

GOVERNMENT RESPONSE TO THE REPORT FROM THE NSW LEGISLATIVE COUNCIL PUBLIC ACCOUNTABILITY COMMITTEE ON REGULATION OF BUILDING STANDARDS

On 30 October 2020 the New South Wales Government delivered its formal Response to the Legislative Council Public Accountability Committee Final Report of 30 April 2020 on the Regulation of Building Standards, Building Quality and Building Disputes (the **Report**).¹

We set out below a summary of the key points emerging from the Government's Response in terms of developments over the last 12 months and the proposed legislative and regulatory amendments.

A. DEVELOPMENTS OVER THE LAST 12 MONTHS

1. The Government has highlighted significant progress on its building reform agenda to restore transparency, accountability and quality to the building industry in NSW.
2. This is not a short-term fix. Real progress at reforming building standards and regulation is to be seen in a 5 year time frame, highlighted by the appointment of a Building Commissioner and the announcement of a six pillar Construct NSW transformation strategy to restore public confidence and create a customer-facing building and construction sector by 2025.
3. Key legislative reforms already implemented are:
 - a) The *Residential Tenancies Regulation 2019* and *The Property and Stock Agents Regulation 2014* were amended in March 2020 to require real estate agents and/or landlords to notify tenants or prospective purchasers where property is, or is part of a building that contains external combustible cladding.
 - b) *The Design and Building Practitioners Act 2020 (the DBP Act)* which came into operation on 11 June 2020 and introduced a duty of care owed to consumers and liability for defective design arising from construction work resulting in economic loss. This duty of care also extended retrospectively to construction work carried out before that date where the loss became apparent after 10 June 2010.²

- c) The establishment of a NSW Cladding Taskforce and the Cladding Product Safety Panel to advise regarding suitable building products and external wall assembly methods associated in relation to con-compliant panels and other wall cladding systems.
- d) The improvement of the regulation of certifiers, enhanced provisions for avoiding conflicts of interest and enhanced compliance and enforcement powers through the introduction of *The Building and Developers Certifiers Act 2018* and *Building and Development Certifiers Regulation 2020* which commenced on 1 July 2020.³
- e) The *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020 (the RAB Act)* which came into operation on 1 September 2020 providing the Building Commissioner with powers to investigate and rectify building work.⁴

B. FUTHERING THE REFORM AGENDA - FUTURE DEVELOPMENTS

4. To further its reform agenda the Government Response identified the following future developments:
 - a) Support for cladding advice and compliance
 - i) The Government is considering opportunities to provide support to residents and building owners seeking to conduct remediation work to respond to flammable cladding risks. The Government Response states that it has inspected 4,127 buildings of which 3,737 are considered as low risk.
 - ii) The remainder namely 390 are under review. Buildings assessed as high risk have been notified to the building owner and consent authority for assessment and any necessary remediation.

- iii) The dissenting statement to the Committee's Final Report, did not support the Committee's recommendation that the Government set up a substantial package proportionate to the Victorian Government's \$600M package, to fund the rectification of buildings containing aluminium composite cladding (**ACP**).
- iv) In our view, for the present time, it is unlikely that the Government will move to adopt the Victorian model of providing a funding package to rectify buildings impacted by non-compliant ACP, preferring instead to allow the market/owners to adopt the legislative changes to the DBP Act and pursue damages for non-compliant ACP and other non-compliant building products from responsible parties.

C. FUTURE LEGISLATION AMENDMENTS

5. An extended first resort insurance product:

- a) The Government Response foreshadowing an "extended first resort insurance product", is welcomed.
- b) That said, it does not provide details of what that will look like. If achieved, it would represent a major step forward by providing a safety net for home owners who have suffered loss, compared to the current scheme of warranty insurance currently operating in NSW for claims against builders arising from defective and/or incomplete building work for at least the following reasons:
 - i) **first**, a first resort insurance scheme would enable home owner's access to a builder's warranty insurance where a complaint is made and the builder refuses to comply;
 - ii) **second**, it would avoid placing the burden on owners of incurring considerable costs in seeking to establish that the building work is incomplete and/or defective; and
 - iii) **third**, it would also replace the present "last resort insurance" system in NSW which requires a home owner to pursue the builder via legal proceedings and prevent access to the warranty policy warranty cover unless the builder ceases to trade, can no longer be found, or where the builder's licence is suspended or cancelled for failing to comply with an order from NCAT.
- c) That said, we envisage practical challenges involved in enticing insurers to come back to the market and provide a suitable warranty product that offers consumer protection for claims arising from design, building defects and non-compliant building products foreshadowed in the recent legislation, and on such terms that also make the scheme profitable for insurers when comparing claims payouts as a percentage of premium income.

6. A review in 2021 of the *Strata Schemes Management Act 2015* and the *Civil and Administrative Tribunal Act 2013*:

- a) To review the processes for resolving disputes relating to strata buildings including through NCAT.

The review of strata legislation will commence later in 2020 and consider options for improving management of strata buildings, managing building defects and appointing strata managers in the early stages of strata schemes.

7. A review of the *RAB Act* will be undertaken after 30 March 2022:

- a) A review by the Independent Pricing and Regulatory Tribunal of the Home Building Compensation Fund with its final report is due in November 2020. The Government is to continue to monitor the operation of the Strata Building Bond and Inspection Scheme.

8. Introduction of a Building Commission:

- a) The Government Response is non-committal about introducing a NSW Building Commission, instead saying that it prefers to use the wide range of resources to further its reform agenda. Nevertheless, it will consider the findings of the Committee's review of the RAB Act.
- b) That said, having heard evidence from the Building Commissioner to the Committee on 24 February 2020 about the initiatives and additional powers to investigate, the Committee noted that the Building Commissioner *"emphasised that he does not need a Building Commission to do this."* (*page 5 of the Committee report of 6 April 2020).
- c) In our view, this suggests that for the present, a NSW Building Commission is unlikely. Instead, the Building Commissioner and his team will continue his energetic hands on approach in seeking to identify problem developments and the necessary remedial work required.
- d) Further, the proposed digital capture of proposed plans, drawings with the Department of Customer Service under the DPB Act will also enable review at an earlier stage of design compliance declarations and building practitioner declarations.

9. Drafting of Regulations to the DBP Act:

- a) A further sign of real legislative reform remains for the Government to introduce the Regulations to the DBP Act, which have not been drafted. This leaves many sections without detail and lacking the required operative information to provide a full picture of the legislation's implications.
- b) That said, the Government Response (page 13) provides some detail as to the manner and form of the supporting Regulations, for example, indicating its proposal to develop an electronic portal to receive documents relating to building work.

This facility will be important for an owner or owners' corporation investigating defects in design, building work or a building product that is non-compliant with the provisions of the relevant Standards, where quite often a paucity of records are available to assist in understanding the parties involved in the building work and design.

10. Progressing a national response to the Shergold Weir report:
 - a) Through the Building Minister's Forum, the government is participating in implanting a national response to the Shergold Weir Report. No further details about this are provided.
11. Increased resources for Building Commissioner's staff:
 - a) An additional 60 additional roles as required, to implement the review and operation of the new auditing, registration and design lodgement functions.

D. CONCLUDING REMARKS

12. Further amendments to the regulatory and legislative framework are anticipated over the next several years.
13. By that stage, the courts will also have opportunity to review the expanded duty of care provisions in the DBP Act.
14. At the same time, the impact of the increased powers granted to the Building Commissioner to investigate and order remedial work under the RAB Act, and the commencement of provisions for compliance declarations by registered design practitioners and building compliance declarations for building work under the DBP Act will be more easily assessed as to whether they provide better outcomes for consumers.

-
- 1) See our *Design and Builders Practitioners Act* [Resource Page](#)
 - 2) See our [26 June 2020 Podcast](#) in relation to the DBP Act
 - 3) See our [20 August 2020 newsletter](#)
 - 4) See our [28 August 2020 newsletter](#)

CONTACT US

For more information, contact the author Anthony Herron (Special Counsel) on (02) 8239 6500 or at excellence@kreisson.com.au

This communication is sent by Kreisson Legal Pty Limited (ACN 113 986 824). This communication has been prepared for the general information of clients and professional associates of Kreisson Legal. You should not rely on the contents. It is not legal advice and should not be regarded as a substitute for legal advice. The contents may contain copyright.

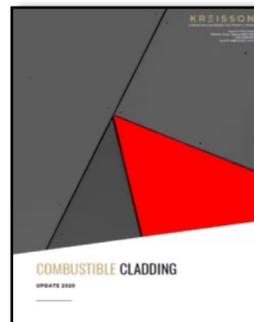
FOR ADDITIONAL READING SEE OUR EBOOKS AT:

<https://kreisson.com.au/education/ebooks/>



Major Changes To The NSW Building Industry

Major events over the last 3-4 years have prompted legislative change in favour of increased compliance regulation and enforcement measures to protect consumers where there is a finding of building defects.



Combustible Cladding

Across Australia various state governments have introduced a series of measures to address community concerns about public safety and to identify the extent of the issues posed by combustible cladding.



Developer Building Bonds

Developers are now required to lodge a building bond with NSW Fair Trading to the value of 2 percent of the contract value for works to secure funding for the rectification of defective building work.