

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

**Organisation:** MinterEllison

**Date Received:** 2 July 2024

---

Public Accountability and Works Committee  
Legislative Council  
Parliament of New South Wales

Submission via website [parliament.nsw.gov.au](http://parliament.nsw.gov.au)

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

### **1. Introduction**

- 1.1 We refer to the terms of reference for the Committee's review, in particular to:
- (a) Part 4 of the *Design and Building Practitioners Act 2020* (NSW) (**DBP Act**); and
  - (b) paragraph 1(b) of those terms of reference, being whether the policy objectives of the DBP Act remain valid and whether the terms of the DBP Act remain effective for securing those objectives.
- 1.2 We are writing to you on behalf of a number of our clients who are participants in the NSW building industry, and have expressed concern in relation to Part 4 of the DBP Act and recent Court decisions which have provided a broad interpretation of that Part.
- 1.3 In summary, the issue of concern is that Part 4 of the DBP Act has been interpreted as creating a statutory duty of care in respect of a broad range of construction activities, which could include infrastructure projects such as the construction of bridges and freeways, and that this outcome is not aligned with:
- (a) the policy objectives of the DBP Act; or
  - (b) the [Commercial Principles for Infrastructure Projects](#) published by Infrastructure NSW.

### **2. Background - Part 4 of the DBP Act**

- 2.1 Part 4 of the DBP Act creates a statutory duty of care. The duty of care:
- (a) is owed by any person who carries out 'construction work'; and
  - (b) is owed to each owner of the land in relation to which the 'construction work' is carried out and to each subsequent owner of the land.
- 2.2 Liability under Part 4 of the DBP Act cannot be limited or contracted out of. In other words, builders are exposed to an uncapped liability to the owners of the land.
- 2.3 The term 'construction work' is defined broadly in the DBP Act, and is crucially linked to the definition of 'building' from the *Environmental Planning And Assessment Act 1979* (NSW) (**EP&A Act**).
- 2.4 As you will be aware, the DBP Act was introduced in response to the national *Building Confidence—Improving the effectiveness of compliance and enforcement systems for the building and construction industry across Australia* report, and was initially conceived with a focus on providing protections to purchasers of residential apartments.
- 2.5 In his Second Reading Speech to the Legislative Assembly on the introduction of the DBP Bill, Minister Anderson stated that (emphasis added):

*"While the regulations have not been finalised, it is envisaged that the duty of care will apply to construction work **in a building that is a class 1, 2, 3 and 10** under the Building Code of Australia. Therefore, **houses, multi-unit residential buildings and other buildings such as boarding***

***houses, hostels, backpackers' accommodation, residential parts of hotels, motels or schools will all obtain the duty of care provided for under this bill—that is, people will be protected where they live or intend to live or reside.'***

### 3. The case law

3.1 Despite the legislation's focus on residential buildings, in the case of *Roberts v Goodwin Street Developments Pty Ltd* [2023] NSWCA 5 (**Goodwin Street**), the Court of Appeal concluded that the statutory duty of care applied to *all* building work, not just the specific building classes prescribed in the regulations (which at that time included only class 2 residential apartment buildings, but have since been extended to cover classes 3 and 9c, with some exceptions).

3.2 The consequence of the Goodwin Street decision is that the duty of care in Part 4 of the DBP Act applies to all 'buildings' as defined in the EP&A Act.

3.3 In the EP&A Act:

***'building*** includes part of a building, and also includes any ***structure*** or part of a structure (including any temporary structure or part of a temporary structure).'

3.4 Various decisions of the NSW Court of Appeal and the NSW Land and Environment Court have found that this definition of 'building' can be widely construed, in particular because the word 'structure' has the effect of broadening the definition beyond the regular meaning of 'building' (*Mulcahy v Blue Mountains City Council* (1993) 81 LGERA 302, *Royal Motor Yacht Club (Broken Bay) Pty Ltd v Northern Beaches Council* [2017] NSWLEC 56, *Hakea Holdings Pty Ltd v Louisiana Properties Pty Ltd* (2018) 98 NSWLR 439; [2018] NSWCA 240 and *Ballina Shire Council v Joblin* [2022] NSWLEC 90).

3.5 We understand from those cases that any structure of significant size that is affixed to land could be classified as a 'building', and therefore the duty of care in Part 4 of the DBP Act would apply to the construction of those structures.

### 4. Impact of broad interpretation on NSW infrastructure projects

4.1 The case law means, for example, that the statutory duty of care potentially applies to the construction of bridges, tunnels, elevated roads and transmission towers, as well as office buildings, hospitals and schools. This seems to go beyond the original intention of the DBP Act.

4.2 As a consequence, contractors who construct infrastructure, including projects for the NSW Government, may have an uncapped liability to the owner of that infrastructure (ie NSW Government).

4.3 This poses obvious and significant concerns for those contractors, and is inconsistent with:

(a) usual market practices which allow contractors to contractually cap their liability (which practices underpin the economic feasibility of such projects); and

(b) Infrastructure NSW's own [Commercial Principles](#) which expressly state:

***'Agencies should apply a broad cap to contractor's liability (i.e. cap applies to total liability not liability to indemnify).'***

4.4 This outcome also appears to be inconsistent with the policy objectives of the DBP Act.

### 5. Conclusion

On behalf of our clients, we would like to request that the Committee consider whether DBP Act could be amended, as part of the forthcoming Building Bill, to provide that:

(a) only 'buildings' within the regular meaning of the word are captured by Part 4 of the DBP Act; and

(b) the broader concept of 'structures' is not captured by Part 4 of the DBP Act. Examples of such structures include, without limitation, bridges, tunnels, roads, water treatment plants, transmission towers, renewable energy facilities and rail infrastructure.