

Design and Building Practitioners Act 2020 & related regulation

For Owners Corporation Network, 23 July 2024

Deborah Lockart, Manager Risk & Compliance,
RHM Consultants

Helen Kowal, Partner, Swaab



Overview

- Introductions
- DBP – what and why?
- Exempt development and waterproofing
- Planning legislation
- Approvals pathway assessments
- Building Bill
- Steps to take





Disclaimers

General information ONLY

The party for whom the remedial building works are being performed (such as an Owners Corporation) is ultimately responsible for assessing the nature of the remedial building work to be carried out, how the DBP and Codes SEPP applies to that work and the necessary compliance obligations.

If it is not clear how the DBP or Codes SEPP applies, a suitably qualified consultant should be engaged.

Determinations must be project specific, as there are many factors to consider.

The Remedial/ Strata Industry and the DBP

What should be clear?

- The DBP applies to remedial building works in class 2 buildings *from 1 July 2025 applies to class 3 and 9(c)
- Some works are excluded e.g. exempt development but others are not e.g. exempt development including for example, waterproofing, cladding **
- Regulatory approval (i.e. Development Approval or Complying Development Certificate) needs to be considered for remedial works
- Investigations to determine cause are recommended
- Registered practitioners should be engaged to consider and perform remedial works
- Regulated designs are required for remedial works in Class 2 buildings not excluded under the DBP

** Always check specific application of DBP to your site

Your questions?

- What remedial work comes under the DBP?
- What work is considered exempt development?
- When do I need to engage a Design Practitioner?
- What type of registration does the Design Practitioner need?
- What is emergency remedial building work?
- What is required for a regulated design?
- Do I have access to the planning portal?
- How do I find a Class 2 practitioner?

Why the reform – from a remedial perspective?

Waterproofing (42%) and fire safety systems (24%) since studies in 2021 are most prevalent defects *


“In NSW, the cost of defective building work is estimated to cost up to \$700 million per annum. Defects can be attributable to defective design, defective or fault workmanship, defective materials, or non-compliance with the Building Code of Australia...Costs associated with rework of the surveyed projects averaged 39 per cent of the contract willingness to invest in NSW Housing...”

[Courtesy: Statement of Public Interest: Building Legislation Amendment Bill 2023]

“...Unfortunately, as witnessed in many jurisdictions, ignoring obligations, particularly involving building maintenance, can endanger the safety of residents and the public. There are now too many examples worldwide where tragedies have resulted due to a lack of building care. Buildings deteriorate over time, and it is essential that building strata legislation are arguably superficial compared to other compliance requirements that are unlikely to result in physical harm... More than half of the strata buildings in Australia are over 20 years old. Therefore, it is critical that Australian state and territory governments consider the introduction of mandatory inspection programs for ageing strata buildings...”

[Courtesy: Strata Knowledge: Mandatory Inspection Regulations for Ageing Buildings: An Analysis of International Trends: Author: Dr Nicole Johnston]

53% of buildings with serious defects (up from 39% in 2021) *



Owners who are resolving defects are mostly doing so by agreement with the builder or developer and almost half are being resolved within one year

48% of strata managers agreed reforms have increased consumer confidence

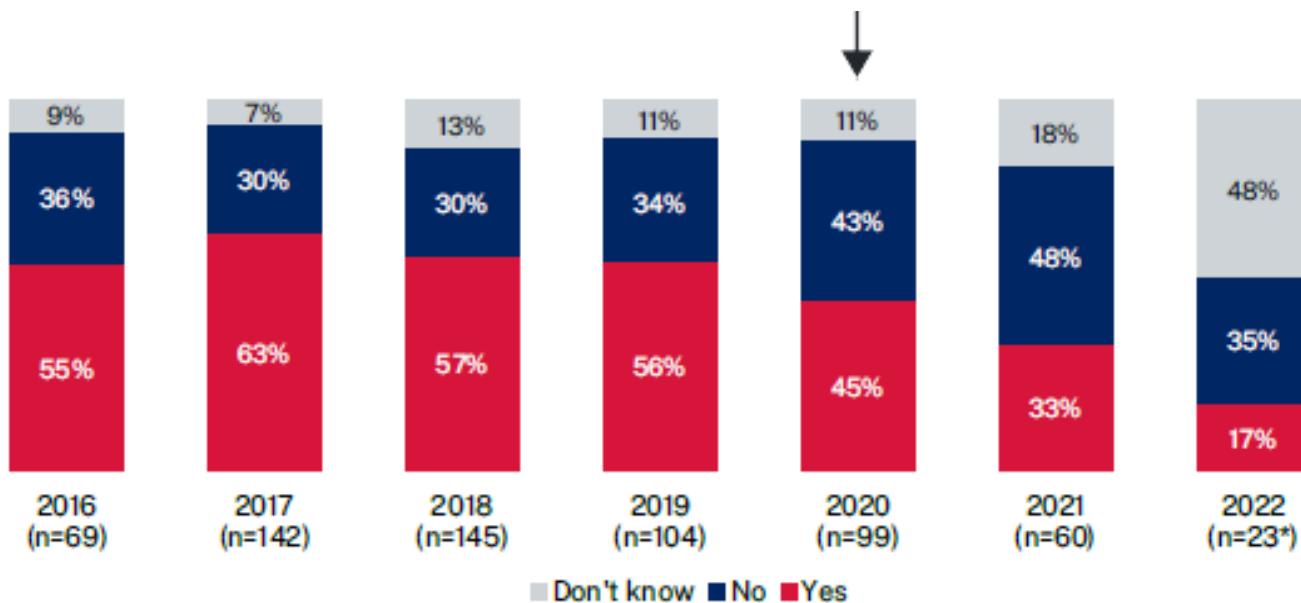
We are seeing results...

34% of buildings with serious defects reported them to the regulator – up 15% in 2021

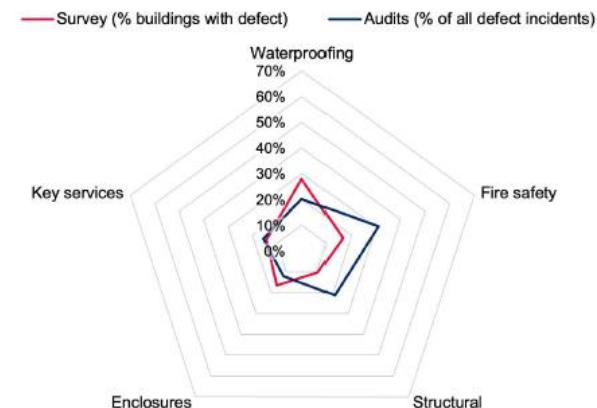
We are seeing a shift in the right direction

Incidence of serious defects (by building registration year) among all buildings²

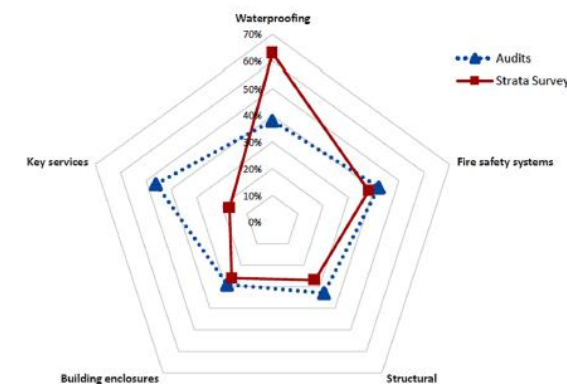
The DPB Act commenced on 10 June 2020
 The RAB Act commenced on 1 September 2020



Comparison of serious defect data between OC audits and survey data (2020-2022)



Comparison from 2021 report



Base: 2021 Survey: Buildings registered 2014-2020 with one or more major defects; OC audits conducted in 2021



TYPICAL REMEDIAL WORKS



Balcony, Terrace, or Rooftop Waterproofing



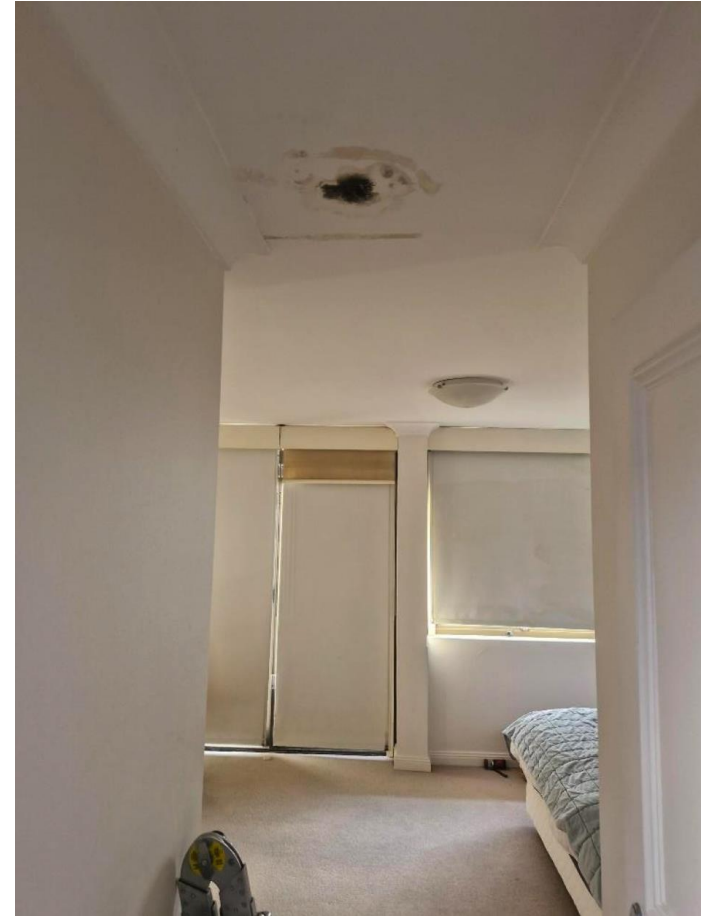
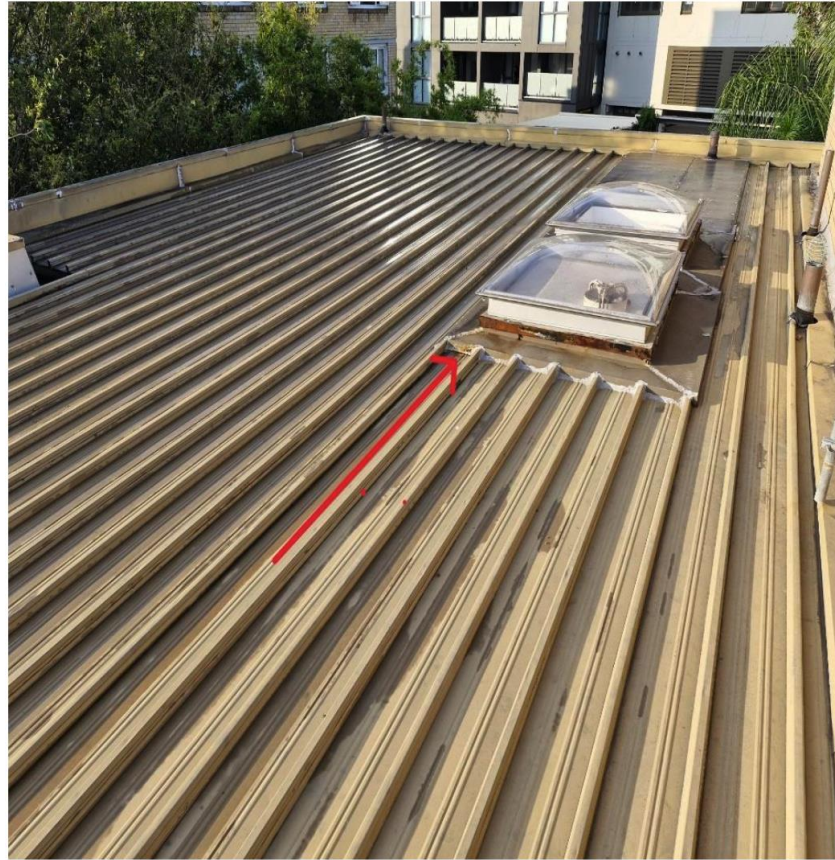
Concrete repairs to a beam, slab or column



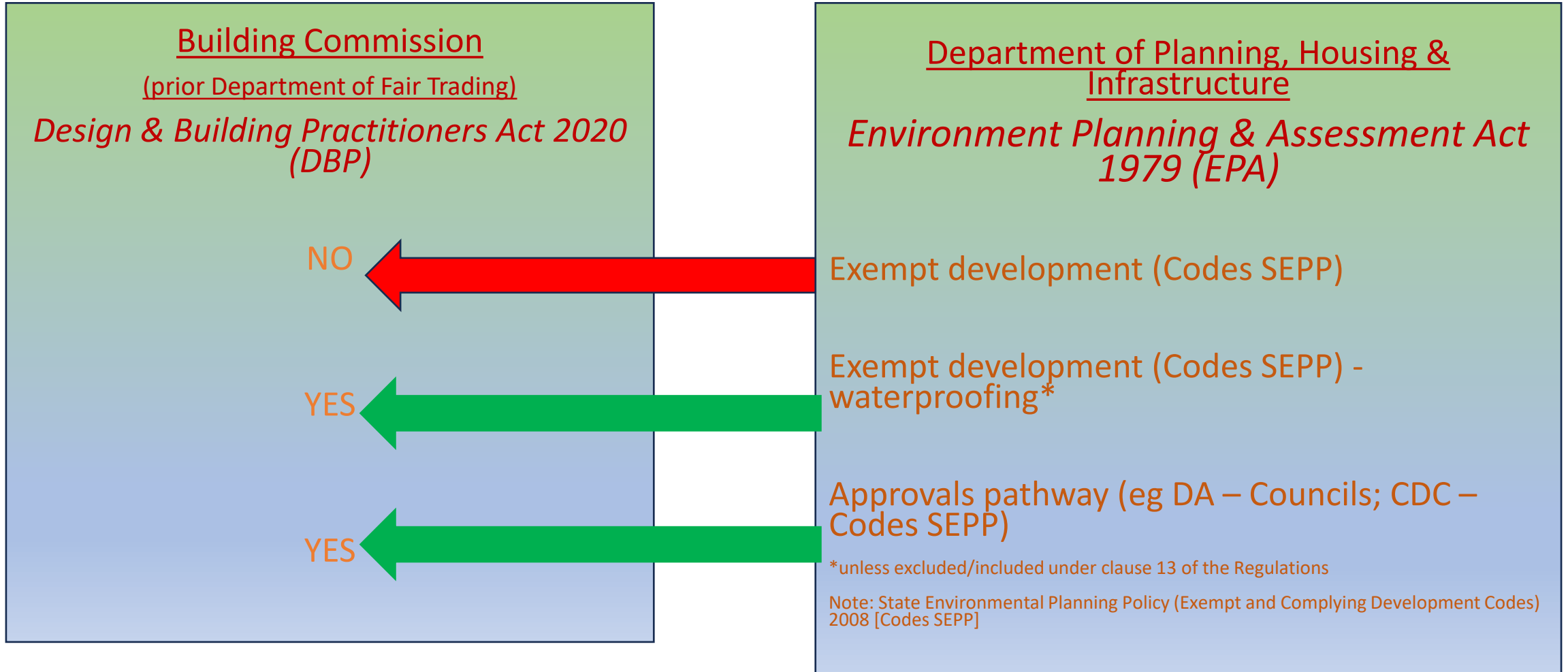


Replace a steel lintel with a reinforced concrete lintel

Maintenance and repairs?



Keeping it simple



Note: other planning considerations may apply

**DBP – What
does it mean?**



Building work: 'work involved in, or coordinating or supervising work involved in, construction, ***making alterations or additions to or repairing, renovating or carrying out the protective treatment of a building....'***



If you are doing *remedial building works* in a class 2 building*, those works are to a *building element* and those works are not excluded under *clause 13 of the Regulations* then you ***MUST COMPLY*** with the DBP

DBP Act, Section 6 Definition

Building Elements

- (1) For the purposes of this Act, *building element* means any of the following—
- (a) the fire safety systems for a building within the meaning of the *Building Code of Australia*,
 - (b) waterproofing,
 - (c) an internal or external load-bearing component of a building that is essential to the stability of the building, or a part of it (including but not limited to in-ground and other foundations and footings, floors, walls, roofs, columns and beams),
 - (d) a component of a building that is part of the building enclosure,
 - (e) those aspects of the mechanical, plumbing and electrical services for a building that are required to achieve compliance with the *Building Code of Australia*,
 - (f) other things prescribed by the regulations for the purposes of this section.
- (2) **The regulations may exclude things from being building elements for the purposes of this Act. SEE DBP REGULATION Clause 13**



DBP Regulation 2021 – exclusions

13 Certain work excluded from being building work

(1) For the purposes of section 4(1) and (2)(b) of the Act, the following work is excluded from being building work—

(a) work that is carried out as exempt development, other than waterproofing,

(b) work that is waterproofing, but only if—

(i) the work is carried out as a result of alterations to a bathroom, kitchen, laundry or toilet, and

(ii) the alterations are carried out as exempt development, and

(iii) the work, including the agreement to carry out the work, relates only to a single dwelling,

(c) work that is carried out in compliance with an order given by a council for the purposes of the Local Government Act 1993, section 124,

Remedial building works IN or OUT



- Works requiring a DA or CDC
- Commenced after 1 July 2021 **
- Waterproofing works (beyond single dwelling alterations to bathroom, kitchen laundry or toilet)
- Cladding works relating to the repair, replacement, rectification or external cladding of a building
- Fire safety system works beyond maintenance and to a load bearing component of the building



- Exempt development works (excluding waterproofing)
- Work carried out in compliance with Council Order (excluding cladding)
- Repair, renovation or protective treatment of a fire safety system for purpose of maintenance (except for load bearing component that is essential to stability of a building)
- Repair, renovation or protective treatment of a building involving mechanical plumbing or electrical services maintenance

Class 2 Buildings & Waterproofing – when the DBP does **NOT** apply?

1

Work involves a single dwelling – **contract splitting is not permitted**

AND



Location of work is a bathroom, kitchen, laundry or toilet

AND



Work is classified as exempt development – **apply DtS (or structurally adequate) & BCA compliant & Fire compliant**

Class 2 buildings

- Class 2 buildings are usually multi-storey, multi-unit apartment buildings where people live above or below each other.
- Class 2 may also be a single storey attached dwelling where there is a common space below such as a carpark or basement.



Class 3

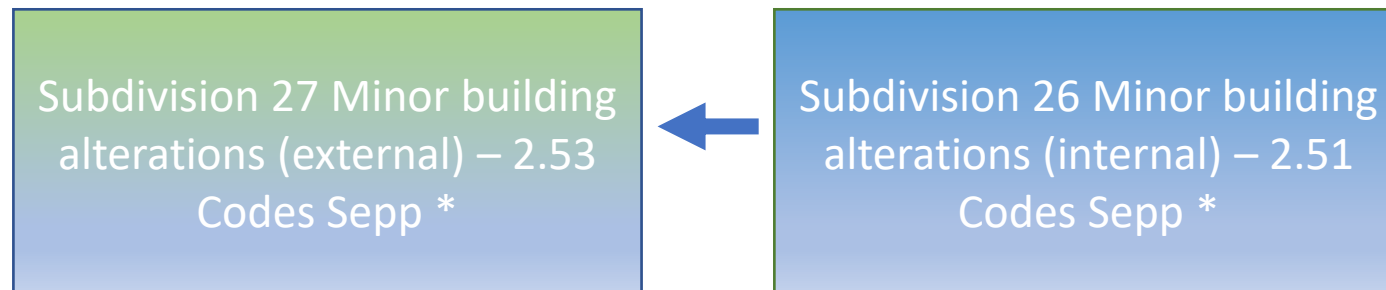
- Boarding houses
- Hostel
- Backpackers accommodation
- Residential part of a hotel, motel, school or detention centre
- Dormitory style accommodation
- Care facilities for the elderly which are not considered class 9

Class 9 (c)

- residential care buildings that may contain residents who have various care level needs (where more than 10% need physical assistance)



Exempt development



*State Environmental Planning Policy (Exempt & Complying Development Codes) 2008

On the flip side....increased protections for consumers under the Part 4 of the DBP

- Liability for negligent persons performing construction work
- Increased obligations for those performing your construction work

Duty of Care extended under Part 4 of the DBP Act for 10 years after completion (6 years from loss becoming apparent)

Authorities emerging:

- 'substantive control'...is the actual control or the ability to exercise control...regardless of whether or not it was used'...[*Pafbun No. 1* [2022] NSWSC 659 & *Pafbun No. 2* [2022] NSWSC 1002]
- To establish a breach of duty occurred and establish that damage was suffered by owner as a result of that breach [*The Owners – Strata Plan No 87060 v Loulach Developments Pty Ltd* (No. 2)]
- A builder cannot apportion the owner's loss with independent contractors i.e. proportionate liability does not apply to claims under the DBP Act [*The Owners – Strata Plan No. 84674 v Pafbun Pty Ltd* [2023] NSWCA 301 Note: Leave granted to appeal on 11 April 2024]

DBP roles and processes

BALCONY WATERPROOFING EXAMPLE EXEMPT DEVELOPMENT

- Design Practitioners
- Building Practitioners
- Professional Engineers
- Regulated Designs
- Design Compliance Declarations
- Variation Declarations
- Building Compliance Declarations
- Planning portal

[REMEDIAL FACT SHEET](#)





Design practitioners & regulated designs

- A Design Practitioner is responsible for making design compliance declarations – they declare that designs comply with the Building Code of Australia and other relevant standards.
- There are 21 categories of Design Practitioners



Which design practitioner do I need for remedial waterproofing ?

INTERNAL and EXTERNAL WATERPROOFING

Example – bathrooms, balconies, flat roof tops, facades

architectural, structural or civil engineering, with relevant experience and expertise

EXTERNAL WATERPROOFING

Example – balconies, flat roof tops, facades

Façade engineers

Professional Engineers

Professional engineers who work on class 2, 3 and 9c buildings (or buildings with a class 2, 3 or 9c part), in any of the following areas, now need to be registered.

Professional engineer registration classes include:

- civil
- electrical
- Fire safety
- geotechnical
- mechanical
- structural

Regulated designs

The background of the slide features a close-up, high-angle view of several rolled-up architectural blueprints. The blueprints are white with black lines and text, showing various technical drawings, including floor plans and sections. The tubes are arranged in a diagonal line across the frame, creating a sense of depth and focus on the design process.

- plans to identify the location of work;
- drawings at an appropriate scale that provide details specific to the remedial building work (e.g. sections, details, specifications),
- documentation to demarcate between the remedial building work and existing building (e.g. specifications, plans, drawings, pictorial representation);
- a schedule of materials or products,
- a specification to describe performance requirements.
- ‘General elevations’ to identify the location of remedial work in the context of the overall building (e.g. the specific balconies or windows to be worked on), and/or
- ‘General sections’ to give context and measurements (unless sufficient details and measurements are provided in detailed construction sections).
- [REMEDIAL FACT SHEET](#)

Building practitioners & building compliance declarations

- Must be registered if working on a Class 2, 3 or 9c building that includes a class 2, 3 or 9c part AND you are required to declare or lodge documents on the NSW Planning Portal.
- The Building Practitioner is someone who agrees to oversee building work.
- Where there is more than one builder, the Building Practitioner is the principal contractor.
- This role is responsible for making building compliance declarations – they declare that building work will be constructed in accordance with compliant designs and in compliance with the Building Code of Australia.



Planning portal

- Building practitioner's responsibilities
- Set up the project on the planning portal
- Lodge their insurances
- Lodge the design compliance declaration AND construction issued regulated design PRIOR TO commencing the work
- Lodge variations throughout the project
- Declare as-builts at the conclusion of the remedial building work



When you do not have to provide a regulated design?

Under s19 of the DBP Act you must not perform any building works for which a regulated design is to be used without a regulated design 'except with a reasonable excuse'

Emergency Remedial
Building Works
FACT SHEET



ARE ANY **HABITABLE** PARTS OF THE BUILDING AFFECTED?



ARE THE ISSUES **SERIOUS**?



DOES THE SERIOUS ISSUE REQUIRE **IMMEDIATE ACTION** TO REMEDY DAMAGE OR PREVENT FURTHER SERIOUS DAMAGE TO THE BUILDING?



DOES THE SERIOUS ISSUE POSE A **RISK TO HEALTH AND SAFETY**?



IS THE REMEDIAL WORK BEING PERFORMED **NECESSARY** TO MITIGATE THESE IMPACTS OR LIKELY IMPACTS?



You still have obligations even if you have a 'reasonable excuse'

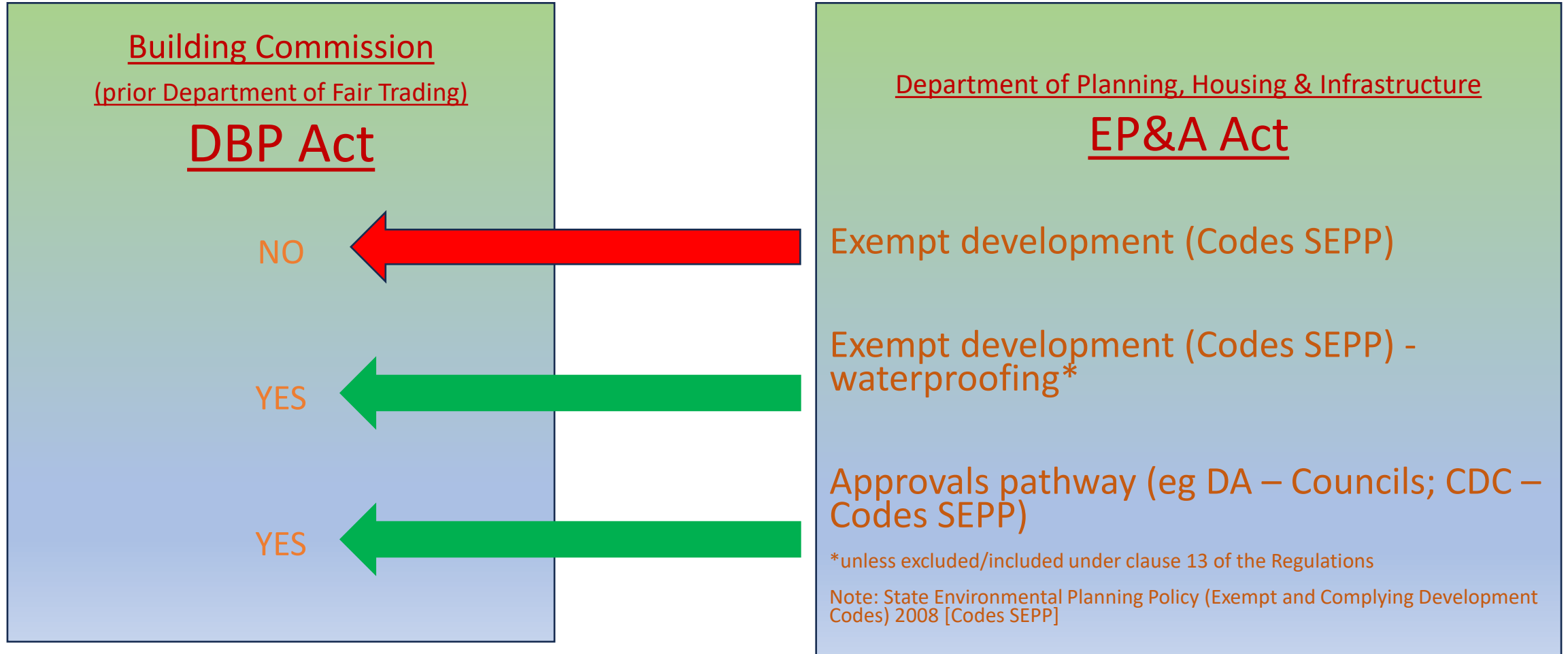
- A Building Practitioner must still register works on the Portal.
- A Building Practitioner must still complete a Building Compliance Declaration for the remedial works and indicate on the form whether the works comply with the BCA
- If the works do not comply with the BCA, the owners corporation/strata manager must:
 - monitor the effect of the emergency remedial building works performed
 - ensure a regulated design is prepared for any further remedial building works performed to remedy that serious issue
 - ensure a regulated design is prepared for any broader scope of works required to be performed (e.g. the entire roof membrane as opposed to the localised repair area)
 - engage appropriate and registered building and design practitioners for the preparation of any required regulated design and performance of the remedial building works
- Subsequent remedial building works related to the emergency remedial building work must comply with the DBP legislation



Adding the next layer of regulation

**State Environmental Planning Policy
(Exempt and Complying
Development Codes) 2008 – Codes
SEPP**

Keeping it simple – Take 2



Note: other planning considerations may apply

State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 – Codes SEPP

[Fact Sheet](#)

Minor building alterations are considered exempt development under the Codes SEPP if that work:

- does not permanently alter the load bearing capacity of the building
- re-instates a building element to its intended structural capacity and does not reduce the structural adequacy of that building element
- does not change the original architecture or design intent i.e. 'like-for-like'
- poses minimal impact to the built environment



What work can be carried out as exempt development?

External window and door replacement

Balcony balustrade repair or replacement

Roof tiling, sheeting and wall cladding repair or replacement

Replace a deteriorated cavity flashing or a leaking cavity flashing

Replace a tiled balcony/terrace with a pedestal paving system

Replace a steel lintel with a reinforced concrete lintel

Concrete repairs to a beam, slab, or column

Balcony, Terrace, or Roof Waterproofing

Repainting of facade



Things to consider if your remedial building project needs planning approval

Development application

Complying development certificate

Planning Consultant

Approvals Pathway Assessment

Project management of the process

Other consultants eg certifier and others depending on the scope

Longer time frames

The DBP applies 100%, likely more CIRDs required

Planning portal and developer profile

Project example

Balustrade replacement (*non-compliant and not safe*)

OC has approved removal of planter box and installation of glass balustrades



FACT SHEET EXCERPT

The works can be considered exempt development, provided the remedial building work meets the NCC and applicable standards

Minor building alterations are considered exempt development under Codes SEPP IF:

- does not **permanently alter** the load bearing elements or layout of the building
- re-instates a building element to its **intended structural capacity** and does not reduce the structural adequacy of that building element
- does not change the original architecture or design intent ie. 'like-for-like'
- poses minimal impact to the built environment

Project example

External window and door replacement

FACT SHEET EXCERPT

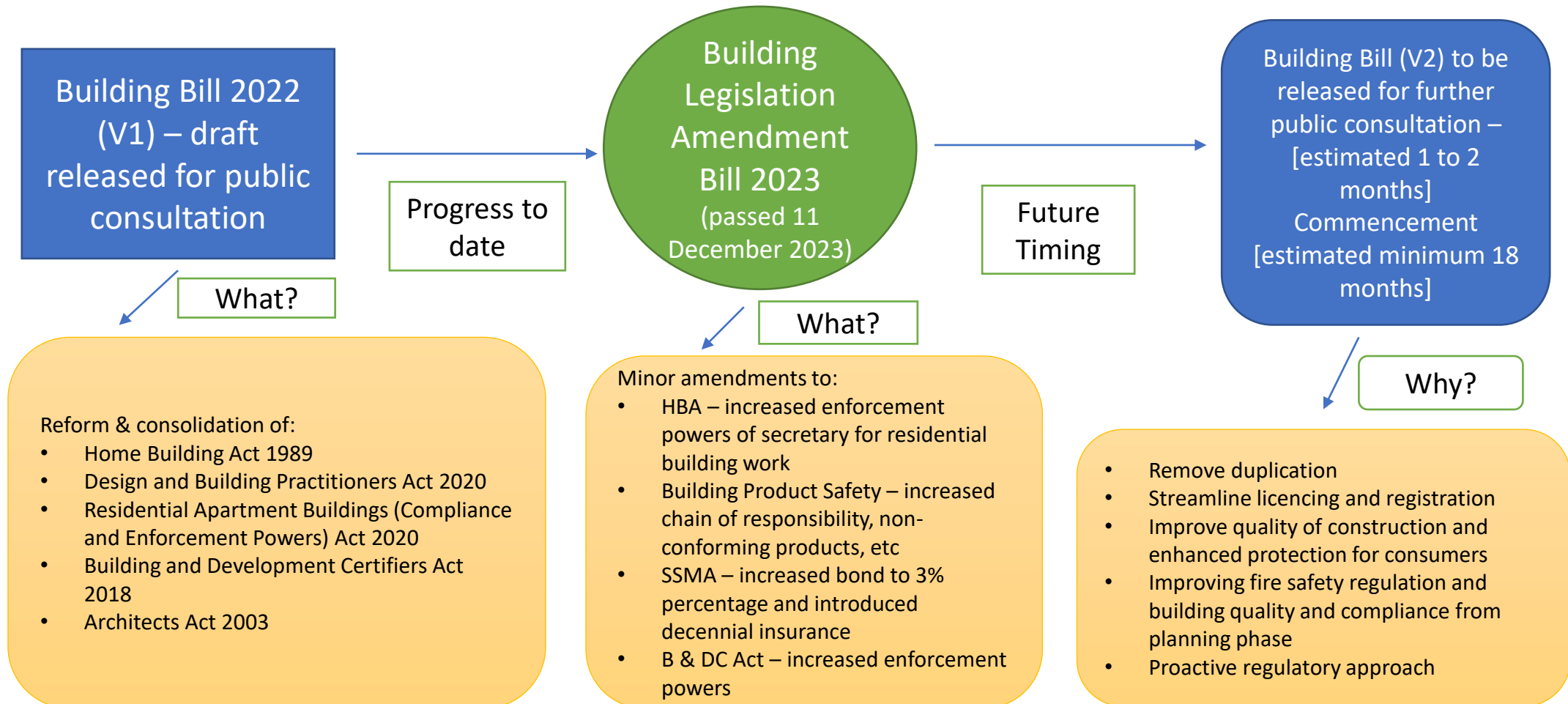
The works can be considered exempt development , provided the remedial building work meets the NCC, applicable standards and window opening size is not altered

Minor building alterations are considered exempt development if that work:

- does not **permanently alter** the load bearing elements or layout of the building
- re-instates a building element to its **intended structural capacity** and does not reduce the structural adequacy of that building element
- does not change the original architecture or design intent ie. 'like-for-like'
- poses minimal impact to the built environment




Building Bill update



Aim for remedial under the Building Bill reform



- Getting ahead of the curve and working with Government so remedial is not stuck in the middle
- Working with Planning and the Building Commission to ensure reform considers the impact on remedial projects
- Overhaul of licensing for practitioners and specialist trades e.g. waterproofing
- Taking remedial works out of approvals stage into regulatory compliance under DBP – regulated designs
- Availability of adequate insurance cover for persons performing construction work for 10 years

A photograph of several white paper cutouts of human figures holding hands, arranged in a line. The figures are set against a soft, out-of-focus green background. The image is positioned on the left side of the slide, partially overlapping the white content area.

Owners - What can you do?

- Understand the DBP and how it applies
- Have an awareness of Codes SEPP and what exempt development means
- Engage a Planning consultant to advise on exempt development (or not)
- Only engage registered and reputable Practitioners to undertake remedial work
- Invest properly, understand the issue before agreeing a solution
- If an approvals assessment is required engage a Planning Consultant to project manage the process
- Consider performing works in stages
- Are your works emergency remedial building works?
- Attend webinars and access training opportunities
- Ask questions of your contractors, check licences and registrations <https://verify.licence.nsw.gov.au/home/DBP>

Where else can I find information?

Building Commission phone line - DBP enquiries 13 27 00

[Building Commission](#)

[Fair Trading](#)

[Building Defects library](#)

[Search for a registered practitioner](#) (advanced search)

Our contacts

Helen Kowal

Partner, Construction and Strata

[SWAAB](#)

hek@swaab.com.au

The logo for Swaab, featuring the word "Swaab" in a bold, blue, sans-serif font.

Deborah Lockart

Manager, Risk and Compliance

[RHM Consultants](#)

dlockart@rhmeng.com

The logo for RHM Consultants, consisting of the letters "RHM" in a large, bold, white sans-serif font above the word "Consultants" in a smaller, white sans-serif font, all contained within a dark grey square.