Broken Promises, Blame Games and Balconies

Interim report commissioned by the Office of the Building Commissioner

NSW GOVERNMENT

WEIR Legal & Consulting

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Foreword

This is an interim report about the defects experienced at the Otto 2 development in Rosebery, NSW.

The owners' corporation recently accepted a substantial monetary settlement from the developer to enable it to attend to defects described in this report. We will conduct further enquiry over the coming year to observe the progress of the Otto 2 owners corporation in remediating the building's defects and to record the ongoing proceedings that may have occurred since.

Otto 2 provides some insights into the lived experience that many other apartment owners suffer in buildings with defects.

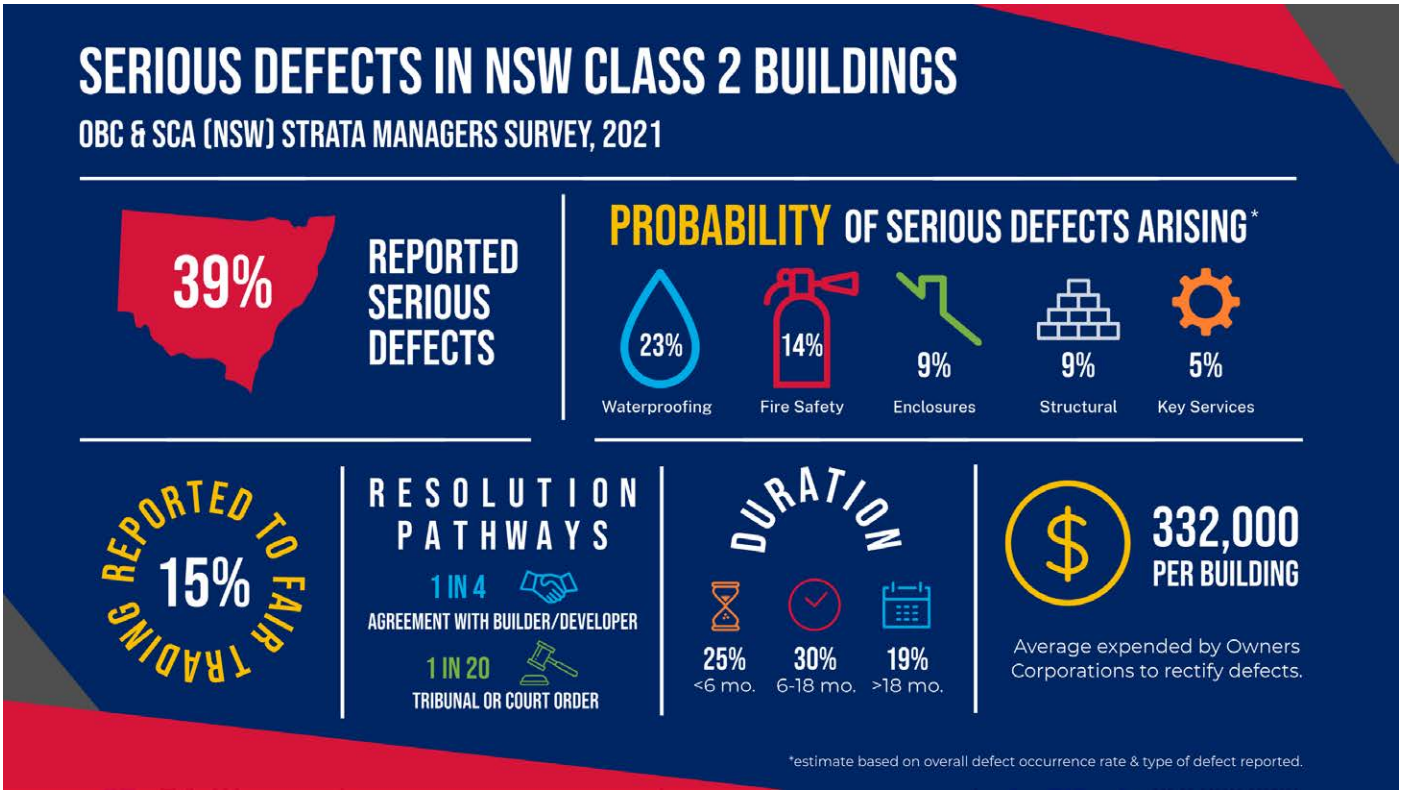
This report is our first case study. We have seen many comparable situations. There will be more case studies. These will be used to help inform future reforms and to shine a light onto the roles that the many players involved have played. We will use these case studies to raise awareness and industry capability. We will also look to hold developers accountable for their defects.

This report comes three years into the building reforms being implemented in NSW to lift the compliance of and public confidence in residential apartment buildings. At the start of this journey, the focus was on new builds. That focus was expanded to legacy buildings with serious defects during 2022.

In response, Project Intervene was launched in November 2022. Using the *2021 NSW Residential Apartments (Compliance and Enforcement Powers) Act (NSW),* Project Intervene specifically targets developers of buildings with legacy defects.

In 2021, research was conducted by the Office of the Building Commissioner (OBC) in collaboration with Strata Community Association (NSW) into the incidence of serious defects in recently completed strata buildings across NSW.[1] We found that only 15 per cent of apartment building owners lodge a complaint with NSW Fair Trading seeking assistance with defects.

It is acknowledged that the performance of NSW Fair Trading as regulator may not have been as effective in getting defects resolved in the past as may have been desirable. This is changing as new powers and capabilities are implemented.



1 "Research report on serious defects in recently completed strata buildings across New South Wales", Construct NSW, Improving consumer confidence, September 2021. See https://www.nsw.gov.au/building-commissioner/building-and-construction-resources/research-on-serious-building-defects-nsw-strata-communities.

Our goal is to increase consumer confidence to engage with NSW Fair Trading in parallel with any other actions that are appropriate for building owners to pursue. We are hopeful that the early successes of Project Intervene will encourage more strata communities to engage with NSW Fair Trading earlier in the journey of getting their serious defects addressed. We hope to help mitigate the time and expense to all parties in having serious defects remediated. This report shows the experience of the Otto 2 owners and evidences the need for a better way in future.

For example, the Otto 2 certifier on this development charged $41,000 for the work. Following the introduction of the Certifier Practice Standard in mid-2020, the certifier has indicated that he would now charge $340,000. This would mean that, the cost of the person certifying the job would have risen from $300 per unit (there are 143 units in the development) to, if done today to meet the required standard that applies in NSW, $2,377 per unit.

Does this mean that the reforms have increased the cost of construction?

No. By the time the settlement amount was paid the owners had spent more than $750,000 in legal and expert fees. That amounts to about $5,200 per unit. Litigation has simply shifted the cost of non-compliant and or compromised construction to the purchasers in the Otto 2 development. In addition to the unit owners paying legal and expert fees, the developer and builders also report paying similar legal fees, bringing the total legal fees across all parties to about $2.5 million, totalling $17,500 per unit all up.

What's more, the building was finished in mid-2015, defects in the balconies were reported on in 2018 and owners were asked not to use their balconies in late 2019. As at Febuary 2023, the balconies have not been fixed. That is a long wait to use your balcony.

David Chandler OAM
NSW Building Commissioner

Executive summary

This case study was commissioned by the Office of the Building Commissioner (OBC) as part of the Construct NSW reform strategy. It provides research into the experience of some customers who purchase newly constructed apartments in NSW. The case study examines the management of defects in the development known as Otto 2 and in doing so, the conduct of various parties involved including the developer, builder, the owners corporation and its various consultants and advisors.

Otto 2 has been chosen because it was one of the first cases where the OBC used powers under the *Residential Apartment Buildings (Compliance and Enforcement Powers Act) 2020 (NSW) (the RAB ACT)* to intervene in what had become a protracted dispute about defects. Whilst some who participated in the case study questioned whether the involvement of the OBC was the catalyst for the confidential settlement between the owners and the developer, others are sure that without this intervention, a settlement would not have been reached.

The case is also one where the builder became insolvent more than three years after litigation about alleged building defects commenced and after significant legal costs had been incurred by all parties. This is not uncommon in building disputes, particularly where apartments are involved. The case study considers the actions that led to the insolvency and position then taken by the developer, a special purpose vehicle who chose to remain solvent and resolve the matter through settlement.

Some features of the case study worth highlighting include that the builder underwent a restructure a few months prior to completion of the project, the result of which was that it would no longer enter into building contracts and would not have the capacity to undertake building works. Any works to complete existing projects or respond to defect rectification would be undertaken by a different entity with two of the same directors. That entity was owed over $1 million by the time the builder went into liquidation, five years later. A similar amount was owed to the trustee of trusts for the four directors. This arrangement meant that even before the build was complete, the builder and these other entities were structured in a way that would allow the builder to be put into administration with limited assets, leaving behind debts and liabilities.

A former director of the builder insists that the builder would not have had to go into administration had it not incurred over $1 million in costs, including legal fees, disputing defects with the owners' lawyers. It alleges the lawyers were unreasonable and the dispute became irreconcilable. This was denied by the owners we spoke to, who claim the builder obfuscated, would not return to rectify defects and when it did, it did not do so properly.

In addition to legal proceedings in the Supreme Court of NSW under the *Home Building Act 1989 (NSW) (the HBA Act)* relating to the defects dispute, in the wake of the builder going into administration the owners brought an action to dispute the appointment of the administrators and also commenced proceedings against 36 parties under the *Design and Building Practitioners Act 2020 (NSW)* but ultimately proceeded against only five. Some owners reached out to the OBC for help, but when the OBC initially offered assistance the owners corporation refused.

Gaining participation of lot owners in the case study process was a challenge. Nevertheless, those that did participate provided a perspective that confirms that apartment owners are vulnerable and their wellbeing is impacted by these situations. They are often dissuaded from making complaints to NSW Fair Trading because they fear the value of their homes may be affected. The owners lawyers agreed to participate, attending two meetings for over three hours, however, they later disputed that they had given consent to include any information they had shared during those meetings.

The decision to publish this case study and the implications for the owners was balanced against the need for transparency and the public interest in educating stakeholders about the experience of defects litigation in the apartment sector. Many people purchase apartments post construction having had limited disclosure about defects history. Buyers need to undertake due diligence but they also need to be given transparency over the true condition of apartments and any defects disputes that have occurred.

Having endured almost six years of litigation, lawyers, defect reports and inspections, this matter is not yet over. The owners' corporation remains in litigation with subcontractors. Some defect rectification has commenced but the balustrades are yet to be rectified and it remains to be seen whether the many thousands of dollars each owner has paid out for lawyers and consultants will be repaid.

Given that this experience is not yet over, the OBC intends to continue to monitor this project to observe how the owners progress with remedying the alleged defects and the extent to which the settlement funds are directed towards ongoing litigation. It is hoped that with ongoing participation of those involved a final report can be prepared in about 12 months time when an assessment of the outcome can be made.

A discussion of reforms or other actions the NSW government could take which may improve outcomes for owners of apartments is included in Part 3 of the case study. Whilst recognising that there have been significant regulatory reforms over the past three years in NSW already, the litigation culture in NSW may remain for some time given the number of legacy buildings in the system. This will unfortunately allow the businesses of strata managers, lawyers and defects consultants (acting for all parties) to continue to flourish at the expense of apartment owners.

Key reasons why building disputes involving strata developments are so prevalent in NSW are: the two year time limit on bringing claims for breach of warranties concerning non-serious defects; the inherent challenges that come with having multiple and diverse owners making decisions about litigation; and the adequacy of resources available in the Tribunal, Courts and dispute resolution services managed by government. This is a very complex knot to untangle. NSW Governments research shows that 39 per cent of recently constructed apartment buildings have one or more serious defects. Proposed regulatory reforms, Project Intervene and market based initiatives such as iCIRT and latent defects insurance should have an impact over time. However, there is likely to always be defects in apartment buildings.

The challenge is reducing their number and seriousness but also ensuring that trustworthy developers and builders return to remedy defects in a timely and effective manner. This may be assisted if the reforms are able to disrupt the litigation culture evident in this case study where the parties are led to focus time and money on the legal battle rather than on getting on with rectification of the defects.

This case study has provided an opportunity to deep-dive into the issues plaguing recently constructed strata developments in NSW enabling learning and reflection. To that end, sincere appreciation is extended to all those who gave their time and were willing to participate in this case study.

About the author

Bronwyn Weir is the Managing Director of Weir Legal and consulting. Bronwyn specialises in advising government regulators on operation and regulatory practice and is known for her expertise in building regulation. In 2017 Bronwyn co-authored the Building Confidence Report with Professor Peter Shergold which was commissioned by Ministers of Australia's nine jurisdictions. She continues to advise Australian governments on building regulatory matters. Bronwyn also advises governments on a range of policy and regulatory matters in including, health, education, water, and environmental regulation.

Introduction

Terms of reference

The terms of reference for this case study were to:

- Set out the nature of the project including the structuring used by the developer, owner and builder
- Examine what occurred after occupation including the identification of alleged defects, how the developer and builder responded and the legal processes that followed
- Consider the actions of the builder leading up to its insolvency
- Consider the involvement of the City of Sydney
- Document the experience of the owners corporation throughout.

The purposes of the case study are to understand what occurred, how it could be improved and what regulatory reform or actions could influence better outcomes.

Process for development of the case study

The process for developing the case study was to review documents held by the OBC in relation to the Otto 2 development and invite a range of parties involved to participate in a meeting to hear their perspectives. In these meetings people were asked to speak about:

- Their involvement in the project
- What, in their opinion, were the key influencing factors and events
- How could things be made better for others in the future.

An opportunity for written submissions was also offered to the City of Sydney (Council) on request and to the lot owners with permission from the owners' corporation committee.

Participation in the case study process was voluntary. Those that participated were advised that they were not obliged to answer any questions. They were told a report on the case study would be published and that anything they said may be referred to in the report. It was explained that unless they made a specific request for a particular comment or answer to remain confidential, it could be included in the report. An opportunity to view a pre-final draft of the report was also given to participants. Having participated in two meetings, lawyers for the Otto 2 owners corporation later disputed that they had given consent to include any information they had shared during their meetings with us. Many of the comments made by Chambers Russell that were to be included in this report provided an alternative perspective to the views expressed by others and would have been beneficial for readers to see. However, as a result of the position that has been taken, all information they provided during our meetings was removed from this report.

Details of people contacted for a meeting and those who participated are listed in Appendix A. The only exception to the above position is that the names of individual lot owners have been withheld.

The case study is set out in three parts, namely:

- **Part 1** – a detailed account of the facts and circumstances
- **Part 2** – a discussion of key issues including further detail about what participants shared
- **Part 3** – comments on what regulatory reform or actions could influence better outcomes

Glossary

Term	Meaning
Broune Report	Defects report issued in August 2018 and commissioned on behalf of Otto 2, issued by Broune Group Consultants Pty Ltd
BWRO	Building works rectification order issued under the *RAB Act*
Capital	Capital Corporation (Rosebery Terrace) Pty Ltd as trustee for the Rosebery Terrace Property Trust, being the special purpose vehicle established by Capital to act as the developer for the Otto projects
Council	City of Sydney
CPS	Practice Standard for registered Certifiers for class 2 buildings
DBP Act	*Design and Building Practitioners Act 2020 (NSW)*
EPA Act	*Environment Planning and Assessment Act 1989 (NSW)*
Home Building Act	*Home Building Act 1989 (NSW)*
Icon	Icon Constructions Australia (NSW) Pty Ltd
Icon Group	Icon and its other companies with similar directors or baring the Icon name, established after April 2015 and including Icon NSW
Icon NSW	Icon Co (NSW) Pty Ltd
JVs	Joint ventures
McCormacks	McCormacks Strata Management
NCC	National Construction Code
OBC	Office of the Building Commissioner which sits within the Department of Customer Service
OCC	Owners corporation committee
PCA	Principal Certifying Authority
RAB Act	*Residential Apartment Buildings (Compliance and Enforcement Powers Act) 2020 (NSW)*
SCLC	Sydney Christian Life Centre
SPVs	Special purpose vehicles
TSD	Transition services deed entered into between Icon and Icon NSW

Part 1

Facts and circumstances

Part 1 – Facts and circumstances

About the project

The Otto development comprises several buildings constructed over a common podium and basement. The development was constructed as two separate projects known as Otto 1 and Otto 2 with each having its own separate strata plan and owners corporation. The two owners' corporations operate independently. They had different strata managers and appointed different lawyers and consultants and their responses to defect rectification issues were independent.

This case study concerns Otto 2 only, however, where relevant and for context references are made to Otto 1. Where there is a reference to actions taken by Otto 1 or Otto 2, this refers to the actions of their owners' corporations.

There are 143 apartments in Otto 2. Each apartment has its own private balcony. The four towers that make up Otto 2 have a rise in storeys of either three, six or seven. Common areas comprise landscaping, recreational spaces, carparking, plant rooms, foyers, lifts, and shared access ways. The development was constructed between December 2013 and mid-2015.

The owner and developer

The owner of the land prior to its development was the Sydney Christian Life Centre (SCLC). SCLC purchased the land from the NSW Government in about 2010. SCLC had proposed to develop the site as a church and parklands. This was opposed by a local action group. SCLC considered selling the land but indications from the market were that it would only attract a sale price several million dollars below what had been paid for the site. SCLC had no expertise in residential development. Through its networks, SCLC began discussions with development entity Capital Corporation, an experienced developer with a strong reputation for facilitating residential developments for landowners, who were often religious and other community organisations.

Capital Corporation established a special purpose vehicle (Capital) to act as the development entity. Under a joint venture between Capital and SCLC, SCLC would supply the land and Capital would arrange all aspects of the development. This included obtaining all necessary development approvals, arranging finance, selecting a builder, overseeing the building contract, all marketing activities to sell the apartments and post construction management of defect claims and rectification. Ultimately, SCLC and Capital would share the profits arising from the development with neither party intending to retain ownership of any lots. Under this arrangement, Capital gave SCLC an indemnity from any legal liabilities arising in relation to the development.

The project was funded by the National Australia Bank under a traditional funding arrangement whereby the bank applied its risk criteria including approving the builder and the requirement for a certain level of presales.

Selecting the builder

During the development approval phase for the work, Capital began liaising with Southern Cross Constructions. This entity was later sold to form Icon Constructions Australia (NSW) Pty Ltd (Icon). The parties proceeded under an early contractor involvement model. Icon was established in 2012 with directors Ashley Murdoch, Louis Raunik, Nicholas Brown and Julian Doyle.

Capital and Icon had not previously worked together but individuals involved in each entity were known to each other from previous projects. Icon provided indicative costings and it was decided not to tender the job to other builders. Icon was responsible for sourcing reputable trade contractors to provide estimates for Otto 1. All estimates from trade contractors were provided to Capital. Capital and Icon then agreed on the price for each trade. The same trade prices were then applied to Otto 2.

In 2013, Capital entered into separate design and construct contracts with Icon for Otto 1 and Otto 2. The contract sum for the Otto 2 project was approximately $41 million. SCLC had no involvement in the selection of the builder, relying solely on the advice of Capital. Icon was a licensed builder able to enter into contracts not requiring home warranty insurance. Director, Ashley Murdoch was the nominated supervisor for the projects. His licence expired in October 2018.

The builder and other entities

Icon continued to enter into contracts to construct other apartment buildings in the Sydney area until April 2015. Just prior to April 2015, Icon Co (Vic) Pty Ltd and Icon NSW[2] purchased assets of Icon and Icon Co Pty Ltd for $635,148. The sales agreements reflected the purchase of Icon by Japanese Construction company, Kajima Corporation. A number of entities sharing the Icon name were established (Icon Group).[3]

The Icon Group rapidly expanded their business in constructing apartment developments in the Sydney area. In addition to the sale of assets, Icon and Icon NSW entered into a transitional services deed (TSD) under which Icon NSW would provide services to Icon to enable Icon to complete existing projects or undertake defect rectification works on completed projects.[4] Two of the four directors of Icon, Ashley Murdoch and Nicholas Brown, were also directors of Icon NSW.[5]

Once Icon stopped entering into contracts in April 2015, any work done to complete projects or undertake rectification works was carried out by subcontractors. The TSD arrangement meant that once existing projects were completed and Icon's finances were depleted, Icon NSW was funding defect rectification work on Icon projects, making it a significant creditor when Icon later went into administration.[6]

The construction phase – December 2013 to July 2015

The Otto 2 project was constructed between December 2013 and 24 July 2015 when the occupation certificate was issued.

The Principal Certifying Authority for both Otto 1 and Otto 2 was Peter Antcliffe who was then working with Building Certificates Australia Pty Ltd. Antcliffe says he had never worked with the builder or developer prior and that the project came to him on referral from fellow certifier, Lee Kippax. Kippax had worked for certifier Lyall Dix. Kippax joined Building Certificates Australia after Lyall Dix's accreditation as a certifier was suspended.

Antcliffe says once he signed the construction certificate he had carriage of the two projects, undertaking all inspections himself. Antcliffe says he conducted about ten inspections on each of the two developments, with most of these occurring in the last three to four months of construction. He says whilst external wet areas were not a mandatory inspection, he would have observed the balcony works during his walk throughs of the site. Antcliffe says there was not anything unusual about the project and he followed all the practices he would usually follow but he notes that as a result of the reforms in NSW, his role and practices have changed significantly since this project.

Post construction – engaging strata managers and consultants

Towards the conclusion of the building work, Capital appointed PRD Nationwide as strata managers for Otto 1 and Otto 2 for a term of one year. After the first year, Otto 2 appointed McCormacks Strata Management (McCormacks) as their strata managers. It is alleged by owners that this change occurred because PRD were unresponsive, including in relation to complaints about defects. Soon after McCormacks were appointed, a general defects report by AE&D Consulting was commissioned identifying a small number of defects. Chambers Russell Lawyers were engaged in early 2017 to provide legal advice on defect rectification.

Legal proceedings commence – mid-2017

Otto 2 commenced legal proceedings in NCAT just prior to the two year statutory limitation for bring claims for minor defects[7], in mid-2017. Their proceedings were against Icon and SCLC for defective building work and breaches of warranties under the *Home Building Act*. The proceedings were later transferred to the Supreme Court in mid-2018.

2 Icon NSW was the builder of the Opal Towers development in the suburb of Sydney Olympic Park.

3 The Report of the First Creditors Meeting lists ten related corporate entities to Icon, six of which are trustees or managers of a partnership of one or more trusts.

4 Referred to in the Report of the First Creditors Meeting.

5 Brown and Murdoch resigned from the directorship of Icon NSW, shortly after Icon went into administration.

6 The Report of the First Creditors Meeting estimated that at the time it went into administration, Icon owed Icon NSW $1,065,272.

7 The statutory time limit under the HBA to bring claims for 'major defects' is 6 years from the date of completion.

Between March and June 2017, Otto 2 obtained five defects reports which were filed in the NCAT legal proceedings. In August 2018 a further defects report commissioned on behalf of Otto 2 was issued by Broune Group Consultants Pty Ltd (Broune Report). The Broune Report includes a CV for Mr Roderick Broune stating that he has 37 years' experience as a structural engineer. The Broune Report identified various structural defects including that the balustrades of a small number of apartments were not structurally sound.

The Broune Report was provided to Icon. Icon sought advice from an engineer and replied in December 2018 requesting access to undertake physical testing of the balustrades. According to the former Icon director, access was denied until December 2019.

During this time, the Icon and the owners were also negotiating a Memorandum of Understanding (MoU) which would set out the basis on which Icon could undertake rectification works to common property. The MoU was agreed in July 2019.

Media attention, the City of Sydney and the OBC – October 2019

In about October 2019, Otto 2 issued a notice to three lot owners telling them to restrict access to their balconies due to safety concerns. Media interest in the development arose with articles published about the unsafe balustrades reporting that the Otto development had the same builder as Opal Towers.[8]

A media outlet contacted Council about the balconies which prompted it to investigate the allegations. The Broune Report was provided to Council as part of its investigation. Council officers inspected the property, which led to Council issuing an order to Otto 2 in November 2019. The order referred to the Broune Report and stated that the balconies were potentially unsafe. It said the "infill panels do not provide adequate edge cover and dimensions of the supporting posts were inadequate." The order said, "all owners and occupiers from the first floor up were to be notified that they must cease access to all balconies until they had been certified to be of sufficient strength and rigidity."

The Office of the Building Commissioner (OBC) was established in August 2019. In the weeks that followed it began engaging with the Icon Group about Opal Towers and the Otto development. In early November 2019, the OBC asked Icon to provide an update. Business Development Manager David Alessi responded promptly on behalf of the Icon Group advising that the balustrades had been certified as compliant in 2015 saying it was a standard system installed on in excess of 5,000 apartments in Sydney. Alessi said given this, the action of Council "seems misplaced". He said "there is no current definitive evidence that there are issues with the balustrades" but to alleviate concerns several months ago Icon had proposed physical testing and had been awaiting a response from the owners corporation. Alessi said access had now been agreed and Icon would carry out testing as soon as possible.

In January 2020, Icon issued a draft balustrade rectification plan to Otto 2 in which it proposed to replace all balustrades. Experts and legal representatives had meetings about the balustrade rectification plan over several months.

In the meantime, on 6 March 2020, Council issued an order to Otto 2 requiring it to "repair all balustrades and have them certified as compliant with relevant Australian Standards."

Negotiations remain unresolved – 2020

In April 2020, Julian Doyle, director of Icon, provided the OBC with an update on their projects. In relation to Otto, Doyle advised that they were progressing negotiations with the owners corporation about the rectification method for the balustrades. Doyle says he spoke to the OBC insisting that Icon was ready and willing to rectify and had proven its commitment to its work through its response to Opal Towers where it had spent over $30 million on defect rectification. Doyle says he told the OBC that Chambers Russell Lawyers were making it impossible for them to progress rectification.

At this time the OBC had no power to intervene, the *RAB Act* was yet to commence. However, the OBC wrote to Chambers Russell Lawyers saying that Icon had told him that negotiations had stalled and offering to facilitate progress. Chambers Russell Lawyers responded promptly saying they did not accept that any delay was caused by their client and that the owners corporation were resolving issues. They said if they needed assistance they would reach out. The OBC followed up via email again in late June and were told by Chambers Russell Lawyers that they would get in touch if instructed to do so.

8 https://www.9news.com.au/national/otto-rosebery-building-safety-concerns-opal-tower-builders-sydney-nsw-news-australia/848cbaf4-02cd-46d5-9c02-f452b3f3c01d (accessed 1 February 2023) and https://cityhubsydney.com.au/2019/10/building-safety-on-the-edge/ (accessed 1 February 2023).

Also in late June 2020, a balustrade rectification plan was agreed 'in principle'. The June plan proposed the replacement of all balustrades and rectification of tiling and waterproofing adjacent to the balustrades. The document does not identify which Icon entity would undertake these works. It bears the logo 'icon.co' and says "Icon shall design, fabricate, supply, install, certify and warrant all the works included in the scope". The work method included replacement of all aluminium balustrades and installation of waterproofing and tiling adjacent to the balustrades. The prototypes and works were to be regularly inspected by waterproofing and structural experts appointed by the owners corporation. The waterproofing under the first two rows of tiles was to be inspected and if inadequate, further tiles would be lifted until adequate waterproofing was identified.

Despite this 'in principle' agreement balcony rectification works did not proceed. Waterproofing expert Paul Ratcliff was engaged by Chambers Russell Lawyers for the owners corporation to assist in negotiations. Ratcliff reports that he agreed with Icon's rectification proposal. However, a second expert, RHM, was engaged to undertake destructive testing on approximately 20 balconies. Ultimately, the impasse on the rectification methodology became irreconcilable and according to Doyle, was a catalyst for Icon entering into administration.

It was reported that Icon was undertaking some rectification works over these months. Owners we spoke to said that Icon was given access to attend to fix defects but frequently they did not attend, or they attended and attempted to fix defects but did not actually fix them.

In August 2020, a report issued by MCD Fire Engineering identified that Otto 2 had combustible aluminium composite panels. The report noted the product as Alpolic FR which it said was not a banned product and that the cladding may be able to be retained under a performance solution. About one year later, in June 2021, Council issued Otto 2 with a fire safety order in relation to the use of combustible cladding. Whilst the owners corporation of Otto 2 are eligible to participate in Project Remediate[9], they have not opted into that program.

Icon goes into administration – November 2020

In September 2020, Icon changed its name to ACN 158 838 852 Pty Ltd and shortly after, on 1 October 2020, director, Julian Doyle advised the OBC via email that he was leaving the Icon Group. He advised of the names of the new directors who would be taking over. In relation to the Otto 2 project, he advised that they were very close to finalising the details for the prototype balcony.

A month later on 4 November 2020, Icon was placed into voluntary administration. Ben Verney of Grey House Partners was appointed as the administrator. That day Icon director, Julian Doyle wrote to the OBC and advised in an email that:

- Icon's name had been changed to ACN 158 838 852 "so does not include the name 'Icon' when placed into administration"
- That Icon NSW, Icon SI (Aust) and Kajima have no obligations or liabilities for projects of Icon and that these entities have performed work for Icon and are creditors that are owed money by Icon
- That insurers have been notified and a claim can be dealt with through those channels via the administrators appointed
- That Icon has no known debtors and have resolved all legacy projects excluding 'Rosebery' (i.e. the Otto projects)
- That Icon and Kajima have been actively and unsuccessfully trying to deal with the owners' corporation since August 2018 and have incurred costs including legal costs, in excess of $1 million. They said "Chambers Russell, the OC lawyers had proven to be difficult."
- There are $400,000 in bank guarantees sitting with the developer which will cover the excess for the insurance claim which will ultimately pay for the outstanding rectification
- The continuing Icon entities are committed to the ongoing support of the NSW Department of Customer Service.

9 Project Remediate is the NSW Government's assistance program offered to eligible owners' corporations with buildings that have combustible cladding that requires removal.

There were media reports on the administration.[10] The Report of the First Creditors Meeting, dated 1 December 2020 stated that:

> *"The Directors attribute the failure of the Company to a multitude of warranty and defects claims, legal proceedings relating to construction projects completed 4-5 years ago, and impediments preventing rectification works.*
>
> *I have been advised by the Directors that the main contributing factors to the failure of the Company was an inability to manage and address the large volume and associated costs arising from an increasing number of alleged warranty and defect claims, including legal costs associated with defending legal proceedings relating to such claims. The Directors also claim a number of impediments prevented rectification works from being carried out. I have not attempted to verify these claims at this time.*
>
> *From March/April 2015, the Company was not generating an income from its normal trading operations. After this date, the Company was reliant on related parties to contribute funds to enable the Company to cover its legal costs together with the costs of rectification works associated with those claims for which the Company accepted liability. Such funding contributions ceased shortly prior to my appointment. This led to the Company's insolvency."*

The Report of the First Creditors Meeting also notes that Icon had incurred legal costs initiating claims against third party defendants (i.e. subcontractors). An annexure to the report summarises the status of defects claims on all Icon projects. Thirteen projects are listed, seven of which (including Otto 1 and Otto 2) are listed as having Supreme Court or NCAT proceedings on foot at the time of entry into administration.

The Report identified creditors' claims totalling in excess of $31 million as follows:

- Related parties – estimated claim $1.16 million of which about half was owed to a Trustee of various trust funds bearing the names of the four directors. The other half was owed to Icon NSW
- Trade creditors – estimated claim $199,635.23
- Contingent Creditors (which included Otto 1 and Otto 2) – estimated claim $30.44 million
- Social Club creditors – estimated claim $1,874.

In mid-February 2021 Icon was placed into liquidation. Prior to this and on legal advice, the owners corporation initiated legal action to object to the administrator. This resulted in Liam Bailey and Christopher Palmer being appointed as administrators and later as joint liquidators. Their report dated 25 February 2021 valued the creditor's claims at over $34 million with $10.4 million attributed to Otto 2.[11]

A news report refers to the liquidator's report as being critical of Icon directors Nick Brown and Julian Doyle for not providing insurance information. The article also reported that representatives of the Icon Group said that the company in liquidation was not related to the Icon Group and that whilst they were under no obligation to do so they would continue to work constructively with stakeholders.[12]

RAB Act powers are engaged – January 2021

In January 2021, the OBC notified the building manager, Three Property, that it intended to conduct an audit of Otto 2 using its recently enacted *RAB Act* powers.[13]

The OBC communicated directly with Capital about what action it proposed to take to resolve the defects at Otto 2. In February 2021, Capital advised of the status of litigation saying that various adjournments of the matter had been allowed for the parties to negotiate and whilst expert reports had been served, there was no date for a hearing set.

10 https://www.smh.com.au/national/nsw/builder-s-collapse-leaves-apartment-owners-fearing-alleged-30m-defects-bill-20201228-p56qip.html and https://insolvencynewsonline.com.au/proof-of-debt-decisions-could-cost-victorian-a-va/ and https://www.smh.com.au/national/nsw/six-year-nightmare-builders-phoenixing-to-avoid-fixing-apartments-20191129-p53ffc.html (accessed 1 February 2023).

11 Report of O'Brien Palmer Insolvency and Business Advisory dated 25 February 2021.

12 https://www.theaustralian.com.au/business/property/opal-towers-icon-in-liquidation/news-story/75745769949ad883f45f671bdd365262 (accessed 1 February 2023).

13 The *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* commenced in September 2020 allowing the NSW government to inspect any apartment building under construction or that had been constructed in the past six years. The *RAB Act* powers included the issuing of defect rectification orders on developers and builders.

Around this time Council also issued a further order requiring owners to erect wall mounted warning signs in lift lobbies, lifts and adjacent to fire stairs. These were intended to alert occupiers and visitors of the unsafe balconies.

In May 2021, the OBC finalised its audit report for Otto 2. Under the RAB a building works rectification order (BWRO) can be issued where there are 'serious defects'. That term is defined broadly. The OBC found serious or potentially serious defects in all five areas audited – fire safety, waterproofing, structural, building enclosure and essential services. These findings were consistent with the types of defects found in many of the inspections by the OBC for buildings constructed in the past six years. Serious defects listed in the audit report included:

- Roof top waterproofing defects
- Uncontrolled water entry to the basement carpark
- Podium level courtyard planters waterproofing defects
- Balcony waterproofing defects
- Backing to glazed spandrels deteriorated exposing insulation to UV
- Location of basement fire hose reel was impacted by mechanical ventilation equipment
- Confirmation of aluminium balustrade defects as identified in the Broune Report
- Mechanical ventilation system in the plant room was not adequately shielded
- Several instances of burnt out downlight fittings which were not approved for sale in NSW
- Electrical wiring and piping had not been insulated to protect it from deterioration from UV.

The OBC had various discussions with representatives of SCLC and Capital Corporation who were willing to cooperate in the rectification of defects.

In late May 2021, SCLC and Icon NSW were each given notice of an intention to issue a BWRO under the *RAB Act*. Both parties objected in lengthy written replies. SCLC's lawyers, Sparke Helmore, argued that a BWRO should not be issued whilst there were court proceedings on foot as this would interfere with the litigation process and breach their rights to natural justice. Icon NSW's lawyers, Minter Ellison, asserted that they were not the developer and had only subcontracted to Icon to undertake supervisory work. They said that none of the work they did as a subcontractor to Icon was work that is alleged to be defective.

In June 2021 after further investigation and collection of evidence through the issuing of notices to produce, the OBC proceeded to issue BWROs to SCLC and Capital. Capital responded in July saying it intended to comply with the rectification order and was in the process of engaging consultants and inspecting works to develop a scope of works. The BWRO was published on the online register of building works orders by NSW Fair trading.

A BWRO was also issued to Icon NSW in August 2021. Icon NSW's lawyers responded by immediately commencing legal proceedings disputing the order and seeking urgent relief. This resulted in the voluntary withdrawal of the BWRO five days later. Some of the events surrounding the issuing of the BWRO were reported by the media.[14]

Meanwhile, in June 2021 Otto 2's lawyers had made a request under the *Government Information (Public Access) Act 2009 (NSW)* to the Department of Customer Service seeking information about the responses to the BWRO.

At around the same time in July 2021 Chambers Russell Lawyers commenced a second Supreme Court proceeding against 36 parties under the *HBA Act*, *DBP Act* and Australian Consumer Law. After seeking leave from the court to extend the time for service of the new proceedings, in December 2021 only five of the listed parties were served with the proceedings.

In August 2021, the OBC met with the owners corporation committee to advise it on the *RAB Act* powers and the undertakings power that it was proposing to raise in its discussions with Capital.

14 https://www.abc.net.au/news/2021-08-11/opal-tower-builder-denies-link-to-rosebery-otto-complex-defects/100355622 (accessed 1 February 2023).

Settlement with the developer

In the months after the BWRO was issued, Capital, SCLC and the owners corporation began meaningful negotiations towards a settlement.

In August 2022, the OBC was advised by Otto 2 that a confidential settlement had been reached with Capital and SCLC resulting in proceedings against these entities being withdrawn. The owners corporation requested that the BWRO issued to these parties be revoked. The OBC proceeded to revoke the BRWOs.

On 2 August 2022 the OBC received the following email:

> *"...I would like to express sincerest gratitude for all the assistance and support your office have provided to the owners over the past year to achieve this great settlement result for us.*
>
> *...we have all witnessed how hard you have fought for us during this process of negotiation with not only the Developers but also our Builder, Icon. After years and years of ... legal cost expert investigations, all the owners were very frustrated with the lack of progress and without any end in sight by deploying the legal strategies recommended to the owners.*
>
> *Fortunately [the OBC] stepped in in 2021 and had offered the owners an alternative solution to resolve this ongoing dispute and a practical resolution of our building defects. [I am] extremely grateful and believe we would never have gotten anywhere near this extraordinary outcome with the Developers without the clear direction and hard work [the OBC] has put in for us.*
>
> *We have no doubt that it takes someone like [the OBC] to drive the right outcome for the consumers and for the construction industry in general...*
>
> *All the best and thank you very much..."*
>
> (edited with permission from sender)

The current situation

At the time of completing this interim report (March 2023), almost six years from when proceedings were initially commenced in NSW Civil and Administrative Tribunal (NCAT), no significant rectification work has been undertaken at Otto 2. The balustrades are not rectified and the orders issued by Council restricting access to balconies and requiring rectification remain in place. It is understood that legal proceedings remain on foot against various parties including subcontractors Sydney Balustrades Pty Ltd (in liquidation), the cladding contractor, Sydney Plaster and the external waterproofing contractor, Superseal Group Pty Ltd.

Legal fees incurred by the parties are substantial. There is a reference in documents reviewed to $1 million being spent by the Icon Group and between $750,000 and $1 million by Otto 2. It is not known the amount of legal fees incurred by Capital, SCLC and third parties involved in the litigation.

The value of the alleged defects is unknown. The report of the liquidators valued creditors at over $34 million with $10.4 million attributed to Otto 2.

Council has advised that it is continuing to investigate the response to its orders and may take enforcement action against Otto 2.

Part 2

The issues

Part 2 – The issues

The developer/owner arrangement

The arrangement between SCLC and Capital is an example of where the developer is a joint venture or partnership between an inexperienced land owner and an experienced property developer. Other research into financial and contractual governance across a range of projects has been undertaken by the OBC.[15]

It is well known that the use of special purpose vehicles (SPVs), joint ventures (JVs) and partnerships are common in the property development sector. These are legitimate development structuring arrangements in the right hands. Properly governed, SPVs, JVs and partnerships provide development specific structuring, investment and financing arrangements that are appropriate for the participating parties. The OBC has been calling on all developers to achieve a rating from a regulated ratings agency for their SPVs, JV or partnership in order to provide consumers and other key development participants with a transparent insight into the development sponsors and their counterparty arrangements.

It is also common for the directors involved in a development entity to be directors and shareholders of numerous companies and beneficiaries of trusts. The directors of Capital were Gary Lingard, Greg Taylor and Stephen Grant. These three directors were linked to 116 corporate entities, 72 of which were current.[16]

For Icon the directors were Ashley Murdoch, Louis Raunik, Nicholas Brown and Julian Doyle. Between them, these four directors were directors or shareholders of almost 300 other corporate entities.[17] Murdoch and Brown were also directors of Icon NSW until Icon went into liquidation when they were replaced. Over the period between late 2019 and September 2020 when communicating with Otto 2 and the OBC, communications from the Icon Group referred to “icon”. They made no distinction between entities or reference to the fact that Icon was relying on the services of Icon NSW to operate.

Complex structuring arrangements are common and make it challenging for regulators to undertake enforcement activities, particularly where documents or communications from entities have generic logos or letterheads making it difficult to determine which entity is responsible for the document or communication.

A key issue for governments is ensuring that when seeking to bring accountability to developers and builders through legislation, the definition of the term ‘developer’ is drafted to capture the range of relationships that exist in practice. This is discussed further in Part 3.

It is also important that the nature of related entities and their history is understood when considering the credibility of the entity involved in a new project. The market-led, iCIRT ratings tool is designed to consider related entities as part of its ratings assessment. Whilst iCIRT has been developed by a private entity, the NSW Government has provided public support for the development of the product and to encourage similar products in the market by other regulated ratings agencies. The government has also encouraged builders and developers to get rated.

Developer/builder relationship

Icon was selected to be the head contractor following an early contractor engagement model. Although Icon was the only tenderer for the work, each of the subcontractor’s competitive quotes for Otto 1 were submitted to Capital. The parties then agreed on prices for each trade. Julian Doyle says he recalls the subcontractors being chosen based on the lowest quotes. Icon was allowed to change trade contractors on the basis that where they obtained a lower price, savings would be shared but where they went with a contractor that had a higher price, Icon would have that cost offset against any of its savings. The same trade prices were applied to Otto 2.

This model provided for a degree of competitive tendering amongst trades. This demonstrates the influence developers can have over setting the cost of works, even where there has not been a tender process involving multiple head contractors. Doyle insists that this did not mean the trades engaged were substandard and that he accepts it was Icon’s responsibility to source quotes from competent trades.

15 Construct NSW Improving governance and contracts, Research report on financial, contractual and governance risks for the construction industry, August 2022.

16 Based on Australian Securities and Investment Commission (ASIC) searches conducted by the NSW Fair Trading.

17 The Report of the First Creditors Meeting refers to Murdoch being a director or shareholder of more than 100 companies, Doyle more than 17, Ranuik more than 60 and Brown more than 100.

Capital and Icon said that their relationship during construction was pretty typical. However, Doyle alleges the project ended on a sour note. He says Otto 1 was finished one month after the date for completion under the contract. Doyle alleges there was a verbal agreement between Capital and Icon that liquidated damages payable on Otto 1 could be offset for every week that Otto 2 was finished early. Otto 2 was finished one month early but it is alleged that Capital did not honour the verbal agreement to offset liquidated damages on Otto 1. Capital denies that there was any such agreement and says further that if Icon were rushing to finish because of this alleged arrangement it could only have impacted the finishes within the apartments, not the common property defects that have been alleged.

The Principal Certifying Authority (PCA) Peter Antcliffe, recalls there was immense pressure to issue the occupation certificates for both projects but said it was and continues to be very common for builders and developers to aggressively pursue sign off. He says generally builders will argue against any issues raised, insisting that the certifier accept installation certificates and saying that the installer knows more about what they are doing than the certifier because they are the specialists. Antcliffe also said it is common for a builder or developer to call and email several times a day to ask for the occupation certificate to be issued. Capital explains that the pressure to finish is immense due to the significant borrowing costs that are incurred when the draw down of lending is at its peak towards the end of the job. Each additional day can cost thousands of dollars in financing costs.

It is not possible to say whether the model used to price trades and the alleged incentive to complete Otto 2 early led to defects that would not otherwise have occurred. However, these practices are examples of the significant influence that developers have over projects and the pressures brought to bear on builders and trades. They reflect the well-known culture in the apartment development sector of delivering projects 'cheaper and faster' often at the expense of compliance and quality outcomes.

Post construction, although SCLC was a party to litigation, it and Capital had limited involvement in the negotiations between Icon and Otto 2. The expectation was for Icon to manage defect claims and both Icon and Capital agree this reflected the responsibilities Icon had under the building contract.

After Icon went into administration, Capital became more involved and was responsive to the OBC's insistence that it must take accountability for the unresolved defects. Capital was established for this single development only. It could have also gone into administration once profits were distributed which would have left SCLC standing and no doubt soured the relationship between them. This may also have impacted the reputation of Capital as a trusted advisor to landowners who want to engage in property development projects.

The OBC has sought to leverage the position of developers that are immersed in the business of apartment development and care about their reputation, through its program known as Project Intervene.[18] The objective of this project is to use the *RAB Act* powers to have the developer arrange for remediation of defects giving owners' corporations an alternative to protracted litigation over defects. There are no such programs run by any other government in Australia.

Whilst some may see this approach as punishing ethical developers who have chosen not to fold their special purpose vehicles up and walk away, the objective of Project Intervene is to shift the unfair burden on owners' corporations caused by serious defects and expensive litigation to the parties that have profited most from selling a defective product.

In a similar approach, the UK government recently announced it would require developers to sign a contract with the government requiring them to rectify defects in new and refurbished apartment buildings.[19] Complementary legislation will give power to government to prevent developers who do not sign the contract or do not comply with the contract from being issued with building approvals going forward, preventing them from continuing to do business in the housing sector.

18 https://www.nsw.gov.au/housing-and-construction/project-intervene.

19 https://www.gov.uk/government/news/six-weeks-for-developers-to-sign-contract-to-fix-unsafe-buildings (accessed 1 February 2023).

Structuring and insolvency of Icon

The structuring of the Icon Group is set out in the facts and circumstances in Part 2 above. In summary, Icon's assets were purchased by Icon Co (Vic) Pty Ltd and Icon NSW.[20] Japanese Construction company, Kajima instigated the purchase. Kajima established a number of entities sharing the Icon name (Icon Group) and proceeded to rapidly expand the business.[21] Icon and Icon NSW shared two of the same directors, Anthony Murdoch and Nicholas Brown. These two entities entered into a transitional services deed (TSD) under which Icon NSW would provide services to Icon to enable Icon to complete existing projects or undertake defect rectification works on completed projects.[22] By reason of this restructure, even before the project was completed, a decision had been made that Icon would cease carrying out construction work itself and would stop receiving income from new contracts.

Notably, the amended AS4300-1995 design and construct contract entered into by Capital and Icon required Icon to seek approval of subcontractors from Capital. Capital can't recall being told about the structural changes at Icon and says as far as they were aware they were dealing with the same people and entity.

The OBC began communicating with Icon very soon after it was established in August 2019. The OBC sought updates on various projects including the Opal Towers project and the Otto development. In those communications (including in writing), Julian Doyle insisted that 'icon' were seeking to resolve the disputes on all projects, that they would take responsibility for their work and that they had made a number of changes to improve their practices and minimise defects on future projects. The legal entities involved in the various projects referred to in the communications were different, however representations made to the OBC did not make any distinction between entities or deny legal responsibility for any project on account of the way various entities had been structured. The logo on written communications simply said 'icon'. It was common knowledge that Kajima was providing financial backing to the Icon Group, particularly in relation to Opal Towers.

It was not until November 2020, just before going into administration, that Doyle advised the OBC that the purchase of Icon by Kajima five years earlier was intentionally structured to avoid taking on liabilities of Icon. The OBC promptly spoke to representatives of Icon Group entities who confirmed the legal position. The OBC expressed extreme disappointment, noting that assurances had been given over the previous year that 'icon' would take responsibility for the resolution of defects when all the while the Icon Group knew that it could withdraw support at any time it chose by putting Icon into administration. After the administration commenced, representatives of the Icon Group were quoted in the media saying, "the company in liquidation was not related to the Icon Group and that whilst they were under no obligation to do so they would continue to work constructively with stakeholders."[23]

The OBC acted on these public assurances and verbal assurances given to it by Evan Byrne, the CEO of 'Icon'. It proceeded to use powers under the *RAB Act* against Icon NSW, including issuing it with a building works rectification order issued under the RAB Act (BWRO) in August 2021. These actions were met with an aggressive response from the lawyers for Icon NSW who initiated urgent legal proceedings. This led to the prompt voluntary withdrawal of the BWRO, but the OBC continued to invite the CEO to work with it to resolve the defects at Otto 2.

These events reflect the lack of transparency that can occur when a construction company is taken over by a new entity. Arrangements like the TSD used in this case to enable Icon to continue to participate in defect rectification are not public documents and as it transpired, the assurances given on behalf of the Icon Group were subject to the decisions of its directors who could deny legal responsibility at any time.

It is not unusual for entities to wait a period of two to five years after a company's assets are purchased before winding the company up. This gives the impression that the new entity will take accountability for the liabilities of the old. During those intervening years owners' corporations can accumulate significant legal and consultancy costs chasing and even successfully achieving an award of compensation for defects that may never be able to be recovered. Also commonly, while litigation is on foot, the defects are not being remediated and consequential damage to the building may be exacerbated. The OBC's experience across a range of projects is that owners' corporations are almost always oblivious to the risks of their builder or developer becoming insolvent and them never recovering legal and consultancy costs. Owners are often directed to focus on the fight rather than the fix. The OBC is seeking to disrupt this paradigm through offering owners an opportunity to participate in Project Intervene.

20 Icon NSW was the builder of the Opal Towers development in the suburb of Sydney Olympic Park.

21 The Report of the First Creditors Meeting lists ten related corporate entities to Icon, six of which are trustees or managers of a partnership of one or more trusts.

22 Referred to in the Report of the First Creditors Meeting.

23 https://www.theaustralian.com.au/business/property/opal-towers-icon-in-liquidation/news-story/75745769949ad883f45f671bdd365262 (accessed 1 February 2023).

The experience in this case reflects similar structuring arrangements the OBC is observing on other projects. In particular, on projects where a builder has gone into administration during the project, the OBC has observed that the contracts between the developer and the new entities being brought in to complete the works (who are in no way related to the original builder) contain broad indemnities from liability given to the new entity. The consequence of these practices is that the statutory warranties passing to the purchasers are significantly compromised, potentially leaving them with no one to pursue if there are defects. Where the OBC sees this occurring, they are using the *RAB Act* to prevent the works from proceeding until the contracts are amended to ensure the new entity is taking responsibility for the entirety of the works.

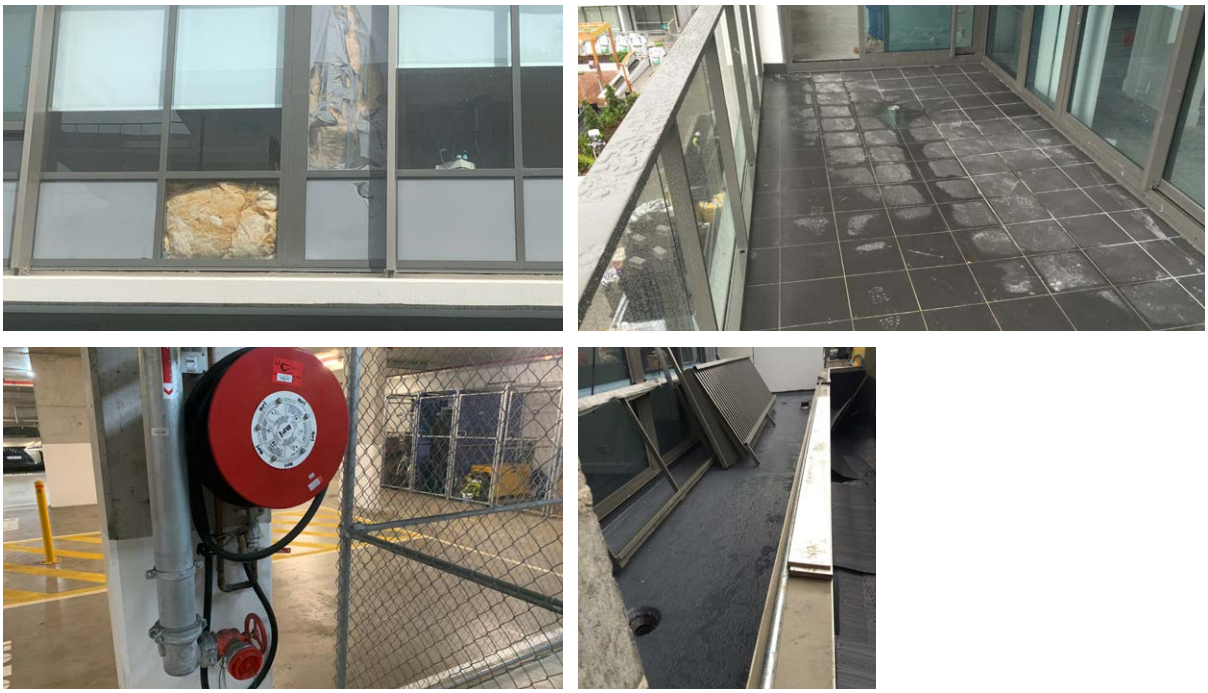
Regulatory responses to insolvency risk are discussed further below in Part 3.

The defects

The multiple reports obtained by Otto 2 alleged a range of defects. A defects schedule dated in August 2020, not long before Icon went into administration and before the *RAB Act* commenced.

In addition to those items identified in the Broune Report, the defects alleged included a range of different types of defects, many of which the OBC have found to be common to apartment developments in NSW:

- Multiple instances of inadequate sealing of fire penetrations
- Exposed steel reinforcement to slab
- Unsealed construction joints
- Missing thermal detectors
- Inadequate fire sprinkler coverage to the basement
- Thermal and smoke detectors had dust covers left on
- Deterioration of waterproofing membrane coatings to the roof and slabs
- Pin holing and blistering in waterproofing membranes
- Intermittent cracking sounds in walls
- Water penetrations and mineral leaching through cracked soffits
- Efflorescence and mineral leaching on garden planters, concrete walls and balconies
- Delaminating colour backed glass façade
- Fan decks missing filters
- Downlights covered by insulating batts.



Photos from the inspections by the NSW Fair Trading and the PCA

In response to several of the alleged defects, Icon's consultant, BCA Logic, said "if this had been detected during construction the matter could have been addressed as a performance solution" or "'Fire and Rescue NSW (FRNSW) did not detect this issue on their final inspection thus were satisfied with installation.'" When the OBC initially asked Icon to respond to the claim of balustrade defects, Icon's David Alessi rejected the allegation saying that the balustrades had been certified as compliant in 2015. These kinds of responses reflect a failure to take responsibility and accountability for defects by seeking to rely on the approval by the certifier or inspection by FRNSW. Whilst the certifier and FRNSW do undertake statutory inspections and are expected to identify compliance issues, the mere fact that they have not, does not mean the defect does not exist.

As for stating that an alleged defect could have been addressed by a performance solution, this reflects an abuse of our performance-based National Construction Code (NCC). Compliance with the NCC can be achieved via a performance solution, a deemed to satisfy solution or a combination of the two. The pathway that is used should be chosen at the design stage and the design should then be constructed accordingly. Under NSW laws a construction certificate cannot be issued for work already performed which means that retrospective performance solutions cannot be justified by the issuing of a construction certificate.[24] Instead, under the 2020 reforms, the variations process set out under the *DBP Act* must be followed before work is done that does not comply with declared approved designs.

Waterproofing expert Paul Ratcliff's inspection of the balconies revealed the waterproofing membrane under the tiles on the balcony was finished below the tiles where they met the balustrade bottom rail. He observed plastic packers under the bottom rails, which he says should have been removed by the balustrade installers. Ratcliff alleges these defects allowed water to get in under the balustrade, corrode the fixings and cause cracking of render adjacent to the balconies.

Ratcliff alleges these issues would have been noticeable during construction and should have been picked up by various people including site supervisors if they were properly overseeing the work of the trades. He says the certifier should also have observed the alleged faults. Antcliffe rejects that assertion. He says external waterproofing is not part of mandatory inspections and that certifiers are not trained in undertaking waterproofing inspections.

Ratcliff says the defects reflect the general incompetence of waterproofing trades he has observed, asserting that they have inadequate training. In particular Ratcliff says the current competencies to obtain a Certificate III in construction waterproofing do not properly cover structures and drainage.

The balustrade contractor, Sydney Balustrades Pty Ltd (ABN 99 128 606 324), was engaged under a design and construct subcontract by Icon. It prepared shop drawings for the balustrade design in 2014. Icon's David Alessi told the OBC the balustrade design was a standard system used on over 5,000 apartments across Sydney. Sydney Balustrades was joined to the Supreme Court litigation but has since gone into administration.

Whilst a builder may choose to pursue sub-contractors for rectification of defects or compensation, under clause 9.3 of the standard form design and construct contract the builder is the sole entity responsible for the actions of their sub-contractors. Any action they may take against their sub-contractors should not impact on the timeliness of their response to owners for defect rectification.

Arguments about rectification

It would appear there were irreconcilable differences between the parties about how various defects, in particular the balustrade defects, ought to be rectified. It is difficult to determine who, if anyone, was being unreasonable in these negotiations.

A defects schedule lists alleged defect items taken from various reports and includes Icon's reply. For 75 per cent of these items, including those relating to the balustrades, Icon's reply was either "Icon to rectify" or "Icon has completed". Icon also disputed several items and requested a joint inspection to clarify some items. Bearing in mind that Otto 2 did not necessarily accept Icon's replies, it does appear that Icon was cooperative, willing to rectify most of the alleged defects and had returned to undertake some rectification works.

24 See *Environmental Planning and Assessment Act 1979* clause 6.8(2).

Doyle says in his experience across the projects he has been involved in in Queensland, Victoria and NSW, the litigation culture in NSW is far worse than the other two jurisdictions. Doyle alleged that within NSW, there are law firms that are renowned for drawing out the process, delaying and causing excessive legal costs to both parties. He points out that the Supreme Court of NSW's civil claims list for construction disputes includes all the 'big name' builders in Sydney, regardless of their reputation or quality of their work. Doyle says this does not occur in Brisbane and Melbourne. He argues that better builders will resolve defects if they are given a reasonable time to do so and that the two year time limit (which does not operate in Victoria or Queensland) leads to a situation where a legal action must be commenced on just about every job.

Several months were spent negotiating a documented rectification plan for the balustrade rectification. Chambers Russell appointed waterproofing expert Paul Ratcliff to investigate and assist in the negotiations. Ratcliff reported his advice was that the rectification proposal by Icon was reasonable. Ratcliff alleges his advice was not taken.

Ratcliff reflected on his broader experience, saying it was common for a builder to be willing to commence rectification under supervision, with a view to only rectifying issues that are found to actually be defects as they go. He says builders often 'get their back up' when an owners corporation's lawyer claims that the entire replacement of wet areas is required. This results in a stalemate in negotiations which might end in the builder 'walking away' (i.e. going into voluntary administration).

Ratcliff said it is better if the owners allow the builder to start rectification, then at least progress is made towards a resolution. However, Ratcliff was also aware of situations where an owners corporation had taken a settlement sum, assuming a certain scope of works was necessary, only to find that once rectification work got underway, the defects were more extensive. The owners corporation may then bring an action against their lawyer claiming they were negligent in advising the owner to accept the inadequate settlement sum. Ratcliff says despite these scenarios, there are disputes that are progressed fairly and reasonably but it comes down to the approach and competency of the lawyers and experts involved.

In this case, the position put on behalf of the owners corporation that the balustrade rectification must include full replacement of all tiling and waterproofing membranes appears to have been a trigger for Icon putting itself into administration. Julian Doyle is adamant that this position was unreasonable. In any event Icon did not wait around to see what decision the court would make on this aspect of the dispute.

It would appear that the defects within the apartments in this development were minimal. However, the OBC has found that in many defect disputes, the litigation covers defects both within some apartments and in common property. This increases complexity and litigation costs to all apartment owners. Project Intervene addresses serious defects only in common property and shared infrastructure.

Lot owners' experience – the role of lawyers and other consultants

In order to give all lot owners an opportunity to participate in this case study, a request was made to the OCC to circulate a letter from the OBC inviting owners to make a submission. The letter was circulated by McCormacks.

Only a small number of lot owners participated in the case study. The lack of willingness of lot owners to participate in the case study. This could be due to a range of reasons including apathy, being tired of dealing with the dispute, or a fear that the case study will impact the value of their apartments. These concerns have been weighed against the need for transparency and the public interest in publishing this case study to help other apartment owners understand what occurs when defect disputes arise.

The following is a summary of what the lot owners that participated in this case study said:

- Most owners had no knowledge about buildings or how to deal with defects when they bought their apartments off the plan. They had no choice but to trust their strata manager and lawyers to lead them through the process and tell them what to do
- They felt very confused when lawyers presented to meetings of owners on their 'options' for progressing the dispute. A lot of qualifications were given and although they asked questions the answers given were unclear and sometimes dismissive. They found it almost impossible to know which options to choose, even though the whole purpose of these meetings was to get their instructions
- With regard to legal costs, the total legal and consultant fee spend so far was not known by those that participated. Owners continued to pay money in not knowing if or when they would get their building fixed

- Owners allege that they had no idea what it might cost or what they were spending on legal fees at any time and it took several months for them to understand what sorts of things they would get charged for. They said it was possible that some OCC members knew more about estimated legal fees
- There were different views given about the involvement of lot owners outside the OCC. On the one hand it was reported that very few owners outside the OCC took any interest or would turn up to meetings. However, it was also reported that non-committee members asked the OCC for reports and information and got no or limited responses. They also said there were differences of opinion between owners and that the members of the OCC have changed over time due to disagreements about how the case should proceed
- Owners said they had no idea that Icon was going to go into administration until it happened and they were shocked and concerned. This led to their lawyers advising them to dispute the appointment of the administrator. They did not understand fully what this litigation was about but had to trust what their lawyers told them
- With regard to the OBC's involvement, it reached out to offer assistance and was told by the OCC it did not need his help. Some owners were very sceptical about having the OBC involved. There was a lack of trust that the government would assist and some took the position that because they had invested so much money in legal fees and consultants, they did not want to depart from their court case. Some owners did not believe the OBC could resolve their dispute or that they would end up better off than if they proceeded with the litigation
- In terms of the impacts the litigation has had on them beyond the financial, the owners spoke about the significant investment of their time in meetings with lawyers and government officials that takes them from their jobs and personal time. They also spoke about the pressure of making decisions on behalf of other owners who then disagree as well as the frustration of having no idea what decisions are being made for them by other owners. They were concerned at the impact media attention had had on the value of their apartments and their ability to sell, should they want to whilst all of this is going on. They were also worried about whether the defects would be properly rectified and how much more money they would have to pay to get to an outcome.

The above account, albeit from a small number of the 143 lot owners, reflects the challenges involved in disputes involving strata communities. It also impacts on the government's attempts to improve outcomes. A research report produced by the OBC and Strata Community Association (NSW) in partnership in 2021 found that in only 15 per cent of cases owners' corporations lodge a complaint to NSW Fair Trading about defects in their building.[25] This case study has not attempted to ascertain why this is the case and it is noted that steps have been taken by the OBC to encourage owners to bring complaints to it in recent years.

A challenge with the litigious environment surrounding defects in apartment buildings is that within short time after spending money on legal and consultancy services, some owners can become heavily invested in the fight and in seeking a return of the money they have spent rather than on finding a solution. This seems to have been the case for some owners at Otto 2 who resisted early attempts by the OBC to help break the stalemate that is alleged to have developed between the parties' lawyers.

The court processes

In May 2023 it will be six years since proceedings were commenced in NCAT. It took one year for the proceedings to move from NCAT to the Supreme Court making the proceedings in the Supreme Court almost five years old. One party advised that adjournments of both Supreme Court proceedings for four to six months at a time have been common, with the court readily granting adjournment requests made by consent of the parties.

Each time parties are joined or they go into administration (which has occurred often in this matter), this also delays progress. Whilst the proceedings commenced well before the COVID-19 pandemic, this is likely to have further impacted delays in court proceedings.

On review of annual reports from the NSW Supreme Court there is no specific information about case load or completion rates for building and construction disputes.[26] It is not possible to conclude whether five years to progress a matter like this is common or considered acceptable.

25 "Research report on serious defects in recently completed strata buildings across New South Wales", Construct NSW, Improving consumer confidence, September 2021. See https://www.nsw.gov.au/building-commissioner/building-and-construction-resources/research-on-serious-building-defects-nsw-strata-communities.

26 Building and Construction matters are heard in the Technology and Construction list. The annual reports to not show figures for the types of cases within this list.

The case study makes no conclusion about whether the time taken to progress the litigation was typical or justified. However, there was no suggestion from the people we spoke to that the Court had put pressure on the parties to mediate or have the matter listed for hearing, indicating that proactive case management activities by the Court may have been limited.

Council actions

Council was alerted to the safety concerns regarding the balustrades in October 2019 following a media enquiry. They have issued various orders on Otto 1 and Otto 2 directed at preventing the occupation of balconies, warning occupants and requiring the balustrades to be rectified with times for compliance extended multiple times. Council have also issued a fire safety order relating to combustible cladding.

Due to its ongoing investigation, Council declined to answer many of the questions put to it in writing as part of this case study, including declining to comment on the current status of all orders issued by it or to provide copies.

Council sought to prevent the use of the balconies in order to mitigate the risks associated with the non-compliant balustrades. Representatives of owners expressed frustration in their dealings with Council. The owners described the council officers as "unsympathetic" and "impractical". They said that at one point Council wanted owners to fix doors to their balconies shut. This would have prevented the primary means of ventilation to many apartments and in the end no orders were issued by Council for this to occur. There was also a requirement for warning notices to be affixed inside apartments and in common areas. Owners said it was difficult to get all owners to comply and when they did comply, some would later remove the notices so maintaining compliance was a challenge.

Council said its interactions with the OBC had been "cordial and professional" and that they wish to continue to work collaboratively given overlapping investigative and compliance actions. It said earlier communication would be beneficial and that "Timely notification would allow the City to work with the OBC to mitigate the potential of overlapping compliance action as occurred in the Otto investigations which will improve the customer experience." The OBC also said communication between it and the Council could have been commenced earlier and occurred more frequently.

Council was unable to provide statistics on how often it issues orders for rectification of defects in strata developments. It said that when Council receives a complaint about alleged defects "the Council will investigate the allegations, undertake a merit assessment and then may issue corrective action as suitable to the matter in accordance with the Council's compliance policy and internal practices and procedures" and that "Council typically keeps any enforcement action in progress until the matter of the enforcement has been resolved."

Council was asked what it believed the roles of the Council, NSW Fair Trading and private certifiers are when complaints are made by owners' corporations about defects in strata buildings. Council responded as follows:

> *"The Council is the primary investigative body. It will investigate and issue orders on the building owners to ensure that the owners appreciate the gravity of the situation and to ensure that the building is maintained in a safe environment.*
>
> *The Certifier is responsible for ensuring the development is undertaken in accordance with the approval and that the building is safe and fit for purpose when the OC is issued.*
>
> *The Dept of Fair Trading is to act as a quality control mechanism to ensure that the developer is held accountable for the workmanship employed within the development to limit the financial impact to the owners and to install faith in the building industry.*
>
> *In general, the roles of the 3 entities are summarised above, it would be beneficial to ensure that there is appropriate legislation in place to ensure the proper integration of tasks and roles."*

The Council had no suggestions for reforms to improve outcomes for owners.

Part 3

What regulatory reform or actions could influence better outcomes

Part 3 – What regulatory reform or actions could influence better outcomes

Each person interviewed for this case study was asked what things they believed could be done to improve the management of defects in apartment buildings. This input was used to inform the commentary in this part of the case study. Categories of issues are as follows:

- Statutory limitations on bringing actions
- Dispute resolution
- Making the 'developer accountable'
- Regulatory responses to insolvency risk
- What to do about the lawyers
- Effectiveness of the *RAB Act*
- The strata bond scheme
- Collaboration between regulators
- Inspections during building work
- Improving rates of compliance and building product performance.

The participants made some suggestions that are not directly relevant to this case study. These have been provided to the OBC for their consideration.

Before considering each of the above issues, feedback from some of the participants on the impact of the significant reforms made to date in NSW is summarised.

Reforms to date have made a difference

It is important to note that some of those that participated in this case study said the significant reforms that have been introduced in NSW over the past three years, have made a difference.

The *DBP Act* introduced a requirement for designers of key building elements to declare designs and upload these to the e-planning portal before construction starts on site. The same obligation applies where there is a proposed variation to the declared design. At the end of the project the builder must declare that the designers' declared designs have been built. This is intended to prevent the commencement of projects without adequate design/integration effort and to ensure variations are documented.

The Certifier Practice Standard for class 2 buildings (CPS) is mandatory for certifiers to comply with in NSW. It does not create any new prescriptive regulatory requirements, rather is sets out best practice putting the onus on certifiers to engage in any due diligence, inspections and other enquiries reasonably required to support their statutory, public interest role.

As the PCA, Peter Antcliffe said the practices of the industry have definitely improved since the *DBP Act* and *RAB Act* were introduced and since the publication of the CPS for class 2 buildings. He says there are now more detailed designs being produced making it easier to identify non-compliance during inspections and giving builders a much clearer set of plans to build to. He says since the reforms it is much more common to conduct joint inspections with the architect, which enables a more informed discussion about detailing and compliance checking. In addition, the newly introduced mandatory inspections for penetrations have had an impact and the approach to sealing penetrations was much better now. He said that because the certifier is required to sign these off, it gives them greater authority to push back on installers that insist that the installation is compliant. There is also more detail given about the tested system so they can ascertain whether the installation is compliant. However, there had been no training for certifiers on doing these inspections.

Antcliffe also noted that additional sign offs and more detailed design requirements are having a big impact in terms of cost. His concern was that for smaller projects, owners are choosing not to get approvals because the approval costs may exceed the cost of the works involved. By way of example, he said that his fees as the PCA for Otto 2 were $47,000 (which he noted was $330 per apartment and probably less than what it cost for the front door locks for the project). For the same job now he would charge around $350,000. He says the increase relates to increased obligations on them to inspect and review much more detailed documentation as well as a significant increase in professional indemnity insurance costs.

Ratcliff also said that the quality of construction documentation has improved. He says a large part of his business now is from architects who come to him to have waterproofing detail designed, documented and reviewed. He says the quality of installation is still poor because, in his view the training for water proofers is still inadequate. He also says there are still many builders that substitute the specified quality waterproofing products for cheaper products that claim to meet the same standards but do not perform in practice. Ratcliff calls for significant changes to regulate the practices of product manufacturers who make claims that are misleading, with no consequence.

Statutory limitation on bringing actions

There was agreement from some participants that the two year time limit to bring actions for breach of warranties for minor defects results in more litigation because it does not give sufficient time for defects to crystallise and be resolved. They said it's all very well to ask owners to complain to the NSW Fair Trading but there is just not enough time to identify these issues before the two years is up. It was suggested that the timeframe should either be removed altogether or suspended if a complaint has been lodged with NSW Fair Trading or until the process under the strata bond scheme is completed.

Simplification of limitation periods was also recommended, noting that owners' corporations have to get lawyers involved early because it is impossible for them to work out themselves how long they have and who they can sue. This would also be alleviated if the two year time limit on bringing claims was able to be addressed.

It was also noted that the duty of care reforms under the *DBP Act* have led to uncertainty about the scope of the reform and the need to join multiple parties to proceedings, which would not be necessary for claims based on breach of warranties. Simplifying the impacts of these reforms may require consideration of proportionate liability laws and how they operate in other jurisdictions. For example, in Victoria, when apportioning liability a court 'must not' have regard to persons who are not parties to the litigation unless they are dead or wound up.[27] This puts the onus on a defendant to join other parties rather than the owners' corporation.

Dispute resolution

With regards to experts, it was suggested that finding a way to ensure that disputed defect items come before a reputable independent adjudicator as soon as possible is the key to more timely outcomes.

The difficulty for the tribunals, courts and government is finding the best available experts to act in those roles. Without this, the current processes are often ineffective.

The Civil Procedure Act 2005 (NSW) states in section 56 that "the overriding purpose of the Act and rules of the court, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings." If the tribunal or court lacks adequate resources to meet this objective, this opens up the ability for some lawyers to drag things out.

Making the 'developer' accountable

When regulating 'developers' a question for government is how the term is defined in legislation so as to ensure all relevant parties are captured when seeking to impose responsibilities and accountabilities on parties.

27 Section 24AI(3) of the *Wrongs Act 1958 (Vic).*

Presently, there are different definitions of 'developer' in the *Home Building Act* and *RAB Act*. There is a proposal to resolve this via amendments. The proposed new definition of 'developer' will be found in the proposed *Building Compliance and Enforcement Bill*[28] and is similar to the *RAB Act* definition. If enacted, the legislation will cover persons who contract or arrange for building work to be carried out (in this case Capital); the owner of land on which work is carried out (in this case SCLC); and the principal contractor for the work as defined in the proposed new *Building Act 2022* (in this case Icon). The new definition does not require ownership of lots before or after the development.

The new definition would capture the three key parties in the Otto 2 development. Arguably however, it would not capture the other entities that purchased Icon's assets and provided services to Icon after it stopped entering into new building contracts. This is discussed further below.

Regulatory responses to insolvency risks

With regard to regulatory tools that can be used to respond to the consequences of insolvency events, this is a challenge for all governments. A key reason why businesses are conducted through corporate entities is to manage liability to individual shareholders and directors. As noted above, when used by trustworthy participants, SPVs, JVs and partnerships are legitimate means to structure a development vehicle. Further, it is not illegal to become insolvent or to choose to stop trading, so as to stop income coming into a company when liabilities are still crystallising. It is not illegal to buy only the assets of a company and not its liabilities. Whilst there are many responsibilities placed on individual directors and office holders under the laws governing corporations, it is still generally the case that directors and shareholders acting in good faith are not personally liable for breaches or other liabilities of a company that they are involved in, otherwise known as the 'corporate veil'.

Illegal phoenix activity is often spoken about in commentary about the construction industry. This practice is regulated under federal laws. The Australian Securities and Investments Commission (ASIC) defines illegal phoenix activity as:

> *"When a new company, for little or no value, continues the business of an existing company that has been liquidated or otherwise abandoned to avoid paying outstanding debts, which can include taxes, creditors and employee entitlements."*[29]

In undertaking this case study there was no information to suggest that ASIC had investigated or were taking any action against Icon, Icon NSW or any other Icon entity nor is it alleged that the structuring that took place would constitute illegal phoenix activity – that is a matter for ASIC.

At a state level, governments have sought to regulate this area through 'anti-phoenixing provisions' in registration and licensing regimes.[30] In both Queensland and Victoria, registered building companies must have at least one director who is personally registered. Where a registered building company becomes insolvent, directors or former directors may have their personal registration suspended, cancelled or disqualified. In addition, to try to prevent suspended or cancelled individuals from continuing to operate entities through others, any 'close associate' or 'related person' of the individual can also have their registration refused, suspended or cancelled. The limitation of these sorts of laws is that they can only operate after the insolvency event and can only apply to licences or registered entities, which at present does not include developers. There may also be instances where the insolvency event occurs several years after a responsible director has commenced and is already operating other entities.

The reforms proposed for NSW seek to strengthen anti-phoenixing laws. In addition to including similar powers to those set out above in Victoria and Queensland, the government has proposed requiring all registered building practitioners to take reasonable steps to not enter into contracts with or continue to contract with any person who has engaged in 'intentional phoenix activity'. This is a novel approach. It may be challenging for registered building practitioners to ascertain when a person is engaging in 'illegal phoenix activity' or to end existing contracts if they do. A more effective approach might be for NSW Fair Trading to determine whether a person has engaged in intentional phoenix activity and if so, publish their name on a register that registered building practitioners can refer to when seeking to enter into contacts.

28 At the time of publication of this report *Building Compliance and Enforcement Bill* had not been tabled in Parliament, however it was out for public consultation in late 2022.

29 See https://asic.gov.au/for-business/small-business/closing-a-small-business/illegal-phoenix-activity/ (accessed 1 February 2023).

30 Queensland uses the term licence, Victoria uses the term registration – for the purposes of this document the term registration used to refer to both terms.

It is also proposed that directors have a personal statutory duty to ensure building work performed by their company is monitored and checked for compliance with the National Construction Code (NCC) and relevant laws.

Short of seeking to remove the protection of the corporate veil altogether, for example by legislating that where a company goes into administration or liquidation any breach of warranties will apply to directors or former directors personally OR making provision for liabilities for breach of statutory warranties to transfer to any entity that buys a company's assets, it is difficult to prevent the consequences of company insolvencies for owners' corporations. Enacting laws like this may not even be constitutionally possible or practically effective (for example the assets of a company may be sold to several entities).

Ultimately, whether or not a builder or developer takes accountability for defects will largely depend on their ethical character and regard for their reputation in the market as was demonstrated by Capital in this case. Yes, there will be times where despite an individual director's willingness to pay compensation, their business has legitimately failed due to market factors or poor financial management and there are no funds to pay. However, in many instances significant profits are distributed and the individuals involved choose to engage in structuring activities that allow them to legally avoid accountability. These people convince themselves that this is a fair outcome because they have not broken any laws and the suffering imposed on their innocent customers is ignored or justified as being the fault of someone else or 'just the way things work out'.

Effectiveness of the RAB Act

The OBC's use of the BWRO process was met with lengthy written arguments from the lawyers for SCLC and Icon NSW. They raised multiple legal arguments against the use of these powers, including arguing that their use was an abuse of process whilst litigation was on foot. The OBC did not agree with these assertions. It says the use of the powers does not cut out the legal processes open to parties. As is shown in this case, the cost of litigation in these matters is extensive and leads parties to focus on the legal battle rather than fixing the defects. Intervention using the *RAB Act* powers can act as a circuit breaker to that process and owners' corporations that decided to opt in to Project Intervene are seeking the OBC's assistance.

The government should ensure that the *RAB Act* powers are as robust as possible to support Project Intervene.

The Strata Bond Scheme

Introduced in 2017, the NSW strata bond scheme requires 2 per cent of the construction cost of new apartment buildings to be paid to the government upon commencement of an apartment project. Subject to meeting a specified process, these funds can be used by owners to identify and rectify defects or returned to the developer if defects are resolved.

There was a consensus among the case study participants that the strata bond scheme is unlikely to materially improve outcomes for owners of apartment buildings. Reasons given included that the amount of the bond is inadequate.

Other criticisms of the bond scheme were that the timeframes are too short, the process is very complex and the quality of some of the experts that are willing to be involved is lacking.

Recently the NSW government made reforms which provide that where latent defects insurance is in place, a project will not need to participate in the bond scheme. There are also reforms proposed to the strata bond scheme process, including to extend the overall time for the process from two years to three years. The government will no doubt continue to monitor the effectiveness of the strata bond scheme.

Coordination between regulators

Regulation of the building industry is a joint responsibility of state government, local government and the appointed PCA. There are overlapping enforcement powers given to these three parties which can create confusion for consumers and can also lead to one assuming the other will or should act.

In the present case the content of Council's orders issued to Otto 2 overlapped with the BWRO issued by the OBC to the developer. Both Council and the OBC have said their communication with each other could have been better. It is reasonable to conclude that a more coordinated approach by regulatory bodies with concurrent powers is likely to improve the consumer's experience of government and regulatory outcomes.

Inspections during building work

Questions were raised about whether certifiers have adequate training in inspecting external waterproofing or many other highly technical elements of construction. They rely on certification from others and in many cases where they question compliance, they are told by the builder that the installer has more knowledge and their certificates should not be questioned.

These observations highlight the heavily reliance within the building approval system on self- certification. The certifier and possibly the engineer perform the role of independent certification. However, both professionals will be engaged to undertake a certain number of inspections and this is often an area where the builder and developer want to cut cost.

A strong message has been communicated by the OBC to certifiers and engineers about being accountable for what they approve. For example in the CPS[31] certifiers are told that they should not treat critical stage inspections as the only time inspections should occur and that they must take a risk-based approach to determining what other inspections should be carried out and by whom.

The government will need to monitor this issue and should consider how to support certifiers, architects, engineers or other suitable experts receiving the training required to enable effective independent inspections. Digital capture of inspection records and practices across sites would also assist the government to understand the extent to which practices have changed and whether further reforms are needed in this area.

Improving rates of compliance and building product performance

It almost goes without saying that disputes about defects in strata developments will be curtailed by increasing the rates of compliance in the design and construction of apartment buildings. The NSW government is well aware of this and has already made several reforms that go directly to changing the culture of compliance. It has also supported the development of market led initiatives including the iCIRT ratings tool and latent defects insurance both of which are gaining momentum.[32]

The defects in this case include a number relating to the performance of building products. For example, allegations include:

- failure of painted glass used on spandrels
- light fittings used did not meet applicable standards
- exposed cabling on roof areas was not UV rated
- the balustrade system was not compliant
- products used to protect penetrations were not compliant and fire dampers were not properly installed.

The alleged non-compliances may have been due to either the product not complying with required standards or poor installation practices or both. These alleged defects highlight the poor regulation of building products in Australia including the absence of supply chain laws, weak evidence of suitability requirements in the NCC and the lack of effective regulatory resources dedicated to overseeing the practices of manufacturers and others in the supply chain.

The NSW government's proposed reforms include the introduction of product safety supply chain laws.[33] This reform is overdue and yet will make NSW one of only two jurisdictions in Australia with such laws.[34] Reforms to evidence of suitability requirements are the responsibility of all Australian governments through the Australian Building Codes Board and a nationally coordinated approach to regulatory oversight is required.

Other reforms proposed in NSW advance the significant changes that have occurred over the past three years, including the proposal to make waterproofing work a specialist trade, introducing practice standards for appropriate supervision, introducing licensing for defect consultants and new enforcement powers including a demerit points scheme and education training notices. The education initiative with NSW TAFE, Construct NSW, has led to the establishment of more than 25 micro credential courses which have been undertaken by over 35,000 participants. That program will support improvements to continuing professional development requirements. Over time these changes should reduce the levels of non-compliance and therefore the prevalence and complexity of defects litigation.

31 https://www.fairtrading.nsw.gov.au/ data/assets/pdf_file/0009/902349/Practice_standard_for_registered_certifiers_0920.pdf.

32 The iCIRT ratings tool is intended to provide greater transparency over the trustworthiness of market participants whilst latent defects insurance provides first resort cover for significant defects in apartment buildings for 10 years post construction.

33 Amendments are proposed in the draft *Building and Construction Legislation Amendment Bill 2022.*

34 Queensland introduced product supply chain laws in 2017 which are found in the *Queensland Building and Construction Commission Act 1991 (Qld).*

Appendix A: Consultation schedule

Parties and stakeholders who participated in this case study
City of Sydney
Richard de Carvalho, General Counsel, Capital Corporation
Julian Doyle, former director of Icon
Yolande Nyss, Program Manager, Office of the Building Commissioner
Matthew Whitton, Director, NSW Fair Trading
Timothy Whincup, General Counsel, Sydney Christian Life Centre
Paul Ratcliff, Building & Waterproofing Consultant, Paul Ratcliff Inspections
Peter Antcliffe, Principal Certifying Authority for Otto 2
Scott Chambers, Partner, Chambers Russell Lawyers, owners' corporation legal representation participated voluntarily in two meetings but later denied it had given consent to use any information obtained from those meetings in the report. As a result any information obtained from them was removed from the report.
Parties and stakeholders invited to participate who declined or did not respond
Roderick Broune, Structural Engineer Consultant, Broune Group Consultants
Sandra Steel, Partner, K&L Gates – formerly acted for Icon
Greg Anderson, DEA Lawyers – legal representatives for Otto 1
Ashley Murdoch, former director Icon
Hugh McCormack, McCormacks Strata Management – strata managers for Otto 2
PRD Strata Managers – strata managers for Otto 1

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NSW GOVERNMENT