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OCN Submission
Design and Building Practitioners Bill 2019
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Introduction

The Owners Corporation Network of Australia Limited (**OCN**) is the peak independent consumer body representing residential strata and community title owners. Strata is the fastest growing form of residential property ownership in Australia. Over half the new dwellings to be built in our metropolitan areas over the next decades will be strata titled. OCN notes that it is likely to be the only true consumer group making submissions on this Bill.

The *Design and Building Practitioners Bill 2019* (the **Bill**) is the result of the Building Stronger Foundations discussion paper announced 19 February 2019 and then released on 26 June 2019 indicated as taking "the first steps" in implementing the NSW Government response to the national report, Building Confidence: effectiveness of compliance and enforcement systems for the building and construction industry across Australia (the Shergold-Weir report).

OCN supports the introduction of the Bill, but raises a number of issues that it says are necessary to address if the aims of the Bill are to be fully and properly met, including improving design and construction quality, and improving both transparency and consumer protection for consumers in the home building market, in NSW.

Important aspects of the Bill and its operation, as currently drafted, are to be prescribed by the regulations. OCN cannot yet comment upon those aspects. OCN's largest concerns with the Bill as currently drafted are:

1. The section 3(1) definition of "class";
2. The duty of care provisions;
3. "Building elements" and "performance solution" designs being "regulated designs";
4. The definition of "building element";
5. Real transparency in the design and construction of apartment buildings;
6. Allowing occupation certificates without declarations of actual compliance; and
7. The Transitional provisions.

Also, given the adverse consequences in terms of human suffering we believe the penalties for breaches of the Bill should be higher.

This submission will comment briefly on each of those largest concerns before listing some further concerns. However, it must be noted that this Bill is clearly only the first stage of a larger series of reforms required to reform the construction industry and rebuild consumer confidence. Other essential steps for a successful series of reforms include:

A. Extra consumer protection for the various strata schemes already dealing with defects claims or currently under construction. The Bill only provides a regulatory scheme and statutory duty of care for design and construction work that will commence at some time in the future. Rebuilding consumer confidence cannot wait until after those developments to be started sometime in the future are all designed and then constructed;

B. The loopholes in the statutory warranties provided by the *Home Building Act 1989* (**HBA**) for owners corporations against development managers (developers who do not own the relevant land such as Ecove for Opal Towers) and sub-contractors are long overdue for closure with retrospective effect;

C. The Bill does nothing to regulate developers. Developers are the parties controlling apartment developments and making the ultimate profits. However, they are completely unregulated and routinely use $2 companies to avoid any responsibility for defects. Changing that is integral to achieving the NSW government's objective of changing the current building industry culture;

D. Under the current builder's licence arrangements, there is no insurance eligibility or additional licence requirements to be met before a builder can build something higher than three storeys. It is an absurd regulatory failure that a builder not considered an acceptable risk to insure for a $20,000 contract can simply build a high rise instead. That can be easily resolved by requiring additional licencing requirements before a builder is permitted to build something higher than 3 storeys;

E. Manufacturers, suppliers and importers of building materials and products used in apartment construction have no accountability to owners corporations. Their lack of accountability does nothing to discourage profiting from unsuitable products and leaves a large hole in the consumer protection provided by the regime. The ability via the *Building Products (Safety) Act 2017* to ban specific products proven dangerous (after they have been used at the ultimate expense of consumers) does nothing to address that.

Section 3(1) definition of "class"

That section 3(1) definition of "class" is:

> ***class*** of building means a building of that class as recognised by the *Building Code of Australia*.

That definition has a profound effect upon the Bill's operation as it:

(a) Limits what is covered by "building work" due to the use of "class" within the section 4 definition of "building work";

(b) Then flows though to also limit what is covered by the definition of "regulated design" due to the use of "building work" within the section 5 definition of "regulated design"; and

(c) Then also flows through to also limit what is covered by the duty of care due to the use of "building work" within the section 26(1) definition of "construction work" which limits what the duty of care will apply to.

Thus, almost all of the Bill's operation will be dependent upon the adequate operation of the section 3 definition of "class".

The current definition of "class" limits the government's ability to make decisions upon what the Bill will and will not apply to by restricting the government to using BCA building classifications when making those decisions. Further, the restriction is to prescribing a BCA class classification for "a building" (ie: a whole building, not part of, or parts of, a building).

That definition of "class" will be like a straitjacket for the government when it focuses upon drafting the regulation. It could result in the Bill, or substantial parts of the Bill, not applying to various mixed-use buildings involving significant residential parts clearly intended to be regulated by the Bill. However, such a perverse outcome can be easily avoided by providing a flexible definition that is not limited to describing different types of construction via the BCA building categories all limited to decisions to "a building" being either completely in or completely out of the Bill's operation.

One approach to easily resolve this issue would be changing the section 3 "class" definition to:

> **class** of building means a building or part or parts of a building of a type or nature prescribed by the regulations.

This would leave the government with the flexibility to be able to implement what it ultimately wishes to implement via the regulation as opposed to leaving the government with problems that it cannot solve via the regulation due to the limits of the regulatory power.

The duty of care provisions

The meaning of "building work" for the purposes of the industry wide duty of care

A substantial weakness in the Bill's duty of care is that it will not apply (for designers or installers) in respect of construction that is not within the definition of "building work" (Due to the issues with the definition of "class" noted above). OCN is also of the strong view that confirmation of what the duty of care is to apply to should not be left to a regulatory decision at some point in the future. That is particularly important given the government's announcements throughout this year that the duty of care will apply to all industry participants.

That can be easily addressed without affecting any plans for staging the implementation of other parts of the Bill via the "class" definition by making the following amendments.

- Delete the s26(1) definition of "building";
- Replace s26(2) with "In this part, a reference to **building work** includes a reference to anything that is residential building work done in connection with an existing or proposed dwelling in a building or residential development with 4 or more existing and/or proposed dwellings";
- In s27(1), replace "a building" with "building work".

Individual within the definition of "owner"

Noting s21(1) of the *Interpretation Act 1987 (NSW)*, the use of the term "individual" instead of "person" in the s26(1) definition of owner means that any apartment owner who is not a natural person will not have any duty of care protection in relation to lot property defects or personal loss to the lot owner caused by common property defects (eg: damaged property, alternative accommodation).

That will exclude genuine consumers who do not, at least formally, own a unit in their own name (including family companies, trusts and SMSF's) from any duty of care protection. OCN understands and supports the NSW government's intention to not provide the duty of care protection to substantial corporations. However, that should not be done with a 'net' that also catches genuine consumers. This issue is easily

resolved by using the term "person" instead of "individuals" and using the already included regulatory power under s26(5) to exclude persons from being considered an "owner" in a targeted way.

Section 28(1)

The drafting of section 28(1) must be improved to avoid arguments such as an owners corporation has not suffered a loss unless and until it has already paid for repairs. That can be easily achieved by replacing "bears the cost of rectifying defects (including damage caused by defects) that are" with "is responsible for repairing any defect or any loss caused by a defect that is".

"Building elements" and "performance solutions" being "regulated designs"

The operation of large parts of the Bill is dependent upon the meaning of "regulated design". However, the 'definition of "regulated design" in section 5(1) is simply a class of design prescribed by the regulations. Nothing is defined in the Bill itself. Section 5(2) provides that regulated design "may" include a design for a "building element", or a performance solution for building work or a building element, but does not actually make those things a regulated design. However, later sections of the Bill are drafted on the assumption that design for a building element or a performance solution will be a regulated design (see sections 9(2), 16(2), and 17).

Section 5(1) should read:

> For the purposes of this Act, regulated design, means a design:
> (a) for a building element;
>
> (b) for a performance solution for building work or a building element;
>
> (c) of a class prescribed by the regulations that is prepared for building work.
>
> But does not include any design for the repair, renovation, decoration or protective treatment of a building unless it is work or part of work for which consent under Part 4 of the *Environmental Planning and Assessment Act 1979* is required.

The definition of "building element"

The section 6(1) definition of "building element" is currently too narrow and will leave significant aspects of design for apartment buildings not covered by the scheme. It does not include many building services that should only be designed by specialised design practitioners and which currently routinely do result in significant defects in strata schemes. For example:

(a) Hydraulics designs for hot water, cold water and stormwater services (the current regime has not prevented the common use of polypropylene pipes, despite it being common industry knowledge and practice not to use such since about 2011) ;

(b) Mechanical designs (including air conditioning) or electrical designs (noting issues for the latter in recent years with the use of defective Infinity cables);

(c) Lifts and car stackers would not be covered by the Bill (which are currently not covered at all under the HBA noting Sch 1, cl 2(3)(l) of same).

Defective building services regularly result in 7 figure repair bills for owners corporations.
The section 6(3) definition of "building enclosure" overlooks that there are many parts of residential buildings that are not "habitable" rooms meaning the requirement of "habitable" would exclude things that it should not. Further, excluding any part of a building below the ground will exclude important measures

to keep out sub ground water (that is often not "waterproofing") which must be covered.

Those issues can be easily addressed by the following two amendments:

Firstly, replace s6(1)(e) with:

> (e) building services (including but not limited to electrical, mechanical and hydraulics services).
> (f) other things prescribed by the regulations for the purposes of this section.

Secondly, in s6(3), delete the definition for "above grade wall" and improve the definition of "building enclosure" as follows:

> **building enclosure** means the parts of the building that physically separate the interior environment of the building from the exterior environment (above and below the ground) including roof systems and walls (including windows and doors).

Real transparency in the design and construction of apartment buildings

The Bill does not include any requirements for sub-contractors to go on the record confirming what work they have done or what designs they built to. The current situation where owners corporations are left 'in the dark' in relation to who the sub-contractors were and what work they each did will continue. Not requiring subcontractors to at least declare what work they have done and the particular designs they built will undermine the whole intent of the declarations scheme which was for all participants in a project to transparently take ownership for their respective contributions.

Further, any design that is not a regulated design or any part of a regulated design that is varied by the builder (as it is not for a building element or performance solution) does not under the Bill have to be declared and a copy of the design does not have to lodged.

Thus, under the Bill, owners corporations will be left with various aspects of the building where they do not know what was designed, or who is responsible for the design, or who (if anyone) was supposed to, or says that they did, build to that design.

Unless the Bill provides a regime under which owners corporations can:

(a) Access the finalised design that is actually built to for each aspect of a building (whether a regulated design or not);

(b) Identify who is responsible for each aspect of those finalised designs;

(c) Identify who all the builder's subcontractors were and which subcontractor did what work;

the Bill will fail consumers. It will not provide the cultural change needed to reduce the prevalence of defects. That can only be achieved by transparency and accountability. It will instead keep letting a number of the industry participants who are taking short-cuts avoid accountability by 'staying under the radar'.

Allowing occupation certificates without declarations of actual compliance

Section 15 of the Bill requires a builder to provide a building compliance declaration to the developer or development manager prior to an application being made for an occupation certificate. However, the builder generally does not make the application for an occupation certificate. The Bill does not prohibit developers from seeking an occupation certificate without a building compliance declaration. Nor does it prohibit or prevent a certifier from issuing an occupation certificate without first receiving a building compliance certificate.

Further, a building compliance declaration is only required to say what does and does not comply with the BCA. There is no requirement under the Bill to any stage get to the point where a declaration is issued saying that BCA compliance has actually been achieved. That makes the term 'building compliance declaration' misleading.

There must be a requirement for a declaration that the building is compliant, and it should not be possible to apply for or obtain an occupation certificate without such a declaration. The penalties for doing so should also not be a fine that could be outweighed by the profits made from breaching such a requirement.

The Transitional provisions

Confident consumers will need to know, not guess, whether they are buying into a building that has been designed and built with the transparency and the accountability that the Bill seeks to provide.

The current transitional provisions turning upon, for different things, when certain different things were done, or for different participants in the project, when they agreed to carry out their own respective roles, will not achieve that. They will result in a ridiculous mess where parts of a building's design is subject to the regime and parts are not. Some of the parts of the construction work will have to be declared and some will not. Some of the designer and installers will be (or should be) known to the consumer and accountable under a duty of care and others will not. It will be impossible for consumers to know what they are buying and for owners corporations to know where they stand when defect issues arise.

The Bill must commence operation in a way that makes it clear that everything done for a building is, or is not, covered by the schemes under the Bill. That should be based upon a clear date documented on the public record, such as building work done under a construction consent issued on or after a particular date and design work for that building work.

List of other OCN issues with the Bill

BCA references should be interchangeable with NCC references.

Change "design" definition to "**design** includes all plans, sections, elevations, details, reports, manufacturer's details and specifications".

"Supervising" design work "principal design practitioner" clearly covers the head designer running a design team of multiple separate consultants, but only refers to "co-ordinating". There is no mention of "supervising" which is a different concept and involves more oversight and control. However, section 4(1) uses "supervising" in defining the ambit of building work, and section 7(2) seems to envision such (without using the term, which it also should).

Including nominated supervisors of building practitioners Including the term "registered director" in the Bill raises the issue of whether a nominated supervisor of a building practitioner who is not a director also needs to be included in this scheme. This would allow the scheme to make them personally liable, and avoid cases where directors could blame their nominated supervisor on the basis they relied on them, and proportionate liability allows them to.

Section 7(1)(a) defines a building practitioner to include a person who contracts to do building work. However, it does not seem to allow for:

(a) Who the contract is, or has to be, with (which has been a loophole issue under the HBA since the *Ace Woollahra* case which has still not been properly fixed)?

(b) What if the 'head contractor' is not the real builder and simply subcontracts all of the work to the

real builder?

(c) What if there was no contract (i.e. builder doing work for itself, or related entities such as to avoid the provisions of the Bill)?

Compliance declarations

Seeking to ensure compliance with the BCA only is not enough. The BCA does not cover all works and situations. Section 8(1)(b) allows additional requirements to be provided in the regulation but the OCN is concerned that what is required will not happen and sees no reason why the issue cannot be addressed now. Design declarations must also include a requirement to declare that a design is fit for purpose.

Section 9(3) requires a design practitioner to provide a design compliance declaration to the principal design practitioner. This assumes they know who they are.

The penalty at s9(6) of 2,000 penalty units contrasts with that under s10 for unregistered designers of 500 penalty units. Presumably this is in addition to, and concurrent, or the offender would be better off being unregistered and breaching s10 (as only a registered design practitioner would appear capable of breaching s9) than being registered and breaching s9. See also fines under ss12(4) and 13, and so on.

Section 12(1)(b) does not say who the declarations by registered principal design practitioners must be provided to.

Section 16 requires that a building practitioner "must" take "all reasonable steps" to ensure regulated designs for the building work are prepared by registered design practitioners, and declarations obtained. While it provides a fine if not complied with, the section does not provide for what happens if all reasonable steps are taken but not all required designs are provided and declared. OCN is concerned by the tendency of some builders to make excuses and seek to escape sanctions for breaches by saying that "I tried to" or "I meant to but I forgot". The same has occurred repeatedly to date under the mandatory inspections scheme for certifying authorities under the EPAA. The builder fails to organise inspections by the certifying authority to perform the mandatory inspections (such as say slab being poured per design with reinforcement in place). The builder provides a certificate from an engineer saying they inspected and confirmed the work was done per design. Years later defects arise and it is found the work was not done per the design despite the certificate.

Section 16(2) deals with variations, and the same issue arises for taking "all reasonable steps".

Section 17(1) deals with building work (other than in relation to a building element or performance solution – which is not the same wording as section 5, and also assumes the regulation reflects section 5 which it may not) that varies from a regulated design. This seems to ignore that this would only be to the extent that the regulation provides something more than design of a building element or performance solution for building work or a building element (which is dealt with by section 17(2)). Further, the requirement that a design for a regulated design that is not prepared by a registered designer is "recorded in the form and manner prescribed by the regulation" does not give comfort that those varied designs will need to be lodged.

Section 17(2) requires the building practitioner to take "all reasonable steps" to ensure the building work for a building element or performance solution (which does not seem to be the same as the section 5 definition) for which a regulated design is to be used. In practical terms, that mean they do not have to comply with it, just try. That is insufficient.

Section 17(3) refers to "except with reasonable excuse" without saying what that might be.

Section 17(3)(a) requires a "final design" without saying what that is. It requires such from a registered design practitioner for the work, without saying what part of the work is being referred to, which suggests one practitioner might deal with all the work, or does not seem to allow for different practitioners being required for different parts of the work and those practitioners being required to be the relevant ones. "A" practitioner also does not seem to necessarily refer to the practitioner who provided the design originally, and could be someone else who may be on a limited retainer, or without full understanding of the project.

Section 17(3)(b) refers to a design being required from a registered design practitioner whose registration authorises the practitioner to provide declarations as to the matters which the declaration relates. However, the Act does not establish any system or process for how this is done beyond section 44 and dealing with such in the regulation. The requirements to take "all reasonable steps" under this section has the issues noted above for other sections.

Section 11 Registered design practitioners to be indemnified requires adequate insurance while leaving that to the regulations, with no assurance of what will be adequate.

The NSW government's recent decision to allow exemptions for cladding claims for certifiers' professional indemnity insurance gives serious cause for concern that the government would allow exemptions that would leave other industry participants also inadequately insured, rather than have to deal with and solve the current insurance issues facing the industry that would enable adequate insurance (for the benefit of industry participants and consumers).
There should be a public register of insurance coverage and details to ensure maximum transparency for the industry and consumers, in the same way as contractors have any lack of HWI/HBCF eligibility publicly declared on their licence details. Failure to do so will allow designers to potentially operate without or with inadequate insurance, and prevent consumers and clients from easily confirming insurance is in place.

Section 14 Registered principal design practitioners to be indemnified See the comments for section 11 above which also apply here.

Section 20 Registered building practitioners to be indemnified The comments above for section 11 also apply here.

Section 18 Obligations relating to BCA This section creates a general obligation by the builder to comply with the applicable parts of BCA requirements of regulations. Again, as raised repeatedly during feedback discussions with stakeholders and Fair Trading, not all aspects of building works are covered by the BCA.

Section 21 Compliance with BCA Section 21(1)(a) refers to "the applicable governing requirements", which presumably means the Deemed to Satisfy requirements but this is not clear. The statement seems too generic. Similarly for section 21(1)(b) referring to "applicable performance requirements". Does this mean by "alternative solutions" as allowed under the BCA?

Section 24 Improper influence with respect to provision of declarations It is not clear whether the understanding needs to be "reasonable". This appears assumed, but should be explicit, Otherwise unreasonable understandings might be acceptable, which is clearly not the intent.

Section 25 Regulations relating to insurance requirements Section 25(g) referring to former design or building practitioners raises the issue that practitioners need to have insurance in place for preferably 10 years after completion of the last project done, as without insurance the statutory duty of care to be owed is essentially useless.

Part 4 Registration of practitioners Generally, to the extent this Part relates to building practitioners, it appears to be setting up an additional and concurrent registration scheme to the licencing scheme for builders under the HBA.

There is no scheme for registration or regulation of developers, who are as much a part of the cause of the current defects crisis that the Bill is trying to deal with, as designers and builders.

Section 32 Classes of registration Presumably this includes disciplines or areas of expertise for designers. Such cannot be properly considered until the draft regulation is seen, and should have been dealt with in the Bill.

Sections 35 Determination of applications & 36 Grounds for opinion that a person is not a suitable person to carry out work The history of complaints and claims should be part of what is taken into account, for maximum transparency for consumers.

Section 38 Duration of registration It is not clear whether time while suspended counts towards registration period (and it should not).

Sections 39 Conditions of registration & 40 Particular conditions There are no indications as to what conditions might be imposed. Presumably these will be in the regulation. Such cannot be properly considered until the draft regulation is seen.

Section 45 Registered body corporate with insufficient registered directors A registered body corporate should also be barred from providing a compliance declaration during a period it does not have insurance required under the Bill in place.

Section 56 Registered directors must report certain conduct There should be an obligation on all design and building practitioners to report any such conduct by any other practitioners that they deal with. Permitting silence facilitates offenders continuing to offend.

Section 62 Appointment of authorised officers & Section 94 Delegation It is not clear that the powers granted to the Secretary of the Department of Customer Service extend to the recently appointed NSW Building Commissioner, which they clearly need to.

Section 86 Practitioners register Section 86(3) should include details of insurance for maximum transparency.