Owners Corporation Network (ACT) Inc.

30 June 2010

Andrew Barr MLA
Minister for Planning
ACT Legislative Assembly
GPO Box 1020
Canberra ACT 2601

Dear Mr. Barr

The OCN understands that the Eleven Point Plan you have provided is the initial response to our letter of 26th May 2010 to the Chief Minister requesting a Judicial Inquiry. Although the ideas provided in your plan are welcome the OCN does not believe this plan adequately replaces the need for the requested inquiry. To address this deficiency the OCN repeats its request for the Inquiry and restates the particular points of reference for this inquiry below:

1. The correction of existing defects being experienced by unit owners and owners corporations through a Government controlled building industry fund; or

2. Assistance to affected unit owners and owners corporations, with retrospective legislation to bring the directors of the vanishing building companies and developers to book for expenses incurred due to the ineffective Government certification process;

3. Examination of the extent to which provisions of the Unit Titles Act have operated to relieve developers and builders of their ongoing responsibilities and warranties after registration of a units plan;

4. The imposition of serious penalties on the directors of builders' and developers' companies to stop further defective buildings being constructed;

5. A full and fearless examination as to why complaints of our members have not been dealt with by your bureaucracy to date.

An early and essential step for success of this inquiry will require the Government to contact all Owners Corporation Executive Committees to ensure comprehensive and accurate information is provided for the inquiry. The OCN continues to offer to assist the Government in this regard but the details of all Owners Corporations will need to come from Government sources.

With respect to the matters addressed in your letter of 7th June 2010 the OCN would offer the following comments for consideration:

Both the ACT Building Act and Regulations 2004 and the ACT Construction Occupations (Licensing) Act 2004 require amendment to ensure that:

i) developers and or owners are made responsible for work carried out by the builders they employ and if obvious defects exist they or their builders should pay the costs of repair without new owners incurring legal costs.
ii) private certifiers/inspectors are contracted and regulated by ACTPLA, not by the builders or developers.
iii) the duties and responsibilities of certifiers/inspectors are adequately prescribed to specifically cover good building practices as well as compliance with the Building Code of Australia for certification purposes.

iv) there is some form of indemnity insurance available for all residential buildings, irrespective of the number of stories in their construction, should it be required.

v) the ACT Building Act and Regulations 2004 should be changed to address and protect all residential buildings in the same way regardless of the number of stories.

These are simple straightforward propositions that should be dealt with in a simple and straightforward manner if we are to achieve the outcomes we require.

Turning to the 11 points enumerated as receiving specific consideration:

1. It is unclear what is meant by the "new timeframes for builders warranties". Currently the Building (General) Regulations 2008 Part 4 Section 38 states that the warranties under Section 88 of the Building Act 2004 extend for 6 years for structural elements and 2 years for non structural elements. The 12 months for owners and 3 years for Owners Corporations are not understood unless this is referring solely to the non-structural elements. Furthermore, under the current Act, Section 88 exempts all buildings over three stories from the warranty provisions and Section 84 excludes all paving, fences and retaining walls from any residential building. These exemptions would have to be removed.

   While the suggestion that a warranty period of three years for non-structural elements for Owners Corporations would certainly be welcome it appears to be quite inappropriate for unit owners to be restricted to 12 months. A slowly leaking shower recess may well take over 12 months to reveal itself as many examples can show. The OCN does not believe there should be this discrimination. The OCN would certainly agree to the Date of Settlement being used for the commencement of the warranty as, in some cases the OCN is aware of, the developer retained many units for over a year before selling them and then claimed they were second sales so there was not warranty or defects period allowed.

2. A building defects fund is certainly worth further consideration especially when it would be linked to the warranty periods discussed above in point one. On several occasions developers and or builders have deregistered their companies long before expiry of warranty periods. A key issue here will be the amount of money put into the fund to ensure defects can be rectified. It will also be essential that independent building consultants are available to set down criteria for defect correction and to facilitate sign off of rectification from unit owners. The cost for this consultancy would need to come from the fund.

3. A possible pre-occupancy inspection may not be necessary provided the inspection system is properly carried out and the warranty scheme is in place. However Section 48 of the Building Act requires that on completion of the building, the certifier certifies that it has been constructed in accordance with the building code and the Building Act, both of which documents already demand that the work be done in a proper and skilful way. But after the final inspection by the certifier, things might be done that would undermine the validity of his certificate. Hence, a presale inspection by the certifier and his verification that the building is as he last saw it, and that it still complies with the legislated requirements might have merit as a way of closing any back doors through which developer/builder (or certifier) might subsequently seek to escape. If such an inspection is put in place the cost should be born by the builder but the report should be provided to the new owner or owners corporation.

4&5. Increasing the stages at which mandatory inspections are carried out is absolutely essential. Even a cursory glance at the Building Act 2004 shows that a building certifier is responsible for certifying a great many different items throughout the building work. It

would be well nigh impossible for him to carry out those responsibilities on the few occasions he is presently required to inspect a particular building site. The OCN would strongly recommend at least ten inspections as follows:

i) At the commencement of the project;
ii) Following excavation, and the placement of drains and supply lines;
iii) Prior to pouring footings and foundations;
iv) Prior to the covering of any drains and supply lines;
v) Prior to pouring the concrete floor slab [this to be repeated for each floor slab poured or fitted];
vi) Prior to the covering/sheeting of all and any framework;
vii) On completion of waterproofing in 'wet' areas and prior to it being covered;
viii) At suitable times in high rise buildings to ensure fire safety between individual living units and within common property, risers between floors or any other spaces used for ducted ventilation or other services shared between units;
ix) At the time each ceiling space is completed to insure insulation and electrical wiring are properly separated;
x) Following the completion of all building work.

Note that some of these inspections could take place at the same time if the building work permitted.

Another key point here is to recognize certifiers claim to have insurance to protect themselves against errors in certification. If certifiers incorrectly certify satisfactory completion of workmanship, and use of proper standard products and materials, the certifier or their insurer should be liable to make good.

6. The regulation of trades people who undertake waterproofing, as with any other aspect of building work should be considered in the light of the efficacy of the inspection procedures and indemnity provisions adverted to above.

7. With regard to building certification arrangements, consumers have clearly lost confidence in the current system due to the perceived 'conflict of Interest' due to the provisions that allow the **owner** of any building site (the developer) to employ and pay the building certifiers, with little if any oversight of the operation of the quality control systems by ACTPLA, as the regulatory agency, thereafter. The OCN believes it to be essential that this aspect be addressed, in parallel with insurance and liability arrangements for certifiers and indemnity insurance funds as a safeguard against developer and or builder default as mentioned above. In addition, consideration should be given to Developers being required to obtain Construction Occupation Licensing Registrar confirmation of the adequacy of the licences held by certifiers prior to their appointment.

8. The OCN considers that the lack of mandatory examination of certifier qualifications is an extraordinary deficiency, and notes this surely must be the only jurisdiction in the country that does not require proper examination of certifiers. In our view its absence probably accounts for a great many of the problems being experienced, and urgent action is required to introduce remedial measures. Consideration might usefully be given to a system similar to that used in New South Wales where all accredited certifiers must undertake two courses each calendar year, viz Accredited certifiers: Professional Practice and Accredited certifiers; and Legislative Requirements. The Canberra Institute of Technology could be requested to run the necessary courses.

9. The roles and responsibilities of ACTPLA is a very contentious issue. As late as August 2009 Neil Savery wrote (letter 25 August 2009) that "The ACT's Building Act 2004 has never included objectives in relation to the overall quality control of building construction" and also in ACTPLA's current brochure "certifiers' employment" it is stated that "A building certifier, also known as a building surveyor, is needed to ensure the building

plans and work is completed in accordance with the building legislation and the Building Code of Australia. The Code covers issues such as structural safety, and health and fire protection, but does not address quality of the work or finish."

These statements appear to be totally untrue. They are directly contradicted by the ACT Building Act 2004 and the Building Code of Australia, both of which directly address and require the use of materials in accordance with Australian Standards and Industry guidelines and the execution of work in proper and skilful ways. The Act and the Building Code clearly demonstrate that the constructability of a building and the quality of the workmanship required to construct it are inseparable. The OCN would therefore suggest that it is those people requiring their separation who require the suggested education.

10. The suggestion to create an industry award for quality of workmanship is a diversion from the real and urgent issues. Furthermore, as some of the buildings, both large and small, that have won awards in the last few years have been constructed by some of the worst offenders in the industry, awards in the industry are of dubious quality or validity. And over the past few years there have been developers and builders who have won awards even though they have reinvented themselves in new companies following involvement in previous bankruptcies. The OCN doubts if such awards are worth considering at this stage.

11. Changes to the Unit Titles Act 2001 creates a large group of totally different issues, and these should be dealt with quite separately from, the issues relating to building defects. This Act has a great many appalling 'errors' in it but only those relating to the developers and or builders dealings with Owners and Owners Corporations are dealt with here. Certainly changes must be made to the Unit Titles Act 2001 in order to both better protect owners at the point of purchase.

31A. Contract for sale of unit before registration of units plan:

31A(2)(a). Before a units plan is registered and up until the end of the Developer Control Period only the Default articles should be permitted and no permissions should be allowed under any circumstance. In fact it would be preferable for the Articles for an Owners Corporation to be only promulgated after a properly formed Executive Committee is established after the Developer Control Period has ceased.

31A(2)(c). The provision to a buyer by the developer of the estimate of the buyer's contribution to the corporation's "general funds" is important. However, equally important for buyer's, now that Sinking Fund Plans have to be prepared, would be the provision of the estimate of the buyer's contribution to the "Sinking Fund". This should be added.

31A(3). No developer should be allowed to hold proxy votes under a sale contract. This practice would seem to be extremely dubious and unethical, even if currently legal.

46A. Restriction on owners corporation during developer control period:

46A(1)(a)ii(A). No contracts should be entered into during the Developer Control Period that exceed that period unless they contain a provision that they may be changed by an incoming Executive Committee at the end of that period.

95A. First Annual general meeting – developer to deliver records:

95A(c). This is a much needed and very important addition to the Act. However, it must be more specific. It must include copies of ALL final certified "as constructed"

building plans, including, electrical, mechanical, plumbing and drainage plans. [The plans handed over to many Unit Plan complexes do not even match the buildings!]

95A(h). An additional clause should require the inclusion of a comprehensive list of all items of machinery and equipment that will require regular maintenance. [In many Unit Plan complexes there are hidden sump pumps that no one knew about until they failed!]

115A. Proxy votes – limit on developer:

115A(1). As referred to above (31A(3)) the practice of a developer/builder holding proxy votes obtained under contracts of sale should not be allowed.

115A(2). It is not clear from the way this is written, exactly what is meant. It appears to mean that a builder/developer "must exercise no more than 2 proxy votes" This should be clarified or better still builders/developers should be prohibited from having proxy votes altogether.

Relative to the published statement that a Review of the Unit Titles Act is to be carried out starting in September 2010 the OCN repeats its offer to assist with this review; however it remains essential that the Government provides the OCN with details of all ACT Owners Corporations and their Executive Committees. With this information available the OCN could ensure accurate input to evidence future changes to legislation. When will we receive this information?

Yours sincerely

Gary Petherbridge
Chairperson
OCN (ACT)