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Director, Environment and Building Policy
GPO Box 39
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Dear Sir/Madam

ENVIRONMENTAL PLANNING AND ASSESSMENT AMENDMENT (IDENTIFICATION OF BUILDINGS WITH COMBUSTIBLE CLADDING) REGULATION 2017

This submission questions the rationale behind the introduction of the *Environmental Planning and Assessment Amendment (Identification of Buildings with Combustible Cladding) Regulation 2017* (the **Regulation**), which is to make provision for the identification of, and collection of information about, buildings to which combustible cladding has been applied.

The Owners Corporation Network (OCN) commends the New South Wales government for its ambition to address the community's concerns regarding flammable cladding material on residential apartment buildings (and other high-rise buildings). However, the way the government is going about this will have major unintended consequences for building owners and occupiers.

Of particular concern, is the observation that the NSW Government appears to be placing the responsibility for identifying potentially flammable cladding with building owners.

While that might be appropriate for buildings where the building owner was responsible for the building's construction (primarily those excluded by the new Regulation), it does not appear to be appropriate for buildings that have passed from the original builder/developer to an Owners Corporation.

Surely the responsibility for identifying potentially flammable cladding lies with the builder who allowed such material to be used in the first place? It is a requirement of the EP&A Act and its Regulations that those who build a building and certify it as compliant must do so in accordance with the National Construction Code (NCC), Australian Standards and all other relevant fire and building regulations. Furthermore, clause 129C Record of site inspections of the Environmental Planning and Assessment Regulation 2000 requires accredited certifiers to keep detailed records of all the inspections and certifications they have made.

Any reasonable person would conclude that the onus should be on builders and certifiers to demonstrate to the Government and the public's satisfaction that they can identify through their own records which buildings have potentially flammable cladding.

This sensible approach has already been adopted by major banks and insurers. For example, Westpac has audited all new and current building projects it has funded over flammable cladding used in construction by requiring builders of new and current projects to provide confirmation of compliance on external wall cladding products that are either designed [to be installed], being installed or are already installed.

The NSW government placing the burden of identification and audit on strata owners is also out of step with other jurisdictions, notably Victoria, Queensland and Western Australia where the cost of this initial work is being borne by the government.

By instituting this Regulation, the public cost will be high because the only way to determine if a building has cladding that will "readily burn" is via expensive investigation, analysis and testing on each and every building over 2 storeys. Given the limited test facilities available in Australia for this type of work and the current backlog of similar tests it may be impossible get test results back within under 18 months.

The most cost-effective approach is simply to require builders and certifiers to search their records for the relevant information and supply it to government. Given this reality, it is unconscionable for the government to allocate such a heavy cost burden on owners when a far cheaper, easier and more reliable alternative exists.

Apart from the unfairness of burdening innocent building owners with exorbitant investigative costs and potential loss of mandatory insurance cover, this Regulation sends the wrong message to those responsible for the use and installation of flammable cladding, other non-conforming products and non-compliant building practices. In effect, the government is conveying to the building community that there is little or no consequence for those creating problems and that they can continue in a business-as-usual manner.

This is especially important because the Regulation states that the Secretary may establish a 'Register of buildings with combustible cladding" yet there is no indication of what, if anything the government is going to do about the problem. Nor is it clear how such information will benefit building owners and occupiers affected by potentially flammable cladding on their building.

Unless the government also urgently overhauls its building defects legislation to create a duty of care between the builder/developer and all subsequent owners of a building, then this Regulation fails to meet the community's expectations.

This is not just our view. The Senate Inquiry into Non-Conforming Building Products has just released an Interim Report: Aluminium Composite Cladding. In their report the Committee recommends that state and territory governments work together to develop a nationally consistent statutory duty of care for end users in the residential strata sector. They also have come to the conclusion that there is "*an urgent need to provide a statutory duty of care to cover the discovery of non-compliant or non-*

conforming building products" so that those responsible for creating the situation can be held legally accountable.

In conclusion, OCN would add that for the Regulation to achieve its intended objective, additional powers, information and actions may need to be provided and we have outlined these in the following proposed changes to the EP&A Regulation 2000.

In addition, OCN strongly urges the government to establish a cost-effective ASIC-style public register of strata schemes with two contacts updated annually for a small fee, to facilitate communication with owners corporations.

The registry would include: The registered strata plan number, the street address of the strata scheme, the number of lots and their type (residential, commercial etc.), contact details for the secretary and/or chair of the executive committee. The registry would be updated annually.

This model already exists elsewhere - The Canadian province of Ontario has recently introduced new legislation governing condominium developments that includes the establishment of a registry of condominium corporations (the equivalent of our owners corporations). This registry will be maintained by a newly created 'condo office' that will operate at arm's length from government but with authority delegated by government. It will be funded by a small levy (estimated at $1-3 per month per unit) as well as user fees for the other services provided by the office. You can read more about these changes here: http://www.ppforum.ca/events/ontario-condominium-act-review.

The provincial government is currently drafting the regulations that will govern the roll out of these changes. Condominium corporations will be required to submit an annual return to the condo office (including these contact details), which will also enable their fees to be assessed. If you would like to speak directly with someone involved, you can contact Noah Gitterman, Senior Policy Advisor, Policy, Planning and Oversight Division, Consumer Protection Ontario [Noah.Gitterman@ontario.ca ph. 416-212-0831].

The benefits of a similar model in NSW - OCN is frequently approached by government agencies seeking to make contact with people responsible for strata title buildings. High profile examples include ABS (for purposes of Census data collection), NBN, and previously the Digital TV roll-out.

Such a register would allow government departments to contact and access strata titled buildings. Whist the goal is to register strata titled buildings nationally, NSW is the most likely state to adopt this initiative. NSW has traditionally led the other states and territories in terms of strata. And the government is currently focused on both strata and data collection and sharing.

OCN is more than happy to engage with government to facilitate the best outcome for owners and the community at large.

Sincerely
Karen Stiles
Executive Officer

Note – Text highlighted in GREEN and italicised is new content proposed by OCN. Text highlighted in RED and strikethrough is content OCN proposes be deleted, and text in BLACK Times New Roman font is original Amendment Regulation text.

Schedule 1 Amendment of Environmental Planning and Assessment Regulation 2000

Division 7C Identification of buildings with combustible cladding

OCN has several concerns regarding the definitions. Firstly, we wish to have the words "under 5 percent pitch" added to the definition. While flame spread will probably not be as fast as in a vertical situation, it could still be significant for any paneling/surface greater than 5 degrees from horizontal.

Secondly, OCN wishes to have the term 'readily burning' added in order to clearly classify the level or degree of combustibility the new regulation is setting. After all, practically any solid material will 'burn' under the right conditions, so specifying the degree of combustibility provides certainty to all who must comply with the regulations.

OCN Recommended Changes to Draft Regulation:

It is recommended that Division 7C be amended as follows:

186S Definitions

In this Division:

building with combustible cladding means any building that has combustible cladding applied to any of its external walls or to any other external area of the building, other than a roof *under 5 percent pitch*.

combustible cladding means any cladding comprised of materials that are capable of readily burning (such as timber, polystyrene, vinyl or polyethylene) and includes any cladding system that incorporates elements that are capable of readily burning (such as combustible framing or insulation behind the surface cladding).

readily burning *means the ability of a substance to easily burn or ignite, causing fire or combustion in the presence of a source of ignition.*

For the reasons outlined in our introduction, OCN categorically rejects the idea that building owners should be required to provide the following information at exorbitant cost and inconvenience and that, instead, it should be provided through a simple (no cost to the public) search of existing project documentation retained by builders and accredited certifiers.

OCN Recommended Changes to Draft Regulation:

It is recommended that Division 7C be amended as follows:

186T ***Builders and accredited certifiers*** ~~**Owners**~~ **of buildings with combustible cladding must provide details of building and its cladding**

(1) The *builders and accredited certifiers* ~~owner~~ of a building with combustible cladding must provide the Secretary with details about the building and its cladding.

186U ***Builders and accredited certifiers*** ~~**Owners**~~ **of buildings may be directed to provide details of building and its cladding**

(1) The *builders and accredited certifiers* ~~owner~~ of a building may be directed in writing to provide the Secretary with details of any cladding that has been applied to the building.

186V ***Builders and accredited certifiers*** ~~**Owners**~~ **of building with combustible cladding must follow up with cladding statement**

(1) The *builders and accredited certifiers* ~~owner~~ of a building with combustible cladding must provide the Secretary with a cladding statement, or progress report on a cladding statement, for the building, as required by this clause.

Annexure 1 – Submission by Affected OCN Member

Shared with permission

Amendments to State Environmental Policies concerning Cladding

Colin J Knowles
Chair of a Strata Plan with Combustible Cladding
16 Feb 2018

I am the Chair of a Strata Committee which has a residential tower of 19 storeys with a total of 100 units where combustible cladding covers about 30% of the façade. I am making this submission in a personal capacity as an individual who has had to manage the cladding issue for the past two years. We had conducted initial inquiries following the Lacrosse fire but were advised by manufacturers and builders that the cladding was not of the same type and was safe.

Following the Grenfell fire, we researched more and better information to discover that the cladding was combustible PE and engaged a fire engineer to report. We had this report before the NSW Cladding Task Force was in place. Since then, tracking the developments, engaging with the original builder, architects, experts, owners and residents and Government, has become a long and demanding task. We remain far from having the solutions, or ways to pay for it (see the **Indicative Cladding Rectification Budget** at the end of this submission).

In addition to commenting on the proposed legislation, this submission, sets out some of the financial and other challenges facing owners in the face of little or no legislative obligations on the regulators, builders and others whose decisions and actions allowed this problem to be dumped on innocent purchasers who had no way to discover this hidden problem.

Key changes to the draft legislation that should be considered:

Recommendation 1 - Procedure for authentication and verification of the authority of persons lodging registration.

Recommendation 2 - Procedure of removal of a building from the register when the building no longer met the criteria for registration.

Recommendation 3 - Requirement for registration of new buildings to be carried out by the original owner at the time of issue of occupancy certificate.

Recommendation 4 - Early establishment of standards and testing for the cladding system that can be relied upon.

Recommendation 5 - If the register is intended to remain up to date then provision should be made to obligate owners to update periodically, and there should be clear definition of "who" amongst the representative of owners should be charged with that task.

Rationale for Recommendations

Recommendation 1 – The suggested web site registration would not provide adequate traceability or authentication of the person making the registration and so would be open to abuse.

Recommendation 2 – If a building cannot be removed from the cladding register after cladding issues have been addressed, it may have adverse impact on property values. If there is a need to construct a permanent register of building owners that should be separate from the "cladding" register.

Recommendation 3 – The most accurate and complete information would be available from the builder at the time of completion. Much of the information will be difficult for owners to obtain later. If new buildings do contain "combustible cladding" then registration must be an obligation on the builder.

Recommendation 4 - Owners of buildings with combustible cladding as well as the industry have no proper guidance as to what products will be deemed "incombustible" until there is a standard, test method, and actual tests. The current vacuum leaves innocent owners open to an expensive quick fix that may later prove wanting.

Recommendation 5 - Contact information for owner's representative changes periodically, updates could be by way of a general obligation to report and a formal periodic update akin to the ASIC company return.

General Comments on the Legislation

The proposed policies do nothing to assist owners who purchased properties in good faith from reputable builders, complete with legitimate certification and fire certificates and who now face very significant and unavoidable costs because Government regulatory processes failed to prevent the installation of combustible cladding.

The Building Products (Safety) Act 2017, virtually allows any product to be deemed unsafe retrospectively. This means that unless extreme care is exercised in replacement of the now determined "combustible cladding", owners could find themselves again in a similar position requiring further replacement action at some time in the future, if it is discovered that the replacement, turns out to be unsafe.

The legislative instruments and amendments leave the way open for an "alternative solution" to be presented which means that future cladding systems may still be "combustible" but is deemed sufficiently safe to be approved under today's rules. One assumes that such buildings would need to be registered and remain so.

A cautious owner would well be advised to avoid completely any cladding system that was not certified and tested to meet the most stringent test of incombustibility. However, there are manufacturers/suppliers already marketing "incombustible" cladding, for which in the fine print says their product meets all current Australian Standards and were tested against the more recent and more stringent UK standards, but failed at least one part of the more stringent test. It makes no mention of the changes being proposed in Australia, and the failure (exceeding the debris limits) is

The current lack of information shows that most purchasers of buildings do not have access to documentation, history, and expertise, to be informed, and are now faced with the high costs of determining whether they have combustible cladding. The costs would be considerably lower if the onus fell back to the builder or the certifying authority. Given the great difficulty owners have in obtaining documentation, the legislation should compel builders to provide complete documentation rather than have cash strapped owners having to pursue such matters through the courts or undertake expensive independent investigations.

The definition of “incombustible cladding” applies to the complete cladding system. The information available at this time does not seem to demand that the manufacturer of a product must market that product as a system (waterproofing, insulation etc behind the cladding). This means that any certification of a cladding product for an owner is of little value unless it has been tested with a system identical to its proposed use.

In the present environment, practical solutions offering a truly “incombustible” retrofit for these light weight cladding products, are not available. It is not practical to do major structural work to replace the external cladding with a totally different system or products that will impact adversely on the building structural design the visual appearance. As mentioned earlier, much of this problem relates to the yet to be defined test standard and methods and one wonders how the few buildings currently undertaking remediation are going to guarantee compliance.

Replacement of cladding is being demanded by insurers and the consent authority as non-negotiable. Insurers are also demanding that they approve the replacement product and design. The timing of such a task is critical. It is not possible to remove the cladding without installing a replacement because it provides a rain and weather shield for the underlying water proofing. The underlying waterproof protection will often be combustible and require replacement to comply with the now defined test of “incombustibility”. There is also the practical matter of raising funds to undertake the work. The requirement to obtain a DA for changing the cladding adds further time and cost.

Alternative solutions such as installation of external sprinklers are yet untested and could cost as much as cladding replacement. While they might reduce the spread of flame, it would require nor remove the combustible cladding but rather be permitted under an “alternative solution” and remain permanently on the register. Any building so equipped which had a cladding fire would undoubtedly have significant cladding damage before the sprinklers had much impact. This would not happen if the cladding is truly “incombustible”

Practical Implications for Owners

AS5113, which will establish the new testing and certification methods, is not yet available, I understand that it is scheduled for release in May 2018 but that it will take some time before a compliant test facility is set up and manufacturers have their products certified.

After the fire events of La Cross and Grenfell, Government agencies started take proactive action. Unfortunately, Government action seems directed more at being seen to have acted and inquired but has provided little in the way of practical advice and solutions and support for affected building owners.

Owners who innocently purchased into buildings that were legitimately certified as meeting all relevant standards. They now confront substantial special levies because of a regulatory framework that allowed shortcut solutions. Most of these had, or should have had, “alternative solution” certification would appear to have been the basis for its approval. But if no reports can be found, one can only assume that the certification authorities deemed the product to be safe. This can not be permitted to continue.

Specialist fire engineers have reported that the BCA as existed at the time of construction, should not have allowed the use of combustible cladding other than through an “alternative solution”. Irrespective of what transpired, it appears that the owners have no reasonable avenue of recourse to any of the parties who enabled this to happen. The legislative changes do not alter this, and over time could lead to future owners facing the same issues.

Owners need to get on with addressing the problem directly (either from pressure from consent authority, insurer, or owners). Raising funds is a real difficulty in strata residential properties where many residents may be living on retirement income and limited or no capacity to borrow or repay loans or meet steep increases in Strata Levies.

Indicative Cladding Rectification Budget for a Residential Tower with Partial Cladding
In respect of single residential tower with cladding covering only 30% of the building the indicative cost estimates of dealing with the issue are set out below.

Consultant and associated costs to locate relevant material, review the information, approach various authorities and builder etc to establish facts to provide to Fire Engineer	$8,000
Managing communication with owners and residents on an ongoing basis for life of the project	$6,000
Fire Engineers Reports	$9,000
Legal Assistance in responding to draft Fire Orders Etc Consultancy costs in providing required information to Insurers and engaging with insurers on realistic time-frames and solutions	$4,000
Researching the market, builders, manufacturers to be sufficiently informed to approach builders and others about possible contributions and to develop a practical time-line for addressing the issues	$8,000
Consultancy with Architects, and Quantity Surveyors to establish realistic cost estimates	$9,000
Legal advice required by the owners in respect of liability, and allocation of costs	$15,000
Arranging and conducting multiple General Meetings of owners to approve arrangements to raise funds, and to approve expenditure	$4,000
Selection and Contracting of a project manager for the remediation (noting the requirement of the SSMA 2015 that multiple quotes are required for any expenditure over $30,000.	$2,000
Project Management Costs for Duration of the Project	$350,000
Preparation and processing of DA required for Consent to replace the cladding	$5,000
Tender process to select a contractor to strip, supply and install	$6000
Scaffolding and scaffolding permits	$700,000
Contractor Costs including removal, supply and install as necessary final inspections, certifications and documentation	$2,500,000
Updating register etc.	$1,500
Preliminary Total	**$3,627,500**

This could result in an average special levy of almost $40,000 per unit if this must be met by the 100-unit owners. It could cost up to $23,000, or more, to provide a reliable cladding report to the NSW government under the proposed EPAA legislation.

Those owners who cannot pay, face a statutory 10% per annum interest payment against unpaid levies. Borrowing by the Owners Corporation, is challenging because of the guarantees sought by lenders plus borrowing costs result in even higher costs to the owners. Those on pension or retirement incomes are certainly going to have extreme difficulty in paying their share. Hence, there could be a very significant social cost down-stream if unfortunate owners are forced to move and sell because they cannot pay.