

22 May 2019

Building Quality Inquiry in the ACT  
The Standing Committee on Economic Development and Tourism

**By email: [LACommitteeEDT@parliament.act.gov.au](mailto:LACommitteeEDT@parliament.act.gov.au)**

Dear Ms Atkins,

**RE: Opening Statement to Inquiry Into Building Quality : Public Hearings**

We note that the “Committee has read all submissions and comments made in submission do not need to be repeated”.

Therefore, in the light of the above and the fact that my submission was made on or about 19 July 2018, we will confine my opening remarks to the following four points:

**1. Fidelity Fund**

Point 6 of my submission dated 19 July 2018 addressed prudential standards set for fidelity funds.

Since my submission, on 13 February 2019 the Federal Court handed down its decision in *The Owners – Units Plan No. 3115 v The Trustees of the Master Builders Fidelity Fund Scheme* [\[2019\] FCA 115](#).

The Federal Court was critical of the manner in which this Scheme had been implemented, at paragraph 6 holding:

*It is appropriate to note at the outset that many of the issues which require determination in this proceeding have been made more difficult by anomalies in the drafting of various written instruments, including the*

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*Deed and the fidelity certificates, as well as some of the surrounding legislative instruments. The complexity of the Fidelity Fund Scheme was noted in the recent decision of the Court of Appeal of the Supreme Court of the Australian Capital Territory in *Koundouris v The Owners – Units Plan No 1917* [\[2017\] ACTCA 36](#); [323 FLR 375](#) at [\[11\]](#) and [\[12\]](#), a decision which raised different issues to those in this proceeding. The complexity is compounded by the multiple changes which have been made in the legislative regime since 2002, not all of which have been reflected in the administrative documents.*

Setting aside this criticism, the outcome of this decision is as follows:

- in order to make a claim on the Master Builders Fidelity Fund Scheme, an owners corporation needs to:
  - identify building defects in the apartment building;
  - commence court proceedings against the builder;
  - obtain judgement against the builder;
  - defeat any appeal of that judgement by the builder;
  - pursue the builder for judgement unsuccessfully;
  - appoint a liquidator to the builder; and
  - make a claim on the Fidelity Fund,all within 5 years of completion.

This is quite unrealistic especially as a builder could appeal any judgment to ensure that no claim can be made within 5 years;

- this key piece of consumer protection (the Master Builders Fidelity Fund Scheme) therefore does not protect apartment owners and is fairly ineffective. This is contrary to the intention of establishing the Master Builders Fidelity Fund Scheme.

The above is particularly important given the anecdotal evidence that the Master Builders Fidelity Fund is the largest provider of residential building insurance in the ACT for apartment buildings.

One further minor issue that would also assist apartment owners would be a requirement that the certificate of currency for residential building insurance be included in the contract

for sale of land of a dwelling. This is a requirement in NSW and simplifies the process of determining the identity of the insurer, etc.

## **2. Shergold Weir Report**

The Shergold Weir Report was released on 22 February 2018, well over a year ago. It recommended a national best practice model to strengthen the effective implementation of the National Construction Code and made 24 recommendations which are intended to address the weaknesses identified in Australia's compliance and enforcement systems with the suggestion they be implemented over a three year period.

The position of the ACT Government in response to this report is difficult to determine given the lack of publicity in this regard. Curiously there is not one mention of the Shergold Weir Report in the "Documentation and Information for Building Approval Applications Preview Guideline" released last week.

Further, a simple Google search of the terms "ACT Government" and "Shergold Weir Report" elicits no ACT Government document that addresses the Shergold Weir Report recommendations.

Further again, nothing on the Environment, Planning and Sustainable Development Directorate website addresses the Shergold Weir Report.

I make this observation in the light of the NSW Government Response to the Shergold Weir Building Confidence Report dated February 2019 which promised the implementation of a number of major reforms.

## **3. Introduction of Duty of Care**

The NSW Government Response to the Shergold Weir Building Confidence Report included a promise to introduce "an industry wide duty of care to homeowners" to ensure that building practitioners owe a duty of care to owners' corporations and subsequent titleholders of residential developments.

This is important given it would enable action against designers and building certifiers for negligent acts or omissions as well as widening the ability of owners corporations to take action against builders. Currently such actions are extremely limited in light of the recent decisions of the High Court of Australia and the NSW Court of Appeal.

Such a reform is very important as negligent design is a common cause of building defects.

The question remains as to whether the ACT Government will follow the lead of the NSW Government in this regard.

#### **4. Cladding Rectification Agreements**

In Victoria, Cladding Rectification Agreements (**CRAs**) are agreements between owners (or owners corporations), lenders and local councils whereby owners are provided a long-term, low-interest loan to pay for the building work required to rectify the combustible cladding.

Under the CRA, the owners will pay the funds back through their council rates over a minimum period of 10 years with the CRA transferred to any subsequent purchaser of the property if it was sold during that period.

The ACT Government should look at adopting a similar scheme for ACT apartment owners in relation to building defects (rather than cladding). This would alleviate the difficulty many owners will face in paying large special levies or taking out strata loans at exorbitant interest rates.

I attach links to relevant articles for your information.

[https://www.vba.vic.gov.au/\\_data/assets/pdf\\_file/0007/83059/Cladding-Rectification-Agreements-Fact-Sheet.pdf](https://www.vba.vic.gov.au/_data/assets/pdf_file/0007/83059/Cladding-Rectification-Agreements-Fact-Sheet.pdf)

<https://www.planning.vic.gov.au/building-policy/cladding-rectification-agreements>

The above may go some way to demonstrating that the ACT Government is listening to apartment owners who suffer from building defects.

Yours faithfully



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