

The First Major Step in Tackling the Strata Living Crisis in NSW



Introduction

In 2019, the Opal and Mascot evacuations became embodiments of a failed system in the building and construction industry, forcing the government's hand to seriously consider implementing major reform to what can be described as a fragmented and ineffective regulatory landscape that affords little to no protection for consumers who purchase residential apartments in high rise buildings in New South Wales (NSW).

A year on, the Berejiklian Government has delivered on their promise to crack down on residential developers and builders who shun their legal and social responsibility to properly construct apartments in compliance with relevant safety and construction codes.

Two new pieces of legislation have recently been enacted in NSW forming the first of the “*six pillars of reform*” that will be spearheaded by the state's new Building Commissioner, David Chandler OAM. In this article, we discuss key components of the [Residential Apartment Buildings \(Compliance and Enforcement Powers\) Act 2020 \(NSW\)](#) (RAB Act), due to commence on 1 September 2020.

Overview of the RAB Act

The RAB Act provides the Secretary of the NSW Department of Customer Service (**Secretary**) very broad powers to investigate building sites during the construction phase and prevent developers and builders from obtaining occupation certificates (**OC**) until “*serious defects*” are remedied.

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Notably, authorised officers will be entitled to enter a building site and *“open up, cut open or demolish building work, if the authorised officer has reasonable grounds for believing that it is necessary to do so because it is connected with a serious defect in a building.”*

These powers have been long overdue and are key to tackling the problem that has plagued the NSW residential sector for years, head on. In short, developers will be forced to rectify serious defects prior to the issue of the OC while the builder is still on site and developers are yet to handover to purchasers and receive settlement funds.

What work does the RAB Act apply to?

The RAB Act has retrospective application and applies to residential apartment buildings either under construction or which were completed within the last ten years from the date a power under the RAB Act is exercised by an authorised officer. A *“residential apartment building”* is defined as any Class 2 Building under the Building Code of Australia (BCA). Relevantly, the term *“developer”* is broadly defined and includes *“persons who contract, arrange, facilitate, or otherwise cause building works to be carried out, landowners on which building works occur, principal contractors, and strata scheme developers.”*

Expected Completion Notices and Prohibition Orders

Part 2 of the RAB Act outlines a scheme by which the Secretary can monitor the completion of all relevant residential building works in NSW. Specifically, developers will be required to provide an *“expected completion notice”* to the Secretary between 6 to 12 months before issuing an OC which must contain the date that the developer expects to apply for OC.

If a developer fails to provide or is late in providing an *“expected completion notice”*, the Secretary has the power to issue a *“prohibition order”* that prohibits the developer from obtaining an OC or registering a strata plan.

A prohibition order may also be issued if the developer fails to provide an *“expected completion amendment notice”*, if the Secretary is satisfied that the works contain a serious defect, or if a necessary building bond required under section 207 of the *Strata Schemes Management Act 2015* (NSW) has not been provided.

Combining this notification scheme with the soon to be developed electronic “risk rating platform” will ensure that any serious defects in new developments completed by historically problematic developers or builders, will be identified, investigated and remedied before handover to purchasers.

Investigation and Enforcement Powers

Part 3 of the RAB Act gives the Secretary and her *“authorised officers”* exceptionally unhindered powers to pre-emptively investigate building works for defects while construction occurs. For example, authorised officers will have the power to enter any premises without a search warrant at a reasonable hour or anytime building work occurs. However, this power does not include parts of a premises used solely for residential purposes, in which case permission of the owner or a search warrant would be required.

Once an authorised officer has entered a premise, that officer *“may do anything that in (their opinion) is necessary to do done for an authorised purpose.”* In this regard, as stated above, express provisions in

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section 24 of the RAB Act allow authorised officers to *“take and remove samples, cut open or demolish building work, use reasonable force to break open or access anything, to destructively test anything, and to seize anything connected to an offence.”*

Developers who do not comply with the directions of an authorised officer, or who otherwise obstruct, hinder or interfere with their investigative functions will be liable to fines of up to \$110,000 in the case of a body corporate, or \$22,000 in any other case.

Undertakings, Stop Work Orders and Rectification Orders

If investigations reveal issues or defects with building work, the Secretary may, pursuant to section 28 of the RAB Act, accept an undertaking from the developer that works will be remedied. Alternatively, a stop work order can be issued if there is reasonable belief that the building work is likely to result in significant harm or loss to the occupiers or future occupiers of the building. Developers have 30 days to appeal a stop work order to the Land and Environment Court.

Finally, section 33 of the RAB Act empowers the Secretary to issue a *“building work rectification order”* if there is reasonable belief that the building works would result in *“serious defects”*. A rectification order will require a developer to carry out building work to meet a specific standard and may indicate a specific manner by which the standard could be met. Developers should be wary that if a rectification order is issued, the Secretary may issue a *“compliance cost notice”* which requires the developer to pay all or reasonable costs and expenses incurred as a result of monitoring, and resolving the rectification order.

Non-compliance with either a stop work order or a rectification order will expose developers to penalties of up to \$110,000 plus \$11,000 each day the offence continues. If the developer is a body corporate these penalties may be up to \$330,000 plus \$33,000 for each additional day.

The powers given to the Secretary to issue these orders will reduce the backlog of cases currently before the courts, which in turn will mean, owners and owners corporations will no longer have to incur the expense of having to commence litigation to enforce their statutory warranties for defect rectification.

Concluding Remarks

No system is perfect, but the current landscape within which building participants operate is far from perfect and has consistently left owners of residential apartments in high-rise buildings with no redress when serious and major defects manifest. The RAB Act, in culmination with further reforms to be introduced shortly by the NSW Building Commissioner, are a decisive and long needed first step in reforming this broken system in the residential building and construction industry and reinstating consumer confidence back into the residential building sector.

Developers and builders should prepare themselves for a major shift in the way they carry out and complete their projects as government regulation and oversight becoming will become integral component of every project. We have no doubt that these new reforms will have the desired outcome as serious defects will become apparent during construction as opposed to years after the event when those defects have significantly worsened, builders are nowhere to be found or the only resort for owners is to commence protracted and expensive litigation.

Construction Legal has been an active voice in building reform initiatives. If you are interested in further thoughts pieces, please click [here](#).

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