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

TRANSCRIPT OF EVIDENCE

CANBERRA

WEDNESDAY, 22 MAY 2019

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

By authority of the Legislative Assembly for the Australian Capital Territory

WITNESSES

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Amended 20 May 2013

The committee met at 10.36 am.

KERIN, MR CHRISTOPHER, Kerin Benson Lawyers

THE CHAIR: Good morning and welcome, everyone, to the fourth public hearing of the Standing Committee on Economic Development and Tourism. We are inquiring into building quality in the ACT. On behalf of the committee, I thank you, Mr Kerin, for appearing today and for your submission. I draw your attention to the privilege statement before you on the table. Have you had a chance to have a look at that?

Mr Kerin: Yes.

THE CHAIR: Great. I remind you that proceedings are being recorded by Hansard for transcription purposes and that we are being webstreamed and broadcast live. We do not have a particularly long time. I appreciate that you have provided us with a summation of your submission. I invite you to make an opening statement. We will then go to questions.

Mr Kerin: My opening statement deals with other issues not canvassed in my original submission. I did not think there was much point in doubling up.

THE CHAIR: Fair enough.

Mr Kerin: I am happy to read this new opening statement.

THE CHAIR: Can you give a summary of it? We have a copy of it, so we can incorporate that into our evidence.

Mr Kerin: Sure, okay.

THE CHAIR: Can you give a summary of what you have provided as additional detail?

Mr Kerin: Sure. Basically there are four points. The first is in relation to the fidelity fund. As many of you probably know, there was some litigation surrounding the interpretation of the scheme in terms of how it operates. The Federal Court handed down a decision in February of this year in that regard.

In short, the outcome of that decision is that, in order to make a claim on the scheme, an owners corporation needs to do all of the following within five years of completion of the building: identify the building defects in the apartment building; commence court proceedings against the builder; obtain judgement against the builder; defeat any appeal of that judgement by the builder; pursue the builder for judgement unsuccessfully; appoint a liquidator to the builder; and then finally make a claim on the fidelity fund.

The reality is that most owners corporations have an element of dysfunction within them. Identifying building defects usually takes some years. Overcoming inertia to actually act on that takes a further amount of time. And, even if you obtain a

judgement against the builder, the builder can easily tie you up in appeal proceedings for some time. The way the fidelity fund scheme operates, as the law presently stands, it is very difficult for an owners corporation to make a claim on the fund. That is important because the fund appears to be the most popular form of the two options for insurance available to owners corporations.

QBE offer a product, an insurance policy, and the Master Builders fidelity fund offer a product. They are the two products on the market. The Master Builders fidelity fund appears, anecdotally to me—simply by the fact that every time I search for these things, four times out of five it is a fidelity fund certificate, not QBE insurance—most common. Most of the insurance issued in the ACT is fidelity fund insurance. The reality is that it is almost impossible to make a claim. That is a big deal because this is consumer protection legislation. That is the first point.

THE CHAIR: Before you go to your second point, could I ask you a quick question?

Mr Kerin: Sure.

THE CHAIR: Is a solution to that, broadly speaking, an extension of the time from five to, say, 10 years, or would you recommend the simplification of the process? Or is it a combination of the two?

Mr Kerin: There are two potential solutions to this. That Federal Court decision is on appeal. The owners corporation, who is the appellant, may be successful on appeal. The full Federal Court may take a different interpretation as to how the scheme operates, which will enable owners corporations to make a claim within a reasonable period of time after completion. That is one way this mess might get sorted out. The only other way is by the Legislative Assembly revisiting the scheme and amending it in some way to give owners a fair chance at making a claim.

THE CHAIR: A longer period.

MS ORR: Is it just a longer period or are there other considerations?

Mr Kerin: It could be a longer period; it could be other ways.

MS ORR: Potentially, what are some of those other ways that you see?

Mr Kerin: The way the court has interpreted the scheme is that it is not insurance, so the Insurance Contracts Act does not apply and the way an insurance policy normally operates does not apply. With the QBE policy you can notify the insurer of a potential claim event and then, after the period of coverage, still make a claim. The problem here is that there is no facility to do that; it does not operate in that way. So with QBE, you notify QBE of a potential claim event, and then you go and sue the builder and get an outcome. That might take 10 years or whatever. But then you can still make a claim when the builder fails to pay the judgement amount.

MR PETTERSSON: Why is the fidelity fund not an insurance product?

Mr Kerin: That is a very long, technical question. I can refer you to the judgement on

that but, to be honest, it is a matter of some confusion, in the sense that representatives of the Master Builders Association have made public statements in the past saying that it is insurance. But upon looking at the matter closely and understanding the implications of what that means, their position in the litigation was, "No, it is not insurance."

THE CHAIR: This sounds like something that could take quite a bit to unpack, but we do not have time. We might go to your other points.

Mr Kerin: My second point relates to the Shergold Weir report. This report, commissioned by the Building Ministers' Forum, was released in February 2018. A number of states and territories have acted on, or at least indicated they will act on, the 24, or some of the 24, recommendations made.

I am unable to find anywhere the position of the ACT government in response to that report. This is odd, in the sense that it is a very well publicised document. The public is aware of it through the Opal Tower disaster and so forth. Professor Shergold, and I think Bronwyn Weir, have appeared in various media outlets talking about the report. It is not a secret document. I just do not know what the ACT government's response to that is. It is a bit of an odd situation.

THE CHAIR: They are appearing before the committee. We will have the opportunity to ask them.

Mr Kerin: That was my second point.

MS ORR: Is it correct that that one goes through the Building Ministers' Forum?

Mr Kerin: Yes.

MS ORR: There could be a response that has been noted through the minister's capacity as part of that forum. We could follow up and find out. I think it would have been responded to but not as an item of the committee.

Mr Kerin: I have done Google searches of various types.

MS ORR: Okay.

Mr Kerin: I have looked on the Environment, Planning and Sustainable, Development Directorate website. I cannot find anything in terms of what the ACT government's position is in response to the report.

MS ORR: Okay, noted.

Mr Kerin: Yes.

MS ORR: The third one is the introduction of duty of care?

Mr Kerin: Yes. This is one that is also quite important. The New South Wales government, in February of this year, set out its response to the Shergold Weir report.

One of the four key responses was the introduction of a duty of care to home owners to ensure that building practitioners owe a duty of care to owners corporations and subsequent title holders.

There was a decision of the High Court in 2014—Brookfield Multiplex v SP61288 or an SP number of that sort—which made it very, very difficult for owners corporations to sue builders and designers; that is, engineers who design work. Basically a building defect can have two causes: poor workmanship by a builder or negligent design by an architect or an engineer. Or it can be a combination of those two—poor workmanship and negligent design.

The statutory warranty coverage that you have largely extends to workmanship issues. There is a little bit of design there but it is mainly poor workmanship that it covers. It does not enable an owners corporation to serve a negligent engineer, a negligent architect, a negligent builder certifier or anyone of that type.

That is a gap. If you have a building that has a particular defect that is 60 per cent the responsibility of a negligent architect and 40 per cent poor workmanship, you are never going to get more than 40 per cent through the statutory warranty coverage. You are unlikely to be successful in suing the architect for that 60 per cent responsibility of negligence.

In response to that, the New South Wales government has indicated that a statutory duty of care will be introduced. I think that should be looked at seriously by the ACT government. Are there any questions on that?

MS ORR: No, that is fine.

THE CHAIR: No.

Mr Kerin: My fourth point is something called cladding ratification agreements. In Victoria in response to the cladding crisis—obviously you have Lacrosse and another building, the name of which escapes me, that had significant fires on the side of the building—the Victorian government, in response to the concern that owners are having to pay millions of dollars to replace cladding in their buildings, has set up an arrangement whereby owners corporations and owners, lenders and local councils enter into a kind of tripartite agreement whereby the lender lends money to the owners to pay for this work and the owners repay this loan via their council rates and the councils pay back the lender.

Obviously we do not have local councils in the ACT. This can be done directly with the ACT government. This would work well, I think, in relation to building defects. There are publicised cases of owners corporations in the ACT having to pay $10 million or more in building defects. That is a significant amount of money. That translates to, I think, in one case at least $50,000 in a special levy to each individual owner. Many of those owners will not be able to pay that special levy. And it would be very hard for them to sell their unit because no-one wants to buy a unit that is in that kind of state. You are between a rock and a hard place.

The only solution there would be a strata loan. There are two or three organisations

that offer strata loans to owners corporations. They are unsecured loans but the loan providers are happy to do it. The problem with those loans is that the interest rates are quite high. They are unsecured loans and that is why the interest rates are quite high. There is a higher element of risk there.

A rectification agreement for lot owners would enable individual owners to take loans at low interest rates and be able to manage the problem that they are facing when they have got a very large special levy they have to pay. That is something I think the ACT government should look into.

MS ORR: In your submission you state that no residential buildings above three storeys have statutory warranty protection.

Mr Kerin: Which part? Where were we?

THE CHAIR: Page 2, No 1.

MS ORR: Page 2, yes. It states that no residential buildings above three storeys have statutory warranty protection. Can you run us through your rationale behind that? I took it from that that you think it is appropriate that they should have it. Can you run us through what you think should be going on there, if they do not have warranty protection?

Mr Kerin: What I say there is that this effectively means that currently in the ACT no residential buildings above three storeys have statutory warranty protection. The amendment that occurred in 2016, which took effect on 20 August 2017, meant that apartment buildings arising from those building contracts entered into after that date would have statutory warranty coverage. Until that point the solution was to sue the builder for negligence or to sue the designer for negligence. That High Court decision I talked about earlier, the 2014 one, effectively cut off that avenue.

What happened was that, in fact because it takes a year, a year and a half, to build a building, effectively it is only now—what are we now, 2019—that we are seeing buildings above three storeys having statutory warranty coverage. Buildings between 2014 were unable to recover the loss arising from defects because they did not have statutory coverage and the High Court decision made it very difficult to sue the builder for negligence.

I have advised at least two large owners corporations in that position: "There is not a lot that you can do, aside from asking the ACT government to issue a rectification order, because you have got no rights." That situation arose notwithstanding the fact that I wrote to the ACT government on a number of occasions following that High Court decision in 2014 saying, "You need to fix this now; otherwise there will be owners who will face a situation where they have no rights whatsoever."

MS ORR: Has there been a test case? Has anyone pursued anything under warranties, for that time period that you are aware of, where it has actually been put forward and it has been said, "No, there is no standing to it"?

Mr Kerin: If you do not have the warranties there is no point pursuing anyone. You

have got no rights.

MS ORR: What I am trying to determine here is: is there any other law firm that has taken a different interpretation and has tried to redress something where there has been a judgement made that it is not the case? I can appreciate your reasoning and rationale that you have outlined to us.

Mr Kerin: I do not think my interpretation is unique. It is pretty clear. It is a very simple concept. The statutory warranties simply are not there. You have got no rights. Having said that, there is an owners corporation in the ACT that has taken a view that the ACT government has been negligent in the way it has set up its building legislation framework, if you like. They are suing the ACT government for negligence, for the failure to put together a scheme that works properly. That is an avenue taken by one owners corporation. Whether or not they are successful in that regard is another question. But that is what they have done.

MR PETTERSSON: In point 6 of your submission you talk about prudential standards for insurance products and fidelity funds. You say that you are not sure if any exist. Can you expand on that?

Mr Kerin: As I indicated earlier, the fidelity fund appears to be the most popular form of insurance in the ACT. It is unclear how much money the fund has to pay for defects. In normal circumstances where you think you might have significant claims but not sufficient funds to pay out the claims you would put in place measures to ensure that when claims are made you can satisfy the claims. I have heard rumours that there is not a lot of money in the fund.

Under the Building Act the ACT government is required to ensure that the fund has appropriate prudential standards in place. This is not publicised. It would be very helpful for me to know if the fund has got any money so that, if we are suing the fund for $10 million, the fund can actually pay it out or it has a reinsurance contract that will pay it out. There is no point in me pursuing a fund that has got no money. Right now I have no idea how financial the fund is.

I say this because, as I indicated previously, the ACT government failed to check the prudential standards of QBE Insurance for a period of 10 years. The ACT government has got form in this regard. I am not too worried about QBE Insurance; it is a very significant operation. The Master Builders fidelity fund scheme is another matter.

THE CHAIR: In your submission you make the point that regulation begets more regulation. The more regulation we have, the more we seem to need. Your solution seems to be in part that the ACT government needs to do more to actually enforce existing regulation.

Mr Kerin: Yes.

THE CHAIR: And, secondly, that we need to address issues with certifiers. Did you want to extrapolate on that?

Mr Kerin: I certainly acknowledge that the ACT government is focused on this now.

It has taken some time. I started doing work in the ACT for owners corporations in 2010 and it was certainly an issue then. There has been amending legislation. Much of it has not addressed building quality. Some of it has addressed safety on building sites and things of that nature. But I think in recent years there has been more regulation in relation to building quality.

I think in the ACT, compared to New South Wales and Victoria, and possibly Queensland, you probably have better regulations than they do in those jurisdictions. But they are not being enforced. For example, in relation to the scheme of rectification orders in the ACT, they do not have an equivalent provision in New South Wales and Victoria. In Queensland there is something similar but it is not as strong as the ACT version. But what has happened is that the ACT government has found itself in litigation with well-resourced builders who are appealing those rectification orders. It has found itself spending large amounts of money in legal fees, as I understand, and as a result has been reluctant to exercise its powers to issue rectification orders. That appears, just anecdotally through the media, to have changed in the last few months. I seem to see more rectification orders being issued. But it is no good having all this armoury if it is not being used.

THE CHAIR: Unfortunately, we are going to have to close there because of the time constraints. But thank you very much for your submission, your addendum to the submission and also your evidence today. We may get back to you if we have got any further questions, if you are happy to answer them as well. You will be sent a copy of the draft transcript by the secretary, Hamish, just to make sure it absolutely accurately reflects the conversation today. But thanks very much for attending; we appreciate it.

Mr Kerin: My pleasure.

MOLONEY, MR DAMIEN, Capital Building Consultants

THE CHAIR: Thank you for coming here today. Once you have read the pink privilege statement in front of you, could you indicate that you understand its implications.

Mr Moloney: I understand.

THE CHAIR: Thank you. Do you want to kick off with an opening statement before we have some questions?

Mr Moloney: Yes, absolutely. There is something I would like to speak about that was mentioned to me when I talked to people about coming here today and doing the submission. The biggest questions and concerns, especially from builders that we deal with, and the larger builders who have been around for 20-plus years, are probably about the cost of land. The SLA is making the cost of land really high here in the ACT, as you all know. Stemming from that, when a person has to buy a piece of land to build their dream home, they are buying it at an exorbitant cost compared to anywhere in New South Wales. That is creating a ceiling for builders. They have to build a home within a certain amount to be able to (a) be affordable for people and (b) keep in with the market of other houses around them.

When people are going into ballot systems and things like that, they are not understanding the cost of building, how much it is going to cost. They have to go into a ballot system, they get picked a piece of land and then they might have a fall of three metres over the block of land. The excavation costs alone on that create a massive build cost. People do not have the understanding of what it is going to cost. People come in and buy a 450-square block of land, which is small, for $450,000. Then the builder needs to build that house within a certain price to be able to (a) make money and (b) make it quality. I see a lot of cutting costs and cutting corners in buildings to meet this ceiling of the price of the home. There is so much competition among builders out there that builders go cheaply into a contract and then they have to cut corners to do it, to win the job. That point is not in the submission, but it is pretty out there and pretty—

THE CHAIR: Because it is the reality of what is causing some of these—

Mr Moloney: Absolutely, yes, and it is causing a lot. Builders go in and win the jobs, and they might be doing it for $250,000 to build a house, or $350,000 or $450,000, depending on the size of the house. The people who are buying the land, especially in ballot systems or through the SLA, who are putting pressure on people to buy this land now because it might go tomorrow—it is incredible—just do not understand what is involved in the cost of building, from engineering right through to excavation and things like that, which is where a lot of the cost is. People are getting pressured to buy this land through a ballot system or through the SLA.

THE CHAIR: How does that compare with New South Wales in terms of cost and pressure?

Mr Moloney: In country New South Wales, out at Googong, for example, there is an abundance of land and it is—

THE CHAIR: The price you were quoting was $1,000 a square metre, which sounds about consistent. What is—

Mr Moloney: In Taylor it is a bit less. It is around $800. I know because we have just purchased a block of land there. In Throsby it is as high as $1,000 a square metre for a block of land.

THE CHAIR: What is Googong?

MS ORR: I appreciate the point you have made. Given the limited time, I would like to get back to the real focus. I certainly appreciate that the cost of land is a factor in it. But we see issues and we have been told countless times before that all jurisdictions in Australia are facing issues with building quality. I would like to get back to focusing on that. The cost of land is going to be part of it, yes, but if it was as simple as the cost of land we would not be seeing issues in other jurisdictions.

THE CHAIR: Yes. That is why I was just asking where you see the difference. You have Throsby and Googong. I imagine a lot of similar builders are building on both sides. Are we seeing a difference in those two very similar markets?

Mr Moloney: Absolutely. In my day-to-day life we do a lot of expert witness reports in disputes between builders and we do conflict resolution between disputing builders. I have never had a job out at Googong. It is mostly the ACT. It is the same builders, it is the same everything, but these guys are trying to make a living by shrinking costs and cutting corners, and that is where the defects come up. I have not had a job in Googong or Queanbeyan or anywhere of that nature. I have had them in Sydney, obviously, because there is exactly the same problem there.

THE CHAIR: I suppose that the same people looking for a block of land in the ACT region are going to get better bang for their buck in terms of cost and quality in Googong compared to the ACT.

Mr Moloney: You are going to get everything better in Googong. Land size is better. The price is better on land. It is not so much the builders, because they are exactly the same builders. But we have never had a job for dispute resolution, with the amount of building in Googong compared to here in Canberra.

THE CHAIR: It is a very interesting point. So the same builder in the ACT—

MS ORR: But that does not mean that there have not been disputes in Googong.

Mr Moloney: No, not at all.

MS ORR: You are just saying that in your experience—

Mr Moloney: I personally have not—absolutely.

MS ORR: So it is possible?

Mr Moloney: Of course it is. It is not so much due to that. All I am trying to put across is that it seems to be part of it.

MS ORR: I appreciate that it is part of it, but you also made the point that you have had cases in Sydney where you have had the same issues because of—

THE CHAIR: Where house prices are a lot higher, where land is higher.

Mr Moloney: Exactly right.

THE CHAIR: So you are saying that if you get affordable land then there is more margin for the builder, because they can make sure that they are not cutting corners.

MS ORR: Are you speaking about detached housing? You are not speaking about multi-unit developments?

Mr Moloney: I am just speaking about your mum-and-pop four-bedroom, two-bathroom—

MS ORR: Okay. That is quite a different thing. A lot of the issues we have seen come before the committee have actually been in multi-unit developments.

Mr Moloney: Yes, absolutely. I am just trying to explain what I see, and it is very much to do with the building quality in the ACT.

MS ORR: Do you think that is the only issue, though?

Mr Moloney: No.

MS ORR: What are some of the other issues that you see?

Mr Moloney: The gentleman before me was talking about the responsibility of the builder when it is either an engineering problem or a roofer problem. I understand that the builder needs to go through and he is ultimately responsible for the whole works of the building. There is a difference between when a draftsman or an architect puts something on paper and when you put it into a building.

I come from a building background. I used to build homes. I was a project manager on high-rise construction. I have my carpentry and builders licence. I come from a bit of a different background compared to a solicitor or someone like that. I have been in it. I know how it all works and where these things go wrong. There is definitely no responsibility for the architect or the engineer who is designing these plans. And the builders do it to the plans, to the detail. But ultimately it always falls back on the builder as the builder's problem. That was a good point that the gentleman before me brought up. I think there needs to be more back on those certain guys instead of the builder or as well as the builder. It is not shared at the moment and it should be shared between them.

THE CHAIR: It is better to investigate what is the stem of the problem: the quality or the design.

Mr Moloney: Absolutely, yes.

MR PETTERSSON: Let us say land prices were made cheaper.

Mr Moloney: It is pretty hard at the moment, because you cannot—

MR PETTERSSON: One of the essential assumptions, though, is that there is a lot of competition in the building industry. So will the goalposts not just shift? Will these builders not just have the same ferocious competition at that lower price point?

Mr Moloney: There are probably better ways than just to shrink the land costs. For example, I used to work for Core Building Group, a massive company here in the ACT. They are now buying blocks of land in Goulburn and selling them. A good idea, I feel—and it was brought up to me by a builder—is, as they do in New South Wales everywhere from Bathurst to Sydney, Newcastle and Wollongong, to have a certain number of blocks of land that they can only sell to builders or that builders get first grabs on. Then they can set the prices. They will get first pick of the homes and have cheaper priced land, and then they can build better quality and sell it to the consumer as a better product.

MR PETTERSSON: Why would it be a better product?

Mr Moloney: Because the builder will have a determination, I guess, on what they are selling their product for. They will not have that ceiling on how much they have to build in this tiny little gap between the house market prices and the land on which they build. I understand your point that, if it was $450,000, what if we took it down $400,000? That gives a builder an extra $50,000 either to build better quality or have a better mark-up and still sell it at market value at $800,000.

MR PETTERSSON: But one of the essential premises is that there is so much competition and the competition out there is so ferocious that everyone is trying to undercut each other?

Mr Moloney: But I do not think that you would undercut as much as $100,000 on a build. You would still say "at market price". There is no way you would slip down $50,000 just to beat Bob's building next door, because you would be in the same position. You would still have to keep it at market price.

MR PETTERSSON: But the market price would shift?

Mr Moloney: It would shift, yes, but you would still have the people who are building their houses compared to builders building house and land packages.

MR PETTERSSON: I do not think we will come to the same conclusion on that point. Moving to a slightly different point, assuming that there is that competition between builders, is there a way that you can emphasise to builders that responsibility to deliver a product that meets the expectations? At the moment there seem to be a lot

of shortcuts being taken, for whatever reason. Ignoring the price side for one second, do you have any recommendations on how we can improve these products?

Mr Moloney: Education. When I did my building licence it was a couple of years and three nights a week at TAFE. We started with, say, 30 people in our class. By the time we got to the end two years later, three nights week after working all day, 15 people had dropped out. They were not the serious ones. The serious ones stayed on and did something. There is a lot of emphasis around at the moment that you can get your builders licence in a certain amount of time.

When I did my building licence it was all about running a business. It was all about subcontracting, contracts, learning how to handle money. Essentially you are a bank. You get a $100,000 progress payment through and it is sitting in your account. You get these younger builders going out and buying brand-new cars because they have got $100,000 that is not theirs in their account.

We do a lot of conflict resolution with builders going broke, going bust and leaving, and then it comes back to the fidelity fund. There needs to be more education. There used to be. There used to be that education where you sat down and you learnt for an hour and a half, two hours a night, three nights a week about how to run a business—not putting two pieces of wood together, not banging a nail into a piece of timber but actually how to be a builder.

MS ORR: How does the training we have in the ACT compare to that in other jurisdictions?

Mr Moloney: At the moment it is similar to New South Wales. It is very similar to New South Wales. The ACT should be leading and not copying New South Wales. We should not be worrying about other jurisdictions. We should be doing what we should be doing and leading the way in training these guys that are coming through and getting their carpentry licence. A bricklayer can be a builder within six months at the moment. To me, that is crazy. You can be the best businessman at being a bricklayer and ordering bricks and working out how much mortar you need and things like that, but when it comes to building you are pricing absolutely everything. It is your responsibility to be that builder, to build that family home.

MS ORR: And in your opinion, the capability is just not there within the workforce?

Mr Moloney: It has dropped. It has dropped far. It needs—

THE CHAIR: The technical skill necessarily has not dropped; it is more the business skill in order to tie it all together?

Mr Moloney: Yes, absolutely.

THE CHAIR: It is absent?

Mr Moloney: Yes. That is a point, yes. It is a part of it, the business skills of people being builders. It is a massive thing. It is huge. To be a builder you have to be in control of every trade. You are not just a sparky who is coming and putting in a power

point and off you go. You are controlling the whole build and the responsibility for that falls on you.

THE CHAIR: The project manager as well?

Mr Moloney: Absolutely. The bigger guys who are doing the bigger buildings are hiring their project managers to do that for them.

THE CHAIR: Can I ask about certification. You made a really interesting point about this confusion around certifying, that certifying is not about the detail of quality; it is about making sure of the structural quality. A lot of the complaints in terms of building quality, particularly I suppose on the smaller buildings, on the standalone mum-and-dad houses, tend to come down to quality that is not structural. There seems to be a misunderstanding about what certifiers do. In your submission you say that that information needs to be provided to people so that they actually understand the role of the certifier.

Mr Moloney: Absolutely.

THE CHAIR: But in that context do you see scope for expanded roles for certifiers so that there is a greater focus on perhaps not just the structural but other elements of the building?

Mr Moloney: Yes. I think the training that the certifiers get, the courses they go through, do not concentrate on the finishes or a defect of the home whatsoever. On a mum-and-pop house they come five times. They come before the concrete is poured, to make sure the steel is in there, the frames, so on and so on. I think to really look at defects in a home, cosmetic defects in a home, you need to be somewhat trained to recognise defects and you need to know the standards and tolerance guides, the standards and tolerances of every trade and what they have as their standards and tolerances.

That brings me to another point. The ACT standards and tolerances guide is from 2007, and we took it from Victoria. New South Wales have got a 2017 standards and tolerances guide that we should be adopting because it is now 2019 and our standards and tolerances guide is over a decade old. There is definitely movement there for the certifiers to look at cosmetic defects as well and I think they would need to be trained in that.

THE CHAIR: Let's take a doorframe or a window frame or something like that that is not structural. Let's say the door does not fit or something like that. At the moment that is not the builder, that is the certifier.

Mr Moloney: No, that is the job of no-one.

THE CHAIR: Could it be the job of the certifier?

Mr Moloney: It could be, yes, absolutely.

MS ORR: In your experience, are a lot of the disputes that you find yourself acting as

arbitrator on just cosmetic defects?

Mr Moloney: Yes.

MS ORR: It is not the actual structural—

Mr Moloney: No. There is a massive stigma out there on certifiers and I just do not think it is anything. I think the certifier has to check the structural elements of the building and has nothing to do with paint or windows or doors closing. It is to make sure that the steel is in the concrete, that the frames are built correctly and have the tie downs and that the frame is not going to go anywhere. It is not that the carpenter has not shaved a door properly and it is not closing properly or the lock is broken or things like that.

But a certifier is probably more qualified than anyone, besides a builder, to go through and check these sorts of things. It can be a simple checklist that comes from the standards and tolerances guide that they can do. It would take half an hour out of their time to do it.

THE CHAIR: And at what stage—basically at the end?

Mr Moloney: At the end, absolutely.

THE CHAIR: At the end of the build they go and do a defects check?

Mr Moloney: Yes, absolutely. Obviously the builder has—

THE CHAIR: Before the final payment?

Mr Moloney: Yes, absolutely. He has a 90-day defect liability period. The builder has to do a walk through with the client, and the client at the moment is the one checking the defects. The clients have no idea what a defect is. They have no idea.

THE CHAIR: Do other jurisdictions have anything like that or not?

Mr Moloney: It is very similar. Again, we should be leading the way.

MS ORR: You raise the potential conflict of interest by having the builder appoint the certifier or suggest a certifier. Do you think this feeds into the problem?

Mr Moloney: I think that is a no-brainer when it comes to this sort of thing. It is like a builder hiring a plumber to do all his jobs. You get good prices, you know him and you have that relationship there. It is probably a hard one because it is an additional cost to the person purchasing or building the house. But I think the person building, constructing, whatever they are doing, should not be the one. The home owner should be the one engaging the certifier so that there is no conflict of interest there. Bob the builder does not give Joe the certifier all his work. Joe the certifier lets a couple of things slide so that he can keep Bob the builder's work all the time.

THE CHAIR: And we have heard that repeatedly.

MS ORR: The counterargument to that—just playing devil's advocate—is that they are independent certifiers.

Mr Moloney: They are, but not in the real world.

MS ORR: I just wanted to check. You also mentioned contracts. You say in your submission that you believe a large proportion of building disputes arise from a hybrid building contract, particularly those set out by the MBA and HIA.

Mr Moloney: There is one better than the other.

THE CHAIR: Which one?

Mr Moloney: I probably do not want to put it on camera, to be honest. But there is one better than the other. I think MBA's is better. From my point of view, with no legal background whatsoever but being in the midst of this thing, I think the MBA one not so much protects the client more but explains things a lot better than the HIA one.

MS ORR: So it is not necessarily providing more consumer protections.

Mr Moloney: No.

MS ORR: It more clearly states what does and does not—

Mr Moloney: Yes. The smart thing for any client to do would be to go see their solicitor to get a fair dinkum, lock-tight, turnkey contract made up.

MS ORR: This has come up in quite a few hearings. We have had people give a lot of feedback on contracts. There is not a lot of confidence in the MBA and the HIA contracts, from the witnesses that we have had before us. Suggestions have been put forward that there be a standing government contract. Do you have a view on that suggestion?

Mr Moloney: A building contract changes so much that a standardised building contract is probably not the best way to go. I do not know how you would do it. A standard home that is being built on this block is completely different to what is being built on these blocks. Slopes are different, how much goes into it and how much money goes into it are completely different. There are obviously some things you can standardise, but there is a lot that you cannot standardise. That is another big problem that we are seeing in the conflict resolution stage.

THE CHAIR: We are going to have to close it down.

MS ORR: Can I ask one last question. I will be very quick. We have had a lot of people say that, when they have gone back to make amendments to the contracts from, say, the MBA or HIA, for example, there has been no opportunity to change them. Your suggestion was to go and get a good lawyer and change the contract. If that is not an option, how do we get around that?

Mr Moloney: You do not go with that builder if they do not give you that option.

MS ORR: Yes, I can appreciate that, although—

Mr Moloney: If the builder wants to use the MBA contract and does not want to use your contract—

MS ORR: the feedback that we have is that, realistically, if you go to another builder you get the same issue.

Mr Moloney: That is what I am saying.

MS ORR: You are not going to be able to find someone who is going to give you an alternative.

Mr Moloney: You are protecting your biggest asset you are ever going to build. You are building a million dollar home; you do not want a standardised building contract that does not really cover you. Any lawyer is going to be fair in the contract to both parties, but it cannot be a standardised contract. It is just incredible.

MS ORR: Okay. I think I get your point.

THE CHAIR: We are going to have to leave it there, I am afraid. Mr Moloney, thank you very much for appearing today. Thank you for your submission. I thank you for your real-world advice, coming from where you do. It has been very interesting. You will be sent a copy of the draft *Hansard* by the secretary, Hamish, just to check for accuracy. If we then have any follow-up questions or anything further, we may be back in touch. Thank you very much.

Mr Moloney: Perfect. All right. Thank you.

The committee adjourned at 11.24 am.