

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

Organisation: Australian Institute of Building Surveyors

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Submission
NSW Parliamentary Inquiry

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

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Australian Institute of Building Surveyors

Who we are

The Australian Institute of Building Surveyors (AIBS) is recognised nationally and internationally as the peak professional body representing building surveying practitioners in Australia.

Our Mission

AIBS is committed to ensuring a safer Australia through continuous improvement and development of the profession of Building Surveying. The overarching objective of the Institute can best be summarised as follows:

To achieve the highest standard of professionalism through Professional Development, such as education pathways and training, and Advocacy in representing the profession and establishing standards.

Professional Standards

The Australian Institute of Building Surveyors (AIBS) Professional Standards Schemes for Building Surveyors operates across all states and territories and is a legislative instrument that obliges AIBS, to monitor, enforce and improve the professional standards of members under the Scheme, thereby reducing risk for consumers of professional services.

The AIBS Professional Standards Scheme upholds the professional standards of Scheme Members, who are building surveyors, and ensures that clients have access to appropriately qualified and skilled building surveyor practitioners for representation and advice.

Preparation

This submission has been prepared following receipt of an e-mail from the Committee Chair, Public Accountability and Works Committee, Legislative Council, Parliament of NSW of 30 May 2024 inviting AIBS to provide a submission.

Overview

In reference to the terms of reference of the inquiry, the following broad observations are made.

- The functions exercised or delegated by the secretary are effecting an uplift in the standards of compliance evident in residential apartment building construction occurring post introduction of the relevant legislation. This is largely a work in progress with some functions and delegations under-utilised.
- The policy objectives are largely as relevant as they ever were, albeit a duplication of objectives of the Environmental Planning and Assessment Act.
- The establishment of the Building Commission NSW has been beneficial to effecting an improvement in the standards of compliant construction in NSW and continue to be supported by AIBS.

The broad statements made above are addressed in greater detail in the following section of this submission, together with additional observations that AIBS note as relevant to the general theme of the terms of reference for the inquiry.

In Detail

The entire process of reform that has led to the current approach to regulation of the building industry in NSW via the Design and Building Practitioners Act and Regulations, the Residential Apartment Buildings Act and Regulations and related reforms proposed or undertaken since 2018 has been considered and assisted by AIBS via several submissions and comments throughout this period. There remain elements of the current approach that AIBS believes can and should be addressed with future reforms to further improve regulation of the sector to the benefit of consumers and the economic prosperity of NSW.

Appended to this submission are copies of previous submissions made in response to consultation opportunities at each point of development and introduction of the legislative scheme currently in place. Several of these submissions describe the importance of reform and the impact that such reforms can have on consumer outcomes and the economy in NSW. We don't wish to repeat these statements in this submission but invite reference to points of relevance in the appended documents.

A recurring theme of AIBS submissions has been around the role of building surveyors in the regulatory system and how this can be supported, and strengthened, giving maximum effect to the consumer and economic benefits of having sufficiently independent and competent review processes in place.

There are key points of reform that achieve this as follows.

1. First and foremost, reform should ensure the strength and value of the role of building surveyors in the assessment of development proposals against technical and legislative requirements and if appropriate, the authorisation of the commencement of construction is maintained if not enhanced. This includes avoidance of the kind of fragmentation of design compliance verification responsibility that was evident in the Building Practitioner's Board findings in relation to the Opal Towers structural defects where the building surveyor was

admonished for failing to ensure that the design was complete, with the building surveyor not held responsible for the deficiencies in the actual design outcome. This was because under the current regime of requirements, the standard of conformity of structural engineering design is not the building surveyor's responsibility but that of the design engineer – who effectively gets to self-certify compliance of their work. This assessment responsibility fragmentation must be addressed with building surveyors obliged to have regard to attestations of conformity by design practitioners but responsible for determining for themselves the standard of compliance that is reasonably able to be assumed from design documentation.

2. There must also be responsibility to end users / consumers for all involved in procurement, design and construction of any development, particularly so that the responsibility extends to consumers who may not have any direct relationship with the persons involved in procurement, design and construction through transfer of title and such effects.
3. Accountability mechanisms need to address the various procurement arrangements that are operating in the sector that have at their core the dissemination and displacement of risk and responsibility. Special purpose vehicles and similar financial entity arrangements are part of the problem together with design and construct approaches and the inherent conflicts of interest arising for those involved in design, management of the cost of construction, and the pressures this process exerts on compliance mechanisms and enforcement measures as a deterrence to non-conformity.
4. The competence, capability and active engagement of those with regulatory responsibility of the sector is also essential to the delivery of appropriate outcomes from the legislative scheme. This means that there needs to be in place a system of accountability for regulatory bodies – local government, Registered building surveyors, the Building Commission NSW, and relevant registration bodies.
5. Clarity of technical and legislative requirements provides enhanced opportunity for compliance, both through reduced effort and complexity in understanding what is required as a practitioner involved in the process, and importantly, for regulators looking to take compliance and enforcement action in instances where deficient work has been detected.
6. Design and construction declarations must be well understood as an accountability mechanism, ensuring that these are not ever taken to be absolute statements about the standard of conformity of design or construction work that has occurred. It is not possible for anyone to ever be completely satisfied that compliance is fully achieved, such is the complexity of development activity and the limitations of the economic realities of regulation of documentation and construction oversight. Instead, the best indicator of compliance of design occurs when a building surveyor can reasonably form an opinion about the standard of compliance that the design documents represent, and further, when a building surveyor can reasonably form an opinion about the standard of compliance of completed construction work.
7. In addition to the accountability mechanisms described above, there should be an ability for aggrieved consumers who are able to demonstrate they have suffered a loss as a result of defective design or construction work to resort to:
 - a. suitable recourse mechanisms that are readily accessible to typical consumers,
 - b. low cost dispute resolution pathways and most of all,
 - c. resources sufficient to restore consumer positions.

After mediation and like schemes, first resort insurance schemes are likely to play a key role in this infrastructure. Professional Indemnity Insurance cover of practitioners will also be helpful in the event of failure of earlier safety nets, provided the legislative requirements for cover ensure adequate cover is taken out by relevant practitioners, and that appropriate run off cover is also taken out post completion of the project or post retirement of relevant practitioners. We make further comment on insurance requirements for practitioners in our submission of January 2024 attached for reference.

As a further note on accountability – currently there is no requirement for the engagement of a principal design practitioner and industry is tending not to engage such people. Instead, by default, building surveyors, because of the key role they play in design compliance verification, are being relied upon to ensure matters of design coordination are being addressed prior to authorisation of construction pursuant to the Environmental Planning and Assessment Act. When properly valued and supported, it is clear the role of the building surveyor in this process raises the question, is there any need for a principal design practitioner?

8. The construction industry is national if not international in its composition and outlook. It does not make sense that regulation of the industry is not uniformly occurring throughout the 8 Australian jurisdictions where building work occurs and is regulated. This adds considerable cost and complexity to construction compliance, particularly around product conformity and industry innovation. This stifles economic investment and innovation in the industry, most notably impacting efforts to mechanise construction elements in off-site environments.
9. Qualification and registration frameworks too should not be isolated jurisdictional quirks of industry. There should be a concerted effort by all to adopt the National Registration Framework model produced by the Implementation Taskforce of the ABCB and supported by building Ministers to ensure that the benefits of a singular approach to qualification and registration can be realised.
10. The role of curriculum setting bodies needs careful review to ensure that vested interests are not able to adversely influence the quality of practitioner supplied to any field, particularly where the efforts to overcome practitioner shortages might motivate a lowering of educational standards to ensure an increased supply. AIBS notes the adverse results of the 2020 ARTIBUS project in relation to building surveying qualification as an example of how inappropriate attention to competent advice can be damaging to professional capability.
11. There are many building surveyors who are migrating from statutory roles into consulting roles in NSW. This is driving greater scarcity in available practitioners for important statutory functions such as design assessment and mandatory inspection work. It is happening because the regulatory system is not improving fast enough with respect to the items listed above so that building surveyors, like their professional indemnity insurance providers, are insufficiently confident of the capacity of the government to ensure adequate regulation of the industry. To reduce their exposure to liability, they are seeking consulting roles that will, over the latter years of their career, reduce their need for run off insurance cover when they elect to retire. This is a barometer of industry health that should not be ignored.

The Design and Building Practitioners Act and Regulations run in parallel with many elements of regulation of the building industry via the Environmental Planning and Assessment Act and Regulations. The two legislative schema run in parallel and have very similar objectives – to ensure that design and construction of buildings achieves acceptable standards. This duplication is confusing and expensive to administer so that reform efforts should do all that can be done to mitigate duplication of legislative control.

Duplication extends to the extent to which practitioners are regulated by the government's licensing and registration systems and occupational associations to which those same practitioners belong. There is considerable advantage in having occupational associations partner with registration authorities to regulate practitioner groups, a point recognised in draft legislation that is yet to be presented to the Parliament related to co-regulation of the industry. Occupational associations should not be looked at as alternative registration authorities rather as entities operating equivalent schemes capable of verification of the credentials and suitability of a practitioner for registration by the registration authority. There are also synergies available with respect to auditing and compliant investigation.

The process of resolving defects identified during pre-occupation stage inspections by the Building Commission includes an ability for a developer / builder to provide an undertaking which may involve work that is not contemplated in design documentation and consequently is not contemplated by any construction authorisation that has been issued pursuant to the

Environmental Planning and Assessment Act. It is not clear if there is appropriate integration between that process and the Environmental Planning and Assessment Act requirements for the lawful conduct of building work.

The reform approach outlined in consultation documents released this year will, in many instances, address points of concern noted above, if implemented, and if that implementation addresses the points raised in our consultation response. See attached. There remain many areas of reform that are not yet addressed and AIBS urges the NSW government to resolve these points as soon as possible.

In closing

AIBS is committed to working with government, industry and key stakeholders to continually improve the building regulatory system throughout Australia. AIBS would be pleased to provide any clarification or additional information necessary to support this important inquiry into regulation of the NSW construction industry.

Please contact us for any clarification or further information that may assist.

Attachment table listed below:

Attachment	Date	Submission Referenced
A	Sep/18	Build & Dev. Certifiers Bill
B	Oct/18	Options paper
C	Jul/19	Building stronger foundations discussion paper
D	Oct/19	Draft Building and Development Certifiers Regulation 2019
E	Jan/20	Building and Development Certifiers Regulation 2020
F	Jul/20	Design and Building Practitioners Regs.
G	Nov/20	RAB Legislation
H	Jan/21	Design and Construction of Residential Apartment Buildings (Design and Building Partitions Regs)
I	May/21	Changes to the D&BP Act, RAB Act and the HB Act
J	Jun/21	Building and Development Certifiers Amendment Regulation
K	Sep/21	OBC co-operative approach
L	Nov/21	Home Building Act 1989 Review
M	Apr/23	Draft Building Bill 2022
N	Jul/23	Decennial Liability Insurance
O	Dec/23	Co-regulation model framework
P	Dec/23	Prefabricated building work proposal in the Building Bill
Q	Jan/24	Professional Indemnity Insurance
R	May/24	Building Bill