Subject: home building act

I am the Chairman of Owners Corporation SP66366. Our building consists of 7 Villas. Some months ago we made a claim under the Home Building Act against Vero Insurances Limited. It was accepted but in dispute was the the amount of the excess required by Vero. It was not $500 as specified by the Act but seven times this amount (there being 7 lots in our strata plan) & the repair required was part of the Common Property as defied by the Strata Titles Act. I believe most claimants accept this multiplication as they cannot afford to wait for the faulty work to be rectified but as ours was only a small claim & not urgent we decided to take the matter to the Consumer & Tenancy Tribunal. At the door of the Court Vero capitulated & reduced the excess to $500.
Attached is an Article I subsequently wrote which explains the situation in more detail.
Bill Caldwell

CLAIMS BY INSURERS TO MULTIPLE EXCESSES IN STRATA DEVELOPMENTS.

Many Strata Managers will have experienced the shock & anger expressed by Owners when informed that a legitimate claim pursuant to the provisions of the Home Building Act ("the Act") is subject to an excess to be borne by the Owners of $500 multiplied by the number of Lots in the relevant Strata Plan so if the Block contains say 7 units this excess becomes the not insubstantial sum of $3500 & this despite the fact that neither the Aer nor the Policy makes any mention of this alleged right to multiply.

In a recent application to one of the Insurers this was explained by it in relation to an Owners Corporation claim where the Strata Plan contains seven Lots, in the following terms:- "With regards to the excess an amount of 3,500.00 will apply and this is payable by the Owners Corporation. When Insurance is provided to the builder for works on a site a certificate is issued for each unit. No certificate is issued for the common property and we create in essence 7 claims all under the one claim number."

A careful examination of the Act & its Regulations provides no support for this interpretation of the Act.

The first thing to note is that the Act makes little mention of Strata developments,or of Owners Corporations or,more importantly, of Common Property. The Act is designed to provide Insurance cover for faulty work by the builder of **Dwellings** in the nature of private homes. By the Regulations "dwelling" is said to include (amongst other things) "parts of a building containing more than one dwelling...being stairways, passageways,rooms and the like, that are used **in common by the occupants of those dwellings** (the emphasis is mine) together with any pipes, wires, cables or ducts that are not for the exclusive use of any one dwelling." The definition extends much further to include in a dwelling many other parts of the building including, detached garages, decks & verandahs, driveways, paths, retaining walls, fences & gates. Indeed it is difficult to envisage any items which fall outside this definition in sharp contrast to "Common Property" as defined by the Strata TitlesAct. However the Draftsman of the Act,I think almost as an afterthought did make provision should there be common property. Regulation 59 provides,in effect, that where there is a claim paid by the Insurer in relation to common property then the amount each owner of a dwelling in the complex would otherwise be entitled to claim in relation to his own dwelling is to be reduced by an amount arrived at by dividing the amount paid by the number of dwellings in the complex.

I believe that many Owners Corporations have fallen into the error of equating "common property" where referred to in the Act & its Regulations with the artificial definition of "common property" in the Strata Titles Acts. At least one Insurance Company has added to the confusion (for its own benefit) by stating in its Policy that the Act defines "common property" when in fact there is no such definition. Chris Harris, in a publication on the net on Strata Titles says of common property -"What's common property. What isn't? Basically when you buy an apartment you own everything inside the "skin"and everything else is common property. So,for instance, in the case of the external walls of the apartment,including adjoining walls, you own the paint on the walls but not the actual walls themselves. You own the carpet but not the floor" etc, etc.

There can be no comparison between the Common Property of the Strata Titles Acts & that same phrase as used in the Home Building Act yet it is by deliberately misusing the phrase that Insurance companys have created for themselves a nice little earner as there would be very few claims in respect of Strata Title apartments that did not involve common property within the meaning of the Strata Titles Act. Where as is often the case & its claim is large, the Owners Corporation cannot afford to dispute the Insurer's claim that there will be no payment under the policy unless the Owners Corporation accepts the alleged right to multiply the $500 limited in the Act by the number of lots in its plan.

What then can be done to limit or avoid this alleged right of multiplication?

Before providing possible solutions, permit me to give you some particulars of the outcome of our Corporation's recent claim. The builder (or more likely one of his subbies) had negligently driven a steel bar through an underground sewer pipe. After the sewer became blocked on two or three occasions an investigation revealed the problem. By this time the builder had gone into liquidation and when a claim was then made by the Owners Corporation the Insurance Company, whilst admitting the claim, was quick to point out that as we have seven lots the excess would be $3500 which was probably more than the cost of rectification. For the reasons set out below we took this matter to the Consumer, Trader & Tenancy Tribunal but prior to the hearing a more detailed study of the Act & its Regulations was made as a result of which we commenced a second concurrent appeal to the Tribunal solely in the name of the Owner whose sewer had been blocked. This was done because the blockage took place underneath that Owner's driveway. To repair the problem part of the driveway & an adjoining wall had to be demolished. The second

appeal was taken by the individual Owner as both the driveway & the wall were within her lot & more importantly, by virtue of the Act, formed part of her Dwelling. At the door of the Tribunal, the Insurer's Solicitor offered to accept the individual Owner's claim with an excess of only $500 provided both claims were withdrawn. This we gladly accepted.

Why was the individual claim so readily accepted? We will not know for sure but it is my opinion that the Insurer was unwilling to risk an adverse finding in favour of the Owners Corporation.

Some of the risks the Insurer runs are as follows:-
1. The Insurance Policy is an unusual one--The Policy must comply with the provisions of the Act & s102(6) provides "A contract of insurance may provide that the Insurer is not liable for such amount (not exceeding $500) of each claim as is specified in the contract." Not to comply with this section is a breach of the Law & thus illegal.
2. There are two principles of Law dealing with the construction of Contracts of this nature. Both are so ancient that they have devolved from Roman Law. One is that of *uberrimae fidei* that is of utmost good faith , a requirement which imposes an obligation of fair dealing on both parties. In our case the Insurer sought to mislead both in its policy & correspondence by claiming a right to multiplication. The other principle is that of *contra proferentem* which applies to all contracts & provides that if there is an ambiguity in a contract then a Court **must resolve it against the party who drafted the contract.** When one considers that the Owners Corporation had no input into the terms of the contract (most other contracts being usually negotiated between the parties) & that the builder to whom the policy is issued has no interest whatsoever in its terms, one can see a heavy burden on the Insurer claiming this mythical right of multiplication.

If an Owners Corporation believes it has a valid claim then I recommend that to the extent possible the claim be made only by those Owners whose dwellings(as defined in the Act) are affected. If there is common property (again being property outside the definition of dwelling) then the Owners Corporation can be joined as a party & the risks to the Insurer specified above,tested. If multiple excesses are claimed the Owners Corporation's Solicitor should be consulted. I found the Consumer Trade & Tenancy Tribunal an inexpensive & speedy forum in which this problem could be determined.