

10 Year Retrospective Right

The Design and Building Practitioners Act 2020 (“**D&BPA**”) makes game changing provisions and will have a significant impact on the building industry and on strata schemes.

The D&BPA commences in stages:

- Some of the D&BPA commenced on 11 June 2020, especially Part 4 imposing a new duty of care with retrospective effect. This is not limited to residential buildings.
- Most of the rest of the D&BPA commences on 1 July 2021. This includes Part 2 [regulated designs and building work], Division 1 of Part 3 [professional engineering work] and Parts 5–9 [registration of practitioners, disciplinary action against practitioners, investigations, enforcement & miscellaneous].

Division 2 of Part 3 [specialist work] commences on a day to be proclaimed, presumably on or after 1 July 2021, depending on progress with technical aspects.

The D&BPA differs from the bill which failed to pass last year including in the following way:

- Increased scope, e.g. extension of building elements to services, construction work to manufacture or supply of building products and economic loss to reasonable costs of providing alternate accommodation.
- There are new practitioner categories and obligations, i.e. specialist design practitioner/specialist work and professional engineer/professional engineering work.
- Provision for compliance declarations to be given to principal certifier, who is to take them into account when issuing occupation certificates.
- Enhanced enforcement powers, e.g. secretary able to issue a stop work order.
- Major changes to transitional provisions, e.g. some work under existing arrangements caught and duty of care given retrospective effect.

Key features

1. Registration of design and building practitioners:

- Registration.
- Professional indemnity insurance.
- Disciplinary regime.
- Regulation of design and building work:



T: (02) 9929 0226

E: dbannerman@bannermans.com.au

P: PO Box 514

M: 0403 738 996

NORTH SYDNEY NSW 2059

ABN: 61 649 876 437

W: www.bannermans.com.au

AUSTRALIA

- Registered design practitioners, registered principal design practitioners and compliance declarations.
- Building practitioners and relevant documents.
- Professional engineering work.
- Specialist work.
- Secretary given broad investigative and enforcement powers.

2. Duty of Care:

- Imposes duty “to exercise reasonable care to avoid economic loss caused by defects in or related to a building for which the work is done and arising from the construction work”.
- Extends to persons carrying out construction work, defined as “building work,
 - (a) the preparation of regulated designs and other designs for building work,
 - (b) the manufacture or supply of a building product used for building work,
 - (c) or supervising, coordinating, project managing or
 - (d) otherwise having substantive control over the carrying out of any work [referred to above]”.
- Construction work covered is very wide and includes supply and manufacture of building products.
- Duty of care is owed to each owner and subsequent owner.
- Not limited to residential buildings and includes leasehold strata schemes who do not presently have statutory warranty rights.
- However, the regulations could narrow the type of person owed the duty of care.

Other important points to note:

- (a) Delegation and contracting out of duty prohibited.
- (b) Additional to other rights e.g. under *Home Building Act 1989* and common law.
- (c) Operates retrospectively to extend to economic loss from the date of the work “If the loss first became apparent within the 10 years immediately before the commencement of section 37 [11 June 2020] or the loss first becomes apparent on or after the commencement of that section.
- (d) Subject to 10 year limitation period (from the date of completion of the work) under Section 6.20 of Environmental Planning and Assessment Act 1979 (previously known as Section 109ZK).
- (e) So building work completed more than 10 years ago will be out of time.

- (f) Proportionality claims will apply in respect of the new duty of care.
- (g) Potential methods of limiting liability by limitation of liability schemes negotiated by professional bodies for their members, e.g. under the Professional Standards Act 1994 NSW could be an invalid attempt at “contracting out” of duty of care under the Design and Building Practitioners Act 2020.

Prepared by Bannermans Lawyers
1 July 2020



T: (02) 9929 0226 M: 0403 738 996 ABN: 61 649 876 437
E: dbannerman@bannermans.com.au W: www.bannermans.com.au
P: PO Box 514 NORTH SYDNEY NSW 2059 AUSTRALIA