LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON ECONOMIC DEVELOPMENT AND TOURISM
Mr Jeremy Hanson MLA (Chair), Mr Michael Pettersson MLA, Ms Suzanne Orr MLA (Deputy Chair)

Submission Cover Sheet

Inquiry into Building Quality in the ACT

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ROSSTAYLORASSOCIATES

SPECIALIST CONSULTANTS IN BUILDING REPAIR AND WATERPROOFING

30th September 2018

To:

The Committee Secretary,

Standing Committee on Economic Development and Tourism, Legislative Assembly for the ACT

Legislative Assembly Inquiry into Building Quality

By:

Ross Taylor

Ross Taylor Associates Pty Ltd

This submission is based on two articles written by Ross Taylor. The first article is titled 'The Placebo Building Laws' which was published by Sydney Morning Herald in an abridged form under the title 'New Building Laws won't Stop dodgy developers cutting corners'. A second opinion piece was requested and submitted to the Sydney Morning Herald under the title ' A Conspiracy of Silence'. This is expected to be published in abridged form in the Fairfax Publications in October 2018.

The author has been practicing as an expert in the field of building defect analysis and peer review of new building design (with particular focus on waterproofing issues) over the last 40 years.

While the legislation may vary between NSW and the ACT the articles are based on very similar analysis of the root causes of defects and the failure of regulation in both regions.

Article 1

The Placebo Building Laws

With the home unit building fervour in NSW and ACT in full swing , the occurrence of substantial defects in new construction continues unabated. It is common for large scale apartments of 100 units or more to have defects costing $5 million to $15 million to fix. The process of getting the builder, developer or insurer to fix the issues often drags on for 4 to 6 years. Many Strata Owners end up paying for the repairs themselves after protracted efforts to get the Developer , Architect , Engineer or Builder to fess up. New owners are often stunned that there can be so little consumer protection. In one landmark case an Owners Corporation in Sydney ended up paying over $10 million just in legal bills in an unsuccessful, drawn out, effort to have defects rectified by the builder.

Into this frame we see the recent and the proposed changes to NSW strata building laws. These changes enable bold press releases promising the arrival of effective regulatory reform. However a close reading reveals a different story. Unfortunately these changes are of the Placebo type - you know , treatments given to make a patient feel better but having no therapeutic effect. This follows a well worn track of ineffective legislation here in NSW and the ACT . One apartment complex in the ACT has recently been left high and (not so) dry to the tune of $20 million of defects after a wealthy local developer shut down the legal entity responsible. Considering the original build cost would have been around $45 million the defects amount to more than 40% of build cost. The developer continues with high profile CBD developments up the road under their new branding while the ACT Government regulator looks on. The only sound is that of the Pheonix rising.

Ineffective legislation is at the heart of the alarming rise in defects and defect disputes. There has been a gradual depletion of consumer protection by NSW and other Government legislators over the last 20 years. Into the void step short term, profit focused developers unhindered by any effective regulatory sanctions nor encouraged by any sensible proactive regulatory supports. More on that later. So what is the origin of the defects ?

The defects that cause the most grief are water penetration, building cracking and inadequately fire resistant materials. We find that these defects mostly have their origins in the decisions and directions of the developer or developer / builder. They have their *expression* in poor building practices but these are usually *effects* and not causes. Essentially we find that building failure, defective workmanship and use of inappropriate materials is the effect of developer centric behaviours.

The issue at hand is the conga line of rapacious developers and developer / builders who have no intention of devoting the time, attention and money to getting the design right before construction, selecting proven materials to give a quality product or paying the builder enough to get it right. In short these ones don't care about the end result once the pre-sales contracts are

snapped up. As one developer so eloquently put it " If they keep buying crap , I'll keep building it ". In the absence of effective legislation they prosper and in the process they lower the bar.

This behaviour while now the norm in Sydney, is by no means universal. Developers and developer / builders who have a reputation to maintain, who care about the end result and eschew this skimping, cost driven mentality, are in the minority. The result on their projects is almost defect free construction. When they have problems that arise they fix them without the consumers needing to take recourse through the legal system. All strength to them. They prosper through quality and reputation. They make sure they do not have profit depleted through call backs, arguments and reputation erosion.

However when a developer is solely profit focused the major defects start at least two years before the workers arrive. It goes something like this. The developer saves on Consultant fees by only paying the Architect or Structural Engineer enough fees to get building approval, but not enough to provide workings drawings or address design anomalies between documents. Defects often originate in the gaps between professionals drawings and there is no time or budget for the reconciling and closing of these gaps. Once DA is achieved its full steam ahead ! The builder is then asked to 'Value Engineer' the design to effectively screw down his price or otherwise the next builder in line will get it. They then get the builder to take over full design responsibility at the reduced price. To afford this impost the builder is reliant on the subbies to design the details for free. Since time is now of the essence to meet the developers sales programme, the key designer of the details often will , by default, become the bricky or formworker who has to make it fit as he goes along. It is not commonly known by consumers that a good builders profit margin on these projects is only about 3% of the construct sum. About the same as the agents fees for selling the units. But they only get this if everything goes right which it rarely does. Not a lot of wriggle room.

Compounding the errors is the dizzying array of new building materials and systems arriving on site. These are often nominated , once again by the developer, for their speed of installation and lower cost - not their longevity, track record or beauty. The cladding of Grenfell Tower being a case in point. Very often newly developed lightweight structural system components, waterproofing materials and cladding systems turn up on site. These new " faster , better" systems have unresolved details of connection, necessary to keep the rain out and the fire at bay. The guys on site then have to work out how to make it work with the few options available to them under the ever present constraints of programme and budget. This design on the run, initiated by the developer years before a blow is struck on site, is at the heart of the defect malaise.

Anecdotal evidence across hundreds of projects suggests that $1 not spent on design detailing and appropriate material selection before construction translates to $30 for repair on completion and $100 after the matter goes to court. A stitch in time saves 100.

So now to the key questions - how could a series of regulators over the last 20 years get it so wrong. ? Why are the laws covering these issues so ineffective ? Lets look at the roll call of regulatory recalcitrance and legislative laxness.

- The current Building Certifier system is a particularly fine example of Placebo legislation. Commenced 20 years ago this system of outsourcing of document review and inspections lies at the heart of the rise of defects and gives the impression that somebody is watching. In practice the prime focus of the certifier role is the processing of paperwork and dispersal of accountability not the physical checking of key construction processes. The Certifier legislation only requires a relatively few inspections at critical stages. On a $60 million unit development with 150 units there are hundreds of key points where independent inspections are needed to check compliance and prevent expensive defects. Under the current legislation Certifiers only need to carry out as little as 10 physical inspections. The system is also fundamentally flawed in that it requires the certifier to be hired by the very developer they are supposed to be checking. This places the certifier in an invidious position. The certifiers business model is dependent on repeat business from developers. But if they are too rigorous it can be seen as un-cooperative and the next gig doesn't happen. As one certifier recently confided " you challenge them at your peril ". Subtle but real pressure in the developers favour.

- Recent changes to the Home Building Act have been promoted as improving consumer protection. The reverse is the case. Under these changes the definition of the type of a defect covered by the maximum 6 year warranty period has now been tweaked to include only the most extreme type of occurrence - the type that rarely occur. The type of waterproofing, fire and structural defects that cause the bulk of repair costs are excluded from the new definition of Major Defect that carries the 6 year warranty. So these defects have to be found, documented and claimed within 2 years. This is particularly unrealistic as these major defects usually don't show up until 3 or 4 years after construction. The consumer ends up carrying the can once they emerge. Couldn't have been drafted better if written by a developer.

- The arrival of the Strata Building Bond scheme has been much heralded by the NSW Government. It has been sold as providing protection for consumers in buildings of over 3 floors in height. These buildings form the bulk of the new home units, they are the ones with the tower cranes dotted throughout most suburbs and are the ones with the most expensive defects. These buildings used to have building defect insurance cover which was removed by a legislative stroke of the pen some years ago once the scale and cost to the insurers was realised. This was despite (and because) of the fact that these very large buildings are the most prone to defects and generate the biggest defect costs for unsuspecting owners.

- The Bond scheme is scheduled to commence in January 2018. From this date developers will be required to lodge a bond with NSW Fair Trading equal to 2 per cent of the contract price for the building work. The scheme provides for an independent consultant to be appointed to

inspect the building and report on building defects found. The bond monies are then to be used to carry out the repairs pinpointed by the reports if these have not already been carried out by the builder or developer. On checking the details of the scheme we see classic Placebo legislation at work. Firstly the independent consultant is to be selected and paid for by the Developer. Sounds familiar ? They can be appointed at any time within the first 12 months and can submit the report as early as 15 months after the building is completed. The Owners Corporation notionally has a right of refusal of the inspector selected but not the right to appoint. Bearing in mind that most new Strata Committee members will still be unpacking boxes in their gleaming new apartment at this time, they are unlikely to be aware of embedded issues and know to raise objection. After all the developer has offered to appoint an inspector to look at faults - what could go wrong ? Lets us count the ways.

- Amoung the most costly defects to fix are waterproofing , facade and structural defects. These take time to emerge. As discussed these usually only start to show up in volume at year 3 and 4 so its highly likely they will not be apparent for the initial report at the 15 month mark. If no appreciable defects are reported at this time then there is no follow up report required. When such defects do emerge a few years later they will fall completely outside the catchment of the bond scheme.

- Rigorous, experienced report writing including essential destructive investigation of key areas is needed to uncover the hidden truth. However such a consultant brief is likely to be too expensive and the truth too inconvenient for the developer compared to simpler, compliant reports. Conflict of interest built into the system. The developer in the driving seat. Who drafted this legislation ?

- The 2% sounds like at lot at first glance. However we often find that the defect repair bill on an average block of units is about 8% of the original construction cost. Owners will therefore not be covered for the big repairs even if they happen to become apparent in the first 2 years.

The regulations certainly do not provide protection to consumers. They appear weighted to benefit the developer. The motivation for the NSW regulator proposing such a manifestly unfair piece of legislation can only be surmised.

Sanction based regulation such as this, is predicated on the cost of the penalty being such as to encourage better behaviour in future. However Developers can easily sidestep the pain. Most contracts written by developers for large buildings have a clause which makes sure the Builder underwrites the developers exposure to any defects claims by the owners. The developers will simply extend this contractual device to any exposure they may have under the Strata Bond Scheme. Any repairs will come out of the builders retention. Problem solved. Back to business as usual.

Solutions abound. Everyone in the industry has their favourite. Heres a few of mine.

- Legislation is needed which creates a level playing field of compliance expectations rather than a sanction free race to the bottom. Start by requiring detailed working drawings on the key defect issues by qualified Architects and Engineers prior to Development Approval. Then bring back the long lost Clerk of Works role to the building sites. This is an experienced building professional who represents the future owners not the developer or builder. Their job is to make sure the structure is built in compliance with the drawings, laws and standards and they are located on site. Their salary should be paid for by the future owners using a 2 % levy on the new building purchase price. Good developers and builders have nothing to fear, crook ones everything.
- There is a desperate need for better consumer information on repeat offenders so that better informed purchasing decisions can be made. Name and shame legislation would help raise the bar.
- Stop handing out industry awards for designers or builders on buildings which are judged while the paint is still wet. Give them at least 3 years to prove themselves before handing out the gongs.

In short create an environment that supports good behaviour and calls out the bad. The good developers, designers, builders and tradespeople are there. They just can't prosper in the shallow end of the building industry gene pool. With lax legislation the good architects, engineers, builders and developers are pushed to the margins or out of the industry while the second raters have no motivation to improve. Consumers have no way of telling the difference and so buy on price. The slow spiral to the bottom continues unabated.

In the meantime, if you own a unit in NSW just relax , take your placebo legislation and have a good lie down. Everything's under control ….it just not who you think.

Article 2

A Conspiracy of Silence

Social planners refer to an intractable issue as a 'wicked problem' - an issue that is difficult or impossible to solve. According to Urban Taskforce Australia, by 2024 only 49 % of residents in Sydney will live in detached homes with 51% in higher density units and townhouses. The wicked problem is that, at the current rate, most of these higher density dwellings will be built with major defects inherent in their design and their construction.

As recently reported by ABC News ACT, a developer / builder has managed to outfox the ACT Government regulator to the tune of $20 million of building defects - in one home unit complex alone. The owners are left with cracks, leaks and fire defects and no effective help from the politi-

cians and regulators responsible for the sector. The fact that this developer has been a repeat offender and is selling brand new units just up the road, adds insult to injury to the string of affected unit owners. Like many of his type, he seems to find no impairment from either regulators or the market place in selling these big, bold apartments in the heart of the nations capitol.

New buyers of these developments are none the wiser to the antics of these players and the trail of deconstruction they leave in their wake. It's the same story throughout our wide brown land. The consumer has little information other than the sales brochure when looking to shell out their $1m plus on a new unit. When you buy a $30,000 car there is endless information with blogs and Choice comparisons. Product recalls are highly publicised, brand reputations matter. For a $100 million dollar block of 100 units with inherent design and building faults….. the silence is deafening.

How does a potential buyer make an informed decision ? In Sydney in considering the purchase of a unit there is one reliable name brand and then everyone else. There is very little information available in the market place for a consumer to distinguish between an experienced developer, builder or architect who care (and there are many of these) or the dodgy brothers making a quick buck. In the absence of better information on the track record of these key players, selection assumes all quality is comparable.

This in turn feeds the machine that generates chronic defects in many new unit complexes. Economists long ago worked out that imperfect consumer information leads to lower product quality. To see how this works in buildings which have been put together by less than scrupulous developers you just need to follow the money.

It goes something like this : The consumer sees the glossy brochure which promises high rise nirvana with a great foyer and sparkling kitchen. The brochure doesn't tell you its the developers first high rise building in Australia and the builder has only been in business for two years. The consumer doesn't know about this hollow history and assumes a reasonable level of quality. So they pick the unit based on location, European cookware brand and price. The developer knows this and spends up on the foyer. Elsewhere they select cheap knock off building components and thin, light structural systems that do not stand the test of time. Savings are made on the bits you can't see. The Builder, Architect and Engineers are all screwed down on price by the developer at the start of the design process. Cost and programme are the only factors of concern here - not to keep prices low for the consumer but to optimise the profit for the developer. The Owners then move in and find the defects start to emerge in two or three years. The balcony leaks, the roof sags and the walls start to crack. The Owners try to get the builder back and after some token attempts at repair by the builder with a tube of silicone the Owners find their calls aren't returned. The developer has moved on and because the building is over three stories and, by now its more

than 2 years since construction, there is no recourse for the owners under the new regulations. The developer pockets the cash and buys their next site.… and repeat.

If better consumer information were available the dodgy brothers would have trouble moving their stock and their business model would fail. The good developers and builders would see that attention to quality is rewarded with quicker unit sales and retained profit through defect prevention.

Why is better information about the track record of the key players in a new development not available? Why does a strata search often not tell you what you need to know about the hidden condition of a building? A closer look reveals a pervasive conspiracy of silence.

When major defects, (usually of the waterproofing, facade or fire kind) are found, a buildings Strata Committee members usually do not want to publicise the fact. At this point they are concerned about the reputation of their building in the market place and resale value of their units. Silence commenced.

The defect consultants, strata manager and lawyers are sworn to secrecy as a matter of privacy for their clients. If there is a negotiated settlement of major defects with the developer, builder or architect, then strict confidentiality clauses are usually imposed. Silence enforced.

There is no 'name and shame' legislation or Offences Registers in place for serial offenders or absconders. Building industry associations perversely are not interested in calling out the recalcitrant operators via support of such regulation. They are worried about their larger members getting in the news for repeat minor infractions. Silence lobbied.

The result is a short journey to a high wall for a potential unit buyer when conducting a web search for feedback from previous buyers on the developer or builders past projects.

Where else can the consumer look for comfort? Surely they can take solace in the prestigious industry awards listed on the website or brochure of the architect, developer or builder? Ain't necessarily so. The most respected industry gongs are judged while the building is brand new, the paint just dried, the concrete still curing. These awards are not good indicators of likely performance in a rain storm a few years down the track when the expensive defects usually emerge.

Exhibit A , your honour, the The National Portrait Gallery in Canberra. This beautiful building won three major design Awards for its Architects in 2009. The Builder won the prestigious Master Builders 'Project of the year' Award with the Judges saying
"it displays a level of quality which far exceeds accepted industry standards".

It won The Concrete Institute of Australia Medal of Excellence Award in 2009. Each of the winners probably still have these awards proudly displayed on their walls and on their websites as proof of quality.

A few weeks ago it was announced that the Gallery would be completely closed for 6 months next year. Extensive leaks to the podium and car park and other issues have been getting worse over the last few years and major corrective action is necessary. This is not routine maintenance. These are corrections of critical defects such as those affecting thousands of units. Will the awards be withdrawn ? Unlikely. Perhaps a public holding of those responsible to account ? Nothing to see here. Silence maintained.

There are many examples such as this which betray the industries core value system that allows the dodgy brothers to prosper in the outer suburbs of a city near us all. Designers and builders of a premium public building such as the Portrait Gallery are feted without reference to the ability of the project to perform its longer term core function of keeping the rain out. User experience in service doesn't seem to matter. Form seems to follow price and programme not function.

When talking of solutions to this problem we see that regulators have had little luck and no apparent skill in the drafting of regulations in this space over the last 20 years. The recently enacted Strata Building Bond and Inspections Scheme for new buildings of four or more storeys is a case in point. It calls for a cursory, non-invasive condition report, commissioned by the developer, to be done a little over a year after the building is completed. This is early enough to ensure that expensive defects such as leaks and cracks, that emerge only after the building is exposed to the elements for a few years, have not yet show up. A clean bill of health results, perhaps some minor patching carried out and the developer gets his bond moneys back. Silence regulated.

A wicked problem indeed.

End Of Submission

Ross Taylor
30th September 23018

From:	Ross Taylor
To:	LA Committee - EDT
Subject:	Legislative Assembly Inquiry into Building Quality
Date:	Friday, 28 September 2018 4:09:17 PM
Attachments:	18-04-08 Conspiracy of Silence Opinion Piece (1).pdf

Attn: The Committee Secretary, Standing Committee on Economic Development and Tourism, Legislative Assembly for the ACT.

Over the last 10 years I have been working in the ACT carrying out forensic analysis of building defects. A major part of our work has also been negotiation with builders for rectification of high rise residential projects. This provides us invaluable insights into the root causes of the most common and most expensive defects. As a result we are commonly requested by architects and builders to assist with the design of the structures, since this is the starting point for the defects to emerge. As a result, we have had a significant impact on the reduction of these defects in buildings undergoing this design review process. Please see attached 1 article, and a link to the other below of opinion pieces we have written which cover some aspects of the lessons learned.

http://www.smh.com.au/comment/new-building-laws-wont-stop-dodgy-developers-cutting-costs-20170910-gyenl1.html

Regards,

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ROSSTAYLORASSOCIATES

SPECIALIST CONSULTANTS IN BUILDING REPAIR AND WATERPROOFING

8th March

Opinion Piece: A Conspiracy of Silence

Ross Taylor
Ross Taylor & Associates Pty Ltd
Waterproofing and Building Repair Consultant

Social planners refer to an intractable issue as a 'wicked problem' - an issue that is difficult or impossible to solve. According to Urban Taskforce Australia, by 2024 only 49% of residents in Sydney will live in detached homes with 51% in higher density units and townhouses. The wicked problem is that, at the current rate, most of these higher density dwellings will be built with major defects inherent in their design and their construction.

As recently reported by ABC News ACT, a developer / builder has managed to outfox the ACT Government regulator to the tune of $20 million of building defects - in one home unit complex alone. The owners are left with cracks, leaks and fire defects and no effective help from the politicians and regulators responsible for the sector. The fact that this developer has been a repeat offender and is selling brand new units just up the road, adds insult to injury to the string of affected unit owners. Like many of his type, he seems to find no impairment from either regulators or the market place in selling these big, bold apartments in the heart of the nations capital.

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