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YSP Podcast Transcript: Episode 361. Why you should be paying attention to “Project Intervene”

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Intro: Welcome to Your Strata Property, the podcast for property owners looking for reliable, accurate, and bite-sized information from an experienced and authoritative source.

Amanda Farmer: Hello and welcome to this week's podcast episode. I'm your host, Amanda Farmer. And this week I am attempting a feat that I believe I've attempted only once before on the podcast, and that is to interview three guests at once. My guests this week are Yolanda Nyss, Elizabeth Stewart, and Bruce McKenzie. and we're talking about Project Intervene, the New South Wales government project that helps you, owners corporations, to negotiate an agreement, also referred to as an undertaking with the developer of your building to properly fix serious building defects at the cost of the developer. All the detail is here in this chat.

Let me first introduce our guests. Yolanda Nyss has more than 20 years experience in the New South Wales Public Service. She has worked in disciplinary action units in home building and compensation funds and has been responsible for high-level stakeholder engagement. Yolanda has worked in the ministerial advisory unit and advised on and led dispute resolution in real estate, strata and retirement village matters. In 2019, building commissioner David Chandler invited Yolanda to play a critical role in delivering Construct NSW, a major once-in-a-generation reform program to transform the construction industry. More recently, Yolanda has led the development and implementation of Project Intervene as its program manager.

Elizabeth Stewart is a lawyer who has worked in government property and construction for over 20 years and is now providing legal support to the reform program being implemented for new and occupied residential apartment buildings by our New South Wales Building Commissioner.

Bruce McKenzie has over 36 years experience in the building industry as a licensed building contractor and qualified supervisor on a wide variety of commercial projects. Bruce is the current national manager for commercial services and major projects, building consulting division at Sedgwick. Formerly known as Sergon, the building construction division now forms part of Sedgwick known as the largest claims management corporation in the world today. Bruce sits on the leadership team for Sedgwick and is responsible for the operation, development and growth of the commercial services offerings, as well as contributing to the overall expansion of the business. In 2022, Bruce commenced a secondment with the Office of the New South Wales Building Commissioner to launch Project Intervene. Bruce is the Acting Program Director, has developed and implemented the program, including managing the panel of project managers and experts.

Now there's a really important date looming for Project Intervene. You're going to hear it in this chat. Make sure you write that one down, especially if you are living in or managing a residential strata building in New South Wales that is six years old or less and has original building defects. More in this chat. I'll take you over now. to hear from Yolanda Nyss, Elizabeth Stewart, and Bruce McKenzie.

Amanda Farmer: Bruce McKenzie, Yolanda Nis and Elizabeth Stewart, welcome to the show.

Bruce Mc Kenzie: Hi Amanda, thanks for having us.

Yolande Nyss: Hi Amanda.

Elizabeth Stewart: Hello Amanda.

Amanda Farmer: Thank you for joining us. This is a very special production here today with three guests because we are talking about a very, very important topic. I'll start with you, Yolanda. Do you want to let us know what is Project Intervene?

Yolande Nyss: Project Intervene is a program to get serious defects fixed in residential apartment buildings. The focus is on serious defects in the key building elements which relate to waterproofing, structure, fire safety, building enclosure and essential services. So this program is a surge project. It's for a limited time where we're looking at getting the serious defects fixed in

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buildings.

Amanda Farmer: Definitely something that is top of the agenda, has been top of the agenda for some time now in New South Wales. Is this for new buildings? Is this for existing buildings? What category of buildings are we dealing with here or who is eligible for this project?

Yolanda Nyss: So this program is for legacy buildings. The criteria for the program is buildings that are up to six years old. So we're aligning it with the statutory warranty period. The other critical part is that they need to be an active developer or builder to ensure that remediation responsibilities can occur and that there are some sort of evidence that there are serious defects in these buildings so that we can assess it against the program.

Amanda Farmer: So these are relatively new residential strata buildings. We have a developer on site who should be attending to their legal duties to fix these buildings. But our state government has had to come up with a plan, a project to assist, to intervene indeed in this process. Why is that the case? Why is this project necessary?

Elizabeth Stewart: So to date there have been not many options available to owners corporations apart from pursuing a complaint to the department but more commonly litigation to solve the problem. Our experience shows that the owners corporations are not getting a prompt and proper repair of defects before going to litigation. And if litigation is commenced, then what we find is that the owners corporations are involved in huge expenses of legal and forensic expert fees and the delay in commencing the repairs of serious defects can be around three to four years and when the litigation is over if the owners corporation is successful and able to enforce the judgment the owners corporation has to then commence calling for designs, and companies to do the work and supervise it and get it done properly which is outside the experience of most owners corporations.

So Project Intervene is providing an alternative to that using tools that are available in the Residential Apartment Buildings Compliance and Enforcement Powers Act. Those tools will continue to be available to the department after. So it's a surge project that's designed in a particular way with a particular team focused on getting this outcome but the tools that we're using to achieve it remain in the act and will continue to be available. So we're trying to give owners an alternative to litigation to get defects fixed.

Amanda Farmer: I know Elizabeth, many of our listeners will be relating to what you're outlining there with the pain that comes with trying to get original building defects fixed and will be very interested to know how they can get involved in this project. So I think you really hit the nail on the head there identifying these problems. It's taking too long, it's costing too much money and the outcomes are just not acceptable for our owners.

Yolanda, you mentioned there earlier that the project is focused on defects in key building elements, I think were the words that you used, so that those who are in these new buildings were thinking about whether or not they might qualify for this project. Can you share a little bit more, or maybe Bruce, you want to jump in here, share a little bit more about what these key building elements are and what types of defects will be considered eligible for intervention, let's say.

Bruce Mc Kenzie: Yeah, I'm happy to talk to that. So as Yolanda mentioned earlier, there's five key building elements that are part of Project Intervene. They're divided up into waterproofing, fire safety systems, structural systems, building enclosure and building essential services. So they're the five key elements. And some examples of those, waterproofing systems is probably one of the more popular elements in the scheme. I think most owners would relate to that.

Certainly that does relate around when there is water ingress into a building specifically. So things like failures on roofs, on membranes to balconies or anywhere where there's water penetrating a building. One of the things that does apply to those five elements is the defects needing to be a serious defect. So the project intervene scheme doesn't necessarily cover minor defects or defects of a minor nature.

The RAB Act that was mentioned before has a definition in there of what qualifies as a defect. So certainly anybody can look that up

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and get a better description of what that is. Fire safety systems, the second one is something that we are finding a lot of defects in at the moment. So that can be anything from fire doors not being compliant to fire compartments not sealing properly between different areas of buildings. Fire stairs are quite common where there's defects to do with widths and heights and access and egress. So there's just some examples there.

Structural systems, most people would relate to building cracking and more serious structural problems, so that one's fairly self-explanatory. I think building enclosure normally relates to the enclosure of the building in other words the cladding, the elements that protect the outside of the building.

So we've got quite a list of different defects that qualify in that area. And then the final one, building essential services does relate to all the critical services in a building. And that's everything from the, obviously the electrical services through to plumbing, hydraulic services, communications, fire, the electronic side of fire, which is smoke detection and that sort of thing.

So those elements are also critical and if they're not installed properly or there's a defect that can have serious effect on the building if there was some kind of event. So that's a high level overview of what those five different elements cover.

Amanda Farmer: Sounds like you're covering most of the building there, which is great. Does anybody else want to jump in on that topic before we move on? Elizabeth or Yolanda?

Yolande Nyss: I suppose I just wanted to add to that, just a sort of bit of a high level process, you know, so when we get a matter registered by the owners' corporate registering their matter.

We'll confirm eligibility, then we'll organize for an inspection of the building elements as Bruce has described to confirm or identify the serious defects. And then we'll use those findings to have a discussion with the developer about getting those serious defects remediated.

What we're trying to achieve is to get to an undertaking, which provides a sort of a model where we have independent oversight to ensure that proper designs are procured, the contractors are procured properly, and then the remediation work getting done, and then the supervision over that as well to ensure that the works are carried out in a compliant manner.

Elizabeth Stewart: And I think it's also worth adding that these serious defects that we're empowered to look at and include in the project are in the common property. So I think most people who live in a strata unit and come to know that the common property is the building and can include the tiles and so on in the bathroom unless the lot owner has changed them.

So the serious defects are limited to those parts of the building. They're not any of the lot parts but all of the things that have been mentioned such as balconies, windows, roofs, planter boxes causing water problems, fire safety in the car park etc., are in the common property.

So it's a limitation on the scope of project intervene, but not a practical problem for owners. I think that's just worth mentioning.

Amanda Farmer: How long has Project Intervene been operational?

Yolanda Nyss: We started as a pilot in April last year, but just to obviously go through the process and really sort of, I suppose, nail the program. But the main program commenced at the start of November, 2022 last year. And we're closing the registration on the 30th of June, 2023.

Amanda Farmer: Important date to remember and we will come back to that. So you've had a number of buildings or have a number of buildings going through this process at the moment and your representatives are in there talking to the developers trying to get this work completed, trying to get to this undertaking as you said, Yolanda. How is that going? How are the developers

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responding to this intervention?

Yolande Nyss: We've had success in a number of projects. Sometimes it takes a little bit of discussion, like multiple discussions with the developers to get them to that point. Each developer weighs up how they're going to approach this issue. And so we're putting whatever time is required to have those discussions with developers to ensure they understand their obligations. Undertaking is one of the tools we want to get an outcome, but we also have other regulatory tools which include building work rectification orders that we may issue.

Elizabeth Stewart: So I might just jump in here and talk about the benefits of taking the project intervening route, which is based on undertakings, as Yolanda said. We're talking about a willing developer here.

We've encountered a lot that have said they are willing and promised quite a lot, but delivered nothing. And we've come across developers who are skeptical about entering into an undertaking, but have gone ahead and entered into it and found it to be a good solution to meeting their statutory warranties and then being able to leave behind a less disgruntled owners corporation. I don't think anybody is happy at the outcome of the fix of the defects because they've had to live through, you know, getting them fixed, but, you know, relatively happier.

So we're talking to the willing developers and the benefits for a developer is that if the developer is resisting a claim in litigation, they're incurring legal costs as well. And what we've also found with some developers is that they have applied resources to a fix because they have some sort of section of their business which deals with defects in new buildings or occupied buildings. And, you know, they've repaired those defects maybe two, three times, leading to anger and frustration in the owners corporation and also in the developer business and we found that there's sometimes some dissatisfaction or misunderstanding within the developer about how to fix a problem.

Water is a notorious problem to fix it seems, and what project intervene allows with the independent involvement of an undertaking manager, which is one of the roles in that undertaking and with the superintendent is that we're finding out a design for the correct solution to the problem causing the serious defect, supervised repair and so that the defect is fixed once and for all and then owners can move on and maintain their building rather than having to worry about fixing defects that were made in the construction of the building.

So those features of independent oversight, identifying the right solution and working with a willing developer leads to a good outcome for the owners. We have to stress that the undertaking is a matter between the department and the developer and the owners corporation is consulted and brought along for the path of completing the defects under the undertaking, but it's not a party to the undertaking.

I mentioned before that we're talking about a willing developer. With the ones that are not willing, we do still have the tools that Yolanda mentioned right at the start, and those are the issue of orders and so on to deal with the defects which we've spotted. So even though we don't end up with a document that's promising the developer to deliver the works under an undertaking, we may still have an order requiring them to do so, and it's preferable to do the work under an undertaking, but nonetheless, our focus is on getting the defects fixed by whatever means we have available.

Amanda Farmer: Bruce, with your many years experience in the industry, did you have any comments from that side as to how you're seeing or you might foresee this project being received by the industry itself?

Bruce Mc Kenzie: Certainly dealing on the insurance side of our business for many years and seeing a lot of defects, this is a welcome relief. I know for many years we've felt probably a little bit toothless, I guess, in being able to really truly assist owners in an outcome that's going to lead somewhere. So other than recommending legal proceedings and that, Elizabeth mentioned that before and most certainly our experience with that is the same. It's lengthy, it's costly, and it doesn't necessarily always end with all parties happy. So I think from an accountability perspective, this is an absolute game changer. It really is making, I think, developers nervous. I think it's safe to say they are nervous about this. They know there is accountability coming down and they have to take

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steps in some direction. I think one of the typical manoeuvres we've seen over the years, we've all seen it, is the delay tactic of holding out on defects, trying to reach the end of that statutory warranty period where that expires and then certainly the accountability or the legal phase kicks in after that, it becomes more complex. So I think this is certainly something that has definitive due dates on it as opposed to litigation that can string out. So from a point of view of getting action, I think this is certainly a good avenue and it's really, there's nothing to lose getting involved in Intervene for any owners corporation. There really isn't, it's a very positive scheme. So from my perspective, from the outside, working with the commissioner's office, it's a privilege to do that on something that's so impactful to the industry, but I would certainly encourage anyone to jump in. There's nothing to lose really.

Amanda Farmer: Now just putting my lawyer's hat on, I'm interested to know, Elizabeth, I've heard you talking about the orders that may be made under the RAB Act. Is it the intention then that if these orders are made, you're essentially short-circuiting, removing that process of going to the tribunal with a home building application? Or is that still available to our owners corporations? If all else fails, where does that process sit in all of this?

Elizabeth Stewart: So the owners still have their civil rights to pursue their warranties in the tribunal or make a complaint to fair trading and so on. What our orders try to do, and they work in parallel with those proceedings, we don't ask anyone to stop their litigation. Although if defects are fixed, obviously there's no need to pursue the litigation. But the orders seek to have the defects fixed.

They require compliance with the Design and Building Practitioners Act, before construction starts so the proper solution should be identified. And so where a building comes to the attention of the department that's a possible outcome that an order is issued very often in occupied buildings owners have already commenced proceedings to preserve their warranty rights because they've got defects.

I don't think there is any building that we've come across yet with zero defects. I think that most people can hope for is that the defects are not very significant and that the developer or builder quickly attends to the rectification of them after the issue of the occupation certificate or they've been found by the owners corporation. But the intent of the orders is to get the defects fixed and they will go once we've spotted the defects will issue the orders if we don't have another course of action available to us.

I think it's also worth mentioning that we don't succeed in negotiating and undertaking with every developer despite doing our best. Not every developer agrees and we'll just mention in one example the developer raced off having delayed responding to litigation to enter into a deed of settlement with the owners corporation and finalise that and that was done to say well no need for an undertaking, nothing to see here, we've reached agreement, it wasn't a bad outcome for the Owners Corporation and we're still keeping an eye on the work. So that's something that people should keep in mind, we can't compel any developer to enter into an undertaking, so it's a good thing where a developer does do that and once they do that, it's in forcible for against them to fix the defects.

And it might also be useful to just mention a couple of examples where we've entered into undertakings. So we've got one building in the North Shore where the Owners Corporation had proceedings, had civil goes, the developer having repairs done to water coming into one particular level of the units and also some exploding glass on the balconies. I think three attempts were made and so we became involved in that one. We've initially had the developers say no, we've got our team looking at this and they are doing the repairs.

And so after many meetings, we're at a negotiation phase of the undertaking being in team two. And we've arranged some meetings where the owners have spoken to the developer directly. And we find it very powerful for the owners corporation representatives to speak to the developer, express their frustration and anger at what's occurred, what they've lived through, usually three, four, sometimes five or six years of this.

And for the developer to send a representative and actually meet with people. Apologize for what's happened to date and undertake to fix in the future. But in that particular case, there were repairs being done to windows when the cause of the water ingress was

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facade issues. That's one example where I think we're on a path to the final fixing of those defects so that people can move back into their building. It's been ongoing expenditure for the developer. So one would like to understand why they've repaired something the same way three times and then not got fixed but persisted.

Anyway, we haven't found out the answer to that. I suppose those fixes were cheaper. But in the long run, it's better to fix it right, better to build it right in the first place. But if it doesn't get built right in the first place, better to find the correct solution and fix it once and then move on and you leave behind happy unit owners and a good brand.

Amanda Farmer: Just on that point, Elizabeth, about the correct fix, part of your intervention involves bringing additional technical expertise to be able to investigate, to diagnose, and then to specify a scope for the fix. Is that right?

Elizabeth Stewart: It's quite an elaborate sort of template. But we have the expertise of the investigators with Bruce and his team are arranging. We have an undertaking manager who runs the undertaking and the negotiation. And those people that are on our panel have construction experience and a very good nose for picking up a correct versus a dodgy solution.

And so they are sort of essentially looking at making sure the solution is the right one, but then also ensuring that the design is declared by an appropriately registered design practitioner and uploaded in accordance with that Design and Building Practitioners Act that we have in play now, which you know also assists owners and none of this is at the cost of the owners corporation. It's all paid for the undertaking manager, the superintendent under repairs are paid for by the developer.

Amanda Farmer: I was going to say it sounds like the owners' corporations winning the lottery by having this kind of assistance for nothing, but I suppose the owners who are living in leaking defect-ridden buildings wouldn't feel that way. And indeed, it's about time they caught a break. Bruce, just on this point about the inspectors and the expertise that is being brought to the table. Can you share a little bit about who these people are, what it is that qualifies them to be part of this project?

Bruce Mc Kenzie: Yeah, sure. I guess the process is the first thing. What happens once the project is handed to Sedgwick, ordinarily it's registered and the documentation is issued, whatever documentation the owners corporation or the strata manager has, what we do is triage those documents and get an understanding of what the serious defects might be in that building.

Once we get that understanding, it helps to guide us towards the kinds of experts that we'll engage to do the inspection on site. Naturally, in those documents, if we do see a high dependency of fire problems or waterproofing or whatever the case may be, we'll lean towards experts that specialize in those areas so we can get the best diagnostics on site.

We would contact the owners corporation representative, introduce ourselves and schedule that inspection. We would also reach out for any other documents they may have that just might assist. Typically, because a lot of these projects, as Elizabeth pointed out, have action in progress, there are previous reports and different things that have been done so they do become important for us to review and guide us in the right direction. And the types of experts can be anything from a structural engineering to services engineering, waterproofing experts. We've got quite a large panel, a mixture of consultants who get appointed to these projects.

A lot of them can specialise over a couple of disciplines so they're experienced in various areas. They deploy to site. Normally what they do is arrive on site. They'll inspect, as already pointed out, the common areas only. And that starts with the entry foyer down to the basement, normally in the plant rooms. A lot of that mechanical area in those basement areas is typically where we do find issues and particularly basement car parks, water leaking and that sort of issue. And we would then go up to the top floor of the building through the fire stair or through the lifts and inspect the top floor and work our way down from there.

So it's a sequence that all the consultants follow. It's very, very structured and typical and they have a template they follow and we get a nice consistent reporting result that then gets passed to the Commissioner's Office to take further action from there.

Amanda Farmer: A lot of thought, a lot of work, a lot of time put into getting this right. So hats off to everybody who's been involved in bringing Project Intervene to life. Now where should our buildings, by which I mean our strata committee members, our strata

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managers who are managing these buildings, where should they go to find out more and get registered for project intervene?

Yolande Nyss: So we've got a webpage for project intervene. So they can either search for project intervene on the nsw.gov.au page, or more specifically, it's nsw.gov.au/project-intervene.

Amanda Farmer: I will make sure there is a link to that exact page in the show notes for this episode so everyone will be able to click straight through. There is indeed a lot of helpful information there, a good summary of what we've discussed today for buildings who are looking to find out more. You mentioned a deadline earlier Yolanda, can you just repeat that one for us?

Yolande Nyss: Yes, it's the 30th of June 2023.

Amanda Farmer: And that is the last date by which buildings can register to be part of this project, to get the assistance of the Building Commissioner's Office with resolving these defects directly between the building and the developer.

Yolande Nyss: That's correct. And so just one of the other point about eligibility is that we would prefer an authorised representative of the Owners Corporation to lodge their matter. So that, you know, the other Strata manager or someone from the Strata committee. So that's not all individual complaints that we're managing.

Amanda Farmer: That is indeed a really good point. So our strata committees should be passing resolutions, I believe, to appoint somebody to be an authorized person to lodge this application or indeed authorize and direct the strata manager to make this application, this registration on behalf of the building. That's a good thing to cover off and make sure you're doing that by the deadline of 30 June 2023. Anything that anyone would like to add that we haven't covered off yet before we wrap up.

Elizabeth Stewart: I would just like to add that we've had resistance from some owners corporations because they don't trust the developer to be involved in the solution, but we don't have through Project Intervene any power to get a different person to do it at the cost of the developer. So we just have to use our robust independent supervision to get that result.

But nonetheless, trust is at such a low level that owners corporations are resistant. And that can be a factor in not achieving and undertaking as well, we should mention. And some law firms are also resistant to project intervene because it doesn't provide for any damages to be paid to the owners corporation or reimburse legal and forensic costs that the owners corporation has already spent. Instead, the project requires the fixing of defects and that's just the limit of our and it's for each owners corporation to sign up for the journey or not but we just like to mention that because it is a feature of the project.

Amanda Farmer: All good to know, I think making sure that you are living in a safe, healthy, watertight home is the number one priority for our owners who are suffering in these buildings. So I do encourage anyone who feels that they might be eligible for project intervene to head over as a first step and read those details that are there on the nsw.gov.au website link here in the show notes and then have a chat to your strata committee to your strata manager and see if you can authorise one representative to register for the project and take it from there.

Thank you Bruce Mackenzie, Yolanda Nyss and Elizabeth Stewart for joining me today. I wish you all the best for the rest of the project.

Bruce Mc Kenzie: Thanks, Amanda.

Elizabeth Stewart: Thank you.

Yolande Nyss: Thank you.

Outro: Thank you for listening to Your Strata Property, the podcast which consistently delivers to property owners reliable and accurate information about their strata property. You can access all the information below this episode via the show notes at yourstrataproperty.com.au.

