

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

Organisation: NSW Government

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NSW Government Submission to the Legislative Council Public Accountability and Works Committee review of the *Design and Building Practitioners Act 2020* and *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020*

1. Introduction

The Legislative Council Public Accountability and Works Committee's review of the *Design and Building Practitioners Act 2020* (**DBP Act**) and *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (**RAB Act**) provides an opportunity for the Committee to consider the significant work of the NSW Government, local councils, unions, industry associations and the construction industry to lift the quality of design and building work in NSW.

The NSW Government has made significant progress in its commitment to comprehensive reform of the building industry, transforming the NSW residential construction sector to put quality at its centre. The establishment of a dedicated building regulator in the Building Commission NSW and modernising NSW's building laws are critical to this reform.

To support this work, the Government has committed to working with industry, unions and other stakeholders on proposed legislation to consolidate legislative instruments covering the construction sector. This new legislation would repeal the DBP Act and RAB Act, along with other building legislation, to create a consistent, fit for purpose, more streamlined and modern building regulatory framework. The new legislation would retain the key elements of the DBP Act and RAB Act, that have supported a maturing industry, while introducing new elements to reduce the burden of compliance across multiple pieces of legislation and further modernise NSW's building laws.

The Government is well progressed in developing this new Building legislation. Before its introduction to Parliament, the Building Commission NSW will undertake further targeted consultation with industry and consumers to ensure it responds to their feedback. Broader regulatory context.

2. Broader regulatory context

The construction of non-compliant, substandard buildings represents a significant cost to both consumers and Government. The Centre for International Economics report *Building Confidence Report: A Case for Intervention* (2021) found the cost of building defects across NSW is over \$622 million.¹ Among apartment (class 2) buildings alone, there is an average cost of \$300,000 per building to rectify defects. This translates to an average cost of ~\$36,000 per unit to rectify defects – a cost which largely burdens consumers. Recent work undertaken by Building Commission NSW estimated that the cost to rectify defects may be as much as \$48,760 per unit in some class 2 buildings.² This estimated cost excludes dispute resolution, time, and non-financial costs such as the stress placed on consumers.

Remedying building defects, particularly in large buildings, often takes several months or years. This has clear impacts for consumers at an individual level and also creates significant challenges for the property market due to the estimated \$3.9 billion in lost property value due to asset impairment in class 2 buildings alone.³

¹ Centre for International Economics (2021), [Building Confidence Report: A Case for Intervention](#).

³ Office of the Building Commissioner and Strata Community Association (2021), [Construct NSW: Improving consumer confidence – Research report on serious defects in recently completed strata buildings across New South Wales](#)

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The DBP Act and RAB Act have had transformational impacts on the NSW construction sector by creating clear accountability from design through to occupation – addressing the ongoing impacts of building defects on homeowners, practitioners and the broader community. The Acts empower Building Commission NSW to proactively intervene where non-compliant and unsafe work occurs on regulated buildings, with a focus on acting before the harm has impacted unsuspecting customers.

The Acts were introduced at a time of low confidence in the construction sector. They were intended to uplift regulatory oversight of apartment building construction and sit within a broader building legislative framework to regulate building work in NSW.

The DBP Act and RAB Act seek to integrate with parts of the planning system to ensure developers and practitioners produce compliant designs from the start of a project. This not only reduces the rates of defects in completed buildings but adds certainty to projects and reduces the cost of rework. These Acts enable compliant and safe housing to come to market sooner and at reduced costs for consumers over the life of the building.

The DBP Act requires all designs for building elements and performance solutions on a regulated building to be prepared and declared by a registered design practitioner before a certifier issues a construction certificate or complying development certificate.

The *Environmental Planning and Assessment Act 1979 (EP&A Act)* and supporting Regulations include requirements for issuing an occupation certificate. This includes an obligation to notify Building Commission NSW before the developer applies for the occupation certificate to allow an inspection to occur and prevents the issuing of an occupation certificate where the Commission has identified serious defects.⁴

The DBP Act and RAB Act have focused on the key people involved in the delivery of regulated buildings, including developers, design practitioners and building practitioners. The Acts prescribe obligations on those with the most control over the delivery of a project. These requirements complement more broad ranging rules that apply to those carrying out architectural work (under the *Architects Act 2003*) and trade work (under the *Home Building Act 1989*). These Acts invest the Architects Registration Board and Building Commission NSW with disciplinary and enforcement powers against registered practitioners who have produced non-compliant work or engaged in unprofessional conduct.

The DBP Act and RAB Act have strengthened oversight of certification work by providing clearer processes for producing designs and the compliance of design and building work with the Building Code of Australia. To complement these processes, additional obligations have been imposed on certifiers under the *Building and Development Certifiers Act 2018*, including a prescriptive Certifier Practice Standard. The combined powers under the three Acts have given Building Commission NSW stronger powers to oversee certifiers, as well as supporting certifiers to take strong action against non-compliant work.

The DBP Act and RAB Act have also given more confidence to incoming homeowners that their buildings are safe and compliant. Strata bodies in particular have benefited from proactive design and building work oversight before occupation and more detailed designs and reports on the building. This uplift in information is supporting strata bodies to have more informed plans for maintenance of their buildings and to inform decisions around renovation or remediation.

This is backed up by clear rules under the *Strata Schemes Management Act 2015*. Key changes that have been implemented due to the impact of the DBP Act and RAB Act include the progressive roll out of decennial liability insurance as an alternative to the existing strata building bond inspection scheme under the *Strata Schemes Management Act 2015*. With respect to decennial liability insurance, insurers are starting to return to the NSW market, with international interest in offering 10 year warranties over new apartment buildings. Increasing confidence in the quality of project documentation and regulatory oversight is creating incentives for insurers to offer Australian first products to new NSW apartment buildings.

⁴ Serious defect is defined under section 3 of the RAB Act.

The Government recognises the progress that has been made over the past five years, driven by bipartisan support for meaningful reform, but there is more work to be done. While the DBP Act and RAB Act currently sit alongside other building legislation, the Government is committed to consolidating all building legislation to ensure consistent rules for all building work in NSW and to reduce duplication and complexity for industry and the community.

Key regulatory reforms that have already been implemented since the Public Accountability Committee's previous inquiries into building regulation in 2019 and 2021, include:

- expansion of the Building Commission NSW's enforcement powers into low rise residential construction (from December 2023) and into shared accommodation, such as hostels and boarding houses (from July 2023),
- establishing the Independent Construction Industry Rating Tool (iCIRT), which uses a star rating system for developers and building professionals, on their 'trustworthiness' and record of delivering a reliable outcome,
- the rollout of decennial liability insurance, a 10 year warranty on apartment buildings' core building elements,
- delivering Project Intervene, which has seen Building Commission NSW taking a more active role in negotiating undertakings with developers for the benefit of the owners' corporations living in existing class 2 buildings, who are currently experiencing building defects,
- ongoing audits of design and building work on class 2 buildings.

Through these reforms, consumers have been given new tools to distinguish between trustworthy and risky construction companies, and the NSW Government has been given expanded powers to prevent and halt risky developments to protect consumers.

3. Establishing Building Commission NSW

On 1 December 2023, the Government stood up Building Commission NSW, a building regulator with a singular focus on restoring confidence to the NSW construction sector by uplifting industry capability and standards of work, providing consumers with greater confidence in quality housing coming to market. Building Commission NSW builds on the previous work of NSW Fair Trading and the NSW Building Commissioner to strengthen oversight of the construction industry.

By standing up Building Commission NSW, the NSW Government has established a strong, modern regulatory framework to enable the Government's efforts to deliver more well-built homes to meet NSW's housing demands.

Building Commission NSW has benefited from dedicated additional funding (\$24 million in 2023/24 and \$35 million in 2024/25), oversight and support from the Department of Customer Service and has an established team to deliver its ongoing core functions and meet industry and community expectations on how the Building Commission NSW regulates the sector.

4. Impact of maturing regulatory framework

There is some evidence that the changes to the regulatory framework for the NSW construction sector described in this submission are beginning to have a positive impact on building quality.

Building Commission NSW is identifying fewer serious defects during occupation certificate audits of buildings that have also been subject to a DBP Act design audit. By working collaboratively with design and building practitioners during the design and early construction phases of a project, Building Commission

NSW is enabling practitioners to identify and rectify defects – saving time and cost over the duration of the construction and life of the building.

In addition to clear improvements in practitioner conduct during audits, research indicates that buildings coming to market since the DBP Act and RAB Act commenced have fewer defects than legacy buildings. In the 2023 Strata Defect Survey, 59% of owners of buildings occupied in 2019 reported experiencing serious defects. Only 17% of owners of buildings occupied in 2022 surveyed reported serious defects.

While this progress is promising, the Government is committed to continuing the work of Building Commission NSW to enforce the obligations under the DBP Act and RAB Act to hold industry accountable for the work they produce. The Government is currently consulting on further enhancements to the schemes but considers that the policy settings in the two Acts remain critical to delivering compliant, safe and trustworthy residential buildings in NSW.

5. Next phase of reform – further improvements with consolidated Building legislation

The NSW Government has committed to creating plain English consolidated Building legislation to reduce red tape and duplication and allow consumers to be better informed. The Government has been engaging with industry and community stakeholders since the 2023 election on a suite of proposals that consolidate existing legislation, remove duplicative provisions (including where practitioners are required to hold overlapping registrations) and modernise building laws to meet the needs of NSW practitioners and homeowners and renters.

Through this engagement, the Government has identified opportunities to further enhance construction oversight. Work has commenced on draft legislation to implement these reforms, with draft legislation expected to be shared with stakeholders in the second half of 2024.

The Government is committed to ensuring that the proposed Building legislation enhances NSW's strong regulatory framework, continues to restore confidence in the NSW construction industry, and provides an efficient regulatory environment that supports housing supply and affordability.

Further information

Design and Building Practitioners Act

The DBP Act grants the Building Commission NSW (via a delegation from Secretary of the Department of Customer Service) comprehensive powers to ensure compliant upfront design and clear accountability throughout the construction process, as well as powers to require the remediation of defects in regulated buildings.

On 3 June 2020, Parliament passed the DBP Act, with most reforms in the Act commencing on 1 July 2021. The duty of care provisions of the Act commenced on 10 June 2020. To support the commencement of the Act, the Department of Customer Service worked with industry and community stakeholders between June 2020 – April 2021 to develop the Design and Building Practitioners Regulation 2021 (**DBP Regulation**).

The DBP Act's duty of care provisions provide that any person who carries out construction work has a duty to exercise reasonable care to avoid economic loss caused by defects:

- a. in or related to a building for which the work is done; and
- b. arising from the construction work.

The duty is owed to future owners of the land and cannot be delegated or contracted out of.

The duty is owed by a broad range of practitioners across the contracting chain, including builders, architects, engineers and other designers, contractors and other building practitioners, to bolster existing legal rights for consumers. The duty applies to all building work and is not limited to only certain buildings. In certain circumstances, the duty of care applies retrospectively to construction work carried out up to 10 years before the DBP Act commenced. This period is consistent with the limitation period for defective building work outlined in EP&A Act.

The DBP Act also introduces a regulatory framework for the registration of design and building practitioners that prepare and/or declare plans, or carry out building work, for building elements and performance solutions and establishes a registration scheme for professional engineers.

The DBP Act works in tandem with the RAB Act to ensure end-to-end accountability of building work⁵ on regulated buildings.⁶ This framework:

- requires compliant project documentation before building work occurs,
- sets obligations on builders to follow those designs and seek sign off before varying from them,
- creates clear as-built designs to support certification throughout the build, and
- prescribes comprehensive enforcement powers where practitioners or developers breach obligations under NSW building laws.

The DBP Regulation provides that certain lower risk work does not require a registered practitioner to prepare designs or declare that the design and/or building work complies with the Building Code of Australia. Section 13 of the DBP Regulation details work that is exempted from the requirements of the declaration scheme including, for example where the building work is:

- valued at less than \$5,000 including labour and materials (excluded under the Home Building Act),
- exempt development under planning rules except waterproofing work,
- waterproofing work within a single dwelling carried out as a result of alterations to a bathroom, kitchen, laundry or toilet and which is exempt development,
- being done under a council order except related to cladding,
- being done under a development control order except related to cladding,
- for the maintenance of a component of a building including a fire safety system except a load-bearing component that is essential to the stability of a building,
- for the maintenance of a component of a system in the building for mechanical, plumbing or electrical services,
- electrical or plumbing work that is a performance solution for building work, other than work for a building element,
- the subject of a development consent but is not work for a building element or performance solution for building work (work not requiring a regulated design),
- a non-structural fit-out only for class 5, 6, 9a or 9b parts,

⁵ Building elements are defined under section 6 of the DBP Act to cover: fire safety systems (including passive fire), waterproofing, building structure, building enclosure and building services that are required by the Building Code of Australia. Section 3B of the DBP Regulation incorporates aspects of a vertical transportation product that are required to achieve compliance with the Building Code of Australia.

⁶ Currently limited to apartment buildings (class 2 buildings), buildings with a class 2 part, and since 3 July 2023, new shared accommodation buildings (class 3 buildings) and residential care facilities (class 9c buildings) and new buildings with a class 3 or 9c part.

- exempt from Building Code of Australia (BCA) under clause 164B, 187 or 188,
- the installation of an awning, blind or canopy over a window or door,
- the installation of a roofed structure over a balcony, deck, patio or terrace, whether open or enclosed, unless the roofed structure is installed above the existing topmost roof of the building.

The work that is exempted from the declaration scheme has been added to since the DBP Act commenced in response to ongoing engagement with community and industry representatives to moderate impacts and ensure risk-based approach to obligations on design and building practitioners.

The NSW Government has subjected the DBP Act to regular review and updates. Ongoing work to improve the operation of the DBP Act include:

- an Engineering Practice Standard (published by Building Commission NSW in April 2024) to prescribe additional requirements on registered professional engineers to meet their professional obligations, including allowing longstanding obligations under the Building Code of Australia to produce fit for purpose work to be enforceable by Building Commission NSW,
- establishing a Vertical Transportation Industry Working Group to collaborate on opportunities to introduce targeted registration categories for lower risk vertical transportation work on regulated buildings and modernise regulation of the sector,
- a NSW Government and industry Remedial Building Work Working Group to create clear guidance and accountability for remedial and renovation work on existing buildings and identify opportunity to enhance how this sector is regulated,
- bringing stakeholders across the sector together to identify new ways of addressing professional indemnity insurance pressures by holding three industry roundtables since the DBP Act registered practitioner insurance obligations commenced, and
- broad communications and engagement with industry and the community to improve understanding of DBP Act requirements, including to support strata bodies to keep costs of remedial and renovation work under control by making clear where work does not need to meet the declaration requirements under the DBP Act.

Residential Apartment Buildings (Compliance and Enforcement Powers) Act

Commencing in September 2020, the RAB Act has empowered the Building Commission NSW (via a delegation from the Secretary of the Department of Customer Service) to undertake proactive enforcement of NSW's building laws. The RAB Act provides the building regulator with the power to audit building work on class 2 (largely apartment buildings), class 3 (boarding houses and hostels) and class 9c (residential care) buildings during construction and post-occupation by establishing a new defect category of 'serious defect' that triggers powers under the Act. The RAB Act requires developers to notify Building Commission NSW at least 6 months before applying for an occupation certificate – an expected completion notice (**ECN**) – allowing Building Commission NSW to undertake data-informed inspections of work nearing completion.

Following a pre-occupation certificate, post-occupation certificate or “anytime anywhere” audit, where serious defects are identified, Building Commission NSW may:

- enter an undertaking with the at fault party to rectify the defects or resolve underlying causes of defects in the management of the site or business,
- order responsible parties to rectify defective work through building work rectification orders,
- stop work on site under stop work orders, and
- prevent a certifier issuing an occupation certificate by issuing a prohibition order.

Section 61 of the RAB Act provides that a Building Commissioner is to be employed under the *Government Sector Employment Act 2013*, with this role reporting to the Secretary of the Department of Customer Service. While all enforcement powers under the RAB Act are able to be delegated to the Commissioner by the Secretary (other than the power of delegation), the Secretary must delegate functions to the Commissioner under section 9 of the Act (prohibition order powers).

Where an order is issued, Building Commission NSW will publish the details of the order online and undertake follow-up inspections as required to ensure that the order has been complied with. The information gathered through the audit process is then used to enhance the Commission's risk rating tools and inform the development of continuing professional development modules on areas of greatest need.

Since 2020, the RAB Act and Residential Apartment Buildings (Compliance and Enforcement Powers) Regulation 2020 have been amended to enhance the oversight of design and building work on class 2, 3 and 9c buildings and respond to issues raised by industry practitioners and building owners, including:

- increased penalties for non-compliance with Building Commission NSW orders and directions,
- imposed a levy on developers to partially offset costs of Building Commission NSW's audit program,
- expanded the grounds for issuing a prohibition order,
- enhanced the way undertakings can be used (including strengthening the use of rectification bonds to benefit owners),
- expanded power to order a development to engage a suitably qualified person to provide information or work on an issue to leverage broad industry expertise to resolve defects, and
- strengthened Building Commission NSW powers to publicise orders and outcomes of inspections through publishing remedial orders online and allowing a court to issue publicity orders.

Low-rise, single dwelling residential (Class 1) construction

The NSW Government recognises the pressing need for more homes to enter the market – to ease pressure on the housing market and keep young people in NSW. In 2023, to support work across Government to ensure that the tens of thousands of new homes coming to market are compliant, resilient and well-built new powers were provided to the Building Commission NSW to oversee work on low rise residential construction (class 1 buildings).

The *Building Legislation Amendment Act 2023* amended the *Home Building Act 1989* to grant Building Commission NSW power to enter all residential building sites before an occupation certificate has been issued, and where necessary issue rectification orders, stop work orders or on-the-spot fines for non-compliant work. These amendments provide the building regulator similar powers to the RAB Act but without imposing unnecessary regulatory burden to industry. For example, the new powers do not require a developer to lodge an ECN as class 1 construction may not involve a commercial developer and the regulatory benefits of this notice are significantly less than in class 2, 3 and 9c construction.

In addition to the broad new powers to enforce NSW building laws across all residential construction, Building Commission NSW has also issued a mandatory practice standard for all certifiers working on class 1 and class 2 buildings. These practice standards, which form a condition of a certifier's registration, set out prescriptive obligations that a certifier must follow when overseeing residential building work, including their conflict of interest obligations, how to determine applications for building certificates and expectations for site visits during construction.

The Building Commission NSW has also been provided new powers and additional funding for more inspectors across NSW to target non-compliant work on NSW building sites.