



Précis Paper

NSW Government sets residential developers in its sights

Abstract – A multi-faceted and balanced discussion about the spectrum of new legal reforms faced by the building/construction industry, with a special focus on the industry viewpoint, rating system, complaint system and professional associations.

Discussion Includes:

- Unpacking the reforms
- The industry viewpoint
- The rating system
- Professional associations
- The complaint system
- Assessing issues

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1. In this edition of BenchTV, David Chandler (NSW Building Commissioner, NSW Government, Sydney), Christopher Kerin (Principal, Kerin Benson Lawyers, Sydney) and Ross Taylor (Managing Director, Ross Taylor & Associates, Sydney) comprehensively analyse the contemporary reforms to the building/construction industry and its subsequent implications on the rating system, complaint system and the landscape of professional associations.

Unpacking the reforms

2. In the past, many owners of buildings had difficulties in coordinating with lawyers and experts to lodge claims and seek justice, against developers/builders. There are a number of new provisions to counter this.
3. There have been many pieces of legislation over the years that have been declared as the ultimate cure, but it has not really worked. The industry accepted this reality in 2018.
4. Customers became so disillusioned to the point that they were not seeing any kind of trustworthiness in builders.
5. The NSW government elected to pick up on a piece of legislation that was themed out of the 'Building strong foundations' discussion paper, which was widely circulated.
6. This gave rise to the *Design and Building Practitioners Act* (DPB). It will come into effect on the 1st of July.
7. The government brought in the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act* (RAB). It went through the parliament at the same time as the DPB - 8th of June. The RAB is a companion to the DPB.
8. The Minister in his Second Reading Speech made it clear that the government intent was to stand this legislation up around Class 2 buildings, because those were the most problematic.
9. It could roll out to other asset classes in the future.
10. The main focus is on high-rise buildings with repetitive defects.
11. When the Commissioner stepped in, the legislation was approximately 80% complete.
12. The DPB can change the way (via two routes) in which the industry works. It requires accredited designers to declare their designs for the key elements of a building - structure, water proofing, fire systems and enclosures.
13. Contractors must declare that the building was built in accordance with the designer's rules. This aims to prevent contractors from resorting to short cuts.
14. Page 4 of the slides displays a very developer-facing piece.

15. Ultimately, developers must be held accountable, because they benefit from the sale price. Within this framework, developers are in the driving seat.
16. The powers under RAB authorise the Commissioner to call in documents and issue orders concerning buildings in the midst of being constructed. Parties that choose to ignore these orders, will face consequences.
17. The DPB requires designers to be registered. A rebuild of the government-licensing platform is required in this regard.
18. The DPB mostly applies to buildings that are trying to achieve a construction certificate from the 1st of July.
19. The DWG drawing specifies a portion of real estate that the regulator will use to do its job in the future.
20. A declaring designer will need to go out to the licensing platform and must get reassurance about the upload. A one time digital shot will then go into the DWG. This also applies to the constructor.

The industry viewpoint

21. The industry has tried to publicise the new reforms. However, that has proved to be a difficult communication task.
22. If there is a disconnect between the project designs and the way that is being made, an immediate consequence will follow. In most cases, the developer will be forced to go away and rectify their drawings to match what was initially promised.
23. This helps individuals to realise that improper documentation is unacceptable.
24. Waterproofing is the standout fault line in the buildings that being inspected.
25. The data in Page 12 of the slides is based on real life incidents. The repercussions in this context are significant.
26. The mediation for flammable cladding in NSW is about to begin. This will always triumph the cost of waterproofing.
27. Nobody has looked into the implications of the structural issue. This is not far behind waterproofing.
28. Once a defect is identified under RAB, the developer/builder is invited to confirm that they are responsible for it. Usually, this does not attract any kind of pushback.
29. The scale and frequency of legacy projects is distorted by the washing machine issue - when a problem seems bigger than it actually is. Ultimately, the aim to fix the serious defects in the common property.
30. Quite often, litigation is driven by process. The outcome becomes secondary. Usually, the judge will award money and that is the end of it.
31. Rectification orders act as an important tool.
32. The Commissioner is about to enter into some enforceable undertakings to set up the Governor's arrangements for performing that work.

33. Once such orders are issued, it has to be published on the Fair Trading website. This provides another layer of consumer care.
34. When a builder seeks a push back, the Land and Environment Court gets involved; it can be expensive and it takes time.
35. The Commissioner has a set of soft powers. For example, he can call the parties to conciliation.
36. The ones that will go on the register will be those that are imposed by going the hard way.
37. At the moment, there is a template form being prepared in relation to enforceable undertakings. This does not need to appear on the register.
38. Enforceable undertakings, which are of a voluntary nature, are the ideal outcome of conciliation.
39. The first rectification order and the first prohibition order were issued in a project that took place at Caringbah in October 2020.
40. The certifier simply had to observe the final parts of the agreement to make sure that aspect was performed before the occupation certificate (OC) was issued.
41. On the 1st of September, developers had to notify the regulator that they were within the 6-month period in terms of achieving an OC. There were 470 notices of intended OCs within the first fortnight.
42. 220 were expected within the first 2 months.
43. The Commissioner does not wish to intervene, lightly. He wants to make sure that people see that the regulator's actions and decisions measured.
44. The April site selections were recently finished. From the 1st of March, we are now looking into those that have got 6 months to go. This is the prime mid-year goal.
45. The whole idea of the OC order is to not act as a blocker, in any sense. 90% of developers do not engage in a push back.
46. When a developer accepts their mistake and decides to rectify it, a BWRO is issued. Sometimes, a prohibition order is also issued.
47. A monitoring process comes into effect, from this point onwards. When developers are in the midst of rectification, they are checked on every month. Eventually, a final assessment occurs.
48. The first co-order projects picked themselves. These projects were from co-order developers who left some poor examples behind.
49. A builder who has a high number of SafeWork rectification orders during the construction process is mostly likely to be someone who is not overly enthusiastic about compliance or construction.
50. In December, the Commissioner looked into a list of potential candidates. When the top 20 NSW builders were lined up, it became clear that there were 5 common certifiers. This quickly evolves into bias if it is the only method of selection.

51. Other metrics needed to be created to cater for geography and scale. The regulator's existing data analytics are very powerful.

The rating system

52. The rating system for builders is a work in progress. The Commissioner sought a market response to ratings, but only 1 response was received. That tender never went ahead.
53. An extraordinary ratings system called Single Viewer Building Tool, was internally built. It shows links between data sets that have never been realised before.
54. At the moment, it is exclusive to the regulator but the forefront aim is to create a market facing ratings process. This involves a thorough analysis of trustworthy builder characteristics.
55. The data analytics communicate that all projects are Special Purpose Vehicles (SPV). This is a legitimate form of procurement.
56. The governance of each SPV is a major challenge.
57. When you look at the good players who use SPVs like Mirvac, they tend to have corporate governance in addition to independent governance.
58. The less trustworthy developers tend to expose situations where there is 1 director for about 80 SPVs and no governance.
59. In the future, there has to be methods beyond holding a director liable. That is a front-end approach.

Professional associations

60. As a theme, accountability is a core piece of the challenge when it comes to changing the culture of the industry. It has to start with professional associations such as Engineers Australia. Currently, the Commissioner is putting pressure to make sure that such associations are accredited under the Professional Associations Scheme.
61. Professional associations are a voluntary membership club.
62. The Australian Institute of Building Surveyors is an exemplar in the eyes of the Professional Standards Council, when it comes to ratings.
63. Professional indemnity insurance is a major industry problem. Achieving CAP PI will significantly change the landscape.
64. The goal is to mentor members, in addition to showing them the benefits of achieving a professional standards rating.
65. At the moment, members are paying unreasonably high prices for insurance policies. Simple legislation around PI is not sufficient.
66. For every dollar of premium in NSW, the cost of the insurance industry is about a \$1.23.
67. There is about 70 cents in the dollar gap between the viability of the PI that is available in the market place.

68. Immediately, some relief is provided to that spectrum of risk if more people join the CAP PI framework. This is not a cheap exercise.
69. It needs to be done in conjunction with a regulator. This demands the enactment of complimentary legislation, which specifies rules about easement.
70. The DPB specifies a couple of options for being in the industry. Individuals who are not a part of the Professional Standards Scheme, will have to acquire a high number of CPD points.
71. Engineers were the most trusted class of individuals in the construction process. However, the Commissioner now sees them as the most compromised. They accept compromised engagements and execute shorthand designs.
72. They are prepared to accept a compromised scope of project delivery observations.
73. As a result, engineers do not have the capacity to entertain multi-discipline design integration. There have been cases of incomplete work as a consequence.
74. The first thing to include in a drawing is the down pipe. 80-90% of the problems in the building/construction industry are design-based.
75. This picture shows that there has been some integration between the structural engineer and the designer.
76. One of prospective solutions is Building Information Modelling (BIM).
77. However, there are IP issues surrounding who owns the bits that are installed. BIM has not been the panacea within this context.
78. This picture displays a plant box in the middle of a podium. Membrane has been laid to waterproof the podium.
79. There is a large joint going underneath the structure. It will have a watering system on it. It was closely related to the water in the basement, from before.
80. The opening up/shrinkage was measured at 18mm over the next decade. The thickness of the membrane was measured at 0.6mm.
81. The joint was nearly 100m in length. The rectification costs for the builder was close to \$100 000.
82. In response, the builder instituted new practices; a positive outcome. The cost of building it right is usually cheaper than a complete re-build.
83. There is a flat line on the concrete slab. The engineer did not have the money to meet with the architect to discuss how the falls were going to be achieved.
84. Traditionally, architects took responsibility for the top of the slab and engineers took responsibility for the profiling of the bottom part of the slab. Ideally, engineers should take responsibility over both parts.
85. There are consequences for good and bad choices.
86. Thus far, 36 audits have commenced. Pre-OC audits have also been carried out. Currently, legacy buildings are being audited.
87. The way, in which the building regulator office works, is being drastically redesigned. The method of lodging building defects is now split.

The complaint system

- 88. Complaints will not be taken from a lot owner, especially if he/she is aggrieved of their executive committee.
- 89. The vast majority of buildings are common property. The area that goes up until the surface of the tiles is common property.
- 90. A portal has been established to collect serious complaints concerning common property and the other complaints (usually consumer-centred) will go off to another part of Fair Trading. There tends to be some overlap between both categories. This makes litigation costly.
- 91. The Owners' Corporation can now advise Fair Trading about serious defects in the common property.
- 92. The critical rule here is that the person must be an authorised representative of the owners' corporation.

Assessing issues

- 93. The role of the Commissioner is vital when transforming the regulator. 80% of the regulator resources are from the back of the bus.
- 94. By the end of 2022, 80% of the regulator's effort will be from the front of the bus.
- 95. The Commissioner is attempting to marry up cause (poor governance of the SPV and the relationship between the developer and the builder) and effect.
- 96. You can pick the DNA of a building by a walk around the basement.
- 97. 60-70% of the time, issues are directly spotted.
- 98. A walk from the basement to the roof via the fire stairs is even more useful.
- 99. The fire stairs are the second indicator of DNA.
- 100. Sometimes, unit bathrooms are also inspected.
- 101. Some tier 1 builders need to improve the quality of their services. Approximately, 1000 bathrooms have been stripped, to date.
- 102. This picture is an example of design leading to workmanship defect because the tile alignments were not fully considered. The tiler then tried to build it in an unorthodox way. This caused a cascade of defect.
- 103. If the fault line starts in a place where there is a lack of falls, the membrane is automatically compromised. The vertical and horizontal tiles are also impacted.
- 104. Often these issues indicate that the builder has taken short cuts to save money. When the regulator intervenes, consumers will usually save a massive amount of money.
- 105. The awareness of product compliance is shockingly low amongst developers and builders. The Commissioner recalls a personal experience in which he called the authentication documents for the job, but received certificates from an overseas

manufacturer, that only had in-house compliance information. It had nothing to do with Australian standards. A CSIRO document was provided but it was from 1980.

106. Currency is absolutely vital because materials, assembly and applications are constantly changing. Regulators will ignore certificates that are over 5 years old.
107. Supply is also an issue. When a specific product is used for a specific job, a top-down influence becomes apparent.
108. Some developers have realised that there is a real correlation between being sloppy at the front end and what its costs at the back end.
109. One of the leading builders in Australia was in a situation 5 years ago, whereby the carry cost for provisioning on the balance sheet for building defects was about \$5000 per apartment. This builder builds around 1000 apartments per year. Resultantly, it shows on the balance sheet.
110. The national manager of that product was told by the Board to manage the defect costs to point that it can be removed from the balance sheet, in due course. The cost has been brought down to \$200 this year.
111. When such decisions are made, the company capital becomes more free and efficient.
112. Other industries are dealing with similar problems in their own ways. From a strictly legal perspective, builders who provide the wrong answer could incur an imprisonment term.
113. There is a lot of room for improvement in the occupational health and safety space. This has much to do with the induction process.
114. There is a systemic failure of too much responsibility being invested in the safety manager.
115. There was a huge change that occurred in the building/construction industry, 18 years ago. It was termed as accountability for safety - every individual had a share in the accountability. We must note that this has not been fully achieved.
116. The extent of responsibility possessed by management continues to be in a grey area. It is not reasonable to expect micro-management from managing directors but that effect should be replicated in some form. It is a fundamental need.
117. Regardless of industry (e.g. buildings, pharmaceuticals), exemplar companies have a process for innovation. Acting on internal and external feedback is a large part of it.

BIOGRAPHY

David Chandler

NSW Building Commissioner, NSW Government, Sydney

David Chandler OAM was appointed NSW Building Commissioner in 2019 after an impressive forty year career in the Australian construction industry. Highlights of Mr Chandler's career include project management of some of Australia's most iconic developments such as Sydney's Quay Apartments. As Adjunct Professor in the School of Computing, Engineering and Mathematics at Western Sydney University, he founded the Centre for Smart Modern Construction. Mr Chandler was also the Deputy Chair of the BER Implementation review and is a regular industry commentator and presenter. He was awarded an Order of Australia Medal in 1989 for his services to the construction industry.

Christopher Kerin

Principal, Kerin Benson Lawyers, Sydney

Mr Kerin worked for many years in leading commercial construction law practices acting for government, developers and contractors in the building, transport infrastructure and resources sectors. He has also developed a specialization in ACT strata law, acting for ACT owners corporations in a range of matters. He has provided training to most ACT strata managers and is the author of the Kerin Benson Lawyers Guide to ACT Strata Law which is intended to become the standard reference for strata law in the ACT.

Ross Taylor

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Mr Taylor is a specialized waterproofing consultant with over 4 decades of experience. He is also a Lecturer at UTS, where he teaches building technology and design team management.

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