1 July 2024

Abigail Boyd MLC
Chair
Public Accountability and Works Committee
Parliament House, Macquarie Street

By email: pawc@parliament.nsw.gov.au

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

Dear Ms Boyd,

The Urban Development Institute of Australia NSW (UDIA) is the state's leading development industry body. We represent the leading participants in the industry and have more than 450 members across the entire spectrum of the industry including developers, financiers, builders, suppliers, architects, contractors, engineers, consultants, academics and state and local government bodies. In NSW alone, the property industry creates more than $581.4 billion in flow on activity, generates around 387,000 jobs and provides around $61.7 billion in wages and salaries to workers and their families.

UDIA invests in evidence-based research that informs our advocacy to state, federal and local government, so that development policies and critical investment are directed to where they are needed the most. Together with our members, we shape the places where people will live for generations to come and in doing so, we are city shapers.

UDIA welcomes the opportunity to make a submission to the review into the *Design and Building Practitioners Act 2020* (NSW) and the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (NSW). Our recommendations and comments are appended to this letter.

Our submission has been informed by input from members of the UDIA NSW Strata and Building Regulations Committee. The Committee provides a development perspective with a strong focus on building regulation, establishing new schemes, renewal and dispute resolution and is chaired by Mark Monk of Helm Properties.

UDIA has actively participated in consultation opportunities since the commencement of building regulatory reforms in 2019 and welcomes the opportunity to provide comment for this review. We do however want to reiterate the following which has previously been provided in writing to the Committee and which we would like placed on the record:

> The terms of reference outline that a report of the review is to be tabled in the Legislative Council by a date determined by the Committee and that the Minister is to table in the Legislative Council a written response to the report within 3 months after the tabling of the report. The review will consider the functions exercised or delegated by the Secretary of the Department of Customer Service and whether the policy objectives of the DBP Act and the RAB Act remain valid and whether the terms of the statutes are effective for securing these goals.
>
> It has been brought to our attention and we have previously written to you to ensure that it has also been brought to the attention of the NSW Legislative Council's Public Accountability and Works Committee (PAWC), that the NSW Government is planning to introduce to NSW Parliament a "Single Building Bill" by the end of the year. We understand this Bill will effectively absorb the DBP Act and the RAB Act, as well as several other related pieces of legislation, into a single statute. Furthermore, we are advised it is likely an exposure draft of this Bill will be provided to stakeholders for consultation in the coming weeks.
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> It is the position of UDIA NSW that a single building bill should not be introduced into the NSW Parliament until the PAWC has undertaken its review of the DBP Act and the RAB Act, delivered its report in the Legislative Council, and the Minister has responded. Any recommendations that have been made by the PAWC in its report should then be considered by Government and incorporated into the Single Building Bill as appropriate. We are concerned that the two processes should not be allowed to run in parallel given that one has the potential to impact the other and would ask that the Committee seek assurances from the relevant Minister that the Single Building Bill will not be finalised or considered for introduction to the Parliament until your review has concluded.

If you or your team have queries about the content of this submission or wish to discuss it in more detail, please contact UDIA NSW Director of Policy, Harriet Platt-Hepworth on 0474 772 291 or at hplatthepworth@udiansw.com.au

Kind regards,

Stuart Ayres
Chief Executive Officer
UDIA NSW

The Design and Building Practitioners Act 2020 **(NSW) (DBP Act)**

Recommendation 1: The legislative scheme should be limited to strata titled apartments

This legislation is consumer focused, and as such it should be limited to strata titled apartments. The statutory duty of care provisions in the DBP Act were enacted to protect owners corporations and hence the "mum and dad" consumers who become members of the owners corporation when they acquire lots in the scheme. This protection has potentially extended out to all building works as a result of the way the Act has been interpreted by the Courts (incorrectly in our view through the case of Goodwin Streets). The same (inadvertent or intentional) extension should be avoided with the new Single Building Bill. Unnecessary and unwarranted regulation of sectors such as build to rent which is institutionally held and where there is no consumer to protect will only add unnecessary cost to the sector, further exacerbating the housing affordability crisis facing the State.

Recommendation 2: Streamlining the limitations provisions across the corresponding pieces of legislation so that there is one clear limitations rule that applies for claims under the statutory duty of care provisions.

Currently there are three pieces of legislation that have to be considered before a claim can be properly characterised as "out of time." (6 years under the Limitation Act 1969, 10 years under the Environmental Planning and Assessment Act 1979 and the DBP Act). However, there is much confusion in industry at the moment with many believing they have a 10 year right to sue developers/builders. This confusion is causing claims to be lodged when they should not be, which in turn requires cost to be expended on defending these claims. The process and corresponding pieces of legislation need to be streamlined in order to limit confusion.

The Residential Apartment Buildings (Compliance & Enforcement Powers) Act 2020 (NSW) (RAB Act)

Recommendation 3: The legislation should be limited to strata titled apartments.

The RAB Act currently only applies to building work undertaken on a residential apartment building, being a class 2 building or any building containing a part that is classified as a class 2 component. UDIA is supportive of this, and notes that extension of the Act beyond class 2 at this stage would not be supported.

Recommendation 4: Project Intervene requires more resources and obligations on the parties should not extend beyond those detailed in the statute.

The NSW Building Commission has used the undertaking process obligations under Part 5, Division 1 of the RAB Act to initiate and run the "Project Intervene" process. The time taken to complete the process from start to finish is taking too long with negotiating deeds is taking 6-9 months alone in some cases. UDIA considers that this delay is due to a lack of resources (in particular Undertaking Managers) and as such recommends that additional resources be provided for, to ensure a more timely undertaking process.

The Project Intervene process has many obligations that are not provided for in the RAB Act. For example: the "voluntary" process includes a mandatory requirement for the developer to pay for all the costs of the Undertakings Manager and provide additional securities. As this is not provided for in the legislation, this is not a requirement that the developer should have to comply with. Developers should only be required to engage in a process that requires them to meet their existing obligations under the *Home Building Act NSW 1989*(NSW) (HB Act). Any rectification orders that are issued need to be aligned with the existing statutory framework provided in the HB Act and should not attempt to go beyond those obligations.

Recommendation 5: A stay in proceedings for 6-9 months when a project enters Project Intervene.

Where a project has been identified to be part of the Project Intervene process or a

where a similar process using the powers under RAB Act is used once this project concludes, any court proceedings should automatically be stayed for a period of time (ideally for 6 months but up to 9 months where necessary), so that the owners are not expending legal costs unnecessarily.

Owners corporations should be required to refer any disputes concerning serious defects in the common property of residential apartment buildings that are up to six years old to the Regulator for consideration whereby that project then becomes the subject of an enforceable undertaking, before commencing any litigation. This is to avoid the more costly and timely route of litigation as the first port of call. It also ensures that NSW Civil and Administrative Tribunal resources are not drained. This is premised on the fact that the undertaking process is efficient and timely.

At this point in time, a moratorium (or stop the clock) on the statutory limitation period should take place, running from the time that the developer receives the inspection report which identifies "serious defects" (Commencement Date). From the Commencement Date the OC will be unable to commence or continue proceedings in respect of the subject defects while this process is under way (i.e. until the developer enters into a Developer Undertaking, the OBC issues a building works rectification order or the process is otherwise discontinued). The moratorium will continue until the earlier of:

1. 6-9 months anniversary of the Commencement Date; or
2. conclusion of the Project Intervene process.

The statutory limitation period for the subject matter will then extend by the period the moratorium was in place. This is in the interest of both the owner's corporation and the developer as it does not require the parties to expend legal costs to preserve their legal position but does not prejudice the owner's corporation from later commencing proceedings (during the extended statutory limitation period) if the defects are not rectified.

Recommendation 6: A clear policy is required for the RAB Act powers post Project Intervene.

UDIA supports the intent of Project Intervene and once the legacy projects have all been assessed and appropriately remedied, we would advocate for a ongoing version of this process to continue under the same principles. However, UDIA would argue that

a clear policy outlining how the Building Commissioner exercises the powers under the RAB Act in respect of occupied class 2 buildings, needs to be established i.e. how and when the powers are used and what preconditions must be met. We would recommend there should be a requirement for the owners and the developer to try and reach a resolution in the first instance, before applying to the Building Commission for the use of an enforceable undertaking. This process should all be determined through consultation and legislated through a head of power with the specific process prescribed through regulation.

The recommendations outlined above under 'Project Intervene' and the process outlined above under 'A stay in proceedings for 6-9 months when a project enters Project Intervene' should be included in any enduring process that continues once Project Intervene concludes.

Recommendation 7: Definition of "serious defect" needs to be streamlined.

The definition of serious defect needs to be streamlined with the definitions of "major defect" and link back, coherently, with the "key building" elements of the DBP Act. UDIA notes that the definition under the HB Act is currently under review for this alignment.

Conclusion

UDIA wishes to be part of the ongoing conversation to improve the regulatory environment for building in the State, to ensure that buildings are safe and secure for occupation, and there is a clear process for dispute resolution. UDIA appreciates this opportunity to offer our comments to this review.