

# Building Commissioners New Powers

On 1 September 2020 the *Residential Apartments Act* commences. These are the main regulatory limbs through which the NSW Government, in conjunction with the existing *Home Building Act*, hope to create a more consumer friendly construction industry, and thus avoid high rise defect disasters such as Opal Towers and Mascot Towers.

Whilst the *Design and Building Practitioners Act* takes the big stick to building professionals in terms of processes and penalties, and the *Residential Apartments Act* does the same for developers, it seems that certifiers of building quality have escaped regulatory reform. The Government may have been inhibited from upping what is required from building certifiers by suggestions that professional indemnity insurers might refuse insurance to building certifiers if their exposure to legal liability was increased. Instead, what the government has sought to do through the *Residential Apartments Act* ("the Act") is to set up an additional regulatory regime with the power to review and prohibit the issue of occupation certificates.

## **Occupation Certificates Targeted**

Under the Act, the NSW Building Commissioner and his team, can be delegated by the Secretary of Consumer Affairs to enter building sites, inspect works and require the production of documents, if not satisfied those delegated may:

- Issue a stop work order,
- Issue a rectification order, and
- Prohibit the issue of an occupation certificate.

Just so that the Secretary and delegates know which sites to give attention to, the Developer is required to give the Secretary 6 months' notice of an intention to apply for an occupation certificate. Failure to give this notice can prevent the issue of an occupation certificate. (The Act contains provisions for when the anticipated date of applying for the certificate changes for reasonable reasons, or where the total building work will take less than 6 months to complete.)

Another matter that can prevent the issue of an occupation certificate is where the developer is required under the Strata Schemes Management Act 2015 to provide a 2% Security Bond against defects but fails to do so.

## **Compliance Powers**

The Act is big on powers for the Secretary and the Secretary's delegates, but short on statutory obligations.

The delegates can choose what they review and what they don't review. Presumably they will focus on major projects, or projects that are reported to them as having serious problems. In that regard it remains to be seen what impact on building quality this Act will have in NSW, if any.

The investigative powers invested in the Secretary and the Secretary's delegates are akin to those enjoyed by the Police, they include the right to require cooperation, and the right to obtain and issue search warrants.

Non-compliance with the Act carries not only significant penalties for developers, but also directors and those involved in the management of development companies.

### ***Developers***

Developers will no doubt seek to pass many of the obligations and risks arising from the Act downstream onto contractors. However such risk-shifting has its limits, most notably in the case of contractor insolvency.

The power to prevent the issue of an occupation certificate has the potential to stifle the life-blood of developers: income from sales and rent. Contract risk passing cannot be adequately relied upon to shield developers from such consequences. The Act therefore provides a strong additional motivation for developers to actively take measures to ensure construction to required standards (in addition to the liabilities imported under the *Home Building Act*).

### ***Appeal Rights***

Developers can appeal decisions made by the Secretary and delegates to the Land and Environment Court.

### ***Buildings Effected (Not just Residential)***

Recognising the reality that many apartment buildings are combined with shops and offices, the Act extends the definition of residential apartment to include the whole building, where part of that building is classified as class 2. Although the application of this may be limited by later regulation.

### ***Effect of Act on Industry?***

The obvious, and optimal, way to regulate residential building quality in NSW would have been to tighten up the process and requirements with respect to Occupation Certificates and those who issue them. The Government has not done that, instead it has empowered a Building Commissioner (delegated with the Secretary's powers) to monitor and spot check projects as the Commissioner sees fit.

The Act contains provisions which should provide comfort for consumers. Whether that comfort has any reality depends upon the Building Commissioner's choices and resources. Only time will tell.

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