2 September 2024

Policy
Building Commission NSW
NSW Department of Customer Service
E: hbareview@customerservice.nsw.gov.au

Dear Sir/Madam

PROPOSED BUILDING REFORMS

The Owners Corporation Network of Australia Limited (OCN) is the independent peak consumer body representing and advocating the rights and interests of residential strata and community title owners and residents. OCN is a full member of the Consumers' Federation of Australia.

OCN strives to create a better future for residential and community living and ownership. We support the transition to resilient, empowered communities living in climate ready, defect-free buildings.

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.

In NSW, urban consolidation has been a goal of successive Governments resulting in a rapid expansion of the residential strata sector. The emphasis on increasingly tall and more complex apartment buildings to house a growing population demands that only the most suitably qualified professionals are permitted to undertake this work. However failures in the regulatory system and in the construction industry have led to systemic defects in high rise apartment buildings.

Therefore, the protection of consumers through the delivery of high quality, sustainable homes is of paramount public importance.

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

Yours sincerely

K Stiles

Karen Stiles

OCN Submissions on Proposed Building Reforms

This submission is made by the Owners Corporation Network (**OCN**. OCN, on behalf of apartment owners, has been pressing for building reform for over 20 years. All too often though, our voices have been drowned out by building industry advocates and failed by successive Governments focused on the quantity of housing at the expense of quality. The true cost of this to consumers runs into the billions of dollars.

The OCN welcomes the opportunity to provide submissions on the proposed building reforms.

OCN notes that stakeholders were only provided with 3 weeks to provide comments on some five (5) draft Bills. This period is unreasonably short and OCN is unable to comment or make submissions on the draft Bills as a whole.

As such, OCN has concentrated on highlighting only a number of specific key issues identified in the short time available.

Building Bill 2024

Developer Statutory Warranties

Page 19 of the draft Building Bill consultation paper makes clear it is not intended that developers no longer owe warranties to owners. However, section 98 sets out who the warranty providers are. It includes the following at s98(b):

"*if a person did not enter a contract with the owner for the work—the person who contracts or arranges for, facilitates or otherwise causes, whether directly or indirectly, the work to be carried out*"

Such does not cover a *"developer"* as defined by Schedule 4. It only applies if there was no contract to do the work with the owner – presumably when the builder is also the owner doing the work for itself. Such would be covered by the definition of developer under Schedule 4.

Section 98(b) should simply refer to "*a **developer** in respect of the work*".

Major Defects under Statutory Warranties

The *"major defect"* definition provided by section 95 of the draft Building Bill is significantly narrower than the current definition under the Home Building Act, despite the other changes seeking to widen such.

The requirement in sub-sections 95(1)(b) and (2)(b) that the defect *"has a significant impact on the building"* means that until it has had such an impact, it is not a major defect.

The current definition required that it *"causes, or is likely to cause"* the various impacts (now significant impacts in the draft Building Bill). The existing *"causes, or is likely to cause"* terminology should be carried over into the Building Bill rather than the proposed change noted above which would very significantly reduce consumer rights.

Definition of "home"

The OCN is concerned that the definition of *"home"* does not include *"part of a home"* or any of the longstanding extensions to the definition of *"dwelling"* at clause 3(2) of Schedule 1 to the *Home Building Act* (**HBA**).

Section 96(1)(f) warranty

The new provision should as per the current provision at s18B(1)(e) of the HBA include the words *", to the extent of the work conducted,"* after the works *"will result"* to ensure that the warranties require that each part of a home worked on has to be fit for habitation, not just that a home as a whole can be lived in. The additional words are also needed so that the warranty does not extend to work within a home not carried out by or on behalf of the warranty provider.

Building Bond Extension

Under section 100 of the draft Building Bill, if a building has the building bond then the 2 year warranty period for *"non-major defects"* can be extended as provided. However, section 100(3) is confusing and will cause unexpected and unfair reductions in consumer rights due to the definition of final report under section 100(7). If the interim report identifies no defects or no final report is required for any other reason, then the warranty period for non-major defects under the currently proposed drafting will expire 90 days after the issue of the interim report. The unintended consequence of that is some unsuspecting owners corporations will only have a non-major defects warranty period of 18-21 months (reduced from 24 months).

Decennial Insurance

The decennial insurance required under Part 5 of the draft Building Insurance Bill requires a provision that says a policy is deemed to extend cover to the extent required by the Act and is invalid to the extent it is inconsistent, in the same way as section 103D (and specific sub-sections of section 102) of the HBA.

Building Work Compliance Declarations

Chapter 6 of the draft Building Bill needs to require more comprehensive mandatory inspections, and a more comprehensive list of building elements needing building works declarations (currently compliance certificates), which should be in a prescribed form making clear the details of the scope of work done, products used, and locations involved.

The fact that external balcony waterproofing does not need a mandatory inspection or compliance certificate currently when such is often defective and causes extensive water damage to the building shows the fundamental shortcomings of the current system over 25 years into operation. Certifiers only do the bare minimum of what is required to reduce their potential liability. The Bill should ensure sufficient inspections and certificates is in place, as opposed to repeating the current inadequate requirements.

In relation to section 150, the words *"or carries out work,"* should be deleted. The inclusion of those words is not in the existing corresponding provision of section 6.30 of the *Environmental Planning and Protection Act*. Including those words would have the unintended consequences of:

- Completely undermining what is required of builders to ensure that the work they build complies with the NCC; and

- Completely changing the responsibility of builders and subcontractors to achieve compliance with the current s18B HBA warranties;

- Making disputes even more complex and costly than they already are and more focused on litigating liability instead of focused on identifying the repairs needed and having the repairs carried out.

Extension to Warranties

Section 100(1)(c) of the draft Building Bill provides an extension to the statutory warranties period when the owner lodges a notice of building dispute with the Secretary, but then refers to a period prescribed by the Regulation which has not been provided. That is not good enough. It is being proposed that owners are not permitted to commence warranty claims in NCAT until after the Secretary issues a certificate permitting the commencement of proceedings. There are many problems with that highlighted in OCN's 31 May 2024 submission answer to question 23 which does not seem to have been considered. Pursuing such a regime but leaving the mechanism supposed to somehow protect consumers from unfairly losing rights to a measure to be prescribed at some point instead of being debated in, and approved by, parliament after consultation is inadequate.

A further issue with what is included is that section 100(2) says that no additional defects can be included, and no other extensions granted. The meaning is unclear given the section does not specify what it is that additional defects cannot be included within. It does however seem to have an intent contrary to clear longstanding case law providing that if proceedings are commenced within time the particulars of the actual defects can be added to the case with the Court's leave in due course – it is the cause of action that needs to be commenced within time. The proposal seems to be another radical reduction in consumer rights that will have the effect of minimising developer responsibility instead of restoring consumer confidence.

Section 161 meaning of "building claim"

The OCN notes that many of the types of claims listed at section 161(1)(b) are within the definition of *"building dispute"*. The drafting of section 161(1)(b) should make it clear that the types of disputes listed within s161(1)(b) are *"building claims"* irrespective of whether they are a *"building dispute"* for which the Secretary has not issued an approval under s159(1)(d).

Section 6 definition of 'close associate' for a defence to a statutory warranty claim

This definition has been inappropriately and without justification narrowed from the existing definition which should be restored in full.

Loosening of protections against phoenix behaviour in the NSW residential apartment industry

The OCN is stunned that the current restrictions against persons involved in companies that have not met defect claims simply continuing to build through other companies are proposed to be removed instead of tightened. Proceeding instead with the watered down approach within Part 6 of the Building Compliance and Enforcement Bill 2024 would be a disgraceful step backwards towards allowing the 'bad apples' in the industry to continue to be unaccountable for ruining lives of consumers left to live with and pay for their shoddy work.

<u>Building Compliance and Enforcement Bill 2024</u>

The persons other than a *"developer"* that a BWRO can be issued is unclear from the drafting of section 69(1)(b). That should be made clear.

Section 87 making work carried out under a *"remedial order"* exempt development would have the presumably unintended effect that there would never be any regulated design from a registered design practitioner or any building compliance declarations for any work required under any of the types of orders that can be issued by the Secretary, except for waterproofing work.

Hopefully the intention was to not require a development consent for work carried out under a *"remedial order"* which would be a practical measure. It would be extraordinary if it is proposed to

let builders who have had to have orders made against them due to defective work not have to obtain regulated designs or provide building compliance declarations in relation to the repair work. Such a regime would encourage a 'cowboy' approach to repairs. Shoddy builders will be asking for orders to be made against them so that they can avoid doing proper repairs and consumer protections.

In section 88(4), *"refuse or"* should be inserted before *"fail"* to retain the existing wording in s41(3) of the RAB Act which was included by amendment of the parliament so that owners cannot be prosecuted for refusing to provide access where there is a reasonable excuse for refusing to provide access.

Section 96(2)(b) is too broad. It allows for the making of a completely different order that an owners corporation (the most affected party!) has not been given a chance to comment upon.

The meaning of *"relevant person"* in section 99(1) is not defined. The drafting should make it clear who can appeal and that should include owners corporations.