Making the Building the Design & Building Practitioners Bill 2019 More Effective for Consumers

Proposals by the Owners Corporation Network – November 2019

Section 1 – Amendments to Promptly Address Consumer Protection Flaws

Issue 1: Giving Statutory Duty of Care Immediate Effect

The definition of 'building' at section 29 under 'duty of care' is left to the regulations meaning that duty of care provisions will not apply to any building affected by defects unless specified by the regulations. The government says that it intends for it to initially apply to 'Class 2' buildings, that is, multi-storey and multi-unit residential buildings. There are concerns that this definition could provide loopholes by not covering buildings that are mixed use.

Furthermore, there is no reason to wait for the regulations to determine that apartment buildings should be covered, given this is the whole intent of the proposed regime. Including apartments in the definition for buildings should be enshrined in the act with the ability to extend it through regulations.

> ***Proposed Amendment to address Issue 1:***
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> ***Amend the section 29 definition for "building" (for the purposes of Part 3 only) so that it covers all of a building or parts of a building that is residential work within the meaning of the Home Building Act 1989 where the building contains four or more proposed or existing dwellings. Also retain existing regulation making powers to add to what is covered by the section 29 definition of "building".***

Issue 2: Loopholes Being Exploited in the Existing Statutory Warranty Regime

There are some significant loopholes in the existing statutory warranty regime under the *Home Building Act 1989* that were created through case law and that legislative attempts to close have been unsuccessful. The Minister has previously indicated support for considering closing these loopholes.

Developers who are not landowners currently avoid the section 18B Home Building Act statutory warranty obligations to owners corporations and lot owners as those future owners are not successors in title to a non-land owning developer. Development contract structures routinely take advantage of that. It was done at Opal Towers where the Sydney Olympic Park Authority engaged Ecove who then engaged the builder and carried out the role of a developer despite not being the landowner.

Another recent example is the case The Owners - Strata Plan 81837 v Multiplex Hurstville Pty Ltd [2018] NSWSC 1488 (4 October 2018) which reinforced this loophole. The widened "owner" definition from the 2010 and 2011 amendments was read narrowly by Court, and succession in title issue for the owners' corporation was again raised.

Also, a recent decision of The Owners – Strata Plan No 91322 v Trustees of the Roman Catholic Church for the Archdiocese of Sydney [2019] NSWCA 89 should be addressed. In summary, the Court of Appeal held that the owners' corporation of a leasehold strata scheme is not the "successor in title" to the developer, by reason of the owners' corporation not holding freehold title to the common property. The owners corporation's ability to sue a

builder or developer, depends on the owners corporation being a “successor in title” to that developer.

Furthermore, in the case of The Owners – Strata Plan No 74602 v Brookfield Australia Investments Ltd [2015] NSWSC 1916 (16 December 2015), the Court found that owners and future owners did not have benefit of the sub-contractors’ statutory warranties under Section 18B of Home Building Act. The Court’s reasoning suggests that the introduction of section 18B(2), which did not apply in that matter, has not addressed that and the Court will still find that subcontractors do not owe the warranties to owners notwithstanding section 18B(2).

It is also of concern that contract arrangements could result in a developer inappropriately avoiding liability for particular defects under section 18F.

Amendments to address Issue 2:

The bill should be drafted to close these loopholes and to also provide a general anti-avoidance provision seeking to minimise the ability of parties to avoid the warranties by using creative contract arrangements. It is suggested that such objectives could be achieved by amendments to the Home Building Act such as follows.

Amend section 3A by replacing all text with the following:

> For the purposes of this Act, where residential building work is done in connection with 4 or more existing or proposed dwellings or an existing or proposed retirement village or accommodation specially designed for the disabled, each person on whose behalf the work is done or who is an owner of the land at the time that the work is done, other than a company that owns a building under a company title scheme, is a developer on whose behalf the work is done.

Amend s18B(2) to read:

> The statutory warranties implied by this section are not limited to a contract to do residential building work for an owner of land and are also implied in every subcontract under which a person contracts to do residential building work.

Amended s18C(1) to replace all text with the following:

> Each owner of land is entitled to the benefit of the statutory warranties from each person who has done residential building work on the land (including all contractors, subcontractors, owner builders and developers) as if each of those persons were required to hold a contractor licence and had done the work under a contract with that owner of the land to do the work.

In s18D(1A) insert “(including any subcontracting agreement)” after the first reference to “contract”.

Add the following to the end of s18F:

> (5) This section does not apply to provide any defence to a person who was, at the time that the work was done or arranged, a developer on whose behalf the work is done or a close associate of a developer on whose behalf the work is done.

Add the following to the end of s18G:

(2) If a court or the Tribunal finds that any provision of an agreement or other instrument or any other arrangement was entered into or put into place with the intent to avoid any statutory warranty being owed by any person or class of person to an owner or subsequent owner that would have otherwise been owed the benefit of the statutory warranty, then the Court or Tribunal may find that the statutory warranties were owed by that person or class of person to an owner or subsequent owner.

In schedule 1, clause 1, add the following to the end of the definition of "owner":

and

(c) includes in respect of a leasehold strata scheme, the owners corporation and each person who jointly or severally, whether at law or in equity, is entitled to a leasehold estate in a lot (but does not include, in respect of a lot the subject of a sublease, the sublessee).

Issue 3: The Lack of Transparency of Who to Hold Accountable for Different Work

Specifically, the bill imposes obligations upon regulated design practitioners in relation to regulated designs that they prepare and also upon head construction contractors. However, the bill does not provide a regime under which an owners corporation will for every part of the building have a copy of the final design/s that was supposedly built to, know the person/s responsible for those design and know the subcontractor/s who carried out the relevant physical work.

This is highly problematic because owners' corporations that identify defects will have trouble knowing who is responsible to pursue under the duty of care obligations in relation to any design defects that are not defects in a regulated design and for installation defects – noting that in many instances, the main concurrent wrongdoer will be a subcontractor whose identity and/or required scope of work is not known to the owners corporation. It also undermines the enforcement regime contemplated in the Bill.

Such holes in the transparency that the bill will provide weakens the prospect of accountability for all parties involved in a development which is needed to encourage best practice and culture change amongst all parties involved in a development.

Proposed amendments to address Issue 3:

Create a new section or add to existing sections so all contractors, including the head contractor and all subcontractors, that do any building work for a building must provide a document confirming what work they did to and requiring that all those documents be lodged with all building compliance declarations.

Also require that the documents to be lodged with a building compliance declaration include copies of all final designs and specifications that are not regulated designs while also identifying the person/s responsible for each aspect of those final designs and specifications.

Issue 4: Suppliers and manufacturers are unaccountable to end consumers for faulty products

Suppliers and manufacturers can reasonably be expected to, and do, provide instructions on the uses for which a particular product is suitable and installation instructions. As noted by a number of stakeholders yesterday, not including them would leave a hole in the duty of care cover where a builder uses a product for a particular purpose in reasonable reliance upon information from a supplier or manufacturer that it is suitable for that purpose only for it to be later discovered that it is not suitable for that purpose. The ACL is not drafted with an owners corporation in mind and simply does not provide protection to an owners corporation due to the way that it is drafted. Also, including supply and manufacturers in this way would simplify a builder or developer liable for a product suitability issue under the Home Building Act being able to cross-claim for contribution against the supplier or manufacturer when the genesis of the problem was representations made by the supplier or manufacturer.

Proposed amendment to address Issue 4:

Include in the definition of "construction work" - Supplying or manufacturing a product that is intended for use in construction work

Issue 5: Messy Transitional Arrangements Undermine the Effectiveness of the Regime

This issue, involving the Bill's transitional measures, reduces the effect of the consumer protections already mentioned as well as the overall effective operation of the Bill.

Specifically, the effect of the current transitional provisions is that the obligations for various parties to provide the various declarations required by the Bill and regulations will turn upon when each party entered into their relevant retainer. That will result in some parts of a project being subject to compliance declarations and other parts not being subject to them. That will cause significant confusion during and after a project. The declaration requirements in the bill should either apply to all of a project or none of it with it being clear when they apply and when they do not.

Furthermore owners corporations will in many instances not know whether a particular party involved in a project owes a duty of care as the owners corporation will not have a detailed history of the retainers for every party involved in a project and it will generally not for particular defects be able to pinpoint the date of the particular acts and/or omissions that have caused the defects. That will cause confusion and result in owners corporations not being in a position to properly consider whether they have rights against parties. It will also compound the challenges faced by the Secretary in delivering effective auditing and enforcement of the regime.

Proposed Amendments to address issue 5 involve redrafting the transitional provisions so that:

(a) The applicability of the duty of care provisions in relation to a building will turn upon whether the date of issue of an occupation certificate that authorises the occupation and use of the whole of the building is on or after 1 January 2021 with the duty of care provisions applying retrospectively to the extent needed to achieve that.

(b) The applicability of the rest of the bill for a building turning upon whether the date of issue of the first consent to construct the whole of the building was on or after a particular date to be prescribed by the regulations.

Section 2 – The retrospective application of consumer protections

Issue 6: Is there a case for applying a degree of retrospectivity to the closing of loopholes?

This issue is raised knowing the real concerns with retrospectivity particularly in relation to criminal matters.

In this case though we are not seeking retrospectivity that, in the circumstances is unreasonable. There is no element in our proposals of retrospective criminality. Nor are we seeking to overturn matters already decided in courts based on unintended loopholes.

This issue is probably better characterised as achieving effective and timely transition of application to ensure that commonly understood obligations are supported by reasonable rights of reparation. In this way there is a close connection to Issue 4 and the propositions set out here.

It is critical to achieve this because for every month that passes one thousand or more new apartment owners in NSW are expected to face costs and disruption caused by building defects.

Closing consumer protection loop holes should be implemented in a way that reinstates an intended principle that people delivering defective products are accountable to the consumers for those defects.

In stakeholder consultations to date associations for both builders and designers have expressed the view that their members already owe a duty of care. That has at least been their members' longstanding expectation prior to the relatively recent cases and the implications of those cases more recently becoming widely known. Thus, any argument that retrospective operation changes the goalposts upon which people have been operating in good faith is fragile indeed. There is no unfairness in holding professionals accountable for loss caused by their own incompetence or recklessness.

As noted already transition arrangements must be implemented in a way that provides future owners, in particular owners corporations, with certainty as to whether a duty of care is owed by a party who has done construction work. An approach that has the application of the duty of care or changes to remove statutory warranty loopholes turning upon when the particular construction work was done or when a particular contract was entered into would be disastrous. It would result in a generation of owners corporations that will simply not know whether they have duty of care rights or not as they will not have the relevant information or documentation.

The only way to give certainty is to make the duty of care and removal of warranty loopholes apply retrospectively, either to disputes for which proceedings have not yet been decided, or disputes for which proceedings have not yet been commenced. Retrospective operation is also needed as the consumer confidence crisis has already happened and the state economy is already at risk of failure because of it. Having a duty of care that will start helping some consumers who end up buying buildings not yet under design or construction does nothing to address the current crisis.

The current crisis will not be addressed by passing a law that will start to help some consumers 5 years or more from now.

There is some precedent for this too in the way in which the NSW Government has already addressed the warranties owed by builders who adopted flammable cladding solutions when it was widely known for some time already that there were issues with this product.

> ***Proposed amendments to address Issue 6 could be based on the approach adopted in in the Home Building Regulation 2014 relation to flammable cladding as follows:***
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> **69A Major defect in building--external cladding**
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> (1) For the purposes of paragraph (b) of the definition of **"major defect"** in section 18E (4) of the Act, if the external cladding of a building causes or is likely to cause a threat to the safety of any occupants of the building if a fire occurs in the building, that defect is prescribed as a major defect.
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> (2) This clause applies in respect of a breach of statutory warranty in the following circumstances only:
> (a) if the warranty period for the breach starts on or after the commencement of this clause,
> (b) if the warranty period for the breach started before the commencement of this clause and the period in which proceedings could be commenced for the breach of statutory warranty had not already expired before the commencement of this clause.

Section 3 – Amendments Measures to Address Other Key Flaws in the Overall Operation of the Bill

Issue 7: The Bill leaves open the possibility that vital building systems will not be regulated

The definition of a building element at section 6 is narrow and leaves significant aspects of design for apartment buildings not covered by the scheme. Of great concern is that it does not include many building services that should only be designed by specialised design practitioners and which currently result in significant defects in strata schemes. Examples include hydraulic designs for hot water and storm water services, mechanical designs like air-conditioning, lifts and car stackers etc. It is impossible to conceive anyone other than specialist electrical, hydraulic and mechanical consultations being permitted to do the designs for these works.

Proposed amendment to address Issue 7:

Extend the existing definition in the bill for 'building element' to include building services (including but not limited to electrical, mechanical and hydraulics services).

Issue 8: Ensuring that a required compliance declaration is made before occupation

While the bill includes a requirement for the registered building practitioner to provide a compliance declaration before an application for an occupation certificate is lodged, there is nothing in the bill to ensure an occupation certificate is not issued unless the compliance declaration is received and complies with obligations. This is problematic because usually the developer applies for the occupation certificate, not the builder, and there is significant evidence that developers have been responsible for defects. To prevent this, the certifier should be required to view all compliant declarations before issuing a certificate.

Proposed amendment to address Issue 8:

Introduce an obligation on the certifier to see all declarations of compliance and ensure that they comply with requirements before issuing an occupation certificate.

Issue 9: The Bill should ensure that a 'regulated design' includes a 'building element' and 'performance solution'.

The regulations will determine what a regulated design is however the whole regime would be ineffectual if a regulated design did not include a building element or a performance solution. Indeed the rest of the bill has been written with references to building elements and performance solutions as if they are regulated designs. There is no reason to allow the uncertainty of relying on the regulations to define these as a regulated design.

Proposed amendment to address Issue 9:

Amend the definition in the bill for 'regulated design' at section 5 to include a design for a building element, and a design for a performance solution for building work or a building element, in addition to the existing inclusion of a design of a class prescribed by the regulations that is prepared for building work.