Submission No 5

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

Organisation: The Law Society of NSW

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THE LAW SOCIETY
OF NEW SOUTH WALES

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Ms Abigail Boyd MLC
Committee Chair
Legislative Council Public Accountability and Works Committee
Parliament of New South Wales

Via Review portal

Dear Ms Boyd,

Review into the *Design and Building Practitioners Act 2020* and the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020*

Thank you for the opportunity to contribute to the review into the *Design and Building Practitioners Act 2020* ("DBP") and the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* ("RAB"). The Law Society's Property Law, Business Law, Litigation Law and Practice, and Environmental Planning and Development Committees contributed to this submission.

Timing of the review of the DBP and RAB

We note that the current review is being conducted under s 109 of the DBP and s 69 of the RAB. These sections provide for a statutory review much sooner than the usual five-year period. Both the DBP and the RAB were assented to in June 2020, and provide for statutory reviews to be undertaken "as soon as possible after 30 March 2022". While we appreciate the impetus to conduct the reviews now, in our view, it is still relatively early to be considering whether both Acts are operating effectively to achieve their policy objectives. This is particularly the case for the DBP, where many of the operative provisions did not commence until 1 July 2021. We understand that examples of some of the issues that the DBP was designed to address are still being identified, and proceedings commenced in relation to matters pursuant to the DBP are in the process of working their way through the court system, which suggests that it is potentially premature to determine whether the legislation is operating as intended.

We also note that the review is being conducted at a time when fundamental changes to the regulation of building work in NSW are under development. A public consultation draft of a proposed Building Bill, intended to replace the *Home Building Act 1989* (HBA),[1] was issued in 2022 and is the subject of ongoing consultation. The proposed Building Bill has significant ramifications for the Acts under review. At a general level, it is difficult to consider whether the DBP or RAB could benefit from legislative reform when the proposed Building Bill is intended

[1] A public consultation in relation to a proposed Building Bill occurred in 2022, which included a public consultation draft Building Bill.

to overhaul responsibility for building work in NSW, but is not yet settled. In addition, Part 8, Chapter 6 of the proposed Building Bill consolidates the current Division 6.6 of the *Environmental Planning and Assessment Act 1979*, and Part 4 of the DBP, to provide a single duty of care framework for building work in NSW.[2] We therefore submit that the review must be cognisant of the broader building regulation reform agenda currently on foot, and it may therefore be appropriate to defer any potential suggested legislative amendments until the provisions of the Building Bill are settled. In particular, pursuing any changes to the duty of care provisions in the DBP would appear to be problematic, given the proposal to move these provisions to the new Building Bill.

Validity of the policy objectives of the DBP and RAB

In relation to the objectives of both Acts, we note that neither the DBP nor the RAB contain an objects provision. An express objects provision would be beneficial for both Acts, and assist in the interpretation of their respective provisions. However, having regard to the objects of the DBP and RAB as set out in the Overview of the Bill in the explanatory memorandums for each Act, we consider that the objects are still applicable and valid.

Practical issues

In our members' experience, there are a number of practical issues being encountered in the operation of the DBP in relation to class 2 buildings. There appears to be a shortage of registered design practitioners available to prepare designs and associated declarations in a timely manner, and a shortage of registered building practitioners. Anecdotally, we are aware of experienced licensed builders encountering difficulties with the application process to become a registered building practitioner.

The shortage of available registered design practitioners and registered building practitioners to carry out crucial functions under the DCP for example, to provide building compliance declarations and to obtain compliance declarations for regulated designs, may be frustrating the objectives of the DCP.[3] In our members' experience, the shortage appears to be causing delays in rectification of defects in existing buildings, often with associated inconvenience to occupants who may be experiencing water ingress and worsening mould problems. This is a serious problem for residents of such buildings, and it also exposes an owners corporation to potential damages claims from owners for breaching the duty to maintain and repair property under s 106 of the *Strata Schemes Management Act (2015).*

Another practical issue that has emerged is that design practitioners are unwilling to provide designs and declarations for anything other than a complete repair or replacement of a building element. For example, where a section of waterproofing membrane on a building roof might previously have been the subject of a repair, it is now necessary to replace the membrane on an entire roof in order to satisfy design compliance requirements, which significantly increases remedial costs. Based on our members' experience, the additional cost for owners corporations of obtaining designs and declarations for works such as waterproofing repairs, replacement of corroded lintels or concrete spalling repairs, is adding over 30 to 40% to the cost of remedial works projects.

We understand that typical costings for a unit building are approximately $25,000 for a design practitioner to come to the site and prepare designs, a further 9 to 12% of the contract works price to supervise the works, and another $3,000 to prepare certifications and lodge them on the NSW Planning Portal. For a contract of say $150,000, these costs add approximately $44,000 to the project cost. With concrete spalling works, the problem is usually greater, as

[2] Regulatory Impact Statement - Building Bill 2022 Part 2, at Page 45.
[3] Explanatory Memorandum for the Design and Building Practitioners Bill 2019, at page 1.

contracts typically cost the work at a rate per square metre, with the total cost not being known at the outset of the works because the extent of the spalling is usually not apparent until the works are commenced. This means that the contract price, plus the design practitioner's fees, will not be known when the works first commence. We understand that this is creating a significant financial burden for many elderly owners, and owners who do not have the financial capacity to borrow to pay special levies. We further understand that the increase in costs of remedial works is resulting in owners corporations delaying remedial works. We suggest that this issue should be examined closely.

Complexity of the DBP

The DBP is regarded as being quite technical and difficult to apply in practice. For example, in our view there is some uncertainty about the works for which design compliance declarations are required. Section 13 of the *Design and Building Practitioners Regulation 2021* defines work that is excluded from being building work under the DBP. The expression "single dwelling" used in s 13(1)(b)(iii) of the Regulation is not defined. It is unclear whether a unit in a class 2 building is a single dwelling, and whether work in that unit, which may have a structural impact on the building, is work "which relates only to a single dwelling". This needs clarification in our view and may be sufficiently straightforward as to be able to be addressed prior to finalisation of the Building Bill.

Duty of care provision under the DBP

As mentioned earlier, it is currently proposed to move the duty of care provisions from the DBP to the Building Bill, which we support. When moving these provisions to the new Building Bill, we suggest that specific consideration should be given to addressing the following matters that have arisen in relation to the duty of care provisions in the DBP:

- Clarification that the duty of care is subject to Part 4 of the *Civil Liability Act 2002* ("CLA"), that is, the principle of apportionment. This issue arose in *The Owners – Strata Plan No 84674 v Pafburn Pty Ltd* [2023] NSWCA 301 ("*Pafburn*"), where the Court of Appeal concluded that the proportionate liability provisions of the CLA do not apply to the DBP. We submit that it is fair that, just as any other negligence case for property damage, Part 4 of the CLA should apply. It is our understanding that it was always intended that proportionate liability under Part 4 of the CLA would apply. If this is not to be case, the implications for participants in the building industry being able to obtain appropriate insurance will need to be considered.

- Clarification of delegation. Our understanding is that the intent of s 39 of the DBP in relation to non-delegation of the duty was to prevent those that owed the duty from contracting out of the duty, but not to be wholly liable for all of the loss and damage – only that part of the loss and damage for which they were liable, consistent with Part 4 of the CLA. This rectifies the shortcomings of judgments such as *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185 and *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515, which limited the existence of a duty of care to, amongst others, subsequent owners of land. We do consider that there was an express intent to essentially make the duty one of "strict liability" but that the intent was to allow a remedy against a tortfeasor for their negligence without the need to establish that a duty of care existed. In our view, the fact that special leave has been granted by the High Court to appeal the decision in *Pafburn* illustrates the need for clarification of the issues in relation to apportionment and non-delegation.

- Clarification of the requirements for proving loss. Having regard to the practice of legal practitioners needing to prepare an additional document to that of a 'Scott Schedule', commonly now known as a "Loulach Schedule" (following the decision in *The Owners – SP No 87060 v Loulach Developments Pty Ltd (No 2)* [2021] NSWSC 1068), there should be clarification of the requirements of claimants proving loss and damage arising from claims they make.

- Clarification whether the duty of care provisions are intended to extend to the personal liability of a director, as recently held in the decision of *Kazzi v KR Properties Global Pty Ltd t/as AK Properties Group* [2024] NSWCA 143.

Project Intervene

While we recognise the overall benefits of Project Intervene, the scheme under which the Office of the Building Commissioner (OBC) exercises powers under the RAB to compel a developer or builder to remediate serious defects, we note that this may sometimes have a problematic impact upon prior proceedings initiated in the Supreme Court for building defects under the HBA. The OBC prepares its own audit report about defects it considers to be serious defects within the meaning of the RAB, and then negotiates with the builder about the repair of these. This process can take more than 12 months, during which the Court proceedings are effectively stalled, in order to avoid duplication of claims about the same defects.

Once the OBC obtains agreement from the builder as to which defects it will repair, the owners corporation then needs to revise all the expert evidence it has served in the proceedings to delete the defects which are to be repaired under Project Intervene, and to quantify the cost of the revised list of defects. This process is not easy, as the OBC's list of defects usually doesn't describe the defects in exactly the same terms as the owners corporation's experts have done, so the task involves trying to work out which defect previously described by the owners corporation's expert is to be repaired under the Project Intervene agreement, and engaging experts to assist in this task. Rather than reducing legal and experts' costs for owners corporations, the involvement of the OBC may delay the progress of proceedings on foot and add to legal and experts' costs. We suggest that further consideration be given to the way in which Project Intervene impacts upon concurrent legal proceedings for building defects claims, and whether processes could be improved so that, overall, defects claims are dealt with in a more expedient and less costly manner.

We also understand that it is unclear whether an individual lot owner has standing in relation to the processes undertaken by Project Intervene; for example, where the lot owner wishes to make representations in connection with the proposed scope of remediation works. In our view, this should be clarified.

As the Building Bill may make significant changes to the way in which building defects legal proceedings are run, it may be more appropriate to consider these matters once the Building Bill is finalised.

Improvements to the Register of building work orders and List of current developer undertakings

NSW Fair Trading currently maintains a *Register of building work orders* ("Register"),[4] issued by the Building Commissioner under s 62 of the RAB and s 98A of the DCP, including in-force prohibition orders, building work rectification orders, stop work orders, and enforceable undertakings for residential apartment buildings. Checking the Register can be a useful way

[4] https://www.fairtrading.nsw.gov.au/help-centre/online-tools/rab-act-orders-register.

for consumers to find out about a particular builder or development, although it does have limitations, given that a builder may use special purpose vehicles for different building projects.

We suggest that the Register could be enhanced for ease of use. The Register is a lengthy webpage, with the type of orders separately listed, in chronological order according to the date the order is issued. To establish whether an order is in place, a manual search of the Register must be made. Each listed order identifies the recipient of the order, the street address of the work, and the date of issue of the order. As of 14 June, the site lists 137 orders and one undertaking. Over time, unfortunately, this number will likely increase, making manual searching potentially unwieldy, and possibly, with a greater chance of errors being made.

The other difficulty with the Register is that once an order is satisfied/revoked, no historical information is available as to the date at which this occurred, rather the order is simply removed from the Register. From a consumer protection perspective, it would be helpful if the Register included the historical information in relation to orders that have been satisfied or revoked. Modified orders should also be identified.

The Building Commission also maintains a *List of Developer Undertakings* ("List'),[5] obtained under s 28 of the RAB, where the developer undertakes to fix "serious defects" in a building at the developer's own cost. As of 21 June 2024, there are eight developer undertakings, listed by strata plan number, making the List relatively easy to navigate. We have previously supported the merger of the Register and the List so that all this information could be available in one place, and we suggest this should be considered, provided enhancements to useability are also made.

Thank you for the opportunity to comment. Any questions in relation to this letter should be directed to

Yours sincerely,

Brett McGrath
President

[5] https://www.nsw.gov.au/departments-and-agencies/building-commission/undertakings-building-and-construction.