of fire protection system failures and inadequate maintenance, common building defects including waterproofing and fire safety non-compliance, and mistakes made by some accredited certifiers have reduced the quality and safety of buildings, and consequently, the community's confidence in building regulation and certification."[51]

Some three years later, the Lambert Report was commissioned to review the *Building Professionals Act 2005* (NSW) where it was determined that private certification issues were attributed to the "lack of clarity about the roles, responsibilities, functions and accountability of private certifiers".[52]

The author has been involved in many cases acting for Owners Corporations in litigation involving water ingress, ventilation, and fire safety defects. In one case which involved the construction of a brand new "luxury" development, a series of life-threatening fire safety deficiencies were found by the Council and Fire and Rescue NSW immediately after the development had been certified and residents moved in. Upon investigations, it quickly became apparent that the certifier had not undertaken any proper fire safety inspections, instead choosing to sign off the development as being BCA compliant based on paperwork furnished to him by the builder. Stephen Netting, manager of fire safety compliance at Fire and Rescue NSW, described the non-compliance issues as "life-threatening", and further added: "We see a lot of buildings like this. We have in the order of about 350 fire safety concerns at the moment."[53] The certifier was ultimately reprimanded by the Building Commissions Board but is still practicing as an accredited certifier in New South Wales.

From the time residents moved in, the Owners Corporation consistently and tirelessly tried to obtain the developer's and builder's commitment to rectify major fire safety and other defects that were plaguing the development. However, ultimately those efforts failed, and the Council issued a Fire Safety Order to the residents giving them 180 days to rectify the defects themselves or face prosecution. Suffice to say, the Owners Corporation was left with no choice but to commence legal proceedings against the developer and builder, however, those proceedings did culminate in a favourable out of court settlement.

V. Recent Government Reforms

In its White Paper issued in 2013, the NSW Government stated that "changes are being made to the building regulation and certification system to rebuild confidence in the quality and safety of buildings".[54] Since then, persistent lobbying has led to reforms of the certification regime in the *EPA Act* and strata laws set out in Pt 11 of the *Strata Schemes Management Act 2015* (NSW). These reforms are designed to fill the void created by the multi-storey insurance exemption and are an attempt to place stringent checks on certifiers of fire safety and compliance of multi-storey developments.

A. Developer Bonds

On 28 October 2015, reforms to the *Strata Schemes Management Act 2015* (*SSM Act*) received Royal Assent. These reforms included introduction of developer bonds and compulsory post completion inspections (*Developer Bond Scheme*) through Pt 11 of the *SSM Act*. The developer bond scheme was originally due to commence on 1 January 2017 but was pushed back to commence on 1 January 2018.

[50] Department of Planning, *A New Planning System for NSW: Green Paper* (2012), cited in City Futures Research Centre, *Dealing with Defects* (December 2014) 26.

[51] Department of Planning & Environment, n 38, 181.

[52] NSW Government, Independent Review of the Building Professionals Act 2005 (2015).

[53] Lisa Visentin, "NSW Government Fails to Act on Proposed Building Industry Reforms for Almost Two Years", *The Sydney Morning Herald*, 22 June 2017 <http://www.smh.com.au/nsw/nsw-government-fails-to-act-on-proposed-building-industry-reforms-for-almost-two-years-20170620-gwutt5.html>.

[54] Department of Planning & Environment, n 38, 180.

In short, for all construction contracts entered after 1 January 2018, the inspection and bond process is as follows:

(1) *Building Bond* – Prior to the issue of an occupation certificate, developers are required to give the Secretary of the Department of Finance, Services and Innovation (Secretary), a building bond in the amount of 2% of the contract price of the building work.[55]

(2) *Appointment of a Building Inspector* – If the initial period of a strata scheme ends up to 12 months after completion, the developer must appoint a qualified building inspector (not connected to the developer), to carry out an inspection of the building work.[56] The inspector is to be approved by the Owners Corporation in a general meeting.[57] If this is not done, the Owners Corporation can notify the Secretary of the Department of Finance, Services and Innovation (Secretary)[58] and the Secretary will appoint the inspector.[59]

(3) *Mandatory Inspections and Reports* – The building inspector must inspect the works between 15 months and 18 months after the completion of the building work and give an interim building inspection report.[60] The contractor that performed the works must then return to the site to carry out any rectification work identified in the interim report prior to the final inspection. Between 21 to 24 months after completion of the works, the inspector is to carry out a final inspection and generate a final report detailing any unrectified defective building work that was identified in the interim report and the scope of works required to rectify the building work.[61]

(4) *Rights to use Building Bond* – The obvious purpose of the bond is to secure funding for the payment of the costs of rectifying defective building work identified in the final report.[62] Accordingly, the Owners Corporations will be able to use that building bond for fixing defective building work identified in the final building report.[63] Excess money must be paid back to the developer.[64]

(5) *Release of the Bond* – the developer bond must be realised or claimed within two years from completion of the works or within 60 days of the final report being provided to the Secretary.[65]

Importantly, these new laws do not apply to construction work for which a homeowners' warranty is required.[66] The legislation is designed to fill the void created by the Insurance Exemption but will clearly not address latent defects that appear two years after completion.

B. Fires Safety Laws

On 21 September 2016, the State Government released the Lambert Report, that is, its final statutory report of the review of the *Building Professionals Act 2005* (NSW), setting out 150 recommendations on how to improve the certification regime in New South Wales,[67] including to allow only those with appropriate qualifications and certifications to design, install, construct and maintain fire safety systems.

[55] *Strata Schemes Management Act 2015* (NSW) s 207(1)–(2).

[56] *Strata Schemes Management Act 2015* (NSW) s 194(1)(a).

[57] *Strata Schemes Management Act 2015* (NSW) s 195(1).

[58] *Strata Schemes Management Act 2015* (NSW) s 194(1)(b).

[59] *Strata Schemes Management Act 2015* (NSW) s 196(1).

[60] *Strata Schemes Management Act 2015* (NSW) s 199.

[61] *Strata Schemes Management Act 2015* (NSW) ss 200, 201.

[62] *Strata Schemes Management Act 2015* (NSW) s 207(3).

[63] *Strata Schemes Management Act 2015* (NSW) s 210.

[64] *Strata Schemes Management Act 2015* (NSW) s 210(3).

[65] *Strata Schemes Management Act 2015* (NSW) s 209(3).

[66] *Strata Schemes Management Act 2015* (NSW) s 191(3).

[67] Local Government NSW, *The Lambert Report – Final Statutory Report of the Review of the Building Professionals Act 2005*, September 2016.

Approximately a year after the Lambert Report, and some three months after the Grenfell Tower fire in London,[68] on 1 October 2017, the *Environmental Planning and Assessment Amendment (Fire Safety and Building Certification) Regulation 2017* (NSW) (*Fire Safety Regulations*) was enacted under the *EPA Act* to introduce stringent requirements around fire safety design, construction and certification. The changes include the following:

(1) plans for certain fire safety systems to be signed off by the certifier;
(2) Fire and Rescue NSW to complete fire safety inspections for multi-unit residential building projects;
(3) new critical stage inspections to be undertaken; and
(4) assessment of the ongoing performance of essential fire safety measures to be undertaken by "competent fire safety practitioners".

While there is no doubt that the new fire safety laws and developer bonds are a step in the right direction in dealing with the strata living crisis, these reforms are piecemeal and ad-hoc. This view is shared by Professor Ian Bailey SC, a barrister specialising in construction disputes and founding chair of the Society of Construction Law Australia who has been quoted to say that the Government's approach to reform was "incomplete and ill-considered" and would do little to fix the systemic problems, which led to a "forest of defective buildings".[69]

C. Building Commissioner

In the wake of Mascot Towers, the State Government appointed Mr David Chandler as NSW's first Building Commissioner on 1 August 2019.[70] The Commissioner has investigatory and disciplinary power in relation to misconduct in the building industry as well as oversight over licensing and auditing across the building industry. Advocating for legislative reforms of the building industry through industry consultations is also on the agenda with the Commissioner who will advise the Government on enacting new laws to improve the building standards and provide better protections for homeowners and purchasers.

While some say that this is a step in the right direction, it is the author's view that enacting further legislation is not the solution to the strata living crisis but merely another bandage on what is, clearly, a broken system. What is required is a holistic solution that addresses the heart of the issue and one which gives *all* homeowners in NSW equal consumer protection. It is for this reason, that the author advocates for decennial liability and decennial insurance.

VI. The Case for Decennial Liability

In France, insurance for contractors in the construction industry is regulated by statute through concepts known as "decennial liability" and "decennial liability insurance". France was the first country to implement this regime and since its inception, many countries, such as Belgium, Canada, Spain, Sweden, United Arab Emirates, and Qatar, have seen its success and implemented similar regimes.[71]

A. France

France enacted the Spinetta Statute in 1978 to protect the interests of building owners and purchasers. Specifically, under Arts 1792 and 1792-4-1 of the *French Civil Code*, builders, architects, designers, and engineers can all be found liable for up to 10 years. This liability is referred to as "assurance décennale",

[68] Nick Miller, "London Fire: Building Safety under the Spotlight after Deadly Blaze Engulfs Grenfell Tower", *The Sydney Morning Herald*, 15 June 2017 <http://www.smh.com.au/world/london-fire-building-safety-under-the-spotlight-after-deadly-blaze-engulfs-grenfell-tower-20170614-gwrdky.html>.

[69] Visentin, n 53.

[70] NSW Government, "NSW Building Commissioner Appointed", *Housing and Property*, 7 August 2019 <https://www.nsw.gov.au/news-and-events/news/nsw-building-commissioner-appointed/>.

[71] Other countries include Algeria, Angola, Argentina, Bahrain, Bolivia, Brazil, Cameroon, Chile, Colombia, Egypt, Finland, France, Gabon, Indonesia, Italy, Iraq, Jordan, Kuwait, Lebanon, Mali, Malta, Morocco, Netherlands, Oman, Paraguay, Peru, Philippines, Republic of Congo, Romania, Saudi Arabia (on Government contracts), Senegal and Tunisia.

or decennial liability. The Article, translated to English, states as follows: "All Constructors of works are strictly liable towards the principal or the purchaser of the works, for damage, including that resulting from a vice of the soil, which compromises the solidity of the works and which, by affecting one of their constitutive elements or part of their equipment, renders them improper for their intended use." The term "constructor" is widely defined to include architects, contractors, technicians, or other persons bound to the building by a contract of hire of work, any person who sells, after completion, work which they built or had built, and any person who, although acting in the capacity of agent for the building owner, performs duties similar to those of a hirer out of work.[72]

One of the key concepts of the model is that builders will be jointly responsible with engineers and architects that performed work on the project. Equally important is the notion that liability is strict and cannot be excluded as a matter of public policy.[73] Owners do not have to prove that the contractor was negligent in or failed their contractual obligations, all that is required is physical damage.

Decennial liability is based on a tiered system of contractor responsibility. Greater responsibility is imposed in the first years and less in later years. For example, in the first year after completion, contractors are mandated to guarantee complete performance of the work, known as "la garantie de parfait achèvement".[74] In addition, for the first two years after completion, contractors guarantee that all of the fittings of the house are in good working order, known as "la garantie de bon fonctionnement".[75] For 10 years after completion, liability arises where there is damage to the building related to the strength of the building (or one of its constituent parts) and renders the building unfit for purpose. There is ample case law that defines "strength of the work" and "unfit for purpose". The 10-year guarantee includes claims for soil defects, weatherproofing, and waterproofing.[76] Moreover, the regime covers both latent and patent defects.

The 10-year liability period from major defects, damage or even partial or total collapse commences on the date the owner accepts the construction works and the benefit of the liability is transferred to any subsequent owners of the building during the 10-year period. Minor defects are not covered by decennial liability as they are more likely to be easily remedied.

When decennial liability was enacted, France saw many owners being unable to utilise the full benefit of the 10-year liability for various reasons. The most obvious reason being that by the time the defects manifested themselves, the building company no longer existed or did not hold the asset backing to cover the cost of rectification. This problem led to the introduction of compulsory decennial insurance provisions added to Art L241-1 of the *Insurance Code*, making it mandatory for those who assumed decennial liability to also take out compulsory decennial liability insurance. The failure by contractors to take mandatory insurance attracts a criminal penalty of up to 6 months' imprisonment or a €75,000 fine (approximately AU$120,000). Insurance companies are also obligated to offer decennial liability insurance and if their premium pricing as compared to the construction risks is too high, they can also be exposed to government penalties.

Decennial liability insurance must be taken out before any works commence. In this regard, the *Insurance Code* provides for the obligation of the "builders" to prove to the owner upon commencement of the works, and at any time during the performance of the works, that insurance is current. The scheme is based on a single premium principle, that is, the insurer collects a single premium at the outset of construction from each person or business involved in the project's construction. Insurance premiums range from 0.8 to 2% of the cost of the works. In terms of a policy amount limit, there is none as the law in France does not allow a liability limit. If a claim is made against the insurance, it is usually for the cost of repairing the building work, as determined by the insurer. Importantly, the policy is assignable between successive owners, where tenants' interests are usually noted.

[72] *Civil Code* (France) Art 1792-1.

[73] *Civil Code* (France) Art 1792-5.

[74] *Civil Code* (France) Art 1792-6.

[75] *Civil Code* (France) Art 1792-3.

[76] *Civil Code* (France) Art 1792-6.

Building owners are also required by the French *Insurance Code* to take out a type of decennial liability insurance.[77] Some may say that this is akin to "double insurance" as both owners and contractors are insuring the same building but the purpose of requiring both owners and contractors to obtain insurance is to avoid having the owners involved in lengthy, protracted litigation during which they must continue to wait to be paid for their claims.

The process in which an owner lodges a claim with the insurer is simple. The owner notifies the insurer of the defective work and the insurer investigates the matter within a period of 60 days, usually by engaging a loss adjuster to inspect the extent of the defects. Naturally, for more extensive defects, insurers can seek extensions. The insurer is then required to either accept or reject the claim in 90 days. If the claim is approved, the insurer will make the owner an "offer of indemnity" to cover the cost of the rectification work. If accepted by the owner, payment is paid within 105 days. Once the owners are paid out, the owner's insurer will pursue a subrogated claim against the contractor or design professional's insurer. This model of insurance allows for fast payout of claims and the ability of owners to repair the defect quickly so that the building can be used more expeditiously.

Decennial liability insurance is advantageous to both owners and contractors. For owners, the decennial liability insurance scheme gives owners a sense of comfort knowing that their building is going to be insured for defects for a long period of time. In addition, when claims are made, they are assessed and paid out quickly so that defective rectification work can occur promptly. Put another way, the uncertainty and unpredictability of litigation is removed through the concept of "strict liability". Owners are not left waiting until the end of a lengthy and protracted litigation to learn their fate at which time the defects may have significantly worsened. The French model ensures that when major structural damage is uncovered, owners are paid under their own policies and the insurer then has the choice of suing in a subrogation action. Such a scheme is more efficient than the drawn-out fights over interpretations of the CGL policies.

As decennial liability insurance is mandatory in France, the insurance problem of "adverse selection" is eliminated. This problem arises when potential insureds, that is, contractors and engineers, who have the highest risk of loss or who are the most likely to cause the types of injuries covered in the policy, are more likely to buy the insurance than those who are less likely to need the insurance. Theoretically, this tendency could put an insurer in a risky financial situation if there are not enough low-risk policyholders purchasing insurance. However, as all contractors and design professionals in France must obtain decennial liability insurance, the problem of adverse selection is eliminated as the scheme ensures a fairly large premium pool for insurers, reducing the likelihood of financial demise for insurers.

For contractors, the strict liability scheme also provides advantages. Simply knowing that contractors owe decennial liability to owners may incentivise contractors, engineers, and designers to work together to ensure that the design and construction of the building is fit for its intended purpose.

In terms of the disadvantages of the decennial liability insurance, there are few. One worth noting is the ability of insurers in that market to collude with each other to fix the minimum price for insurance policies. This potential situation arose in Spain during 2008–2009 when the National Markets and Competition Commission (NMCC) issued fines amounting to a total of €120 million on several insurance and reinsurance companies for alleged anti-competitive conduct in fixing minimum prices for decennial liability insurance policies. Fortunately for those companies, the Supreme Court overturned the NMCC's decision on the basis that there was simply not enough evidence to find the companies liable for anti-competitive behaviour.[78] These issues are easy to manage if stringent surveillance and auditing measures are put in place to monitor compliance.

Some may also say that the premiums and deductibles make the regime expensive. However, the cost of the insurance is reasonable when broader factors are considered. For example, parties would be spared from spending hundreds of thousands of dollars on litigation and contractors would be spared from paying more than the cost of the rectification work. Owners would avoid costs associated with loss of use

[77] *Insurance Code* (France) Art L242-1.

[78] Francisco Marcos, "The Spanish Property Insurance Cartel" (2012) 18 *Connecticut Insurance Law Journal* 509.

of the property, the delay in the future use of the property and corresponding loss of profits that could be generated from the property. These cost savings outweigh any perceived disadvantage of high premiums and deductibles.

B. Spain

Spain introduced a new Decennial Liability regime which applied to all buildings licensed after 6 May 2000[79] following ongoing complaints about the quality and safety of buildings during the 1980s and 1990s. The legislation imposes a 10-year liability on developers for any harm resulting from the building's foundation and other structural elements of the building.[80]

The extent of decennial liability includes material damage arising from inherent vices or defects in the masonry, supports, beams, framework, load-bearing walls, or any other structural elements that threaten the building's solidity, mechanical resistance, and stability.

The Act makes the purchase of decennial liability insurance mandatory and makes the owner of the home the beneficiary. Specifically, the Spanish regime provides for three types of insurance policy to mirror the three types of decennial liability, that is, physical damage insurance to cover physical damage:

(a) resulting from flaws and defects affecting detailing elements for a period of one year;
(b) of the building caused by flaws or defects affecting its habitability for a period of three years; and
(c) of the building deriving from flaws or defects affecting the foundation, supports, beams, load-bearing walls, or any other structural element, and that form part of the resistance and stability of the building.

C. British Columbia, Canada

The decennial liability insurance regime has also been successfully implemented in British Columbia under Pt 8 of *Homeowner Protection Act*, SBC 1998. Specifically, s 22(1) prohibits home building work being performed without warranty insurance. Section 22(2) goes on to provide that home warranty insurance for a new home must provide coverage for:

(a) defects in materials and labour for a period of at least 2 years after the date on which the warranty begins,
(b) defects in the building envelope, including defects resulting in water penetration, for a period of at least 5 years after the date on which the warranty begins, and
(c) structural defects for a period of at least 10 years after the date on which the warranty begins.

D. New Jersey, United States

In New Jersey, contractors and developers are also subject to a 10-year statutory warranty period for major structural defects in new homes. Shorter warranties of one and two years apply for other non-major defects. Prior to commencing home building work, developers and contractors are required to enrol in a State Warranty Plan, which provides two years insurance cover to home owners, and a Private Warranty Plan, which provides home owners with insurance protection for 10 years if the builder does not remedy the defects.[81]

E. United Arab Emirates and Qatar

In the UAE, decennial liability is mandatory and found in Art 880 of *UAE Civil Code* as follows:

(1) if the subject of a contract is the construction of buildings or other fixed installations, the plans for which are made by an architect to be carried out by the contractor under their supervision, they shall both be jointly liable for a period of ten years. During this time, they must compensate the employer

[79] *Ordination and Edification Act* (Ley 38/1999, de 5 de noviembre, de Ordenación de la Edificación, cited in Richard Ward, "Decennial Liability in Construction Projects", Eversheds Sutherland, 12 November 2015) <https://www.eversheds-sutherland.com/global/en/what/articles/index.page?ArticleID=en/Construction_And_Engineering/Decennial_Liability_in_Construction_Projects>.

[80] *Spanish Civil Code* Art 1591.

[81] *New Jersey Administrative Code* § 5:25-3.

for any total or partial collapse of the building or installation that they have erected and for any defect that threatens its stability or safety, unless the contract specifies a longer period. This law will apply unless the contracting parties originally intend that the installations should remain in place for less than ten years.

(2) The said obligation to make compensation shall remain notwithstanding that the defect or collapse arises of a defect in the land itself or that the employer consent to the construction of the defective buildings or installations

(3) The period of ten years shall commence as from the time of delivery of the work.[82]

Decennial liability is strict liability and any clause that purports to exclude or limit the contractor's or designers' liability is void.[83] All project participants are jointly liable for damage and major defects in the building. Liability is for the whole or partial collapse of the construction work and any defect threatening the integrity or safety of the building, even where the defect or collapse is due to soil subsidence. There is also a time bar embedded in the regime which has the effect that no claim for compensation will be heard after three years from the collapse of the building or the discovery of the defect.[84] Interestingly, decennial liability insurance in the UAE is not mandatory meaning that the requirement for insurance is governed by the relevant contracts.

Qatar also has a similar decennial liability system as the UAE and there is no mandatory insurance to work hand in hand with the decennial liability regime.[85]

VII. What Would Decennial Liability Insurance Look Like in NSW?

There are variances in the decennial insurance model around the world, both in the period of cover and the period of liability. In New South Wales, where there is a significant gap in consumer protection for those living in multi-storey developments, the decennial liability insurance regime would be an ideal solution that could be seamlessly implemented to close that gap. It is therefore submitted that decennial liability insurance should be introduced in NSW to cover "major" defects in multi-storey buildings and be offered and managed by the private sector.

A. Changes to the Statutory Warranty Periods under the HBA

Under the *HBA*, contractors are currently liable to owners and successors in title for building defects for a period of six years for "major" defects,[86] and two years for "non-major" defects. A "major defect" is defined under the *HBA* as a defect in a major element of a building that is attributable to defective design, workmanship or materials that causes or is likely to cause:

(1) inability to inhabit or use the building for its intended purpose;
(2) the destruction of the building or any part of the building; or
(3) a threat of collapse of the building or any part of the building.[87]

"Major element" is defined to include an internal or external load-bearing component of a building that is essential to the stability of the building, including foundations, footings, floors, wall, roof, columns and beams, or a fire safety system and waterproofing.[88]

A non-major defect is a defect that does not fall into the "major" defect category.[89] Not surprisingly, the six-year liability on contractors for "major" defect is consistent with the decennial insurance regime in

[82] *UAE Civil Code* Art 880.

[83] Abdulaziz Al-Mulla, James Bremen, Simon Halliwell, "Decennial Liability: The Case for Harmonisation" (2012) *International Bar Association*.

[84] Al-Mulla, Bremen, Halliwell, n 83.

[85] *Qatari Civil Code* Arts 711–715.

[86] *Home Building Act 1989* (NSW) s 18E(1)(b).

[87] *Home Building Act 1989* (NSW) s 18E(4)(a).

[88] *Home Building Act 1989* (NSW) s 18E(4)(a)-(d).

[89] *Home Building Act 1989* (NSW) s 18E(1)(b).

France, where owners are only entitled to make a claim on decennial insurance policies for defects that render the building unsafe for occupation or have been partially or completely destroyed.

To apply the decennial liability insurance regime to multi-storey residential buildings in New South Wales, the six-year statutory liability period for major defects should be extended to 10 years for residential building work covered by the home warranty scheme and multi-storey buildings. The concept of a 10-year liability is not foreign to New South Wales as s 6.20 of the *EPA Act* (formerly s 109ZK) already specifies a capped 10-year period after approval of a final occupation certificate within which an action can be started against builders and designers.

No changes would be required to the existing two-year statutory liability period as the developer bond scheme will afford apartment owners protection for non-major defects.

B. Changes to the Insurance Requirements in the HBA

The revocation of cl 56 of the *Home Building Regulation 2014*, that is, the multi-storey insurance exemption, would mean that all types of residential building work would need to be insured by the contractor or developer, regardless of whether they were undertaking a duplex or a high-rise residential apartment tower. The specific requirements for taking out decennial liability insurance can then be specified in a new section in Pt 6 of the *HBA* where all the other insurance requirements are currently contained.

C. Introducing the Concept of Joint Responsibility

The concept of joint responsibility between contractors, architects and engineers would need to be introduced into legislation. Currently, the statutory warranties are imposed only on "the holder of a contractor licence".[90] That obligation can remain for residential building work covered by the mandatory home warranty regime. For multi-storey residential buildings covered by decennial liability insurance, a new s 18BB can be introduced in words to the following effect: "statutory warranties in respect of major defects in multi-storey developments are imposed on the holder of a contractor licence and all relevant professionals associated with the design and construction of a multi-storey development." The concept of "relevant professional" is already in the *HBA* at s 18F(4) of the *HBA* and perhaps would require a slight modification.

Imposing joint and several liability on designers and engineers will also eliminate the need for them to take out separate professional indemnity insurance for seven years and for contractors to take out contract works insurance. Accordingly, the money for premiums that would have otherwise be used to pay these insurances can be used to pay for the premium to take out decennial liability insurance. Among other things, having one single policy reduces the risk of gaps between insurance while at the same time, reduces the blame culture that can arise between parties under those policies.

The concept of joint and several liability between the contractor and relevant professionals is also consistent with the Government's decision to exclude the proportionate liability provisions of the *Civil Liability Act 2002* (NSW) to apply to residential building work.[91]

D. Changes to the EPA Act

As matters presently stand, developers choose, appoint, and pay accredited certifiers to complete the role of PCA on their developments. The problems with this have been highlighted above. To avoid these problems, and for decennial liability insurance to work, the appointment of a PCA should be changed. We would also need absolute clarity about their role during the construction process. To give insurers comfort and to encourage them to stay in the decennial liability insurance market, it is only natural that they have control over the appointment of the PCA. This would remove any concern that the certifier is taking "short cuts" in the certification of the building.

[90] *Home Building Act 1989* (NSW) s 18B(1).

[91] This change was introduced in or around October 2011.

Slight amendments would need to be made to s 109E of the *EPA Act* as follows:

(1) amend s 109E(1), 109E(1AA) and 109E(1)(A) so that it refers only to development consents and complying development certificates for residential building work; and
(2) introduce a new s 109E(2)(A) which requires the insurer to take responsibility for engaging the PCA on a development that consists of more than three storeys.

VIII. Conclusion

It is acknowledged that no insurance scheme is perfect, but the scheme presently in operation in New South Wales is far from perfect. The mandatory government-run home warranty scheme is currently sitting on a $375.8 million deficit and 85% of all newly constructed residential apartment buildings with insurance contain defects. What more needs to be said on the topic to justify major reform? It is not enough to simply try and close the gap in consumer protection by forcing developers to stump up with a 2% building bond, and requiring certifiers to physically inspect work at certain stages of construction. Rather, it is advocated in this article that the State Government adopt decennial liability and decennial liability insurance as the holistic solution to the strata living crisis, while reverting to a privately-run home warranty scheme for all other residential building work. As highlighted in this article, there are many advantages in the decennial liability insurance model. It provides the necessary protection needed for those living in strata title developments and at the same time protects contractors from facing bankruptcy when major damage in a high-rise development is discovered. From a policy perspective, decennial liability insurance offers cost savings by reducing litigation and increasing efficiency through owner's insurance and subrogation suits, relieving the pressure on our court system. Apartment owners deserve the same level of protection as homeowners and the reality is that piecemeal reforms will not do so. Perhaps it is time for the State Government to rethink its approach to the strata living crisis and consider decennial liability and insurance administered by the private sector.