Submission No 33

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

Organisation: Urban Taskforce Australia

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Urban Taskforce
AUSTRALIA

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To whom it may concern

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

Introduction

The private property development and construction sector are a vital part of the building and construction industry, delivering critical housing, contributing to State economic growth, employing 8 per cent of NSW's workforce and 10 per cent of the State's industry output. If you include the real estate staff and ongoing building management and maintenance associated with these new works, the employment associated with the sector grows to almost 15% of all employees.

This Review into the Design and Building Practitioners Act 2020 (DBP Act) and the Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020 (RAB Act) is an opportunity to re-evaluate these instruments in the current context of a housing supply and affordability crisis that is forecast to intensify, at least in the short-to-medium term.

These Acts were introduced, and eventually supported across political lines, as a response to the public concern associated with the collapse of Mascot Tower and concerns related to the construction of Opal Tower, both in the lead up to the 2019 NSW election.

The appointment of the NSW Building Commissioner, now the NSW Building Commission, in combination with these Acts, have done a lot to improve public confidence and drive out those that were not complying with building standards from the industry.

The primary principles contained in these Acts have scrutinised the building consent and inspection processes, ensured fire evacuation capacities,

provided certainty that capable people are undertaking design, construction and inspection, and improved and encourage better practices in building design and construction.

By way of context to this submission, assessing the impact and effectiveness of policy is as important as detecting unintended consequences or negative externalities that were not predicted or were under evaluated. Policy frameworks should reflect the extent of the risk and severity in the degree of regulation.

The implementation and enforcement of these Acts have led to broader applications and have caused significant delays in the housing development process. This has increased the associated risks and reduced the pool of experienced professionals and skilled workers in the sector.

Additionally, companies now require more advanced management and stronger financial capabilities, further reducing supply and driving up the costs of delivering medium and high-density housing, resulting in apartments that have become progressively viable only as a luxury option for affluent individuals.

Understanding development financing approvals and project feasibility, which directly influence the amount of housing delivered, is crucial. Considering the needs and positions of property developers when refining policy can uncover new efficiencies and innovations, while still achieving policy objectives.

A consolidated list of recommendations can be found at Attachment 1 on page 18.

A Single Building Act

Urban Taskforce has been advised by our members that challenges exist with claims being made where legal practitioners and relevant experts hold differing and diverse interpretation of both the DBP and RAB Acts.

Interpretation issues, involve greater time and costs on expert opinions that can then be knocked back by planning or certifiers, requiring reapplication and further costs and time delays. These issues are exacerbated by practitioners handling two Acts that are, at the same time, poorly integrated with each other and overlap in scope.

This review offers an opportunity for the Legislative Council to reassess building legislation in general and replace these Acts with a single Building Bill that reflects an updated context and with a focus on enhancing integration across property development phases and interpretational clarity.

Recommendation 1: the DBP and RAB Acts should be amalgamated into one Building Bill with a focus to simplify and streamline planning, development and construction with a focus on inefficiencies and interpretational clarity.

Return Agency to Certifiers

Urban Taskforce is advised of 3 issues regarding the Certifier Interpretation:

1. Certifiers have differing interpretations of the Acts. Further, the requirement to comply with the different Acts (let alone BCAs and the NCC) often highlights conflict with expert recommendations for defects;
2. Variations that require declaration are left up to the discretion and professional judgement of the design practitioner, however, Urban Taskforce members advise that the lack of clear definition of terms leads to different interpretations, resulting in inconsistencies in the timing of lodging variations;
3. Despite a clear practical requirement for certifiers to have a level of discretion in approvals, under the RAB Act they have, in practical terms, lost the ability to approve what is acceptable (even where a change has no structural or meaningful impact on the building's integrity, nor any impact on the amenity of sensitive receivers, causing gross inefficiency, time lost and increased cost.

These three issues are part of a broader underlying issue of generalised regulation attempting to control the quality of construction outcomes: that is – broad regulations can never be applied to every construction project without the application of common-sense flexibility – the skills that certifiers have traditionally exercised. The role of site and use-specific expert recommendations have a higher chance of providing a better result.

Regulation should then focus on providing precise frameworks that allow experts to approve defects rectification with a best practice apparatus that mitigates diversity result between certifiers or against regulation.

Recommendation 2: Areas of "grey legislation" should be removed and replaced with a precise framework and clear definitions to encourages more consistency and certainty in how certifiers carry out their responsibilities.

Design Declaration - Auditable Notes for Minor Changes

Urban Taskforce is advised that the current design declaration policy is disproportionately burdensome compared to the respective risk. This issue centres around commonplace and minor alterations falling automatically

under ‘service changes’ or ‘structural changes’ and requiring full design document declaration to be updated on the planning portal.

The frequency of minor changes on a major project is extremely high.

Attempting to meet the required level of document declaration demanded under the DBP Act has proven to be cost prohibitive, impossible to keep track of and, in many cases, risks incorrect documentation.

Minor changes should not require complete re-documentation.

The DBP & RAB Acts function well in forming an audit trail of alterations throughout the construction process. However, this improvement is negated when constant recertification and redocumentation translates to over-burdensome time and cost losses.

To optimise design and maintain quality throughout construction, minor design alterations need to be able to be made and executed without elongated processes that would stall works.

As an interim measure for minor changes, an auditable note can be entered on the planning portal from a relevant design practitioner with this note being reconciled with design documentation before construction of that part commences. Major works are obvious exclusions with others including fire safety, waterproofing, and acoustics.

For consistency, it should be explicitly stated when, and in what cases, a declaration is required. Therefore, *‘minor change’* requires precise definition to bring clarity and efficiency to construction processes. Presently, the serious defects and structural element’s definition is inefficiently broad.

Work needs to be undertaken to determine what constitutes a ‘minor change’ that requires an audit note and what constitutes a ‘major change’ that warrants design declaration.

Recommendation 3: the Act should make provision for greater reliance on audit trails, by enabling private certifiers the discretion to approve ‘minor’ alterations and lodge an interim note that can be reconciled at next documentation update, instead of requiring additional signoffs or approvals.

a) that provision is made for minor changes to be make without document declaration.
b) that a precise definition of “minor changes” is provided with the purpose of improving clarity, consistency and efficiencies with approvals and defect rectification.

Definition for 'Variations'

To maintain consistency of documents on the portal, when one person uploads a variation, all other parties must also upload their documents, creating significant work and delays.

As an example: a service penetration requiring a move of 200mm, causes an internal partition wall to shift by the same amount. Such a change, assuming it is considered to be minor and acceptable to all relevant parties, could impact 'structure' and 'services', which are key building elements.

If the structural engineer, being conservative, decides to upload this change to the portal, the Act currently necessitates everyone else to re-upload their documents to reflect the updated architectural arrangement and service changes, potentially causing considerable construction delay.

The intent of the DBP Act is to ensure that what is built is fully declared and co-ordinated to avoid future problems, and to clearly delineate responsibility and liability. However, requiring documentation for the entire project to be re-declared before one part of it can commence is needlessly prohibitive.

As variations inevitably occur during the building process, it is vital for building schedule and feasibility that construction parts can be broken up, and that re-declared documentation is only required for the relevant parts of construction that is about to commence.

By breaking construction into parts, all parties can correctly declare and endorse these parts for immediate commencement, as opposed to the complexity of the entire building. This is the practice that quality builders have been using for the last 25 years.

This process would ensure that a coordinated design is declared at the time of obtaining Construction Certification, but that variations, major or minor, are fully endorsed and declared before the commencement of that relevant construction part.

This approach eliminates ambiguity and inconsistency regarding when and what needs to be declared. When a set is declared, it captures all the latest changes, indicating agreement from all parties on the updates. This still satisfies the intention of the DBP Act to have declared built outcome and relevant accountable parties.

Recommendation 4: that policy is updated to provide a refined framework:

a) that brings clarity and consistency into professional judgement;
b) that outlines that a full set of coordinated, declared documents are required to obtain a Construction Certificate, however, post-CC variations can be re-declared in construction 'parts' that are issued prior to the commencement of that part of construction.

Audits & Occupation Certificates

Urban Taskforce members have advised that audit processes mandated by the DBP and RAB Acts can result in significant delays in obtaining Occupation Certification, with poor communication in regards to if an audit will take place, when that audit will be and, most importantly for project impact, what the results and follow-on requirements of that audit are.

The run up to OC is a project phase where the developer is most leveraged and financially vulnerable (most amount of funds spent on project and highest interest). As costs to the developer are ultimately borne by consumers, these commercial factors should be taken into consideration.

The Building Commission has no set period to advise whether an audit is required, nor is there a set time when the audit process must be completed. This needs to be tightened up to facilitate a more orderly process.

For this reason, the onus of audits should be shifted onto The Building Commission. There should be a 28-day period from lodgement to notify the developer if an audit will take place. Thereafter, an audit date should be provided. The audit results should be returned within another 28 days.

Recommendation 5: the legislation should be amended to mandate if an audit will be undertaken for occupation certificate within a specified timeframe – that being within 28 days of the lodgement of an expected completion notice. The Secretary should be required to provide a specific audit date. Following the audit, the final audit results should be returned to the applicant within 28 days.

Mature Market for Decennial Liability Insurance

Recent amendments to the relevant Regulation postpone the proposed increase of the Strata Bond levy from 2% to 3% until November 2, 2024. This follows concern from Urban Taskforce that there is only one insurance product currently in the market offering 10-year defect liability insurance. It is very unclear as to whether that single insurance provider has the financial backing to insure larger Urban Taskforce members with construction projects valued in the multiple hundreds of millions of dollars.

Mandating that the Strata Bonds be increased from 2% to 3% when there is a monopoly provider of insurance, and where that insurer may or may not be able to provide insurance to all players for all projects, is not appropriate.

The independent Ministerial advisory panel recommended that there should be no increase in the Strata Bond until a mature DLI market had matured. The question becomes: what is a maturated DLI market?

Urban Taskforce asserts that suitable maturation of the DLI market will not be achieved until there are at least three major insurers (able to insure large developers) providing a DLI Product. The premium must be locked in at OC, and the policy must cover the risks and obligations mandated under the DBP and RAB Acts (this is sometimes referred to as an insurance policy which sits "back to back" with the obligations under the Acts).

This is important to protect property development practitioners and to avoid monopolistic or duopolistic dynamics that are so commonly found in the insurance sector.

If such a mature market does not materialise, the Government should provide a default insurance product or risk the sector diminishing as financiers refuse to fund the risks or developers simply move to other States where these strata bonds and DLI insurance mandates don't exist.

In the meantime, there is no case for increasing the Strata Bond payment as to do so would force private sector builders and developers into using a private sector insurer which, for many, may not be able to actually provide the relevant insurance.

Recommendation 6: That the Strata Building Bond remains at 2% until a minimum of three major insurers offer a DLI product that covers the risks and obligations presented under the DBP and RAB Acts.

Strata Building Bond Alleviation – the Independent Construction Industry Rating Tool

Some Urban Taskforce members argue the iCIRT rated developers should be relieved from the burden of a Strata Building Bond, or that some form of dispensation should accompany the iCIRT rating.

This would provide an incentive for iCIRT rated members to maintain their standing with iCIRT and provide a carrot to the stick of new regulation.

It should be noted that iCIRT ratings are currently assessed and provided by a single private (for profit) company for a fee. Government regulation should not mandate the use of a monopoly product that is delivered for the profit of any private company in the absence of competition.

Further, some Urban Taskforce members note the unfair disadvantages that iCIRT ratings and any reward offered for the private sector "stamp of approval" places on smaller development proponents.

Recommendation 7: that consideration be given to rewarding developers and builders that have gone through (and paid for) iCIRT certification. Further, a mature market for such a rating is critical to the integrity of such a tool.

10-Year Retrospectivity

As a result of an amendment to the original Bill, the Act mandates serious defects be rectified on buildings which were granted OC up to 10 years in the past, no matter who the current owner is.

This provision is obtuse, unclearly defined and makes quantifying risk impossible. It is unfairly onerous and forces owners into risks they cannot insure for.

The major scandals that led to the establishment of this legislation demonstrated that catastrophic defects happen relatively quickly. Building and construction experts have advised Urban Taskforce with the same conclusion.

Serious defects are exposed well within the first 6 years of a building's life.

This ten-year "retrospective application" of the Act has been a leading factor in effectively stopping a DLI product from coming to market, as it is too risky and ambiguous for insurance companies to quantify and cover the risk of past and unknown works, practices and materials.

Legislation is rarely made retrospective as this undermines confidence in investment decisions. Retrospectively "shifting the goalposts" is both unreasonable and unfair. More importantly, it is impossible to insure.

Retrospectivity clauses should be limited to a period no more than 6 years, as this balances the serious defects that could arise yet gives the insurance industry a chance of quantifying risk and bringing a product to market.

Recommendation 8: that retrospectivity clauses be limited to a period no more than 6 years, in any redrafting of legislation.

Recommendation 9: retrospectivity should contain a threshold that is limited to serious defects with 'serious defects' being clearly and sensibly defined to relate only to issues such as structural integrity issues, water ingress and issues involving safety.

Recommendation 10: mechanisms should be created, or exclusions made, to any review of the DBP Act to allow the insurance market to quantify an insurance product that covers the DBP Act's stipulations, before property owners are exposed to these risks.

Performance Solutions not covered

Performance Solutions are a vital part of meeting construction requirements within feasibility limitations.

However, further confusion has been caused in the industry and for experts who are reluctant to propose design briefs to address issues via performance solutions, as is currently permitted under the NCC.

The relevant "experts" now seek to achieve compliance with objective and Deemed-to-Satisfy parts of the NCC, to avoid liability and to ensure cover under their respective insurance.

Recommendation 11: NCC permitted performance solutions should be deemed compliant if they adhere to the NCC and BCA at the time of the rectification works.

No Exposure to Unsophisticated Consumers

The retrospective application under the DBP Act causes significant additional costs for remedial work to developer-owners as they must comply with the new regulations and building code requirements when rectifying any past omission or error.

The legislation does not exclude residential build-to-hold or build-to-rent projects. Owner-occupiers should not be required to go to the cost, trouble and risks when there are no sales to unsophisticated consumers. Where there are no exposed consumers, application of the DBP Act's defect regulations is an overreach and does not fall under the scope of consumer protection.

Recommendation 12: build-to-rent and build-to-hold categories of property development should be exempt from these regulations/Acts.

Contractor Liquidation

Urban Taskforce has been advised of a case where a liable developer undergoing a defect rectification process on a project completed nine years ago, where the original builder has gone into liquidation, is legally required to conduct defects rectification work in compliance with the DBP Act.

This has created a situation where the required regulated design rectifications are cost prohibitive and even if they were undertaken, they would arguably add no quality to the building rectification works. In this case, the regulated design is adding exorbitant and unnecessary cost, as well as extreme scheduling extensions to the defect rectification process.

This has created real and present commercial risk on the developer with, reportedly, no benefit to the building or a consumer.

There needs to be mechanisms put in place that make allowance for other avenues to rectify defects other than regulated design.

Recommendation 13: clauses contained in the DBP Act should be revised to not insist on a regulated design and allow for a 'performance solution' approach to defect rectification.

Government as DLI Underwriter

Urban Taskforce is advised by members that the policy of the current, sole DLI provider, has a number of "carve outs" when measured against the DBP and RAB Acts. The insurance policy does not cover all serious or serious defect rectification required by the Act.

Large insurance policy providers have, to date, not produced a product that covers all the liabilities under the Act. The problem is that the Act is so complicated, and covers so many unknown or unquantifiable risks, that they have chosen not to offer any product to the market.

If DLI products have any chance of becoming effective in securing the objectives of the DBP & RAB Acts, there needs to be provisions to cover the carve outs seen in Resilience's policy, with a premium that is locked in at the point of the issuance of the OC. Further provisions must protect consumers, builders and development proponents and match the risks and obligations manifest in the DBP & RAB Acts.

If Government is serious about the DLI scheme it should underwrite this insurance until the insurance market catches up to the required standards. This would provide security for homeowners and inject confidence into the development and construction sector with regards to Class 2 developments.

Since detached houses are already underwritten, this means that only in the case of market failure would the Government be required to step in to underwrite claims for apartments.

Recommendation 14: the Government should publicly underwrite the DLI scheme with a premium locked in at OC, and coverage for the risks and obligations prescribed in the DBP & RAB Acts.

‘Adequate’ Professional Indemnity Insurance

As the scope of responsibility for construction liability widens and the need for Professional Indemnity Insurance grows, determining which stakeholders are liable and the level of insurance required has become increasingly complex.

Advisors on a project might not have enough responsibility or involvement to bear the liability burden, yet they often find no legal path to indemnity, even with legal counsel.

Tracking the liability for defective works involves tracing it back through the developer to the primary contractor and then to the subcontractor. However, it often emerges that the subcontractor's liability insurance only covers a portion of their liability.

This results in costs being unfairly borne by parties who had fulfilled their role engaging expert design and certifiers.

Recommendation 15: that a fair system is constructed that specifically helps the industry navigate professional Indemnity Insurance and that a framework is provided to stakeholders for correct adoption and implementation.

Emergency Works

Urban Taskforce has been advised that the emergency remedial work process under the DBP Act can only be used in limited circumstances. This process can only be utilised if the work undertaken is limited to what is necessary to mitigate the impacts or likely impacts until further remedial building work can be undertaken.

It does not extend to the permanent scope to rectify the emergency work. Instead, it is limited to temporary scope to mitigate loss or damage. This results in parties incurring unnecessary time and cost, and residents potentially living in dire circumstances (eg. mould).

Recommendation 16: The emergency remedial work process should be extended to allow permanent scopes to be undertaken; and given the onus that is placed on the building practitioner through the RAB Act, they should be able to identify and carry out such works.

Rectification of Building Defects in Original Construction

Rectification works conducted by the original builder, developer or subcontractor relate to the original construction contract. For example, the permanent contractual scope to rectify water ingress issues, involves reactive remedial works.

Under the DBP Act, they must comply with the preparations of regulated design. However, this can rarely be determined without conducting invasive investigations.

The result is parties incurring unnecessary time and cost as invasive testing is needed to determine the scope.

There is no provision, under The Home Building Act 1989, that rectification work under statutory warranties must comply with the DBP Act, when the original builder/developer/subcontractor returns to rectify.

Recommendation 17: in redrafting legislation, further exceptions should be made for the need to prepare regulated designs during the rectification of building defects in the original construction.

Recommendation 18: provision should be made, when redrafting legislation, to allow invasive testing to be carried out to determine the appropriate rectification scope prior to preparing the regulated design, in relevant areas such as water ingress.

Liability of Original Builder and Developer and Inconsistent Legislation

There are at least four current avenues a consumer can pursue the original builder and developer for building defects:

a) **Home Building Act**: a claim for breach of statutory warranties for 2 and 6-years from "completion" against the original builder and developer.
b) **Design & Building Practitioners Act**: a negligence claim for breach of duty of care against builders, developers and subcontractors, with a 10-year liability.
c) **Residential Apartment Building Act**: issues building work rectification orders on builders and developers, administers developer undertakings and issues stop work orders or withhold OCs. This Act puts the burden of cost and heavier compliance obligations on the builder/developer.
d) **Building Bond Scheme under the Strata Schemes Management Act:** This Act puts the burden of cost on the builder/developer to engage an expert to prepare a building defect report and fix the reported defects. However, this process does not dispose of the owner engaging their own experts to do a more fulsome report (this may be an inevitable consequence as obligations under the Strata Schemes Management Act exist for owner's corporations to vote on building defects within the statutory warranty period). There are numerous flaws in this system, including the fact that the inspector does not recommend scopes to fix, but relies on developers to propose a scope.

There is a lack of consistency between these legislated solutions. The framework is inconsistent and unintegrated.

As an example, if an owner commences legal proceedings against the original builder and developer for building defects, the Court does not recognise the role of the Building Commission, nor any order issued on the building or against the builder and/or developer (such as a building work rectification order or developer undertaking).

This results in parties incurring unnecessary time and costs in litigating a matter, and in some cases, being forced to progress the matter to a hearing as the Court will not agree to adjourn the matter until there is an outcome of the Building Commission component of the claim.

Moreover, The Building Commission does not recognise the Court process, nor do they take into consideration contracts, negotiations or deeds agreed by the parties that relate to the same issue. This results in the parties incurring unnecessary time and costs, and onerous burden on all parties to the dispute.

Delegation of responsibility - under the RAB Act, the developer is often the first point of contact & is held responsible, builders and contractors also need to be held accountable as they are the licenced & qualified designers or trades people who design & carry out the works.

Building practitioners are responsible to sign off on all elements of construction, although they are not experts in specialist trades (such as electrical & mechanical). The design practitioners or trades carrying out the works need to be held accountable.

The legislation should be condensed into one streamlined process such as the process undertaken in Queensland (QBCC) to avoid multiple processes running alongside each other which seek the same outcome. This will reduce the unnecessary time and cost expended by each party and a clear understanding of how to prosecute and defend a claim.

Recommendation 19: that the relevant Act forges a unified and streamlined process to deal with building defects that:

a) reflects the recognition that the Court/Tribunal system and Building Commission process must have with each other;

b) fairly distributes the liability, not squarely on the original builder and developer but across the original subcontractors and consultants;

c) eliminate duplicative processes and establish a clear hierarchy of decision making and process.

Construction industry labour shortages

The current legislation and the efforts by the Commission have resulted in a material increase in novel risk to experienced consultants, builders and certifiers, resulting in many leaving the industry or electing not to participate further in the sector. This has resulted in a shortage of skilled, capable resources.

Many leaving the industry are unwilling to risk their brand and reputation by continuing in the sector, notwithstanding years and in many cases, decades of delivery of quality residential apartment buildings.

Other resources seek work in the booming areas of the Gold Coast and South-East Queensland or simply retire.

There is no doubt that the DBP and RAB Acts are part of this exodus.

Given the current focus on supply of housing, the Acts should encourage developing capability and retaining the most experienced and capable participants in the sector and find ways to reduce cost and increase efficiency.

Recommendation 20: the administrative burden and cost of compliance needs to be considered with a view to amending the Acts to attract skilled trades and construction industry consultants back to NSW to assist in delivering against the Government's mandate for housing supply.

The definition of 'serious defect'

The inclusion of all non-compliance with the Building Code of Australia under the definition of "serious defect" is an over-reach in the legislation and should be corrected through this review and a subsequent amendment Bill. Further, the drafting of the Act as it is effectively removes all flexibility that a PCA once had to make common sense judgements on matters of BCC compliance.

With the appointment of the Building Commissioner and then the establishment of the NSW Building Commission, a safer market space for the consumer has been achieved. It is also true, however, that feasibility risks to development proponents and construction companies have substantially increased. Many contractors, not just the poor ones, have simply left the Class 2 construction sector in NSW and are unlikely to ever return.

A number of unbalanced power asymmetries have built up with the Building Commission staff exercising broad powers, largely effectively unfettered.

Recourse through the Land and Environment Court or Supreme Court, as provided for is, by and large, impractical as the developer is in a position of peak debt at the completion of construction (the time that you apply for an OC). Any delay costs significant sums of money. The Building Commission staff are fully aware of this. This leaves them largely without oversite yet holding enormous power.

The cost of compliance, for those builders and developers who have always, and continue to build quality apartments in accordance with the construction codes, is very high. The vast majority of apartments being built fall into this category.

The additional burden on construction costs reduces the number of credit applications that meet bank feasibility requirements, limiting the supply of new homes and raising the price to the consumer. All this in the middle of a housing supply crisis.

One way to reduce the impact on costs would be to more tightly limit the Building Commission's focus to defined serious defects and limit focus to structural integrity issues, water ingress, acoustic integrity, and issues involving fire and life safety. Treating all BCC non-compliance as being equal to a structural or serious defect is not sensible.

That would reduce the risk and confusion associated with compliance and continue to ensure the integrity of the construction sector and importantly give housing supply a chance or increasing.

Other issues arise with pre-completion audits by the NSW Building Commission are being conducted up to six months prior to construction completion and resulting in Rectification Orders being issued for works that were not defective, instead they were just incomplete at the time of the inspection.

One example from an Urban Taskforce Member is that of Rectification Orders being issued for incomplete passive fire seals around services penetrations, prior to those works being commenced. In this case final approval that the order had been complied held up the issuance of the Occupation Certificate for over 3 weeks despite evidence of completion, and numerous follow-ups.

Cases like this are adding significant cost and risk to the participants when they are most financially exposed and inconveniencing consumers who are trying to understand their settlement dates and manage decisions relating to their move-in.

Recommendation 21: the definition of 'serious defect' should be reviewed and refined as the current definition is too broad, including any works that do not comply with the Building Codes or design plans. The definition should:

a) Only relate to completed works

b) Reference the primary objects of the RAB Act, ie. a serious defect as defined in the RAB Act under that title, with reference to items (b)-(d) only (excluding (a).

Replacement Contractor after Administration

There are difficulties arising from the DBP Act when one contractor goes into administration. The DBP Act does not provide for the replacement of a contractor under these circumstances. Members have advised that this can result in the considerable time and effort just to discover and understand how this process is undertaken (particularly on the portal).

This also led to prolonged engagement of a replacement contractor where they were unwilling to take on the requirements and responsibilities of the DBP Act for works they did not conduct.

The resolution of this involved the engagement of the replacement contractor requiring the assistance of the Building Commission. The Commission was able to provide the necessary steps particularly the actions required to replace the Building Practitioner on the portal.

Recommendation 22: Provisions in the DBP Act should be clear for the replacement of a contractor when an insolvency occurs, particularly the changing of the registration of Building Practitioner on the portal, should be provided.

Building Commission Accountability

While we accept that it is rarely if ever the intention for Building Commission staff to wield absolute power unfairly, when this does occur, if even by accident or error, quality builders and developers can be put into a position of commercial crisis or even liquidation. As noted above, recourse through the Land and Environment Court is, in most cases, highly impractical because of the realities of the construction process and the delays associated with Court proceedings.

In the event of a dispute or a failure to make a timely decision, there needs to be an independent umpire who can be called on to make an on-site determination and ensure the Building Commission is held accountable.

Their rulings will need to be binding and issued without delay and without the need for detailed reasons. While this is not a perfect solution, it would help ensure the Building Commission ensures their decision-making is more timely, consistent and practical.

Recommendation 23: that a third-party independent umpire be established with powers to make fast, on-site determinations that take into account commercial factors of projects and has the agency to hold the Building Commission staff accountable.

Conclusion

The review of the DBP Act and the RAB Act is timely and welcome.

These Acts, alongside the efforts of the NSW Building Commission, have significantly improved public confidence and industry standards. However, it is essential to continually assess their impact and effectiveness in the face of the current housing supply and affordability crisis.

It is vital to balance the need for regulations with the practical realities of the construction and property development industries. Policymakers should use this review to reflect on the implications of the use of these regulations on industry capacity. This approach will ensure that the sector continues to contribute positively to NSW's economic growth and housing needs without disproportionately burdening any stakeholders.

Should any Committee member wish to discuss matters relating to this submission, please contact Head of Policy, Planning and Research, Mr Benjamin Gellie on or via email

Yours sincerely

Tom Forrest
Chief Executive Officer

Attachment 1 – Urban Taskforce Recommendations

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Recommendation 10: mechanisms should be created, or exclusions made, to any review of the DBP Act to allow the insurance market to quantify an insurance product that covers the DBP Act's stipulations, before property owners are exposed to these risks.

Recommendation 11: NCC permitted performance solutions should be deemed compliant if they adhere to the NCC and BCA at the time of the rectification works.

Recommendation 12: build-to-rent and build-to-hold categories of property development should be exempt from these regulations/Acts.

Recommendation 13: clauses contained in the DBP Act should be revised to not insist on a regulated design and allow for a 'performance solution' approach to defect rectification.

Recommendation 14: the Government should publicly underwrite the DLI scheme with a premium locked in at OC, and coverage for the risks and obligations prescribed in the DBP & RAB Acts.

Recommendation 15: that a fair system is constructed that specifically helps the industry navigate professional Indemnity Insurance and that a framework is provided to stakeholders for correct adoption and implementation.

Recommendation 16: The emergency remedial work process should be extended to allow permanent scopes to be undertaken; and given the onus that is placed on the building practitioner through the RAB Act, they should be able to identify and carry out such works.

Recommendation 17: in redrafting legislation, further exceptions should be made for the need to prepare regulated designs during the rectification of building defects in the original construction.

Recommendation 18: provision should be made, when redrafting legislation, to allow invasive testing to be carried out to determine the appropriate rectification scope prior to preparing the regulated design, in relevant areas such as water ingress.

Recommendation 19: that the relevant Act forges a unified and streamlined process to deal with building defects that:

a) reflects the recognition that the Court/Tribunal system and Building Commission process must have with each other;

b) fairly distributes the liability, not squarely on the original builder and developer but across the original subcontractors and consultants;

c) eliminate duplicative processes and establish a clear hierarchy of decision making and process.

Recommendation 20: the administrative burden and cost of compliance needs to be considered with a view to amending the Acts to attract skilled trades and construction industry consultants back to NSW to assist in delivering against the Government's mandate for housing supply.

Recommendation 21: the definition of 'serious defect' should be reviewed and refined as the current definition is too broad, including any works that do not comply with the Building Codes or design plans. The definition should:

a) Only relate to completed works
b) Reference the primary objects of the RAB Act, ie. a serious defect as defined in the RAB Act under that title, with reference to items (b)-(d) only (excluding (a).

Recommendation 22: Provisions in the DBP Act should be clear for the replacement of a contractor when an insolvency occurs, particularly the changing of the registration of Building Practitioner on the portal, should be provided.

Recommendation 23: that a third-party independent umpire be established with powers to make fast, on-site determinations that take into account commercial factors of projects and has the agency to hold the Building Commission staff accountable.