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Easy and Transparent Trading Consultation Paper
Regulatory Policy, BRD
Department of Finance, Services and Innovation
Level 5, McKell Building
2-24 Rawson Place
SYDNEY NSW 2000

E: policy@finance.nsw.gov.au

Dear Sir / Madam

EASY & TRANSPARENT TRADING CONSULTATION PAPER JULY 2018

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.

The Owners Corporation Network of Australia Limited (OCN) is the peak consumer body representing residential strata and community title owners and residents. As such, OCN is uniquely positioned to understand the impact that the legislative framework has on day-to-day machinations and community living. We have a lived experience and a practical hands-on approach to strata administration, issues management and resolution, and harmonious living.

There are several very significant reforms being put forward in this paper, and OCN regrets that it has had insufficient time given other concurrent reviews to cover all the areas in the detail they deserve.

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

Yours sincerely

Karen Stiles
Executive Officer

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OCN SUBMISSION
EASY & TRANSPARENT TRADING CONSULTATION PAPER JULY 2018
Prepared by Banjo Stanton

Item 1.6 – Removing 13 categories of home building licences

The OCN is firmly opposed to the proposal to remove 13 categories of home building licences.

The consultation paper supports this proposal by arguing that removing the Home Building Act statutory warranty protection for the 13 categories of home building licences would leave consumers with adequate protection against defective work from other laws. That is simply untrue. The proposed changes will substantially reduce consumer rights.

The consumer guarantee provisions in the Australian Consumer Law do not apply in respect of the provision of services to someone other than a consumer. A developer is not a person who acquires services as a consumer under clause 3(3) of the Australian Consumer Law. Consequently, where the relevant contractors work on the construction of a new residential strata building, they do not provide any consumer guarantees to install with due care and skill or that their services will be fit for service.

All the other laws listed by the consultation paper as providing protection for consumers will do nothing to protect the purchasers of residential units as they only protect the parties who contract with the relevant contractors. The proposed changes would see the relevant contractors having no accountability for defective work included within the construction of an apartment building. That will simply exacerbate the already endemic problem of defective construction of apartment buildings that leave owners having to pay for the repair of shoddy construction work.

Licencing the relevant categories of contractors requires contractors to show a minimum standard of competence in their field before being let loose on consumers. The OCN does not see a minimum level of competence requirement as a barrier to healthy competition. However, it protects consumers from ‘cowboys’ and protects competent contractors from having reasonably based pricing undercut by cowboy contractors.

OCN agrees that the cost of considering licence applications and licencing fees can be reduced by extending the duration of licences for contractors who have shown the minimum level of competence required to obtain a licence. There is no evidence that licensing these contractor categories stifles competition from competent contractors or stifles innovation.

Consumers can be expected to check whether someone has a licence and to understand that not having a licence means that the contractor has not demonstrated a minimum level of competence. It is fanciful to expect consumers to be able to confirm for themselves whether a contractor is sufficiently trained or skilled in the absence of a licence requirement. The concept that the market will ‘weed out’ bad apples does not assist the many consumers who fall victim to a bad contractor before that contractor has created such a trail of destruction that the contractor’s incompetence becomes widely known.

In fact, on 9 November 2015 NSW Fair Trading put out a press release as follows:

"Unlicensed building a jolly rotten business"

Fair Trading Commissioner Rod Stowe said the victims had been greatly disadvantaged by the behaviour of the Jollys and he warned people to check trade licences where they are required for work to be undertaken.

"Fair Trading will continue to prosecute rogue individuals and companies but ***the best protection against these kinds of errant practices is to only deal with licensed and reputable contractor****s," he said.*

"Do your homework. Where required, licensing ***helps eliminate illegitimate operators*** *from the industry and* ***creates a level playing field*** *for all tradespeople. Check trade licences for free at www.fairtrading.nsw.gov.au or call 13 32 20."*

The consultation paper argues that removing the licence categories will still leave consumers with the protection of rectification orders. Rectification orders currently provide some protection to consumers as there is a potential consequence under section 51 of the Home Building Act if the contractor does not comply with the rectification order. However, the potential section 51 consequences are the only possible consequences for a contractor ignoring a rectification order. Those section 51 consequences only apply against holders of a contractor licence. There is literally no consequence for an unlicensed contractor for ignoring a rectification order. It is therefore quite fanciful to argue that rectification orders will keep assisting consumers if these contractor licence categories are removed.

The consultation paper suggests that if the relevant trades are done poorly, there is little risk of significant financial detriment. Painting, glazing, plastering and mechanical ventilation contracts for apartment buildings are often in the hundreds of thousands of dollars. Defective glazing in a high rise building presents a risk of injury or death. Inappropriate mechanical ventilation poses a health issue. Paint has a protective as well as an aesthetic function. It is often used as a waterproofing measure (eg elastomeric coatings). It is often used as a fire safety measure (eg intumescent paint). And it is often the only way of protecting the long term integrity of exposed structural steel against corrosion. The OCN is aware of issues with the coating of one strata plan's structural steel where the repair costs are expected to exceed $10 million. The other very real threat to consumers – and to the unlicensed trades people - of removing the painting and decorating licenses is the inappropriate management of lead paint and asbestos. Both are known to affect health and even cause death.

The consultation paper's 'other consideration' that work in these trades is often for a contract less than $5,000 and thus already unlicensed does not support further deregulation. The existing ability to do minor work without a licence does not mean that there is no point in having a licence requirement for carrying out non-minor work. The suggestion that there is no evidence of greater risks with work over $5,000 is odd. A large amount of defective work obviously costs more to repair or replace than a small amount of defective work.

In summary, removing the licence classes:

1. Will remove the Home Building Act warranty protection for this work which will not leave adequate legal redress in place for the protection of consumers who purchase residential units;

2. Will result in rectification orders losing their consumer protection/assistance effect by removing the potential for consequence to a contractor who ignores a rectification order;

3. Will result in more defective work by allowing 'cowboys' unable to demonstrate a minimum level of competence to legally contract with consumer which is the kind of competition that should not be allowed;

4. Will threaten the livelihoods of competent contractors who will have their prices reasonably based for carrying out competent work undercut by dodgy operators (which will cost the competent contractors a lot more than their current licence fees).

Maintaining a licence requirement with a minimum standard of competence and responsibility for any poor work via meaningful rectification orders and the Home Building Act warranties is the appropriate balance of government intervention for these contractor classes and it should not be changed.

Item 1.8 – Allowing licence holders to trade out of external administration

The OCN objects to this proposed change applying to the Home Building Act. It would significantly water-down the provisions introduced by the government to reduce phoenix-trading. The onus should stay on an insolvent contractor to demonstrate to the Secretary that the circumstances behind an insolvency should not prevent the contractor's licence from continuing.

Item 2.3 – Non-Disclosure Agreements

Non-Disclosure agreements (NDA's) are an enormous problem for residential strata owners involved, usually, in, defects rectification and compensation negotiations. The intent and outcome of the general use of NDA's in the strata sphere is to:

1. hide the enormity of the building defects problem to the community, and
2. allow dodgy operators to continue operating without a public 'black mark' against them.

As the result of these NDA's building defects are an unchecked human and financial cost to the affected individuals, as well as a huge, avoidable financial cost to the community via the overburdened legal system.

The strata experience correlates with those reported by consumer advocate, Choice, where people's life and safety are put at risk by NDA's. These are a pernicious blight on the community and must be prevented.

2.8 Allowing Strata Lots to Choose Their Own Utilities Provider

Whilst there are potentially big savings for owners when they all use eg the same electricity provider, particularly with regard to the owners corporation supplying solar power, a growing number of utilities contracts entered into by developers severely disadvantage subsequent owners.

The growing tendency of developers to enter into agreements with suppliers so that infrastructure is supplied at no charge to the developer, results in subsequent owners being locked into an onerous contract that has a very long, or indefinite, term and inflated ongoing charges.

OCN believes that developers should be able to set up contracts for up to 3 years, after which time the review of the contract, in terms of its value to both the owners corporation and individual owners, should become a mandatory item on the Annual General Meeting agenda. That is, subsequent owners corporations should not be denied the right to renegotiate utilities contracts, including internet contracts, on behalf of the OC and individual owners. Option 3 of the discussion paper looks the closest to achieving this by prohibiting developers from locking future owners corporations into long term contracts, and from incorporating automatic roll-ons into these contracts.