

The house with no piers

A review of the issues relating to alleged defects in the construction of a home and the related complaints and dispute process.



Contents

| | |
|--|-----------|
| 1. Executive summary | 3 |
| 2. The scope of this review | 3 |
| 3. Relevant facts and circumstances | 4 |
| Construction of the home | 4 |
| Post occupation defects and issues identified | 5 |
| NCAT proceedings commenced | 5 |
| First expert conclave and 'agreed facts' | 7 |
| Design engineer joined to proceeding by the builder | 7 |
| Second expert conclave | 8 |
| Hearing of the case at NCAT | 8 |
| The decision of NCAT | 9 |
| Costs orders | 10 |
| Appeal to the Appeal Panel | 10 |
| Further complaints made by the owners | 11 |
| 4. The outcome – are there piers? | 12 |
| 5. Liability and possible further action that could be taken against each party | 13 |
| The builder | 13 |
| Rectification orders | 13 |
| Disciplinary action | 14 |
| The council | 14 |
| The design engineer | 15 |
| Expert engineer for the builder | 15 |
| Industry association for the engineers | 15 |
| Industry association for the builder | 16 |
| NSW Fair Trading | 16 |
| Builder warranty insurance | 17 |
| Solicitors for the owners | 17 |
| Barrister for the owners | 18 |
| 6. Lessons learned and issues for potential reform or improvement | 19 |
| The 6 pillars | 19 |
| Other observations | 20 |

1. Executive summary

This is a report on the construction of a home in regional, NSW in 2009, the alleged defects and the issues faced by the owners in making complaints and commencing legal proceedings. The builder did not construct the footings for the home in accordance with the footings design provided for under the construction certificate issued by a local council. The council officer failed to identify that the footings were not constructed in accordance with the approved design when conducting mandatory inspections. The weight of expert evidence is that the footing design prepared by the design engineer was inadequate. Further, the design was for a slab and piers and the piers were not constructed by the builder.

The owners lodged a complaint with NSW Fair Trading. They were told that the dispute resolution service could not assist them because it was a contractual dispute. They were told to pursue their claim at the NSW Civil and Administrative Tribunal (NCAT).

The owners endured three and a half years in the NCAT seeking damages to rebuild their defective home. The legal case was poorly managed by the owners' legal team. Due to this and to the false evidence given to NCAT by the builder and the builder's expert engineer, NCAT found that the builder had constructed the footings in accordance with the design and awarded the owners only \$6,643.49 in damages to rectify cracks it determined to be cosmetic.

The owners were ordered to pay the builder's costs. In total, their own and the builder's legal and expert witness costs were \$301,000.

The owners ran their own appeal. They were unsuccessful with the Appeal Panel determining that on the evidence before NCAT, the decision was reasonable. The Appeal Panel noted that important evidence about the absence of piers had not been put before the tribunal by the owners' legal team.

The owners have made complaints about the design engineer and the builder's expert engineer to their professional industry association. This included presenting further evidence obtained after the NCAT proceeding. Both complaints were dismissed. The lack of detail in the record of the consideration of the complaints is unsatisfactory. No effort was made by industry association's complaints committee to explain their findings or to set out any analysis of the evidence before it. This suggests that the industry association has no interest in or respect for the consumers of engineering services. Further it demonstrates a lack of willingness by the industry association to hold their members to account for what the weight of evidence shows was incompetent and unprofessional conduct by the engineers.

The NSW Building Commissioner inspected the site in mid-2020. He observed the excavated footings and the absence of piers under the slab. He asked the builder's industry association to consider the matter and the conduct of the builder as its member. They refused to do so on the basis that a decision from NCAT had been made. This suggests that the builder's industry association has no interest in or respect for the consumers of building services provided by their members. Further it demonstrates a lack of willingness by the industry association to hold their members to account for what the weight of evidence shows was incompetent and unprofessional conduct by the builder.

The NSW Building Commissioner has commissioned this report and further investigation will be undertaken by NSW Fair Trading into the conduct of the builder and certifier. The report will also assist the Commissioner to understand in detail what has occurred, what can be learned and what reforms or actions can be taken by the NSW Government to prevent these outcomes for consumers in the future.

2. The scope of this review

In undertaking this review I have had access to thousands of pages of material provided by the owners. This includes audio recordings and transcript of the first 2 days of the NCAT hearing and the appeal hearing. The owners and the engineer that they appointed as their expert witness were also interviewed.

3. Relevant facts and circumstances

Construction of the home

The owners purchased a block of land in about 2009. They visited display homes and collected brochures. They could not find a home with the exact layout they liked so they made up their own drawing from various brochures. They were choosing between using one of the project home builders or a smaller local builder. Through a family connection they knew a local builder and approached him to discuss their project.

They showed the builder their made up drawings. The builder suggested they have the plans drawn up by draftsperson and an engineer prepare a footing design so he could prepare them a quote. The builder recommended a draftsperson. The draftsperson prepared one sheet of drawings. This sheet made its way to the engineer for him to prepare the footing design. The owners say they never spoke to the engineer and it was either the builder or the draftsperson that provided the plans to the engineer.

The engineer did a soil investigation and prepared a design for footings. He produced a 'certificate of structural design adequacy' in which he lists the site classification as Class 'S' and Class 'P' – Cut to fill. His footing and slab drawings consisted of three pages. Sheet one shows a slab design with piers to one half of the slab. On sheet two there were six details of footings. There was no detailing for the piers but a note 'piers to firm developed land at all corners and max 2.5 cts under perimeter walls and slab'. Sheet three had bracing details for the frame.

The owners were given an invoice for the footings design for \$737 by the builder which they promptly paid. The invoice was addressed to the builder.

In mid-2009, the builder provided a quote to the owners which was signed by both parties on each page together with a HIA standard form contract for the construction of a home. The contract price was \$226,139. The draftsperson's and engineer's drawings were attached to and formed part of the contract.

A development consent (DC) was issued within a few weeks of the contract being signed followed by a construction certificate (CC) shortly after. According to the council file the plans approved were the single sheet from the draftsperson and the soil information and footing design from the engineer. The council also had a copy of the HIA contract on file. The DC listed mandatory inspections as follows:

1. At commencement
2. Pier holes (if any) before concrete is poured
3. Footings, with reinforcement in place before pouring of concrete
4. Before internal covering/lining of the framework for any floor, wall, roof or other building element
5. Before covering stormwater drainage connections
6. Plumbing work prior to covering/lining walls
7. Sewer drainage work prior to back filling/lining
8. Before covering waterproofing in any wet areas
9. After the building work has been completed prior to occupation

The DC also provided 'engineer to certify soft spot checks', 'engineer to certify that piers have been constructed to 'firm developed' or 'firm natural' in accordance with the engineering detail provided.

Inspections records show the following:

| | | |
|--------------|----------|--|
| Footings | 21/7/09 | additional steel at step down to make steel continuous |
| Slab | 31/7/09 | OK |
| Frame | 1/10/09 | OK |
| Ext Drainage | 23/10/09 | OK |
| Wet Area | 12/10/09 | OK |
| Final | 3/12/09 | OK |

An occupation certificate was issued in December 2009.

Other evidence from council includes an email from mid-2016 responding to the owners confirming that council has no record of a certificate from the engineer for footings inspections. The email says that based on the inspection records the work was carried out in accordance with the structural designs.

Post occupation defects and issues identified

The owners moved into the house in late 2009. Between 2011 and 2014 they called the builder back to tend to issues including a roof leak. These issues were resolved by the builder over four or five visits.

In mid-2014 the owners asked the builder to attend to look at cracking in brickwork and plaster and movement of windows and doors. The builder attended the site with the engineer. The engineer wrote to the owners about the inspection saying that there had been minor settlement of the site which had resulted in cracking. He says that they noticed a lack of management of drainage on the right hand side of the dwelling that should be rectified.

Shortly after this the owners arranged for a soil report for the site. The report says the site is classified as H2. The owners wrote to the builder expressing concern over the soil classification. The builder responded a few weeks later saying that the cracking was not significant but he was prepared to meet on site to discuss minor issues he would be prepared to improve if agreement can be reached.

In 2015, the owners complained to council and NSW Fair Trading (OFT). The owner says she spoke to an officer from the OFT and travelled to the OFT offices to provide the officer with copies of documents. The owner was told that an investigator would be appointed but this did not occur. Instead, the OFT wrote to the owners saying that the complaint was about contractual issues and it was not appropriate for the Home Building service to attempt to resolve the dispute. The letter suggested the owners go to NCAT and gave them details of the Home Building Advocacy Service in Parramatta where they could access professional legal support.

NCAT proceedings commenced

The owners commenced proceedings in NCAT in late 2015. The damages claimed in the application were \$226,139, being the value of the contract to construct the building. The defects described are summarised as:

- extensive internal and external cracking and movement
- window and door movement
- movement of and bathroom kitchen cabinetry
- poor electrical wiring (replacement of 47 globes in 5 years including a globe spontaneously bursting)
- dampness and mould issues
- water damage from a skylight.

At a telephone hearing early in the proceedings the owners were advised by the NCAT member that NCAT would not hear the matter unless they had professional legal help given the value of the claim. The owners were given leave to appoint lawyers.

The owners spoke to their local conveyancing solicitors who recommended a legal firm specialising in building and construction law. That firm was later appointed.

The owners engaged a building certifier to provide advice on the value of repairs to the internal and external cracking. They also had a plumbing expert attend who after placing CCTV cameras down their drains advised that there were inadequate falls in the drains.

The expert building certifier's report has photographs of defects. He identified internal and external cracking, damage to gyprock, architraves, skirting, sills and cornices, dampness on bricks, problems with door and window operation, and defective connections of downpipes. He inspected the mould and damp and could not determine the cause. He said he believed the cracking was due to movement of the slab and recommended the owners engage a structural engineer to advise on the cause of cracking. The expert building certifier valued the repairs at \$14,057.

An expert engineer was engaged by the owners. He recommended a further soil investigation which was carried out in mid-2016. The report says the correct site classification was H1 and the footings should have been 400mm deep not 250mm deep as designed.

The owners' expert engineer's first report says the footings were under designed and the house required demolition and rebuilding. He said he had dug adjacent to the footings and probed with a metal rod and found the footings were only 200mm and there was no sign of any piers. He said in his opinion the design is 'quite inadequate' for the site soil conditions and that the builder had 'constructed them even smaller, without piers.'

Quotes were obtained from two builders for demolition and rebuild for \$382,341 and \$583,053.

In mid-2016 the owners' solicitors filed points of claim on behalf of the owners, a witness statement and expert reports. They argued:

- the builder had engaged the design engineer and was liable for the defective design prepared by that engineer
- the owners entered into a contract with the builder and that contract attached the drawings prepared by the draftsman and the engineer's footing design
- the site was incorrectly classified as S when it should have been H2
- the slab and footing system was inadequate
- the piers, if constructed, failed and do not support the structure
- there is substantial cracking internally and externally
- the slab and footings have failed
- doors and windows have moved
- the builder should pay \$500,000 to demolish and rebuild and the owners' legal costs.

The owners say that at some stage the solicitors advised them that as the maximum jurisdiction of NCAT was \$500,000 they could not make a claim for more than this amount. The owners say they asked if they should be going to another court and were told by the solicitors that it was better to stay in NCAT and maintain the current claim.

The builder filed affidavits and expert reports. The builder appointed an expert engineer. The builder's expert engineer's first report contained detailed photos and measurements of cracking. He concluded the cracking was mostly minor and within normal expectations. He said only cosmetic repairs were required.

The affidavits of both the builder, and his carpenter provided that the footings were constructed in accordance with engineer's design. The carpenter said he does the set outs for the builder and the piers were present. He said that he specifically recalled the piers being constructed as they had had difficulty propping the meter box in the corner (where the owners' engineer says the pier was missing) due to the pier.

The builder said the owners engaged the design engineer on the basis that they paid his bill. He said even though the engineer's invoice was addressed to him, he had no contract with the engineer and the owners were responsible for his design. The builder said the site is prepared in accordance with the engineers details and that the contractor engaged who dug the footings died in tragic circumstances three years ago so he was unable to source notes of the dig. He said if the footings were not in situ (which was denied) council would not have let the pour proceed unless there was a further engineering report. He said he was unaware of any such variation.

In mid-2016, the builder made a Calderbank offer for \$20,000 inclusive of costs. The owners say their solicitors advised them not to take the offer as their legal costs already exceeded that amount and the offer would not compensate them for the defects. The owners' solicitors instead suggested that an offer be made to the builder for him to purchase the home. The owners say they recall agreeing to this proposal but no further advice was given by their solicitors on making an offer.

Later in 2016, the builder and his expert engineer filed further material, in particular responding to the owners' expert engineer's claim that there were no piers and inadequate footing depths. The builder confirmed that he constructed the footings and piers then poured the slab in accordance with the engineering plans provided by the design engineer at the request of the owners. He said he had attended the site with his expert engineer and carpenter and they dug a number of holes, including in the area the owners' expert engineer says he dug. They said they identified a pier where the owners' engineer said there was none. They also identified piers in five other locations where they dug. Photos are attached to the builder's affidavit. The photos are black and illegible. The builder's expert engineer's report corroborates the site visit and the identification of footing depths of 250-300mm and piers in all locations.

First expert conclave and 'agreed facts'

In late 2016, the first of two conclaves occurred at the site. An NCAT member oversaw the conclave. It was attended by the owners' experts, namely their engineer, building certifier and soil engineer and by the design engineer and builder's expert engineer. They signed notes to say they all agreed that samples taken by the owners expert soil engineer show the site classification as H. All agreed that:

- the design engineer had not followed the deemed to satisfy footing design requirements in AS2870
- if the design engineer's alternative solution did not meet the Building Code of Australia (BCA), demolition of the home is required
- if the footings design did meet the BCA then only localised rectification was required.

The builder's expert engineer wrote to the NCAT member the following day saying he did not agree the site was H. He said the P classification was appropriate given fill of approximately 400mm and recent tree clearing. He said the design engineer was entitled to design an alternative solution and rely on his own expertise for that design and therefore his design meets the BCA. He said that the rectification costs agreed for cosmetic repairs were appropriate and there was no damage of structural significance.

In late 2016, the parties filed an agreed statement of facts as directed by NCAT. In it, one of the issues in dispute is whether or not the footings are the required depth and whether or not piers were constructed.

Design engineer joined to proceeding by the builder

Around this time, the design engineer made the owners an offer to buy their home for \$380,000. The owners obtained a valuation of the property from real estate agent saying it was worth \$425,000 to 435,000. The owners provided this information to their solicitors. The owners say the solicitors gave them no advice on making a counteroffer to the design engineer.

Shortly after, the builder issued proceedings against the design engineer claiming that if he was liable for damages it was because of the footings design. The design engineer filed affidavits and engaged an expert engineer to prepare a report as his expert.

The report from the design engineer's expert says the site classification should be M. He said at his inspection of the site he dug in two locations at the rear of the home and found no piers. He also found evidence of reinforcement at the base of the slab indicating that bar chairs had not been in place and the reinforcement was not adequately covered by concrete. He says that the design engineer underestimated the reactivity of the site. He said that although the piers were not there, they would not have helped because piers in highly reactive soils can move up and down. It was concluded the current damage was minor but that significant damage is expected to occur during the life of the residence. He said that removal of nearby trees will help and that underpinning of the existing footings with piers is required down the east side of the dwelling.

Second expert conclave

In late 2016, a second conclave was conducted because of the new proceeding against the design engineer. This time the design engineer's expert attended with the other five experts that had attended the first conclave. A different NCAT member oversaw the second conclave. His laptop battery went dead and he had to use the computer of one of the expert's to make notes. Just prior to this conclave the owners had exposed the footing in the area that both the owner and builder's experts had said they had dug. The area was left exposed and showed clearly there was no pier in that corner. According to the owners' engineer's, all experts viewed the footing and agreed there was no pier in that corner. Although the owner's expert recorded this finding in his notes this agreed position was not recorded in the experts' joint conclave notes. The builder's expert also did a follow up report. He does not refer to there being no piers but he does say he supports the proposal for underpinning.

A few months later, the builder made a second Calderbank offer for \$40,000 inclusive of costs. The owners say that their solicitors advised them not to accept the offer as their legal fees had far exceeded this amount.

Hearing of the case at NCAT

Just prior to the hearing in mid-2017, the owners' solicitors asked them to prepare details of their costs for demolition, rebuild and all associated costs which could be used if there were settlement discussions. The owners provided their solicitors with a handwritten note of costs totalling \$643,000. To the owners' knowledge, no settlement discussions were had on the morning of the hearing and no offers of settlement were made.

The first two days of hearing were in mid-2017. There is audio recording of these days. There is also a transcript but it is very poor quality, often not identifying who is speaking and missing words and sections of time. There is no audio recording of the third or fourth day of hearing.

Day one started with opening submissions by the barristers acting for the three parties to the proceedings, Mr A (for the owners), Mr B (for the builder) and Mr C (for the design engineer). In relation to the question of whether piers were constructed, in opening submissions Mr B referred to the account of the owners' expert engineer that he dug in one spot and found no pier and that of the builder and his expert engineer who dug in five locations and identified piers. He said, if the owners' case is that there are no piers then they need to put on better evidence of this because his client has been to the site and done a more thorough inspection than the owners' expert and says that there are piers. He said they will also call evidence from council to say that their records show that the footings comply with the design. Mr A said he believed all experts had seen the absence of piers at the second conclave. Mr B said they do not agree with that account. Mr A said that the question of whether the piers were present was in dispute between the parties.

One of the owners gave evidence followed by their expert building certifier, soil engineer and engineer. Mr A led evidence from the expert engineer about his inspection and how it was that he came to the conclusion that there were no piers. The owners' expert engineer was otherwise in the witness box for several hours and subject to extensive cross examination from Mr B and Mr C focussing on the soil classification, the interpretation of the footings standard (AS 2870), whether the footings design was adequate and whether the cracks would get worse over time. The owners' engineer gave evidence that there was not yet structural failure but it was likely to occur over time.

A representative from council gave evidence at the end of the second day. He said the inspection record showed his initials for the footing inspection indicating he did that inspection. He said he could not specifically recall doing the inspection. He said he 'would have' taken the plans, looked at them and compared them to the site. He said that it is likely that this was a footing inspection of the trenches. He said that if inspecting piers he would have checked the depths and ensured a firm base. He was not asked whether he did inspect piers and it was not put to him by Mr A that there were no piers nor was he asked why the council did not require an engineer's certification of the inspection of the piers when the DC had required this to occur.

The council officer that conducted the slab inspection was also summonsed by the builder's lawyers to attend to give evidence. However, there was no time to hear from him within the scheduled hearing time. The owners say that this officer did not return to give evidence on the third or fourth day as it was agreed by the barristers that he was not required.

Between the first two days of hearing and the second two days, attempts were made to obtain receipts from the largest concrete supplier in the area. It was thought that if they could ascertain the amount of concrete purchased this would be evidence of the depth of footings and whether piers were poured. The concrete supplier's head office said they could not find any record of supplying concrete to the site. A subpoena was issued to the builder for him to provide receipts for concrete. He attended NCAT and said he did not have any receipts for concrete. He was asked to provide an affidavit to that effect. The owners say he never provided the affidavit. During this time no other action was taken to excavate the footings, take photos or improve the evidence that there were no piers.

The third and fourth day of hearing was in late 2017. As there is no audio or transcript of the third and fourth day there is no record of who gave evidence or what they were asked. The owners say that the builder was called to give evidence but Mr A said he did not want to cross examine him. They report that the builder's expert engineer gave evidence but the questioning by Mr A was only about his legal proceedings with the Queensland Board of Professional Engineers a few years earlier. The design engineer's expert did not give evidence and the owners understood that this was because the other parties said they did not intend to rely on his report. The owners recall that they finished early on the third day and the final day was closing submissions. They say written submissions were provided by all three barristers. A copy of draft submissions prepared by Mr A do not refer at all to the absence of piers, the second conclave and the fact that two of the expert witnesses say there are no piers. They do not highlight that the council officer did not give evidence that piers were actually inspected. Instead they focus on legal arguments about the warranties and *Home Building Act 1989 (NSW)* (Home Building Act), the soil classification, slab design and extent of cracking.

The decision of NCAT

The decision was handed down in early 2018. In summary NCAT found:

- the owners had contracted with the design engineer for him to prepare the plans. To the extent that the builder arranged for the design engineer to do that work, he did so as agent for the owners. Notwithstanding this, if the design resulted in defective building work, the builder was liable for those defects based on a breach of warranties under the contract and Home Building Act
- the conclave evidence was not relied on by any party during the proceedings so NCAT had no regard to it other than to consider the agreement reached by experts on the value of rectification of cracking
- the site may have been incorrectly classified but this was not the responsibility of the builder and therefore was not a breach of the warranties under the Home Building Act
- the piers and footings were constructed as designed. NCAT considered the evidence of the owners' expert engineer and the builder's expert engineer in their early reports only. NCAT preferred the evidence of the builder's expert to that of the owners' expert on the basis that the builder's expert had been more thorough in digging in five places when owners' expert only looked in one place. NCAT also had regard to the evidence of the inspector and council records that the footings were in accordance with the design. No reference is made in the decision to the report from the design engineer's expert on this issue or to the evidence of the builder or his carpenter
- there were defects evidenced by the cracking and this was a breach of the warranties under the Home Building Act for which the builder was responsible
- the cracking to brickwork and external finishes was mostly minor and even though there were two cracks of 6mm which, according to AS2870 were categorised as 'significant', this did not mean that the home needed to be demolished. The evidence of the builder's expert engineer that the cracking would not get much worse was accepted over that of the owners' expert engineer and the design engineer's expert who said that it would get worse as the clay expanded and contracted. Whilst NCAT accepted there was a possibility of minor future cracking, it accepted the evidence of the builder's expert that the moisture conditions under the slab would have stabilised in the seven years since the house was built
- the defects did not reflect that the slab and footings were inadequate or that the building required demolition. Rectification required cosmetic repairs only which NCAT valued at \$6,643.49
- taving found that the footings were constructed by the builder as designed and the defects were limited, there was no basis to find that the footings design was defective and the builder's claims against the design engineer failed.

Costs orders

A decision on costs was made on the papers. NCAT ordered the owners to pay the costs of the builder. It accepted the argument made by the builder that although he had been found to breach the warranties and damages had been ordered, he had still been successful in the proceeding as the claim had been for demolition and rebuilding of the home. The Calderbank settlement offers were considered and it was determined that it was not unreasonable for the owners to reject those offers. Therefore, they did not operate to require the owners to pay the builder's costs on an indemnity basis.

The owners acted for themselves in negotiating the payment of costs with the builder's lawyers. They allege that the builder's lawyers were rude and asserted that they could afford to pay all of the builder's costs because they had recently received an inheritance.

Ultimately, the owners paid \$142,000 of the builder's legal costs (they had been asked to pay approximately \$180,000). The owners' own legal costs were approximately \$159,000.

Appeal to the Appeal Panel

The owners appealed NCAT's decision. They were unable to pay for their solicitors to act and had lost faith in their ability so they represented themselves in the appeal hearing.

Between lodging the appeal and the appeal hearing the owners engaged three further experts as follows:

- an expert, who gave an opinion about the evidence of the reinforcement not being correctly placed in the slab. He said the bars will corrode and if this has occurred throughout the slab and footings this will affect the performance of the slab
- two further expert engineers reviewed all of the expert reports from various engineers filed in the proceedings and concluded that the site classification should have been H and that footing design was inadequate. One said that the footing design was 18.8% of the stiffness required for a class H site and that internal stiffening beams should have been provided for. They both said that damage will continue to occur as the clay moisture changes and that patching of cracking will not resolve the underlying issues.

The owners filed the new expert reports in the appeal but the Appeal Panel said they would not consider the new reports as they were not 'new evidence'.

The appeal hearing took place in mid-2018. The Appeal Panel decision was made almost 12 months later 2019. The Appeal Panel dismissed the owners' appeal. They said (in summary):

- that the owners' grounds of appeal are no more than commentary on parts of NCAT's decision that they disagree with. It said the owners' submissions make no proper analysis of whether NCAT made an error of law
- the owners have not established any errors of law by NCAT
- the decision of NCAT shows it had regard to competing evidence, it favoured certain evidence and provided its reasoning for doing so. That reasoning was logical and showed that NCAT understood the differing expert opinions. It was open to NCAT to make the findings it made
- in relation to whether piers were constructed, at the appeal hearing the owners referred to the second conclave and the exposed footing seen by all experts. The Appeal Panel said that this issue was not raised during the hearing, noting that the builder's expert engineer was not cross examined on it nor was it raised with the owners' expert engineer or any other witness during the hearing.

Following the Appeal Panel decision in 2019 the owners' expert engineer returned to the site and conducted an extensive excavation around the footings in the area where the piers were supposed to be. He measured the depth of the footings and found it to consistently be 200mm and not 250mm as designed. He also found no evidence of piers in any locations around the perimeter of the slab. Numerous photos were taken of this inspection.

Further complaints made by the owners

Since the Appeal Panel decision, the owners have lodged complaints summarised as follows:

- to the Office of Legal Service Commission (OLSC) against the builder's lawyer for his behaviour during costs negotiations. The complaint was dismissed
- to OLSC against their solicitors for their mishandling of the case including their failure to try to settle the case and the constant change of solicitors handling the file. The complaint was dismissed
- to the NSW Bar Association against barrister Mr A for failing to cross examine the builder on relation to the absence of piers. The outcome is still pending
- with NCAT to allege that the builder, his expert engineer and the carpenter, lied to the tribunal about the presence of piers and should be prosecuted. NCAT responded saying that if there had been an offence, it had no ability to investigate it. They said in any event any proceeding would have had to have been brought within 12 months of the false representation to the tribunal so they are out of time
- with NCAT to complain about the conduct of the hearing including the conclaves, delays and alleging a conflict of interest involving one of the barristers and the tribunal member who heard the return of the summons against the builder to produce receipts for concrete. These complaints were dismissed by NCAT
- to the industry association that the builder's expert engineer is a member of. The complaint was dismissed. The decision says that although they accept that there are no piers and that this was of material importance to the owners, the builder's expert engineer did not breach their code of conduct in relation to the matter
- to the industry association that the design engineer is a member of. The complaint was dismissed as unsubstantiated with no reasons given
- to CGU Insurance (CGU) seeking to claim on their domestic builder warranty policy. CGU advised that the policy would not respond given the builder had not died, disappeared, become insolvent or had his licence suspended
- to the Minister for Better Regulation about the OFT's failure to assist with the complaint. A response was provided on advice from the OFT suggesting they make a complaint about the council but noting that OFT may not consider complaints about conduct more than three years old
- a complaint to OFT against the council. The outcome is still pending and will be informed by this review
- to the Building Commissioner which resulted in him visiting the site and observing the footings confirming no piers were constructed. The Commissioner proceeded to arrange for this review which will inform further responses to all recent complaints made to the Minister for Better Regulation and the OFT.

The owners' expert engineer has also complained to NCAT and assisted in providing supporting material for the owner's complaints to the industry association about the design engineer and the builder's expert engineer.

The owners advised that they sought legal advice from another legal firm about bringing a claim against the council in 2019 before the 10 year expiry on bring claims. They were advised that there were reasonable prospects of success but were unable to finance the making of a claim against council so did not act on that advice.

The Building Commissioner contacted the builder's industry association on behalf of the owners and asked them to consider the matter and take action against their member. The industry association advised they would not consider the matter given it had been the subject of NCAT proceedings.

4. The outcome – are there piers?

The home has no piers. This was the evidence of the owners' expert engineer and the footing engineer's expert and the photograph of the exposed footing at the second conclave shows no pier in that location. The evidence of the builder's expert engineer and the builder is based on a site visit where they say they dug four or five holes and found piers. The photos attached to the builder's statement are black and illegible.

Shortly after the appeal was over, the owners' expert engineer did an extensive excavation and took photos confirming there are no piers and that the footings were only 200mm not the 250mm specified in the design. The Building Commissioner attended the site in mid-2020. The footings were exposed for his visit. The Commissioner confirmed that there are no piers.

This means that:

- the builder gave false evidence and carried out defective work
- the carpenter gave false evidence
- the builder's expert engineer gave false evidence or at the very least evidence based on inadequate investigation
- the council officer approved work that did not comply with the approved design. They did not carry out all mandatory inspections listed on the DC or insist on the inspection certificate from the engineer as required in the DC
- the NCAT case appears to have been poorly managed by the owners' legal team because the 'fact' that there was no piers was not established adequately in the evidence filed or the questioning of witnesses. In this regard the owners report that the builder and his expert engineer were not cross examined on the issue and based on the transcript it was not put to the council officer that no piers were found nor was he asked about why the inspection certificate required from the engineer under the DC was not obtained. Despite the builder's barrister raising the inadequacy of the evidence on this issue in his opening submissions, no steps were taken to strengthen that evidence and the evidence of the builder his expert and the council building inspector was unchallenged.

NCAT's decision was open to it because the evidence before it that there were no piers was conflicting and on the face of the early reports, it did appear that the builder's expert had done a more thorough inspection than the owners' expert. However, it is not clear that the tribunal was taken to the evidence in the later reports which reflected what happened at the second conclave. In addition, the evidence from the design engineer's expert does not appear to have been highlighted by the owners' barrister through witnesses or in closing submissions.

The early evidence that there are no piers is corroborated and put beyond doubt by the inspection that the owners' expert engineer performed after the appeal decision and the inspection by the Building Commissioner. In both cases extensive excavations were carried out along the side of the home to show, unequivocally that there were no piers.

If the tribunal had found that no piers were constructed, it may have gone on to find that the house needed to be demolished but there is no certainty of this. The evidence of the design engineer's expert (who also said that there were no piers) was that underpinning using piers should occur. No costings for underpinning were discussed and it appears that this alternative rectification method was not raised in detail at the hearing given that expert did not give evidence. The owners' expert engineer was asked about the proposal for underpinning when he gave evidence and he also commented on it in his reports. He said he did not agree with underpinning as a highly reactive site should not have piers.

Whilst it cannot be concluded that NCAT would have ordered the demolition and rebuilding of the home, had the tribunal found there were no piers it is unlikely the owners would have been ordered to pay the builder's costs and likely that the builder would have been ordered to pay the owners' costs.

5. Liability and possible further action that could be taken against each party

The builder

The builder has carried out defective work in not constructing the piers.¹ He also gave false evidence to NCAT. The evidence was contained in his two statements which were filed with the tribunal.

The owners advise that the builder was called to give evidence on day three of the hearing. There is no recording of day three. They say that the builder entered the witness box and confirmed the evidence in his statements. Their barrister did not ask any questions of the builder.

The NCAT decision does not refer to the evidence of the builder when concluding that the piers were constructed. It refers to the evidence of the expert engineers for the owner and builder and the council officer. Nevertheless, on the basis that the builder's statements were filed and apparently tendered into evidence under oath or affirmation, he has made false statements to the tribunal.

I note that under clause 6.20 of the *Environmental Planning and Assessment Act 1979 (NSW) (EPA Act)*, a 'civil action' for loss or damage cannot be brought more than 10 years after the date for completion of the work to which the claim relates.

Although it is now more than 10 years since the home was completed, there are actions the Secretary could take under the Home Building Act to issue a rectification order and/or take disciplinary action against the builder. These actions are not likely to be considered a 'civil action' and there does not appear to be a statutory time limit on when these actions can be taken by the Secretary. In the letter from the Minister for Better Regulation's office it says that complaints can be dismissed where they relate to events that occurred more than three years before the complaint was made. This appears to be a policy position rather than based on any statutory time limit for considering complaints about the conduct of licensees.

It is more than three years since the home was built and more than three years since the builder's evidence was filed. His evidence was tendered in the tribunal in late 2017 and it is less than three years since it was determined unequivocally that no piers were constructed.

Rectification orders

Section 48C of the Home Building Act provides that a person that has a dispute with the holder of a contractor's licence with respect to residential building work can notify the Secretary of their dispute. The builder holds a contractor's licence and the owners have a dispute with him over defective building work.

The Secretary may investigate the dispute. The inspector must cause a written report to be prepared and a copy of that report to be given to each party. (section 48D).

The inspector may make a rectification order if they are satisfied that any residential building work is defective and may serve a written order on the contractor requiring the contractor to take such steps as are specified in the order to ensure the defect is rectified. (section 48E).

A rectification order does not give rise to rights and obligations (section 48F) and the builder could refuse to comply with the rectification order. However, the failure to comply with a rectification order is a ground for disciplinary action.

¹ EPA Regs 98(1)(a) prescribed condition of a DC that work must be in accordance with the BCA.

Disciplinary action

Disciplinary action can be taken under section 62 if the holder of a contractor's licence is guilty of improper conduct.

Improper conduct is defined in section 51 to include:

- committed an offence against section 307A or 307B of the *Crimes Act 1900 (NSW)*, whether or not an information has been laid for the offence. These sections make it an offence for a person to provide false or misleading information to a public authority or a person exercising a function under a law of the state (which would include NCAT)
- without reasonable excuse, does not comply with a rectification order
- commits a fraud or makes any misrepresentation in connection with any contract.

Disciplinary action can be taken following a complaint and investigation. If disciplinary action is taken and the grounds alleged are proven, the Secretary may do various things including impose a penalty of \$11,000, impose conditions on a licence, suspend, cancel and/or disqualify a licence. The outcome of a disciplinary action does not include compensation for an owner or enforcing a rectification order. However, if the builder chose to rectify the defect or compensate the owners, this could be taken into account in determining the appropriate outcome of the disciplinary action.

The contractor can appeal a disciplinary action taken by the secretary to NCAT.

The council

The council officers failed in the following respects:

- issued the CC based on inadequate drawings – there was no detailing for the piers²
- failed to carry out all mandatory inspections as listed in the DC
- failed to require the engineer's certification of inspections which was a condition of the DC
- issued the OC when they could not have been satisfied that all inspections required under the DC had been carried out (EPA Act s109E(3)(e) and 109H(2))
- failed to ensure that the building work was carried out in accordance with the approved documents in that the piers were not constructed
- the record of inspections is very limited and does not appear to comply with EPA Regulations 143C(3) and 162B.

The building inspector that inspected the footings did give evidence in NCAT but stated clearly that he had no specific recollection of the inspection. His evidence was given on the basis of things he would have done and it was never put to him by the owners' barrister that there were no piers constructed. The evidence was not misleading. However, when the inspector inspected the site, he ought to have identified that piers were not constructed and either requested a revised engineering design or required the piers to be constructed.

A different inspector is said to have inspected the slab. The owners' expert engineer's evidence is that the footings were 200mm rather than the required 250mm. It is possible that the footings were prepared correctly but the pour that occurred after mandatory inspection was shallow. It is unlikely that the inspector would have been able to tell at the time of the footings inspection that the piers had not been dug.

The council officer that issued the OC failed to ensure that all inspections listed in the DC had been conducted and that the certification from the engineer required in the DC had been obtained. He was not called to give evidence.

At the time of the relevant conduct council officers were not accredited by the Building Practitioners Board.³ Therefore the OFT has no ability to investigate or consider disciplinary action against the officers involved. Council may have acted negligently, however any claim that could have been made by the owners is now statute barred.

² EPA Regs 145(1) – the CA must not issue a CC unless the design and construction will comply with the BCA.

³ Accreditation of Council employed certifiers was required from 1 September 2010.

The design engineer

The design engineer did not give evidence about whether the piers existed. However, five experts retained by the owners, including after the original NCAT determination was made, have opined that his site classification and footing and slab design were incorrect.

The design engineer says his design was a performance solution and he relied on his own expertise which he says he is entitled to do under the BCA. The Appeal Panel said NCAT's reasoning and determination on the question of the adequacy of the footings design was open to it. Although the tribunal may have found that the site classification was incorrect, it could not attribute this to the builder. As the owners' claim was not against design engineer, any finding about the site classification had no relevance to the outcome. Regardless of whether the original soil classification and design were defective, any claim against the design engineer now would be out of time.

The owners complained to industry association for engineers. The complaint was dismissed. The decision contains no reasoning other than to say there was insufficient evidence to support the complaint.

There is no further action that can be taken against the design engineer. He is not an accredited certifier in any of the engineering classes in NSW, so the government has no regulatory oversight of his conduct.

Expert engineer for the builder

The builder's expert engineer has either given false information or he did not make adequate enquiries before providing evidence to NCAT that the piers were constructed. Further, having observed at the second conclave that there was no pier in the corner of the building where he had previously said there was a pier, the expert witness should have sought to amend his earlier expert report.

The builder's expert engineer's evidence about the presence of piers is in his report which was filed with NCAT. According to the owners, the builder's expert gave evidence on day three of the hearing. There is no recording for day three. The owners say he was cross examined about previous disciplinary matters in Queensland and not cross examined about his evidence that he observed piers or did not observe them at the second conclave.

The owners complained to engineer's industry association about the builder's expert. The complaint was dismissed. The decision says that although they accept that there are no piers and that this was of material importance to the owners, the builder's expert did not breach their code of conduct in relation to the matter.

There is no further action that can be taken against the builder's expert engineer. He is not an accredited certifier in any of the engineering classes in NSW, so the government has no regulatory oversight of his conduct.

Industry association for the engineers

The complaints review conducted by the industry association for the engineers is underwhelming.

In relation to the design engineer, the association was provided with the reports from five experts that concluded that the original site classification and design were inadequate. In addition, the design engineer's own expert said the original site classification was incorrect and his design was therefore incorrect.

Notwithstanding that a decision had been made by NCAT, as an expert industry association, it was incumbent on them to review those reports, some of which had not been before NCAT, and apply their technical expertise to consider whether the original site classification and design were inadequate. It is difficult to accept how the association did not prefer the weight of expert opinion against the design engineer in considering the complaint. The record of the decision is woeful. It notes the committee members that considered the matter via a teleconference in mid-2019. It provides limited details of what material was considered, no assessment or analysis of the evidence and no reasoning for their decision. It simply says there was insufficient evidence to support the complaint.

In relation to the builder's expert engineer, the association was provided with details of the evidence he gave in NCAT and the photographs taken by the owners' expert engineer after the appeal decision showing that piers were not present. The same individuals that reviewed the complaint against the design engineer also heard this complaint. They considered whether the builder's expert engineer:

- failed to act on the basis of well-informed conscience
- failed to be honest and trustworthy
- failed to act on the basis of adequate knowledge.

In relation to all three aspects they found there was insufficient evidence to support the complaint. In a separate paragraph they say that it has been found that piers do not exist and whilst this was of material importance to the complainant, they did not believe the approach taken by the builder's expert or the manner in which it was taken was inappropriate.

Having accepted that there were no piers, it is difficult to believe that the association did not conclude that the builder's expert had acted dishonestly in his reports or at the very least in not correcting his reports after the second conclave when the area he said had a pier, was exposed and seen by all experts at the conclave as having no pier.

The lack of detail in both complaint documents is unsatisfactory and gives the impression that very little time or effort was taken to consider the complaint properly. No time was taken to explain their findings or their analysis of the evidence before it. This suggests that industry association has no interest in or respect for the consumers of engineering services. Further it demonstrates a lack of willingness to hold their members to account for what the weight of evidence suggests was incompetent and unprofessional conduct.

Industry association for the builder

The Building Commissioner referred the matter to the builder's industry association asking it to take action in relation to the builder. The association said they would not take any action due to there being a decision by NCAT. The association's position is unreasonable given there is new evidence based on the excavation by the owners expert engineer and the site inspection by the Commissioner, confirming that there are no piers and confirming that the decision of NCAT was in part based on false and misleading evidence provided by the builder.

The lack of willingness of the association to become involved is unsatisfactory for the owners and gives the impression that they have limited interest in or respect for the consumers of building services provided by their members. Further it demonstrates a lack of willingness to hold their members to account for unethical, incompetent and unprofessional conduct.

NSW Fair Trading

The owners complained to the OFT in 2015 before commencing proceedings at NCAT. They did not know at this time that there were no piers.

The owners were told that an investigator would be appointed but this did not occur. Instead, the OFT wrote to the owners saying that the complaint was about contractual issues and it was not appropriate for the Home Building Complaints Service to attempt to resolve the dispute. The letter suggested the owners go to NCAT and gave them details of the Home Building Advocacy Service in Parramatta where they could access professional legal support.

A review of the OFT files shows that after the complaint an OFT officer telephoned the builder who said there was nothing wrong with the engineer's design or the build and that all standards were adhered to. The builder is reported as saying he was not willing to offer any redress and the problems may have been cause by a lack of management of drainage and trees. He said he was happy to fight the complaint 'all the way' but would be willing to participate in a mediation. It is recorded that this was communicated to the owner the following day and she said she would like the matter referred to the dispute resolution and investigation process. It was determined there was insufficient time remaining for dispute resolution intervention. There is a file note saying that the dispute is in regard to a difference of opinion between engineers in terms of the soil classification and this was not something an inspector would be able to determine so it was not suitable for inspection. Ultimately a letter was sent saying the matter was not appropriate for the Home Building Complaints Service to resolve.

Intervention by the OFT at this early stage may prevented the protracted legal dispute that ensued. It is unacceptable for a government dispute resolution service not to operate to assist owners and builders to resolve disputes on the basis that they are 'contractual'. The files show that it was considered to be a dispute about the site classification. Presumably, this was not considered to be an issue for the builder and as engineers are not licensed by OFT, perhaps was not something that OFT considered to be within their remit. However, it was an issue for the consumer. At the time of the complaint, the owners knew that their house was cracking and had advice that the footing design was inadequate. It was apparent that there were alleged defects and these should have brought the owners complaint within the scope of the dispute resolution service. As to the note about the time remaining, presumably this a reference to the six year time limit on warranties which would have expired in December 2015. However, as the building contract was entered into before 2012, there was a seven year time limit on the warranties in this case. Therefore they had until December 2016 to bring their NCAT claim which was sufficient time for dispute resolution assistance.

Builder warranty insurance

The owners notified the insurer of the dispute in 2015 and tried to make a claim on their warranty insurance in mid-2019, after the NCAT appeal decision. They were advised that as the builder had not died, disappeared, become insolvent or had his licence suspended, the policy would not respond.

This advice is correct. It is also unlikely that the policy would have responded given it was more than six years since the completion of the home.

Solicitors for the owners

The owners allege that their file was passed between six lawyers and at times they did not know who had carriage of their matter. There were also changes in the solicitors handling the file at critical times such as just before the hearing.

The owners allege that they were always willing to make offers to settle and provided costings, valuations etc. but were never sent proposed settlement offers to approve and no settlement offers were ever made. They were told not to bring proceedings against design engineer or accept the builder's Calderbank offers and they followed that advice.

It is evident from the costings prepared by the owners just prior to the commencement of the hearing that if they were to be fully compensated for the losses associated with demolition and reconstruction of the home, their claim exceeded the jurisdiction of NCAT. The only alternative costs to demolition and removal were those in the report of the owners' expert building certifier totalling approximately \$14,000. There were no costings for the defects reported in relation to plumbing and drainage, mould and dampness and the electrical problems that were identified in the original application commencing proceedings.

On the audio recording of the first day of hearing it can be heard that the court book compiled by the owners solicitors was out of order and incomplete. During the owners' barrister's opening submissions there is constant confusion about his version of the court book and the version the Tribunal member had, with inconsistent documents and page numbering.

The brief to counsel to appear in the matter restates the points of claim including that 'the piers, if constructed, failed and do not support the structure'. The brief to counsel makes no other reference to the issue about missing piers or seeks counsel's advice on the strength of the evidence to prove that fact.

The owners allege they were advised against proceeding against the design engineer. They also allege they received no advice or recommendation about whether they should proceed against council for failure to identify that there were no piers or to require the conditions of the DC to be met when issuing the occupation certificate.

Between the first two days of hearing and the second two days, attempts were made to seek evidence about the amount of concrete purchased for this site. This was at the barristers instigation. The owners say there was no other discussion about the need for further evidence and they assumed that when the matter resumed the builder, his expert engineer and the expert for the design engineer would be questioned by their barrister about the evidence that no piers had been constructed. This did not occur.

The owners complained to OLSC about the solicitors. They alleged that their solicitors:

- failed to provide advice about making settlement offers noting that they were advised by solicitors handling the matter not to accept the Calderbank offers, but after NCAT's decision told by the solicitors that they should have accepted those offers
- changed solicitors with carriage of the matter frequently and at critical times
- had many conversations with them about their dissatisfaction with fees and mismanagement of the matter and the time it was taking to resolve the matter
- failed to act on instructions from the owners to complain to NCAT about delays in the proceeding
- provided incorrect advice about whether they should have brought proceedings against the design engineer
- in negotiating a costs order in their favour in relation to the second conclave, the solicitors did not act on instructions and settled for a lesser amount leaving the owners \$10,000 out of pocket
- overcharged for their services.

The response to the owners' complaint from OLSC says the allegations raised about the alleged failures to properly advise or represent them essentially amount to allegations of professional negligence. It goes on to say that disciplinary action against allegedly negligent lawyers is only possible in circumstances where gross negligence can be demonstrated. They say in this case, they did not consider the conduct of the owners' solicitors to be so egregious that it would warrant negligence to agree that would support disciplinary action. OLSC suggested the owners seek legal advice about making a civil claim against their solicitors.

In relation to the complaint about overcharging they say that there are strict time limits within which such complaints can be considered and the owners' complaint was out of time.

The owners can still make a civil claim against their solicitors for professional negligence and it would appear on the material that has been provided that they would have reasonable prospects of success. However advocates immunity may apply to alleged incompetence actions of the solicitors that are directly related to the hearing. I note that it would appear that at the relevant time the owners' solicitors were a member of the Law Society professional standards scheme.

Barrister for the owners

Audio recordings of most of day one and two are available and the owners have given an account of what occurred on day three and four of the hearing. There are also references to the evidence given on day three and four in the recording of the appeal hearing.

The owners' barrister made very little of the evidence from the owners' expert engineer and the engineer appointed by the design engineer. Based on the audio recording of day one and two, he made a brief reference to the second conclave in his opening submissions and also questioned the owners' expert engineer about the fact that he had concluded there were no piers. However, he did not lead evidence from any of the other experts about the second conclave and the fact that all experts present observed the excavated footing with no pier. He also did not question the council officer about the absence of piers.

In relation to day three and four, the owners say day four was closing submissions only. They say on day three their barrister did not question the builder or his expert engineer about the missing piers and did not require that the design engineer's expert be called to be questioned about his evidence that there were no piers or about what happened at the second conclave. The Appeal Panel's decision notes that there was no evidence put before the tribunal about the excavated footing showing the absence of a pier at the second conclave.

The draft version of written closing submissions that has been provided makes no reference to the evidence about there being no piers at all. The final version of submissions has not been provided.

The owners have complained about their barrister. Their complaint is under consideration by the Bar Association.

The owners are within time to make a civil claim against their barrister for professional negligence however, advocates immunity is likely to limit the success of any such claim. I note that it would appear that at the relevant time the barrister was a member of the Law Society professional standards scheme.

6. Lessons learned and issues for potential reform or improvement

This section of the report considers the above findings against the 6 pillars adopted by the NSW Building Commission and makes other observations which could inform future thinking about improving outcomes for consumers.

The 6 pillars

Pillar 1 – A better regulatory framework. Implementing legislation and transforming the focus of the regulator.

Under Pillar 1, the intention is to transform the regulator to being more proactive in regulating the sector. In order to be of greater assistance to consumers like the owners in this case, OFT would need to be more willing to offer dispute resolution where there are allegations about engineering issues and contractual disputes. They would also need to have inspectors with adequate skills to consider allegations about engineering issues. Whilst OFT officers may presently inspect alleged defects, for them to have been able to facilitate the resolution of the dispute in this matter, they would have needed to have excavated to inspect footings as was done by the various expert engineers engaged by the parties in this case. The improvements in regulatory practice intended by Pillar 1 should improve outcomes for consumers in the future by assisting them with early dispute resolution and independent technical advice on alleged defects.

New legislation will introduce a requirement for registered engineers to produce declared designs which will increase accountability for engineers and also see their conduct regulated by the NSW government. However, these laws are only intended to apply to designs for buildings that are class 2 or a mixed use building that contain class 2. Therefore, they will not apply to the home built in this case which is a class 1 building.

Pillar 2 – Rating systems, is intended to develop an industry led rating scheme that can better inform financiers and insurers on the selection of industry participants. The initial area of focus for this work is on the multi-unit apartment sector. However, the concept of a rating scheme for consumers could conceivably be a longer term outcome of this work.

In this case, the owners selected a local builder that was known to them through a family connection. It is not possible to say whether the owners selection of the builder would have differed if there was a rating scheme that they could have had regard to. However, the border intention to provide greater transparency about the rating of industry participants should improve outcomes for consumers.

Pillar 3 – Skills and capabilities, is intended to improve the standards of education (and therefore competency) of all types of industry participants through improvements to accreditation of courses and course content. The initiative will also develop course content for continuing professional development that could be made compulsory for those that are currently licensed. Broadly speaking, the outcomes should improve competency and in turn reduce non-compliance and defects in all building types. However, it will only improve competency in existing practitioners if they are required to undertake further education. This requirement can only be imposed on licensed or registered participants. Given engineers involved in class 1 buildings are not required to be registered, the benefits of Pillar 3 may not be seen for established engineers like the design engineer involved in this case.

Pillar 4 – Better procurement methods, is aimed at encouraging the use of standard form contracts for large projects that are fair and reasonable. It is not relevant to contracts for the construction of class 1 dwellings, however there are already significant consumer protections relating to the content and form of contracts for home building. The form and content of the contract used in this case does not appear to have contributed to the issues that arose from the alleged defects.

Pillar 5 – A digital future, aims to move the industry to digital record keeping which will improve transparency and access to information for owners of buildings. This pillar will in part be implemented under the new *Design and Building Practitioners Act 2020* which will only apply to class 2 buildings.

Pillar 6 – Case studies and other research will be undertaken to ensure decisions about further reforms are informed by evidence based information. This review is one such case study.

Other observations

The documentation which was accepted by the council when issuing the CC was limited to a single A3 page of architectural drawings and the footings information prepared by the design engineer. For a \$200,000 plus investment this level of detail is very limited. The footing design provided for the installation of piers but there was no detailing for the piers. Conditions of the DC were that the 'engineer to certify soft spot checks', 'engineer to certify that piers have been constructed to 'firm developed' or 'firm natural' in accordance with the engineering detail provided. However, there was no follow up to ensure that this certification was carried out.

Although the council officer that inspected the footings said that he could not recall the specific inspection of this site, he said he would have said something if he had observed that piers had not been installed at the time of his inspection. Clearly, he did not do so in this case as there are no piers on the outer edge of the footings as envisaged by the footing design.

Despite these obvious shortcomings, the conduct of the council was not considered by OFT when the owners made their complaint about the building. This may have been because council officers were not required to be accredited certifiers at the time. Council officers that are accredited certifiers are now regulated by the OFT and officers should have an appreciation for the potential that the certifier's conduct may have contributed to alleged defective building work when considering complaints.

The recently issued Certifier's Practice Guide emphasises the need for certifiers to ensure the adequacy of the quality and type of document relied on when issuing a CC. However, this guide only applies to new residential apartment buildings. Its application to domestic dwellings should be considered. In relation to the A3 drawing that was accepted, it would appear that each of the requirements set out in Schedule 1 of the *Environment Planning and Assessment Regulations* the applied at the time the DC and CC were issued were met. Those requirements do not specify the size of drawings which enables the draftsman to include multiple drawings on a single page at very small ratios. Some consideration could be given to the adequacy of these regulatory requirements.

The design engineer said his design was an alternative solution. He did not rely on the deemed to satisfy requirements in the relevant Australian Standard on the basis that he classified the site as "P" or problem site and the standard provides that in these circumstances an alternative solution should be used. The CC does not record that an alternative solution was used for the footings design. It is not known if the council officer undertook a substantive review of the design to confirm that it was acceptable. There was evidence from several witnesses that the soil classification was incorrect and not usual for the area. If that is the case one might have expected the council officer to have questioned the soil classification. It is not known whether this was done and given the time since the DC and CC were issued, it is unlikely that the council officers involved would recall any detail about the issuing of the approvals for this site. If a certifier does not have the skills to assess a footing design, they can rely on a certification by an accredited engineer. In this case, the design engineer was not accredited. It is not mandatory for footings designs to be certified by an accredited or registered engineer in NSW. In the absence of anyone checking the adequacy of footings designs, particularly where they are a performance solution, the engineer self certifies. Consideration should be given to whether it should be mandatory for any performance solution relating to footings to be checked and certified by an independent engineer or the certifier (if they have the skills).

The owners' expert engineer noted that in Queensland, where he also works, it is usual the practice that the design engineer (who must be registered) will conduct inspections of their design during the work and approve that work. He says this is not the practice in NSW and he has had a number of experiences on NSW projects where his structural designs have not been followed. He suspects there are no inspections or if there are, the inspectors do not identify departures from the designs because they are not engineers and do not know what to look for. Consideration should be given to mandating that the design engineer must inspect and approve their engineering design during construction as part of the mandatory inspection process. This process was envisaged in the conditions on the CC for this case, however, the certifier did not require those conditions to be met.

The conduct of the two industry associations is disappointing. Whilst the industry association for the engineers did have a complaints process, on the face of the documentation, the association did not apply good decision making procedures to its process leaving the owners with no understanding of why their complaints were rejected. In the case of the builder's industry association, they refused to acknowledge that they had any role in considering the conduct of the builder. Governments cannot force industry associations to operate credible complaints processes in a genuine and independent manner for the benefit of consumers. Industry associations that are captured only by the interests of their members will continue to work against increasing the competency and integrity of the industry. Consideration should be given to ways to encourage industry associations to co-regulate their members and be more focused on consumer interests. There has been encouragement from governments for associations to seek approval for professional standards schemes. Changing the culture of industry associations is essential to industry reform and accountability.

In terms of the conduct of the owner's legal team, complaints made to OLSC about the solicitors involved were dismissed with the owners advised to consider commencing civil proceedings against their solicitors. The OLSC complaints process is part of a professional standards scheme and although the explanation from OLSC of why it rejected the complaint was much more detailed than that of the engineers' industry association, the outcome for the owners is no better.

The lines between what a regulator is willing or able to do with a complaint and an owner's ability to bring civil claims are often blurred. Where owners do exercise their legal rights to bring a civil claim there is no guarantee they will obtain competent and effective legal advice, despite the considerable expense of legal services. According to OLSC the conduct of the owner's solicitors was not sufficiently egregious to warrant disciplinary action. That assessment does not appear to turn on the financial consequences of the alleged incompetence, in this case approximately \$300,000 in legal fees and no compensation for defective building work. In the case of the engineers' industry association it found no case to answer. The builder's industry association would not even consider the complaint.

It is noted that even where disciplinary action is taken by a regulator or complaints are found proven by an industry association, the consequences are aimed at the practitioner. These processes do not usually result in compensation for the complainants.⁴ This is often why civil action is recommended. However, when an owner has taken civil action and been let down by the system, having a regulator or industry association find against those involved may provide some closure to the ordeal that has been endured. Disciplinary actions are also essential to provide accountability for poor conduct. They may also cause the practitioner to improve their performance and conduct in the future, avoiding harm to other consumers. For this reason, the role of the regulator and industry associations is a very important part of the system of accountability. However, in this case we can see that none of the regulators or industry associations have been willing to take up the issues and make adverse decisions about the conduct of the practitioners involved.

⁴ It is noted that in certain circumstances complainants can be awarded up to \$25,000, or other amount agreed, as part of disciplinary actions against legal practitioners.

The Office of the Building Commissioner
E: buildingcommissioner@customerservice.nsw.gov.au

