LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON ECONOMIC DEVELOPMENT AND TOURISM

(Reference: Inquiry into building quality in the ACT)

Members:

MR J HANSON (Chair)
MS S ORR (Deputy Chair)
MR M PETTERSSON

PROOF TRANSCRIPT OF EVIDENCE

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WEDNESDAY, 29 MAY 2019

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Secretary to the committee:
Mr H Finlay (Ph: 620 50129)

By authority of the Legislative Assembly for the Australian Capital Territory

Submissions, answers to questions on notice and other documents, including requests for clarification of the transcript of evidence, relevant to this inquiry that have been authorised for publication by the committee may be obtained from the Legislative Assembly website.

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Amended 20 May 2013

The committee met at 10.02 am.

TAYLOR, MR ROSS, Ross Taylor Associates

THE CHAIR: Welcome to the fifth public hearing of the Standing Committee on Economic Development and Tourism inquiry into building quality in the ACT. Today we are hearing from industry experts and from owners corporations. Thank you for coming. You have come from Sydney for this hearing specifically?

Mr Taylor: Yes.

THE CHAIR: Can I draw your attention to the pink piece of paper in front of you. That is the privilege statement. Could you have a look through that and make sure that you are aware of its contents.

Mr Taylor: Yes.

THE CHAIR: While you are doing that, I remind you that these proceedings are being recorded by Hansard for transcription purposes and are being webstreamed and broadcast live. You have read the pink piece of paper? All good?

Mr Taylor: Yes.

THE CHAIR: I invite you to make an opening statement. We have obviously got your submission. If you would like to, please make an opening statement before questions, noting that we have not got very long.

Mr Taylor: I am happy with you having read those. That is the opening statement that I would make. It is probably best to make use of the time.

THE CHAIR: On the issue of certifiers, which you have raised, you make the point that there are only a certain number of points at which the certifier gets involved. Do you think there is scope for increased involvement of certifiers in the process? Do you think there should be more points at which they are engaged? Building quality does not seem to be one of them. It is about structural issues rather than building quality. It is limited and there are things that are outside the scope of certifiers. Is there potential for us to recommend increased scope of what certifiers do?

Mr Taylor: The answer is yes. At the moment their actual purpose with regard to quality is completely ineffective. A certifier is essentially an outsourcing of a previous council function, as I understand it, and is very good at doing the paperwork in terms of gathering the paperwork early in the process. But we find that the skill level of the certifiers and their remit, what they are asked to do, has no impact on building quality whatsoever.

MS ORR: When you say "building quality" can you clarify what you mean by that?

Mr Taylor: Certainly: the rising of defects, building quality being the prevention of the rising of systemic and expensive defects.

MS ORR: When you say "defects" are you talking about things under the Building Code or more contractual? We have heard of issues with both.

Mr Taylor: We have the issues of both?

MS ORR: The committee has heard about issues that go to the Building Code and issues that would probably be classed more as contractual. If you have got the wrong colour tiling, is that what you are talking about with quality or are you talking about water ingress, for example?

Mr Taylor: No. The key thing that I would like to feed back from my exposure to this is that the industry gets very distracted with minutiae that is not the real issue for consumers. The problem that we are talking about is systemic issues across a whole home, in a complex, that are extremely expensive for consumers to repair. They are almost invisible to them when they purchase and in their first few years. It is that scale of defect that I think there should be particular emphasis on, as opposed to the colour of tiles or whether the kitchen doors close.

MS ORR: On that, certainly the certification process happens during the construction and at the point of sale and transfer?

Mr Taylor: Yes.

MS ORR: Do you think there is any role after construction for going back and doing an assessment of how the building is holding up? We are finding that most people coming before the committee are saying it takes a bit of time to notice if there is going to be an issue.

Mr Taylor: The most expensive defects, other than fire, take two or three or four years to emerge. But I think that, in the task that you guys are tackling, I would be focusing just on, during inspection, the vetting of the design and during the construction. Inspections after the fact are very much secondary compared to the prevention side, and there is a major prevention role to be had. I personally think that the current certifier system, rather than tinkering with it and adding inspections, should be just started again. It is so fundamentally flawed with regard to building defects.

MS ORR: In your submission you say that the certifier system is flawed because it requires the certifier to be hired by the developer. Can you outline exactly why you think this is a flaw in the system?

Mr Taylor: There is a fundamental conflict of interest. In any of our works, with the person that pays the bills the golden rule, is it not, is that the person who holds the gold makes the rules. That absolutely applies to certifiers. I have actually heard people say, "You can't be too hard on the developer; otherwise you will not get the next gig." It is a very real one. When the person checking the work is hired by the original owner, being the developer, then the future owner's interests are not being protected.

MS ORR: How do you think this conflict of interest can be prevented?

Mr Taylor: I think a fundamental change would be to go back to the clerk of works arrangement—and that was a structure that was in place 30, 40 years ago in the industry. When the government and the banks, for example, were going to be the future owner they would then hire somebody to watch over the building and make sure there was compliance to BCA standards who was independent of the builder and architects. Often the clerk of works might be hired by the architect, incidentally. There was close teamwork. That has disappeared. The certifier system needs to be fundamentally changed so that it is not picked by the developer. The developer should pay for it but it is picked by somebody that is independent of the developer so that there is no conflict.

MS ORR: In your view, just to clarify, would the clerk of works be separate to the certifier or do you see—

Mr Taylor: Totally. I think the certifier serves a function in getting the paperwork through—the water board approvals and gathering the paperwork—but, in terms of anything to do with technical checking, certifiers do not have the skill set to do the technical checking of the major defects that go wrong. They cannot, for example, be expected to be structural engineers. They are not structural engineers checking the steel and the cover on the steel, the falls on concrete, and whether they are according to the drawing. They very often come in for half an hour before a major pour. There just is not the skill set there in the current system.

MS ORR: The role of the clerk of works would be separate to the certifying?

Mr Taylor: Yes, completely. I would put that in place of the certifier inspection. Rather than adding inspections to the certifier, you would have a different person that is highly skilled—and there are so many people that reach 40 or 50 and have had enough of the daily grind of a building site—that is right across concrete pouring, curing of concrete, problems of flashings in brickwork, which the average certifier is not going to be across.

THE CHAIR: Isn’t that a duplication, though, if you have got certifiers doing what they do and then you have a clerk of works engaging people for the other things?

Mr Taylor: Yes.

THE CHAIR: Are you duplicating the system?

Mr Taylor: My point is that you do not duplicate it; you do not have the certifiers do that. You fundamentally change the system. The scale of defects we are seeing in the industry corresponds with a similar period to the certifier system—and it is not their fault. It is the way that legislation has been written, so that they are not the right person and they are not there to be able to check this.

MS ORR: Is it a duplication, given that you are essentially saying that there should be a different role?

Mr Taylor: Yes. I suppose what I—

MS ORR: You are not saying that these clerks of works should be the certifier. I took it to mean the certifier still does the paperwork and signs off on the building plans but the clerk of works is more of an inspectorate-type role.

Mr Taylor: That is right. What I am saying is that I understand that there is a need for that administrative work. It may be two roles. There is a person that does the paperwork sign-off, but anything to do with checking the drawings or checking the work during progress is then in this other role and is not a part of that certifier. It is a fundamental shift, is what I am saying, not a duplication.

THE CHAIR: You have been around this for a while. Is that a shift back to where the system used to be?

Mr Taylor: Yes.

THE CHAIR: When did that change occur?

Mr Taylor: Twenty-five, 30 years ago.

THE CHAIR: What were the arguments to change 25, 30 years ago? Why did this change in the first place?

Mr Taylor: A major reason is the emergence of design and construct contracts. There was a shift in the risk management by owners, major developments, about 25, 30 years ago. I think it first started with Lend Lease offering, “We can offer a full design and construct package,” because they engaged their own architects and engineers and it was a very good service under that regime of a single company that had those skills. And then bit by bit everybody said, “We can do that too.” Now we have it quite prolific and you have building companies then being asked by the developer to provide a design and construct service. Because of that lax system or change to certifying, they can then have the builder take over the design responsibility, which is at the heart of the major defects.

MR PETTERSSON: I am sorry; I must have missed the point: why did certifiers need to be privatised in that process?

Mr Taylor: That is outside my skill set, but I think it was a risk and cost managing exercise by government. Local government in New South Wales particularly thought, “I know; what we’ll do is we’ll outsource this and have it as a private thing and developers will pay for it. It’s a great idea.” That was the notion, I understand.

THE CHAIR: Your concern, though, is of the independence of certifiers, not necessarily whether they are engaged by the ACT government or in the private sector. I assume that it is about making sure that they are accountable to the eventual owner—

Mr Taylor: Yes.

THE CHAIR: rather than necessarily who engages them or whether they are

employed by the government or private sector. Equally, if you were to have a separate sort of system, as you are proposing, then the people doing the inspections could be either engaged by the government or the private sector, as long as they were appointed by the clerk of works rather than by the developer.

Mr Taylor: Yes, They are appointed by somebody separate from the developer and have the interests of the future owners in mind, and in fact an obligation to the future owners.

MS ORR: Going back to contracts, in your submission you state that most contracts written by developers for large buildings have a clause which makes sure the builder underwrites the developer's exposure to any defects claimed by the owners.

Mr Taylor: Yes.

MS ORR: In your opinion, how do you think this affects the quality of the build? Do you know of any instances where this arrangement has had a negative impact on a consumer?

Mr Taylor: Yes. Essentially, we have a few actors that feel that they are beyond the reach of litigation. Therefore, their behaviour becomes quite relaxed. One of them is the developer, who has that buffer of the builder taking full responsibility for design and construction and for any costs associated with defects. This is a massive buffer to the developer. It means then that the developer can screw down the design during that design development stage, to save money for the developer, without worrying about the repercussions of litigation or a defect arising.

That buffer makes the decision-making of the developer quite different. The behaviour in developers when they have an ongoing interest in the building is quite different behaviour from when they know they are going to flick the building and they will be off the hook; they will be out of reach of litigation.

MS ORR: Do you have any solutions for how that can be improved so that it is not an issue?

Mr Taylor: In New South Wales, as you would be aware, there is equal obligation on the developer and the builder, but the developer gets that cover by that contractual arrangement. I do not know; I think it is more for the barrister and lawyer fraternity to work out the nuances of contract law. That contract law is not my expertise.

I highlight a point to this inquiry in the limited few minutes we have: generally we see the industry putting its emphasis on the wrong end of the process, conventionally. We see the industry organisations putting a lot of emphasis on the training of tradesmen as being the issue. When we do analysis and the forensic work, I see that the start of the defects is way back, earlier in the process, and at the phase when the developer has the most influence on the design. That is when the leaks and the cracks happen—when the developer starts screwing down the floor to ceiling heights, changing the architect to get a cheaper designer, changing the builder to get a cheaper builder, and screwing down all of the costs to maintain their margin. That is the source of it. If you can go back to that source with the reviews you are doing, that is when you will have

the maximum impact.

MS ORR: If I have understood that correctly, Mr Taylor, while more training of tradespeople would probably never hurt, it alone will not fix the issues in your opinion.

Mr Taylor: I think it is worse than that: it is a major distraction. I think it has distracted most of the industry from the causes way back. From my viewpoint I see people floating on the outside very happy with that distraction. Structural engineers, for example, are not engaged in the defect issue and should be. The developers should be engaged in this issue, as well as architects. But we understand that there has been a huge reduction in the architect's role, to save money for the developer. That gets to the essence of the design issue.

MR PETTERSSON: In your submission you call for a naming and shaming register. Why?

Mr Taylor: I think in our society nothing changes without there being a threat of consequences, especially in industry. We see codes of practice for pharmaceuticals or banks, even. They have a limited effect. The harsh reality of our free enterprise system is that major profit-making organisations act on the basis of consequences.

In the last couple of years I have been involved in some media work where I do peer review of designs. Yesterday I was talking to the regulator. Even they are seeing a shift in the concern of builders and developers to get their name in the paper. And it changes behaviour. So name and shame would be better than going through the complexity of legislative work. I understand how hard legislative work is and the amount of legal power that a developer will throw back to challenge decisions.

One of the simplest parts of our system is name and shame legislation, like with restaurants, where people cannot afford to have their reputation hammered by having that on a list that people can check. At the moment, consumers have almost no way of checking the bona fides of a developer or builder when they buy off the plan or buy a new building—almost none. That would be the start of empowering consumers with better information.

MR PETTERSSON: What elements would be needed to have an effective register? Would you need buildings specifically cited or just a number of citations?

Mr Taylor: Yes, buildings specifically cited when a builder or developer has not behaved.

MS ORR: How do you see that balancing with the privacy concerns of people who have bought these properties?

Mr Taylor: I do not know. Again, that is outside my rank. But I would say this: you have to be very careful. When a builder has 10 doors that do not close or there are a range of minor things, most builders in my experience will go back and fix those things. They might be in the process of fixing them, and there is no need for them to have their reputations blemished by minor things. But there are major issues. The classic one is out at Bruce—it has even been in the paper—with $20 million of defects.

For the eight years they have been trying to get them fixed, that developer and that builder have been operating around Canberra. There is a big difference between the little things that should not be raised and the big ones which go unpunished.

THE CHAIR: You also raised with the structural issues the point that a lot of the issues have only a two-year warranty period.

Mr Taylor: Yes.

THE CHAIR: And they may not have arisen in that period.

Mr Taylor: That is right.

THE CHAIR: Are you recommending a longer period for those issues in terms of warranty? If so, what period do you think?

Mr Taylor: I think the statutory warranties need to be overhauled because the wording at the moment is about structural elements. For example, waterproofing strictly is not a structural element; it is in a floor, say, but it is not an element per se. It could be argued that it is only in the two-year mark, and major defects like that are more like three or four years. I think there could be a redefining of the two big expenses, which are fire and water, and facade cracking. Those elements have a much longer period. Certainly the six years would be a help.

MS ORR: Are waterproofing, fire and facade the only areas that you think the committee should be considering?

Mr Taylor: Not fire but certainly facade is my field. It is very hard to chase all the little cracks and fissures and problems. I often think it is a waste of time. The major expenses are the problems that the consumers face. If you do some research and data collection just on what they are, I think you will find that they revolve around water, cracking, facade and fire. Everything else then becomes a tenth order defect.

MS ORR: Lastly, in your submission you state that builders and designers should have to wait at least three years before receiving industry awards.

Mr Taylor: Yes.

MS ORR: Why do you think that should be the case?

Mr Taylor: At the moment there is a culture in the whole of the industry. Architects draw drawings and they think that that is the way it is going to look forever. People buy buildings thinking those drawings are the way it is going to be. There is a culture in the industry of reinforcing that by the Master Builders awards and the HIA awards. All of these are judged when the paint is still wet. I suggest that a cultural change is needed for them to see that you get an award only if it works—three years is a good period—and you have an occupant as one of the judges. Then you will get a completely different result.

THE CHAIR: We are going to have to close it there, I am afraid. But, Mr Taylor,

thank you very much for coming up from Sydney.

Mr Taylor: It is a pleasure.

THE CHAIR: Thank you for appearing today and for your submission. Hamish, the secretary, will send you a draft of the *Hansard* so that you can check that it is accurate. We may be back in touch with any follow-up questions. We will see how we go. It has been very useful. I get the feeling we could go on for a couple more hours, but, sadly, we are restricted.

Mr Taylor: I would just like to commend you for making the time available; thank you.

THE CHAIR: Good on you. Thanks.

FALCETTA, MR MAURICE, Trinity Law

THE CHAIR: Before we start, could I ask you to confirm that you are aware of the pink privilege statement that is on the table. We have got your submission. Thank you very much for that. I invite you to make an opening statement before we go to any questions.

Mr Falcetta: Thank you for that. I will not make an opening statement other than resubmitting or re-commending our submission. One aspect when I was preparing for today was that I noticed that there was an earlier submission which was referred to in the document and which did not seem to be uploaded. I can certainly provide that again. That was in relation to the 2016 inquiry which the Assembly did.

THE CHAIR: That is the previous submission that you refer to?

Mr Falcetta: Correct.

THE CHAIR: I have got a question about the dispute mechanisms, which you discuss. You are saying that they are not working and the current system could be improved. Can you expand on that point? How do you see that we could improve that whole dispute mechanism?

Mr Falcetta: I think it is important to analyse what is the dispute, whether it is contractual, legislative, disciplinary. There are a whole range of disputes across the legal spectrum. With regard to your question, specifically what dispute do you want me to speak to?

THE CHAIR: It seems that, particularly in the larger complexes, when there is a structural fault it often arises that the only avenue for owners and owners corporations is to pursue the builder through the court system, and that seems to be a long and protracted process and is very costly. Is there another way to do that? Can the regulator get more involved and avoid—

Mr Falcetta: There are parallel provisions there. There is the private civil law pathway and then there is a regulatory pathway where the regulator has enormous powers under the legislation to issue things called rectification orders and emergency rectification orders. From time to time they do and are still doing that now.

THE CHAIR: Are those rectification orders limited by time?

Mr Falcetta: There is a 10-year period from the date of practical completion. It is quite a long period.

MS ORR: We have had a number of people appear before the committee who said that with litigation being primarily the main recourse—let us characterise it as that—they do not see that as being adequate, that there are a lot of disputes that they would like to see mediated or not necessarily put through as a civil case but perhaps put to the ACAT or something like that, that there are just not other avenues, that it all has to go straight to quite costly litigation and it then gets tied up by developers with big

pockets. Is there any comment you can make?

Mr Falcetta: I think that is a bit inaccurate. For example, the regulatory pathway that I was talking to is done through ACAT, which is a no-cost jurisdiction.

MS ORR: We have had raised with us that there is a financial limit on cases before ACAT and people are seeing that as—

Mr Falcetta: $25,000. But that is in a private legal suit; that is, "I'm suing you or you're suing me. I promise to give you a pen and you promise to give me $1." That is in that context. But ACAT is an interesting place. It has got quite a broad jurisdiction, and one of the jurisdictions it has is administrative review and occupational discipline. In the administrative review, for example, the regulator could issue a rectification order or an emergency rectification order, and that gets dealt with in ACAT. That is a no-cost jurisdiction. In that sense, the regulator is acting as the police force and bringing those actions.

THE CHAIR: Who brings the action before ACAT, the owners corporation or the regulator or—

Mr Falcetta: Pausing on that issue, if the regulator issues a rectification order, the person who is subject to the rectification order can seek to have that decision reviewed and then that goes to ACAT. But otherwise they comply with the order.

THE CHAIR: Why do we hear so many stories about litigation and going through the courts? If there is a situation where the regulator can issue a rectification notice, why do so many of these situations end up in court?

Mr Falcetta: I do not know. I do not know in the general sense. I can only speak from my experience. Sometimes there is confusion with the word "litigation" and what that actually entails. We have just talked about three or four different sorts of litigation. It is all different types of litigation.

If I could go back to a different point that I could raise—and I was listening to Mr Taylor speak—I agree with Mr Taylor that good design is the starting point and would avoid litigation. If we have got good design to begin with, it must be as a consequence, as a function, that there will be fewer disputes, less litigation, if we have a process that enables that.

THE CHAIR: I think the government has taken some steps towards that in the last little while.

Mr Falcetta: Yes, which is good.

MS ORR: On a slightly different topic, you note in your submission a suggestion for an insurance scheme. Can you please explain it to the committee?

Mr Falcetta: Yes, certainly. I approached it from this perspective: at the moment building quality is a matter of some focus, and quite rightly so, but it is interesting to know the reason why. One of the reasons why could be just general market forces. If

you have got more activity you tend to have those sorts of issues. It could be a result of good ideas—people thought they were good ideas in terms of designs and products, which, with the fullness of time, has not proven to be the case. For example, 40 years ago everyone thought that asbestos was a great idea. It is not the case now.

The question is: rather than trying to have a fault-based system, rather having an insurance-type based system—whether that is insurance in a traditional sense rather than in a levy sense—we are wanting good design but we are also wanting people to be innovative in the design process. Sometimes things have to go through generations to see whether that idea was a good idea in terms of all the material science aspects. You only know that by doing that. You might have a reasonable basis to say, "I think this should work," but until you actually do it, it might not work. That is the policy rationale—accepting that there will be, as a statistical event, problems and dealing with them in probably a non-adversarial type of way.

MS ORR: Your suggestion is less of an insurance scheme, if there are avoidable errors; it is more about what we do not know. You used the example of asbestos; everyone thought that was fine. We have subsequently learnt that it is not. In that case the insurance would apply. What I would like to know is: do you see that being different to not laying the waterproofing correctly?

Mr Falcetta: Picking up on that point, in my experience waterproofing issues are complicated. It is a complex problem. It could be design. It could be the detailing and it could be a design issue. It could be a workmanship issue. It could be also whether the material was suitable for the Australian climate. A lot of the materials come from overseas. The material science experience from overseas is different to Australia's. In our system we are trying to say we ultimately blame the builder or the developer or whatever the case may be. And that might be appropriate. But if there is a complex problem then we should be approaching it in different ways. That is my answer to that. One way might be to recognise that we have some sort of a levy or an insurance and we deal with it as a community rather than on an individual basis, and it is funded somehow.

MS ORR: Can you outline the recommendations you make in your submission regarding reform for statutory warranties?

Mr Falcetta: Yes, certainly. The statutory warranty system, in the context of a couple of decisions, is a lot broader than people think. If one of us were to read His Honour's decision in the Koundouris units plan matter, His Honour actually says that the time runs for a lot longer than the two to six years. That decision has been upheld by the Court of Appeal. As the law stands, things like waterproofing are considered structural matters. They actually run for the six-year period rather than the two-year period, as I understand the decision.

What I am saying is that I do not think that is what the legislators, the Assembly, intended the legislation to mean. In His Honour's primary decision he says, "My decision could lead us to places we did not intend it to. But that is what the legislation says, and I interpret the legislation." I think there is scope for people to get that clarity in the legislation.

MR PETTERSSON: In your submission you talk about the broad licensing scheme that exists in New South Wales and recent changes to it. You say that it has been ineffective in improving building quality—

Mr Falcetta: I do not know whether I say "ineffective". I think what I say is that New South Wales is having the same sorts of problems the ACT has, so just adopting their process does not necessarily, on an evidence-based approach, guarantee that we will not have problems. They are having the same sorts of problems as the ACT, so I do not know whether that is necessarily an answer to the issue.

MR PETTERSSON: Can you speculate on why it was ineffective?

Mr Falcetta: I would not be able to speculate about that.

MR PETTERSSON: How do you know it has done little to address the problems?

Mr Falcetta: Well, you are having the same problems. They are having the same manifestations in New South Wales as we have in the ACT. Having licensed waterproofers in New South Wales and still having waterproofing issues suggests to me that, by that very fact, it does not seem to be working.

The way I would tackle it is with a licensing system, which is probably no different to the way the capital works system works in the ACT and in other jurisdictions. I would include certain metrics for different sorts of builders. For example, if you are a multi-unit builder, you need to have certain technical and financial metrics, so hopefully you are getting a better entity doing that, rather than simply focusing on the technical aspects, which is the current focus. That, though, goes against other policy considerations, and that is an important thing to think about. Sometimes they cross over. That might go against affordable housing as well.

MS ORR: You specifically outlined the possibility of imposing mandatory financial management requirements for either the nominee or the corporation for the various types of work. Can you explain how you think this would work and why you believe it to be the best option?

Mr Falcetta: That is really picking up on the point I just made. For example, if you are registered with New South Wales public works or ACT public works to do a $40 million project, you need to have the management and technical qualifications. You need to have the quality assurance programs and all the other technical aspects involved. But you also need to have the balance sheet strength to do the work. That is what I am suggesting, whereas our building system, being a nominee one, is focused on the technical aspects. So is it the case then that we have different sorts of entities doing those works? Those entities, though, the larger and more sophisticated entities, have more overhead structure, which might go against the affordability aspect of certain of our buildings.

THE CHAIR: On the issue of phoenixing, you are saying that there is a misunderstanding as to what the law does and does not allow. There is an impression that a builder might go and do something and then walk away from their obligations

and rebirth a different entity, sometimes with a very similar name but as a different structure. Is that happening or not happening? What is the misunderstanding?

Mr Falcetta: The general concept that you can have a special purpose vehicle and have another special purpose vehicle—the law condones that. So you can approach it at a very macro level, but the law certainly allows that. That is why people have incorporated companies and entities for over 150 years: that separation of personal risk and private. The concept of phoenixing, which is illegal, is when I have company A which is insolvent and has assets, and it sells its assets without value to company B. That is phoenixing and that is not permitted. But if a company does not have the resources—we are going back to that earlier point—and it has liabilities, in fact the law almost demands that those directors do something about it and deal with it in an insolvency context; otherwise those people are exposed personally, so it requires that.

MS ORR: You raise the certifiers in your submission. You encourage a review of the inspection stages of a build in terms of their frequency and ambit. Can you outline why you think this would improve the certification process?

Mr Falcetta: In the certification system at the moment, certifiers do a broad range of work. Some things they know technically about. For example, under the national building code they could tell you whether a step is the right height or a railing is the right height. But there are others things where they would not be able to do that and they would rely on other people. That is a starting point: that they do a broad role. But at the moment these stages are prescribed. If a project goes for 12 or 14 years, there might be mandated six or seven stages or something like that. They are snapshots, so you do not have the continuity of inspection, and inspection is an important aspect of ensuring building quality.

MS ORR: You also suggest that the certifier could be paid by the owners directly, to remove the current potential for conflict. How do you think this would create a fairer and more accountable certification process?

Mr Falcetta: I think that that eliminates the underlying financial conflict that may or may not exist for some certifiers. I think the owner engaging and paying would promote that. But it is also important to note that, in a different context, the developer is the owner and so that kind of happens anyway.

MS ORR: That is certainly the case for multi-unit developments. That is what we have heard. Do you see a way around that?

Mr Falcetta: You could have a developer who has an independent third-party builder as the builder, so there is a complete isolation of roles and responsibilities as well. Sorry, I forgot your question.

MS ORR: If the intention of any reform is to get certifiers acting for the ultimate owner of the building, with multi-unit developments where the developer is the owner at the time of the certification process, do you see any conflict of interest in that and do you think that it is something that we should be addressing?

Mr Falcetta: I do not think there is an inherent conflict. I can see conflicts there. I can

see how the system could work and not work. I would improve the certification process. As I suggested in the submission, for more complex buildings you might have a more highly accredited certifier who might have the higher technical skill set to deal with more complexity. You might increase the certification process. Also, going back to an earlier point, you might mandate having a high level of documentation in a design sense so that it is easier to do the design verification by the certifiers or whoever. The interesting thing is that in the public work space you usually have a high level of documentation, you have a high level of design, and you usually have a high level of supervision across that spectrum. You do not have that in the multi-unit context. If you are able to replicate those factors, a good design and good participants, you should be able to get a good outcome.

THE CHAIR: Thanks very much for your submission and your previous submission, and for appearing today and the evidence you have provided. Hamish will provide you, in due course, with a copy of the draft transcript for you to review to make sure it is accurate. Thank you for attending today. We may have some follow-up questions.

KEELEY, MR JOHN OAM, Crestwood Owners Corporation
KEELEY, MS CHERYL, Crestwood Owners Corporation
DOWNS, MS LISA, Crestwood Owners Corporation
JURKIEWICZ, MS LARA, Crestwood Owners Corporation

THE CHAIR: Thank you very much for appearing today. Before you is a pink piece of paper, the privilege statement. Could you have a look at that to make sure that you are aware of its contents. It gives you your rights and responsibilities in terms of the privilege attached to this committee. These proceedings are being webstreamed and recorded. Thanks very much for your submission. I invite one of you or a number of you to make initial statements before we ask questions. We do not have long, so could you keep it as tight as you can?

Mr Keeley: We prepared a statement to make.

MS ORR: We have got that one already.

THE CHAIR: Yes.

Mr Keeley: It is a bit long and, if you have already got it, it probably would be better, rather than reading it again—

MS ORR: Just go straight to questions.

THE CHAIR: Sure.

Mr Keeley: Just go straight to questions.

THE CHAIR: One of the points that you have raised is the need for clearer lines on what support can be provided by the government in terms of assistance and, if there is a problem, the processes which follow. What is available to you? I assume that you found it difficult when problems arose to work your way forward on who is meant to help you, what help is available and so on. Is that the case and do you think the system is not working for owners at the moment?

Mr Keeley: If you go right back to the very start, as an EC, an owners corporation, we are all new to it. There are probably a few around town that are experienced, but we are all new. The processes are not laid out easily for an EC and, I suppose, on the process side or the regulation side, we would be looking for some clearer instructions on where ECs sit within the overall complex legally.

MS ORR: Mr Keeley, in your submission you noted that—correct me if I have not got the facts right—you have put in a claim against the fidelity fund and they said you had to make individual claims; you could not make a claim as an EC. Is that what you mean when you say that is where ECs sit? Is it going to that?

Mr Keeley: That is possibly a major issue for all the ACT. We have identified, along with other buildings, that, like any committee or anything, you go through a process with your members, which we did. We went through meetings and had the support of

our owners to proceed and then we proceeded as an EC to pursue that. After quite a protracted time from our submission to the Master Builders fidelity fund, the Master Builders fidelity fund came back and said that the EC cannot act on behalf of individual owners.

MS ORR: Who can put in a claim for the common areas which are not individually owned?

Mr Keeley: This is where the legislation probably needs to stand up and identify and support the ECs. There are other parts of the legislation that support the ECs and make them liable. We can be taken to court if we do not pursue problems in our build, but when it comes to the Master Builders fidelity fund, which is a fund set up by the ACT government, there seems to be this loop where, if there is not a fidelity fund issued for the EC of the building then it is only issued to the individual owners.

Ms Downs: Back to your original question, because the Master Builders fidelity fund actually means a whole separate conversation, when we started investigating our claims and issues we found out that certifiers through ACTPLA had signed off on these changes to the original plans. None of this was clear. No-one from ACTPLA was able to give us any direct responses and answers to what had happened. We were unable to track down plans. They were not able to get us plans. We had to get a partner of someone on the committee, who was a builder, to actually go and track these down and get us copies that were not entirely up to date with all the additional alternative solutions that had been incorporated into the final build.

On that initial question: should there be more support and direction for ECs in these matters? Absolutely. Trying to get to the bottom of that rabbit warren—we still have not got to the bottom of it—we took legal action.

MS ORR: Ms Downs, should it be something along the lines of some sort of requirement for developers and builders to hand to the EC a clear set of documentation? Do you think that is something that in your case would have assisted?

Ms Downs: On top of that—and there are a number of recommendations that we have made—I note that the person before us was on the same page as us as far as having someone independent or someone, on the authority of the EC, to actually monitor these alternative solutions and changes as they come up throughout a build. It really is a sloppy way to deal with issues that arise during a build that are not authorised, approved or condoned by the architect.

Ms Jurkiewicz: Or fit for purpose.

Ms Downs: Or fit for purpose.

THE CHAIR: In your case you bought off the plan?

Ms Downs: Yes.

THE CHAIR: Thinking you were buying something and then that changed. You have got no ability to influence that or even be aware of it?

Ms Downs: We did not get told about it, and there is no tracking of it.

THE CHAIR: By the time you got given the keys, what you had initially paid for was not what actually got delivered? Is that the case?

Ms Downs: Absolutely.

Ms Jurkiewicz: And you may have only 90 days in which to lodge rectification orders.

MS ORR: There is the 90-day rectification period, but can I clarify: that is for individual units? That does not go to lodging anything for the common areas, does it?

Ms Downs: Nothing goes to lodging for common areas. It is for everything that you lodge against the Master Builders fidelity fund.

THE CHAIR: Do you have a strata management company engaged?

Mr Keeley: Yes.

THE CHAIR: That was appointed by the developer, was it? What is the interaction between you and them?

Mr Keeley: This goes back, again, to the industry and the way it works, where the initial set-up of the EC is done by the owner, the builder or the developer in our case. The builder combined both. They then put in place, by law, an EC which is made up of them only, a strata management made up of them and an outside company, which generally contracts for the cheapest price to the developer for that.

Where it falls down is that they do not implement a lot of the normal requirements that would happen in a building, especially maintenance plans—things like lifts and exhaust systems. A lot of the general necessary maintenance plans are not implemented and not put in place. They have a contract for two years on those initial strata appointments. You are two years down; you then start to look for an EC to set up, made up of owners. Your contract is open. You have got this new EC coming in two years after the build is done, and then it takes a long time to realise how it works and it also takes just as much time to realise what is required by the EC.

MS ORR: Did you receive any support from your strata company in addressing the defects that you had identified?

Ms Keeley: If I could speak to that, for the first two years we were unfortunate in that we did not get support from the strata manager. Most of us were not on the EC then and we did change strata managers. Since we have changed they have been very supportive. It was only through the strata manager that we had at the time that, when our builder went into liquidation, we even knew that we had the opportunity to claim against the MBFF. We were an EC that was getting building reports and things like that to get a rectification order from the government, even though we did not think that that rectification order would hold up because he had challenged previous ones.

Our then strata manager found out that our builder had gone into liquidation, and then we had this 90-day period in which to lodge against the Master Builders fidelity fund.

THE CHAIR: The previous witnesses suggested that the strata management was appointed by the developer and was then working for the developer almost to keep the complaints quiet for the two-year period, as opposed to actively working for the new owners.

Ms Downs: As are the certifiers.

Ms Keeley: That was our experience.

THE CHAIR: That was your experience?

Ms Downs: As are the contractors.

MS ORR: Do you think there is an issue in this idea of the owner in the first instance as the developer or the builder and then the owners who actually occupy the property as someone different? Do you think there is a conflict forming between those two?

Ms Keeley: The owners who bought off the plan, or other prospective owners, should have had some input into who the strata manager was—what contracts they had for those first two years—and they did not.

THE CHAIR: We need independence of the certifier and the strata management company from the developer. There needs to be a firewall to make it very clear that they are ultimately working for you, rather than for the developer.

Ms Downs: This is hard during the time when you are selling off the land. They do not exist to start with—those people to engage—but, yes, there needs to be a system where there is an independent filter and layer for that advocacy.

THE CHAIR: Do you think that the two-year period, assuming that you make changes so that the strata management company is more independent, should be shortened because you need to get locked into that contract? If you as owners see problems, there is not much you can do to change that. One suggestion is that it be a 90-day period so that, when you form your first owners corporation essentially, that is the point at which the strata management company is changed. Is the two-year period a problem for you?

Mr Keeley: Yes, I think it is. It is not until people start to live in the complexes that things start to be identified. Generally, in the initial period it is just a little bit of cracking; it is the minor issues. It is probably after two years that the major issues start to appear, which is the water ingress, waterproofing. They are the things that take time; they do not appear in the 90 days. You probably would get only minor issues in the 90 days, which are generally covered by the initial takeover of the owner from the developer or builder.

MS ORR: When you moved into the complex, did you get any advice or direction from the builder on things such as maintenance schedules?

Mr Keeley: No.

MS ORR: If there were issues, were there ways to approach the builder, who to speak to, anything along those lines?

Mr Keeley: There were no written things given to the owners in that form. We did have the opportunity, through the warranty periods, with the developer/builder. But as far as the strata management side of things went, who was acting for the first two years, we had very little information come back.

MS ORR: Out of interest, did you have maintenance schedules in place for the first two years?

Ms Keeley: There were some, I think. There were some but not the ones that we should have had.

Ms Jurkiewicz: Like rubbish, maintenance. They were not adequate for the complex.

MS ORR: They were not things such as gutter cleaning? Do you have lifts? Lift maintenance?

Ms Keeley: Yes, I was going to say roof cleaning, those sorts of things.

Ms Jurkiewicz: No lift maintenance.

Ms Keeley: Service on the exhausts in the underground garage—things like that were not in place.

MS ORR: To get a maintenance schedule in place, what was the process you went through?

Mr Keeley: For us, as a new lessee after two years, it was a learning experience. We had to rely on our strata manager to be reminded of the obligation of the EC for this management within the building. That is where the lift maintenance, roller door maintenance, the roof maintenance—all those major cost factors when it comes to your fees—come into play.

MS ORR: Were there any instances in which you lodged claims with the builder about defects you identified where they came back and said that it is a maintenance issue or it is not being maintained properly?

Mr Keeley: One that comes to mind is our roller door—car roller doors—where, again, because of the nature of our build, they basically used domestic machines in a major roller door. When it failed, I think just after the two-year period, it was identified as not commercial standard. It was not the standard required.

MS ORR: Not fit for purpose?

Mr Keeley: Not fit for purpose. A thing like that is $4,000 or $5,000.

MR PETTERSSON: As you try to address some of these building defects, it appears that some of them are being called temporary fixes instead of permanent fixes. What is the difference? Why is that occurring?

Ms Keeley: The problem that we have here is that tradesmen now know that we have some defects at Crestwood and that we have put in a claim for them. For anything that they fix—if they are just fixing a particular part of the roof they give us a guarantee for that—further down the track they are liable for that section of the roof, whereas we have a claim in for the whole lot of the roof.

We have to fix these things because water ingress into people's apartments is causing all sorts of issues—health issues and things like that. As an owners corporation and as the EC for that owners corporation, we are obliged to fix that. But a tradesman will fix only a small section of the roof, for instance temporarily, because we have a pending claim in. Then, on our normal strata insurance, we cannot claim for any resultant damage from that issue because it is only a temporary fix. Not only are we paying for the temporary fix; in the meantime we are also paying for all the resultant damage, rather than being able to claim on our normal strata insurance. After an issue is fixed, you can claim for any damage that has been caused by that issue.

Ms Downs: As soon as we lodged a claim with the MBFF, our insurance company said, "Everything is only temporary." Therefore, they did not pay the excess. We have to start paying the excess for claims as well. Where in the past they would have funded that, we have had to absorb that as a cost.

However, our quandary is that we absorbed those costs as an EC throughout this period while we had a claim in to the MBFF. But they have rejected that. Then it becomes a matter of: "What is the trigger and what was the time point?" While we are considering legal action due to the inadequacy of the MBFF, when does that trigger start again? Should they postdate all that work that they have done and change it? Of course they will not. It is quite a challenge as far as the circumstances that Cheryl has laid out for you.

MR PETTERSSON: If your claim against Master Builders fund were to be rejected, would it be possible for you to get a permanent fix?

Ms Downs: Then we have to fix the whole roof.

Ms Keeley: Only if we pay for it ourselves. We as the owners corporation would have to fund permanent fixes. After, if we had insurable events, yes, we would be fine with our resultant damage et cetera. That is the only other option.

THE CHAIR: Could I get some clarity regarding your problem with your roof. Is it right that, when you put a claim in to the MBFF, they said, "You can't claim. Each individual's got to claim"?

Ms Keeley: That is right.

MS ORR: Even though the roof is a common property area.

Ms Keeley: Yes.

THE CHAIR: Is there a way that you can act on behalf of individual owners?

Ms Jurkiewicz: We have done that.

THE CHAIR: You can do that?

Ms Jurkiewicz: We have done that.

Mr Keeley: In response to that, yes, we are fortunate that we are in the time frame that we were made aware of and that we lodged our claim within that time frame. There is this underwritten thing of one year.

Ms Downs: Do you understand the time frame?

MS ORR: You are welcome to provide us with that.

Ms Downs: It is within five years of being constructed, and within 90 days of the builder going into receivership. That is the only window that the MBFF and the scheme that was set up in 2002 cover. I expect we are one of the only buildings across the ACT that, with Bulum, fell into this category. We found out within 90 days and we were just within our five-year build. We had gone to a lot of effort in the lead-up to start getting building reports and things. I will hand back over to John. But that is the one circumstance.

Mr Keeley: We met the criteria. We lodged the claim. We had public meetings—like I mentioned before—and we had meetings with the owners. We got the support of the owners to progress the claim. With that claim, the wording that came back from the MBFF after quite some time was—

MS ORR: What was the time? You say "some time".

Ms Keeley: We lodged on 31 August, I believe. We received a rejection on 28 March the following year.

Ms Downs: 31 August 2018.

Ms Keeley: No, 2017. Our rejection came through on 27 March 2018. Basically the reason was that an owners corporation cannot act for an owner. They did not reject us on any other circumstance. There was no reason for rejection other than that the owners corporation does not have the authority to claim on behalf of the individual owners.

MS ORR: Can I clarify: are you able to now submit anything further?

Ms Downs: We did. There is this other weird one-year window that leads up to six years where you can then lodge the claim for that five-year period, if you met those standards. We got 69 out of 70 owners to sign their deeds across to us to authorise on

their behalf. We tracked down certain defence personnel who had been missing in action for months, as far as being off the grid is concerned. We got them to sign it. We got people throughout all Europe to sign back. We even had the point where we had to go back and get co-signed documents when there were joint owners of a property. We lodged that, and we still got a knockback on the claim, which is why we have had this extra period where we are still currently considering legal action.

MS ORR: Why were you knocked back in that second instance?

Ms Downs: Pardon?

MS ORR: What was the reason for the second knockback?

Ms Keeley: The reason was that—this was on 11 January 2019—in fact they viewed that we had no claim in the first place.

THE CHAIR: Their initial answer was, "You cannot claim," and then they came back and said, "You have no claim."

Ms Keeley: They said, "You did not have a claim."

THE CHAIR: Who makes the decision?

Ms Downs: Great question.

THE CHAIR: On behalf of MBFF?

Ms Downs: Can I ask you that? Do you know who the trustees of the MBFF are? No. It is not publicly available. I would like to know who are these people, who holds them to account, how are they chosen? Do you know how many times the MBFF has paid out? Once, a very minor cost, only through ACAT, not actually through the legal system.

This thing that was set up by the government in 2002—it has been established for almost 20 years—has never paid out on a claim. It actually does not have to. Through the legislation that was created, it can actually use discretion. Even if there is a valid claim, there is a line in the legislation that says you can use discretion whether or not you pay out on a valid claim.

MS ORR: Ms Downs, you said earlier that the fidelity fund was a whole topic of discussion. Is there anything else you would like to add while we are on the topic?

Ms Downs: I am furious. I am absolutely furious. I appreciate that sometimes when we set up legislation we do it with the best of intentions but this is not accountable. The fact is that people who are specialists in the building industry have no idea how this works. It was set up to replace an insurance scheme. It is not actually insurance.

Ms Keeley: And to protect owners.

Ms Downs: And to protect owners. It is now not under the insurance act; it is under

the Building Act. Therefore, it does not meet those same requirements or needs. This thing that we have created has no accountability.

MS ORR: Do you think it should stay the way it is?

Mr Keeley: Definitely not. There is no coverage, for an owner, under the current legislation for the MBFF.

MS ORR: And if it was reformed, which is what I hear you saying you would like to see, if I have understood that correctly, would you want to see it stay with the Master Builders or would you like to see it go to a non-industry group?

Mr Keeley: That is a challenge for government, to find a player in that field. I think that, as owners, all we expect is our government to put in place something that protects the different levels all the way through. We are all entitled to protection. If you are going to set up a scheme under an insurance scheme or some sort of building regulation scheme, then the end user, who is the owner in this instance, needs to have the same protection.

MS ORR: Ms Downs, you were shaking your head. Do you have a different view?

Ms Downs: No. I am just generally furious at the MBFF. No, I do not disagree.

THE CHAIR: Can I just clarify that, because of the MBFF and the fact that you are making a claim, that affected your insurance? It is a double whammy?

Ms Downs: Yes. Because we have a claim in against the MBFF—and tradesmen and strata insurance know about that—then that changes how they view any repairs that we are doing in the interim.

THE CHAIR: Now where to? Do you have to go to ACAT or what do you do?

Ms Keeley: No, we have got to make a legal claim.

Mr Keeley: We are going to make a claim. We have not done that in terms of ownership. We have got a meeting coming up to ask our owners whether they want to pursue the legal option, which is possibly a $100,000 case for—

THE CHAIR: What is the value of the repair on your roof?

Mr Keeley: This is where it becomes a problem in assessments. If you are going to assess for any sort of damage, you have to get building reports. You get inspectors in. You have to then claim the full amount. We are looking at something in the order of $6 million.

Ms Keeley: $5.95 million. We have claimed the maximum $85,000 per unit per owner, 70 lots of $85,000, because the reports that we have had done to this point are giving us estimates of price ranges but, without doing destructive and invasive inspections, they are not quite sure of the extent of the damage. We have had the roof inspected, and if we were to repair it or replace it—we have had the issues

identified—there is not really a cost that we can put to it because that was done two years ago as well. Now we could have more damage and the costs could be more.

But our other issue is water ingress for balconies. If we were to know how many balconies needed new waterproofing or tiles laid we would have to destroy those balconies to do the inspection. It costs the owners corporation money to get all these quotes. We are getting all these quotes and paying money for them, and we are in that position where we are trying to walk that line of not wasting money and not destroying people's use of their balconies in the meantime.

Ms Downs: We have special levied our EC about $130,000, in order to get $70,000 to $80,000 worth of reports, to hire a lawyer to advise. We are then looking at—based on the costs of the other building which has taken the MBF to court, which I will not name but I am sure you all know, although they did not meet the requirements like we did—further costs. Their legal cost was about $100,000. But then they had to pay the MBFF's legal costs because they got knocked back.

We are going to our members or our owners and we are saying, "This will probably cost about another $250,000 on top of the costs we have already levied you for $130,000." If we fail with this legal challenge we are $400,000 down, and then we have to start fixing the roof as well. This has not been tried, because the way this was set up, quite negligently in 2002, as a replacement for an insurance scheme that is not an insurance scheme, this has never been tested.

Because of the ridiculous requirements of the five years and the 90 days, which needs to be extended—90 days is an unreasonable time frame to lodge a claim such as this—we are one of the few who would actually be legitimate and win a legal challenge. We should not have been knocked back in the first place. We could win a legal challenge. But because it has not been tested before, there is no confidence among our owners. When we take this to a committee in two weeks time and we ask our owners do they want to take this to court, I am expecting we will get an overwhelming response, "No, just get on with fixing the job," and we still will not legally test this abomination of the MBFF.

MS ORR: Ms Downs, can I just check: are you taking the MBFF to court?

Ms Downs: Yes.

MS ORR: Because the builder is insolvent, you cannot take—

Ms Downs: Yes.

MS ORR: Am I right in my understanding of that?

Ms Keeley: And purely on the question of the rejection of our claim. The question we would be asking the ACT Supreme Court to rule on is: can an owners corporation act for owners? Does an owners corporation have the authority—the way they have been set up under strata law you are responsible for everything in the common areas—to act for owners in—

Ms Downs: Because that is in the original—

THE CHAIR: That was your original issue?

Mr Keeley: Yes.

THE CHAIR: But then they have come back and said, “No, you do not have a claim anyway”?

Ms Downs: Yes. But that is as far as the first court case was concerned. Unfortunately with the previous building—

MS ORR: There is no legal precedent?

Ms Downs: That is where they stopped; so the judge only ruled on up to that point. And even though there was a lot of other material presented—

MS ORR: You have to pass the test of whether you have standing?

Ms Downs: Yes, before we get to the next case.

THE CHAIR: The legislation, as you are saying—we would have to go back and confirm this—says basically the MBFF has got discretion.

Ms Downs: Regardless. Even if we won that, they could go back and say—

THE CHAIR: Even if you win that, they can go back and say—

Ms Downs: “We will not.”

THE CHAIR: You are then in a position where you can represent those owners, but in terms of making a claim what you are suggesting is that there is no legal recourse because the MBFF can simply say, “Our discretion is that we will not pay.”

Ms Keeley: They could use their discretion and say, “You have wasted too much time.”

Ms Downs: Yes.

Ms Keeley: “Too much time has elapsed. We do not accept that claim.” They have the discretion overall.

MS ORR: We have heard a lot about what a bad scheme looks like. What would a good scheme look like?

Ms Downs: It must be actual insurance. There must be an accountable board. The facilitation of all those steps in the lead-up to make sure that ECs are doing the right thing to stop it even getting to that point would be great. It needs to take a number of other steps with certifiers actually advocating for ECs. But accountable actual insurance—

Ms Jurkiewicz: Protection for owners exists, but it would be really nice if, because the building practices were sound, it did not have to be used. The fact that they are so dodgy and have taken all these shortcuts means that we little guys are having to argue the point. He is still out there building, but he has gone into liquidation under one company. It is very frustrating for us.

THE CHAIR: The same individual has gone from your company and now runs a different company?

Ms Downs: I would call it phoenixing, like the previous guy was talking about.

Ms Jurkiewicz: I would absolutely guarantee that. How he can keep getting away with it is very frustrating for me as an owner who just came into the market to try to get ahead.

MS ORR: Was it a developer-builder in your instance?

Ms Jurkiewicz: He is the same person, unfortunately. I know the government are now saying that prospective buyers should check this list they have of builders who have been in trouble before. Back in 2010, when we bought off the plan, there was no such thing. And it really was not until 2008, when it actually started to rain in Canberra, that these waterproofing issues and things like that started to come up. We did our due diligence before we bought off the plan. With the things we had control of—location, design and all of those things—everything ticked the boxes. But then you get to the actual way that the things have been built and the unlicensed, unqualified tradesmen that the builder chooses to use on the build. That is the thing that we as owners have no control over.

Ms Downs: In addition to being accountable and having the time frame extended, you should also be issuing a certificate for common areas. If the time frame had been extended for the period in which you could lodge a claim, and there was also a certificate issued for the common areas, we could have managed that and had individual things signed off. Also, the instructions for how you go about this need to be clear. Again, apart from the fact that I cannot find who sits on this board, there is also no guidance about how to lodge a claim. They did not say, "If you are going to lodge a claim, you need to get every single owner to sign off." We got a couple of curt letters from the MBFF lawyer or whoever—

Ms Keeley: The technical officer.

Mr Downs: That is the only contact we have had.

THE CHAIR: We have the MBA appearing, so we can put some of those questions to them.

Ms Downs: The thing I want to leave you with is that this is a product of the government's creation. You created this in 2002. You have ACTPLA. You have these certifiers who have ticked off on every dodgy build we have. A certifier ticked this off without inspecting it, from whatever office they work in.

Ms Jurkiewicz: There is an exhaust fan in our complex opening up into someone's front door, from the car park. How was that signed off? That is the kind of ridiculous stuff that exists everywhere. Who is stamping that? It is crazy.

Mr Keeley: We have sensors that activate our exhaust system at the wrong heights in the basement. They are too low, so it is quite dangerous before they actually activate.

Ms Jurkiewicz: Our water tank was upside down.

Mr Keeley: There are lots of little things.

Ms Downs: What responsibility is the government going to take for a product of its creation, for buildings that have incurred these issues, particularly when there are valid claims that meet your requirements and we just cannot get the Frankenstein of the MBFF to pay out or to communicate with us?

THE CHAIR: In many ways that is why we are having this inquiry. We accept that there are problems all the way through the system. We seek to rectify them. On behalf of the committee, we are very sorry for what has happened to you. We are doing our very best to make sure that we can rectify this. I do not know whether it will help you in your case, but certainly we want to make sure that these systemic issues are resolved. As you say, they have been going on for a long time, since 2002 and before. They need to be fixed. We take this very seriously, so we thank you for your submission, for your evidence and for your passion today. What has happened to you is tragic. I apologise, on behalf of the whole system, for letting you down.

Ms Downs: We appreciate that.

Mr Keeley: We do. My parting comment from the ground level is that we have been here before as communities. I do not know how many building inquiries there have been since 1998 or something when I have been involved. We have been here before. People at the ground level hope that our government will actually act fairly across the industries and across to the owners, following this building inquiry.

THE CHAIR: That is a good closing comment. Thank you. Hamish will send you a copy of the transcript to make sure it is accurate. The transcript probably will not reflect the passion, but we acknowledge it.

Ms Downs: Put in some bold and some exclamation marks.

THE CHAIR: That is right. Put it all in capitals.

MATOS, MR JULIAN, Vista Executive Committee

THE CHAIR: Welcome and thanks very much for appearing today. Can I, before we start, draw your attention to the pink piece of paper. That is a privilege statement. It gives you your rights and responsibilities in terms of privilege. So that you are aware, this hearing is being transcribed and webstreamed. We have got your submission. Thank you very much for that. We have only got a limited amount of time, but I invite you to make an opening statement if you would like. Particularly if there are issues where you can see that you have been let down, what are the fixes?

Mr Matos: Just to give you a very brief background, I purchased off the plan, a first home buyer. I was obviously a bit naive on how everything works. It became pretty obvious fairly early that there were some slight building defects in the finish, basic finish—bad painting jobs, what have you. You go, "That's not too bad. It's not raining on my head; it's all right," and eventually it starts raining on your head.

I got involved with the EC simply because I was concerned about what was happening around the complex of my apartment building, and as it turned out there were quite a number of things that started coming up. By the sounds of it, waterproofing and leaking seem to be a pretty common issue. When we saw there was going to be an inquiry into this we had to say something on behalf of our complex.

To me, the simple question is: is there an issue with building quality in the ACT? Yes, there is. Absolutely. You can drive down Flemington Road and you will see on the exterior of any number of these apartment complexes that have blossomed like mushrooms there are issues—cracking in walls and things like that that you just go, "Are we in a Third World country? Are we really in the nation's capital?"

I fear that, given the quality of the build—it attracts a socio-economic kind of people like me who do not have a lot of money and who are trying to get into the housing market—now I am stuck with a lemon. People in our complex are trying to sell their properties and are struggling and having to sell at less than what they purchased for, significantly less, for a number of reasons: it becomes known that there are quite a few building issues with the complex and, on top of that, it is compounded by the fact that there are now higher body corporate levies simply because we are having to raise the body corporate levies to try and pay for repairs.

MS ORR: How much have you had to raise your body corporate levies? What sorts of things have you had to cover?

Mr Matos: I would say it has probably gone up by at least about 20 per cent, which is significant when you are considering it in the space of five years after the build. That might be representative of starting a bit low, but one of the major projects that we are looking at at the moment is: on one side of the complex we have a number of courtyards where the courtyard walls are rotating and falling away from the building.

MS ORR: They were not stable?

Mr Matos: Not stable, no, basically cracked and tearing away from the building.

MS ORR: Have you put in a claim against the developer or builder for—

Mr Matos: No, we have not, simply because the advice that we have received from building consultants is that, strictly speaking, it has not breached code and ergo our chances of being successful in a legal matter are questionable.

MS ORR: Can you run me through the process the EC has gone through to identify and rectify?

Mr Matos: Basically, when we see an issue we engage a building consultant and building engineer to identify what the problem is. He has gone over it and he has come back with, "It looks like this is the problem," at which point always the question is: is this a breach of code? Do we have a legal standing to make some kind of a claim? It is always really hazy. The information as to where you stand legally is always really hazy.

The recommendation often comes, "Yes, you can pursue this legally. Time factor, unknown." However, the issue is going to persist. If you have got a leaking roof you can certainly go, "Let's take this up legally." The roof continues to leak the whole time and you are living with water pouring down on your head. In this particular one instance, one issue, these walls are coming away and the longer it goes on the more it rotates and starts coming away and what starts off as a little crack is now a crack that you can put a book down and before too long it will start falling over onto the footpath.

The issue then becomes: do we pursue that legally? I do not have any experience on an EC. Like I said, I am a first home buyer. I have had to get in there boots and all simply because there is no lead on what to do, how to do it, how to go about doing it. Information is not easy to come by. We certainly have engaged lawyers to give advice. We have engaged building engineers. We have engaged builders, all kinds of things. We have talked to our strata management and overall it always comes back to, "You know what? You are probably best just repairing it." When you are asking for advice from multiple sources, everyone comes back with the same thing: "I do not know any better; I am just a layperson; I am not involved in the building industry as such." That is the advice that we have received.

MS ORR: Apart from taking legal action, have you looked into any mediation with the builder?

Mr Matos: We have, without much success.

MS ORR: What was your experience of mediation?

Mr Matos: Pretty poor. The builder just does not get back to you. They are not particularly interested.

MS ORR: When I said "mediation" I take it you have tried contacting the builder and just had no response?

Mr Matos: We have tried contacting the builder multiple times. We had them return for a number of small things. They are happy to fix a door that is sticking or whatever—just the small things—but we found the quality of the work that they did was pretty poor. We had an issue with a car park leak where we went, “There are cracks in the slab. The car park is leaking.” They came along and slammed some kind of putty, silicone-type material in there. Of course it stops it for a while, but it does not actually address the issue that there is water coming in from somewhere.

MS ORR: It is not a permanent fix?

Mr Matos: No, it is not a permanent fix. In fact, it kind of made it worse.

MS ORR: In doing that remedy, did they negotiate the remedy with you or did they just say, “This is what we are doing,” and went ahead and did it?

Mr Matos: They just said, “This is what we are doing.” I guess you could say we were a bit naive in not knowing. Like I said, it is hard to find information on how to go about doing it. When you have got basically an owners corporation that is full of a lot of first home buyers, full of a lot of investment property purchases, people do not really know what is going on. It is hard to know what is going on.

I got involved, not because I had experience or even because I wanted to do it, but I felt that I had to do it. I could not just stand by and watch all these things happen. So I got involved. Quite frankly, it is something I do not particularly enjoy. And it is this constant litany of emails—this issue, that issue, this issue. “What are we going to do?”

MS ORR: You have outlined a recommendation in your submission for a bond system for defects. Can you step me through some of your reasoning behind that?

Mr Matos: It may be, once again, a fairly naive view but, as far as I can see, so much of it comes down to funding. We have got all these issues. The builder does not want to pay for it. We feel we should not have to pay for it. And it is hard to get the builder to come to the party. If there was some kind of bond system—if you want this bond back then you have got to do the right thing—maybe that might work.

THE CHAIR: There is a bond system of that sort that operates in New South Wales, just so that you are aware.

Mr Matos: I was not aware of that.

THE CHAIR: We are looking at that as well.

MS ORR: It is relatively new.

Mr Matos: I understand that that would be certainly difficult. That is financial pressure on someone else. If you have got a small business that is doing building work and they have to contribute to a bond, that is going to surely create financial pressure on them. I understand that.

THE CHAIR: The price may be passed on, I suppose.

Mr Matos: Fair enough. At the end of the day, do you just go, "Poor builders, we don't want to put them out, but everyone who buys into this will just have to wear it"? And that is ultimately the thing. It is always going to be unfair to someone. But is it really unfair to try and hold someone to the quality of their work? The biggest issue that we have is waterproofing, which I am sure is something that comes up, because I have read so much about it and heard so much anecdotal evidence.

THE CHAIR: I assume that price point, when you bought, was an important issue.

Mr Matos: Sure.

THE CHAIR: If there were a bond system I assume that potentially the developer, the builder, may then tack that on to the price?

Mr Matos: Sure.

THE CHAIR: Do you see that as something, in retrospect? Would that have made you think, "I am not buying that one because it is too expensive"?

Mr Matos: No, because I saw cheaper properties that I was not interested in. I think at the end of the day you know that you get what you are paying for. Certainly when I was purchasing, because there were a number of developments in that area, I looked at a few. And, yes, price was important, but I deliberately avoided apartment complexes that had lifts or had a swimming pool or things like that because I knew that they were going to obviously be more costly.

THE CHAIR: Knowing that there was a bond of some sort, although it might be part of the price, would give you some degree of comfort in purchasing that product?

Mr Matos: Absolutely. Certainly in retrospect, absolutely that would. Like I said, I guess you could say I was a bit naive. Ultimately you think, "In this wonderful country of ours, in the nation's capital, I do not need to worry about a leaking roof." In my submission—it is a bit of smart alec comment—at the end I said, "What has come to civilisation if we cannot build a building and we cannot stop the rain from coming in!" You have got to start questioning. You go, "What are we doing here?"

THE CHAIR: It is a good point you make. One of the issues is that most owners are naive. They go in and they do not realise the issues until they come up against them.

Mr Matos: Absolutely.

THE CHAIR: And by then the statutory periods and so on have been and gone.

Mr Matos: That is something that we face.

THE CHAIR: That is part of the issue. You are not alone.

MR PETTERSSON: What was your experience with the strata manager?

Mr Matos: Mixed. We started off with one strata management company. After a couple of years, we moved to a different company.

MS ORR: An original strata company was appointed by the developer of the units?

Mr Matos: I believe so. I cannot really recall those issues because I was not so heavily involved at that stage.

MS ORR: No, that is fine.

Mr Matos: Once again there is that naivety. You come into it and you think, "Okay, this is the way that it goes." They were not particularly great. They were very slow to respond to anything. We had a lot of issues with builders and stuff like that. We were trying to get the strata management company to take on that responsibility of contacting the builder. And they would. There was this kind of—

MR PETTERSSON: They would, or they would not?

Mr Matos: They would, yes. Well, people tell you that they are doing something. You email someone, saying, "Hey, can you contact the builder?" Then you do not hear back for a week. Then: "Hi. I sent you an email last week. Have we heard back?" And they would say, "Yeah, yeah. We're still chasing the builder".

MR PETTERSSON: You call for more guidelines for strata management. Is that because strata management, in your circumstance, did not live up to your expectations or because you saw them not doing things?

Mr Matos: I do not think that they—just like with that example—seem to be very proactive. Once again, it is a murky kind of industry for people like me as a first home buyer, especially buying into a strata. You do not even know what they do, what is expected of them, what they are supposed to be doing. You contact them with some things and they will get back to you telling you to contact the builder or whatever. It was quite murky. There is no clear delineation as to what they should and should not do.

MR PETTERSSON: You said after a couple of years that cooperation ceased?

Mr Matos: Yes.

MR PETTERSSON: Was that a strata management?

Mr Matos: Yes, we moved to another strata management company.

MR PETTERSSON: Why?

Mr Matos: Once again, we did not feel that they were actively working in a decisive manner.

MR PETTERSSON: Was that a feeling that emerged earlier than two years in, when you were contractually bound?

Mr Matos: Probably yes; a bit earlier. I think we were contractually bound. When the contract came to an end we said, "Look, these guys aren't giving us anything." You could not say that this was a satisfactory situation. We said, "Let's try someone else."

Once again, it is a bit of potluck. You think, "These guys seem to be all right." You google them a bit. You see no-one has complained too much about them, and you get on board with them. We have been with them for a number of years now and they have been okay. As an EC we have asked whether we need to look somewhere else.

At the moment, with a few issues around the complex, we started going directly to contractors, because dealing with a strata management company seems a bit slow. Sometimes you ask for a quote and need to send another email saying, "We haven't got a quote for this yet." They reply with, "Okay, we will contact them again". In that particular instance, we got in contact directly with a particular contractor that we were talking about and they were like, "Yes, here is a quote". So you ask yourself what is going on.

THE CHAIR: I ask about the regulator, the ACT government. In your submission you make the point that the regulator, the government—I assume Access Canberra—has not really been very helpful.

Mr Matos: Yes.

THE CHAIR: Can you expand on that?

Mr Matos: It stems back to it being hard to make head or tail of how to approach things, contact points, how to go about doing things. It does not seem particularly clear to me and to my EC, per se.

MS ORR: Have you approached them on something in particular that forms that view?

Mr Matos: We have had minor things such as issues with hot water—just really small things. But it always seems a bit of a grey area.

MS ORR: As to whom you go to lodge a complaint?

Mr Matos: Yes, where the contact point is, what the process is and how you actually go about doing it.

MS ORR: Is it a case of approaching Access Canberra and their being difficult to deal with or is it not knowing when to approach them?

Mr Matos: I have not known when, how, where, if.

MS ORR: Yes, okay.

THE CHAIR: Is your strata management company not able to provide that sort of advice?

Mr Matos: Strata management companies have not been particularly helpful with that. They say, “Oh yeah, that’s something you’d need to take up as an owners corporation.”

THE CHAIR: Owners corporations really need to have, from the government, a guide on their rights and responsibilities.

Mr Matos: I think so.

THE CHAIR: To say that, if X happens, these are the avenues available; these are the points of contact.

Mr Matos: That is right. Absolutely.

THE CHAIR: Bearing in mind that you are all well-meaning amateurs in that sense.

Mr Matos: Yes. There is no use giving us a whole piece of legislation because I will read it and go—

THE CHAIR: Yes, you need a simple guide.

Mr Matos: I have read so many things where I go, “I really don’t know what that means.” We have had a building engineer, a building consultant, give us a report and I will go, “Is that a breach of code?” Basically, I am not quite sure I understand what that means.

MS ORR: To summarise, Mr Matos, essentially what you are saying is there is a lot of expert information out there but that the owners corporation is not necessarily expert. There is an imbalance.

Mr Matos: There is an imbalance, absolutely. You get the feeling that the industry hides a little bit behind the veneer of technical jargon and all that. I work in the IT industry. There are segments of the IT industry where, when you are dealing with a customer, you hide behind jargon, you hide behind policy and things like that, and you go, “That’s the policy, and it’s the X, Y and Z, and it’s the flux capacitor, and it’s this, that and the other,” and the customer just goes, “Okay”.

THE CHAIR: I assume that, as you bought off the plan, you had never heard of an owners corporation.

Mr Matos: I had heard of it but I did not understand the inner workings.

THE CHAIR: And the certification process. There is an opportunity at the point that people buy off the plan. They can be provided with information so that they get an independent view of their rights and responsibilities rather than, at the outset, just dealing with the developer or the builder. It could be an obligation to provide, through the ACT government or someone else an overview of how the system works: “Now that you are an owner, these are your rights and responsibilities.”

Mr Matos: Absolutely. Yes, that would be fantastic. We got a welcome package from the developer—a manila folder with a number of details—but it was pretty slapdash: "Here's your warranty for your fire alarm".

MS ORR: Did it include all the information you needed?

Mr Matos: I do not think it did. It had information about fittings inside the apartments and how to use the air conditioner—stuff like that—but there was nothing about our legal rights and responsibilities.

MS ORR: Detailed design plans?

Mr Matos: It did not say who the certifier was.

THE CHAIR: Assuming there was a website, we could have a lot of that information on it. At the point that you paid your deposit, you could get given by the developer information from the ACT government saying, "Now that you are going to be an owner in this, this is what your rights, responsibilities and opportunities are, and this is a link to a more detailed website". Perhaps that would be useful.

Mr Matos: Absolutely, that would be useful.

THE CHAIR: And that does not exist at the moment.

Mr Matos: Yes. Absolutely, it would be useful. And: "If you have grievances this is who you contact and this is the process, and this is the information that you need." With some of the building issues that we have come across, we have been stepped through the process, or what we believe to be the process, by the building consultant, and you just go, "Holy crap, we've got to do all of that just to make a case?" And he is like, "Well, yeah." He is happy to do it because that is money in his pocket while you engage a contractor to assist in doing all this.

I cannot go and make a schematic diagram of what the issue is, why a door leaks or why verandahs have not been waterproofed. He comes back with proper technical drawings and things like that. We commission someone to do that work. We say, "This is a report from a registered building engineer. This is someone who knows what they're talking about. It's not just me going, 'Hey, there's water coming into my carpet.'"

MS ORR: If I understand it, the onus is on the owners corporation to go away and collect the evidence to prove that there is an issue. The burden of proof is on the owners corporation?

Mr Matos: Yes, and that is very much what we have experienced. That is what we have been informed of. If you are making a claim then you have to come with the information. You have to come with all the details. Once again, you just go, "What level of details? What do we need?"

MS ORR: In your submission you suggest that there is a clear conflict of interest regarding building certification. Can you elaborate on that a bit?

Mr Matos: Yes, my understanding is that—from the research that I have done and what I have been led to believe—the certifiers seem to be engaged by builders or developers. If that is true, that to me is mind-blowing for a number of reasons. If the certification is being paid for directly by the developer, surely that just opens a door for corruption. Surely you are going to look for people who pass certification easily. Then there will be pressure on the certifier to pass things easily because their next meal ticket, their next pay cheque, is dependent on their having a relationship with a developer that continues to give them work.

If a developer says, "This guy here does not certify just anything and he nit-picks every little issue and makes it really tough for us," surely that developer will not engage that certifier. Alternatively, that certifier knows if he makes it really tough, they will not want to engage him again because they just want the project to move along: "We can sell the property. Let's move along."

To me, that is a clear conflict of interest. That is something we have discussed with building engineers. We have discussed it as an EC and as an owners corporation, and we all agree. If it is the case that developers and builders pay for the certification and deal directly with the certifier, that is basically so open to corruption, to a system that can be corrupted. Basically, if nothing else—you could be really cynical about it—they could go, "Hey, mate, just pass this. Here's a brown paper bag full of cash. Just pass this property." That is being cynical, of course. But there is the fact that you can make that line like that.

THE CHAIR: The relationship between certifiers and builders and eventual owners is something that has come up repeatedly.

Mr Matos: Yes. I think it is pretty obvious. I am sure you would be getting sick of hearing the same thing over and over: waterproofing. It must be a real bugbear.

THE CHAIR: It is a persistent theme, it is fair to say. Thank you very much for coming today.

Mr Matos: Yes, no worries.

THE CHAIR: We wish you well with your building.

Mr Matos: Like I said, I come from a point of naivety. We just wanted to have our say and make sure you are aware. We trust that you guys will make the right decisions.

THE CHAIR: I think that there is a genuine bipartisan view in the community that something needs to be done to address it. There are improvements that need to be made. There are problems that need to be fixed. There is a will to do it. I am hopeful we will. I thank you for your role in coming forward.

Mr Matos: Yes, and we do not want to start making ghettos.

THE CHAIR: Indeed.

Mr Matos: That is the thing that concerns me. I can see Flemington Road, 10 years from now. If you have a whole bunch of properties that are all falling apart, it is not a good look.

THE CHAIR: Sure. Hamish, who is the secretary, will send you a draft copy of the transcript so that you can make sure that it accurately reflects what was said here. We may be back in touch if we have any follow-up questions. Again, thanks very much, and all the very best.

Mr Matos: Thank you all for your time.

The committee adjourned at 11.49 am.