



Shaping the future of insurance law

New RAB Act gives regulator real power to tackle construction defects

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*The NSW Government has introduced sweeping legislative changes that are intended to regain public confidence in the construction industry. This is **Part 3** of Wotton + Kearney's coverage of these landmark legislative changes and the implications for insurers.*

Click here to revisit [Part 1](#) and [Part 2](#).

AT A GLANCE

- The *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020 (NSW)* (RAB Act) comes into force from 1 September 2020.
- Importantly, the Act applies retrospectively to residential apartment buildings completed in the last decade, potentially providing a means of redress for the owners of defective buildings, including those with combustible cladding.
- The RAB Act gives the Building Commissioner and authorised officers significant new powers designed to prevent developers from constructing defective buildings.
- One of the key powers is the ability to issue prohibition orders that stop occupation certificates being issued and strata plans being registered.
- Another key change is that developers need to provide six months' advance notice of expected completion dates.
- These changes are likely to lead to defective building work disputes occurring during the construction phase, rather than after issue of occupation certificates.

BACKGROUND

The *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (NSW) (RAB Act) comes into force from 1 September 2020 and applies retrospectively to residential apartment buildings completed within the previous 10 years. According to the Building Commissioner, the RAB Act is targeted at the small percentage of developers in the industry doing the 'wrong thing'.

The RAB Act allows the NSW Government to monitor – and step in to manage – residential developments during construction. It does this by giving the Secretary (via the Building Commissioner) power to investigate defects in residential apartments and issue:

- prohibition orders to block the issue of an occupation certificate (or strata plan);
- stop work orders; and
- building work rectification orders (with the ability to recover costs associated with those orders).

To add teeth to the Building Commissioners' enforcement powers, the RAB Act provides for:

- authorised officers to be granted broad investigative powers;
- developers to provide advance notice of expected completion dates;
- creation of offences for non-compliance with orders issued under the RAB Act; and
- developers' directors, and others with management control, being potentially exposed to personal liability for corporate contraventions of the RAB Act.

WHAT DOES THE RAB ACT APPLY TO?

Under the Act, there is a wide definition of 'developer', which includes any person who arranges for, facilitates or otherwise causes (directly or indirectly) residential apartment building work to be carried out. It includes owners of the land on which the building work takes place and principal contractors.

Beyond residential apartment buildings (i.e. a 'class 2' building within the meaning of the Building Code of Australia (BCA)), the regime will also capture mixed-use commercial developments that include a residential component.

WHAT DOES THE RAB ACT DO?

The RAB Act complements the Design and Building Practitioners Act 2020 (NSW) (DBP Act) as part of the government's legislative reform regime.

While the DBP Act provides a new registration, documentation and consumer protection regime, the RAB Act is designed to prevent developers from constructing defective buildings in the first place. As its title suggests, the RAB Act arms the Building Commissioner (by delegation from the Secretary) with robust and focused enforcement powers.

The RAB Act provides the framework for the Building Commissioner (and their authorised officers) to monitor construction of residential apartment buildings by giving them broad powers to detect, and order rectification of, serious building defects. A 'serious defect' will be found to exist if the building work does not comply with the BCA, the relevant Australian Standards or the approved plans.

Notification Requirement

The first step in the process is the requirement for 'developers' to notify the Commissioner at least six months before applying for an occupation certificate (OC).



The RAB Act is designed to prevent developers from constructing defective buildings in the first place.

This notice is called an ‘expected completion notice’ and will act as the trigger point for the Commissioner to inspect the building before the OC is issued. The Commissioner has also identified a number of developers that have ‘a history of completing substandard developments’.

Wide investigative powers

Authorised officers are permitted to enter premises without a search warrant to inspect and detect serious building defects. The RAB Act empowers authorised officers to:

- examine and inspect anything;
- take and remove samples;
- require developers to notify them when certain building work is to be undertaken (i.e. so that work can be supervised);
- direct a person to produce records for inspection; and
- perform destructive testing, including demolishing part of the building work.

Prohibition orders

The Building Commissioner may prohibit an OC being issued, or a strata scheme being registered, if (among other things):

- the expected completion notice was given to the Building Commissioner less than six months before the application for the OC; and/or
- the Commissioner is satisfied a ‘serious defect’ exists in the building.

This significant power is aimed at placing the Building Commissioner in between the developer and the point of sale. The Commissioner has described the power as a “game-changer” noting *“there’s nothing more focusing in a developer’s mind than getting between them and gold”*.

The changes will test the traditional business model of developers that rely on cash flow from pre-sales. From September this year, settlements will be held up if an order preventing the OC is made - buyers cannot be forced to settle off the plan sales without an OC.

Stop work orders

The Building Commissioner may order the developer to stop work if the building work is, or is likely to be, carried out in a way that could result in harm or loss to occupiers or property damage. This power enables the Building Commissioner to manage immediate non-compliances so that buildings are safe for occupation.

Rectification orders

If the Building Commissioner has a reasonable belief that building work is being carried out in a way that could result in a ‘serious defect’, a building work rectification order can be issued to the developer. A rectification order may:

- specify the standard that the building work must meet;
- indicate the nature of the work that, if carried out, would satisfy the standard required;
- require certain building work to be completed; and
- require the developer to refrain from certain building work to be done.

Importantly, while the rectification order is in place, the Building Commissioner can prohibit an OC being issued or a strata plan being registered until the defect is rectified. It is expected that, where possible, developers and builders will look to push liability for completion of specified rectification works down the contractual chain. Under the traditional developer business model, without the cash flow from pre-sales, developers may struggle to fund the rectification works.

If the developer does not comply with the rectification order, it will not be able to obtain an OC. Alternatively, if a rectification order is not complied with, the Building Commissioner can complete the work at its own expense. Any expenses incurred by the Commissioner can be recovered from the developer as a debt.

Developers may appeal rectification and or prohibition orders in the Land and Environment Court within 30 days.

THE CLADDING ISSUE

The retrospective power to issue rectification orders will likely mean that the Building Commissioner can avoid the issues faced by the Victorian Building Authority when it tried to force the builder to replace non-compliance cladding on Melbourne's Lacrosse apartment block.

The NSW Government has not followed the Victorian Government in funding rectification work required to replace non-compliant cladding. Notably, owners of 130 buildings in NSW have recently been issued fire safety notices to replace flammable cladding. So, the retrospective application of the RAB Act (and DBP Act) could provide a means of redress for the owners of those properties faced with significant expenses to replace combustible cladding.

A TARGETED TRANSITION

A developer who expects to apply for an OC during the transitional cut-off regime for the period 1 September 2020 to 1 March 2021 must give notice during the 14 days following 1 September 2020. If the developer fails to give notice within 14 days from 1 September 2020, the Building Commissioner may prohibit an OC being issued and the strata plan being registered.

It is clear from media reports that the Building Commissioner has already identified a number of buildings that will come under scrutiny from 1 September 2020. The extent to which the Building Commissioner deploys his new powers after 1 September remains to be seen.

The Building Commissioner will be able to identify additional developments to focus on through a rating tool that assesses the track record of developers, builders and certifiers on matters such as historical building failures, finance information, complaints and insurance claims. The rating tool is a significant development – we will continue to cover this in our subsequent commentaries, including the extent that it may assist underwriters in assessing industry risk profiles.

Some commentators have questioned whether the Building Commissioner will be adequately resourced to make the most of the new powers under the RAB Act given the many thousands of residential apartments are built in NSW each year. However, it was reported earlier this year that the Building Commissioner intends to recruit up to 60 building project auditors to help weed out bad practice in the high rise residential construction sector.

IMPLICATIONS FOR INSURERS

The broad powers provided to the Building Commissioner by the RAB Act, including rectification orders, will focus attention on the construction phase – this is the primary purpose of the new laws – to stop defective buildings being built in the first place. This increased focus on the construction phase will likely lead to disputes between the parties contracted to perform building work, who in turn may look to their insurers. For Insurers, the RAB Act raises a range of policy questions that will need to be addressed, including:

- Will a rectification orders (including retrospective rectification orders) trigger the insuring clause or mitigation costs cover in a design and construct policy?
- Will an investigation by the Building Commissioner trigger investigation costs cover in a design and construct policy?
- If the Building Commissioner completes the rectification work, will the costs incurred be recoverable by insureds as a 'claim'?

It will take time for the construction and insurance industries to address the questions raised by this new regime - many of issues raised will be tested in court.

Commentary to come

In the meantime, Wotton + Kearney's construction PI team will continue to cover these developments and answer any of your questions (please feel free to contact us). Our fourth article in this series will look in greater detail at the new statutory duty of care.

NEED TO KNOW MORE?

For more information please contact us.



Andrew Moore

Partner, Sydney

T: +61 2 8273 9943

E: andrew.moore@wottonkearney.com.au



Robert Finnigan

Partner, Sydney

T: +61 2 8273 9850

E: robert.finnigan@wottonkearney.com.au



Luke Vincent

Senior Associate, Sydney

T: +61 2 8273 9987

E: luke.vincent@wottonkearney.com.au

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