THE INDEPENDENT VOICE OF STRATA OWNERS

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Better Regulation Division

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Attention: Building & Construction Policy Team

OCN SUBMISSION – DESIGN & BUILDING PRACTITIONERS REGULATION

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

As the key consumer voice, OCN welcomes the opportunity to provide comment on the draft Regulation and is happy to engage with government on any aspect of this submission.

Sincerely

K Stiles

Karen Stiles
Executive Officer

OCN SUBMISSION - DESIGN & BUILDING PRACTITIONERS REGULATION

The Owners Corporation Network (**OCN**) makes submissions on the draft *Building Practitioners Regulation 2020* (**Regulation**), under the *Building Practitioners Act 2020* (**Act**), as follows.

Clause 5 - Form and content of regulated designs involving performance solutions

Performance solutions are invariably complex, and often rely upon aspects and requirements that are not always clear or contained in the primary document. Clause 5(1)(b) of the Regulation should be amended to read as follows [underlining added to note addition]:

> *If no plans or specifications are included – a description of the physical elements of the performance solution <u>that clearly describes every aspect of, and requirement for, the physical elements of the performance solution</u>.*

Additional clause needed – Prescribed classes of building elements

A new clause is needed to prescribe further things as *"building elements"* for the purposes of section 6(1)(f) of the Act.

It is clear from section 6(1)(e) of the Act that it is intended that at least the main mandatory requirements for plumbing and electrical services be regulated design – as they should be. However, the wording of section 6(1)(e) limits what is included within regulated design to what is required under the BCA. That limitation inadvertently excludes the main mandatory requirements for plumbing and electrical services as regulated design, as those requirements (which are within the Plumbing Code of Australia - ie: Vol 3 of the National Construction Code - and the Wiring Rules) are not within the BCA.

Plumbing, drainage and electrical work required under the *Plumbing Code of Australia* and the *Wiring Rules*, should be prescribed as *"building elements"*.

Clause 8 - Further applicable requirements for design and building compliance declarations

Clause 8 should be redrafted as follows to make its requirements clearer. It should include a requirement to declare compliance with the relevant aspects of the consents in place at the time of the declaration, and to confirm that the declaring practitioners are not aware of any issues with the design, or carrying out of the building work, that does not have to be declared under any other aspect of the declaration. Such matters should not be allowed to 'fall through the cracks' in the current declaration requirements.

Such additional requirements are clearly in the public interest and the OCN respectfully submits that there cannot be any reasonable basis for not including them, and a failure to include them would undermine the objectives of the legislation and the construction culture change the NSW government is striving for in order to restore consumer confidence.

1. *For the purposes of section 8(1) of the Act, other prescribed applicable requirements are that design compliance declarations declare that:*

(a) *The regulated design complies with all relevant requirements of the current development consent/s and the current construction consent/s (if a construction consent has been issued) (**approval**);*
(b) *The regulated design is consistent with, and integrates with, the design/s (whether regulated or not) for the other parts of the building work that affect or are affected by the building work to which the regulated design relates;*
(c) *The regulated design includes the detail of any work necessary to integrate the building work to which the regulated design relates with the rest of the building work;*
(d) *The work for such integration with the regulated design complies with the NCC and the approval and the integration does not cause any other part of the building work to not comply with the NCC or the approval;*
(e) *Lists the hold point inspections nominated in the regulated design that the practitioner has attended and confirms that the relevant matters are satisfactory and provides a separate list of the other hold point inspections nominated in the regulated design;*
(f) *The design practitioner is not aware of any aspect of the regulated design or the design for any other aspect of the building work that the practitioner believes does not comply with a regulatory requirement or is not good construction practice other than any such matters listed in the declaration.*

Amendments flowing from the above would also need to be made to the form for design compliance declarations at Schedule 6 of the Regulation.

Corresponding requirements should also be required for building compliance declarations by way of a subsection 2 for clause 8 of the Regulation as follows:

2. *For the purposes of section 8(3) of the Act, other prescribed applicable requirements are that building compliance declarations include declarations by the building practitioner that:*

    (a) *The building work has been carried out in accordance with the current development consent/s and the current construction consent/s (**approval**);*
    (b) *The building work has been carried out in accordance with the NCC and the Wiring Rules;*
    (c) *The building work has been carried out in accordance with all final designs (whether or not regulated designs) for the building work;*
    (d) *The building practitioner is not aware of any aspect of the building work that the practitioner believes does not comply with a regulatory requirement or is not good construction practice other than any such matters listed in the declaration.*

Clauses 12 (Prescribed classes or types of building—building work) & 14 (Certain work is excluded from being professional engineering work)

Clauses 12 and 14 apply the requirements of the Act commencing 1 July 2021 (noting Part 4 regarding the duty of care has already commenced with retrospective effect on 10 June 2020) only to Class 2 buildings under the *Building Code of Australia* (**BCA**) (or buildings in part Class 2).

Serviced apartments, being buildings under Class 3, should also be covered by the Act from the outset. Work on such buildings is very similar to Class 2 and should present little extra burden to building practitioners and designers given they are essentially the same ones involved in Class 2 buildings.

Part of the impetus for the Act was the High Court of Australia's 2014 decision in *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 36 that found there was no duty of care owed to a subsequent owner such as an owners corporation for building work. That case involved a serviced apartment block (which was built at the same time as a residential tower, which in contrast had the benefit of the statutory warranties under the *Home Building Act 1989*). The protections to be provided by the Act (and Regulation) to future work should also be provided from the outset to purchasers and owners of serviced apartments, and the owners corporations for class 3 buildings and parts of buildings.

Part 4 of the Act

Noting the submissions as to Clauses 12 and 14 above, the Regulation makes no provision to extend the duty of care under Part 4 of the Act to classes of buildings and work beyond Class 2 and work that is *"residential building work"* under the *Home Building Act 1989 (NSW)*.

Based on discussions with Department of Finance since the issue of the Draft Regulation, the OCN understands this is on the basis that Part 4 of the Act as it commenced on 10 June 2020 (with retrospective effect) is considered by the government to apply to all *"buildings"* for the purposes of the *Environmental Planning & Assessment Act 1979*, and thus all classes fall into such a definition.

OCN is concerned that due to the definition of *"building work"* in section 4, the drafting of Part 4, Part 4 (and certain limited parts) of the Act commencing prior to the rest of the Act, and the complicated nature of the savings and transitional provisions dealing with same, defendants to duty of care claims will deny such is the case. The Court may well agree with such a reading in the absence of explicit legislative language to that effect. It should not take a court decision possibly years away to determine that issue, noting the uncertainty that would cast over the entire industry and the benefit defendants would obtain in negotiations with plaintiffs (including owners corporations) by the risk of such a finding and outcome.

The Regulation should make it clear that work for all classes of buildings is subject to the Part 4 duty of care by prescribing same for the purposes of section 36(5)(a) of the Act. The OCN also notes that the ability of a Regulation to operate retrospectively is limited and the retrospective operation of such a position should also be confirmed by amendment to the Act at the first available opportunity.

Clause 18 - Lodgement on NSW planning portal before issue of occupation certificate

The OCN is very concerned that clause 18(3) currently does not prescribe anything for the purposes of section 17(6)(d) of the Act. During the process of stakeholder consultation OCN repeatedly raised explicit concerns and made submissions on the Act, and the Government indicated that this issue would be addressed via the Regulation.

Currently, any final design that is:

(a) Not a regulated design; or
(b) A variation to a regulated design that is not for a building element or performance solution[1];

does not have to be declared or lodged.

[1] Clause 26 of the draft regulation does not require the provision of such a varied design.

The OCN considers the lodgement of all final designs for the building work to be **absolutely fundamental** to providing adequate consumer protection and placing owners in a position to properly and efficiently maintain their buildings and deal with building issues as they arise.

It is simply not acceptable, and undermining of the Act's objectives, to leave owners corporations not knowing what the designs were for various aspects of the building or who prepared those designs.

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

(a) Access the finalised design for each aspect of a building; and
(b) Identify who prepared each aspect of those finalised designs;

the regulatory and cultural changes needed to substantially reduce the prevalence of defects and restore consumer confidence will remain incomplete.

Such holes in the transparency that the bill will provide weaken the prospect of the necessary accountability of **all** parties involved in a development to encourage culture change and best practice.

Clause 47 - Insurance requirements under recognition or registration scheme

The OCN has **great concerns about Clause 47**, especially sub-clause (b), allowing the recognised engineering body and professional engineers to decide what insurance, in their reasonable opinion, is necessary. Given the NSW Government has allowed certifiers PI insurance exemptions for cladding claims in recent years, the OCN has great concerns engineers will be able to hold insurance that will prove to be insufficient to cover any claims. Without sufficient insurance, any claims against them for defects will be essentially unenforceable, and the purpose of the Act and Regulation will not be met. Determining that the insurance was not reasonable will not happen until years later, which will be too late for affected consumers.

The minimum requirements for any practitioner within each profession should be prescribed with additional requirements for them carrying out certain types or volumes of work to be set by the relevant professional bodies. That should ensure reasonable minimum insurance cover is in place, as was always envisioned for the scheme under the Act to operate properly. The current self-assessment regime in the Draft Regulation will not achieve that.

Clause 59 – Registered professional engineers must meet insurance requirements

Clause 59(b) might allow an approved arrangement with the same lack of proper cover as Clause 47 raised above. As such, prescribed minimum cover to be provided under such approved arrangements should be made clear to ensure sufficient consumer protection.

Clauses 65 (Registered building practitioners must meet insurance requirements) & 67 (Certain registered practitioners to determine adequate coverage of policy)

Clauses 65 and 67 might allow an approved arrangement with the same lack of proper cover as Clause 47 raised above. As such, prescribed minimum cover to be provided should be made clear to ensure sufficient consumer protection.

Clause 68 – Practitioners must keep records relating to adequacy of policy

Clause 68 only requires such records for insurance to be kept for 5 years. This is inadequate, especially given the duty of care claims and relevant limitation periods mean 10 years from Occupation Certificate is the minimum such may be required. The 5-year figure appears arbitrary and without any proper basis. It is to be contrasted with clause 73 which requires 10 years of record keeping generally. It should be consistent with clause 73, and a minimum 10 years. Noting proceedings might be filed within 10 years and then not served for some months, 11 or 12 years would be more prudent.

Clause 69 - Matters occurring after expiry date of policy

Clause 69 concerning claims notified and made in respect of the policy's expiry date seems to misunderstand and/or oversimplify how claims made and notified policies work. This is an area subject to extensive (Federal) regulation, and the terms of such policies also vary widely (including often being provided by overseas insurers including London markets). These issues are far more complex than this and the related clauses in the Regulation seem to assume and will cut across existing law and contracts (e.g.: section 40(3) of the *Insurance Contracts Act 1984 (Cth)*.

Clause 69 should be deleted.

Clauses 70 (Policy may be subject to limit of indemnity) & 71 (Policy may be subject to exceptions or exclusions)

Clauses 70 and 71 seek to allow limits on indemnity for a claim and all claims in a year, and insurance policy exclusions. This seems to be intended to allow limits on policies as is standard, presumably on the basis there may be concerns the Act's requirement for insurance might otherwise be interpreted as being too open and required to be without any such limits.

The OCN's concerns with leaving such matters to "the reasonable opinion" of professionals (who are not trained in such matters and have a commercial incentive to reduce their insurance premiums), and also cutting across already complex insurance policy law and contracts, are already noted above in relation to clause 47, and are repeated here.

Clause 42 of the *Home Building Regulation 2014* seeks to do something similar with exclusions on insurance under Part 6 of the *Home Building Act 1989*, in more detail than is done by the Regulation here. However, that Act also has extensive details of what cover must be provided. Permissible exceptions or exclusions for insurance policies required by the Regulation should be dealt with in the same way and prescribed. Such matters should not be left to the opinion of practitioners, or rely upon practitioners having reasonable opinions on same, or not being tempted to obtain a reduced insurance premium due to the exceptions and/or exclusions being inappropriately wide. Doing so will result in harm to consumers ultimately unable to recover due to inappropriate policy exceptions or exclusions.

Clause 73 - Record keeping generally

Clause 73 provides that poor record keeping leads to a penalty. However, this does not provide any remedy to interested persons who require those records, often years later, to investigate defects and also who is liable or should suffer consequences. The Regulation should also provide a general subpoena power of The Secretary, or interested parties via NCAT or the Courts, to seek such documents from other persons who may hold copies where this has not occurred, to remedy this issue. This would be similar to the power of NCAT provided by section 17 of the *Strata Schemes*

Management Act 2015 for initial documents not handed over by developers at a first annual general meeting, as required by law.

Clause 74 - Record keeping for all prescribed practitioners

Clause 74 applies the record keeping requirements to *"developers"* as defined under the *Residential Apartment Building Act 2020* (**RAB Act**). Given the extensive if not standard use of *"special purpose vehicle"* companies by developers, which are wound up and deregistered soon after completion of projects, this requirement is essentially meaningless as the relevant liquidators will usually destroy these records once deregistered.

The companies and/or liquidators should be required to hand records over to the Building Commissioner, Secretary or such other government body dealing with such records, in the event of deregistration.

Clause 81 - Exchange of information

Clause 81 allows information sharing for certain purposes and lists owners corporations as one of the relevant agencies. Clause 81(1) should make clear the owners corporations can seek to share such information when required to investigate and deal with defects, including suing for same.

Schedule 1 – Classes of registration as a design practitioner

Schedule 1 clause 1 prescribes the classes of design practitioner and includes *"drainage design"*. That relates to *"stormwater drainage and roof drainage systems"* (see Schedule 1 clause 8 and Schedule 2 clause 8). There is no design practitioner category for *"plumbing services"* design which is one of the specific services identified for regulated designs at section 6(1)(e) of the Act and is not covered by *"stormwater drainage and roof drainage systems"*. It is also noted that *"plumbing services design"* is also used in the RAB Act, at Schedule 1, Clause 4(1)(e).

Either the *"drainage design"* category should be expanded to include *"and all other plumbing services"* or a separate design practitioner category should be created for *"other plumbing services design".*

Waterproofing is also defined as a *"building element"* in section 6(1)(b) of the Act and Schedule 1, Clause 4(1)(e) of the RAB Act. There are extensive issues with waterproofing defects in strata schemes. Generic waterproofing approaches often need to be tailored to suit particular circumstances and sometimes boutique waterproofing designs are needed to properly deal with unusual scenarios.

The OCN suggests that a separate design practitioner category be created for *"waterproofing design"*. It would not need to be exclusively for specialist waterproofing consultants. However, architects, builders, engineers and building designers that wish to be able to prepare and declare waterproofing designs should be required to demonstrate more than a generalist or working knowledge of waterproofing designs.

Schedule 2, Part 2 – Building practitioners

The OCN has repeatedly over a number of years pointed out that under the current regime, the construction of buildings above 3 storeys, which is the most complicated and risky type of residential construction, is the least regulated form of residential construction. If a builder meets the entrance level requirements to be licensed to contract with a consumer to do work worth $5,000 to $19,999, the builder does not need to satisfy any other license requirements to build a high-rise. Nor does the builder need to demonstrate to a home warranty insurer that it has sufficient expertise or solvency to properly construct a high rise or anything else above 3 storeys. The lack of a home warranty insurer involved to say no if a builder cannot be trusted to construct a building more than 3 storeys (since December 2003) has resulted in the large majority of people who build multi-storey buildings doing so via $2 companies.

That together with the widespread prevalence of developers operating via $2 companies has seen the usual commercial scenario for the construction of strata plans above 3 storeys become the developer and builder only really needing to provide a building that is outwardly presentable for several months after completion. By that time, the developer has typically completed the sales for all units and the profits from the sales will have left the $2 company.

Any defects that are discovered after that are of no significant consequence to the people behind the builder or developer as liability for those defects is left with the $2 companies and unenforceable.

Those commercial dynamics have seen:

1. Builders without the expertise and/or intention to provide a good quality building obtaining many jobs by 'undercutting' responsible builders who provide tender prices based upon carrying out a good quality build;

2. Such builders then carrying out the work knowing that they cannot make a profit on the project if they carry out the work properly, and that there will be no real consequence for the persons behind the builder if there are later defect issues as no owners corporation will incur the costs of properly pursuing a $2 building company;

3. Such builders also having no real reason to 'pushback' against any reckless design decisions that increase the developer's profit.

A number of commentators have referred to these dynamics as a 'race to the bottom'. Without any consequence for defects, the cheaper the construction, the greater the profit.
The major crisis in consumer confidence that has resulted was both predictable and predicted.

The NSW Government agency that provides home warranty insurance has been in the business of assessing whether a builder is experienced, competent and solvent enough to be trusted to insure to build a strata development of up to 3 storeys (**3 storey insurance eligibility**) for over 10 years.

The OCN has repeatedly over those years sought the urgent introduction of a separate building licence category for buildings over 3 storeys, with the licence requirements to be at least as stringent as the underwriting requirements for 3 storey insurance eligibility. That would see builders the government insurer does not consider an acceptable risk for building a 3 storey unit block unable to build higher than 3 storeys, including a high-rise, instead.

The Draft Regulation's response to this situation has been to introduce via Schedule 2 Part 2 requirements that a head contractor for a class 2 building (of any height) must in addition to the existing building licence requirement have at least 5 years *"practical experience"* (which is not defined) in the carrying out of class 2 building work within the last 10 years, some general knowledge requirements (with no indication of how rigorously they will be assessed or who would assess them) and the ability to interpret, apply and assess compliance with the relevant requirements of the BCA (again with no indication of how rigorously they will be assessed or who would assess them).

The OCN sees this as a wholly inadequate response to addressing what it considers the greatest failure in the current regulatory regime and greatest contributing factor to the current defects and consumer confidence crisis.

There should be a building practitioner – restricted category which does not allow the holder to carry out class 2 construction of more than 3 storeys. Requirements for that category, other than an existing building licence, are not needed as contractors already have to satisfy home warranty insurance underwriting requirements to be able to carry out such work.

There should be a further building practitioner – unrestricted category which allows the holder to carry out class 2 construction of a building with a rise of more than 3 storeys. The requirements for that category should be:

(a) An existing residential building work general builder licence, with the licence holder or the nominated licenced supervisor/s for a corporation contractor having had at least 5 of the last 10 years spent as a principal contractor, or a nominated supervisor for a corporate contractor, carrying out class 2 building work within Australia;
(b) The knowledge requirements currently included in the Draft Regulation expanded to include the Plumbing Code and the Wiring Rules. And a regime for a licence holder's knowledge to be demonstrated via a rigorous and independent interview process that does not allow for prepared answers to expected questions;
(c) The skills requirement currently included in the Draft Regulation should be elevated to a ***"demonstrated*** ability to:

    (i) interpret, apply and assess compliance with all regulatory requirements for class 2 construction above 3 storeys; and
    (ii) co-ordinate and supervise the carrying out of class 2 construction above 3 storeys.

    Those skills should also be assessed within the independent interview process used to assess the knowledge requirements.

(d) A solvency requirement which is at least as stringent as the solvency related underwriting requirements for 3 storey insurance eligibility.