Submission No 14

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

Organisation: Kerin Benson Lawyers

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Ms Abigail Boyd MLC
Chair
Legislative Council Public Accountability and Works Committee
Parliament House, Macquarie Street,
SYDNEY NSW 2000

Dear Chair,

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

We thank the Committee for the opportunity to provide our response to the review into the *Design and Building Practitioners Act 2020* (hereafter "**the DBPA**") and the *Residential Apartment Buildings (Compliance and Enforcement Power) Act 2020* (hereafter "**the RAB Act**").

Background

The purpose of the DBPA, according to its second reading speech was a response to the *Building Confidence—Improving the effectiveness of compliance and enforcement systems for the building and construction industry across Australia* report (Peter Shergold and Bronwyn Weir, February 2018), *inter alia*, to improve built environment safety and quality and improve consumer confidence.

Particularly, the DBPA was introduced to address the devastation caused to public confidence by the Mascot and Opal Towers and established key redresses to consumers for building defects by enshrining a duty of care owed by any person who carries out construction work to owners for construction work. This duty of care eradicates the uncertainty of whether such a duty exists in common law. This duty was envisaged to apply to class 1, 2, 3, and 10 buildings.

The purpose of the RAB Act according to its second reading speech was to enhance protections for consumers by targeting noncompliance in the residential building sector in respect of property developers and establish a scheme for the regulator (now the NSW Building Commission) to monitor developers and their building work and to enable the regulator to issue work orders to the developer. This would be in addition to the powers to issue orders to builders under the *Home Building Act 1989* ("HBA") and the DBPA.

The Design and Building Practitioners Act

Our firm's experience has been mostly with the DBPA which has provided a solid pathway for design and construction regulation, as related professionals such as Engineers and Building and Design Practitioners are now required to be registered under Service NSW and provide information such as to prove their identity and details about their project experience.

Importantly, the DBPA has imposed a requirement for design practitioners to prepare designs and design compliance declarations for a building practitioner to lodge on the NSW Planning Portal before building work starts on regulated building classes (class 2, 3 & 9c). Section 37 of the DBPA established a statutory duty of care that eradicates any uncertainty that may exist in the common law that a duty is owed to the end user and in respect to liability for defective building work. In the decision of *Roberts v Goodwin Street Developments Pty Ltd [2023] NSWCA* 5 this duty was found to apply to all buildings and not just classes 2, 3 & 9c.

In *The Owners – Strata Plan No 84674 v Pafburn Pty Ltd [2023] NSWCA 301* ("**Pafburn**") it was determined that this duty was non-delegable and in *Kazzi v KR Properties Global Pty Ltd t/as AK Properties Group [2024] NSWCA 143* this duty was found to apply to an individual nominated supervisor. These developments greatly strengthen the remedies available to homeowners in connection to building defects. We do note the decision of Pafburn is currently on appeal to the High Court.

The duty of care imposed by the DBPA on regulated designers provide homeowners with additional remedies not available under the HBA. From our experience various serious building defects (which are expensive to rectify) would not fall under the definition of a major

building defect under the HBA – for example, air conditioning is not a "major element" of building under the HBA and would not fall within the definition of major building defect – which the DBPA duty of care now provides a remedy for homeowners against a builder.

Homeowner's input

However, it is our opinion that this is where the benefits end. Our concerns are with the delegated powers of the regulator – now the NSW Building Commissioner. It is our experience that in practice the exercise of Commissioner's functions often detracts from the objective of the DBPA.

This is because the delegation of power does not take into consideration the homeowner's approach to the defects located in their property. This can lead to adverse outcomes and a question of standing, *inter alia*, in relation to Project Remediate and/or Project Intervene.

For example, a number of our clients have engaged our firm to represent them in building defects litigation, suing the builder and developer with the objective being for the builder and developer to return and rectify the defects. Our clients have also engaged various expert engineers who identified the defects and prepared a scope of works for their rectification. These scopes of work were provided to the builder and developer for the purposes of negotiating and subsequently settling the matter.

In one example, Project Intervene intervened during the settlement negotiations, conducting a review of the building (class 2) and subsequently Project Intervene produced a Draft Building Works Rectification Order, but in their investigations only uncovered twenty-three (23) defects. Our clients' engineers had previously uncovered significantly more defects (approximately 81).

Worse, one of our clients had to find out about a building work rectification order through an article in a national newspaper. This caused great animosity as some of our clients – whose units were not affected by the defects – who were trying to sell their property and now found it difficult to sell due to the negative publicity to the building caused by the national news story.

Our firm elected to write to Project Intervene – attaching the Owners' expert reports and requesting that the balance of the defects identified by the experts retained by our clients be included in the Final Building Works Rectification Order. We received no response from Project Intervene and the subsequent Final Building Works Rectification Order was issued with only the 12 defects. This created difficulty in this litigation, with the builder and the developer claiming that the balance of the defects were not defects having been "cleared" by the NSW Building Commission.

There is also a lack of homeowner input with respect to Project Remediate, which is now part of the NSW Building Commission. Project Remediate provides interest free loans to assist class 2 building owners (Owners Corporations) toward rectification of flammable aluminium cladding panels (ACPs). However, the tender for the rectification is performed by Project Remediate with no input from the owners.

In one example, Project Remediate tendered rectification at a cost of $1,394,789 ex GST. Our client had separately retained fire engineering experts who provided a detailed breakdown of the cost for the replacement of cladding in the vicinity of $200,000 – $300,000. Our client is now in the position of choosing to rectify either in accordance with their own lower cost and scope or having to accept Project Remediate's tendered scope, which is 5 to 6 times the cost, in order to be provided with the low interest loans.

In another example, our client which has ongoing proceedings against the builder for ACP defects, the liability of which is disputed, Project Remediate met directly with members of the strata committee and pressured them to approve their tendered rectification, or otherwise the costs for rectification will increase – but this could significantly adversely affect the legal proceedings.

In our view the DBPA and RAB Act packages generally achieved their objectives. However, from our experience, these objectives fail where the homeowners wishes and inputs are denied by the regulator. Currently there is no clear standing or pathway for homeowners to be involved in the rectification role performed by the regulator. The creation of such a pathway would support the objects intended in both Acts.

Home Warranty Insurance

In NSW, Home Warranty Insurance ("the Insurance") is offered by the NSW Self Insurance Corporation with the Home Building Compensation Fund ("the HBCF"). There is a statutory requirement under the HBA that every building contract contain a contribution towards the HBCF. The insurance policies under the HBCF respond where homeowners suffer losses from defective or incomplete building work where the builder or tradesperson:

1. becomes insolvent
2. dies
3. disappears
4. has their building licence suspended by NSW Fair Trading due to non-compliance with a money order made in favour of the homeowner by the NSW Civil and Administrative Tribunal or a court (source: ICare).

That dictating of what requires rectification (and what does not) and what rectification works should (or should not be performed), and the provision of Insurance are both directly or indirectly controlled by the NSW State Government. This poses a significant conflict of interest where the NSW State Government can through the regulator control what rectifications are allowed and effectively triage what claims may or not be bought, which at the last resort is against insurance issued by the NSW State Government.

Any questions in relation to this submission should be directed to Christopher Kerin, Principal, by email:

Yours sincerely

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