THE INDEPENDENT VOICE OF STRATA OWNERS

12 December 2022

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Customer Service NSW
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OCN Submissions on Building Bill & Associated Bills

This submission is made by the Owners Corporation Network of Australia Limited (**OCN**), the peak consumer body representing and advocating the rights and interests of residential strata title, and community title owners and occupiers.
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.

OCN, on behalf of apartment owners, has been pressing for building reform for around 20 years. All too often though, our voices have been drowned out by building industry advocates and successive Governments focused on the quantity of housing at the expense of quality. The true costs of this to consumers runs into the billions of dollars.

The OCN welcomes the review of the *Home Building Act 1989* (NSW) (**HBA**), undertaken in drafting the Building Bill and associated legislation (*Building Compliance & Enforcement Bill*, and *Building & Construction Legislation Amendment Bill*). It is long overdue.

The OCN understands that the current submissions round is only part of a further consultation process with stakeholders, and further drafts of the Bills will be circulated for submissions. The OCN has not been able to undertake a detailed commentary on the legislation, on a section by section basis, due to the sheer volume of the legislation and the time allowed. OCN relies on the pro bono assistance of lawyers experienced in the area, but their ability to assist in the circumstances is limited. The OCN is arguably one of, if not the, most important stakeholder in this area, but does not have the resources or paid staff industry stakeholders have to devote to these reviews.

Ultimately, given the above, these submissions take a 'high level" approach to commenting on the Bills, on the basis further drafts will be circulated and there will be further opportunity for more detailed submissions (on what will likely be amended Bills). OCN will, of course, seek to discuss the Bills within whatever forums the government provides beyond written submissions, as per the usual approach in dealing with these issues.

Yours sincerely

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Building Bill

Definitions

Defined terms are provided throughout the Bill, but only a few are noted in the Dictionary. This makes the Bill very difficult to read and understand, even for lawyers experienced in dealing with legislation, especially the HBA. It will be even more difficult for lay people. The dictionary should provide a comprehensive listing of every term used in the Bill, even if indicated as limited to be used in one section, Chapter or Part.

The current approach also readily results in drafting errors. For example, Chapter 3 is the most critical part of the Bill for protecting owners. Under s49(1), chapter 3 only applies to "regulated work". Yet, the only definition of "regulated work" at section 9 only applies in relation to Chapter 2. Thus, there is no "regulated work" for the purposes of chapter 3 and the most important part of the Bill does not apply at all to anything!

Care must be taken given Chapter 6 deals with various provisions previously in the *Environmental Planning & Assessment Act 1979* (NSW) (**EPAA**), and sets out different usages of terms used elsewhere in the Bill. The defined terms need to be carefully considered and work within the Bill overall rather than creating concurrent defined term regimes that may conflict or create confusion.
Some terms used are not defined when they should or need to be. Assuming the definition is clear, or relying on "common English usage" is a dangerous assumption especially given the history of such not being applied by the Courts over the history of the HBA. For example, "residence" in section 49(2) is not defined, and seems to assume an understanding of what is meant, in what is a crucial definition (being "home").

Definition of "home"

The definition of "home" in section 49(2) is too vague, and then sets out a number of exclusions which appear to be unnecessary.

OCN submits it would be preferable that a "home" is defined as a building that is Class 1a (excluding 1b would thus exclude boarding houses, etc) and Class 2 under the BCA/NCC. Associated works that fall into other classes like Class 7a & 10 where the use of the homes in the building or complex could also be included. The definition could then exclude anything within each not required and provide for the Regulation to further exclude as required.

It is worth noting that the strata bond scheme under Part 11 of the *Strata Schemes Management Act 2015* (NSW) (**SSMA**) includes non-residential parts for "mixed use" buildings, and it is not clear why these are not covered.

The current definition of "home" creates similar issues that have arisen with "structural defect" and "major defect" under Part 2C of the HBA, and finding out what was left out later (thus requiring the change to "serious defect" under the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (NSW)(**RABA**)).

The exclusion at s49(2)(a) of "*premises not intended to be used for permanent habitation*" appears to ignore the risk of this being exploited by persons to change intention and avoid the consumer protection and compliance requirements of the legislation, as illustrated by the case of *Dawber v Pheltern Pty Ltd & Ors* (Home Building) [2009] NSWCTTT 448 (14 August 2009). It also invites allegations as to what different

people intended at different times. Maintaining this exclusion would be inviting uncertainty, litigation and outcomes from litigation that are unintended.

For example, a house is built on behalf of someone who intended to use it as a holiday home but then needs to sell the house. The house is then bought as a family home and the family later discovers significant defects. The owners of the family home will not be able to hold the builder accountable for defects as the previous owner at the time of construction intended to use the home as a holiday house. There would be a number of other scenarios under which such an exclusion could cause an inappropriate outcome. The OCN queries what the justification for this exclusion is intended to be and whether the wording put forward reflects, and is limited to, any such justification.

Section 72 - Persons having benefit of warranties

It is arguable that under re-written version of this critical section, a builder of a strata plan who contracts with the owner of the land upon which the strata plan is built will not be responsible to the future owners corporation under the warranties. Although, it is also arguable that such a builder would be responsible, such an issue should not be left open for debate.
The drafting of this section reinstates the loophole that was closed by amendment in 2010 following the Court of Appeal's decision in the *Ace Woollahra* case.

The OCN suggests that the safest drafting approach for this critical provision is that the Bill uses the current HBA drafting approach within sections 3A, 18B(2), 18C and 18D but all consolidated within the one section whilst using the updated definition of *"developer"* borrowing from the RAB Act that is already included in the draft Bill.

Subsection 2 does not capture someone who is not a developer or a licence holder carrying out work on land they own. Such a person should not escape responsibility under the warranties just because that person did the work illegally.

Subsection 4 should be amended to make it clear that a developer and a subsequent owner do not have the benefit of the same set of warranties. Otherwise, self-serving deals by developers with builders on a defect issue could later shut out subsequent owners, including owners corporations, from pursuing that defect issue.

Anti-avoidance provision

The Bill should have an anti-avoidance provision, similar to anti-tax avoidance provisions, that if a court finds a term or provision of a contract, or an arrangement or scheme, is entered into with the intent of avoiding the provisions or requirement of the Bill then the Court may find invalid or read down or sever that term or scheme as it finds appropriate.

Delegated Regulations

Extensive and crucial parts of the Bill are to be dealt with in the Regulation, which has not been provided. The Bill simply cannot be properly considered if it cannot be read with the proposed Regulation, to see how they will work overall. Proper submissions cannot be made by any stakeholders with only part of the draft legislation provided.

Leaseholder Strata Scheme Case issue not fixed

The definition of "owner" under Schedule 3 does not seem to cover leasehold strata schemes, as illustrated in the case *The Owners – Strata Plan No 91322 v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2019] NSWCA 89). While leasehold strata schemes are rare, they do exist (usually for government land), and that case found such schemes missed out on the statutory warranties completely.

OCN raised the issue at the time in previous submissions to government as part of the *Building Stronger Foundations* discussion paper.

"Major Defects" issue continues

The biggest issue with the *Building Bill* is the failure of the government to properly deal with the significant watering down of consumer rights that has occurred since the rushing through parliament of the *Home Building Amendment Act 2011* in October 2011 without any notice to or consultation with consumers.

That Act sought to reduce building defects litigation by making it harder for owners to hold builders and developers accountable for shoddy work instead of seeking to address the factors causing shoddy work. That Act's main tool of doing that was using the "structural defects" definition (which later became narrower still as the "major defects" definition) to limit what an owner can pursue after 2 years.

As predicted by the OCN 10 years ago, that reduction in consumer rights led to more defects as shoddy builders and developers were emboldened by legislation making it harder for owners to hold them accountable for defects. It also, as predicted by the OCN 10 years ago led to more litigation. In addition to the prevalence of defects becoming worse, the 2 year time limit for most defects forced owners to try to protect themselves by trying to identify defects early. They then did not have time to try to resolve the defect issues discovered without commencing litigation as the 2 year period was too short to allow pre-litigation resolution attempts to play out.

The Building Bill and associated legislation is the biggest reform of this industry in 25 years.
The two biggest reductions of consumer rights for home building and causes of home building litigation in that 25 years have been:

1. The removal in 2003 of the need for construction over 3 storeys to have home warranty insurance which allowed the current proliferation of most new homes being built and developed by $2 companies with those controlling and doing the work knowing that they would not have to pay to fix defects later and thus encouraged to cut corners to cut costs; and

2. The change from a 7 year warranty period for all defects to "structural defects" having a warranty period of 6 years, and 2 years for all other defects. The definition of "structural defect" (and "major defect") is extremely artificial and excludes various defects that can still have extremely significant consequential effects and damages, and repair costs. This was conceded by the government when it expanded the definition to "serious defect" in the RABA which still does not go far enough.

Owners are thus forced to commence proceedings within 2 years to protect their rights for "non-major defects", when they previously had 7 years and could otherwise have 6 years to identify all defects and negotiate a resolution with builders. Suing for "non-major" defects also requires identifying and suing for all "major defects" that can be identified to avoid losing those rights under the law of estoppel.

The current reform opportunity should be used to restore the statutory warranties by either:

1. Reintroducing the statutory warranties for all defects with a warranty period for 6 years from completion. This will avoid 'lawyers' picnic' disputes about what are "serious defects" or not, and provide 6 years for owners to become aware of defects and negotiate a non-litigated resolution with the builder (or developer). That will simplify and reduce litigation. It also focuses all parties upon getting the defects resolved both pre and during litigation instead of liability arguments over whether a builder should be responsible for its defective work under the operation of artificial legal definitions; or

2. Introducing a definition of "minor defects" which is limited to only particular issues listed that will be limited to minor issues of finishes and fittings that are unlikely to cause significant loss or consequential damage. All other defects would have 6 years warranty period. Further, the legislation should have express provision to allow for the suing for "minor defects" to be done without suing at that time for any major defects that are known or reasonably discoverable at that time. That will promote the prospect of keeping the litigation of minor issues contained and simple and to allow that litigation (if brought) to focus on those issues only (and likely be capable of being dealt with in NCAT).

The government should also consider:

(a) Introducing into the Bill the equivalent of section 54 of the *Limitation Act 1969* (NSW) (which does not apply to claims under the statutory warranties. That would allow potential defendants to confirm a claim and thus delay or avoid the need for an owner to commence litigation to prevent rights expiring.

(b) Suspending the expiration of the HBA/Building Bill time limits in circumstances where a repair order process is under way, thus delaying or avoiding the need to commence litigation to prevent rights expiring. The government cannot expect informed owners to rely upon those processes if pursuing those processes will see their rights reduced by the expiry of time limits.

Home building work directions

The power for the Secretary to issue a home building work directions under Chapter 4, Division 5 unnecessarily duplicates the power to issue rectification orders under the RABA/*Building Compliance & Enforcement Bill*. All home building work should be subject to the same single scheme, not duplicate and overlapping schemes depending on whether Class 1 or Class 2 buildings under the BCA/NCC.

The standing for lot owners to provide notification of building disputes in respect of common property under section 88(4)(a) creates potential for mischief, and lot owners to utilise such notices for ulterior motives in disputes with owners corporations. There are already sufficient remedies available for lot owners in respect of issues in the common property inter alia under section 106 or 237 of the SSMA.

Savings & transitional provisions

It is unclear how the HBA will continue to operate, as it will need to, given the various work done under it will prima facie not be subject to the Building Bill (i.e. the Building Bill is prospective not retrospective). For example, Schedule 4, clause 4.3 suggests the jurisdiction of NCAT will change from the HBA to the Building Act, when it will need to be able to deal with both.

Other Building Bill issues that need to be remedied

<u>Section 25 – Grounds for suspension or cancellation of licence</u> – subsection s25(e) should be expanded so that it also applies where the licence previously held would be suspended or cancelled under the building enforcement legislation if the licence was still in place. This is critical to avoid the loophole of licence holders being able to avoid a forced suspension or cancellation by not renewing or surrendering a licence. That loophole allows members of the industry to easily avoid the consequence of a suspension or cancelled licence affecting their ability to continue trading under another licence already in place or a new licence. Thus, the intended consequence of a licence holder not meeting a building defect judgment is avoided with the person behind the licence holder simply 'gaming' the system and continuing to trade under another licence (often via a very similarly named company).

Section 35 – licence holders must be indemnified – The meaning of *"adequately insured"* under s35(2) does not work in practice. Licence holders cannot know what amount they will need to be insured for to avoid ever being underinsured. Nor will the Secretary know. Thus, this requirement can never be policed in advance of it being breached. The only workable approach is to specify minimum amounts of insurance cover per claim and in the aggregate to apply for particular types of work and circumstances.

Section 51 – Date of completion of new buildings in strata schemes – This section needs to be amended so that it will apply to all construction work for a strata scheme, not just where there is a construction of a new building for a strata scheme. For example, it is common for existing buildings to be modified (sometime very substantially modified) for the purposes of creating a strata scheme. Those strata schemes should not fall outside the sensible operation of section 51.

Subsection 2(b) leaves open the current sensible operation of section 51 (replacing the current HBA section 3C) to be completely turned on its head at any time via regulation. The OCN strongly objects to that. Subsection 2(b) should be deleted.

Section 56 – The signing of a variation requirement at subsection 1(a) should be flexible enough to allow a valid variation to be directed by a person in a contract administrator/superintendent role if the terms of the contract otherwise permit the making of such a direction. Clause 2 of Part 1 in Schedule 1 should also be amended in a corresponding way.

If a contract deals with how the cost of a variation is to be arrived at or determined if the parties cannot agree upon the cost of the variation, it should not be necessary for the cost of the variation to be agreed for it to be a valid variation. Contracts that deal with this issue properly should be allowed to operate without the progress of the work being held up by one party taking an unreasonable approach to what the cost of a variation should be.

Section 63 – The documentation requirements that apply for a minor works contract should be applicable for a contract between parties who are authorised to carry out the work under the contract regardless of the value of the contract. That is needed for transparency and accountability to end users (noting that some subcontracts are for the entirety of a development and/or work that is important for safety or building integrity reasons, to minimise litigation over non-written contracts and to counter tax avoidance.

Section 68 – The longstanding prohibition against mandatory arbitration clauses has been overtaken by other dispute mechanisms. Section 68 should be expanded to prohibit any compulsory dispute resolution process other than a NCAT or Court process.

Section 71(2) – In the first line, "a" should be changed to "the" to avoid potential for severe injustices. For example, a developer is entitled to the benefit of the warranties and may become aware of a defect during construction but ignore it. The position of the owners corporation that does not become aware of the defect until years later should not be adversely affected by the developer's early knowledge of the defect.

Section 74 – This section should be reconsidered. It puts subsequent owners (to owner-builders) into an invidious position. The subsequent owner will not know who is responsible for what under the warranties or what should have been covered under the HBCF.

Section 75(d) – Warranties – The wording of this warranty should be *"a warranty that the work will be carried out in accordance with, and will comply with, this and all other applicable laws."* OCN strongly objects to the requirement that the work comply with the law being removed as per the drafting in the draft Bill.

Section 78 – Defences - A subsection should be added to say that a developer cannot rely upon this section.

Section 87 – Meaning of *"building claim"* – Under the drafting of this section, a claim seeking the carrying out of repairs or a 'work order' (as opposed to payment of money) is not a *"building claim"* and thus not within NCAT's home building jurisdiction.

Section 93 – Often the value of a HBCF claim is well over $500,000 but the value of what is in dispute between the insurer and the owner is less than $500,000. If it is intended that such a dispute be within the Tribunal's jurisdiction, the wording should be amended to clarify that.

Section 115 – Mandatory insurance – There is no definition of when a breach of warranty *"becomes apparent"* for the purposes of the insurance provisions.

Chapter 6 Part 8 – Duty of care – Consistently with the DBP Act, the definition of *"building work"* should include the manufacture or supply of a building product used for building work with a clarification that such manufacturing or supplying is considered to be the *"carrying out of building work"*.

Building Compliance & Enforcement Bill

The fundamental issue with the Bill is that section 103 fails to give appeal rights to owners in respect of rectification orders issued to developers. The input of owners is limited to making a written representation to the Secretary in relation to a proposed draft order.

The OCN is baffled by developers having protection against the Department not reaching an appropriate decision while owners corporations are left unprotected. There is no possible sound justification for this process favouring developers over owners corporations. Owners are seriously affected by such orders and must have the same appeal rights as developers and must also be involved in any resolution of an appeal proceedings rather than being bound by whatever deal the Department and a developer reach between themselves while excluding the owners.

The Bill appears to have similar issues to the RABA, as follows:

(a) Rectification orders need to make clear the scope of works to be done, including providing any designs required by the DBPA. The real specification of the repairs cannot be left to the discretion of the developer, given they have a clear conflict of interest, especially given any issues with that scope may not become clear until too late (or the scope may not even be clear).

(b) The statutory warranties should expressly apply to repair works done under rectification orders. Although the owners have the DBP Act duty of care rights for such work, the statutory warranties are obviously preferable and more conducive to developers being accountable for their repairs, which is more conducive to the repairs being done properly. Developers doing repairs should be just as accountable for the repair work as any other party doing repair work that the owners engage as a contractor. Similarly, HBCF insurance should also be required for such repair work where the value of the work and materials exceeds $20,000.

(c) The Department cannot make any orders for recovery of costs incurred for experts retained to report on the defects, meaning the owners corporation would have to consider other avenues to recover such. That should be changed so that the Department can make such orders when it considers it appropriate. That can only result in a reduction of litigation while also providing further incentive for owners to approach the Department.

(d) There is no clear process for the Department to check on compliance with the rectification order, and ensure the work has been done properly or for the adequacy of the work to be certified by properly independent consultants. That should also be changed for the same reasons, with the provisions to expressly allow for such steps to be required under orders.

Obtaining rectification orders can take time, during which limitation dates can expire. That acts as a disincentive for owners to seeking such orders. As such, the government should consider providing an extension or a suspension of the statutory warranties time limits in circumstances where a rectification order under the Bill is made, with the suspension of time to be from the issue of a proposed rectification order. Such an approach will in some cases delay and in others avoid the need for the owners to commence litigation to prevent their rights expiring.

Building & Construction Legislation Amendment Bill

No proper comments can be provided at this stage with the proposed provisions of the Building Bill still being at an early stage in their drafting/development.

However, it does not appear that the Bill amends section 34(3A) of the *Civil Liability Act 2002* (NSW) to ensure that proportionate liability will still not apply to the statutory warranties in the Bill in the same way as it does not apply to the statutory warranties under the HBA. That is a crucial issue that must be remedied.

It is not clear whether the HBA will be repealed or how it will otherwise remain operating for the 10 or so years it will remain in effect once the Building Bill commences. The same issues also need to be clearly addressed with the RABA being replaced by the *Building Compliance & Enforcement Bill.*
The Bill should amend the SSMA to have a bar against developers, builders and their associates voting at owners corporation general or strata committee meetings on any building defect related issues. The current bar only applying against developers voting on building bond related issues is not sufficient.