BANNERMANS LAWYERS

Principal: **David Bannerman**
dbannerman@bannermans.com.au

Contact: **Jabran Chaudhry**
jchaudhry@bannermans.com.au

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The Hon. Kevin Anderson MP
Minister for Better Regulation and Innovation
GPO Box 5341
SYDNEY NSW 2001
BY EMAIL
AND BY ONLINE FORM

Dear Mr Anderson,

BUILDING DEFECTS IN LEASEHOLD STRATA TITLE PROPERTIES

The recent NSW Court of Appeal decision in *The Owners – Strata Plan No 91322 v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2019] NSWCA 89 ("*SP91322 v the Church*") brings to light yet another issue owners of strata lots, specifically lots held as leasehold title, face in claims against builders or developers for building defects.

We have acted in over 300 defects matters for owners corporations and have made previous submissions on reforms introduced in the *Home Building Act 1989* ("*Home Building Act*") since 2012.

As you would no doubt be aware, Part 2C of the *Home Building Act* (being sections 18A-18G) deals with statutory warranties. Section 18B details the seven warranties that are implied into construction contracts for residential building work. Section 18C extends the benefit of these statutory warranties to "[a] person who is the immediate successor in title" to the developer and the subsequent section 18D extends the benefit of these statutory warranties to "[a] person who is a successor in title to a person entitled to the benefit of a statutory warranty under this Act".

The Court in *SP91322 v the Church* rejected the owners corporation's argument that, although they held the common property under a lease, they were the "successor in title" to the Church as the lease was: (a) for a long 82 year term, (b) did not require payment of rent and (c) provided them with rights comparable to those of an owner.

More relevantly, the owners corporation submitted that section 24 of the *Strata Schemes Development Act 2015* ("SSD Act"), which vests the common property in an owners corporation free of any lease, applies to the strata scheme and that the SSD Act "displaced" the previous *Strata Schemes (Leasehold Development) Act 1986*, which did not contain such a vesting provision.

The Court of Appeal rejected these submissions. McCallum JA commenting at [33] that "the nature of the title held by the owners corporation must be determined according to the legislation in force as at the date on which the strata plan was registered" and adopted the views of Hammerschlag J that "[i]n its general meaning, 'successor in title' connotes no more than a person who holds title after another": *Gardez Nominees Pty Ltd v NSW Self Insurance Corporation* [2016] NSWSC 532 at [50].

As the SSD Act commenced on 30 November 2016, this leaves owners corporations of leasehold strata title properties registered before that date without the benefit of statutory warranties against builders or developers. They are instead left to bear the burden of repairing or remaining "the owner" of a defective building.

This significant lack in statutory protection requires rectification from the Office of Fair Trading.

We suggest the following changes for your consideration:

- Urgent retrospective legislation be put before the Legislative Assembly to address the gap faced by owners corporations of leasehold strata title properties.

- That a new sub-section (1C) be added to Section 18D of the *Home Building Act* with words to the affect: "For the purposes of this section, a successor in title includes a person with leasehold title".

- That a new sub-section (2A) be added to Section 24 of the SSD Act with words to the affect: "Sub-section 2(c) applies to common property previously dealt with in the *Strata Schemes (Leasehold Development) Act 1986"*.

We are happy to meet and discuss this further at your convenience.

Kind regards,

BANNERMANS

David Bannerman
dbannerman@bannermans.com.au
Acc. Spec. (Prop.)
Principal

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