OWNERS CORPORATION NETWORK
ABN 99 153 981 205

Level 5, 95 Pitt Street, Sydney NSW 2000
Phone: (02) 8197 9919
Email: eo@ocn.org.au
Web: www.ocn.org.au

21 March 2019

Regulatory Policy, Better Regulation Division
McKell Building
2-24 Rawson Place
Sydney NSW 2000

e: StrataDefectsBond@finance.nsw.gov.au

Dear Sir/Madam

Submission on Public Consultation Draft (Issued 30 January 2019) of
Strata Schemes Management Amendment (Building Defects Scheme) Regulation 2019

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. The growth of this sector raises increasingly important questions over property ownership and governance.

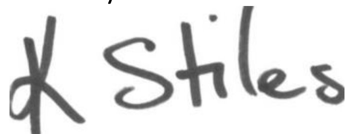
The Owners Corporation Network of Australia Limited (OCN) is the peak consumer body representing residential strata and community title owners and residents. As such, OCN is uniquely positioned to understand the impact that the legislative framework has on day-to-day machinations and community living.

OCN's mission is to protect the rights of present and future strata owners. OCN:

- educates strata committee members and individual owners through meetings, seminars, workshops, guides, and a discussion forum to share experiences and disseminate information;
- advocates necessary improvements to government policy and legislation.

As the consumer voice in this defects bond regime, OCN is happy to engage with Department on any aspect of this submission, and to develop solutions to the issues identified.

Sincerely



Karen Stiles
Executive Officer

Thanks to our sponsors

Principal Sponsor
longitude INSURANCE

Major Sponsor
BAC Insurance Brokers Pty Ltd

Submission on Public Consultation Draft (Issued 30 January 2019) of
Strata Schemes Management Amendment (Building Defects Scheme) Regulation 2019

Authored by Paul Jurdeczka

In respect of Public Consultation Draft (Issued 30 January 2019) of *Strata Schemes Management Amendment (Building Defects Scheme) Regulation 2019:*

Schedule 1[5]:
Clause 45(2)(b) – To the extent Fair Trading intends to provide guidelines as to what "appropriately qualified" means, as part of the "conditions" under Clause 45A, these need to be publicly advertised and the subject of submissions by stakeholders. Further, the difference between "guidelines" and "conditions" in the Regulation, and Part 11, is unclear. The terms appear to be used interchangeably, but the Act and Regulation does not seem drafted in this way, or not clearly enough.

Clause 45A(2) – The classes of inspectors, and/or disciplines involved, would benefit from guidance from Fair Trading as to what it saw such as being, especially given some experts might hold themselves out as being a certain type of expert incorrectly. The example of some experts describing themselves as "hydraulics engineers" when no such branch or degree of engineering existed (except perhaps as a sub-set of civil or mechanical engineering degrees) is an example.

Clause 45A(3) – This indicated basis potentially provides an administrative appeal basis for persons saying this was not satisfied.

Clause 45A(4)(b) – Given there are only 10 authorised professional associations referred to (in the proposed Clause 44(2), at Schedule 1[4]), providing written notice to them in addition to Gazetting would be simple and ensure they were notified, and not have to rely on monitoring Gazettes. Discussions with Fair Trading at the stakeholders meeting on 5 February 2019 were to the effect the Gazetting was intended to apply to both Clause 45A(4)(a) and (b), but this is not how the Clause is currently drafted.

Clause 45B(e) – The term "formal qualifications" is not defined, and unclear as to what this means. For example, university and TAFE qualifications? If so, then the term was not defined, and not clear. The apparent use of plain English terms without further definition or guidance has created issues with legislation (relevantly the *Home Building Act* (**HBA**) and *Strata Schemes Management Act*) previously. The use of the term "relevant" is also unclear as to meaning – relevant to what, and how? Simply removing "formal" from the clause might be appropriate.

Clause 45C(1) – The reference to only Clauses 45 and 45B seems to be too narrow, and more appropriately would refer to Division 2 generally. The reference to the term "guidelines" also seems to differ from "conditions" under Clause 45A, as raised above.

Section 45E(3)(c) – The sub-clause refers to particulars of project experience provided by the member to the developer or that appear on the register, but such particulars are not referred to in the particulars to appear on the register at Clause 45B(1).

Schedule 1[6]:
Clause 46A(h) – The reference to reports is unclear as to whether it refers to pre or post completion reports. This may cover a significant volume of documents, some of which may not be relevant to inspections of defects some time later within the timeframes under the scheme. Owners corporations would prefer to have more documentation than less, but other stakeholders will take a different view, and the concern about fees and costs being spent reviewing irrelevant documents (which might be reducing the bond when the developer is not available to fund same) arises.

Schedule 1[8]:
Clause 49A(a) – The use of the term "unwilling" is unclear and arguably inappropriate, given a builder might be unwilling on an arguably proper basis such as due to having a dispute or defence for a defect or defects (such as under section 18F of the HBA, and being the basis for such). The phrase "fails or refuses" may be more appropriate.

Clause 49A raises the wider issue of, if a developer engaged a new contractor to do the required repairs:

(a) This would be the subject of a written agreement, and presumably require HBCF insurance under the HBA. If it did not, then the owners corporation would want to see a copy of the relevant building contract to be satisfied the value of the work was not such as to require it.
(b) The developer would probably be reluctant to provide a copy, so as not to disclose the terms or price paid.
(c) Any HBCF insurance would be for the benefit of the owners corporation as a "non-contracting owner" under the HBA, and thus a copy should be provided to it as the beneficiary.
(d) The HBA is not explicit on this issue, and should be. Developers and contractors should not be left in any doubt that repairs in such circumstances require a fresh written contract and HBCF cover, or they would try to avoid this requirement for various reasons including to reduce costs.

Schedule 1[13]:
Clause 51 requiring the bond to be in place for up to 3 years might not be long enough given the time that could be required to inspect and report on a large scheme, and given the scheme allows for extensions to be obtained. However, extending this period would create practical problems for bond issuers having to agree to such.

Schedule 1[16]:
Clause 52 (2) & (3) – Issuing a fine may not be sufficient or appropriate to allow the issue to be resolved or remedied. The Secretary or NCAT should have the power to require the relevant documents to be produced, in addition to any fine applicable.

The guidelines and conditions referred to are clearly crucial to how the scheme will work, but are further delegated under the draft Regulation and yet to be drafted. If stakeholders were not provided with a chance to review and make submissions, the way in which the scheme will operate would be put in place without proper feedback. The format of the reports, dealt with under the relevant Australian Standard, is an example of the legislation delegating how part of the scheme will work, in a way that means some stakeholders will not be involved.

Schedule 1[22]:
Schedule 5 Penalty notice offences – Noting the penalty units are set by another Act, these provisions are apparently only to make clear such amounts within the legislation. On this basis the Regulation will need to make sure it is updated to reflect the relevant Act.

Generally, the likely need to involve specialist experts in the inspection and reports process provided under the Act, on the recommendation of the main expert, raises the issue of whether those specialists are involved as experts in their own capacity, or as sub-consultants. The following further issues also arise:

(a) Whether the specialist experts would thus enjoy the good faith defence under the legislation a "head" consultant would.
(b) Who will be responsible for the fees of the sub-consultants, especially if the developer could not fund fees and/or the bond was unavailable or insufficient.
(c) Whether claims for fees would be subject to the *Building & Construction Industry Security for Payment Act*.

The above issues need to be dealt with clearly, as experts are already reluctant to be involved in the scheme due to the risks of liability involved, and failure to make these issues clear would add to those concerns. It is in owners corporations' interests to make sure the best experts are involved in this scheme, and that a large number of experts also involved to ensure competition and choice.