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Victorian Building  
Authority – The Case  
for Transformation

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Revised



**W E I R**  
Legal & Consulting

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# Abbreviations and acronyms

The following definitions and abbreviations are used in this document.

<b>Act</b>	<i>Building Act 1993 (Vic.)</i>
<b>ARBV</b>	Architects Registration Board of Victoria
<b>BAB</b>	Building Appeals Board
<b>CAV</b>	Consumer Affairs Victoria
<b>DBCAs</b>	<i>Domestic Building Contracts Act 1995 (Vic.)</i>
<b>DBI</b>	Domestic Building Insurance
<b>DBDRV</b>	Domestic Building Dispute Resolution Victoria
<b>DTF</b>	Direction to Fix
<b>FOI</b>	Freedom of Information
<b>MO</b>	Ministerial Order for plumbing insurance
<b>NCC</b>	National Construction Code of Australia
<b>OC</b>	Owners Corporation
<b>OP</b>	Occupancy Permit
<b>PDU</b>	Practitioner Disciplinary Unit
<b>PIP</b>	Proactive Inspections Program
<b>RBS</b>	Relevant Building Surveyor
<b>Regulations</b>	<i>Building Regulations 2018</i>
<b>SBS</b>	State Building Surveyor
<b>SCN</b>	Show Cause Notice
<b>SOPA</b>	<i>Building and Construction Industry Security of Payment Act 2002 (Vic.)</i>
<b>VBA</b>	Victorian Building Authority

# Executive Summary

## Context for this Review

The Victorian Building Authority is Victoria's building industry regulator. It is responsible for registering over 65,000 builders, plumbers, building surveyors and other practitioners. It monitors the building industry and has enforcement powers to discipline registered practitioners or to prosecute for breaches of the Building Act and Regulations.

The VBA shares regulatory responsibilities with local councils, relevant building surveyors (appointed by owners to issue building permits), Consumer Affairs Victoria and Domestic Building Dispute Resolution Victoria. There are also separate regulators of engineers, architects and electrical contractors. The regulatory framework is complex and the roles and responsibilities of regulators are not always clear, which can be confusing for consumers to navigate.

The building industry has been the subject of negative commentary for some time. Confidence in the industry has been affected by reports about combustible cladding, the Porter Davis collapse, mouldy and defective homes and high rates of building practitioner insolvency. There have also been reports about poor culture within the VBA and its lack of effectiveness, with many consumers and practitioners unhappy with their interactions with the VBA.

The Government publicly expressed concerns about the VBA in early 2023 and in July 2023 the VBA Board appointed a new CEO, Anna Conin. In March 2024, Minister Kilkeny dissolved the VBA Board and appointed Anna Cronin as the sole Commissioner and CEO.

In late 2023, the Commissioner personally drafted a Regulatory Policy Statement to explain the Authority's new approach to its role. The key priorities are to focus on consumer outcomes using the VBA's powers fully and improving responsiveness. The overall goal is for the VBA to be a trusted regulator. The Regulatory Policy Statement is as much for external stakeholders as it is for internal staff.

Following the release of the Regulatory Policy Statement, in an effort to explore more closely concerns raised by consumers about the VBA's practices, the Commissioner appointed Weir Legal and Consulting to conduct this review. Seven long standing and complex complaints were chosen to enable close scrutiny of the VBA's handling of complaints. The review confirms that the VBA has failed to prioritise consumer protection in its previous regulatory strategy and as a result, its responses to the consumers involved have been inadequate.

The complainants were informed of the review and invited to participate. They have all been provided with a copy of this report prior to its publication. The fact that this report has been commissioned and will be published demonstrates that the Commissioner is very serious about transforming the regulatory practices of the VBA.

## Major Impact on consumers

It is important that this report acknowledges very clearly the dreadful experience these complainants have had in their interactions with the building industry, the VBA and the legal system. Each and every one of them has suffered and continues to suffer severe financial, emotional and physical distress. Every aspect of their lives has been negatively impacted. They have watched their savings or superannuation be replaced with debts they cannot bear. The families and friends of these people have been called on for financial and emotional support, extending the impacts of defective building work and buildings well beyond the

complainants in our case studies. Whilst this report validates claims of inadequate practices of the VBA and system failures, whatever modicum of comfort this might bring to these people will be wholly inadequate.

### **Failure to effectively regulate practitioner conduct**

Most of the building practitioners involved in the seven case studies have committed breaches of legislation or engaged in unprofessional or incompetent conduct. This is where the problems started. The impacts of these problems were then compounded by those with regulatory responsibility failing to regulate effectively. This includes the VBA and the relevant building surveyors involved. Many of the breaches and conduct issues evident from the case studies were not identified by the VBA during its investigations and even fewer of these issues had made their way through to any regulatory action by the time this review commenced. If the regulator does not have the capability and culture to identify what practitioners are doing wrong, the chances of holding them to account are very slim. These case studies highlight the regulator's failure to hold practitioners to account.

Poor complaints management systems within the VBA meant complaints were duplicated, lost, or ignored either completely or for many months. In the seven case studies there were no or very limited technical inspections carried out as part of the VBA's response to complaints. Some complainants were told they should contact DBDRV or go to VCAT about non-compliant work. VBA staff told some complainants that they should provide their own expert reports for VBA to review or that the VBA would not investigate the matter if such evidence was not provided.

When plumbing defects were alleged, if the plumber did not agree to fix the work or the owner did not want the plumber back on site, the VBA told owners to make a claim on the plumber's insurance, with no further action taken against the plumber by the VBA. To get the insurer's details, owners had to lodge an FOI application with the VBA. The case studies include 9 instances where owners made claims against the plumber's insurer. In all of these, insurers delayed the claims process for several months or years. In all but 1 case insurers rejected the claims, leaving owners to lodge legal proceedings. There are allegations that claims are being rejected by insurers, contrary to the Ministerial Order for plumbing insurance which these policies are required to meet.

There has been a tendency by the VBA to focus investigations only on the practitioners and issues identified by the complainants. Breaches and conduct issues by other practitioners that should have been plainly evident from the complaint were often not investigated.

Delays in progressing the complaints were excessive. One complainant first complained about their builder and RBS in 2020. They were told in 2022 that the RBS had done nothing wrong and the builder would be 'cautioned'. The VBA said it would investigate the building inspector. At the time of our review, 2 years later, that investigation is still not complete.

Perhaps the most concerning observation is how complainants were treated. There were examples where, having waited several weeks for their complaint to be responded to, a complainant would receive an email requesting information and be told that they must respond within 7 days or their complaint would be closed. Internal documents referred to some complainants as 'emotional' or 'stirring up trouble'. The VBA's approach to complainants was dismissive and did not recognise the trauma involved. Instead, the culture has been to push back on complainants' concerns and, if the complainant's behaviour became challenging, put them on 'contact management plans'.

## **What caused these failures?**

There is no doubt that the VBA's management and culture failed consumers. In 2018, the VBA was tasked with administering the statewide cladding audit program and delegated powers to deal with 400 of the highest risk cladding affected buildings. Around the same time, the Minister set an expectation that the VBA proactively inspect building works in 10% of the approx. 100,000 building permits issued each year. Funding was allocated to the VBA for these additional tasks. Looking back, it seems that despite the additional funding provided for these new tasks, the organisation failed to adequately carry out its already backlogged 'business as usual' regulatory function in addition to performing these new tasks. .

VBA staff were working with poor IT systems and not properly supported or managed in their roles. Resources were not always being used in the most effective way. It was the job of senior leadership within the VBA to manage the delivery of the VBA's statutory functions and meet the expectations of government.

Executive leadership positions changed frequently over this time, with this lack of continuity resulting in inconsistent management and undetected problems. It appears that middle management were doing what they thought was expected of them and, if they did not know what was expected, they felt empowered to set their own informal policies and procedures. The procedures adopted were aimed at closing complaints and keeping investigations narrowly focussed wherever possible, to get through the workload. There was a lack of focus on consumer outcomes and a risk averse culture, resulting in a failure to take effective regulatory action.

## **The role of an effective regulator and its limitations in protecting consumers involved in civil proceedings**

The VBA is responsible for taking action to address safety risks, to deter improper conduct and, to prevent practitioners from continuing to harm others. However, there needs to be a process for prioritisation of responses to complaints based on risk. Most complainants strongly believe their complaint should be acted on by the VBA. They want practitioners held to account and often they want the VBA to take regulatory action to assist them, directly or indirectly, to recover compensation for losses.

There are some harsh realities that owners face when they find themselves with defective building work or a defective building. When a person buys an apartment, they become responsible to address any safety issues in that building. This has been the predicament that apartment owners of buildings with combustible cladding have faced. Although apartment owners did not cause the defects and safety issues in the building, they must resolve them.

Owners seeking compensation for defective or incomplete building work must take legal action to recover losses from their builder. These civil disputes are costly, unpredictable and lengthy. The quality of lawyers and defect consultants working in this area varies and the court system can be inefficient. Four of the complainants are embroiled in legal actions which are causing them significant distress.

Although the VBA is not responsible for a consumer's experiences with legal proceedings, there is no doubt that its regulatory activities could have been more effective in driving out poor and unscrupulous industry behaviour. Because the regulation of the sector has been ineffective over many years, poor standards of building work and unethical conduct have been allowed to flourish in Victoria's building industry. It is critical that the system is reformed and that the VBA continues its transformation to become a trusted and effective regulator. Without



building system reform, consumers will continue to be faced with debilitating outcomes, including protracted and expensive legal proceedings.

### **What is the VBA doing now?**

Some of the disappointing practices of the VBA observed through the review of the case studies have been changed and there are activities underway to make further improvements. These changes are highlighted throughout the report. The VBA staff engaged in this review in a professional and considered way. They were open to learning and changing. This is to be commended, given the scrutiny they have been under. The recommendations made in this report are integral to an uplift in the VBA's – and the building system's effectiveness.

The Commissioner has embarked on an extensive restructure of the organisation to align the VBA's resources with its objectives of better consumer outcomes and harm prevention. A new end-to-end complaint management system is being implemented and Compliance and Enforcement functions are being refocussed into a single multi-disciplinary Inspectorate. A dedicated Operational Excellence team will be responsible for complex case management. In addition, the State Building Surveyor's role will become more active in issuing determinations, industry guidance and supporting building surveyors to become more consumer focused and effective in their regulatory role.

So what will happen to our 7 complaints? Leading up to and during the review, the VBA arranged for inspections, reopened investigations and commenced disciplinary action in response to some of these complaints. However, for others, although actions taken by the VBA to date may in some cases have been inadequate, delays may mean there is nothing more the VBA can or should do.

### **Suggestions for reform and other actions that can be taken**

The report sets out what actions the VBA and government should take to address the practitioner conduct issues identified in these case studies and the changes that the VBA should make to its own processes. Nineteen recommendations are made for reform, policy development or other action by the VBA. A consolidated list of recommendations is found in **Attachment A**. Some of these recommendations are not new. They reflect findings of the 2018 Building Confidence Report and recommendations of Victoria's Building System Review Expert Panel.

The recommendations in this report include strengthening the oversight of building work during construction; enhancing the VBA's powers; and improving the dispute resolution process offered by DBDRV. The development of a Code of Conduct for builders should be a priority and resources made available to building surveyors to assist them when preparing directions to fix, so that they can be strongly enforced if builders do not comply with them.

The information obtained during this review suggests that regulation of the sector has been ineffective and that building practitioners are not being held accountable by the VBA or relevant building surveyors for poor standards of building work and unethical conduct. The review indicates that the dispute resolution system is also ineffective. It is critical that the system is reformed, and that the VBA continues to transform to become a trusted and effective regulator. If this does not occur, consumers will continue to be faced with debilitating outcomes, including protracted and expensive legal proceedings.



## Objectives and approach to the review

The objectives of the review were to:

- examine how the VBA has responded to the complainants involved in the 7 case studies;
- review interactions between the VBA and complainants, practitioners and other agencies;
- identify regulatory improvements that could be made through improved regulatory practices, amendment to legislation or further policy development.

This review is not an investigation of the complaints that have been made. The practitioners involved were not interviewed and no evidence was collected.

The approach taken was to review material held by the VBA in relation to the 7 case studies. This amounted to over 72 GB of data, containing around 12,000 documents. Some of those documents were several hundred pages long. Documents were reviewed for each of the case studies, before meetings with the complainants to discuss their experience. The purpose of this was to ensure there was an understanding of the history of the matter by the reviewers before the meetings, so that the complainants did not have to relive all the details of their story again. To do so could be unnecessarily stressful. It was also important to meet the complainants, as it would be inevitable that there would be information they could share which was not captured in the documents provided by the VBA. All complainants were frank and forthcoming and we are very grateful to them for the time they gave.

The Commissioner of the VBA and her advisors were updated regularly throughout the 3 month review to provide them with views on each case and summaries of our observations. After all case studies had been reviewed in detail, there were a series of meetings with VBA management and staff. Those managers and staff were given a series of questions about practices and procedures. The objective of these meetings was to receive feedback on the reviewer's observations and to hear about what had changed and what work was underway to improve regulatory practice. These meetings were helpful to the review. The VBA staff were professional and engaged, which is to be commended, given that their work and actions were under scrutiny. They had a keen interest to learn from the review and demonstrated that there is a body of work underway to take positive steps towards improvement. There was also a recognition that there was still some way to go to change culture, embed improved policies and procedures and make the regulator more effective.

# Part A – The Case Studies Reviewed

1. Significant financial, emotional and physical distress.
  - 1.1 First and foremost, it is important that this report acknowledges very clearly that the experience these complainants have had in their interactions with building practitioners, the VBA, other building regulators and the legal system has been appalling. To say that each and every one of them has suffered and continues to suffer significant financial, emotional and health issues is an understatement.
  - 1.2 Every aspect of their lives has been negatively impacted. Their employment or businesses, their ability to sleep and their relationships with each other and with family and friends have been affected. They have put their lives on hold, not knowing what the outcome will be, how they will pay to rectify defects and/or complete their homes, and when the costs they are paying will end.
  - 1.3 They have watched their savings or superannuation disappear, have extended their mortgages or taken out loans at high rates of interest, been levied additional land tax because they have been unable to live on the property and, in some cases have had to call on parents and family for additional financial support. They have battled with banks to suspend mortgage payments on the basis of hardship, knowing that all this does is delay the consequential increase in the amount owed.
  - 1.4 All of the 7 complainants attended meetings with or spoke to the reviewers. There was a consciousness to try not to inflict further trauma on them. Their anxiety, stress and frustration were plainly evident. They told their story; they spoke about the impacts to their mental and physical health and the flow on effects on their families.
  - 1.5 Their lives have been negatively impacted over a long period of time and this will stay with them forever. Whatever modicum of comfort this review might bring to these people will be wholly inadequate.
2. About the Case Studies
  - 2.1 This review is based on an analysis of documents held by the VBA about 7 complex complaints about building work. Some of the 7 complaints involve multiple townhouses or apartments. In total, these complaints relate to the construction of 75 homes. 22 have remained incomplete, some for over 4 years.
  - 2.2 The nature of the 7 complaints and the actions taken by the VBA as at the time of writing this report are summarised below. These summaries are not intended to capture every detail or every practitioner conduct issue that was noted during the analysis of documents for this review. Names of parties involved and addresses are not included. This is primarily because for most of these matters, regulatory action is ongoing.
  - 2.3 It is important to stress that these 7 case studies are not intended to represent all complaints that have been handled by the VBA over the past four years. In 2022/23, the VBA received 1,791 building complaints and 1,746 plumbing complaints. 341 plumbing complaints and 212 building investigations were completed. In that year the VBA also completed 4 plumbing prosecutions and 9 building prosecutions, issued 130 show cause notices and issued 119 disciplinary decisions.

- 2.4 These 7 case studies were chosen because they involve complainants that have been persistent in their engagement with the VBA, other agencies and government about their cases over a long period of time. This has resulted in extensive and ongoing interaction with the VBA which has challenged the VBA's processes and decision making. Whilst the complainants themselves have not been typical, the issues raised about building work is typical of the types of issues brought to the VBA about practitioner conduct. For this reason, conclusions can be drawn about what reforms or other actions the VBA and government could take to address the poor practitioner conduct reflected in these complaints. Those conclusions are set out in **Part D** of this report.
- 2.5 It is also critical to point out that some of the responses of the VBA to the complaints noted below no longer reflect current practices at the VBA. The VBA has been working very hard to examine its practices and improve its effectiveness as a regulator. This review is an integral part of that process. The VBA's response to this report and the changes that have been made or are in train are discussed in more detail in **Part B** of the report.
3. Case Study 1
- 3.1 This couple was nearing retirement age when they entered into a contract for the construction of their forever home in 2020. The builder abandoned the site in December 2020 with the works beyond lock up stage but not yet suitable for occupation. Four years on, the project remains at a standstill. The owners continue to pay for alternative accommodation, the mortgage on their incomplete building and rising legal costs for their VCAT case against the builder and RBS. They were also assessed as liable to pay land tax on the property given they were not living there (although the State Revenue Office has since reimbursed them).
- 3.2 Their expert reports (which are yet to be tested in VCAT) say there are major defects in the construction of the slab, timber framing and roofing. Their RBS has entered their site on multiple occasions without their permission to inspect and later issue them with building notices, despite the fact that he is a respondent to the VCAT proceedings brought by the owners, who are seeking compensation so that they can afford to appoint a new builder. Lawyers for the builder have demanded that the building work not be progressed as they may want access to it for evidentiary purposes. The non-compliant work identified in the notices is serious but there is no one living in the home and no immediate risk, making the utility of issuing building orders to the owners in such circumstances questionable.
- 3.3 The owners first complained to the VBA in mid-2020. They have lodged complaints about the RBS and the builder. After 2 years, the VBA advised there were no breaches by the RBS but that they would investigate the building inspector and builder. There is still no outcome on the investigation of the inspector or the builder. The VBA inspected a limited number of issues at the site in early 2021.
- 3.4 The owner's failure to comply with building notices was referred to the VBA by the RBS. They were advised by the VBA that although the VBA would not seek to enforce the orders against them, they should appeal the building notices and orders to the Building Appeals Board, which they did, incurring further legal costs. The contract price for their home was \$497,000. Before the contract was terminated, the owners say they paid \$381,000 to the builder. They say since then they have incurred \$180,000 in legal costs

and paid \$70,000 for expert reports on defects. They have not yet had a hearing in VCAT. The owner's expert estimate the rectification costs at \$670,000.

- 3.5 Since our review commenced, the VBA has commissioned thorough inspections of the site, which have found breaches or conduct issues by the builder, RBS, plumber and building inspector. The VBA's expert reports also indicate that the engineer and designer's documentation submitted to and approved by the RBS was inconsistent with site conditions and inadequate. The owners are dissatisfied with these inspection reports and have provided their comments. The VBA is now progressing investigations in relation to the builder, plumber, building inspector and RBS. In addition, the building designer's conduct is being assessed and an audit of the plumbing work is being carried out. The VBA says it will take disciplinary action wherever possible.

#### 4. Case Study 2

- 4.1 This family set out to build 4 townhouses side by side to accommodate themselves and their extended elderly family members. Their builder is also the builder for complainants 3 and 4. Their contract price was \$1.637 million. The building permit was issued in October 2018 and their building contract was terminated in September 2020 with the works not yet at lock up stage.
- 4.2 The RBS issued staged permits. The first stage permit for piling works was issued in a hurry to avoid the planning permit expiring and at a time when the builder could not get domestic building insurance due to other active projects. The cost of works on the first permit was stated to be \$15,990 to avoid the need for DBI. The works proceeded well beyond the scope of the first permit for a much greater cost before the second permit was issued.
- 4.3 There were several building defects alleged, including failed waterproofing in the basement, roofing that needs replacement, defective roof framing and the inappropriate use of combustible external cladding. In Building Notices issued to the owners by the RBS after the contract was terminated, 50 non-compliances are listed. The builder is alleged to have refused to allow the owners reasonable access to the site, damaged the underground pipes of a neighbouring property and left large amounts of packaging and waste on the site, brought there from other building sites.
- 4.4 The RBS issued 2 directions to fix. In relation to one of them, the builder delayed fixing the work because the owner refused to agree to a variation to the contract that would require the owner to pay for that work. The Act expressly prevents a builder from charging for work required to be carried out under a direction to fix. The builder stopped the project. Later, when told by the RBS that he could not charge the owners for the work, he fixed the work but proceeded to invoice them for other costs associated with the delay, such as additional scaffold hire, and made an extension of time claim.
- 4.5 The builder allegedly issued claims for work he had not completed, for work that had already been paid for and for variations he had no permission to do. Although these discrepancies were pointed out by the complainant, the builder's next progress claim remained unchanged. It is also alleged that the builder unilaterally varied the agreed project payment schedule to allow him to invoice for increased payments earlier in the project and that he demanded the owners use fittings and fixtures that were cheaper

that those listed in the contract. The owners were assisted in responding to payment claims by their project manager, who had many disputes with the builder.

- 4.6 In the lead up to the contract being terminated, the builder stopped work for months, leaving the site exposed. This caused significant water damage. Before terminating the contract, the builder commenced a claim against the owners under SOPA. The owners were able to prove that the claim could not be brought against them but they were out of pocket \$10,000 in legal fees.
- 4.7 The owner first complained to the VBA in July 2020. Over 3 years she lodged 17 complaints via the VBA online complaints platform. In relation to defective plumbing work, the VBA inspected the work and identified defects. However, it told the owners to claim on the plumber's insurance and declined to take disciplinary action against the plumber. When the owner asked who the insurers were, she was told to make an FOI request. After dealing with one plumbing insurer for 12 months they told her they were not the correct insurer. The owners had to make another FOI application to the VBA to find out who the correct insurer was.
- 4.8 The insurer for the drainage plumbing continues to deny liability and the owners have had to bring VCAT proceedings. The roof plumber's insurer accepts that the roof plumbing must be replaced but says the roof framing will need significant rectification work, which the insurer will not pay for.
- 4.9 The drainage plumber did not notify the VBA for an inspection and stated on his certificate of compliance that 'as-laid' drainage plans had been lodged with the water authority. The water authority has no record of this. When as-laid plans were produced months later, they did not accord with the location of the underground drainage onsite.
- 4.10 No regulatory action has been taken in relation to either plumber.
- 4.11 The investigation of the builder was completed in May 2024. Some of that delay was attributed to difficulties in completing the complainant's witness statement. The VBA did not undertake a technical inspection of the site.
- 4.12 Since our review commenced, the builder has been issued with a show cause notice and is facing serious sanctions. He and his company's registrations have also been suspended immediately. That decision has been appealed to VCAT. The RBS and engineer are also now under investigation and the conduct of the plumbing practitioners is being assessed for investigation.

## 5. Case Study 3

- 5.1 This family set out to build a 3 storey dwelling, basement and pool house for an original contract price of \$2.6 million. Their builder is the same builder as complainants 2 and 4. The work started in early 2016 and was supposed to be complete by mid-2017. However, by mid-2017, the works were barely at frame stage and 98% of the contract price had been paid. Significant basement works and inspections by the builder's engineer were carried out without a building permit in 2016.
- 5.2 On the advice of the owner's project manager, who was later alleged to be in collusion with the builder, in 2018 the contract was amended to increase the price to \$4.6 million and to extend the completion date by 19 months. About 9 months later, the contract was terminated. The owners claim the works were only 50% complete by this time but they had paid the total contract price of \$4.6 million. They have paid a new builder a

further \$2.6 million to rectify defects and complete the works. The owners' allegations are predominantly about breaches of the contract terms including demands over payment, the builder's refusal to allow site access, product substitution and excessive delays, with the job dormant for months at a time.

- 5.3 The VBA conducted a proactive inspection of the site 4 months prior to the contract being terminated in March 2019. No defects were identified. There is limited evidence of defective work but there are claims of product substitution and of damage caused by the works being left dormant and incomplete for long periods. The owner complained to the VBA in mid July 2021. A VBA investigation report was completed three years later, in mid-2024.
- 5.4 Since our review commenced, the builder has been issued with a show cause notice and is facing serious sanctions. He and his company's registration have also been suspended immediately. That decision has been appealed to VCAT. The engineer is under investigation and the RBS' conduct is being assessed for potential investigation.

## 6. Case Study 4

- 6.1 This complainant is a property developer and project manager with over 20 years' experience in the building industry. He complained about 5 sites in total; however, his complaint predominantly concerns 3 multi-unit developments, each for several million dollars. The same builder was engaged for all three projects. This is the same builder as for complainants 2 and 3.
- 6.2 All three contracts have been terminated with works incomplete. One project was close to completion and has since been completed. Completion and rectification costs have totalled \$1 million. For this site, there were several instances where the builder apparently engaged his engineer directly for inspections, in breach of section 33 of the Act. The RBS had no knowledge of the status of the work when he attended for a frame inspection. Inspection reports from the engineer were later produced.
- 6.3 The other two projects were at partial frame stage when the contracts were terminated. For both projects, the developer claims there are significant plumbing defects. The VBA has advised him to deal with the plumbing insurers who are not accepting his claims, causing him to go to VCAT.
- 6.4 For one site, the developer claims that significant defects in steel framing were signed off by the builder's engineer, who has since passed away. The developer engaged a second builder who carried on with the framing work for some months but became insolvent.
- 6.5 In addition to allegations about defects, the developer alleges the builder made excessive payment claims and produced false documents as part of claims under SOPA in mid-2022.
- 6.6 The SOPA adjudicator found in favour of the builder but did not agree to the whole of their claim, identifying that in parts of the claim, the builder had claimed for work not yet carried out. The developer did not pay all monies ordered by the adjudicator and instead the parties entered Deeds of Settlement, under which the developer would pay part of the adjudicated amount, the builder would provide project documents, and the building contract would be terminated. The developer claims the builder did not comply with the Deeds. The builder has issued proceedings against the developer in the County Court to enforce the Deeds. The developer has counterclaimed.



- 6.7 The developer contacted Victoria Police in March 2023 with allegations that the builder relied on fraudulent documents in the SOPA adjudication claim. At the request of Victoria Police, the VBA provided documents and information regarding that issue in October 2023.
- 6.8 Since our review commenced, the builder and the building company has been issued with a show cause notice and is facing serious sanctions. He and his company's registrations have also been suspended immediately. That decision has been appealed to VCAT. The VBA is also now investigating the conduct of the engineer and is assessing whether the relevant plumbing practitioners and the RBS should be investigated.
- 6.9 In relation to the allegedly defective plumbing work, the owner's experts have identified defects on all 3 sites. On one site rectification work is estimated to be over 800,000. The VBA inspected and identified defects but took no action in relation to those defects. One plumber has been disciplined in relation to one site for failing to call for an inspection of underground drainage work and failing to lodge a certificate with the VBA. He was reprimanded and ordered to complete a course and pay costs of \$1,306.50. The VBA is now assessing whether further disciplinary actions against plumbers involved are warranted.
7. Case Study 5
- 7.1 The complainant has made complaints to the VBA in relation to 3 building projects. The first was made in 2017 and was about building work undertaken at an adjoining property. That complaint was about protection works and a boundary fence constructed by the adjoining owner builder without a building permit. The RBS was found to have backdated a building permit for the fence. The adjoining owners were cautioned. The RBS was eventually disciplined in 2022 for conduct that occurred in 2018.
- 7.2 The second complaint relates to renovations to the complainant's own unit and the third to the construction of a new building with four townhouses. The original builder for these two projects refused to complete the work. The second builder went into administration, allowing the complainant to make a claim on her DBI. Both projects had underground drainage laid and slabs poured when the projects came to a halt.
- 7.3 For the townhouse site, the plumber who carried out the drainage work was registered as a plumber but was not licensed to carry out drainage work. Their work was issued with a certificate of compliance by a licensed plumber who did not supervise the work and should not have issued the certificate.
- 7.4 For the renovation project, the identity of the plumber who did the underground drainage works is still unclear. The VBA is in the process of using its coercive powers to try to identify who did the work.
- 7.5 The complainant has expert reports which identify significant plumbing defects on both sites. In addition to defects in the underground drainage work, for one site, a water authority drain was damaged during piling works. The repairs done by an unsupervised, apprenticed plumber have since failed. A certificate was issued for that work by the apprentice's employer.
- 7.6 The VBA told the complainant to engage with the plumber's insurers. One insurer has accepted her claim but is disputing quantum; the others continue to dispute liability.



- 7.7 The complainant has also issued proceedings in the County Court against the second builder, to which the plumbers have been joined.
- 7.8 Since our review has commenced, the VBA has completed disciplinary action in relation to the plumbers that issued the certificates, for wrongly doing so. Both were fined \$5,452.00 plus costs of \$1,036.50 and ordered to complete a course on regulatory requirements. The apprentice plumber involved was cautioned and has since been registered. Disciplinary action was recently taken in relation to defective plumbing work for one site. The plumber was fined \$7,269.60, ordered to complete a course and to pay costs of \$1,036.50. The owner's experts say the cost to rectify that plumber's defects are over \$600,000 and that the defects referred to in the disciplinary action were not all the defects in the plumbing work. The investigation into another plumber remains ongoing as they have denied carrying out the work. Coercive notices have been issued to the builder and plumber and the investigation remains ongoing. No action has been taken against the builder who is no longer registered.
- 7.9 The owner maintains the actions taken by the VBA have been unacceptably slow and inadequate and the policies issued by the plumber's insurers do not comply with the Ministerial Order for plumbing insurance.
8. Case Study 6
- 8.1 The complainant in case study 6 is one of 33 apartment owners. The owners first came to the VBA about defects in their 33 unit development in late 2014. They had just moved in. Twelve months later, despite the VBA not having undertaken any inspection of the site, the owners were told by the VBA their complaint had not been substantiated. Six months later, Council issued an Emergency Order and Building Notice because one of the balconies showed signs of imminent collapse. In late 2018, the site was assessed as part of the statewide cladding audit program which led to the issuing of a second Emergency Order just before Christmas.
- 8.2 At that time, the apartment owners and their OC Manager attended a meeting with Council and VBA representatives, where they were told that if they did not comply with the Emergency Order, they could face legal action. The OC Manager resigned that day. The owners were told not to use air conditioners (in 35 degree heat) and proceeded to perform over \$100,000 of works to address the items in the emergency order. It was very difficult to obtain trades over Christmas and a fire warden was also put in place 24 hours, seven days a week.
- 8.3 The builder's registration was suspended by the VBA in early 2019 and later cancelled in late 2019, almost 5 years after the initial complaint to the VBA. The fire engineer was investigated, but no action was taken against him. The RBS also had his registration cancelled.
- 8.4 Despite the disciplinary actions, the builder has not become insolvent, so no claims have been able to be made on DBI, noting the builder had only taken out insurance for 11 of the 33 apartments. Action was taken by the VBA to suspend the builder w. When an owner complained to the VBA that he was still carrying out building work. The VBA investigated and found evidence that this was the case but decided not to take any action. The owners claim the builder continues to carry out building work as part of his son's business.

- 8.5 CSV has funded cladding rectification works for the building but the owners say they have incurred an additional \$2 million in rectification works. They still need to install fire sprinklers and do associated works, which they say will cost a further \$1.3 million. At present the owners say it is costing them \$11,000 each per year for OC fees and interest on the OC loan (which is for \$2.6 million at 10.95% interest per annum).
- 8.6 One owner has become bankrupt, another two owners have refused to pay and one owner has since passed away without paying. As owners fail or are unable to pay, their debt is distributed to remaining owners. The OC commenced a VCAT action against the builder in about 2020. They have a hearing date for September 2025 but are reluctant to continue with the VCAT hearing given the legal costs. They are not confident they will get a successful outcome, in that if the builder becomes insolvent during this process, they will not be able to recover compensation or their legal costs. If this occurs, the owners may not be able to claim on their DBI insurance given it is now almost 10 years since their project was complete.
- 8.7 The owners believe there are 8 other developments by this builder that have had CSV-funded cladding rectification works, as well as significant other defects funded by those owners' corporations.
9. Case Study 7
- 9.1 The owners of this apartment building discovered concerning defects on the day they moved in, in late 2015. By mid-2016 with the builder and developer refusing to respond, they engaged experts who confirmed their 10-apartment building was seriously defective, including that it had highly combustible EPS cladding installed on the external walls. The first contact was made with CSV and the VBA in mid-2019, when the owners began to see media reports about combustible cladding. The building was audited six months later and determined to be 'extreme risk'. The owners were required to appoint a fire warden to be present 24 hours a day at a cost of \$20,000 and to undertake emergency works. A report by an expert in mould determined that that some apartments were uninhabitable.
- 9.2 CSV agreed to fund cladding rectification works costing about \$1 million. In addition, the owners' corporation took out a loan of \$2.06 million to fund a virtual rebuild of the building. The apartment owners also had to pay legal costs for their VCAT claim against the builder and other related costs.
- 9.3 Despite there being \$3 million of defect rectification work on their apartment building, the regulatory action taken by the VBA to date is a show cause notice issued against the first RBS, which was found through the VBA's internal review process to be unsubstantiated. In early 2022, the VBA issued a show cause notice against the builder. The allegations in that notice relate to the use of non-compliant cladding on this site and four other buildings. At that time, the VBA determined that a 3-month suspension of the builder's registration was the appropriate penalty. That determination was appealed to VCAT and the suspension was removed and replaced with a slightly increased fine. There has been no action taken against any practitioner in relation to the extensive and serious non-cladding defects.
- 9.4 The company operated by the builder went into liquidation in 2023. The builder now runs a development company, using his brother's building company to undertake large apartment developments.

- 9.5 In 2022, the VCAT proceedings brought by the OC were adjourned to allow for the State of Victoria to be joined as a party to seek recovery for the cost of cladding rectification work against the company and director personally. This led to the company becoming insolvent. However, the State's claim against the director was successful, with the court ordering that he pay the State \$1.4 million in damages, plus legal costs. That decision is now under appeal and the builder has not yet paid the damages.
- 9.6 The County Court, in considering the question of the director's liability for the decision to use the non-compliant cladding, accepted the evidence of experts who said the fire engineer's report supporting the use of the combustible cladding had no reasonable basis and should not have been accepted by the RBS. The VBA has not, to date, taken any action against the fire engineer. The conduct of the RBS who issued the occupancy permit has been assessed but the VBA has determined that it does not warrant further investigation. The original RBS has been disciplined in relation to his work at two other sites. The VBA determined to fine him and suspend his registration for 9 months. He has appealed that determination to VCAT.
- 9.7 The owners were able to claim on the DBI for the building, which enabled them to pay off the strata loan. However, the owners say that each of the ten apartment owners remains out of pocket for the loan interest, legal fees, expert's fees and other costs, some to the extent of amounts over \$250,000. The owners also claim that the OC's legal costs were significantly increased because of the State joining their proceeding. In early 2023, the owner's corporation committee requested the government compensate them for a proportion of their losses. This request is still under consideration.
10. Why is it important for the VBA to take regulatory action?
- 10.1 It is important to note that where an owner is seeking compensation from a builder (or other practitioner) for losses associated with defects, they need to take their own legal action against the builder. The VBA has power to prosecute or take disciplinary action but neither of these processes can result in an order for compensation payments to owners.
- 10.2 Having said this, as a regulator the VBA is responsible for taking action to address safety risks, to deter improper conduct and, to prevent practitioners from continuing to harm others. This form of accountability gives some level of comfort to complainants. It is also the case that having been found guilty by a court or in a disciplinary process might impact on how a practitioner defends a legal action brought by an owner. Similarly, if a practitioner is told by the VBA that allegations made against them have not been substantiated or only warrant a caution, this can encourage them to defend their civil proceedings more strongly or refer to the VBA's inaction in the civil dispute.
- 10.3 Most of the complainants have a strong view that, had the VBA 'done its job,' they would not be embroiled in expensive legal actions seeking compensation. They believe that the VBA could have made their builder or plumber come back and fix the defects. Some also hope that if the VBA acts, this may lead to the builder becoming insolvent, which would enable them to claim on their DBI. Whilst these claims are understandable, there is no guarantee that regulatory action by the VBA alone can solve a complainant's issues.

- 10.4 In case study six, the registration of the builder and RBS were cancelled by the VBA, but those owners have gone on to incur substantial costs in rectifying their building and they are still involved in protracted civil proceedings many years later. In our case study seven, the VBA did suspend the builder (in relation to another site), but this was overturned on appeal to VCAT. It is important to note that the VBA currently has no power to order a builder back to site once works are complete. Even if it did, in many cases the builder cannot be sent back (because their registration has been cancelled or they have become insolvent) or owners do not want the builder back.
- 10.5 The interaction between actions the VBA can take as a regulator and civil actions an owner can take is complex. Sometimes what the VBA does or does not do affects the dynamics of a civil claim but at other times it does not. It would not be appropriate if the VBA decided to take regulatory action primarily to help a complainant in their civil case. The VBA should be impartial to any potential impact its action may have on civil disputes between complaints and practitioners when making regulatory decisions.
- 10.6 Civil disputes are often costly, unpredictable and lengthy. When complainants embark on legal proceedings, they may do so based on expert reports which overinflate their expectations about the extent of defects in their property or the amount of compensation to which they are entitled. They may also underestimate the legal costs that will be required. The quality of lawyers and defect consultants working in this area varies. Poor quality legal and consultant advice given to any party to a proceeding can have a significant impact on the progress of the proceedings and on outcomes. The unpredictability of litigation means that legal costs are hard to estimate at the outset. On top of that, Covid 19 has resulted in significant delays in building disputes, litigation delaying progress on many matters by more than a year.
- 10.7 The civil legal process is far from perfect. As proceedings progress, costs mount, and delays set in. The pressure builds for owners, particularly where their home remains incomplete, and they cannot move in. This can cause complainants to become even more frustrated with the VBA as their civil action becomes more difficult. They blame the VBA for the situation they are in when much of the distress they are experiencing is caused by the very imperfect civil legal process.
- 10.8 That is not to say that persistent inaction or ineffectiveness of the VBA over several years is excusable or does not impact consumers. Where practitioners know they have been complained about, and no regulatory action has been taken, this will lead them to believe their conduct is acceptable and they can keep doing what they are doing. Because ineffective regulation of the building industry has continued over many years, poor standards of building work and unethical conduct have been allowed to flourish in Victoria's building industry. It is critical that the system is reformed, and the VBA continues its transformation to become a trusted and effective regulator, otherwise owners will continue to be faced with debilitating outcomes including protracted and expensive legal proceedings.

## Part B – Building Practitioner conduct

Our review has identified allegations and evidence of significant practitioner conduct issues for most of the practitioners involved in these complaints. These are outlined below. In **Part D** consideration is given to what reforms or other actions could be taken to improve the competency and integrity of practitioners.

Whilst this Part focusses on the conduct of building practitioners. Poor conduct will persist in an environment where regulation is ineffective. If practitioners are not held to account by the regulator, there will be a race to the bottom. Those that want to do the right thing will be undercut by those doing the wrong thing and getting away with it. The fact that many of the issues identified below did not seem to be identified and addressed by the VBA in its review and investigation of the complaints made in our case studies is alarming. The VBA needs to have the skills, capability and resources internally to identify when practitioner conduct is unacceptable. It cannot rely on complainants to tell them what to investigate. The VBA needs to prioritise its activities so that it is a credible threat. It needs to manage its resources effectively and act swiftly and proportionately using its full range of powers. These activities need to be systematised and clear. The VBA's handling of the complaints is addressed in **Part C** of this report.

## 11. The Conduct of Relevant Building Surveyors

11.1 Conduct evident from the case studies relating to RBS' is summarised as follows:

- (a) failing to oversee mandatory inspections. In a number of cases the RBS failed to oversee mandatory inspections at all and, when owners complained about defective work, they did not attend site promptly to inspect for themselves;
- (b) failing to provide copies of inspection reports after being requested to do so. The Act provides that an RBS must provide a copy of an inspection report to an owner where a written request is made for it. In two of the case studies, building owners were not provided with copies of inspection reports after having requested them or they were only provided after repeated requests and significant delay on the part of the RBS;
- (c) manipulating the staging of building permits to suit the builder's requirements. In two of the case studies, the RBS issued staged building permits for the building work – not for any construction or technical reasons but simply to allow the builder to commence building work notwithstanding that not all regulatory requirements had been met. For example, on one site, the RBS issued a stage 1 permit for a discrete component of building work, stating the cost of work was \$15,990. This enabled the builder to commence carrying out building work under a contract for \$1.6 million without taking out DBI. The RBS was complicit in enabling the builder to 'game' the system.
- (d) issuing a building permit when DBI had only been taken out for 11 of the 33 apartments being built;
- (e) exercising their enforcement powers against owners, but not against builders. For multiple sites, rather than issuing a DTF to the builder, the RBS did not take enforcement action on more significant non-compliances, even where the owners had raised concerns with them on multiple occasions. Only after the building contract was terminated and the builder had left the site did the RBS issue a building notice to the owners which identified non-compliances and required their rectification. The reticence of the RBS to inspect more promptly and issue a DTF against the builder is concerning;
- (f) accepting certificates of compliance from engineers:
  - (i) without considering the engineer's skills and experience to provide those certificates or their relationship to the builder;

- (ii) for inspections undertaken at the direction of the builder, with no notification to the RBS.

For example, on one site, a stage 1 building permit was issued for the bored piers and capping beam, which was inspected by an engineer procured by the builder. The RBS was unaware that building work had continued and 7 further inspections had been carried by the engineer out without his knowledge or oversight. Other than to issue a building order to stop further work being carried out until the stage 2 building permit was issued, the RBS does not appear to have taken any further action;

- (g) issuing occupancy permits when the building work contained substantial and obvious defects. Case study 6 is a 33 apartment building, with many serious non-compliant and incomplete works, including a missing handrail on stairs. Despite these issues, the RBS issued an occupancy permit. A visitor to the building later fell on the stairs that had no handrail and sustained serious injuries.

## 12. The Conduct of Engineers and Building Inspectors

12.1 In relation to engineers and building inspectors, there are multiple examples of those practitioners:

- (a) failing to carry out building inspections competently. In many instances, significant deviations from the approved design or failure to carry out work in a compliant manner were not identified during a mandatory inspection;
- (b) colluding with builders to carry mandatory inspections without properly liaising with or being instructed by the RBS. Whilst it is acceptable for a mandatory inspection to be delegated to a building inspector or engineer, it is a requirement of the Act that the builder notify the RBS when the building work is ready for a mandatory inspection to be carried out, and it must be the RBS who causes the inspection to occur. There were multiple instances in the case studies of engineers being engaged directly by the builder, attending site to carry out inspections after being notified by the builder and not having any contact with the RBS, other than to subsequently provide an inspection report to them; and
- (c) failing to provide inspection reports to the RBS. In numerous instances, where inspections that were purportedly carried out by an engineer, no inspection report was provided to the RBS until a considerable period of time after the inspection date. This is concerning and gives rise to an inference that the inspection reports may be falsified;
- (d) fire safety engineers failing to consider the proposed use of combustible cladding or if they did consider it, supporting its use without any reasonable basis.

## 13. The Conduct of Building Designers

13.1 In relation to building designers, the case studies demonstrate that the building design documentation was inadequate. It is the role of the RBS to, among other things, assess building designs and determine their compliance prior to issuing a building permit. Where inadequate design has been identified, the RBS should not issue the permit until the documents are corrected. However, this also goes to the question of whether the building designer (whether a practitioner registered under the Act, or an



architect registered under the *Architects Act*) has carried out their work competently and to a professional standard.

## 14. The Conduct of Builders

14.1 In relation to builders, the allegations include:

- (a) carrying out non-compliant work;
- (b) failing to call the RBS to cause inspections at mandatory notification stages and instead directly engaging engineers to carry out inspections;
- (c) demanding progress payments for work that had not been carried out;
- (d) carrying out variations when those variations have not been properly documented and agreed upon;
- (e) demanding changes to the agreed contract, including changing the contract price or the fixtures and fittings. These changes were agreed to by owners who felt they could not run the risk of a dispute with the builder;
- (f) seeking payment for work already paid for and when this was disputed by the owner and then not amending the next payment claim;
- (g) demanding payment for works carried out under a direction to fix, then when the requirement to pay was questioned, refusing to continue with work and then later making further payment claims and extension of time claims associated with the delays;
- (h) submitting false information as part of payment claims SOPA applications;
- (i) wrongly preventing owners from reasonable access to their site, in contravention of the DBCA;
- (j) damaging neighbouring property and failing to rectify it;
- (k) leaving projects dormant and unprotected for months resulting in water ingress and damage to incomplete works, before terminating the contract;
- (l) taking out DBI for only 11 of the 33 units being built;

## 15. The Conduct of Plumbers

15.1 In relation to plumbers the allegations include:

- (a) carrying out non-compliant work. There are numerous examples in the case studies of non-compliances in the plumbing work that were so significant that the rectification costs were estimated in the hundreds of thousands of dollars;
- (b) carrying out work they were not licensed to carry out, in contravention of the Act and with the result that they were not able to issue a compliance certificate for the work;
- (c) failing to issue compliance certificates or issuing them months or years after their work was complete, and only after repeated requests for them to do so;
- (d) failing to notify for inspections of underground drainage, despite a requirement to do so prior to the work being covered by a slab;



- (e) providing false information in a compliance certificate, such as that plumbing work was supervised by them when they never attended the site or that as-laid plans were submitted to the water authority when this had not occurred;
- (f) refusing to comply with directions to rectify.

## Part C – The VBA’s handling of the complaints

For the 7 case studies, processes and attitudes at the VBA sometimes operated as roadblocks to a timely, effective and fulsome consideration of practitioner conduct.

It is important to again stress that these 7 complaints are not intended to represent all complaints that have been handled by the VBA over the past ten years. These cases were selected because of their complexity and distress to consumers.

During the review, meetings were held with VBA officers to discuss the policies and procedures in place at the time. The VBA were also asked to explain if practices had changed and if so, what those changes were.

The VBA says that the inadequate and dismissive responses to the complainants as highlighted below no longer reflect current practices at the VBA. The VBA says it has been working very hard to examine its practices and improve its effectiveness as a regulator. Some examples of changes that are being made are noted below.

Before examining the various shortcomings in the VBA’s handling of complaints, contextual factors referred to by VBA officers are noted.

### Context for the VBA’s previous approach

#### 16. Issues facing the industry

- 16.1 Following the Grenfell Tower fire tragedy in London, the Victorian Government established the Cladding Taskforce. The Taskforce considered not only the risks and approach required to address the high prevalence of non-compliant combustible cladding on Victoria’s buildings, but also opportunities for the VBA to enhance its compliance and enforcement response. In its Interim Report dated November 2017, the Taskforce recommended the VBA lead the development of a statewide audit program which would inspect buildings and work with affected owners. The Interim report also recommend that the VBA significantly increase its compliance and enforcement activities to deter future breaches; review and consolidate its compliance and enforcement policies; work to ensure practitioners had a greater understanding of the NCC and building legislation compliance; improve its data collection and analysis capabilities; and develop a resourcing model and business case to allow it to discharge these functions.
- 16.2 In 2018, in response to the Taskforce’s recommendations, the government tasked the VBA with the development and administration of the statewide cladding audit program. This included inspections and assessments of hundreds of buildings and the VBA being delegated powers to deal directly with 400 of the highest risk cladding affected buildings. In addition, a Ministerial Statement of Expectations was issued to

the VBA which required it to proactively inspect building work done under 10% of the approx. 100,000 building permits issued each year. Funding was allocated to the VBA for these additional tasks.

- 16.3 The government then went on to establish CSV and allocated \$600 million of funding to removal of combustible cladding from Victoria's highest risk buildings.

### Business as usual and delivering on the new tasks

- 16.4 In our meetings with VBA staff they said that when these important new tasks were being given to the VBA the 'business as usual' regulatory functions were facing backlogs. The investigations team had 400 complaints waiting for investigation. A further 300 investigated matters were waiting for review by the PDU team. New managers were appointed to resolve the backlog which took them over 18 months. Some careful decisions had to be made about which complaints to progress and which to close and whilst this was done with care, files were closed or cautions issued where the seriousness of the complaint had not been properly examined because technical inspections were not being done.
- 16.5 Whilst there was never a specific policy of the VBA to not investigate non-compliant building work, a decision was made to not fully resource inspections on complaint matters, only conducting inspections in limited cases.
- 16.6 We heard that during the relevant time, there were frequent changes in the executive leadership team at the VBA. This led to a lack of continuity in direction from the leadership team to senior and mid-level management. As a result, it appears that organisational policy was not clear or communicated properly and as a result was not well understood or implemented either by middle management or by the VBA's staff more generally. We were told that middle management would propose policies or processes and would not be told whether or not they had been approved by the executive team. In the absence of clear communication, middle management felt empowered to set their own informal policies and procedures.
- 16.7 The culture at the organisation was focussed on practitioners, not on consumers and was risk averse, which resulted in an overly legalistic and defensive approach to carrying out of its functions including the investigation and discipline of practitioners. The VBA staff were working with poor IT systems and did not feel properly supported or managed in their roles. When combined with a significant backlog of complaints, this led to an approach where the procedures adopted were aimed at closing complaints and keeping investigations narrowly focussed wherever possible, to get through the workload.
- 16.8 In relation to cladding discipline, the VBA took the approach that the disciplinary actions taken in relation to buildings containing non-compliant cladding would focus on allegations relating to cladding issues only. As a result of this strategy, the VBA did not investigate or seek technical reports to support allegations about non-cladding defects in those buildings, even where these were significant, such as for our 7<sup>th</sup> case study where the costs of rectification of non-cladding defects was over \$2 million. This is why the show cause notices issued on cladding discipline matters were confined to allegations about the use of non-compliant cladding. Because the disciplinary action was limited to the cladding issue, the enforcement outcomes did

not reflect the seriousness of the defects in some of these buildings. The cladding audits and discipline activities are almost complete.

- 16.9 The above explanation provides context for the way in which decision making and processes were managed and overseen by the VBA during the time over which the case study complaints were made.

## Complaint lodgement and systems

### 17. Complaint management systems

- 17.1 The complaint management system was not fully integrated across the organisation. This led to inefficiencies, unnecessary duplication and frustration for complainants. For example, where the complainant had lodged a complaint about the builder but then raised concerns about the RBS or the plumber, they would be advised to lodge a new complaint for each practitioner.
- 17.2 Further, there seemed to be basic administrative failures. In one instance a complainant lodged a complaint about very serious non-compliance issues. Two years later they were incorrectly told in writing by the Department that the VBA had no record of any complaint having been lodged. This caused considerable distress to the complainant who had invested a great deal of time in engaging with the VBA and other bodies about their complaint.

### 18. Lack of interaction/communication between teams

- 18.1 In some of the case studies the complainants lodged multiple complaints. In some instances, the complaints were not consolidated and there was no clear oversight of how the various complaints were being managed. In one example separate complaints had been lodged by the same owner and separate investigation files were opened, without the teams being aware of it.
- 18.2 In one case study, the RBS referred the builder to the VBA for failure to comply with a DTF he had issued. Four months later the owner complained about the RBS. In the investigation report into the RBS there is no reference to the DTF referral.
- 18.3 For another case study, the investigation report references a complaint date which is well after the first complaint was made by the complainant.

### 19. Repetition in process

- 19.1 It appeared from the files reviewed that complaints were initially assessed by the Complaints team who then, where appropriate, referred it to the Investigations and Enforcement team who, at the conclusion of their investigation, might then refer to the matter to PDU. PDU would then carry out its own assessment to determine whether disciplinary action should be taken and if so, on what basis.
- 19.2 Whilst each team fulfils a separate function, it took a great deal of time for matters to progress from the initial complaint through to PDU commencing disciplinary proceedings. During that lengthy process, it appeared that each team separately assessed the issues and did not necessarily form the same conclusion on them.
- 19.3 As far as possible, processes should be designed so that the same issues are not being considered repeatedly by different teams as this delays progress significantly

and can result in inconsistent conclusions between teams. Also, there should be agreed positions on legal or technical issues so that different teams are not arriving at different conclusions on the same issue.

#### **What has the VBA done about this?**

The VBA is in the process of implementing a new end-to-end complaint management system which will be applied to each complaint and be accessible to all staff. The system is designed to provide for complainants to lodge a single complaint which can be updated and added to. Complainants will also be able to see the status of their complaint. In the meantime there have been process improvements made to minimise duplication and inefficiency in complaints processes including:

- establishing a team dedicated to managing complex complaints;
- establishing a new complaints policy which is standardised and simplified across all teams;
- setting up new responsive approaches for consumer enquiries
- improving the website and other interactive channels to improve the customer experience.

## **Technical assessments of building work**

20. Lack of clarity on when a technical assessment will be carried out

20.1 In order to determine whether disciplinary action should be taken against a building practitioner, the VBA needs evidence of whether or not building work is non-compliant. Sometimes photos or documents can be informative, but usually there will need to be a site visit.

20.2 In most of the case studies, the VBA did not attend site to carry out a technical assessment. The VBA's explanation of why it did not inspect sites was inconsistent and confusing, suggesting the position was not well understood internally. For example, the documents reviewed show that VBA staff described the position variously as follows:

- (a) 'I'm not clear on when the VBA will carry out a technical inspection';
- (b) 'we are not an inspection service';
- (c) 'the VBA will only carry out a technical assessment in certain circumstances';  
and
- (d) 'the VBA is an evidence-based organisation so you need to provide evidence of your complaint'.

20.3 In numerous instances, the relevant VBA staff told complainants that they should provide their own expert reports for the VBA to review. Some complainants were told that the VBA would not investigate the matter if this evidence was not provided. This is problematic in a number of respects:

- (a) the expert engaged by the complainant to provide the report may not take a balanced approach to assessment of the issues;
  - (b) the complainant may not procure their report from an expert who holds the appropriate qualifications for the issue being investigated;
  - (c) the report may not cover all of the relevant issues – as previously noted, the complainant is usually not in a position to understand what all of the relevant issues might be and to provide the correct instructions and scope of investigation to the expert they have engaged;
- 20.4 There were differences in approach between the different teams within the VBA. In one matter, the investigation team relied on expert reports procured by the complainant, but PDU took the position that it would not rely on those expert reports and that it needed independent reports. PDU has since advised that this is not always the case and that PDU may rely on a complainant’s expert reports in some cases.
- 20.5 To the extent that the VBA’s position was that technical assessments would be carried out where the circumstances required it, this was not the position conveyed by staff who were dealing with the complainants of our seven case studies. Rather, that the message that was being conveyed to complainants was that:
- (a) non-compliances in the building work were not matters that the VBA was interested in investigating because, once the building work was complete, it had no power to direct the rectification of the building work; and
  - (b) the complainants should be referred to DBDRV and then, if necessary to VCAT, to take civil action against the builder.
- 20.6 It is correct that the VBA currently has no power to require the rectification of building work once the work is completed. However, it is a concern that VBA staff communicated to complainants that the VBA has no role to play where non-compliances are found in completed building work. It is a breach of section 16 of the Act to fail to carry out building work in compliance with the Act, NCC and the building permit. A contravention of section 16 of the Act is an offence which can be prosecuted by the VBA or a breach which can form the basis of disciplinary proceedings. The penalties specified in the Act for contraventions of section 16 are very significant, reflecting the seriousness of such a contravention.
- 20.7 In that context, it is the role of the VBA to hold building practitioners accountable for non-compliant work and to train its staff to understand the role that the VBA must play in investigating and responding to non-compliances. This does not mean all complaints about non-complaint or defective work should be inspected. The VBA has finite resources and must triage complaints so that it applies its resources and responses in a risk based and proportionate way. All staff should be adequately trained to understand this and to communicate this to complainants where necessary.

**What has the VBA done about this?**

The VBA recognises the need to increase its inspections, audit and compliance activity. In its 2023/24 budget, Government allocated \$63 million for building reform, which included significant funding for the VBA. A significant component of this funding is to be directed to more ‘boots on the ground’. Those funds are being used to establish a new multi-disciplinary inspectorate that will conduct audit and surveillance, preventative inspections and

specialist inspections. This will include inspections to support complaints and investigations processes. The VBA is currently resetting its compliance and enforcement approaches to be clear about when inspections will take place. Part of this re-set is the VBA's intent to undertake inspections earlier in the complaints process. For example, when an RBS refers a DTF to the VBA where the DTF relates to significant non-compliances in the building work.

With regard to communications to consumers about the VBA's role in investigating complaints about non-compliant building work, the VBA is working with its front line staff to ensure polite, accurate and useful responses are given.

Despite what was found in these 7 complaints, the VBA advised that it regularly investigates and disciplines builders for failing to build in accordance with the building permit, the Building Act and/or Building Regulations. Whether the VBA triages such matters for investigation and discipline will be guided by the seriousness of the non-compliances having regard to the VBA's risk-based approach. There is currently work being carried out to significantly improve the triage process.

## Investigative approach

### 21. Narrow scope of investigations

- 21.1 For the sites reviewed, it did not appear that a 'big picture' approach was taken by the VBA to understand the issues and how the various registered practitioners involved may be responsible for those issues.
- 21.2 Complainants should not be expected to understand the interaction of responsibility under the Act between different practitioners for building work. The fact that a complainant has not suggested that the VBA should be investigating the RBS, or any other category of registered practitioner should not prevent the VBA from identifying any conduct issues for all practitioners and investigating them.
- 21.3 For 2 of the case studies, the builder directly procured an engineer to carry out a large number of mandatory inspections, without notifying the RBS at mandatory notification stages. It is alleged the engineer approved building work that was not compliant, took his instructions from the builder, failed to provide inspection certificates to the RBS and may even have backdated or falsified certificates. This has had disastrous consequences, because the non-compliant basement construction and waterproofing is difficult to now remedy. The VBA is now investigating the engineer's conduct in relation to both sites.
- 21.4 For one case study, the owner, builder and RBS agreed for the stage 1 building permit to be contrived so that work could commence without a DBI policy in place. This is a regulatory issue that should be of great concern to VBA, but it was not referred to in the investigator's report.
- 21.5 On another site, the complainant asked their RBS for copies of inspection reports and was given only the frame inspection report (which they allege was created the day it was provided to them). The complainant alleged that this meant that no inspections were carried out. Two inspection reports for the slab and footings were later provided. The VBA investigator's report dismissed the allegations of the owners saying there was evidence the inspections were carried out, however, the failure of the RBS to



provide those reports on request was a breach by the RBS that was not identified and pursued by the VBA. This investigation has now been reopened by the VBA.

- 21.6 Of particular concern is the lack of investigation by the VBA into design practitioners. A number of the sites reviewed involved non-compliances in design but the VBA has not considered investigating the design practitioners involved. Whilst non-compliant design should theoretically be identified by the RBS prior to the issue of the building permit, in some circumstances it may not be and this can lead to significant difficulties arising in the building work.
- 21.7 In one case study the building design did not properly reflect the site conditions. This would not have been identified by the RBS when assessing the building permit, given that it is not common practice for the RBS to carry out a site inspection prior to issuing a permit. This then led to non-compliant work by the builder which was not initially identified by the inspector employed by the RBS. The architect involved in that design work should have been referred to the ARBV so that it could investigate that conduct and consider whether disciplinary action should be taken.
- 21.8 This is not to say that the VBA must necessarily expand the scope of every investigation to consider every possible issue. Given that the VBA's resources are finite, every investigation will need to be properly triaged to ensure that investigations focus on the most serious issues.

#### **What has the VBA done about this?**

Changes that have been implemented over the last 2 years to improve the VBA's approach to identification and investigation including:

- (a) appropriately triaging complaints at an early stage to ensure that complaints of the type reviewed will be escalated, while more minor complaints will be addressed in other ways;
- (b) not utilising the initial complaint document lodged by the complainant as determining the scope of the investigation, but rather as a starting point and a guide to the timeline of events; and
- (c) getting technical advice much earlier in the investigation so that potential issues can be identified and explored in the investigation.

For 5 of the case studies reviewed, since our review commenced, the VBA has commenced investigating practitioners involved in those cases who had not been previously investigated.

## **22. Deflecting complainants**

- 22.1 In all case studies VBA representatives told complainants their complaints about defects should be pursued through VCAT proceedings. For matters involving alleged plumbing defects, the VBA's position was that plumbers would not be referred to disciplinary action for plumbing defects because of the availability of an insurance claim by the owner.
- 22.2 The VBA should not involve itself in contractual disputes and complaints relating to minor defects in building work, rather than non-compliances, may fall within the province of a contractual dispute. However, the prospect of civil proceedings should



not be presented by the VBA as an appropriate alternative to complaining about a practitioner's conduct where the matters complained of relate to non-compliances under the Act. It is the VBA's role as regulator to consider those matters and, where an investigation is warranted do so, by taking a 'big picture' view of the conduct of all registered practitioners involved in the matter.

- 22.3 For plumbing, it has been common for the VBA not to take disciplinary proceedings and tell the complainant to pursue a claim against the plumber's insurer. The availability of an insurance claim or civil proceedings is a relevant matter for complainants to know but it does not absolve the VBA from its statutory obligation to investigate the conduct of building or plumbing practitioners and to properly consider whether disciplinary action should be taken.
- 22.4 It is well established in case law that the primary purpose of disciplinary proceedings for registered building practitioners is the protection of members of the community and the need to protect the safety and health of users of buildings. It is the regulator's obligation to take disciplinary action where that is appropriate, having regard to the overall objective of protection of the public. The ability to make an insurance claim does not protect the public against future non-compliant or unsafe work. Accordingly, that ability should not be taken into account by the VBA in deciding whether or not to take disciplinary action. To do so is to effectively force consumers to regulate practitioners' conduct by making insurance claims and/or pursuing civil proceedings against them which presumably may have an impact on that practitioner's insurance premium.
- 22.5 In any event, the availability of a claim against a plumber's insurance does not operate in a quick or efficient manner. In the 7 case studies, there were 8 instances where the owner is involved in legal proceedings against an insurer for non-compliant plumbing work because the insurer refused to accept the claim. Complainants reported that insurers took the maximum time possible (90 days) to investigate their claim and make a decision about it. This means that where a claim is denied and the complainant must then pursue the insurer in civil proceedings (which itself is likely to take around 2 years if pursued to hearing), then it will likely take around 3 years for the complainant to receive any insurance payout.

#### **What has the VBA done about this?**

In relation to complaints about plumbing defects, the VBA has changed its practices to:

- (a) more frequently inspect alleged plumbing defects that appear to be serious;
- (b) more frequently issue orders for plumbers to rectify work and encourage the plumber and owner to cooperate to allow rectification;
- (c) if the owner does not want the plumber back, make it easy for the owner to access details of the plumber's insurer;
- (d) if the plumber refuses to rectify, in addition to facilitating access to insurers' details for the owner, the VBA will progress the matter to disciplinary action based on a risk based assessment that considers the seriousness of the defects and the plumber's compliance history.

In relation to telling complainants that complaints about defects were not a matter for the VBA, this practice has changed. The front line complaints team no longer tells people this.

### 23. Requiring owners to make an FOI application

- 23.1 It has been the practice of the VBA to require that complainants who are seeking information to lodge an FOI application for the release of that information by the VBA. There are many documents that the VBA cannot release without a formal FOI application and there will also be documents which the VBA cannot release even if an FOI application is lodged, because they are prohibited or exempt from disclosure under relevant legislation.
- 23.2 However, there are some documents which the VBA could, at its discretion, release without the need for an FOI application. In circumstances where the information relates to plumbing work paid for by the owner and where the legislation contemplates that an owner is to be given a plumbing compliance certificate or can claim against the plumber's insurance, there is little reason to require that an FOI application be lodged for that information.
- 23.3 An FOI application has a level of complexity and formality to it which makes the process more difficult and time consuming for complainants. Some complainants did not accurately describe the documents they sought. This meant that the relevant FOI officer needed to respond to the applicant and propose a rephrasing of the description of the document or category or documents being sought, which the applicant then needed to consider and agree to. Whilst the VBA officer undoubtedly assisted the applicant, a more informal process would have been appropriate in the circumstances.
- 23.4 An example of this practice in operation is a complainant who, after terminating the building contract with her builder and identifying significant plumbing non-compliances, was told by the VBA that it would not issue disciplinary proceedings against the plumber and that she should claim against the plumber's insurer. The complainant contacted the plumber, who refused to provide the details. The complainant was accordingly required to lodge an FOI application with the VBA. This took several weeks.
- 23.5 She then made a claim with the insurer, who took the maximum time to assess the claim, corresponded with her for 12 months and then told her that the relevant plumbing work was carried out during a period when a different insurer was insuring the plumber's work. The complainant was then forced to lodge a fresh FOI application with the VBA, await the assessment period, obtain the details and lodge another insurance claim with the other insurer, who also took the maximum period to assess the claim and then reject it. The complainant has now lodged VCAT proceedings against the insurer.

#### **What has the VBA done about this?**

The VBA no longer requires owners to lodge an FOI application for plumbers' compliance certificates. Plumber's insurance details can be obtained via the lodgement of an FOI application form, but without having to pay a fee or go through the full application process. Further changes are being made to further simplify this process.

## 24. Incomplete building and plumbing work

- 24.1 There were numerous instances where the VBA determined that it could not pursue a particular issue because the work was incomplete and accordingly could not be regarded as non-compliant. It is sometimes the case that incomplete work can't be regarded as non-compliant but not always. For example, on one of the case studies, whilst the basement was not yet complete, it was clear that water was seeping through it when waterproofing was supposed to have been installed behind the walls.
- 24.2 A further example is in relation to plumbing work. The work involved sanitary drainage plumbing work which was incomplete, however, the in-ground drains had been laid and the concrete slab was poured. The complainant was told that, because the plumbing work was incomplete, the VBA would not investigate it. The complainant proceeded to obtain an expert report which identified significant defects in the work. Since our review commenced, the VBA has now confirmed that there are defects in the work, even though it was incomplete and the plumber has been sanctioned through the VBA's disciplinary process.

## 25. Non-compliant building work

- 25.1 Two of the 7 files reviewed involved cladding compliance issues. That is, non-compliant cladding had been fixed to the external walls of the building and that cladding was identified during cladding audits and was removed with funding from CSV.
- 25.2 Both buildings had, in addition to non-compliant cladding, very considerable other non-compliances. One of the buildings was discovered to be so structurally weakened by water ingress and other non-compliances that all apartment owners moved out and the building was almost entirely rebuilt. The other building had to have all of the balconies replaced because of structural compromise and it is still in the process of having the very extensive non-compliances rectified. In both cases, the VBA did not:
- (a) carry out a technical assessment of the non-cladding non-compliances;
  - (b) investigate the builder for those non-compliances; or
  - (c) take any disciplinary action against the builder for those non-compliances.
- 25.3 Instead the builder and RBSs were pursued by the VBA in relation only to the non-compliant cladding on the building. The complainants were referred to DBDRV in respect of the non-compliances.

### **What has the VBA done about this?**

As noted above, the VBA has reviewed its approach to inspections of alleged non-compliant work and changes have been initiated in this area such as the proposed establishment of a new inspectorate.

## 26. Prosecution of registered practitioners

- 26.1 Complainants were told that the VBA did not prosecute registered practitioners. This was confirmed in our discussion with VBA officers.
- 26.2 The terms 'prosecution' and 'disciplinary action' are sometimes used interchangeably by consumers and misunderstood as the same thing. They are in fact, very different

processes. A comparison table showing the difference between prosecutions and disciplinary actions taken by the VBA is set out below.

<b>Prosecution</b>	<b>Disciplinary actions under the Act</b>
Proceedings are commenced in the Magistrates court by the VBA	The VBA administers this process itself by issuing a show cause notice
The Magistrates hears and determines the matter and imposes the sentence which may include a fine up to the maximum amount stated in the relevant provision.	When issuing show cause notice, the VBA is required to propose an action which can include a monetary penalty up to a maximum of 150 penalty units for each allegation. After considering the response to the show cause notice, the VBA may take an action up to the amount proposed in the notice.
Penalties that can be imposed do not include suspension or cancellation of registration.	An outcome of a disciplinary action can include suspension or cancellation of registration.
Proceedings can be brought against registered or unregistered practitioners, owners or anyone who commits a breach.	Actions can only be taken against registered building practitioners or registered plumbers
Some breaches of the Act are offence provisions that can be the subject of charges in a prosecution. These are indicated in the Act by the inclusion of 'penalty units' under the provision.	Allegations in a show cause notice can include any breach of the Act (including offences) or a range of other allegations such as conduct that is alleged to be negligent, incompetent or unprofessional.
Proceedings for an offence must be commenced within certain time limits from when the breach occurred or from when the VBA became aware of the breach.	There are no time limits on when a disciplinary action can be brought (save for some limitations regarding practitioners whose registration is suspended).
Prosecutions can take several months or years to be heard and determined.	The disciplinary process has specific timeframes set out in the Act. Whilst extensions can be granted, the process is generally completed within about 3 months.

- 26.3 There are offences that can be committed by registered builders such as the failure to call for inspections, the failure to comply with DTFs and breaches of section 16, where the work does not comply with the Act, Regulations or building permit. It is therefore possible for the VBA to both prosecute and discipline a registered practitioner in relation to the same breaches. However, if the VBA determines to commence a prosecution AND to take disciplinary action against a registered practitioner for the same breaches, the prosecution must be completed first and there can be no monetary

penalty imposed in the disciplinary proceeding in relation to the allegations that were the subject of the prosecution.

- 26.4 Complainants were dissatisfied with the VBA's position that it would not prosecute the builders involved in their matters. They perceive that taking proceedings in court is the most serious action and that any decision not to prosecute favours the builder. Whilst this perception is understandable, a court cannot suspend or cancel a license, whereas disciplinary action can have that outcome.
- 26.5 The VBA confirmed that over at least the last 5 years, it has rarely used its prosecution powers, other than in respect of unregistered builders. This is partly a resourcing issue. The funds available for prosecution are entirely absorbed by prosecuting unregistered builders, for whom disciplinary proceedings cannot be taken. It is also partly a strategic decision, based on a comparison of the resources required and time taken to take a prosecution through to completion, compared to taking disciplinary action instead.
- 26.6 However, prosecuting practitioners can send a powerful message to the profession. If the VBA were to pursue the prosecution of builders for building work that does not comply with the building permit or the NCC and to publicise the outcomes of those prosecutions, this could well have significant impact in terms of both specific and general deterrence. The VBA should consider increasing resourcing for prosecution of significant offences or practitioners who repeatedly commit offences.

#### **What has the VBA done about this?**

The VBA is close to finalising a new Prosecutions Policy. This new approach will involve greater use of all the VBA enforcement tools, including prosecutions. It provides that the VBA prefers to use the disciplinary process for registered builder, but it will consider prosecution instead or as well, if appropriate. The policy says the VBA may also seek an injunction to secure remedial or rectification outcomes, where feasible and to complement disciplinary action or prosecution.

The policy says the VBA will consider factors, such as:

- if the practitioner has shown reckless or blatant disregard for the regulatory scheme and the sanction best suited to deal with this behaviour
- if there is a cumulative impact from offending, including a pattern of repetitive conduct that reflects an apparent business model designed to circumvent the regulatory framework
- proportionality and efficiency to best address strategic priorities when targeting certain types of harm (such as by considering the availability of financial penalties under the disciplinary framework compared to those available via prosecution).

## **27. Referral of practitioners to other regulators**

- 27.1 There are other regulators who have investigation and enforcement powers in relation to persons involved in the construction industry. For example, the Architects Registration Board of Victoria (**ARBV**) regulates the conduct of architects in Victoria. Consumer Affairs Victoria (**CAV**) has enforcement powers in relation to

contraventions of the Domestic Building Contracts Act 1995, such as inappropriate claims for payment.

- 27.2 A number of the matters reviewed have identified issues relating to non-compliant designs by architects. However, our review did not identify any referrals of those practitioners to the ARBV, for investigation by it. It is open to the complainants to lodge complaints directly with the ARBV. However, complainants may not necessarily be aware that the issues in their building work may have arisen from non-compliances in the building design. Where a VBA investigation identifies that this is the case, it should refer that practitioner's conduct to the ARBV, to ensure that the conduct of all relevant practitioners is duly considered and investigated if necessary.
- 27.3 In other matters, there were issues that fell within the purview of CAV, but matters were not referred to CAV for investigation. For one case study, a complainant wrote to the VBA, noting that CAV and Victoria Police had told her they were awaiting information from the VBA in order to investigate complaints made by the complainant. The VBA's response was that the complainant should pursue those matters herself. Where the VBA, through its investigations, holds evidence that indicates a contravention of a law enforced by another agency, then it is appropriate to provide that information to the other agency.
- 27.4 It isn't clear whether the VBA has a policy regarding when and how it will refer matters to other agencies. One should be developed or if there is an existing policy, it should be reviewed to ensure that architects involved in non-compliant design be referred to ARBV and that where appropriate, matters are referred to other regulators.

## 28. Investigation of phoenixing and license lending

- 28.1 For two of the builders in the case studies, the complainants provided evidence that the builders were utilising a variety of different entities to carry out their work, or alleged that the builder was phoenixing their businesses, to avoid liability for past projects. In at least one case study, the VBA told the complainant that the VBA does not investigate phoenixing.
- 28.2 It is not a contravention of the Act per se for a builder to change the entity through which building work is carried out. The Act contains some limited provisions that are designed to prevent building practitioners from engaging in phoenixing, in that:
- (a) . a registered company or an individual registered practitioner can be suspended if they become insolvent;
  - (b) a director of a company that becomes insolvent can also be immediately suspended but only if they are a director at the time of the insolvency;
  - (c) an individual or company may not have their registration renewed if the financial probity requirements are not met, which includes considering whether the individual or company:
    - (i) is or has been insolvent;
    - (ii) has had insurance declined or issued subject to special conditions;
    - (iii) judgement debts, amounts payable under a dispute resolution order or adjudicated amounts have not been paid (including amounts unpaid by an entity of which the applicant was a director).



- 28.3 Accordingly, the VBA should have a process for investigation of allegations of phoenixing, but the action the VBA can take as the legislation currently operates is limited.

## Timing

### 29. Delays in progression of complaint

- 29.1 For most of the case studies, the time between the complaint being lodged and PDU taking disciplinary action was 3-4 years. For three case studies, the VBA officers reported significant delays in preparing witness statements due to the complainants not responding to them for long periods or insisting that large amounts of irrelevant information be included.
- 29.2 In the files that were reviewed some practitioners had gone on to carry out non-compliant building work on other sites whilst the initial complaint against them was awaiting investigation, thereby impacting other consumers. This is contrary to the consumer protection purpose of disciplinary action against building practitioners. The Act gives the VBA powers to partially suspend registered practitioners. This power could be used to stop a builder from taking new work or continuing with work on one site whilst they have defects on another.
- 29.3 In addition to the cost, delays and impacts on the wellbeing of owners when they undertake litigation, one could assume that the fact that the VBA has taken no action in response to their complaints gives the builder and RBS the impression that they have done nothing wrong and have no case to answer. This might cause them to defend civil litigation more vigorously.
- 29.4 In two of the case studies, the fact that the VBA has not taken disciplinary action against the practitioners has been referred to by those practitioners or their lawyers in civil proceedings brought by the complainants. The practitioners have contended that if they had failed to carry out their work in accordance with applicable legislation, the VBA would have substantiated the complaint and pursued disciplinary action, which it did not. Whilst this assertion would not constitute a proper defence to a claim in a court, it is still a matter that may carry some weight in a civil proceeding. This has been a cause of considerable frustration and distress for some complainants. It also reflects a weak and ineffective regulatory 'posture' by the VBA.

## Approach toward owners

### 30. Holding owners accountable for non-compliant work of builders

- 30.1 The case studies show a concerning tendency to take a harsher approach to complainants than to registered practitioners. As noted previously, in some case studies, the RBS failed to issue DTFs to the builders. Instead they issued notices and orders to the owners after the contract with the builder was terminated and in circumstances where it was inappropriate to issue those orders.
- 30.2 In one instance, a building order was issued by the RBS in circumstances where:
- (a) the building work had ceased several years ago;



- (b) the RBS and the builder were defending VCAT proceedings brought against him by the owners;
  - (c) the builder had insisted that no rectification work could be carried out because the current state of the building needed to be preserved for evidentiary purposes; and
  - (d) the site was unoccupied, locked and posed no safety risk to anyone.
- 30.3 In was not necessary to issue the orders for safety reasons, it was done where the RBS was aware that the owner was not in a position to comply with it and it was done after the RBS had failed to take appropriate action against the builder whilst the building contract was still on foot.
- 30.4 Where an RBS issues a building order to an owner in circumstances where the building contract has been terminated and the order is not complied with, the RBS must refer the matter to the VBA. The VBA must, as regulator, consider the building order and whether the owner's failure to comply with it (which is an offence under the Act) should be prosecuted.
- 30.5 However, there will be circumstances where it should be abundantly clear to the VBA that it was inappropriate in the circumstances for the building order to have been issued and that it would be likewise inappropriate for it to take any action against the owners for failure to comply with that building order.
- 30.6 In those circumstances the VBA should:
- (a) promptly communicate this to the owners, so that they are not left in fear of prosecution; and
  - (b) communicate with the RBS, to warn them against the inappropriate issuing of building orders (or to consider whether they should be investigated for that conduct).
- 30.7 The VBA did not take those steps. It did not appear that the VBA identified that the issuing the of notices and orders was an inappropriate step by the RBS and did not question the RBS about that conduct.
- 30.8 In addition, when informing the complainants that it would not prosecute them for failing to comply with the orders, the VBA told them to appeal the order to the BAB, which was an unnecessary step if the order was not to be enforced by the VBA. For one site, the owners did appeal to the BAB, which required them to pay for an unnecessary legal proceeding to defend orders which the VBA had said it would not enforce. This has caused them added stress.
- 31. Interactions with complainants**
- 31.1 There were several examples of complainants being treated with disrespect and with suspicion. Some examples of that are:
- (a) a complainant, when asking how the investigation was progressing, being told that 'allegations have been made against him', with the investigator then refusing to say what they are or how he intended to take account of them;
  - (b) in another matter, numerous negative comments were made about the complainant visiting other owners of sites at which the same builder was

carrying out work, as though she was 'stirring up trouble'. She was also openly criticised by the plumbing investigator because she lodged an FOI request to obtain the plumber's insurance details and 'didn't tell him'. It appears that when a complainant is proactive, the VBA has responded with suspicion and concern;

- (c) The investigator in another matter:
- (i) felt the need to warn, in his investigation plan, that the complainant was 'emotional';
  - (ii) commented negatively on the complainant working together with another complainant to pursue their complaints against the builder;
  - (iii) commented negatively on the complainant being reluctant to provide their own expert reports to the VBA rather than the VBA carrying out a technical assessment; and
  - (iv) suggested that the complainant should themselves be investigated because they were able to pay for the substantial build cost without obtaining bank finance.

31.2 In multiple emails to complainants, the VBA gave them 7 days to provide further information and told that if they did not respond in the time given, their complaint would be closed. This was so even though it had taken several months for the VBA to contact them about their complaint.

31.3 The case study complainants had all experienced times where the VBA's approach has been to push back on complainants' concerns or deflect them to other agencies or processes. In some cases, when a complainant's behaviour became challenging the VBA put them on a 'contact management plan'.

31.4 Some of the complainants became more frustrated over time increasing their frequency of contact with the VBA and sometimes behaved inappropriately. This occurred where they also had civil proceedings that were not progressing as they hoped. These complainants were adamant that the VBA's action or inaction had directly affected the progress of their legal proceedings and in some cases, they demanded the VBA take regulatory action so as to influence the outcome of their civil proceedings. These are behaviours that the VBA needs to be able to manage carefully and sensitively.

#### **What has the VBA done about this?**

The new Regulatory Policy Statement makes it clear that the VBA aims to be consumer centric. The VBA says this has been made clear to staff in management directions and in training. The VBA has created new policies on the management of complaints about practitioners and about the VBA. It also has a new VBA Services Charter which sets out service commitments and service standards. Staff have been trained on these documents and new procedures for interacting with complaints are being implemented.

## Part D – Areas for reform, policy development or other action

In this Part recommendations are made for policy development, reform or other actions the VBA can take. A consolidated list of these eighteen recommendations is found in **Attachment A**. Some of the recommendations are not new. The Building Confidence Report and the Reports published by the Victorian Building System Review Expert Panel have made several recommendations for reform over the past 6 years, including to increase accountability for designers, to enhance the VBA's powers and to move the lodgement of building permit documents from Councils to the VBA. As a result, some recommendations made below are likely to already be under consideration by the Victorian government.

### 32. Trauma informed approach

- 32.1 Persistent complainants may be challenging at times. However, they are facing financial ruin and are under terrible emotional strain. They are further frustrated by the length of time that the VBA has taken to investigate and take regulatory action against the relevant practitioners or in some cases, the refusal of the VBA to take action on many of the issues raised.
- 32.2 The case study complainants all referred to seeing doctors and psychologists and having times of severe mental health breakdown over the predicament they have been in for several years. In addition to their engagement with the VBA, they are often involved in multiple legal proceeding and for many they come home every day to the reminder of the defective home. For those in multi-unit developments there can be disagreements between owners which impact on interactions in and around the building. These people are experiencing trauma. The VBA's approach to complainants has not always been trauma informed.

**Recommendation 1:** The VBA should develop a policy and training for all staff on dealing with complainants that is trauma informed and reflects the great strain that many complainants are experiencing.

### 33. Statutory Referrals to the VBA

- 33.1 When an RBS issues a DTF or building order and it is not complied with, they must refer the matter to the VBA which can take further enforcement action. In about 50% of cases, DTFs and orders referred to the VBA are determined to be unenforceable. This is because they are unclear, do not have all prescribed information or ask for things that are not consistent with the legislation.
- 33.2 Currently in this situation, the VBA writes back to the RBS with details of why the DTF or order is not enforceable and it is then up to the RBS to have another go at issuing the DTF or order. This is embarrassing for the RBS and they may decide it is too hard to follow the process. In the meantime, it is likely that there is non-compliant building work that is not getting fixed.
- 33.3 In one of our case studies, a DTF was referred to the VBA but no action was ever taken by the VBA to support the RBS to have the works fixed or to punish the builder for not complying. The VBA should take swift action when a DTF is referred to it. The VBA

should be given powers to issue infringement notices to a builder who does not comply and to suspend a practitioner's registration until they do comply.

- 33.4 It is critical that the DTF and building order processes work effectively. The best way to prevent owners from facing all of the impacts of defective building work is to regulate in a way that prevents the defects from occurring in the first place. This requires oversight during construction. It requires builders to call for inspections when required and RBSs to follow up on compliance and not to issue generous extensions of time where there is no reasonable explanation for why the work has not been fixed. In other words it requires all builders, RBS' and the VBA to play their roles, act fast and be responsive.
- 33.5 The RBS has a regulatory role. They are appointed under the Act to exercise functions in the interest of the public. However, they are also operating private businesses. They will often be unwilling to get involved in disputes and will lose interest in taking enforcement action if they are not well trained and supported in that role.
- 33.6 The VBA needs to provide more training and support to RBSs on how to draft enforceable DTFs and building orders. Giving them advice after the event is of limited use. In addition to providing training, one option could be for the establishment of a help desk for RBS' to call when they are drafting DTFs or notices and orders, so that they are issued properly and can be enforced if they are not complied with. The SBS should take an active role in encouraging RBS' to take decisive action when they identify defects in building work, including issuing building orders to stop work in certain circumstances.
- 33.7 The VBA should take swift and strong action if a builder does not comply with a DTF. The VBA is starting a program to inspect sites more frequently after a DTF is referred to it, even if the DTF has errors.

**Recommendation 2:** The VBA should be given powers to issue infringement notices to a builder who does not call for an inspection when required (section 33) or fails to comply with a DTF and/or to suspend a builder's registration until they do comply.

**Recommendation 3:** The VBA should provide guidance and resources through the office of the SBS that assist RBS' to draft DTFs or building notices and orders that are compliant, enforceable and able to be easily understood.

#### 34. Increasing oversight during construction

- 34.1 The RBS inspects or causes inspections to be done at mandatory notification stages. In practice this has meant that RBS' are not on site frequently during a project and, as a result most of the building work proceeds without independent oversight.
- 34.2 The system needs to provide for greater oversight during construction. This could be by requiring more oversight by the RBS or having VBA inspectors attend site more often.
- 34.3 The RBS (or inspector) generally only inspects works at mandatory notification stages. This needs to change. The RBS is required to oversee compliance with the Act, regulations (including the NCC) and building permit. It is not possible for them to do this properly by doing only mandatory inspections. An RBS should be required to do as

many inspections as are reasonable for them to be able to confirm the building work is compliant. This expectation has been set for building surveyors in NSW through the introduction of Practice Standards.<sup>1</sup> This will add cost to the construction phase but will significantly reduce costs associated with defects which are often borne by consumers after the building is built.

- 34.4 Under the current inspection arrangements, when VBA inspectors attend, often they do not have access to building permit drawings before arrival because these are lodged with councils. Provision needs to be made for the VBA to collect permit documents or have access to documents lodged with councils. Ideally these documents would be accessed digitally.
- 34.5 When VBA inspectors attend a site, they do not always know what stage the works are at. A useful time for VBA inspectors to attend would be close to the works being completed. In NSW, developers of residential buildings are required to notify the regulator at least 6 months before they expect to apply for a Certificate of Occupancy. The NSW Building Commission selects sites based on risk and conducts thorough audits. They review all documents before they visit the site, then attend for at least a half day to inspect. It is common for the NSW inspectors to require destructive testing to confirm that works comply. This does not take the place of the need for thorough oversight at earlier stages of the work, particular for the construction of basements, footings and other structural elements.
- 34.6 The notification and inspection processes in NSW have been successful in identifying defects and demanding they be rectified by the developer and builder before a certificate of occupancy is allowed to be issued.
- 34.7 The NSW proactive inspections program for class 2 developments should be adopted in Victoria. This will require amendments to:
- (a) mandate lodgement of building permit documentation with the VBA;
  - (b) mandate notifications by the developer to the VBA 6 months prior to completion of projects;
  - (c) require production of documents to the VBA and provide powers to enter sites under construction at any time (these laws already exist); and
  - (d) provide the VBA with powers to issue rectification orders and/or prohibit the issuing of an Occupancy Permit until any serious defects are rectified.

**Recommendation 4:** RBS' should be required to conduct as many inspections as are reasonably required to ensure building work is compliant. The NSW Practice Standards for certifiers provide a good example of how this can be done.

**Recommendation 5:** Instead of permit documents being lodged with local councils, the Act should be amended to provide for building permit documents to be lodged in a digital portal with the VBA. Councils can be given access to documents for buildings in their municipality. This will require resources to develop the IT systems required for these lodgements.

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<sup>1</sup> Practice Standard for Registered Certifiers Volume one – new residential apartments and Practice Standard for Registered Certifiers Volume two Class 1a Buildings

**Recommendation 6:** Amendments should be made to require developers to notify the VBA at least 6 months before they intend to seek an OP.

The VBA can then conduct audits of high risk sites and issue DTFs if required. The VBA should be given powers to prohibit the issuing of an occupancy permit until serious defects are rectified.

35. Powers after contracts are terminated or the work is issued with an OP
- 35.1 It is very challenging for a regulator to assist owners to have defects rectified after their contract with the builder is terminated or after an OP has been issued. It is not possible if the builder has become insolvent. This is a complex issue for regulators. Even if regulators improved oversight during construction and reduced the prevalence of defects before buildings were complete, this will not help owners who already have defective buildings.
- 35.2 Currently, building notices and orders can only be issued to a building owner. The DTF power can only be used during construction and whilst it could be used even after a contract is terminated, in most cases the owner will not want the builder back to the site.
- 35.3 The Act gives power to the VBA to seek an injunction from the court ordering that work be carried out, but again, unless an owner will have the builder back, it is unlikely a court will make such an order.
- 35.4 The VBA should be given discretionary powers to order a builder or developer to return to a building to rectify defects. For residential buildings this should be confined to rectification of serious defects such as structural, waterproofing and fire safety defects in common property, wet areas, roofing or facades. The VBA should have the discretion not to make the order where owners do not want the builder to return, except for where the defects require urgent rectification, in which case owners should be required to provide access. The NSW *Residential Apartment Buildings (Compliance and Enforcement) Act 2019* provides a very good example of these powers.
- 35.5 As far as seeking compensation after a builder becomes insolvent, the ACT government has recently introduced the *Property Developer Act 2024*. It provides power for the regulator to issue rectification orders to directors of property developers (which includes builders and developers) in certain circumstances when the builder or developer is has become insolvent.
- 35.6 In the UK, new laws have been introduced to improve rights of leaseholders to pursue developers for compensation or to rectify defects in apartment buildings. These laws include provision for the High Court to make 'building liability orders', which can attribute liability for building defects to related body corporates where the original body corporate has been dissolved and the court considers it 'just and equitable to do so'.<sup>2</sup>
- 35.7 The VBA's powers with regard to illegal phoenix behaviour are also very limited compared to other jurisdictions. In Queensland, the regulator must immediately

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<sup>2</sup> Sections 130 and 131 of the Building Safety Act 2022 (UK)



suspend the licence of a builder if a company that they are or have been a director of in the past 2 years goes into external administration. Proposed reforms in NSW also strengthen anti-phoenixing laws. These include not only suspending license holders involved in companies who have become insolvent but also imposing a duty on all licence holders to take reasonable steps to ensure the persons with whom they enter or maintain a business association with have not been involved in 'intentional phoenix activity'.

**Recommendation 7:** The VBA should be given powers to order a builder or developer to return to a building to rectify defects after an OP has been issued. For residential buildings this should be confined to rectification of serious defects such as structural, waterproofing and fire safety defects, balconies, wet areas, roofing or facades.

**Recommendation 8:** The government should consider statutory mechanisms to ensure that the related entities or directors of builders or developers who become insolvent can be held liable for the defective work of the failed company.

**Recommendation 9:** Enhancements to the Act's anti-phoenixing laws should be made. The VBA should be given additional powers to suspend builders who have been directors of companies which have gone into external administration. The Queensland laws and proposed reforms to the NSW laws (including the obligations placed on all license holders) should be considered as part of policy development in this area.

## 36. Effectiveness of insurance

- 36.1 As noted above, across the 7 case studies reviewed there were 9 instances where complainants made claims to plumbing insurers. In only 1 case has the insurer accepted the claim. In the other 8 cases, insurers delayed responding to complainants or took long periods of time and ultimately rejected claims, causing the owner to have to go to VCAT. In one case, a plumber's insurer took 12 months to advise the complainant that they were not the insurer at the time the work was done. In another, when rejecting the claim, the insurer advised the complainant that they could lodge a complaint with the Australian Financial Complaints Authority (AFCA). When the complainant did this, the insurer then argued successfully that AFCA had no jurisdiction to hear the complaint.
- 36.2 It appears that some plumbing insurers may be behaving poorly, undermining the consumer protection intended by the requirement to hold plumbing insurance that meets the Ministerial Order. Allegations have been made that insurers are seeking to rely on exclusions or reject claims contrary to the requirements of the terms of the Ministerial Order for plumbing insurance. Government should ascertain whether the experience of the consumers in our case studies is more widespread.
- 36.3 The ability to claim on DBI is limited to cases where the builder dies, disappears or becomes insolvent. Policies taken out since July 2015 have an additional trigger for making a claim which is where the builder has failed to comply with a Court or Tribunal Order.
- 36.4 Claims relating to structural defects must be made within 6 years of the date of the OP being issued or of the date when the contract with the builder was terminated. For

non-structural defects, the claim period is 2 years. For policies taken out since July 2017, the maximum cover amount has been \$300,000.

- 36.5 The trigger for insurance claims to be accepted where a builder fails to comply with a Tribunal or Court Order came in in July 2015. Whilst this could be helpful for some owners, in many cases the legal costs associated with taking a proceeding through to a conclusion will exceed the maximum cover amount of \$300,000. Also, it is common for the builder to become insolvent a substantial way into the legal process, but before a proceeding is heard and determined by a Tribunal or Court. Although the insolvency may trigger the ability to claim on DBI, again there is a possibility that the legal costs incurred by owners will exceed the maximum \$300,000 payout they can receive.
- 36.6 The other limitation of DBI is that it is only mandatory for residential buildings of 3 stories or less. Owners of apartments in multi-unit buildings of 4 stories or more are not covered by DBI.
- 36.7 The limitations of DBI are well known and documented. If the government is not willing to lift some of these limitations, it is all the more important for it to ensure there is a robust, well-funded, effective dispute resolution process to owners to access and a well-funded effective regulator to oversee building work during construction to identify and require immediate rectification in serious defects. At present Victoria has neither.

**Recommendation 10:** That government takes measures to ensure that plumbing insurance products comply with the Ministerial Order for plumbing and that consumers are not being poorly treated by insurers when they make a claim on this insurance.

**Recommendation 11:** That government considers the limitations of DBI and whether coverage and maximum cover amounts can be extended in ways that will improve consumer outcomes.

## 37. Dispute resolution services

- 37.1 In the early 2000s, when last resort DBI was introduced, it was recognised that this was an inferior insurance product, because it would only activate if a builder died, disappeared, became insolvent or failed to comply with a Court or Tribunal Order. To address this, the Victorian government introduced a free early dispute resolution services for consumers which was administered by CAV and later DBDRV. CAV and DBDRV receive a significant proportion of the building permit levy collected by the VBA to carry out their building regulatory functions.
- 37.2 There have been various versions of the free dispute resolution offering since it was introduced. The current version, DBDRV, is provided for by under the DBCA. That Act provides for owners to come to DBDRV with their dispute and have a conciliator appointed to assist the parties to reach a resolution. It is compulsory for parties to undergo a DBDRV conciliation before commencing proceedings at VCAT. However, DBDRV can determine that conciliation is not suitable and issue a certificate to parties to allow them to go straight to VCAT. There is provision under the scheme for DBDRV to appoint a technical officer to inspect the works and provide an independent assessment of the defects. Where defects are found, the inspector can issue a rectification order. If the builder does not fix the work as ordered, this can be referred

to the VBA for disciplinary inquiry and the builder can be disciplined and the show cause notice issued must propose suspension of the builder's registration.

- 37.3 The above process sounds like it could be effective in theory. However, in most of the case studies reviewed, either DBDRV determined the dispute was not appropriate for conciliation or the builder refused to participate properly in the conciliation. For the one case where conciliation occurred, DBDRV did not appoint an independent inspector. A dispute resolution order was made in that conciliation in relation to a discrete matter in issue, but the major issues were not resolved.
- 37.4 The DBCA is under review by the government. That review commenced in May 2023 and closed in February 2024. It is imperative that an effective, free dispute resolution service operates in Victoria. This requires a process with greater reliance on technical reports, where independent inspectors undertake site inspections and can order the builder to fix work. Where the builder does not fix the work, they should be suspended from undertaking any other works until they comply with the order.

**Recommendation 12:** The DBDRV process should be reformed and funded to ensure that independent inspectors are appointed to undertake site inspections and can order the builder to fix work. Where the builder does not fix, the Act should be amended to provide that the VBA can immediately suspend the builder to prevent them from undertaking any other works until they comply with the order.

## 38. The role of the RBS in disputes

- 38.1 The case studies show that RBSs are not taking enforcement action promptly when an owner alleges defects are arising during the project. Whilst there were examples where the RBS issued a DTF to the builder, these tended to be for discrete issues, with the RBS unwilling to thoroughly inspect the site to ensure work is complying with the permit, Act and regulations.
- 38.2 In a number of the case studies, the RBS avoided going to site at the request of owners until after the building contract was terminated. They then issued notices on the owners, relying on the owner's own expert reports. There is a role for government in boosting the accessibility of information to owners so that they are more aware of their role, rights and obligations with regard to the RBS and the builder.
- 38.3 This relates to the issues discussed above where the current business model for an RBS is to only go on site at mandatory notification stages. This needs to change. Where an owner advises the RBS that they believe there are defects, the RBS should arrange to attend site and view the works. If non-compliance with the permit, Act and regulations are evident, the RBS should swiftly issue a DTF. The RBS should thoroughly inspect the site and not wait for the owner to get an expert report or only look at discrete issues identified by the owner.
- 38.4 The **Code of Conduct for Building Surveyors** requires RBS' to have a complaints management system for complaints against the RBS but it does not deal with the role of the RBS when a dispute arises between the owner and builder. The VBA should work with stakeholders on amendments to the Code of Conduct or for the SBS to issue a practice note or guidance for RBS' on expectations for how they should respond when disputes arise over building defects.

**Recommendation 13:** The VBA should amend the Code of Conduct for Building Surveyors or the SBS should develop a practice note or guidance for RBS' on expectations for how they should respond when disputes arise over building defects. The SBS should take an active role in implementing this recommendation and in ensuring that RBS' become more consumer focused in their practices.

### 39. Poor quality design documentation

- 39.1 Poor quality design remains an issue in the sector. Whilst it is the responsibility of the RBS to review and approve documentation prior to the issuing of a permit, designers should be expected to fully understand the requirements of the Act and Regulations and prepare detailed documentation for submission to the RBS.
- 39.2 It is noted that the VBA and ARBV have recently jointly published the **Design Documentation Practice Guide for Class 2 residential buildings**. This will assist designers to understand the expectations of them when preparing design. It can also be used to inform developers and builders about the adequacy of design that they must pay for when engaging a designer. If the VBA finds the guideline is not being followed, compliance with it should be made mandatory.
- 39.3 A further way of making it clear that designers are expected to understand the Act and regulations independently of the RBS is to mandate that registered design practitioners must declare that their designs are compliant at the time they submit them to the RBS for substantive review. This should not absolve the RBS from thoroughly checking documents and requesting changes if they are inadequate. This requirement for declared designs for residential building was introduced in NSW in 2020 and is reported to have led to much better quality design documentation. That scheme also requires declared designs to be lodged in a government portal so that they can be accessed for auditing and oversight by the regulator (which should be introduced in Victoria as noted above).

**Recommendation 14:** Amend the Building Act to mandate that registered design practitioners must declare that their designs are compliant at the time they submit them to the RBS for substantive review.

### 40. Staged building permits

- 40.1 There is inadequate regulation or guidance on how and when staged permits should be used. The case studies are evidence that builders seek to manipulate the RBS to issue staged permits 'on demand' to allow them to commence work when fulsome designs are not ready or to avoid other obligations. A lack of clarity around the use of staged permits in the legislation may contribute to their misuse.
- 40.2 Again, the NSW reforms have sought to address this issue. Whilst staged building permits are allowed, the NSW *Design and Building Practitioners Act* and related guidance material makes it clear that fully developed design documentation must be declared for each stage of works.
- 40.3 The Victorian government should implement these features in reforms to address design documentation quality.

**Recommendation 15:** The VBA and the SBS should develop guidance on the use of staged building permits aimed at ensuring they are not issued to enable builders to avoid responsibilities or because documentation is yet to be properly developed.

#### 41. Inspections at mandatory notification stages

- 41.1 The case studies suggest that builders are calling engineers directly to arrange for mandatory stage inspections to be carried out. Engineers are not liaising with the RBS prior to those inspections and are not promptly providing the RBS with inspection reports. This results in the RBS being unaware of the progress of works. It may also reflect close relationships between builders and engineers which can compromise independence and are a conflict of interest. These practices are contrary to the Act.
- 41.2 The VBA has provided training to industry about these issues over recent years. However, it needs to be proactively identifying where these breaches are occurring and taking strong regulatory action against builders and engineers when it is detected.

**Recommendation 16:** The VBA needs to continue to provide training and take enforcement action against builders and engineers when they do not notify the RBS before inspections at mandatory notification stages are carried out by the engineer.

#### 42. Plumbing compliance issues

- 42.1 The case studies revealed that owners had great difficulty in getting access to a plumbing compliance certificate when their contracts with the builder were terminated.
- 42.2 The Act provides that a plumber must provide a plumbing compliance certificate for completed work to the person who engaged them to carry out the work. If plumbing work is incomplete, a builder can request a plumbing compliance certificate for partially complete work.
- 42.3 In a number of the case studies, plumbing work was incomplete and the builder did not request a plumbing compliance certificate, or if a certificate was issued, the owner was unable to obtain a copy. Owners also had difficulty obtaining the plumber insurer's details.
- 42.4 All of the case studies involved allegations of defective roof or drainage plumbing. It is not clear why this is occurring so frequently but we do know that water ingress issues are one of the most common defects in buildings.
- 42.5 There seems to be a lack of documented plumbing design being prepared before building work commences. Licensed plumbers are entitled to prepare plumbing designs but it is not clear that they all have the skills or that they are documenting design. If it is being done, it is not always being properly coordinated with other aspects of design and considered as part of the building approval process. In one case study, as laid plans were said to have been lodged with the water authority but this did not occur. In another case study, defective roof truss design led defective roof plumbing even though the roof design was amended after the building permit was issued.

- 42.6 Plans documenting the proposed plumbing design and layout and reflecting the requirements of the Act, regulations and NCC should always be prepared and form part of the building permit approved plans before the building work commences. This is reflected in the **Design Documentation Practice Guide for Class 2 residential buildings**. However, the same principle ought to apply for all buildings. Further, given owners are paying for the plumber to design and install their plumbing work, they should be entitled to be provided with a copy of plumbing design documents for their records.

**Recommendation 17:** The Act or regulations should be amended to provide that:

- (a) where a plumbing compliance certificate is issued to a person that is not the owner of the site, a copy of the certificate is also issued to the owners at the same time;
- (b) where plumbing work is incomplete, the builder must give the owner details of the plumber within 3 days of any request (even if the builder's contract with the owner has been terminated) and the owner may then request the plumber issue a plumbing compliance certificate for the partially completed work. The plumber must comply with any such request;
- (c) that plumbing compliance certificates include the plumber's insurance policy number and contact details for the plumber's insurer.

**Recommendation 18:** Plans documenting the proposed plumbing design and layout and reflecting the requirements of the Act, Regulations and NCC should always be prepared before plumbing work commences and reviewed by the RBS as part of their assessment prior to issuing the building permit. If the Act does not clearly provide for this, it should be amended and guidance should be issued by the VBA to all building and plumbing practitioners to implement reforms in this area. In developing this guidance, consideration should be given to the need for improved coordination during design development and the role of hydraulic engineers in this process.

The Act should provide clearly that plumbing designs must be lodged with the RBS and form part of the building permit approved documents. A copy of plumbing design documents should also be required to be provided to owners for their records.

### 43. Codes of conduct

- 43.1 Ethical conduct is essential for all practitioner groups. Although the VBA has had the power to issue codes of conduct for any categories or classes of building practitioner, to date it has only published a code of conduct for building surveyors.
- 43.2 Codes of conduct should be published for all building practitioner groups. There has been power to do this since 2018.
- 43.3 The ABCB published a national model Code of Conduct for fire safety engineers<sup>3</sup> which should be adopted in Victoria, particularly given there has been minimal disciplinary action taken against fire safety engineers in relation to combustible

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<sup>3</sup> <https://www.abcb.gov.au/initiatives/bcr/bcr-outputs>



cladding issues. Implementation would need to be done through CAV and the Business Licensing Authority which administers the scheme for professional engineers.

- 43.4 The conduct of builders involved in several of the case studies was unethical and whilst this can form the basis of disciplinary action, ethical expectations on builders should be spelt out in a code of conduct as a matter of priority.

**Recommendation 19:** That the VBA develop and publish Codes of Conduct for all categories of registered building practitioner, starting with builders. For fire safety engineers, the VBA should work with CAV and the Business Licensing Authority to encourage the introduction of the National Model Code of Conduct for Fire Safety Engineers in Victoria.

#### 44. The disciplinary process

- 44.1 The disciplinary process set out in Division 3 of Part 11 of the Act needs amendment. For example:

- (a) it lacks transparency for complainants who cannot access a copy of the show cause notice due to privacy laws;
- (b) it requires the VBA to put forward its case against the practitioner up front, including the proposed penalty. The practitioner can then provide a response including documents or making assertions which cannot be tested, because there is no allowance in the process for evidence to be heard and tested or for the VBA to go back to complainants for a reply;
- (c) the practitioner is then given the decision with reasons. On internal review by the VBA, the practitioner can again produce documents or make statements addressing issues raised in the reasons, and there is no ability for the internal reviewer to test that evidence or seek a reply from the complainants;
- (d) sometimes replies from the practitioner can amount to evidence of further conduct issues, but the allegations cannot be amended to include new issues during the process;
- (e) the proposed penalty must be set out in the show cause notice before the decision maker has considered any response from the practitioner. If the decision maker has considered any victim impact material, this must be given to the practitioner with the show cause notice, before the allegations have been determined.

**Recommendation 20:** To improve consumer protections, that the disciplinary process in the Act be reviewed and reforms be considered to facilitate a more robust process for testing evidence and assertions made by the practitioner in response to the show cause notice.

## Attachment A – Consolidated list of recommendations

**Recommendation 1:** The VBA should develop a policy and training for all staff on dealing with complainants that is trauma informed and reflects the great strain that many complainants are experiencing.

**Recommendation 2:** The VBA should be given powers to issue infringement notices to a builder who does not call for an inspection when required (section 33) or fails to comply with a DTF and/or to suspend a builder's registration until they do comply.

**Recommendation 3:** The VBA should provide guidance or resources through the office of the SBS that assist RBS' to draft DTFs or building notices and orders that are compliant, enforceable and able to be easily understood.

**Recommendation 4:** RBS' should be required to conduct as many inspections as are reasonably required to ensure building work is compliant. The NSW Practice Standards for certifiers provide a good example of how this can be done.

**Recommendation 5:** Instead of permit documents being lodged with local councils, the Act should be amended to provide for building permit documents to be lodged in a digital portal with the VBA. Councils can be given access to documents for buildings in their municipality. This will require resources to develop the IT systems required for these lodgements.

**Recommendation 6:** Amendments should be made to require developers to notify the VBA at least 6 months before they intend to seek an OP. The VBA can then conduct audits of high risk sites and issue DTFs if required. The VBA should be given powers to prohibit the issuing of an occupancy permit until serious defects are rectified.

**Recommendation 7:** The VBA should be given powers to order a builder or developer to return to a building to rectify defects after an OP has been issued. For residential buildings this should be confined to rectification of serious defects such as structural, waterproofing and fire safety defects, balconies, wet areas, roofing or facades.

**Recommendation 8:** The government should consider statutory mechanisms to ensure that the related entities or directors of builders or developers who become insolvent can be held liable for the defective work of the failed company.

**Recommendation 9:** Enhancements to the Act's anti-phoenixing laws should be made. The VBA should be given additional powers to suspend builders who have been directors of companies which have gone into external administration. The Queensland laws and proposed reforms to the NSW laws (including the obligations placed on all license holders) should be considered as part of policy development in this area.

**Recommendation 10:** That government takes measures to ensure that plumbing insurance products comply with the Ministerial Order for plumbing and that consumers are not being poorly treated by insurers when they make a claim on this insurance.

**Recommendation 11:** That government considers the limitations of DBI and whether coverage and maximum cover amounts can be extended in ways that will improve consumer outcomes.

**Recommendation 12:** The DBDRV process should be reformed and funded to ensure that independent inspectors are appointed to undertake site inspections and can order the builder to fix work. Where the builder does not fix, the Act should be amended to provide that the VBA

can immediately suspend the builder to prevent them from undertaking any other works until they comply with the order.

**Recommendation 13:** The VBA should amend the Code of Conduct for Building Surveyors or the SBS should develop a practice note or guidance for RBS' on expectations for how they should respond when disputes arise over building defects. The SBS should take an active role in implementing this recommendation and in ensuring that RBS' become more consumer focused in their practices.

**Recommendation 14:** Amend the Building Act to mandate that registered design practitioners must declare that their designs are compliant at the time they submit them to the RBS for substantive review.

**Recommendation 15:** The VBA and the SBS should develop guidance on the use of staged building permits aimed at ensuring they are not issued to enable builders to avoid responsibilities or because documentation is yet to be properly developed.

**Recommendation 16:** The VBA needs to continue to provide training and take enforcement action against builders and engineers when they do not notify the RBS before inspections at mandatory notification stages are carried out by the engineer.

**Recommendation 17:** The Act or regulations should be amended to provide that:

- (a) where a plumbing compliance certificate is issued to a person that is not the owner of the site, a copy of the certificate is also issued to the owners at the same time;
- (b) where plumbing work is incomplete, the builder must give the owner details of the plumber within 3 days of any request (even if the builders contract with the owner has been terminated) and the owner may then request the plumber issue a plumbing compliance certificate for the partially completed work. The plumber must comply with any such request;
- (c) that plumbing compliance certificates include the plumber's insurance policy number and contact details for the plumber's insurer.

**Recommendation 18:** Plans documenting the proposed plumbing design and layout and reflecting the requirements of the Act, Regulations and NCC should always be prepared before plumbing work commences. If the Act does not clearly provide for this, it should be amended and guidance should be issued by the VBA to all building and plumbing practitioners to implement reforms in this area.

The Act should provide clearly that plumbing designs must be lodged with the RBS and form part of the building permit approved documents. A copy of plumbing design documents should also be required to be provided to owners for their records.

**Recommendation 19:** That the VBA develop and publish Codes of Conduct for all categories of registered building practitioner starting with builders. For fire safety engineers, the VBA should work with CAV and the Business Licensing Authority to encourage the introduction of the National Model Code of Conduct for Fire Safety Engineers in Victoria.

**Recommendation 20:** To improve consumer protections, that the disciplinary process in the Act be reviewed and reforms be considered to facilitate a more robust process for testing evidence and assertions made by the practitioner in response to the show cause notice.