

REGULATION OF BUILDING STANDARDS, BUILDING QUALITY AND BUILDING DISPUTES – COMMITTEE HEARING ON 11 DECEMBER 2019

Owners Corporation Network (OCN) Responses to Questions on Notice

Question on Notice from The Hon. TREVOR KHAN: Are you able to give us that document that you are reading off in a de-identified form, seeing as we are trying to be a bit careful about that?

OCN Response:

The document referred to by The Hon. Trevor Khan was an email from a member of the Owners Corporation Network in late 2019 about the dilemma his apartment block of 11 lots is facing in dealing with external cladding that may or may not be flammable enough to be a material safety risk.

In 'de-identified' form the email laid this dilemma out essentially as follows:

"To bring you up to speed on our particular predicament, I offer the following:

- 1) *New 4 storey apartment block, occupancy certificate issued in June 2016.*
- 2) *Kingspan 1000 Steel Composite cladding was installed and approved by Certifying Authority in 2015. Certifying Authority was XXX Council.*
- 3) *An Interim Compliance Report, from a Fire Engineer, nominated by Strata Manger, certified the Cladding was NOT flammable.*
- 4) *The Final Compliance Report issued by same Fire Engineers determined that cladding may be non-compliant.*
- 5) *This final draft was sent to XXX Council by Strata Manager.*
- 6) *When challenged, Fire Engineer (off the record) states that his company's Professional Indemnity Insurer had sent them a circular advising caution in their recommendations.*
- 7) *Kingspan 1000 Steel/polyisocyanurate composite is advertised as non-flammable and therefore outside the scope of the legislation.*
- 8) *The Strata Manager has several buildings with this cladding in other council areas and advised those local councils accept this cladding as outside the scope of the legislation.*
- 9) *XXX Council are insisting on an Engineered Solution or in lieu, complete removal of the cladding.*
- 10) *Our builder is being passive in providing a solution and at this time, progress has stalled.*
- 11) *We expect a fire order to be issued in the near future.*

Our story highlights the inconsistencies in the interpretation of the legislation. It demonstrates the distortion of reasonable risk to relevant engineers and their insurers. It shows that many apartment owners are held hostage by builders who can disappear and appear later via a phoenix company. It also indicates the need for a substantially longer major defects period and premiums paid into an independent statutory body that can ensure that apartment home owners are not subject to the vagaries of a delinquent builder who may not/ will not warrant his work."

By way of further background on this apartment building our member notes that at present all eleven apartments are owner occupied, save for one apartment which is owned by the builder (in the name of another entity) and is still vacant. Beside the builder, there are only two owners who

are not retired, one is a school teacher and one works as a hotel manager. More specifically, two apartments are owned by retired couples in their late 80's, three apartments are owned by retired couples in their 70's, two apartments are owned by widows in their 80's, two apartments are owned by single women who are either in their 50's or sixties, one apartment is owned by a single lady in her 20's, and one is owned by the builder.

These are the people collectively responsible for resolving this issue and bearing the costs of any required rectification. It is not difficult to imagine the impact this is having on their lives and limited financial resources.

To add to this story the Owners Corporation Network has been informed that the certifier for this building featured in the following recent article in the Sydney Morning Herald:

<https://www.smh.com.au/national/nsw/certifier-accused-of-letting-people-live-in-tower-while-still-a-building-site-20200103-p53ojk.html>

Question on Notice from The Hon. SCOTT FARLOW: What do you think the duty of care provisions would do in terms of addressing that issue?

OCN Response:

The Duty of Care provisions referred to by The Hon. Scott Farlow are presumed to be those contained in the Design and Building Practitioners Bill presented to the Legislative Council on 14 November 2019. If enacted these provisions would be of great assistance to many apartment owners affected by flammable cladding. The number of apartment owners affected is difficult to determine but any scheme built in the past ten years would benefit from the restoration of duty of care rights provisions in that Bill.

In this regard approximately 87,500¹ new apartments have been built in NSW in the past decade. If just 2% of these are affected by flammable cladding then the Bill has the potential to directly benefit over 1,750 apartment owners.

More importantly as many as 70% of new apartment owners in NSW are dealing with other serious defects, including a range of fire safety related defects, may also benefit from the restoration of duty of care rights i.e. as many as 60,000 new apartment owners.

In relation to flammable cladding, an owners corporation now only has rights under the Home Building Act for up to 6 years against the builder and developer of their building. For buildings over 3 storeys high, there is no home warranty insurance. Further, as there is no insurance underwriting requirements to meet for such developments, or extra licencing requirements to be allowed to build over 3 storeys, builders and developers use \$2 companies to build and develop nearly all buildings over 3 storeys. For those buildings owners corporation's rights under the Home Building Act are useless as there is no point incurring costs pursuing a \$2 company.

¹ Australian National Strata Data Report 2018, City Futures Research Centre Faculty of Built Environment UNSW Australia p24 Figure 1 National Dwelling Starts. NSW dwelling starts are approx. 50% of the national number. The average starts nationally per year from 2010 to 2017 = (10,000 + 25,000)/2=17,500. Applying this over the 10 year period from 2010 results in an estimated 175,000 new apartments nationally in that decade. If NSW starts is 50% of this then around 87,500 new apartments were built in NSW in the same period.

Those same owners corporations cannot, under the current law, pursue the supplier or manufacturer of the flammable cladding or any designer that specified the flammable cladding product. An owners corporation does not have any rights under the Australian Consumer Law (ACL) due to a loophole in the ACL. During the construction of an apartment building, advice on what products to use and the products installed are advice and products provided to a builder and/or a developer. As both the builder and developer are outside the definition of a “consumer” under the ACL, owners corporations are left with no rights under the ACL against the manufacturer, supplier or specifier.

Crucially, the noted duty of care provisions would provide owners corporations with the ability, subject to time limits, to pursue suppliers, manufacturers and designers in matters where their failure to act competently has caused or contributed to the owners corporation being left with flammable cladding. Enactment of those provisions would instantly provide many owners corporations with flammable cladding issues with an ability to seek compensation from the responsible suppliers, manufacturers and designers.

Also if the relevant Home Building Act time limit has already expired but the problem became reasonably discoverable less than 6 years ago, the noted duty of care provisions would see the owners corporation being able to pursue a builder for the proportion of the owners corporation’s loss caused by the builder’s incompetence. That will assist buildings where the builder has not used a \$2 company.

Thus, the noted duty of care provisions would be a significant step forward for tens of thousands of apartment owners in dealing with potentially crippling defect rectification costs. That would probably include thousands of apartment owners already saddled with major costs associated with replacement of flammable cladding while not being able to pursue any responsible parties for compensation.

Also very importantly, the noted duty of care provisions will have a preventative effect for future developments. It would be a change from a system where suppliers, manufacturers and designers have no responsibility for their incompetence to a system where they will be accountable for their incompetence. This would inevitably cause those parties to take more care in what they do and temper the commercial temptations to overlook flammable cladding risks. That accountability will be part of reducing the number of owners corporation affected by flammable cladding in the future.