NSW BUILDING INDUSTRY REFORMS

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WHAT HAS HAPPENED?

The NSW Government has passed legislation to further regulate the design and construction of residential buildings. These measures respond to the loss of public confidence resulting from high profile design and building quality issues.

To address these ongoing issues, significant reforms were passed by NSW Parliament this month in the form of:

- the *Design and Building Practitioners Act 2020* (Building Practitioners Act)
- the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (Residential Apartments Act).

The key changes include:

- Statutory duty of care: a new duty of care by persons who are involved in construction work on certain buildings to take reasonable care to avoid economic loss to current and future owners caused by building defects
- Regulation of building practitioners: a system of registration and accountability for design, building and engineering practitioners required to ensure that building work complies with the *Building Code of Australia* (now known as the *National Construction Code*) and relevant Australian Standards
- Preventative measures: to empower the Secretary of the Department of Customer Service (Secretary) (and by delegation, the Building Commissioner) to issue stop work orders in relation to building work which could result in significant harm or loss and orders to prohibit an occupation certificate in respect of a residential building from being issued in certain circumstances.

WHAT ELSE HAS HAPPENED IN THIS SPACE?

Amendments already made to the Environmental Planning and Assessment Regulation 2000 in 2018 which:

- require owners of certain classes of residential and public assembly buildings to be registered on the NSW Government's Cladding Registration portal if they contain combustible cladding
- made a number of reforms to the building and subdivision certification process with effect from December 2019.

OVERVIEW OF THE RESIDENTIAL APARTMENTS ACT

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The Residential Apartments Act will commence on 1 September 2020. Exercise of functions under the Act apply to:

- building work in respect of a residential apartment building
- where the work has not been completed or was completed within the 10 years prior to exercise of the relevant function.

The Act will also apply to mixed-use developments where only part of the building is for residential use.

Who Do These Amendments Affect?

The Residential Apartments Act will impose additional obligations on "developers" described as:

- a person who arranges building work to be carried out
- the owner of the land on which the building work occurs
- principal contractors
- developers of strata schemes.

Directors and persons in management positions may also be personally liable if they knowingly authorise or permit contraventions of the Residential Apartments Act.

Occupation Certificates

Developers must give the Secretary at least six months' (but not more than 12 months) notice of its intention to apply for an occupation certificate under the *Environmental Planning and Assessment Act 1979* (NSW). If the total construction period is expected to be less than 6 months, the notice must be made within 30 days of the commencement of building work.

Failing to submit the notice may result in:

- fines of up to AUD110,000 for a body corporate
- an order prohibiting the issue of an occupation certificate in relation to the residential apartment building, which may prevent a principal contractor from achieving practical completion under the relevant head contract
- an order prohibiting the registration of a strata plan for a strata scheme in relation to the residential apartment building, preventing completion of apartment sale contracts.

For developers expecting to apply for an occupation certificate within six months of commencement of the Residential Apartments Act, notice must be given no later than 14 September 2020.

The Secretary can issue an order prohibiting an occupation certificate from being granted for a residential apartment building if:

- notice of expected completion was not provided within the required time frame
- a serious defect in the building exists (as defined by the Act), or
- a building bond required under the *Strata Schemes Management Act 2015* (NSW) has not been paid.

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Other New Enforcement Powers of the Secretary

The new powers have the potential to cause serious delays to a residential development project. Both principals and contractors of projects should carefully consider allocation of responsibility and risk with respect to compliance with the new regulations.

These new powers include to:

- issue an order to stop work for up to 12 months
- apply to the Land and Environment Court for an order to remedy or restrain a breach of the Act or regulations
- investigate a complaint about a developer or former developer
- issue a building work rectification order.

Where a rectification order is made, the Secretary may also recover its costs from the head contractor or developer:

- if the Secretary carries out the rectification order itself upon failure of the developer to comply with a rectification order
- relating to monitoring or supervising the developer's compliance with a rectification order.

OVERVIEW OF THE BUILDING PRACTITIONERS ACT

The majority of the Building Practitioners Act commences on 1 July 2021. The Act will initially apply to design and construction of residential buildings however it is expected that the scope will be expanded in the future to cover other types of buildings.

Who is Affected by the Building Practitioners Act?

Builders, designers, professional engineers and others involved in the design and construction of all kinds of buildings should be aware of their new obligations.

The end users of buildings such as owners and owners corporations stand to gain regulation and increased accountability of building professionals.

Registration Requirements

Building practitioners (generally head contractors), design practitioners, professional engineers and specialist practitioners will all be required to be registered. It is a condition of registration that the practitioner maintain adequate insurance to cover the practitioner's work.

The Secretary is given broad powers to take disciplinary action against a registered practitioner, including:

- fines of up to AUD220,000 for a company and AUD110,000 for an individual
- imposition of conditions on registration, including a requirement for specified training
- suspension or cancellation of registration
- temporarily or permanently disqualifying the practitioner.

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Directors of registered companies have a personal obligation to report conduct of the company (or a registered individual doing work for the company) that constitutes grounds for taking disciplinary action, such as:

- the standard of the practitioner's work
- the provision of compliance declarations
- allegations of fraud or dishonesty.

Regulated Designs

In general, the Building Practitioners Act requires registered design practitioners to provide design declarations for certain design work. Registered building practitioners must provide compliance declarations for building work they carry out in relation to regulated designs.

A design practitioner must provide a compliance declaration to a person when the practitioner provides that person with a regulated design. A regulated design is a design that is:

- prepared for certain building elements for building work (as specified by the Act)
- prepared for a performance solution, as defined in the *Building Code of Australia*, for building work
- any other design of a class prescribed by the regulations that is prepared for building work.

A building practitioner is prohibited from carrying out any building work for which a regulated design is to be used unless a compliance declaration has been issued which declares that the design complies with the *Building Code of Australia*.

A building practitioner must take all reasonable steps to ensure that building work subject to a regulated design is carried out in accordance with the design and complies with the *Building Code of Australia*. However, it is a defence if the building work was done in accordance with design compliance direction provided by a registered design practitioner.

Duty of Care

Who owes the duty of care?

Any person carrying out construction work on a residential building owes a duty to exercise reasonable care to avoid economic loss caused by building defects (such as costs to rectify defects).

This will include:

- builders (including head contractors, subcontractors, certifiers and engineers)
- any person who prepared regulated designs
- any person who manufactured or supplied a building product
- any person who supervised, coordinated, project managed or had substantial control over the carrying out of any construction work (potentially developers).

Parties cannot contract out of the statutory duty of care.

Who benefits from the duty of care?

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The duty of care will be owed to current and future owners of the land.

What buildings does the duty of care apply to?

The duty of care applies to all residential buildings where economic loss:

- first became apparent within 10 years of the commencement of this part of the Building Practitioners Act
- becomes apparent after the commencement of this part of the Building Practitioners Act.

Scope of the duty of care

The duty of care will extend to any economic loss suffered in rectifying defects or any damage caused by those defects that are the subject of a person's failure to exercise reasonable care.

This is a significant change to the current state of the law in NSW.

The High Court had previously found that consulting engineers did not owe a duty of care to subsequent owners for defects in the foundations of a building complex. The new statutory duty of care has in effect overturned this decision by ensuring that engineers (and all building practitioners) will now owe a duty of care to subsequent owners.

Home Building Act

The duty of care is additional to the statutory warranties of the Home Building Act 1989 (NSW). In some instances, warranty defect claims previously excluded due to expiry of the limitation period may now be made under the new statutory duty of care.

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