

Improving governance and contracts

Research report on contracts for the design and construction of large residential apartment buildings in the context of the Design and Building Practitioners Act and the Residential Apartment Buildings (Compliance and Enforcement Powers) Act



Contents

Message from Director Legal, Construct NSW	4
Message from Carrie Metcalfe, MinterEllison	5
Executive summary	6
Background	8
1. Overview of NSW legislation that impacts buildings with a Class 2 part	8
1.1 Introduction	8
1.2 The Home Building Act	8
1.3 The Building and Development Certifiers Act	8
1.4 The Residential Apartment Buildings (Compliance and Enforcement Powers) Act	8
1.5 The Design and Building Practitioners Act	9
1.6 Other legislation	10
1.7 Future proposed legislation	10
2. Contracts in NSW for design and construction of large buildings with a Class 2 part	10
2.1 Procurement methodology overview	10
2.2 Construct-only model	11
2.3 Design and construct model	11
2.4 Applying the DBP Act to the procurement model	12
2.5 Form of contract	14
2.6 Why address DBP Act and RAB Act in contracts if it is not mandated?	15
Research methodology	16
3. Methodology	16
3.1 Call for documents	16
3.2 Questionnaire	16
3.3 Dealing with conflicts	16
3.4 Scorecard	17
Research findings	17
4. Project A – summary of documents reviewed	17
4.1 Document types and timing	17
4.2 General observations	18
4.3 Scorecard	18
5. Project B – summary of documents reviewed	19
5.1 Document types and timing	19
5.2 General observations	20
5.3 Scorecard	20
6. Project C – summary of documents reviewed	21
6.1 Document types and timing	21
6.2 General observations	21
6.4 Scorecard	22

7. Project D – summary of documents reviewed	22
7.1 Document types and timing	22
7.2 General observations	23
7.3 Scorecard	23
8. Project E – summary of documents reviewed	24
8.1 Document types and timing	24
8.2 General observations	24
8.3 Scorecard	25
Glossary	26
Annexure A – Template questionnaire	28

Message from Director Legal, Construct NSW

This report comes just over 19 months after the substantial commencement of the *Design and Building Practitioners Act* and more than 2 years after the commencement of the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act*. It reflects the experience of those projects which have been audited under the DBP Act, and the documents we have called in as a part of the audits.

We believe that the findings of this report will be instructive to developers, builders, certifiers, consultants, financiers and insurers, all of whom are at differing stages of maturity with implementing the reforms introduced by this legislation.

The report has been prepared by Carrie Metcalfe and her team. Carrie was the industry coordinator for the Property Council of Australia in the Construct NSW working group providing inputs into the roles of design practitioners and building practitioners for the new legislation. Accordingly she was best placed to undertake this report. I commend it to you as it makes instructive reading.

**Elizabeth Stewart, Director Legal Operations,
Office of the Building Commissioner, Department of Customer Service**



Message from Carrie Metcalfe, MinterEllison

MinterEllison is proud to be involved in Construct NSW's once-in-a-generation reform of the building and construction industry in NSW.

Since 2019 we have partnered with NSW Government, industry groups and industry participants in relation to the reforms. We are pleased to continue that work with this report.

A key component of the reforms is legislation. The introduction of *Design and Building Practitioners Act* and the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act* has brought focus to the role of a developer as a party accountable for the delivery of trustworthy buildings.

Our research demonstrates that experienced developers understand the reforms and have taken active steps to incorporate the legislative regime into their supply chains. This is a strong indicator of good governance and supports best-for-project outcomes.

Given that further legislative changes are anticipated, it is important for all developers and industry participants to keep up to date and ensure that their supply chains understand all compliance requirements.

I would like to thank my colleagues William Vu and Heidi Knights, and David Creais from Bartier Perry Lawyers, for their assistance in preparing this report.

Carrie Metcalfe, Partner



MinterEllison provides legal and consulting services to a diverse client base across industries throughout offices in Australia and a global network of member firms and associated companies. As one of the Australia's largest law firms with over 1500 legal staff across the country, we provide seamless national coverage in the most complex of legal issues.

Executive summary

The NSW Government is committed to restoring consumer confidence in the residential building and construction industry through implementation of the Construct NSW transformation strategy. A key component of this strategy is the use of data and research to inform policymakers, industry and the wider community about the pain points and drivers of poor performance across the construction sector.

The implementation of the *Design and Building Practitioners Act 2020 (DBP Act)* and *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020 (RAB Act)* has focused the construction industry's attention on the quality of Class 2 building work and the role of developers, designers and builders.

The Office of the Building Commissioner (**OBC**) engaged MinterEllison to review a sample of large residential development projects to analyse how their design and construction contracts respond to the DBP Act and RAB Act. With extensive experience in drafting and negotiating construction contracts and advising clients in relation to the Construct NSW reforms, MinterEllison was identified as the suitable party to undertake this research.

MinterEllison, with assistance from Bartier Perry Lawyers, reviewed design and construction contracts on five sample mixed use residential projects located in NSW. The projects selected were large developments ranging from 70 to 500 residential lots.

The purpose of the review was to:

- assess if/how the contracts responded to the DBP Act and RAB Act; and
- identify any material clauses which require attention or “ironing out”.

Large projects were intentionally chosen, with the expectation that an analysis of contracts for large projects (which are presumably negotiated between sophisticated parties with the benefit of legal representation) would be of assistance to smaller industry participants.

This report can be read in conjunction with a previous report [published August 2022 Improving Governance and Contracts](#), which provided a broader review of contracting arrangements on residential building projects. The key distinctions between the August 2022 report and this report are:

- the August 2022 report focussed on smaller projects (\$8m-\$15m), and reviewed contracting arrangements more broadly, in particular from a financier perspective; and
- this report focuses on the contractual process for design and delivery of a project in compliance with the DBP Act and RAB Act.

1. Key findings

(a) Overall scorecard

Very Good	Good	Poor
1 project	3 projects	1 project
<i>Addresses the DBP Act and RAB Act to a higher level of detail than the Model Clauses.</i>	<i>Addresses the DBP Act and RAB Acts to a similar level of detail as the Model Clauses. More comprehensive contractual drafting could be included.</i>	<i>Does not address the DBP Act and RAB Act.</i>

- (b) The majority of developers surveyed responded well to the DBP Act and RAB Act, even in circumstances where the contracts were entered into before the legislation commenced.
- (c) Our research indicates that many developers of large class 2 buildings:
 - (i) understand how the DBP Act applies to their procurement model;
 - (ii) understand that the DBP Act prohibits the commencement of construction until designs are complete, and have taken active steps to adjust their supply chains accordingly;
 - (iii) are aware that the RAB Act has placed a focus on the responsibility of developers to deliver quality buildings containing a Class 2 part; and
 - (iv) are using contractual mechanisms to assist with ensuring that projects comply with the DBP Act and RAB Act.

2. Key recommendations

- (a) Developers who have not yet taken steps to ensure that their contracts address the DBP Act and RAB Act should do so.
- (b) Where projects straddle the commencement of the DBP Act and/or RAB Act, Developers should consider amending their contracts to address those Acts, or as a minimum ensure their supply chains are aware of the requirements under the Acts.
- (c) Given that further building reforms are anticipated¹, it is important for Developers to keep up to date with legislative changes and ensure that their supply chains are aware of those changes.
- (d) Developers and certifiers must ensure that their agreements meet the formal requirements of the BDC Act.
- (e) Developers and builders should be aware that from 1 July 2024, the insurance requirements under the DBP Act will apply to builders.
- (f) Developers should be aware that a decennial liability insurance regime (also known as latent defects insurance)² is currently under consideration in NSW.
- (g) Developers should carefully consider the implications of replacing a consultant or builder part-way through a project, or having different stages of a project constructed by different builders. The Developer needs to ensure design work is integrated in accordance with the DBP Regulation.

3. Model Clauses

We suggest that the Department consider:

- (a) updating the existing Model Clauses to address the DBP Regulations (which were published after the Model Clauses were prepared);
- (b) preparing model clauses:
 - (i) suitable for a construction contract using the 'design and construct' procurement model (currently the Model Clauses only cover construction contracts using the 'construct-only' procurement model); and
 - (ii) suitable for certifier agreements, to address the formal requirements under the BDC Act; and
- (c) re-assessing the Model Clauses following any significant changes to the legislative regime, to ensure they are up to date.

¹ See [paragraph 1.7](#) below and [footnote 10](#) for further details on future proposed reforms.

² See [footnote 10](#) for details on decennial insurance.

Background

1. Overview of NSW legislation that impacts buildings with a Class 2 part

1.1 Introduction

The purpose of this report is to assess how design and construction contracts respond to the DBP Act and RAB Act, however for context we have included below a brief overview of the key pieces of legislation in NSW that govern the design and construction of buildings with a Class 2 part.

1.2 The Home Building Act

(a) Residential building work³ and specialist work⁴ have been regulated under the HB Act since 1989.

(b) Key features of the HB Act include:

- (i) a requirement for builders and tradespersons to be licensed when undertaking residential building work and specialist work;
- (ii) formal requirements for some building contracts;
- (iii) statutory warranties for the benefit of homeowners; and
- (iv) home building compensation fund (insurance) requirements, noting that the provisions requiring mandatory insurance do not apply to buildings with a rise in storeys of more than 3.

1.3 The Building and Development Certifiers Act

(a) The BDC Act and BDC Regulation:

- (i) commenced on 1 July 2020 (and replaced the Building Professionals Act); and
- (ii) regulates certifiers (building surveyors, certain engineers, swimming pool inspectors, and strata and subdivision certifiers).

(b) In October 2022, the Department published a Practice Standard for certifiers under the BDC Act. [Volume 1](#) relates to residential apartment buildings.

1.4 The Residential Apartment Buildings (Compliance and Enforcement Powers) Act

(a) The RAB Act commenced on 1 September 2020, with further key regulations commencing on 4 July 2022 (for the introduction of levies).

(b) The RAB Act applies to buildings with a Class 2 part⁵, and places various obligations on Developers.

(c) For the purpose of this report, key features of the RAB Act include:

- (i) the requirement for a Developer to give an Expected Completion Notice prior to applying for an occupation certificate;
- (ii) the requirement for a Developer to pay levies; and
- (iii) providing the Department with broad powers for the purpose of ensuring quality buildings, for example the Department may:

3 Broadly speaking, 'residential building work' is any work involved in, or involved in co-ordinating or supervising, any work involved in the construction of a dwelling, or the making of alterations or additions to a dwelling, or the repairing, renovation, decoration or protective treatment of a dwelling. Schedule 1 of the HB Act contains various inclusions and exclusions from this definition.

4 'Specialist work' means the following work in relation to residential and non-residential properties: plumbing and drainage work, other than roof plumbing work, mechanical services and medical gas work, medical gasfitting work, medical gas technician work, gasfitting work, electrical wiring work, any work declared by the HB Regulation to be refrigeration work or air-conditioning work.

5 From 3 July 2023, the RAB Act will apply to buildings containing a class 3 or 9c part.

- (A) prohibit the issue of an occupation certificate in certain circumstances (eg. if there are ‘serious defects’ in a building);
- (B) issue a stop work order or building work rectification order in certain circumstances; and
- (C) issue penalty notices for infringements of the Act.

1.5 The Design and Building Practitioners Act

- (a) The DBP Act received assent on 10 June 2020, with key commencement dates as follows:
 - (i) 10 June 2020 – statutory duty of care provisions commenced;
 - (ii) 1 July 2021 – the DBP Regulation commenced, and provisions under the DBP Act relating to:
 - (A) registration of designers, builders and engineers;
 - (B) requirements for Design Compliance Declarations, Building Compliance Declarations, and lodgement of documents on the NSW Planning Portal;
 - (C) investigation and enforcement powers of the Department.
- (b) The DBP Act applies to:
 - (i) all buildings (but only in relation to the application of the statutory duty of care)⁶; and
 - (ii) buildings with a Class 2 part (in relation to the other parts of the Act)⁷.
- (c) The DBP Act places various obligations on designers, builders, engineers, and people undertaking Construction Work.
- (d) For the purpose of this report, key features of the DBP Act include:
 - (i) **duty of care:** a statutory duty of care owed to owners by anyone who performs Construction Work on any building;
 - (ii) **registration:** designers, builders and engineers must be registered before working on a building with a Class 2 part⁸;
 - (iii) **declaration and lodgement:** in respect of buildings with a Class 2 part⁹:
 - (A) Regulated Designs must be accompanied by a Design Compliance Declaration from a registered designer which states, among other things, whether the design complies with the Building Code of Australia;
 - (B) Construction Issued Regulated Designs must be lodged in the NSW Planning Portal by a registered builder before physical construction work commences (importantly this means that Regulated Designs in respect of a Construction Certificate must be 100% completed, declared and lodged before work physically commences under that Construction Certificate);
 - (C) requirement for variations to be 100% designed before the work physically commences, and for variations to be re-declared and lodged on the NSW Planning Portal within 1 day of the physical work commencing;
 - (D) requirement for a Building Compliance Declaration to be lodged on the NSW Planning Portal by a registered builder before an occupation certificate is applied for. The Building Compliance Declaration must state, among other things, whether the building work complies with the Building Code of Australia; and

⁶ Recently confirmed by the NSW Court of Appeal in *Roberts v Goodwin Street Developments Pty Ltd* (2023) NSWCA 5.

⁷ From 3 July 2023, the DBP Act will apply to buildings containing a class 3 or 9c part.

⁸ See [footnote 7](#).

⁹ See [footnote 7](#).

- (iv) **enforcement:** powers for the Department to investigate and enforce the Act, including issuing stop work orders.

1.6 Other legislation

Various other pieces of legislation are relevant to the construction of buildings containing a Class 2 part, including:

- (a) the WHS Legislation;
- (b) EP&A Act and EP&A Regulations;
- (c) SOP Legislation;
- (d) the *Strata Schemes Management Act 2015* (NSW)¹⁰ and *Strata Schemes Management Regulation 2016* (NSW); and
- (e) legislation dealing with building products safety, plumbing, electricity, gas and explosives.

1.7 Future proposed legislation

At the time of writing, NSW Government is in the consultation phase for the following new Bills:

- (a) *Building Bill* – which would, in summary, replace the HB Act, including extending licensing requirements to all building work and consolidating parts of the EP&A Act and DBP Act;
- (b) *Building Compliance and Enforcement Bill* – which would, in summary, replace the RAB Act and extend the RAB Act notice requirements and enforcement powers to all buildings, and give the Department enforcement powers under the DBP Act, BDC Act, SOP Legislation, *Building Products (Safety) Act 2017* (NSW), *Plumbing and Drainage Act 2011* (NSW) and *Gas and Electricity Act 2017* (NSW); and
- (c) *Building and Construction Legislation Amendment Bill* – which would, in summary impose a statutory duty on the supply chain of building material and to ensure associates of practitioners are not phoenixing, introduce various building levies and make various changes to the SOP Act, including introducing a mechanism to review adjudication determinations and lower the threshold for when retention monies must be held in trust accounts.

2. Contracts in NSW for design and construction of large buildings with a Class 2 part

2.1 Procurement methodology overview

- (a) The type of contracts used for the design and construction of large buildings with a Class 2 part depends on the procurement methodology chosen by the parties.
- (b) Typically, developers choose between¹¹:
 - (i) a construct-only model; and
 - (ii) a design and construct model.
- (c) From a DBP Act perspective, it is important for developers to understand the difference between these two models, because each will require a different application of the declaration and lodgement regime¹² under the DBP Act. Before applying the DBP Act to a project, the developer must understand which party in the contracting chain is responsible for the design work.

¹⁰ Section 211AA of the *Strata Schemes Management Act 2015* (NSW) was introduced in October 2022, and provides that a building bond is not required under the Act if a developer of a strata scheme satisfies the Secretary that the developer has obtained decennial insurance in a form acceptable to the Secretary. Decennial insurance insures against serious defects in the building elements of common property for a building for 10 years and on a strict liability basis. At the time of writing the NSW Government is undertaking a consultation period to consider the expansion of a decennial insurance regime in NSW.

¹¹ There are other procurement methods available, such as managing contractor, public private partnerships (PPPs) and alliance contracting, but these are less likely to be used by non-government developers of residential apartment buildings, and for the purpose of this report we have focussed on those which in our experience are the two most popular models.

¹² See paragraph 1.5(d)(iii) of this report, and Figure 3 below, for a summary of the declaration and lodgement regime under the DBP Act.

(d) The purpose of this section 2 is to assist developers to understand how to apply the DBP Act in the two different contracting models.

2.2 Construct-only model

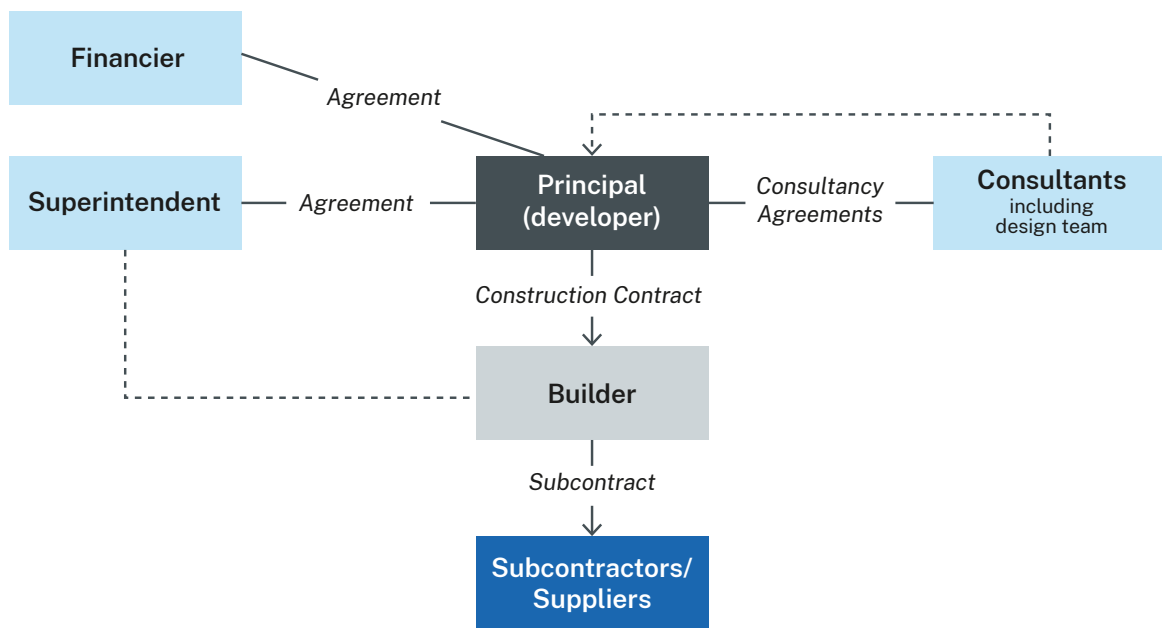
(a) Under a typical construct-only model:

- (i) the Principal's design consultants prepare designs; and
- (ii) the Builder has no design responsibility.

(b) See Figure 1 below for a typical example of a construct-only contracting structure.

Figure 1

Construct-only – basic model



2.3 Design and construct model

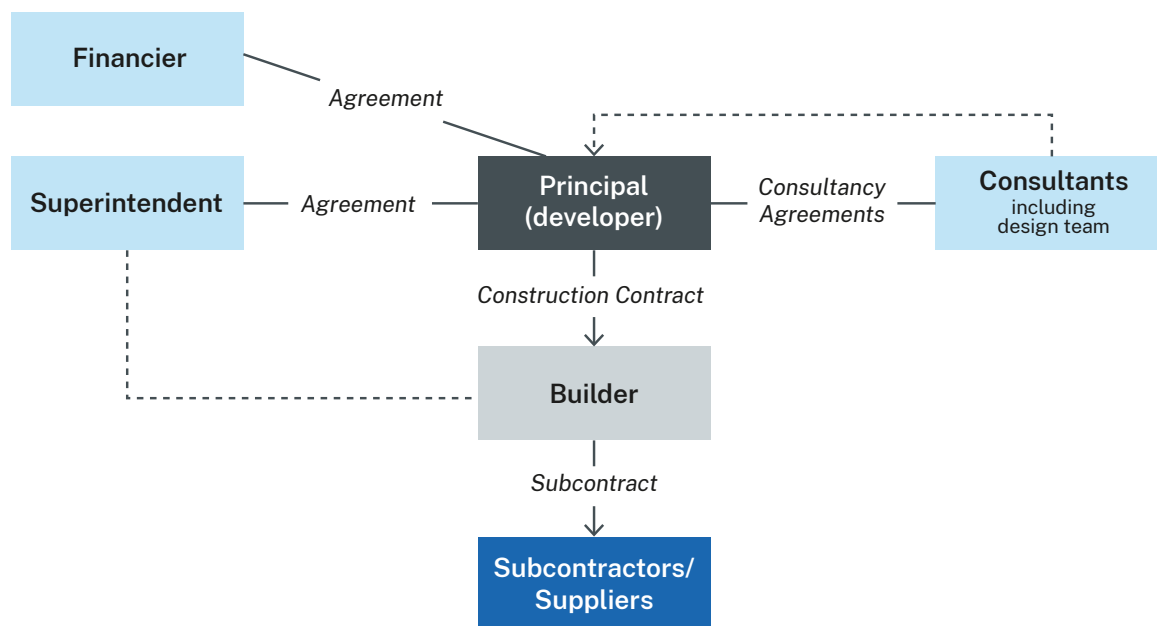
(a) Under a typical design and construct model:

- (i) the Principal's design consultants prepare preliminary designs; and
- (ii) once the Builder is engaged, the Builder takes on responsibility for developing the preliminary design into a complete design (which may require the Builder to take a novation of the Principal's consultants, or the Builder may engage its own consultants).

(b) See Figure 2 below for a typical example of a design and construct contracting structure.

Figure 2

Design and construct – basic model



2.4 Applying the DBP Act to the procurement model

- (a) The combined effect of the DBP Act and RAB Act has been to pivot the regulatory focus on the developer as the party accountable for the delivery of trustworthy buildings. It is the NSW Government's expectation that the market understands this is now the case going forward.
- (b) That means it is important for developers to understand how the declaration and lodgement regime under the DBP Act applies. Whilst designers and builders have statutory obligations to comply with the regime, ultimately a developer will bear regulatory and financial consequences if the regime is not followed on a project.
- (c) In Figure 3 we summarise the key steps relating to declaration and lodgement under the DBP Act and identify where responsibility for each step should be allocated from a practical perspective, as between the Principal and the Builder, depending on whether a construct-only or design and construct model is selected.
- (d) Figure 3 is not an exhaustive list of all tasks required under the DBP Act, but identifies the key tasks required for declaration and lodgement under the DBP Act.
- (e) We note that allocation of responsibility on a contractual basis will not alleviate the liability of each contracting party under the DBP Act (ie. a party cannot contract out of the DBP Act).

Key steps relating to declaration and lodgement pursuant to the DBP Act		Suggested allocation of responsibility	
		Construct-only model	Design & Construct model
1.	Ensure, at the time of engagement, that design consultants are registered and insured as required under the DBP Act. ¹³	Principal	Principal (for preliminary design, if novation is intended) Builder (for completed design)
2.	Procure preparation of: (a) preliminary design; and/or (b) 'principal's project requirements' or 'PPR' document which outlines the Principal's requirements for the project, so that those documents can be attached to the construction contract. ¹⁴	N/A	Principal
3.	Procure from registered design consultants: ¹⁵ (a) Construction Issued Regulated Designs; and (b) Design Compliance Declarations.	Principal (those documents should be attached to the construction contract)	Builder
4.	Provide Construction Issued Regulated Designs and Design Compliance Declarations to certifier prior to issue of Construction Certificate. ¹⁶	Principal	Builder
5.	Lodge Construction Issued Regulated Designs and Design Compliance Declarations on the NSW Planning Portal before commencing physical work. ¹⁷	Builder	Builder
6.	Take all reasonable steps to ensure that: ¹⁸ (a) each Regulated Design for the building work is prepared by a registered design practitioner; and (b) a Design Compliance Declaration is obtained for those designs from a registered design practitioner whose registration authorises the practitioner to provide a declaration as to the matters to which the declaration relates.	Builder	Builder

¹³ This task is not stipulated under the DBP Act, but should be undertaken by prudent parties.

¹⁴ This task is not stipulated under the DBP Act, but should be undertaken by prudent parties.

¹⁵ Under section 9 of the DBP Act, there is an obligation on a designer to provide a Design Compliance Declaration with a Construction Issued Regulated Design.

¹⁶ Under clause 29 of the DBP Regulation, a construction certificate or a complying development certificate for building work is prohibited from being issued unless a Design Compliance Declaration and related Regulated Designs are provided to the certifier. The DBP Regulation does not stipulate who must provide those documents to the certifier, so the developer and builder should contractually agree which party must do so.

¹⁷ Responsibility for this task is stipulated by clause 16 of the DBP Regulation.

¹⁸ Responsibility for this task is stipulated by section 18 of the DBP Act.

Key steps relating to declaration and lodgement pursuant to the DBP Act	Suggested allocation of responsibility	
7. Ensure that building work for which a Regulated Design is to be used, is not, except with reasonable excuse, carried out unless: ¹⁹ <ol style="list-style-type: none"> (a) there is a design and Design Compliance Declaration from a registered designer for that work; and (b) the Design Compliance Declaration states that the design complies with the requirements of the Building Code of Australia and other applicable requirements prescribed under the DBP Act. 	Builder	Builder
8. For variations to Regulated Designs:		
<ol style="list-style-type: none"> (a) procure from registered design consultants, prior to commencing physical work; and 	Principal	Builder
<ol style="list-style-type: none"> (a) lodge on the NSW Planning Portal within 1 day of commencing the physical work based on the varied Regulated Design, Construction Issued Regulated Designs and Design Compliance Declarations for the variation.²⁰ 	Builder	Builder
9. Provide a Building Compliance Declaration and lodge with other required documents on the NSW Planning Portal prior to application for occupation certificate (with copy to Principal). ²¹	Builder	Builder
10. If Building Compliance Declaration sets out steps to achieve BCA compliance, provide notice of steps to certifier. ²²	Builder	Builder
11. Provide copy of Building Compliance Declaration to certifier. ²³	Principal	Principal

2.5 Form of contract

(a) For construction of large buildings with a Class 2 part in NSW, in our experience:

(i) the construction contracts are typically either:

- (A) an amended version of an Australian Standard contract (eg. AS4902 or AS4000); or
- (B) a bespoke form of contract,

and other industry template contracts such as the NSW Fair Trading, Housing Industry Association and Master Builders Association templates are not used on large projects;

(ii) the design consultancy agreements are typically either:

- (A) an amended version of an Australian Standard contract (eg. AS4904); or
- (B) a bespoke form of contract; and

¹⁹ Responsibility for this task is stipulated by section 19 of the DBP Act.

²⁰ Responsibility for this task is stipulated by clause 17 of the DBP Regulation and section 9 of the DBP Act.

²¹ Responsibility for this task is stipulated by clause 18 of the DBP Regulation and section 17(1) of the DBP Act.

²² Responsibility for this task is stipulated by section 22(2) of the DBP Act.

²³ Responsibility for this task is stipulated by section 17(5) of the DBP Act.

- (iii) agreements with certifiers are typically a bespoke form.
- (b) The HB Act stipulates certain requirements for construction contracts for residential building work. For example, those contracts must include particular clauses and warnings required by the HB Act.
- (c) Similarly, the BDC Act imposes certain requirements for agreements with certifiers – those agreements must include particular provisions stipulated by the BDC Regulation.
- (d) By contrast, the DBP Act and the RAB Act do not mandate specific requirements for contracts, it is up to the parties to decide whether to expressly address the DBP Act and RAB Act in their contracts.
- (e) In October 2020 the Department published Model Clauses in relation to the DBP Act. These Model Clauses were prepared by a Construct NSW working group of industry members, including MinterEllison. These are designed to interface with Part 2 of the DBP Act and assist parties to construct-only and design consultant contracts to address the DBP Act requirements.

2.6 Why address DBP Act and RAB Act in contracts if it is not mandated?

- (a) The DBP Act requires developers to have their buildings fully designed before physical construction commences²⁴. By reducing the risk of construction commencing before design is complete, the intention is that the risk of defective work is reduced.
- (b) This change has required developers and builders to adjust their procurement processes since the DBP Act commenced. The DBP Act and RAB Act also impose various other obligations on developers, builders, designers and engineers.
- (c) Given this change in process and statutory obligations, we consider it important that design contracts and construction contracts are amended to contemplate the DBP Act and RAB Act because:
 - (i) the contract serves as an ‘education’ piece for all parties involved as to their responsibilities under the DBP Act and RAB Act. This will be particularly important as the DBP Act and RAB Act are extended to other classes of buildings²⁵;
 - (ii) it ensures the parties’ obligations are clear and thus:
 - (A) encourages compliance from the start of the project;
 - (B) gives contract administrators clear processes to follow;
 - (C) ensures compliance responsibilities are allocated where appropriate (eg. which party is responsible for paying levies under the RAB Act);
 - (D) minimises disputes and statutory penalties (including those relating to directors duties); and
 - (E) ensures that compliance issues are dealt with quickly, minimising delays to the construction program.
- (d) As noted at paragraph 2.4(e) above, parties cannot ‘contract out’ of their responsibilities under the DBP Act and RAB Act, however the contract can be used as a tool for managing those responsibilities.

²⁴ Schedule 1 (clause 4A) of the DBP Act allows designs to be completed on a per-construction certificate basis (if work commenced before 1 July 2023, although it is anticipated that this date will be extended).

²⁵ See footnotes [5](#) and [7](#).

Research methodology

3. Methodology

3.1 Call for documents

- (a) The Department randomly selected five large residential developments across NSW for the purpose of examining the contractual arrangements on those projects.
- (b) The requested contracts were provided directly to the external legal practitioners and not provided to the Department²⁶.
- (c) The Department requested the following documents:
 - (i) contract agreements between the developer and the builder (ie. head construction contract);
 - (ii) the contract between the developer and the design consultants (or between the builder and design consultants if applicable); and
 - (iii) the contract between the developer and the certifier.
- (d) The Department is thankful for those developers' cooperation in providing the requested documents for this research project.

3.2 Questionnaire

- (a) To assess each contract, a questionnaire was developed. A copy of that questionnaire is attached at **Annexure A**.
- (b) The questionnaire was developed by MinterEllison prior to reviewing the contracts.
- (c) A questionnaire was completed for each contract, and a score developed based on weightings applied to each question.
- (d) The review of all documents provided to MinterEllison was undertaken by one lawyer to ensure consistency of the application of the questionnaire, and peer reviewed by two other lawyers.

3.3 Dealing with conflicts

- (a) On one of the five projects randomly selected by the Department, MinterEllison had previously been involved in an aspect of the project.
- (b) To avoid any conflict of interest, Bartier Perry Lawyers were engaged to review the contracts for that project.
- (c) The relevant contract documents were provided directly from the developer to Bartier Perry, and Bartier Perry applied the same form of questionnaire prepared by MinterEllison. The completed questionnaire was then used by MinterEllison to prepare this report, including the scorecard.

²⁶ With the exception of one project, where the construction contract had already been provided to the Department for another purpose prior to the commencement of this research project.

3.4 Scorecard

A rating was then given to each project based on the following:

Figure 4

Project rating	Description
Poor	Does not address the DBP Act and RAB Act.
Good	Addresses the DBP Act and RAB Act to a similar level of detail as the Model Clauses. More comprehensive drafting could be included.
Very good	Addresses the DBP Act and RAB Act to a higher level of detail than the Model Clauses.

Research findings

4. Project A – summary of documents reviewed

4.1 Document types and timing

Construction contract	
Form of contract	AS4902, heavily amended
Procurement model	Design and construct
Date of execution	After commencement of RAB Act After DBP Act published, but before: <ul style="list-style-type: none">• DBP Regulation published; and• commencement of substantial parts of DBP Act
Were the Model Clauses used?	No, but the contract includes more comprehensive clauses
Design Consultancy Agreements/Subcontracts	
Not provided	
Certifier Agreement	
Form of contract	Bespoke
Date of execution	Before RAB Act and DBP Act published and before commencement of BDC Act.

4.2 General observations

- (a) The construction contract is complex and robust and despite being entered into prior to commencement of substantial parts of the DBP Act, it responds in detail to the DBP Act and RAB Act, including by:
- (i) expressly requiring the builder to comply with the DBP Act and RAB Act;
 - (ii) expressly requiring the builder to comply with the Building Code of Australia;
 - (iii) requiring the builder to be registered under the DBP Act and inform the superintendent of the builder's registration status;
 - (iv) requiring the builder to provide to the Principal a copy of the Design Compliance Declarations and (as a condition of practical completion) the Building Compliance Declaration and;
 - (v) requiring compliance with the process for declaring and lodging variations under the DBP Act; and
 - (vi) making it clear which party must provide an Expected Completion Notice under the RAB Act.
- (b) The construction contract was executed prior to the introduction of levies under the RAB Act, and therefore does not expressly address those levies, the result being that if the Contractor is to pay then it will likely be able to claim the cost back from the Principal under the change in law provisions in the contract.
- (c) The Certifier Agreement does not comply with the formal requirements of the BDC Act, which is to be expected given that it was entered into prior to commencement of that Act. For this reason we have given that contract a rating of N/A below.

4.3 Scorecard

	Rating
Construction contract	Very Good
Design consultant agreements	N/A
Certifier agreement	N/A
Overall rating	Very Good

Suggested areas for improvement in the construction contract include:

- (a) specifying what class of registration the builder is required to be registered under;
- (b) specifying which party is to pay the levies under the RAB Act;
- (c) expressly requiring relevant insurance policies to comply with the DBP Act; and
- (d) considering the implications of decennial insurance, also known as latent defects insurance (if and when it applies).

5. Project B – summary of documents reviewed

5.1 Document types and timing

Construction contract	
Form of contract:	Bespoke
Procurement model:	Construct-only
Date of execution:	After commencement of RAB Act Shortly after: <ul style="list-style-type: none"> • DBP Regulation published; and • commencement of substantial parts of DBP Act, then later amended to expressly address DBP Act.
Were the Model Clauses used?	Yes
Design Consultancy Agreements	
Form of contract:	Bespoke form of contract Eight design consultancy agreements were reviewed: <ul style="list-style-type: none"> • architecture • façade • electrical • fire engineering • fire safety • hydraulic • mechanical • structural
Date of execution:	All were entered into prior the DBP Act being published, but most were later amended to expressly address the DBP Act, or there was correspondence between the parties to address the DBP Act.
Were the Model Clauses used?	Yes. The drafting goes beyond the Model Clauses.
Certifier Agreement	
Form of contract	Bespoke
Date of execution	Before RAB Act and DBP Act published and before commencement of BDC Act.

5.2 General observations

- (a) The construction contract is a short form contract between related parties and contains clauses appropriate for that purpose.
- (b) Where a construction contract is between related parties we would expect the underlying consultancy agreements and subcontracts to be robust. The Principal's external consultancy agreements reviewed are robust and appropriate for the purpose. We did not review the builder's subcontracts.
- (c) This project illustrates good practice where the consultants were engaged before commencement of the DBP Act, and the builder was engaged shortly after commencement of the DBP Act. The construction contract was later amended to include clauses substantially the same as the Model Clauses, and some of the consultancy agreements were later amended to expressly address the DBP Act (or there was correspondence between the parties to address the DBP Act).
- (d) The Certifier Agreement does not comply with the formal requirements of the BDC Act, which is to be expected given that it was entered into prior to commencement of that Act. For this reason we have given that contract a rating of N/A below.

5.3 Scorecard

	Rating
Construction contract	Good
Design consultant agreements	
Architecture	Good
Façade	Good
Electrical	Poor
Fire engineering	Good
Fire safety	Good
Hydraulic	Poor
Mechanical	Good
Structural	Good
Certifier agreement	N/A
Overall rating	Good

Suggested areas for improvement in the construction contract, noting that the construction contract was between related parties, include:

- (a) specifying which party is to pay the levies under the RAB Act;
- (b) expressly requiring relevant insurance policies to comply with the DBP Act; and
- (c) considering the implications of decennial insurance, also known as latent defects insurance (if and when it applies).

6. Project C – summary of documents reviewed

6.1 Document types and timing

Construction contract	
Form of contract:	AS4902, unamended
Procurement model:	Design and Construct
Date of execution	Shortly after commencement of RAB Act Before: <ul style="list-style-type: none">• DBP Regulation published; and• commencement of substantial parts of DBP Act.
Were the Model Clauses used?	No
Design Consultancy Agreements/Subcontracts	
Not provided	
Certifier Agreement	
Not provided	

6.2 General observations

- (a) The Principal and the Builder appear to be related parties (as they have a common sole director).
- (b) The General Conditions of contract are unamended from AS4902, which is very unusual for a project of this size and indicates that the parties have not contracted on an arms' length basis.
- (c) As the parties are related, and the construction contract is not as robust as typically seen for projects of this size, we would expect the underlying consultancy agreements and subcontracts to be robust. We have not been provided with copies of those documents.
- (d) Other obvious issues in the construction contract include that:
 - (i) it is not compliant with the HB Act;
 - (ii) it is not consistent with the SOP Legislation;
 - (iii) it is not clear what are the documents comprising the preliminary design (because item 11 of Annexure Part A has not been properly completed); and
 - (iv) the level of professional indemnity insurance required by the Builder is low for a project of this size.
- (e) In relation to the DBP Act and RAB Act, the contract does not contemplate those Acts, which is to be expected given the date of execution of the contract. However, the impact of this is compounded because the contract does not contain the type of amendments typically seen in an AS4902 contract for a project of this nature.

6.4 Scorecard

	Rating
Construction contract	Poor
Design consultant agreements	N/A
Certifier agreement	M/A
Overall rating	Poor

7. Project D – summary of documents reviewed

7.1 Document types and timing

Construction contract	
Form of contract:	AS2124, amended
Procurement model:	Construct-only but with some design and construction elements
Date of execution:	After commencement of RAB Act After DBP Act published, but before: <ul style="list-style-type: none"> • DBP Regulation published; and • commencement of substantial parts of DBP Act
Were the Model Clauses used?	No
Design Consultancy Agreements/Subcontracts	
Form of contract:	AS4904 as amended Two design consultancy agreements were reviewed: <ul style="list-style-type: none"> • architecture • structural engineer.
Date of execution:	<ul style="list-style-type: none"> • one was entered into shortly after the DBP Act was published (but before the substantial parts of the DBP Act commenced), and before the RAB Act commenced, and within one month was varied to address DBP Act • one was entered into before the DBP and RAB Acts were published, and amended weeks after the DBP Act was published (but before the substantial parts of the DBP Act commenced)
Were the Model Clauses used?	No
Certifier Agreement	
Form of contract	Bespoke
Date of execution	Before RAB Act and DBP Act published and before commencement of BDC Act.

7.2 General observations

- (a) The construction contract is generally well drafted.
- (b) The construction contract contemplates the RAB Act but not the DBP Act, this is to be expected given the timing of execution.
- (c) The consultancy agreements are similarly generally well drafted.
- (d) The consultancy agreements were later amended to address the DBP Act.
- (e) As the construction contract was executed prior to commencement of substantial parts of the DBP Act, and there was no later amendment to address the DBP Act, this is a good example of a project that straddles the commencement of the DBP Act. The implications of this include that, from a contractual perspective:
 - (i) the builder may be entitled to claim time and cost arising from the need to, for example:
 - (A) obtain registration under the DBP Act; and
 - (B) comply with the declaration and lodgement regime under the DBP Act; and
 - (ii) the parties have not agreed a process for dealing with enforcement and investigation actions under the DBP Act.
- (f) The Certifier Agreement does not comply with the formal requirements of the BDC Act as it was entered into prior to commencement of that Act. For this reason we have given that contract a rating of N/A below.

7.3 Scorecard

	Rating
Construction contract	Poor
Design consultant agreement (structural)	Good
Design consultant agreement (architectural)	Good
Certifier agreement	N/A
Overall rating	Good

- (a) Even though the construction contract received a rating of poor (because it did not address the DBP Act), we have given an overall rating of good because:
 - (i) given the timing of execution of the construction contract, it is not surprising that it did not address the DBP Act; and
 - (ii) the contract contained otherwise robust drafting that assists with DBP Act compliance generally (unlike in Project C – see paragraph 6.2(e) above).
- (b) Suggested improvement for the consultancy agreements include:
 - (i) expressly requiring compliance with the Building Code of Australia;
 - (ii) make clear what class of registration the consultant is required to be registered under; and
 - (iii) requiring the consultants to comply with the process for declaring variations under the DBP Act.

8. Project E – summary of documents reviewed

8.1 Document types and timing

Construction contract	
Form of contract:	AS4902, amended
Procurement model:	Design and construct
Date of execution:	After commencement of RAB Act After commencement of substantial provisions of DBP Act and DBP Regulation (Note we have only sighted an unsigned copy of the contract)
Were the Model Clauses used?	No
Design Consultancy Agreements/Subcontracts	
Form of contract:	Bespoke form of contract Six design consultancy agreements/subcontracts were reviewed: <ul style="list-style-type: none"> • services • architecture • electrical • fire safety • mechanical • structure
Date of execution:	Four were entered into after commencement of substantial provisions of DBP Act and DBP Regulation. Two were entered into before commencement of substantial provisions of DBP Act and DBP Regulation.
Were the Model Clauses used?	No
Certifier Agreement	
Form of contract	Bespoke
Date of execution	After RAB Act and BDC Act but before commencement of substantial provisions of DBP Act and DBP Regulation.

8.2 General observations

- (a) The construction contract is generally well drafted.
- (b) The construction contract contemplates both the DBP Act and RAB Act.
- (c) The consultancy agreements are similarly generally well drafted, and the majority address the DBP Act.
- (d) The agreement between the developer and certifier does not comply with the formal requirements of the BDC Act (despite being entered into after the BDC Act commenced).

8.3 Scorecard

	Rating
Construction contract	Good
Design consultant agreements	
Architecture	Good
Electrical	Good
Fire Safety	Good
Mechanical	Good
Services	Poor
Structure	Poor
Certifier agreement	Poor
Overall rating	Good

Suggested improvements to the construction contract include:

- (a) as a precondition to practical completion being certified requiring a Building Compliance Declaration be provided to the Principal;
- (b) requiring compliance with the process for declaring and lodging variations under the DBP Act; and
- (c) requiring the builder to notify the Principal if their registration under the DBP Act lapses.

Glossary

The following is a list of terms and acronyms used in this document.

Term	Definition
BDC Act	<i>Building and Development Certifiers Act 2018 (NSW)</i>
BDC Regulation	<i>Building and Development Certifiers Regulation 2020 (NSW)</i>
Builder	means the builder under a construction contract
Building Code of Australia	has the same meaning as in the EP&A Act
Building Compliance Declaration	has the meaning in the DBP Act
building with a Class 2 part	<p>Class 2 buildings are apartment buildings. They are typically multi-unit residential buildings where people live above and below each other. Class 2 buildings may also be single storey attached dwellings where there is a common space below. For example, two dwellings above a common basement or carpark.</p> <p>A building with a Class 2 part is a building of multiple classifications that has a Class 2 as well as another class, making it a “mixed class” (for example, a Class 2 with a Class 5 which are office buildings used for professional or commercial purposes or a Class 6, which are typically shops, restaurants and cafés).</p>
Construct NSW	A strategy led by the Office of the Building Commissioner (OBC) which focuses on six areas of industry reform: regulation, ratings, education, contracts, digital tools, and data and research. It aims to provide industry and regulatory transformation needed to restore consumer confidence in residential apartment buildings.
Construction Certificate	has the same meaning as in the EP&A Act
Construction Issued Regulated Design	has the same meaning as in the DBP Regulation
Construction Work	is defined broadly in section of the DBP Act and covers residential and non-residential design and building work and includes supervising, coordinating and project managing.
DBP Act	<i>Design and Building Practitioners Act 2020 (NSW)</i>
DBP Regulation	<i>Design and Building Practitioners Regulation 2021 (NSW)</i>
Department	Department of Customer Service, New South Wales www.customerservice.nsw.gov.au
Design Compliance Declaration	has the same meaning as in the DBP Act
developer	means the party that procures construction works from a head contractor.
Developer	has the same meaning as in the RAB Act, where it is defined broadly and includes developers, landowners and head contractors.
EP&A Act	<i>Environmental Planning and Assessment Act 1979 (NSW)</i>
EP&A Regulation	<i>Environmental Planning and Assessment Regulation 2021 (NSW)</i>
Expected Completion Notice	A Developer with building work that is approaching completion must give notice of the date they plan to apply for an OC. This notice is called an Expected Completion Notice. Notice must be given, under the RAB Act, between 6 and 12 months before applying for an OC.
HB Act	<i>Home Building Act 1989 (NSW)</i>

Term	Definition
HB Regulation	<i>Home Building Act 2014 (NSW)</i>
Model Clauses	the Construct NSW working group has prepared model clauses to amend construct-only contracts and contracts for the engagement of design consultants that address the DBP Act and RAB Act.
NSW Planning Portal	The digital portal where documents such as regulated designs and compliance declarations must be lodged pursuant to the DBP Act.
OBC	Office of the NSW Building Commissioner sitting within the Department of Customer Service.
OC	Occupation Certificate – authorises the occupation and use of a new building or part of building or a change of building use for an existing building.
Principal	means the principal under a consultancy agreement or construction contract (ie. the developer).
RAB Act	<i>Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020 (NSW)</i>
RAB Regulation	<i>Residential Apartment Buildings (Compliance and Enforcement Powers) Regulation 2020 (NSW)</i>
Regulated Design	has the same meaning as in the DBP Act
SOP Legislation	<i>Building and Construction Industry Security of Payment Act 1999 (NSW)</i> and the <i>Building and Construction Industry Security of Payment Regulation 2020 (NSW)</i>
WHS Legislation	<i>Work Health and Safety Act 2011 (NSW)</i> and the <i>Work Health and Safety Regulation 2017 (NSW)</i>

Annexure A – Template questionnaire

Contract Review Questions Governance and the DBP and RAB Acts	Building Contract	Consultancy	Consultancy	Consultancy	Certifier (PCA)
Introductory questions (Note: Please provide written comments, rather than a score)					
1. Please describe the type of contract. For example: -Building Contract: is it a D&C or construct only contract? -Building Contract: is it an Australian Standard or bespoke form of contract? -Consultancy: is it an Australian Standard or bespoke contract?					
2. Who are the parties to the contract?					
3. Do the parties appear to be related?					
4. What is the date of the contract?					
5. Does the contract appear (on its face) to be fully executed by all parties?					
6. Building Contract: Is the contractor's Home Building Act licence number stated in the contract? If yes, please note the number here.					
7. Building Contract: Does the contract contemplate there is a financier?					
8. Is there an express clause under which the contractor/consultant warrants that their works/services will be fit for purpose?					
9. When considering the Building Contract and the Consultancy Agreements together, does it appear that the correct contract documents have been used for the chosen procurement methodology? For example: (a) if the Building Contract is construct-only, are the consultants engaged by the principal; (b) if the Building Contract is D&C, have the consultants been novated from the principal to the contractor (or engaged directly by the contractor)?					
10. Is it clear, from the contracts, which party bears the risk for designing the 'building elements' as defined in the DBP Act?					
11. Does the Building Contract contain: (a) if D&C: a principal's project requirements (or project brief) document; or (b) if construct only: a set of 100% design drawings?					

Contract Review Questions Governance and the DBP and RAB Acts	Building Contract	Consultancy	Consultancy	Consultancy	Certifier (PCA)
12. Do you have any general comments about the form of Contract, for example: -if the Contract is poorly compiled (eg. missing pages) please note this; -if the Contract is poorly drafted please note this; -if you have noticed that the contract is particularly principal-friendly or contractor-friendly, please note this					
13. Does the drafting contemplate the DBP and RAB Acts? (Note: Please provide a score from 1 - 3)					
14. Does the Contract include an express obligation on the contractor to comply with Law? 1 = No 2 = Unclear (please provide comments) 3 = Yes					
15. If the Contract includes an express obligation on the contractor to comply with Law, does the definition of Law capture the DBP and RAB Acts? 1 = No 2 = Unclear (please provide comments) 3 = Yes (Note: If there is no express obligation to comply with Law, this question is N/A)					
16. If the Contract includes an express obligation on the contractor to comply with Law, does the definition of Law capture the Building Code of Australia? 1 = No 2 = Unclear (please provide comments) 3 = Yes (Note: If there is no express obligation to comply with Law, this question is N/A)					
17. Does the Contract include an express obligation on the contractor to comply with the DBP Act? 1 = No 2 = Unclear (please provide comments. eg. if construct-only, is there any obligation on the principal in relation to DBP Act?) 3 = Yes					
18. Does the Contract include an express obligation on the contractor to comply with the RAB Act? 1 = No 2 = Unclear (please provide comments eg. Are there obligations on the Principal to comply with the RAB Act?) 3 = Yes					

Contract Review Questions Governance and the DBP and RAB Acts	Building Contract	Consultancy	Consultancy	Consultancy	Certifier (PCA)
19. Does the Contract include an express obligation on the contractor to comply with the Building Code of Australia? 1 = No 2 = Unclear (please provide comments) 3 = Yes					
20. Does the Contract include an express obligation on the contractor to comply with the requirements/directions of Authorities? 1 = No 2 = Unclear (please provide comments) 3 = Yes					
21. If the Contract includes an express obligation on the contractor to comply with the requirements/directions of Authorities, does the definition of Authority include the Department of Customer Service, Fair Trading NSW and the Office of the Building Commissioner? 1 = No 2 = Unclear (please provide comments) 3 = Yes (Note: If there is no express obligation to comply with Authorities, this question is N/A)					
22. Do you have any extra comments about whether the Contract generally contemplates the DBP and RAB Acts?					
Registration (Note: Please provide a score from 1 - 3)					
1. Is there a general clause that requires the contractor to hold all registrations required at law? 1 = No 2 = Unclear (please provide comments) 3 = Yes (Note: There is a separate question about consequences of a Change in Law below)					
2. Is there an express clause that requires the contractor to hold registration under the DBP Act? 1 = No 2 = Unclear (please provide comments) 3 = Yes					

Contract Review Questions Governance and the DBP and RAB Acts	Building Contract	Consultancy	Consultancy	Consultancy	Certifier (PCA)
<p>3. Is there an express clause that requires the contractor to hold registration under the Home Building Act?</p> <p>1 = No 2 = Unclear (please provide comments) 3 = Yes</p> <p>(Note: not applicable for consultants and certifier)</p>					
<p>4. In the Building Contract, if there is an express clause relating to registration under the DBP Act, does the clause make clear what class of registration is required to be held by the contractor?</p> <p>1 = No 2 = Unclear (please provide comments) 3 = Yes</p> <p>(Note: not applicable for consultants and certifier)</p>					
<p>5. In the Consultancy Agreement, if there is an express clause relating to registration under the DBP Act, does the clause make clear what class of registration is required to be held by the consultant?</p> <p>1 = No 2 = Unclear (please provide comments) 3 = Yes</p> <p>(Note: not applicable for Building Contract or Certifier)</p>					
<p>6. Is there an express clause requiring the contractor to provide evidence of its registration under DBP Act?</p> <p>1 = No 2 = Unclear (please provide comments) 3 = Yes</p>					
<p>7. If the Consultancy Agreement is for engineering services, is there a clause requiring the engineer to be registered in accordance with the engineers regime in the DBP Act?</p> <p>1 = No 2 = Unclear (please provide comments) 3 = Yes</p>					
<p>8. Do you have any extra comments about how the Contract generally contemplates the registration requirements under the DBP Act?</p>					

Contract Review Questions Governance and the DBP and RAB Acts	Building Contract	Consultancy	Consultancy	Consultancy	Certifier (PCA)
9. Insurance (Note: Please provide a score from 1 - 3)					
10. Is there a requirement for the contractor to hold professional indemnity insurance? 1 = No 2 = Unclear (please provide comments) 3 = Yes					
11. If there is a requirement to hold PI insurance, what level of cover is required? (insert dollar amount as free form text)					
12. Is there a clause expressly requiring that the contractor's insurance complies with the DBP Act? 1 = No 2 = Unclear (please provide comments) 3 = Yes					
13. Is there a clause requiring the contractor to provide evidence that its insurance complies with the DBP Act? 1 = No 2 = Unclear (please provide comments) 3 = Yes					
14. Does the Contract provide the developer a right to approve the terms of the contractor's professional indemnity policy? 1 = No 2 = Unclear (please provide comments) 3 = Yes					
15. Is failure to comply with its obligation to hold PI insurance considered an Event of Default by the contractor? 1 = No 2 = Unclear (please provide comments) 3 = Yes					
16. If the contract requires PI insurance, for what period is that insurance required? 1 = less than 6 years after completion 2 = 6 or 7 years after completion 3 = more than 7 years after completion					
17. Do you have any general comments about whether the insurance clauses in the contract contemplate the DBP Act?					

Contract Review Questions Governance and the DBP and RAB Acts	Building Contract	Consultancy	Consultancy	Consultancy	Certifier (PCA)
18. Declarations and Lodgements (Note: Please provide a score from 1 - 3)					
19. In the Building Contract, is there a clause expressly requiring the contractor to provide a building compliance declaration to the principal? 1 = No 2 = Unclear (please provide comments) 3 = Yes					
20. In the Building Contract, if it is a D&C contract, is there a clause expressly requiring the contractor to provide design compliance declarations to the principal? 1 = No 2 = Unclear (please provide comments) 3 = Yes (Note: If contract is construct only, this is N/A)					
21. In the Building Contract, is there a clause expressly requiring the contractor to lodge compliance declarations in the NSW Planning Portal? 1 = No 2 = Unclear (please provide comments) 3 = Yes					
22. In the Building Contract, is there a clause expressly requiring the contractor to provide as-built drawings to the principal? 1 = No 2 = Unclear (please provide comments) 3 = Yes					
23. In the Building Contract, is there a clause expressly requiring the contractor to lodge as-built drawings in the NSW Planning Portal? 1 = No 2 = Unclear (please provide comments) 3 = Yes					
24. In the Building Contract, does the test for Practical Completion include a requirement to provide a Building Compliance Declaration? 1 = No 2 = Unclear (please provide comments) 3 = Yes					

Contract Review Questions Governance and the DBP and RAB Acts	Building Contract	Consultancy	Consultancy	Consultancy	Certifier (PCA)
<p>25. In the Consultancy Agreements, is there an express obligation to provide Design Compliance Declarations?</p> <p>1 = No 2 = Unclear (please provide comments) 3 = Yes</p> <p>(Note: Not applicable to Certifier)</p>					
<p>26. Is there a clause that requires the contractor/consultant to comply with the process for declaring and lodging variations under the DBP Act?</p> <p>1 = No 2 = Unclear (please provide comments) 3 = Yes</p> <p>(Note: Not applicable to Certifier)</p>					
27. Enforcement - RAB Act					
<p>28. Is there an obligation for the Contractor to provide copies of Inspection or enforcement notices (eg. Stop work orders, BWROs) under the DBP Act to the Principal?</p> <p>1 = No 2 = Unclear (please provide comments) 3 = Yes</p> <p>(Note: Not applicable to Consultants and Certifier)</p>					
<p>29. Is there an obligation for the Contractor to notify the Principal if it loses its DBP registration?</p> <p>1 = No 2 = Unclear (please provide comments) 3 = Yes</p> <p>(Note: Not applicable to Certifier)</p>					
<p>30. Does the contract include any clauses addressing the process for audit inspections under the DBP Act?</p> <p>1 = No 2 = Unclear (please provide comments) 3 = Yes</p> <p>(Note: Not applicable to Certifier)</p>					
<p>31. Do you have any other comments regarding how the Contract responds to the enforcement regime under the RAB Act (eg. Stop Work orders, BWROs, Undertakings etc)</p> <p>For example, does the Contract expressly provide which party will bear the time/cost risk for an enforcement action such as a BWRO?</p>					

Contract Review Questions Governance and the DBP and RAB Acts	Building Contract	Consultancy	Consultancy	Consultancy	Certifier (PCA)
32. OC - RAB Act					
33. Does the Building Contract state which party is to provide the Expected Completion Notices under the RAB Act? 1 = No 2 = Unclear (please provide comments) 3 = Yes (Note: Not applicable to Consultants and Certifier)					
34. Does the Building Contract state which party is to obtain the OC from the Certifier? 1 = No 2 = Unclear (please provide comments) 3 = Yes (Note: Not applicable to Consultants and Certifier)					
35. Risk Profile in relation to DBP and RAB Acts					
36. Does the Building Contract make clear which party is to bear the risk of a Change in Law? 1 = No 2 = Unclear (please provide comments) 3 = Yes (Note: Not applicable to Consultants and Certifier)					
37. Does the Consultancy Agreement make clear which party is to bear the risk of a Change in Law? 1 = No 2 = Unclear (please provide comments) 3 = Yes (Note: Not applicable to Builder and Certifier)					
38. Is the Contractor entitled to claim extra cost arising from a Change in Law? 1 = No 2 = Unclear (please provide comments) 3 = Yes (Note: Not applicable to Consultants and Certifier)					
39. Is the Contractor entitled to claim extra time arising from a Change in Law? 1 = No 2 = Unclear (please provide comments) 3 = Yes (Note: Not applicable to Consultants and Certifier)					

Contract Review Questions Governance and the DBP and RAB Acts	Building Contract	Consultancy	Consultancy	Consultancy	Certifier (PCA)
40. Do you have any other comments about how the Contract expressly deals with risks under the DBP and RAB Acts? For example, are there any qualifying causes of delay relating to DBP or RAB?					
41. Certifiers					
42. Does the Certifier's contract comply with the formal requirements of the Building and Development Certifiers Act 2018? 1 = No 2 = Unclear (please provide comments) 3 = Yes	N/A	N/A	N/A	N/A	
43. Does the Certifier's contract refer to the DBP Act? 1 = No 2 = Unclear (please provide comments) 3 = Yes	N/A	N/A	N/A	N/A	
44. Do you have any other comments about how the Certifier's contract expressly deals with the DBP and RAB Acts?	N/A	N/A	N/A	N/A	
45. Principal Design Practitioner					
46. Does the contract contemplate a Principal Design Practitioner (as defined in DBP Act)? 1 = No 2 = Unclear (please provide comments) 3 = Yes (Note: Not applicable to Certifier)					

