Design and Building Practitioners Act 2020 – Registration and Regulation of Design and Building Practitioners

Reform Finally

The strata sector has for a number of years now lived with:

- A heated residential property market, with newly constructed strata apartments representing an ever increasing proportion of the dwellings in which people live or invest.
- Declining design and construction standards, leading to serious concerns about residential construction quality and safety, e.g. numerous defective residential high rises and widespread use of combustible cladding.
- Concerns about available recourse, in recent years the Government having reduced limitation periods to pursue statutory warranties and Court decisions limiting the availability of common law duties of care against builders.

After a failed attempt last year, the NSW Government has passed reform legislation, Design and Building Practitioners Act 2020 ("Act"), which will likely be game changing for owners corporations and lot owners in buildings with defects. Better still, the Act goes further than the one proposed last year and will have some retrospective effect, i.e. benefit some owners of already completed buildings.

The Act commences in stages:

- Some of the Act commenced on 11 June 2020, especially Part 4 imposing a new duty of care, with retrospective effect.
- Most of the rest of the Act 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 Act operates by implementing a registration regime for various design and building professionals, regulating various aspects of building design and construction and imposing a duty of care in relation to various forms of construction work. This article will consider the registration and regulation aspects of the Act. A related article Design and Building Practitioners Act 2020 – Duty of Care will consider the new duty of care imposed by the Act.

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Registration Regime

Key features:

- Restriction of specified kinds of work to registered practitioners:
    - **Registered design practitioner** for work involving preparation of regulated designs.
    - **Registered principal design practitioner** for work involving coordination of the provision of design compliance declarations for the purposes of building work done by a building practitioner.
    - **Building practitioner** for building work, meaning "work involved in or involved in coordinating or supervising work involved in one or more of …….. the construction of a building of a class or type prescribed by the regulations for the purposes of this definition, the making of alterations or additions to a building of that class or type or the repair, renovation or protective treatment of a building of that class or type.

      However, where there is a principal contractor and other contractors/subcontractors, the obligations set out below attach to the principal contractor.
    - **Registered professional engineer** for professional engineering work, meaning "engineering work that requires, or is based on, the application of engineering principles and data to a design, or a construction, production, operation or maintenance activity, relating to engineering" [UNLESS] "the work is only provided in accordance with a document that states the procedure or criteria for carrying out the work and the work does not require the application of advanced scientifically based calculations" [OR] "the engineering work is prescribed by the regulations as not being professional engineering work".
    - **Registered specialist practitioner** for specialist work, meaning "the design, construction, installation or maintenance of a building element" [OR] "other work, involving a building element, that is prescribed by the regulations" [BUT NOT] "work prescribed by the regulations as not being specialist work", building element meaning fire safety systems, waterproofing, internal or external load-bearing components essential to the stability of the building, a component of a building that is part of the building enclosure, aspects of the mechanical, plumbing and electrical services for a building that are required to achieve compliance with the Building Code of Australia and other things prescribed by the regulations.
- For registration, requirement of an application to the Secretary, who must be satisfied as to qualifications, skills, experience and professional indemnity insurance.
- Possibility of registration being varied, suspended or cancelled in certain circumstances.
- Imposition of complaint/disciplinary regime.

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Regulation of Regulated Designs

Key concepts:

- **Regulated Design** means "a design that is prepared for a building element for building work or a design that is prepared for a performance solution for building work (including a building element) or any other design of a class prescribed by the regulations that is prepared for building work.

- **Building Element** means fire safety systems, waterproofing, internal or external load-bearing components essential to the stability of the building, a component of a building that is part of the building enclosure, aspects of the mechanical, plumbing and electrical services for a building that are required to achieve compliance with the Building Code of Australia and other things prescribed by the regulations.

- **Design Compliance Declaration** means a declaration in the form and manner prescribed by the regulations as to ……. whether or not a regulated design prepared for building work complies with the requirements of the Building Code of Australia, whether or not the design complies with other applicable requirements prescribed by the regulations ……., whether or not other standards, codes or requirements have been applied in preparing the design and any other matter prescribed by the regulations.

- **Principal Contractor** means a person who agrees to do building work under a head contract and for whom "work is to be carried out under one or more other contracts or arrangements as part of or incidental to the work carried out under the head contract".

  Note- where there is a principal contractor, the obligations referred to below as attaching to the builder attach to the principal contractor and not to subcontractors.

Key obligations:

- A builder must not, except with reasonable excuse, carry out building work that requires a regulated design until a final design is received from a registered design practitioner together with a declaration from that registered design practitioner.

- A builder bears the responsibility of ensuring that:

  - all regulated designs are prepared by registered design practitioners;

  - regulated designs are accompanied by a declaration from a registered design practitioner as to compliance with the Building Code of Australia and any other applicable regulations; and

  - the same is done in relation variations to regulated designs.

  Maximum penalties for non-compliance are $33,000 for companies and $11,000 for individuals.

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- A builder must, prior to application for an occupation certificate, provide to the person for whom the work is performed, a building compliance declaration and other documents required by regulation, stating:
    - whether the work complies with the requirements of the Building Code of Australia;
    - whether the work complies with the requirements of any other applicable regulations;
    - if non-compliant, the steps the builder will take to ensure compliance;
    - whether the builder has relied upon and built in accordance with each regulated design as prepared by a registered design practitioner;
    - whether the builder has obtained a design compliance declaration for each of the regulated designs;
    - whether a principal design practitioner has been appointed in relation to the regulated designs to which the design compliance declaration relate; and
    - whether the builder has obtained a principle compliance declaration from the principle design practitioner in relation to the design compliance declaration.

  The maximum penalty for making a false or misleading building compliance declaration is $22,000 or imprisonment for two years, or both.
- The legislation provides that regulations may make provision of a declaration a precondition to application for other requisite certifications.

Investigation, Enforcement and Disciplinary Action

The Act provides for the appointment of authorised officers with wide-ranging powers to investigate compliance, including powers to:

- Require the production of documents and records;
- Require persons to attend at a specified time and place and answer questions;
- Enter premises and in some circumstances inspect and seize items;
- Obtain search warrants;
- Access or demolish building work if an 'authorised officer' has reasonable grounds for believing that it is necessary because of an offence under the Act.

The maximum penalty for obstruction of or failure to comply with a direction of an authorised officer is $11,000 for a company or $2,200 for an individual.

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The Secretary can also issue a *Stop Work Order* if the Secretary is of the opinion that the work is or is likely to be carried out in contravention of the Act and such contravention could result in significant harm or loss to the public, potential occupiers or significant damage to property.

Key takeaways

- The Design and Building Practitioners Act 2020 introduces a registration regime for design and building professionals in NSW.
- The Act imposes a new duty of care with retrospective effect, benefiting owners of completed buildings.
- Key features include restrictions on certain types of work to registered practitioners.
- The Act aims to address declining construction standards and improve building safety.
- The legislation is being implemented in stages, with most provisions commencing on 1 July 2021.

****The information contained in this article is general information only and not legal advice. The currency, accuracy and completeness of this article (and its contents) should be checked by obtaining independent legal advice before you take any action or otherwise rely upon its contents in any way.*

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