

# RESIDENTIAL APARTMENT BUILDINGS (COMPLIANCE AND ENFORCEMENT POWERS) ACT 2020 (NSW)

18 September 2020

## RESPONDING TO PUBLIC CONCERN

The Residential Apartment Buildings (Compliance and Enforcement) Act 2020 (NSW) (the RAB Act) is the New South Wales Government's response to growing consumer and public concern about the quality of residential apartment construction in NSW.

The RAB Act affects Developers who undertake Building Work, terms which are defined at section 4 and section 5 respectively. The RAB Act only applies to Residential Apartment Building Work not yet completed, or completed within the last ten years (section 6).

## NOTIFICATION REQUIREMENTS

Part 2 of the RAB Act prescribes a number of notification requirements in relation to Residential Apartment Building Work.

Section 7 precludes a Developer from making an application for an occupation certificate without first notifying the Secretary of its intention to do so between 6-12 months before it ultimately makes the application. The notification is called an Expected Completion Notice. The Expected Completion Notice must set out the date that the Developer expects to make the application for the occupation certificate for the building or part of the building.

Section 8 permits the developer to make an Expected Completion Amendment Notice if it becomes aware that circumstances have changed so that the Developer expects an application for the occupation certificate to be made on a different date than the expected date specified in the expected completion notice.

Section 9 enables the Secretary to make an order prohibiting the issue of an occupation certificate (called a Prohibition Order) in relation to a Residential Apartment Building (and the registration of a strata plan) if;

- the Expected Completion Notice (or Expected Completion Amendment Notice) was not given or was given less than 6 months before the application for an occupation certificate was made; or
- the Secretary is satisfied that a Serious Defect in the building exists. If the Secretary decides to make a prohibition order then it must give notice to the persons listed in section 9(3)(a)-(f).

If a prohibition order is in place against the Developer of a Residential Apartment Building, the Developer may appeal to the Land and Environment Court within 30 days of the notice of the order being given (section 10).



### PG. 1

When to notify the Secretary of an your intention to apply for an occupation certificate

### PG. 2

Investigative powers of the Building Commissioner or other Authorised Officers

### PG. 3

Building Commissioner Powers, Stop Work Orders and Building Rectification Orders



## INVESTIGATION CAPACITY

Part 3 of the RAB Act gives Authorised Officers the ability to exercise certain functions. An Authorised Officer includes the Building Commissioner and any other person appointed by the Secretary under Division 2 of Part 3 of the RAB Act.

Section 17 enables the Authorised Officer, by written notice, to direct a person to give them or another Authorised Officer any information or records they may require for an Authorised Purpose. An Authorised Purpose may include the following:

- investigating, monitoring and enforcing compliance with the RAB Act, the requirements of the BCA, relevant Australian standards and relevant approved plans;
- investigating whether buildings have Serious Defects;
- obtaining information or records for purposes connected with the administration of the RAB Act; and
- enforcing, administering or executing the RAB Act.

Importantly, the notice must specify the manner in which information or records are to be given as well as a reasonable time by which they are to be given (section 17(2)).

An Authorised Officer may require answers from a person whom the Authorised Officer suspects on reasonable grounds of having specific knowledge of information reasonably required for an authorized purpose (section 18(1)).

The Authorised Officer has the power to record questions and answers as long as they inform the person who is being questioned that the record is being made (section 19(1)).

Section 20 enables the Authorised Officer to enter any premises (without a search warrant) at a reasonable hour in the daytime or at an hour during which business is in progress or is usually carried on at the premises. However, where such premises are used for residential purposes only, the Authorised Officer may not enter without the permission of the occupier or the authority of a search warrant (section 21(1)).

Once the Authorised Officer has lawfully entered a premises, their wide-ranging powers enable them to do anything that is in their opinion necessary to be done for an Authorised Purpose. A non-exhaustive list of things the Authorised Officer can do is contained in section 24(2). Generally speaking, it includes inspection, seizure, copying and taking records. It also includes the ability to direct a Developer to carry out Building Work, to test materials and to open up, cut open or demolish Building Work (section 24).

## POWERS OF THE BUILDING COMMISSIONER

For ease of reference the following table identifies the powers of the Building Commissioner conferred by the RAB Act:

Building Commissioner Powers	Relevant Section
Power to require information and records	Section 17
Power to require answers	Section 18
Power to record evidence	Section 19
Power to enter construction sites	Section 20
Power to enter residential premises (only with permission or warrant)	Section 21
Powers that may be exercised on premises including; examine anything, take or remove samples of anything, many any examinations, inquiries or measurements, take photographs or videos, require production of records for inspection, copy any records, seize, remove or demolish building work that may offend the Act or regulations or in connection with a serious defect	Section 24
Failure to comply with a direction without reasonable excuse attracts a maximum penalty of 1,000 penalty units (corporate) or 200 penalty units (in any other case)	Section 27

## REMEDIAL ACTION

A feature of the RAB Act is the power conferred onto the Secretary to issue Stop Work Orders (section 29). The Secretary must be of the opinion that the Building Work is, or is likely to be, carried out in a manner that could result in significant harm or loss to the public, occupiers or potential occupiers of the building (section 29(1)). The Stop Work Order remains in force until the order is either revoked, the terms of the order end or the maximum period of 12 months from the date of effect elapses (section 29(5)).

## RECTIFICATION OF SERIOUS DEFECTS

Another hallmark of the RAB Act is the power of the Secretary to issue Building Work Rectification Orders on reasonable belief that the Building Work was or is being carried out in a manner that could result in a serious defect (section 33(1)). The Order would make the developer either carry out or refrain from carrying out Building Work in a manner that would eliminate, minimize or remediate the serious defects or potential serious defect identified (section 33(2)). The Order must be made by written notice given to the developer and remains in force until it is revoked by the Secretary or the term of the order ends (section 33(6)).

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For further information, please contact EA Legal at (02) 8212 8533 or [admin@ealegal.com.au](mailto:admin@ealegal.com.au) for a complimentary consultation.