Submission No 1

INQUIRY INTO REVIEW INTO THE DESIGN AND BUILDING PRACTITIONERS ACT 2020 AND THE RESIDENTIAL APARTMENT BUILDINGS (COMPLIANCE AND ENFORCEMENT POWERS) ACT 2020

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Legislative Council Public Accountability & Works Committee
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Design & Building Practitioners Act 2020 and Residential Apartment Buildings (Compliance & Enforcement Powers) Act 2020

This submission responds to the Committee's invitation to participate in the review of the *Design & Building Practitioners Act 2020* (NSW) and the *Residential Apartment Buildings (Compliance & Enforcement Powers) Act 2020* (NSW).

In summary, events over the past decade have demonstrated that the penalties under the *Design & Building Practitioners Act* are insufficient deterrent for systemic abuses by property developers (and professional enablers) engaged in major residential construction projects. Those events also demonstrate the usefulness of timely comprehensive compliance verification across the state, a matter highlighted by the Building Commissioner in his statement about regulatory failure in the Illawarra region. Recent funding increases for the Commissioner are commendable. It is fundamental, however that the Commissioner's staff should have a proactive 'can do' corporate culture to inhibit problems that impact both individuals and government.

Basis

The submission reflects teaching and research regarding consumer protection, particularly in sectors where there is a fundamental asymmetry of information between consumers and goods/service providers with a consequent need for effective forward-looking regulation (as distinct from regulation that seeks to mitigate harms after they occur, in particular through litigation by individuals who have acquired uninhabitable dwellings). The submission also reflects evaluation of regulatory models at the state, national and international levels (including risks of regulatory capture and regulatory incapacity attributable to resourcing, governance, risk transfer and corporate culture).

The submission does not represent what would be reasonably construed as a conflict of interest. It is for example independent of industry or consumer groups.

Policy Objectives

The Committee's Terms of Reference including reviewing the two enactments to 'determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain effective for securing those objectives'.

It is important to recognise that the policy objectives are currently and will remain valid. It is also appropriate to question the effectiveness of the terms of the legislation, which both can

and should be strengthened in the public interest without adverse impacts on housing affordability and the NSW government's development strategy in the Sydney metropolitan region.

The Commissioner has for example acknowledged the importance of rebuilding trust and confidence in the regulatory regime and, by extension, in the government. It is recurrently acknowledged that for most Australians the purchase of a dwelling (whether for their own use or as an investment) is the purchase of the lifetime. That purchase is one where there is a fundamental information asymmetry between consumers and property developers/builders, inadequately offset by guidance from realtors, valuation sites and inspectors. Sites such as Domain or AllHomes may for example indicate the likely market value of a house or apartment but will not certify that new/past construction is 'sound' and thus does not need remedial work that might dwarf the price of an apartment in one of the upmarket blocks that have been featured in the mass media as likely to collapse. In contrast to the People's Republic of China, Australians necessarily trust that government – at the state/territory level – will provide an effective legal framework that will ensure consumers do not become the victims of incompetent or unscrupulous developers, builders, agents and inspectors. In essence, they regard that as a key role of government: one reason why we have government and why mechanisms such as stamp duty or licensing fees are legitimate.

Regulatory failures, such as those associated with the billion dollar collapse of the Toplace group, result in the distrust and disengagement of people evident in support of extremist political groups and the disquieting data in the 2019 ANU Election Study report (satisfaction with democracy is at its lowest level since the constitutional crisis of the 1970s, trust in government has reached its lowest level on record. Only 25% of Australians believe people in government can be trusted, 56% believe government is run for 'a few big interests' and only 12% believe the government is run for 'all the people'). That is unsurprising given perceptions of a Prime Minister as lacking a 'moral compass' and a Premier as being characterised by ICAC as having engaged in 'serious corrupt conduct'.

The Building Commissioner's 2023 *Strata Defects Survey Report* in noting the prevalence of serious defects indicated that the building/development industry prior to the legislation had both inadequate self-regulation – the same weakness evident in the other Australian jurisdictions, including disquieting behaviour by ostensibly independent professionals – and inadequate action by regulators (attributable to corporate culture, insufficient resourcing and deficient policy settings such as adequate deterrents). It was unsurprising for example that substantive defects occurred in Toplace developments and in much smaller developments.

A culture of misbehaviour requires regulation: there is no reason to believe that all entities in the property development/construction sectors have developed a moral compass and will necessarily behave without guidance provided by the legislation.

The policy objectives of the legislation therefore remain relevant.

The Commissioner stated that

> The Building Commission NSW is working hard to rebuild trust and capability in the construction sector. I'm very confident that the industry is getting it. Either build it right or there will be consequences.

Such rhetoric is conventional. In order to give effect to the policy objectives the consequences must be meaningful, in other words penalties that are on a scale to deter misbehaviour and are sufficiently large to gain the attention of industry participants, the media and consumers.

Concerted action by regulators is also necessary and achievable, as discussed below. The legislation being reviewed by the Committee should thus be regarded as a commendable start rather than the solution to all problems or as something that replaces the burden on private litigators.

Action

The penalty regime in the legislation is inadequate. It is insufficient to deter egregious under-performance or non-performance by large commercial entities, for example where directors control groups rather than an individual enterprise, are able to accrue very substantial revenue through multiple large scale projects and as we have seen recently are willing to transfer assets out of the Australian justice system.

The legislation should accordingly be amended to increase the maximum penalties. That increase should be reflected in a forward looking prosecution program, something that requires a vigorous corporate culture and cooperation between regulators. The necessary culture includes embrace of information technology (vigorously building for example on partnering with the State Insurance Regulatory Authority for data matching). More subtly, it requires a sense of mission throughout the Commission that offsets the tendency of officials at the workface to view their priorities and values through those of the entities they regulate.

Looking beyond penalties

The objectives should be given effect through replacement of the Strata Building Bond & Inspection Scheme (SBBIS) which is restricted to defect rectification costs of 2% of construction value, potentially leaving strata holders 'high but not dry' (and indeed with residential property that is either unsaleable or so reduced in value that consumers face a major loss on their purchase of a lifetime without any fault or their own and in circumstances where they could legitimately expect protection by government.

In making that statement it is important to recognise that governments benefit directly from property/construction development and should accordingly be more active as regulators rather than transferring risk to consumers and civil litigation. In some instances the only 'winners' of large scale defects are the entities coordinating class actions.

A national approach

The construction and residential development sectors are state/territory rather than Commonwealth responsibilities.

Experience with the Victorian Managed Insurance Authority (which faces criticisms regarding accessibility, transparency, tacit minimisation of payments and an adversarial culture) should inform the NSW regime.

More broadly – given that regulatory issues are not restricted to one jurisdiction – regulatory best practice should be facilitated through joint work by the state/territory ministers. That has the potential to reduce consumer confusion (or unawareness) and provide parliamentary committees with performance metrics for evaluating the effectiveness of the regulators in their jurisdiction. As a corollary it might result in state/territory cooperation for a Home Building Compensation Fund with national scale, given the value of spreading risk.

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