Society of Construction Law Australia
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The role of the legal profession in regulatory failure and reform

I acknowledge the Wurundjeri people of the Kulin nation and pay my respects to elders past and present and to all first nations people in attendance today.

I'd also like to acknowledge Justice Stynes who is here today with her colleagues, Justice Craig, Judge Burchell, Judge Kirton and Judicial Registrar Burgess and their associates. I am grateful for the attendance of Tanya Thomas, Head of legal at Cladding Safety Victoria and Megan Peacock, Executive Director of the Building Policy and Reform Division at the Department of Transport.

Thank you SoCLA for inviting me to speak and in particular to Kiri Parr and Kezia Adams for all of their work in organising this event. It is a great honour to be asked to give this address and a little overwhelming to be speaking in front of so many of my peers.

I began my legal career in the construction law team at Maddocks. I almost fully worked on building regulatory matters in those early years. The partner I worked for was a former building surveyor. He had a strong practice acting for the new Victorian Building Control Commission and council building departments. He also had a strong front and back end construction practice, but I did very little 'real' construction law. As my career developed, I applied my skills in building regulation to other areas of regulation and very much consider myself to be a government lawyer, specialising in regulatory law, acting for regulators across a range of sectors. Because of my profile in building regulation, I am still often referred to as a construction lawyer. In preparing for this presentation, I have come to see that some of what I want to talk about tonight goes to my identity as a public law specialist rather than a construction lawyer and to what I see as the disconnect between building regulation and construction law. I hope you will come to see what I mean during the course of this presentation.

My topic today is the role of the legal profession in regulatory failure and reform.

It is quite obvious that our profession plays a role in regulatory failure and reform. After all, we assist governments to write and enforce laws. We also advise our clients on their legal rights. Lawyers are notorious for 'finding loopholes' in the law which can sometimes signal regulatory failure. But there is also the influence that the legal profession can have on broader public outcomes in less obvious ways and that is what I want to talk about this evening. In particular, I want to talk about the influence of our profession on compliance and consumer outcomes in the context of the building and construction industry.

There are 2 places I want to shine my torch today:

1. design and construct procurement; and
2. statutory rights and duties as a consumer protection mechanism.

Before I flick my torch on to look at these topics I'd like to say a few words for context.

You will all be aware that our federated system of government means that the regulation of the building and construction industry is primarily controlled by the states and territories. We

do of course have relevant Commonwealth laws for these matters such as industrial relations laws, company laws and the Australian Consumer Law. But state and territory governments hold the reins when it comes to security of payment, home building contracts, licensing and registration and the planning and building approvals processes.

Through what seems to me like it must have been an era of miraculous cooperation in the 90's, the governments came together to create the Australian Building Codes Board. The ABCB was charged with establishing and administering the Building Code of Australia (now the National Construction Code - NCC). The ABCB exists through an intergovernmental agreement between our 9 Australian Governments. Until recently, the ABCB lived within the Commonwealth's variously named Departments of Industry. Owing to the significance of government policies on housing supply, the ABCB now lives in the Treasury.

The ABCB reports to the Building Ministers Meeting (BMM). The BMM come together roughly 3 times a year to discuss public safety risks, systemic issues and to set the strategy for the development of the NCC. It was the BMM that commissioned Professor Peter Shergold and I to develop a road map for governments aimed at improving building regulatory frameworks and in turn levels of compliance with the NCC across the country. We were commissioned to undertake this work in 2017 in the wake of the Grenfell Tower tragedy. There was a recognition that non-compliant combustible cladding was a symptom of a bigger problem with our built environment. Peter's and my report is known as the Building Confidence Report. It was the first of many reports I have prepared for Australian governments on building regulatory issues.

The BMM is a collection of Ministers from the 9 governments. These Ministers change frequently. With some notable exceptions, Building Ministers have usually been junior Ministers. With election cycles and portfolio shuffles we tend to see most Ministers rotating on and off the BMM every 12-18 months. From NSW, Victoria and Qld alone, there have been 11 different Building Ministers over the past 3 years. The Commonwealth Minister is the BMM's chair. There have been 4 different BMM chairs since our 2018 Building Confidence Report. This lack of continuity makes it difficult to get long term strategic thinking and harmonisation at a national level.

Industry frequently cries for national harmonisation but even our NCC, adopted by all states and territories has many hundreds of state and territory variations. In my work I am often asked to undertake jurisdictional comparisons of laws. These are complex tasks. The reality is that very few people understand in detail how all of the different building regulatory regimes work in practice and how they came to be the way they are. In my view, not enough time is spent making the most of our federated system by trying to establish whether particular features of one jurisdiction's scheme produce better industry and consumer outcomes than another's.

For example, Qld is the only place where there has been a first resort builders warranty scheme for over 40 years. In the late 90s, other parts of the country decided to move away from government run home building guarantee schemes to a private insurance market. Within 10 years, governments were dragged back in to underwrite these schemes. Over that time, as a compromise, these schemes were changed to 'last resort' schemes that would only activate when a builder died, disappeared or became insolvent. They were also pared back to only apply to homes and residential buildings of 3 storeys or less. Some of these

schemes have required significant funding by taxpayers over the years,[1] [2] and in my recent work reviewing the NSW Home Building Compensation Fund it was clear that these schemes are subject to significant criticism by both consumers and industry.

Qld retained its first resort warranty scheme throughout this period. But, when people ask me 'are the outcomes better in Qld?', 'do they have less defects in buildings?', my answer is 'I don't know'. It is possible that the class 1 and low-rise sector have reasonable levels of compliance in Qld because of its first resort warranty scheme, but what about the high rise and commercial sectors where warranty insurance is not mandatory? What level of oversight and insight does the Queensland government have into compliance for those larger buildings? I am not aware of any published research on this.

More recently we have had some fairly credible government reports on the prevalence of defects in apartment buildings in NSW and Victoria.[3] [4] In both cases it has been concluded that around 50% of apartment buildings in those two states have serious defects.

In addition to the lack of research into the effectiveness of regulatory schemes, sometimes industry groups resist reforms and lobby for their reversal. Most recently we have heard the Master Builders Association of NSW say that the significant reforms introduced in NSW in 2021 are costing too much, that the 'pendulum has swung too far'.[5] No one has presented any research that weighs these alleged costs with possible benefits. It is likely that the reforms have not been in place long enough to even be able to measure this credibly. But with governments all so focused on delivering housing supply, I fear the blinkers are on and the criticisms of the powerful MBA will be listened to, given they are seen as an important delivery agent for government agendas.

In my experience, what remains the same in every corner of our vast country is the impact that poor building work can have on consumers. In my work I have spoken to dozens of home and apartment owners burdened by the impact of serious building defects. For these people, the costs can be catastrophic.

In 2020 I conducted a review into the experience of owners of defective apartment buildings in NSW.[6] I interviewed owners corporation committee members from a sample of apartment buildings. The owners corporation committee of one 380 apartment complex spoke to me about how their committee had been run by people associated with the developer who refused to respond to complaints about defects. It had taken the new committee many

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[1] Independent Pricing and Regulatory Tribunal New South Wales, Review of the Efficiency and Effectiveness of the NSW Home Building Compensation Fund, p 31 "During 2017-18, icare received $138.4 million in funding relating to reimbursements of prior year losses and an additional $43 million in respect of policies written post 1 July 2018. As at June 2019, the fund had assets of around $400 million, compared to forecast claims liabilities of just over $1 billion. This means it still has a forecast deficit of around $650 million, which will need to be funded by taxpayers.".

[2] Victorian government funded support payments following the collapse of Porter Davis in 2023 https://www.vic.gov.au/support-payment-schemes-customers-liquidated-builders

[3] Research on serious building defects in NSW strata communities, 2023 Strata Defects Survey Report, November 2023 https://www.nsw.gov.au/departments-and-agencies/building-commission/building-and-construction-resources/research-on-serious-building-defects-nsw-strata-communities

[4] Cladding Safety Victoria, Non-Cladding building defects, 2024 https://www.vic.gov.au/sites/default/files/2025-02/Research-Analysis-Non-cladding-Building-Defects.pdf

[5] Realestate.com.au, Too expensive: pressure on to roll back 'Opal Tower' laws', 7 October 2025 https://www.realestate.com.au/news/too-expensive-pressure-on-to-roll-back-opal-tower-laws/

[6] This report was not published.

months of door knocking and speaking to owners to win enough support to be voted in. When I met with them, they were so pleased to begin a process for seeking compensation.

They spoke of sewage seeping into their basements and combustible cladding. Not long after the building became occupied, a broken sprinkler head had caused flooding in the lower floors of the basement. The pumps, designed to deal with this sort of situation, did not work leading to lifts being inoperative for several weeks. Some owners had to walk up more than 20 flights of stairs to get to their apartments. The building had been issued with only an interim occupancy certificate. Though people had been living in the building for over 2 years, the fire safety systems were said to be seriously defective and unable to be signed off. The new committee were especially excited because they had just managed to pass a resolution approving the engagement of a range of consultants to undertake defect reports. These initial reports would cost over $350,000. That was before they paid for lawyers or even knew what the cost of rectifying defects would be. I thought then and still think 'what if that money had been spent on dedicated, independent oversight of quality and compliance during the works?'. About 18 months after I interviewed these owners, their developer and several of its related entities became insolvent. Media reports say the group had $240 million of unsecured creditors including over $120 million in defects claims by strata bodies.[7]

I have interviewed the owners of Opal and Mascot Towers. These people were immersed in a nightmare for many years. The NSW government spent almost $25 million in accommodation and other assistance for the displaced owners of Mascot Towers.[8]

Owners have told me about losing their superannuation, using their parent's superannuation, entering into bankruptcy, losing their jobs, sleeplessness, anxiety, broken marriages and relationships, nasty infighting between residents, miscarriages, avoiding having children, and suicide. Life changing trauma that has persisted for many years.

In 2020, I interviewed a husband and wife who were the owners of a home in regional NSW for a report called 'The house with no piers'.[9] When I met them, they had already endured over 7 years of stress related to alleged structural defects in their home. In 2009, the couple were in their early 40s when they set about building their forever home. The build cost was about $220,000. Within 12 months of moving in they became concerned about cracks appearing in their walls. Their builder told them it was drainage and settlement. They eventually engaged experts and made a claim in NCAT. They were told they could not self-represent so they found a local law firm specialising in construction disputes. It took over 3 years for a decision. They lost. They were ordered to pay the builder's costs, their own legal costs and those paid to the builder totalling over $300,000. $80,000 more than they had paid for their home.

They lost in large part because of a dispute about whether the cracking had occurred due to a failure to construct piers as required by the engineering design. Numerous experts were involved. They opined about the soil classification and whether the footing design was

[7] The Sydney Morning Herald, The bankrupt, the fugitive and the billion-dollar Toplace collapse, 3 August 2023 https://www.smh.com.au/national/nsw/the-bankrupt-the-fugitive-and-the-billion-dollar-toplace-collapse-20230802-p5dter.html and ABC News, Toplace director Jean Nassif says he'll fix dodgy Sydney buildings if police drop warrant, 6 April 2024 https://www.abc.net.au/news/2024-04-06/jean-nassif-toplace-sydney-buildings/103653526

[8] NSW Minisiterial Media Release, Mascot Towers owners finally free to move on, 28 June 2024 https://www.nsw.gov.au/media-releases/mascot-towers-owners-finally-free-to-move-on

[9] Weir Legal and Consulting, commissioned by the NSW Government, The house with no piers, December 2020, https://www.nsw.gov.au/sites/default/files/2023-08/the_house_with_no_piers.pdf

appropriate. The owner's engineering experts said there was no evidence of the piers being built. The builder's expert said there were piers. He said he had inserted a probe into the area under the home and could feel the piers. The Tribunal found that the piers had been built. After the NCAT case was over, the owners contacted the newly appointed NSW Building Commissioner for help. David Chandler visited the site. In preparation for his arrival, for the first time, the owners dug a substantial trench along the side of the home where the piers were said to have been built. The Commissioner climbed into the trench and saw with his own eyes the piers had not been built.

Less than a year after my report was published, I learned that the husband had developed brain cancer. Within 6 months he had passed away. We will never know how much the years of worry and stress contributed to his illness.

My interactions with people who have suffered at the hands of the building and construction industry have and continue to heavily influence the lens through which I approach my work. I am also affected by conversations I regularly have with industry participants who are genuinely troubled by the day-to-day decisions they make which push the boundaries of their moral and ethical beliefs. They have a strong desire to maintain professional standards in the face of the commercial pressures and the incessant race to the bottom. It is important to acknowledge that the majority of industry participants are diligent and do very good work. In my mind we should be motivated to regulate effectively for these two categories of people — consumers who buy and live in our buildings and those in the industry who want to follow the rules whilst staying true to their integrity and ethical boundaries.

So with this context in mind, lets shine a light on my chosen topics for this remainder of this presentation.

Design and construct procurement

Through the 90s and 2000s we saw so much change in the construction industry. Off the plan sales and foreign investment fuelled significant growth in apartment construction. Our new Building Code of Australia was performance based, opening up the door for flexibility in compliance under the guise of 'innovation'. We also embarked on a system of private certification, allowing what had been an important statutory function of independent oversight of design and construction to be delivered by private building surveyors.

Although the early version of private building surveying firms were headed by ex-local government surveyors, over time, as new graduates came through the important statutory function quickly faded in favour of client service. Many private surveyors were eager to please. In the context of an 'off the plan' development, as the project nears completion, the private surveyor's decision to issue an Occupancy Permit is all that stands between the maxed-out finance facility and the handover of tens of millions of dollars in settlement funds by consumers eager to move into their home or commence their investment. Most private building surveyors don't stand a chance when insisting on compliance, revised documentation and certificates. I was once told by a building surveyor that they are under immense pressure to issue occupation certificates, and it was very common for builders and developers to aggressively pursue sign offs from them.[10]

Over the last 30 years the design and construct model also became the procurement vehicle of choice. Lawyers set to work on conditions of contract which allocated as much design and

[10] Weir Legal and Consulting, commissioned by the NSW government, Broken Promises, Blame Games and Balconies, June 2023, page 20 https://www.nsw.gov.au/sites/default/files/2023-06/broken-promises-blame-games-balconies.pdf

construction risk to the builder. This is said to make perfect sense. It enables the builder to be involved in finalising the design using their expertise. They can find cost savings and efficiencies by working with the consultant engineers, architect and designers who would be novated to them under the D&C arrangement. Building surveyors were also involved in the design process, attending design meetings to advise on NCC compliance and also being novated across to the builder.

Over time it became quicker and more cost effective to get projects rolling on limited design. Engineers, architects and designers came under increasing pressure to get the bare minimum down on paper to support staged building permits which would be issued on demand by the building surveyor. As far as product selection, 'let's not get too specific' — builders and developers want the flexibility to choose products along the way and substitute equivalent products that might save money. The substitution process would be run past the architects who would ensure that the look they were after was not compromised by the proposed new product.

The process I have just described bears limited resemblance to the building approvals processes required in building regulations. Noting that there are some differences in the building approval requirements across jurisdictions, the usual features in building approvals regulation are as follows:

- A building permit can only be issued if the building surveyor is satisfied that the proposed work will comply with the relevant Act and Regulations including the NCC;

- It is a conflict of interest for the building surveyor to participate in the design of a building for which they are appointed to issue the building permit. Their core function is to independently review the designs prepared by others and presented to them to be assessed for compliance against the NCC and other regulations;

- With regard to products and systems proposed for use in the design documents, the NCC requires that each product must have 'evidence of suitability'. That means the building surveyor should be given test reports, certificates or other product information showing how these products can be used and what testing has been done to verify their performance;

- The building surveyor must be appointed by the owner, whilst the builder will often act as an agent of the owner, the building surveyor's client throughout the performance of their functions is the building owner;

- Inspections of the work must occur at mandatory notification stages (as defined by the building surveyor). In Victoria, these must be carried out by or on behalf of the building surveyor. It is not appropriate for the builder to arrange for their own inspections along the way and present the building surveyor with a wad of inspection certificates at the end of the job;

- In every jurisdiction it is an offence for a person to carry out building work that does not comply with the stamped approved building permit documents. It is not legal or acceptable to change products or construct the building differently to what has been approved without documenting that change and presenting it to the building surveyor

for review and approval before the proposed change is constructed or the substituted product is installed.

The features I have just described bear little resemblance to common practices in construction.

Front end lawyers might be thinking that the D&C contracts require parties to comply with all laws and that it is incumbent on the building surveyor and other practitioners to comply with their obligations under the Act. They might say 'these things do not need to be spelt out in contracts.'.

Others might ask, 'where is the regulator in all this?'. 'If the surveyors were breaching conflicts of interest and approving sub-standard documents why weren't the regulators doing something about this?'. 'If products do not have 'evidence of suitability' to support their use, why is the surveyor issuing the permit and why aren't the regulators doing something about this?'. 'If builders are not calling for inspections from the building surveyor or departing from the approved drawings, why aren't they being pulled up by the building surveyors or the regulators?'.

These are valid questions. But my question to this audience is what is the role of the legal profession here? Do the D&C contracts you draft adequately reflect the statutory roles and obligations of the parties involved? Do they reflect the key features of the building approvals process that I have just outlined? I believe the answer is no.

It is my view that D&C contracts could be much more specific about how the design and construction process must work to ensure compliance with the building approvals process. There could be contractual obligations to require greater clarity and documentation of the staging of the project. They could expressly require the production of detailed documentation before a permit is issued.

In relation to variations and product substitution, it is not simply a matter of the Principal and head contractor following a process to make changes. The contract should expressly acknowledge the regulatory process by requiring that the building surveyor be presented with any proposed changes that may impact on NCC compliance before the substitution or variation can proceed.

Too often, changes are made by a builder without properly working through the impact of those changes on the engineering design. This often leads to 'workarounds' in design and retrospective performance solutions being used to justify non-compliance.

In 2020, in response to the Building Confidence Report, the then Victorian Building Authority published a Code of Conduct for Building Surveyors.[11] The code does not change any of the legal obligations that have been on building surveyors since 1995. But it does spell things out in more detail. It reminds everyone that the functions performed by the appointed building surveyor are statutory functions and that the surveyor has a duty to the public when performing their role. It says that the obligation to act independently means not participating in design either before or after accepting an appointment to issue the building permits. It means not agreeing to be novated to a builder before or during construction.

[11] Victorian Building Authority, Code of Conduct for Building Surveyors, June 2020 https://www.vba.vic.gov.au/__data/assets/pdf_file/0015/114351/VBA-Code-of-Conduct-for-Building-Surveyors.pdf

How many construction lawyers know and understand that Code of Conduct? How many of you have thought about whether the construction contracts we use and the practices that you know occur on building sites align to that Code of Conduct? I was told by a building surveyor as recently as last month that clients still expect them to be novated to the builder. More troubling was that he said that this was still also happening on jobs where the government is the Principal!

If our role as legal advisors is to help our clients to be compliant, then what are the obligations on us as a legal profession to ensure that we fully understand the building approvals process and make sure the conditions of the contracts we draft align to and promote those regulatory requirements?

When lawyers act for builders and developers advising on the contractual arrangements, do they have any obligation whatsoever to the end user and consumer? Many of you will say 'No, my obligation is only to my client.'. But I ask you to reflect further on my questions. What would be the downside if standard form contracts expressly reflect the regulatory processes more closely? What would be the downside in trying to influence increased levels of compliance with laws that are directly relevant to the delivery of works under the D&C contract? What could be achieved if lawyers felt some sense of obligation to influence greater levels of compliance with the building regulatory laws?

The consequences of not following the building approvals process are significant. I have spoken about some of these already in relation to the impact on consumers. But there are broader implications for us all. The Victorian government is in the home stretch of delivering its $600 million cladding rectification program.[12] Significant taxpayer funding has supported that program. Cladding Safety Victoria have led the world in managing the removal of non-compliant combustible cladding from over 400 apartment and government buildings. CSV's report on 'Compliance in Design' tells us that in the vast majority of cases the specification of cladding products lacked adequate detail.[13] We know that most of the products which have been removed from buildings never had 'evidence of suitability' for their use when they were installed. We know from the litigation associated with the Lacrosse fire that product substitution occurred with no referral of that process to the building surveyor.[14] Poor regulatory compliance does not just affect consumers. It affects the whole community. The cladding crisis and media reports on the prevalence of building defects impacts consumer confidence.

One jurisdiction has introduced reforms aimed at addressing the impact of the D&C procurement method. This is of course NSW under the authority of its inaugural Building Commissioner, David Chandler. The *Design and Building Practitioners Act 2020* (NSW) commenced operation in 2021. I was lucky enough to work with David and his team on the Bill and bring to life what was ground-breaking legislation. In one fell swoop it closed significant gaps in the NSW regulatory system by introducing registration for design practitioners whilst also seeking to ensure the building approvals process was understood as part of the D&C procurement model. The DBP Act requires design practitioners to prepare detailed designs and declare that they complied with the NCC before submitting them for approval to the building certifier. In the implementation of those new laws it was made clear

[12] Victorian Government, Victoria's Cladding removal program on track, August 2021 https://www.vic.gov.au/victorias-cladding-removal-program-track

[13] Cladding Safety Victoria, Compliance in Design https://www.vic.gov.au/sites/default/files/2025-02/Research-Analysis-Compliance-in-Building-Design.pdf see p 36.

[14] *Owners Corporation No.1 of PS613436T v LU Simon Builders Pty Ltd (Building and Property)* [2019] VCAT 286.

that staged building approvals could be used, provided that the documentation for each stage was detailed and declared as compliant with the NCC.[15] In conjunction with the DBP Act, the NSW government issued a comprehensive Practice Standard for building certifiers, also designed to recalibrate the understanding of their role.[16]

David Chandler took the additional step of commissioning research with the aim of improving contracting practices.[17] He also commissioned model clauses to be used in construction contracts in NSW that would reference the DBP Act and reflect the obligations flowing from that Act.[18] This was a good initiative, but I believe it needs to go further.

Yes, building practitioners need to understand and meet their obligations and yes the regulators need to be more active and effective but what of the legal profession? My questions for you tonight are 'did the legal profession contribute to these systemic failures through the proliferation of a D&C model which facilitated practices that do not align to the building regulatory requirements?' and 'how well do you understand the building regulations that apply to these projects and the statutory obligations of the parties involved?'.

Moving on to my second topic.

Statutory rights and duties as a consumer protection mechanism

Having now referred to the DBP Act we segue into another important feature of that Act. Those of you practising in NSW will be acutely aware of the statutory duty of care introduced in Part 4 of the DBP Act. These provisions provide:[19]

- A person who carries out construction work has a duty to exercise reasonable care to avoid economic loss caused by defects arising from construction work;

- This duty is owed by those who do building work, who design building work, who manufacture or supply building products or who supervise or coordinate or otherwise have substantive control of the carrying out of work; and

- A person who owes a duty of care under this Part is not entitled to delegate that duty or contract out of that duty.

There have been a number of decisions about this duty of care.[20] The courts have interpreted the duty broadly, applying to building work for any type of building and covering all persons involved in the building work, including natural persons.

More recently in the case of *Pafburn,*[21] the High Court by a majority of 4 to 3, ruled that those who delegate or entrust work to others cannot seek to exclude or limit their liability via

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[15] Practice standard for registered certifiers, Volume One – new residential apartment buildings, October 2022, p 56 https://www.nsw.gov.au/sites/default/files/noindex/2025-02/certifier-practice-standard-vol-1-new-apartment-buildings.pdf and Design Practitioner's Handbook, July 2023 edition p 13, https://www.nsw.gov.au/sites/default/files/noindex/2025-06/design-practitioners-handbook-final.pdf

[16] Ibid Practice standard for registered certifiers (n 15) p 14.

[17] Minter Ellison, Construct NSW Improving governance and contracts, March 2023

[18] Model Clauses – for engagement of design consultants, NSW Commissioner – Working Group 4; Model Clauses – Construct Only Contract – NSW Building Commissioner – Working Group 4

[19] DBP Act Part 4, Duty of care, ss 36-41.

[20] *Roberts v Goodwin Street Developments Pty Ltd* [2023] NSWCA 5; *University of Sydney v Multiplex* [2023] NSWSC 383; *Goodwin Street Developments v DSD Builders (in liq)* [2022] NSWSC 624; *Boulos Constructions Pty Ltd v Warrumbungle Shire Council* [2022] NSWSC 1368.

[21] *Pafburn Pty Limited & Anor v The Owners - Strata Plan No 84674* [2024] HCA 49.

the apportionment regime. This means developers and head contractors will be liable to owners for defects, although they can still bring cross-claims against other parties.

The intention behind the duty of care provisions was always to make the process of seeking compensation more straightforward for consumers faced with a defective building. Yes, there are often a number of parties that cause defects but why should the consumer have to be drawn into that dispute? They just want the problems fixed.

So far, other jurisdictions have not followed NSW by introducing a statutory duty of care, but some have moved towards reforms to increase accountability for developers. In 2023 and 2024 I worked extensively with the ACT government on its property developer reforms. The *Property Developer Act 2024* (ACT) creates the first licensing scheme for developers in Australia which will commence in 2026.[22] Under that Act, developers will need to be licensed to apply for and obtain a development or building approval or when entering into off the plan contracts.[23] Regulated residential buildings to which the Act applies are projects for class 1 or 2 buildings with 3 or more dwellings. Developers and builders can be issued with orders requiring them to rectify defects.[24] Where a rectification order is issued and not complied with, and the builder or developer becomes insolvent, directors of the entity will be personally liable for compliance unless the project has an approved form of latent defects insurance.[25] In addition, owners will be able to make claims for breaches of warranties implied under home building laws against both the builder and the developer.[26]

The Victorian government's foray into increasing developer accountability has been more timid. They will introduce a developer bond scheme, like the scheme that has been in place in NSW since 2018.[27] They will also introduce a rectification order power that can be issued to developers. However, so far, Victoria has chosen not to include other stronger reforms like those introduced in NSW or the ACT.

Creating statutory rights as a consumer protection mechanism is common. Home building laws in all jurisdictions imply warranties into contracts which enable owners and subsequent purchasers to pursue compensation for incomplete work or defects.

When governments create statutory rights for consumers, they do so intending for the process for obtaining compensation to be more straightforward for consumers. They are calling on the legal profession to assist parties to resolve disputes in a more efficient way by providing clarity on duties owed, by whom and on how losses ought to be defined. Security of payment laws are another example of this. In this way, the legal profession plays an important role in reform and in protecting parties seen as more vulnerable such as consumers and sub-contractors.

The statutory duty of care reforms in NSW and the developer licensing scheme in the ACT are courageous reforms. They deliberately place responsibility for delivery of compliant buildings at the feet of developers and head contractors. This has been strongly resisted and

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[22] Act Government Property developers licensing scheme, https://www.planning.act.gov.au/professionals/regulation-and-responsibilities/property-developers-licensing-scheme

[23] *Property Developers Act 2024 (ACT)*, Part 2.

[24] Ibid Part 5.

[25] Ibid s 52.

[26] Ibid , consequential amendments to Building Act 2004, [2.13].

[27] Victorian Government, New bond system for apartments https://www.vic.gov.au/new-bond-system-apartment-builders

criticised by some.[28] Developers have been incredulous at suggestions that they should bear liability if their builder does not deliver a compliant building. They say that this is not fair, it will affect housing supply and that developers will walk away. They say there should be more trades licensing and accountability for the work they do, pushing the risk and blame down the chain away from the head contractors and developers.[29]

The NSW and ACT governments do not agree. They say, 'this is your product, you chose the consultants and the builder, you chose what you are going to pay and how much attention you will give to quality design and quality assurance during construction'. All those decisions influence the outcome.

In relation to director liability, I expect we will see more of this in regulation. In the face of high rates of insolvency and, more importantly structuring of projects aimed at deliberately avoiding liability and accountability, governments will be left with no choice but to dismantle the corporate veil. In the UK, reforms post-Grenfell include extending the limitation period to bring claims for defects from 6 years to 30 years in some cases and where the original entity responsible for defects no longer exists, allowing courts to attribute liability to a related body corporate.

Through these reforms governments are increasingly telling developers and builders 'you can't build defective buildings and walk away leaving consumers with the liability'.

My call to this audience is to understand the policy behind these reforms. Understand that all that is being asked on behalf of consumers is the ability to buy a home that will be compliant, that will not leak and harbour mould, that will perform if there is a fire and that will be structurally sound.

I'm not asking you not to defend claims made or rectification orders issued against developers and builders. The laws will be tested by an endless queue of legal practitioners and the courts will be asked to interpret them. I am asking you to understand the context and objectives of these changes and to understand that unless responsibility can be shifted to those who sponsor these projects and unless we can move away from regulatory solutions that respond to defects rather than prevent them, nothing will change. Just as governments are trying to get in front of the problem, I urge you to encourage your clients to get in front of their new risk environment. Developers can mitigate this increased risk by investing in better compliance outcomes. Good developers and builders already do this.

When governments call on the legal profession to assist parties to resolve disputes through the creation of statutory warranties or duties of care, they are diverting parties into a tribunal and court system that can be slow and unjust. I have spoken of the couple behind my report 'The house with no piers'. In another review that I did involving an apartment complex in NSW, the builder was restructured to cease trading before the occupation certificate was issued.[30] All of the services to finalise the project and respond during the defects liability

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[28] The Fifth Estate, Behind the ACT's controversial new legislation to target shonky developers, November 2023, https://thefifthestate.com.au/innovation/behind-the-acts-controversial-new-legislation-to-target-shonky-developers/ (accessed 9 November 2025).

[29] ABC News, Canberra developers say they aren't to blame for bad buildings, as Government plans 'dodgy developer' ban, November 2019, https://www.abc.net.au/news/2019-11-27/developers-say-ban-targets-wrong-end-of-the-food-chain/11740558 (accessed 9 Nov 2025) and see Australian Broker, Property Council cautions against personal liability in ACT housing law, March 2024 https://www.brokernews.com.au/news/breaking-news/property-council-cautions-against-personal-liability-in-act-housing-law-284265.aspx (accessed 9 November 2025)

[30] Broken Promises, Blame Games and Balconies (n 10).

period were provided by a related entity. 5 years post construction and 3 years into litigation claiming compensation of over $10 million for alleged defects, the builder entered into voluntary administration. The former director of the builder reported to me that the builder had incurred close to $1 million in legal and consultancy fees. The owners corporation had also spent over $750,000 in legal and related fees. At the time the builder became insolvent, 3 years into the litigation, there were no dates set for conciliation or hearing. Engagement in the court process had consisted of a series of interlocutory steps, including several adjournments by consent. Again, I ask, could that $1.7 million have been spent on better oversight during construction?

In conclusion, I hope my presentation has been true to the objectives of the annual Justice Stynes Adress. I hope it has encouraged you to reflect on the role of the legal profession in regulatory reform and failure. To question how we as a profession can influence compliance with regulatory processes through front end contract drafting and advice to your industry clients on their new risk environment.

For those of you engaged in back end construction law, I have to admit that I sometimes hope that effective regulation can put you and me out of work and that the industry is capable of building safe and compliant buildings every time. But we know that will never happen.

We know that governments will continue to provide elaborate schemes that seek to support consumers when faced with building defects. In doing so they will continue to see the legal profession as having a role in this through the creation of statutory warranties and duties of care. The way our profession and the legal system delivers on those consumer protections is not always something we can be proud of. However, the legal profession has an important role in regulatory reform and regulatory failure. There are many of you that give your time to making submissions to governments and advocating about injustices. I encourage you to continue to help governments find the balance between supporting consumers and enabling the building and construction industry to thrive.

Thank-you.