

23 January 2023

Richard Potts
Director Home Building Compensation Regulation |
Workers & Home Building Compensation Regulation
State Insurance Regulatory Authority
Level 14-15
231 Elizabeth Street
SYDNEY NSW 2000

Dear Richard

**Home Building Amendment Act (Insurance Cover) Regulation 2023
OCN Submissions on Building Bill & Associated Bills**

This submission is made by the Owners Corporation Network (**OCN**), an association of thousands of apartment owners run by apartment owners. 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 is grateful for the opportunity to provide submissions on the draft *Home Building Amendment Act (Insurance Cover) Regulation 2023*.

The OCN strongly opposes the proposed exemption from the need to obtain home warranty insurance (**HWI**) under Part 6 of the *Home Building Act 1989 (HBA)* for certain work to be done under “Project Intervene” and work funded by “Project Remediate” (being proposed Clause 56A).

Such regulatory changes would be completely contrary to the spirit of the legislative reforms that the government has been introducing in recent years, since defects in Opal Tower became apparent in December 2018 and the consequent public awareness of the “defects crisis” in home building in the state.

The best consumer protection for homeowners in New South Wales since the HBA commenced in May 1997 has been the statutory warranties and the HWI cover provided in respect of same. Those protections have been steadily watered down in the years since (by governments on both sides), such as by:

- The reduction of home warranty insurance from “first resort” to “last resort” in 2002.
- The exemption of the need to obtain HWI for the construction of new “multi-storey” buildings from 2003.
- The reduction of the statutory warranties in February 2012 from 7 years for all defects to only provide cover for “major defects” (initially “structural defects”) for 6 years and 2 years for all other defects (with an artificial and legalistic definition that did not include many

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issues that would be major and costly, which is essentially conceded by the wider definition of “serious defects” contained in the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020 (RABA)*.

- Various exemptions to the definition of “dwelling” or “residential building work” to remove certain types of work over the years, such as elevators or car stackers which can be complex and costly machinery to repair or replace, and often supplied by overseas manufacturers.

Notwithstanding that watering down of the HBA statutory warranties and the HWI cover, they remain the best protection for consumers where defects are discovered in home building work. The proposed Clause 56A will exempt remediation work (being the repair of defects) from the need for HWI where:

- (1) It is by a “developer” (as defined by the RABA, which includes the head building contractor) for the purpose of complying with an undertaking given by a developer under section 28 of the RABA.
- (2) It involves replacement of flammable external cladding being funded by the interest free loan program being provided by the NSW Government (being “Project Remediate”), where the owners corporation has given written consent to it being done without insurance.

Exemption for “developer” remediation work under an undertaking

If the relevant defects were to be repaired by a contractor engaged by the relevant owners corporation, the remediation work would need HWI in the normal way - providing protection for the owners in the usual way.

Here the repair work is to be undertaken by either the original contractor responsible for the defects it is repairing, or a new contractor engaged by a “developer” presumably for payment to do those works (and which normally would require HWI that would protect the owners corporation in the usual way). In either case there is a higher risk of the repair work being done defectively, as the “developer” clearly has an interest and desire to minimise costs in doing work for which it cannot obtain a return. As such, it is even more important for HWI to be in place, to protect against the work not being completed or the contractor not being able to do or to pay for repairs in due course if there was defective repair work done.

Allowing such exemptions will be inviting developers to cut costs in arranging repairs by using \$2 company building contractors that are cheaper than contractors with the expertise and solvency position that would allow them to obtain HWI for such work. Such exemptions will undoubtedly be welcomed by developers but will see many consumers being left ‘high and dry’ by the government’s repair schemes when defects in the repair work are discovered and the \$2 company contractors do not stand by their work as the people behind those companies have little reason to incur costs doing so. Those uninsured owners will then be left having to fund further consultant and defect costs themselves. This would be a case of ‘history repeating itself’ with the current government repeating the mistakes of previous governments that led to the current position.

The exemptions will also operate as a disincentive for consumers to participate in Project Intervene or Project Remediate.

The proposed exemption for work under the RABA does not extend to work to be done under a rectification order issued on a “developer”. However, the RABA does not specify that HWI is required for such work. OCN submits that the RABA should specify that. The current lack of clarity is one reason why many residential strata schemes are reluctant to utilise “Project Intervene” or seek rectification orders under the RABA.

The government should not be making exemptions that facilitate the doing of “dodgy” repairs to cut costs, or leave the relevant owners to bear the risk that repairs are done defectively and the developer is not available to repair them (yet again), leaving the owners being to pay for them to be done properly (on the third attempt).

Project Remediate work

Hundreds of residential strata schemes across NSW are grappling with the challenges of flammable cladding, including the substantial costs of removing and replacing the cladding (often at the same time as suing the relevant liable parties to recover those repair costs). The presence of cladding has also led to vastly increased insurance premiums for those buildings, or even the threat of not being insured as required by law.

The NSW government has established an interest free loan scheme to assist such owners corporations in funding the significant costs of determining the appropriate repairs and doing the required work. OCN would have preferred the NSW government to pay for the cost of such (for various reasons), but welcomed the support that is being provided.

However, those costs will still need to be paid back by owners. In some cases, the increased insurance costs are being exacerbated by the slow pace of the “Project Remediate” process, and may ultimately outweigh the interest saved.

The repair work involved in removing and replacing cladding is some of the most complex and costly possible. It involves a dwindling pool of various technical consultants (many suffering challenges in obtaining insurance themselves). If it is not done properly, noting it was done wrong in the first place, the owners corporations will be left with a further significant repair bill again in the future.

The proposed exemption will allow owners corporations to choose not to have HWI for these repairs. Already desperate unit owners, faced with significant repair costs that still need to be paid back albeit interest free and over 10 years to the government, are being given the apparent option to “save” money by electing not to have HWI. Some unit owners will doubtless take the “cheap option”, leaving them without HWI protection. This may well (and OCN says it will almost certainly) lead to those same unit owners selling their units as soon as possible after repairs are completed, leaving the risk of uninsured defects in the cladding repairs to the next “generation” of owners in the building.

It is noted there is no need for such consent to be provided by a general meeting resolution, raising the risk a strata committee could make such a decision itself (unless Project Remediate required such, which the Regulation does not provide for). Even if it did, a normal resolution requiring a simple majority could lead to 51% of desperate unit owners (particularly investors who simply wish to sell) forcing 49% of unwilling unit owners to be left without HWI.

If the repair work was not being funded via “Project Remediate” (as some owners corporations have chosen to do), then HWI would still be required for the repair work. This is creating a two tier system of buildings with such repairs. Purchasers of units would be better placed, and less exposed to risk, in buying units in schemes with cladding repairs which funded their own repairs and have HWI for same. However, that subtle and legalistic point will be lost on most consumers (and their conveyancers and conveyancing lawyers). It is noted there is no requirement proposed for a public register of this, or that such needs to be declared in sales of units – purchasers will have to work it out themselves, and will then be blamed for not doing “due diligence” if they fail to spot the issue.

It is also suggested the exemption will benefit the government directly (see “False savings” section below).

False savings

It is worth noting that HWI insurance premiums have increased dramatically in recent years, apparently due to the poor performance of the relevant government insurer (HBCF/iCare), and those premiums appear to bear little relationship to risk and be mainly intended to cover the deficit being suffered by the insurance scheme (which has been insured by the government since 2010 after private insurers withdrew from the market given the unsustainable costs involved, leading to the government ironically suffering enormous losses insuring the home industry it had failed to properly regulate).

These exemptions seem to be an attempt to reduce the need for the government to insure the risks of the home building industry it has failed to properly regulate for some 25 years (by governments of both sides).

A well-known Australian insurer currently has an advertising campaign based on the concept of “Bargain Regret”, a.k.a that sinking feeling you experience you feel when you go for a cheap deal, only to be let down in the long run.

The proposed exemptions would be worse for many NSW unit owners who would not even be left with cheap insurance. They would be left with no insurance by a regulatory regime which is meant to protect them, after supposedly learning the lessons of the “defects crisis” and trying to fix decades of regulatory and industry neglect.

Yours sincerely

A handwritten signature in black ink that reads "K Stiles". The signature is written in a cursive, slightly informal style.

Karen Stiles
Executive Director