Submission No 65

INQUIRY INTO FURTHER INQUIRY INTO THE REGULATION OF BUILDING STANDARDS

Organisation: Owners Corporation Network

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THE INDEPENDENT VOICE OF STRATA OWNERS

19 September 2021

NSW Public Accountability
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Committee

FURTHER INQUIRY INTO THE REGULATION OF BUILDING STANDARDS

1. The Owners Corporation Network of Australia Limited (OCN) is the only consumer organisation whose sole mission is to advocate on behalf of residential strata owners.

   The protection of consumers through the delivery of high quality, sustainable homes is of paramount public importance.

   In NSW, urban consolidation has been a goal of successive Governments resulting in a rapid expansion of the residential strata sector. The emphasis on increasingly tall and more complex apartment buildings to house a growing population demands that only the most suitably qualified professionals are permitted to undertake this work. However, failures in the regulatory system and in the construction industry have led to systemic defects in high rise apartment buildings.

2. OCN acknowledges the NSW government's recent extensive regulatory reform will contribute to improving building standards. The focus of this submission is to succinctly note:

   (a) Key aspects of the reforms to date that fall short; and

   (b) Key reforms needed but not yet addressed.

   <u>The OCN's main concerns are with the DBP legislation</u>

3. Meeting the transparency, accountability and *"trustworthy building"* objectives requires that owners:

   (a) Have all of the final design for their building (not just the regulated designs);

   (b) Know who prepared each design; and

   (c) Know which contractors are responsible for installing which aspects of the construction.

4. That transparency for all parties in the construction of a building is essential so that each party carries out their role knowing that they cannot 'cut corners' and still 'fly under the radar'. That transparency and knowledge of future accountability is important for preventing defects as it will reduce the cutting of corners. It will also allow owners to be able to use their increased consumer rights when needed.

5. The coverage of the regulated design regime turns upon the meaning of *"building element"* at section 6 of the DBP Act. The following aspects of that definition need to be improved:

   (a) The non-inclusion of all fire safety measures (as opposed to the *"fire safety systems"* for a building within the meaning of the BCA which is what is currently included and is ambiguous);

   (b) Lack of a definition of *"waterproofing"*. Without a definition it can be interpreted much more narrowly than intended. The OCN understands that the government's favoured definition of *"waterproofing"* would be the *"collection, redirection and drainage of water"* and the OCN supports that;

   (c) The mechanical, plumbing and electricals services covered being limited to those required to achieve compliance with the BCA. For example, the Plumbing Code (at Volume 3 of the NCC) is omitted. The coverage of the regime would be improved and simplified by requiring that all aspects of the mechanical, plumbing and electricals services be regulated design;

6. OCN opposes the government's recent decision without consultation to make remedial waterproofing subject to regulated designs without that being complemented by the regulation of who can provide specialised waterproofing investigation and remedial recommendations. The OCN agrees that remedial waterproofing should be regulated. However, the failure to have a remedial waterproofing design practitioner category, or regulated list of waterproofing consultants for endorsing remedial waterproofing designs, is a substantial regulatory failure for both consumers and the industry. The result of that is:

   (a) Almost all the consultants who have the required skills, knowledge, and experience for this area are unable to provide regulated designs;

   (b) Almost all of those permitted to issue regulated designs do not have the required skills, knowledge, and experience to do the job properly;

   (c) Those permitted to issue regulated designs are not required to have their designs endorsed by a consultant with the skills, knowledge, and experience to identify the causes of water ingress and the repairs needed;

   (d) That is made worse by the reality that in many cases, there will be commercial pressures and conflicts of interests applied to architects or engineers involved in the original construction to issue inadequate regulated designs that suit the interest of the builder and/or developer;

   (e) Owners corporations arranging repairs themselves will have to pay a lot more to obtain regulated design for the repairs for at best, little or no benefit, or at worst, inadequate design.

The OCN's main concern with the RAB Act

7. An owners corporation is the party most affected by a flawed building work rectification order. If an order requires or permits the carrying out of work that will not be a proper long term repair or will cause adverse amenity or aesthetic issues, the owners are stuck with the consequences and funding a remedy for the consequences. Owners also face criminal prosecution if they do not provide access for repairs. That allows the legislation to be used to intimidate owners into providing access into their homes for inadequately specified repair work by contractors they have no faith in for good reason.

8. Despite those aspects and the reality that those carrying out the functions and powers provided by the Act will not ever be infallible, owners corporations (unlike developers) cannot appeal building work rectification orders. Further, many repair orders are and will be modified by negotiation between Fair Trading and developers to settle litigation brought by developers appealing orders. Despite being the most affected party, an owners corporation has no say in such settlements and cannot challenge the revised repair orders that result.

OCN comments on Project Remediate

9. The OCN commends Project Remediate for the framework and processes that it has put in place. The OCN's 4 main concerns with the progression of cladding issues are:

   (a) Only a small number of owners of buildings deemed high risk can access Project Remediate, leaving a large number of vulnerable owners to fend for themselves;

   (b) Eligible owners, although significantly assisted by interest free loans, still having to fund the repairs themselves. The owners are the victims of regulatory and industry failures. The repairs should be government funded with the government then being able to recover those costs, where possible, via a statutory assignment or subrogation of owners corporation rights;

   (c) Owners corporations already under stress paying for the replacement of cladding are not being assisted in addressing defect issues in the façade that have been covered up by the cladding. Those owners corporations are currently unconscionably being left to themselves to address those issues despite often not being in a position to; and

   (d) The communication to owners corporations of why the Project Remediate framework provides the most cost effective process to achieve a proper cladding repair needs to improve to the point that all affected owners corporation understand that.

Key Home Building Act (HBA) reforms needed

10. Introducing additional (and meaningful) licence requirements for builders of residential apartments in buildings above 3 storeys. The OCN has repeatedly pointed out the need for this reform. The government's recent response of requiring that a residential building work licence holder have 5 years practical experience to be a head contractor for a building above three storeys (including a high rise) is

manifestly inadequate. This is an ongoing significant failure in improving building standards and consumer protection.

11. Each person only being allowed one residential building works licence number for life and a presumption against a person being able to build through more than one company at once or being able to build through a new company within 7 years of having a licence through a previous company.

12. Introducing a licensing system for all developers of residential apartment buildings above 3 storeys. If the government is going to allow the widespread practice of developers using *"single purpose vehicles"* (which become $2 companies shortly after completion when the units are all sold and the profits distributed elsewhere) as the land owning entity liable for defects to continue, there must be a requirement for a licenced parent company or director who is responsible for the single purpose vehicle's defect liabilities.

13. Have one 6 year HBA warranty period for all defects. By removing 'lawyers' picnic' disputes over time limit issues for each separate defect, that will return the focus of all warranty claims to fixing the defects. The time limit for all defects under the HBA should be simply six years from completion (with no possibility of extension). In addition to being unfair to owners, and creating unnecessary complexity, the current 2 year period for many defects increases litigation by not allowing enough time for owners corporations to resolve defect issues with builders and developers prior to it being necessary for an owners corporation to commence proceedings to protect its position.

14. Until one HBA warranty period for all defects is implemented, the RAB Act definition of "serious defect" should be adopted in lieu of "major defect" and amended to include any defect or non-compliance that can be reasonably expected to cause a risk to safety.

15. Closing loopholes:

    (a) For developers and builders avoiding liability via the contract structuring for a project. This should be achieved by adopting the RAB Act section 4 meaning of "developer" as suggested in the current HBA review Concept Paper and adding to s18G to allow the Court to overrule the effect of any contract structuring approach intended to avoid responsibility for defects;

    (b) To prevent developers being able to rely upon the design related defences intended for builders in section 18F by 'gaming' the current wording of section 18F;

    (c) For subcontractors clearly being responsible for their work to consumers under the HBA (by minor revisions to sections 18B(2), 18C and 18D(1A) to clarify that intention);

    (d) In the definition of *"owner"* that leaves leasehold strata schemes with no rights.

16. A requirement that all residential building work subcontracts be in writing (even if they are only subject to the short form contract requirements for contracts with consumers under $20,000).

Other reforms needed

17. Mandated 10 year decennial insurance.

18. An independent, properly resourced Building Commission.

19. An independent, properly resourced Strata Commissioner.

20. The funding of an independent consumer based organisation from general revenue or via an alternative funding source.

21. Contracts of sale for apartments in a building above 3 storeys to contain a clear warning that the HBCF insurance scheme does not apply to the building.

22. *Building Products (Safety) Act 2017* - amend this Act to replicate the "chain of responsibility" provisions contained in the Queensland legislation.

23. Addressing the following aspects of the defects bond scheme that substantially compromise its ability to assist consumers:

    (a) The developer selecting and retaining the building inspector and deciding the scope of works (the ability for an owners corporation to litigate the developer's choice of inspector is 'cold comfort');

    (b) The building inspector not including a scope of works or any hold points for independent inspections during repair works in the initial report;

    (c) The building inspector being prohibited from reporting in the final report any new defects that have manifested;

    (d) The building inspector not providing an estimated repair cost in the final report.

24. See more detailed comments on many of the above issues in the Stanton Legal 28 July 2019 submission to the Public Accountability Committee (copy **enclosed**).

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