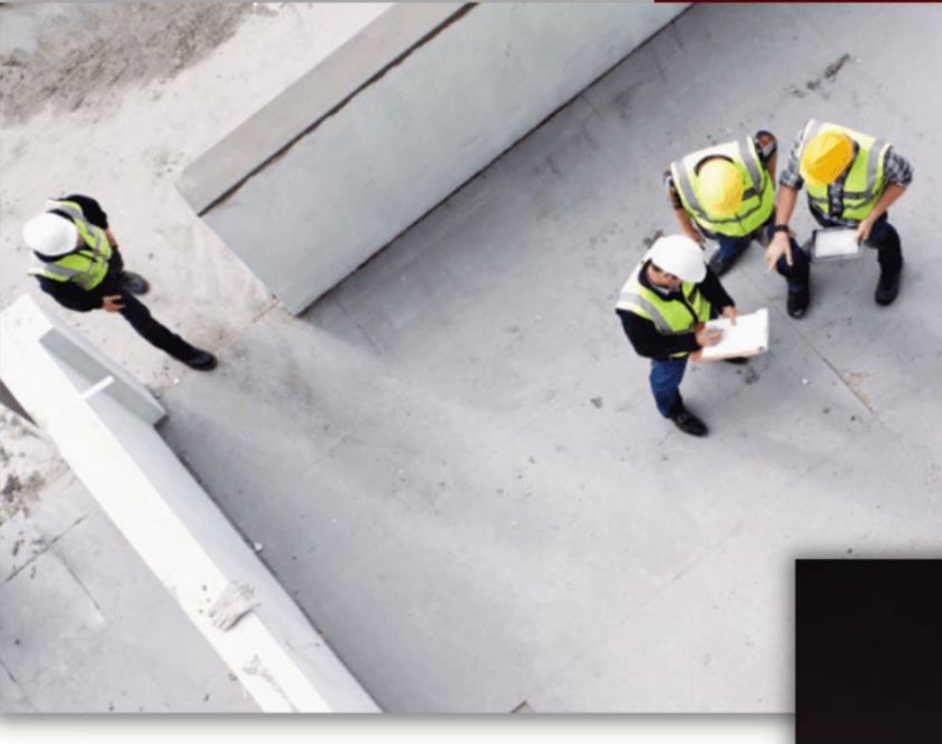


Insuring Against Defects: Is Decennial Insurance Effective



Newsletter

February 2023: Issue 1

CRISP
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In this Newsletter, we discuss the recent amendments to the Strata Schemes Management Act (at s211AA) which are to allow a Developer to obtain “decennial insurance” instead of providing a “developer bond”. Let us discuss the proposed form of “decennial insurance”.

The most recent amendments to the Strata Schemes Management Act (at s211AA) are to allow a Developer to obtain “decennial insurance” instead of providing a “developer bond”. The proposed form of “decennial insurance” is discussed in this Newsletter.

The option of obtaining decennial insurance instead of providing a “developers bond” was the result of the Discussion Paper dated August 2022 by a Ministerial Advisory Panel.¹ The Panel’s advice concerned the viability of the introduction of decennial insurance in NSW. We explore in this Newsletter the Panel’s advice. The Panel’s advice referred to the Resilience Insurance’s defects policy of insurance, the subject of one of our December 2022 newsletters.

Starting with the Panel’s Recommendations. The first was the Government must maintain the pace of its reforms to NSW Building laws and “the capability of the regulator”. Limited comment as to this “capability” was said by the Panel’s report except to note the Regulator being proactive by addressing non-compliant design and building work earlier in the construction process. Compare this to the Second Reading Speech² which noted the Commissioners work since September 2020 including 168 audits, 700 serious defects found, and 29 building work rectification orders issued.

Of interest is the Panel’s view that unless the quality of apartments was significantly improved, the market for “decennial” insurance would be unviable given the multiplicity of claims.³ Stating a prerequisite for a viable insurance market was the success of the NSW Government’s reforms “... buildings will be fit for purpose resilient and measurably safer”.⁴

A fault with the Panel’s report is its failure to provide the Strata Owners with a sufficient fund to obtain quality expert reports as to the extent of the defects and how to best be remedied. This is said despite the Panel’s claim that it is a “consumer facing claims scheme”. That is a poor claim to make given the need to prove the existence of a serious defect and a

¹ Department of Customer Service (NSW), *Decennial Liability Insurance Ministerial Advisory Panel Advice to NSW Government*, Discussion Paper (2022) (‘Discussion Paper’).

² New South Wales, *Parliamentary Debates*, Legislative Assembly, 12 October 2022, 97 (Victor Dominello, Ryde—Minister for Customer Service and Digital Government, Minister for Small Business, and Minister for Fair Trading).

³ Discussion Paper (n 1) 22.

⁴ *Ibid.*

means of rectification to compel the policy to “respond”. For that statement to be true the investigation, identification and rectification works should be at nil cost to strata owners. Despite this the report has a focus on not imposing financial costs on developers/builders and insurers. A jarring statement for an advisory Panel especially given their proclaiming that their recommendations are a consumer facing claims scheme that provides “adequate consumer protection”. Again, it is the apartment owners who “pay the price” by following the Panel’s recommendations.⁵ Again, it’s the developer/builder at fault but they “don’t pay”.

However, the above fault is challenged by another egregious flaw which is requiring a Strata Owners complaint to be the subject of the NSW Fair Trading dispute resolution processes. The department’s inspectors have been very slow to provide reports and the reports are of varying quality. Worst the inadequate reports have allowed notorious Builders to keep their licences and continue constructing shonky “stock”. It’s also a flaw to enable a developer/builder a first right of refusal to undertake rectification works, unless against the benchmark of a proven industry experts’ assessment and an Expert Code compliant report. Again, if you don’t have this independent measure any Insurer is going to meet the developer/builder’s disparaging assessment.⁶

Compare the above to the benefits of a “s28 Undertaking” under the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* and the proactive actions of the Building Commissioner and team. Rectification works are supervised to an independent managers assessment/acceptance with the developer/builder meeting all the strata owners’ costs and providing security against completion pursuant to a binding Deed.

Also unfortunate are the disparaging and incorrect comments are made about the developer bond scheme.⁷ The scheme provides the means to that obtain effective expert reports funded by the Developer’s bond. This is of assistance to prosecuting a claim before a Tribunal or Court. (Refer to s215(4) of the *Strata Schemes Management Act 2015*, for example).

⁵ Ibid 17; this is admitted by the Panel “DLI costs will be passed onto the customer as a cost increase on their unit purchase”.

⁶ Further entrenched by the Insurers entitlement to refer back to the developer/builder as to whether they will complete the rectification works. “Recommendation 2”.

⁷ Discussion Paper (n 1) 15-16.

The Panel's report refers to the Resilience Insurance product, but notes underpinning any insurance market is a continued and significant shift in the quality and compliance of apartments being constructed. Further that insurers should be protected by an effective dispute resolution scheme despite the inadequacies of the Department of Fair Trading's inspectors and NCATs questionable processes.

The second reading speech introducing the Bill based on the Panel's recommendations asserts, "...a big win for owners of these buildings who will benefit from this cover for 10 years without having to establish fault", is wishful and not true if reliance is placed on the Panel's Report.

The Panel's report proclaims "protecting building owners from certain types of defects materialising over a period of 10 years..." and "ensures that there is insurance coverage to rectify serious defects in class 2 buildings and that the insurance is cover for up to 10 years on a no fault basis that avoids complex and costly litigation." The statements are fanciful. Strata Owners will still be required to incur substantial costs to obtain independent reports. No insurer will simply "pay out" because a Strata says, "I've a problem". The dispute resolution mechanisms are with Institutions that are not consumer facing and have consistently proven to be unreliable. And the Insurer is not compelled to assist the Strata Owner and is disincentivised to do so when the Insurer retains the right to put the work back to the developer/builder and avoid the costs of "paying out" under the policy. There is no compulsion for the Insurer to uncover the extent of the defects and ensure BCA compliant (i.e. fit for purpose) rectification works. The Consumer now has to battle the Insurer to prove the policy responds and won't succeed without high quality expert reports and costings.

The Panel's report is replete with references to "requirements" including for "trustworthy building- buildings that are fit for purpose, resilient and less risky". The Panel's assurance that decennial insurance achieves "the less risky" because unsatisfactory works will be appropriately rectified is not correct. Unfortunately, the Panel's report is more hope than reality. Again, consumers of apartments have been let down.