

# Design & Building Practitioners Act 2020

## Introduction

The Design and Building Practitioners Act 2020 (“Act”) greatly improves the prospects of owners corporations and lot owners in buildings with defects, with some retrospective effect, i.e. benefits for some owners of already completed buildings.

The Act operates in conjunction with the Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020 which we have considered in a separate article titled [Building Commissioners New Powers](#).

The Act commences in stages:

- Some of the Act commenced on 10 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;
  - Part 3 Division 1 – reserving professional engineering work to registered professional engineers and imposing indemnity insurance requirements;
  - Parts 5 – registration of practitioners;
  - Part 6 - disciplinary action against practitioners;
  - Part 7 – investigations;
  - Part 8 – enforcement;
  - Part 9 – miscellaneous, e.g. review and report on act in Q2 2022.
- Part 3 Division 2 – reserving specialist work to registered specialist practitioners and imposing indemnity insurance requirements, commences on a day to be proclaimed.
- The Design and Building Practitioners Regulation 2021 has been made and commences on 1 July 2021.

The Act operates by implementing a registration regime for various building practitioners, regulating various aspects of building design and construction and imposing a duty of care in relation to various forms of construction work.

These measures necessitate stakeholders giving urgent consideration to the following issues:

- Professional Engineers and Design and Building Practitioners need to register under the legislation.
- Some practitioners will need to declare BCA compliance for their designs and lodge them on the NSW Planning Portal before work can start.
- Practitioners need to consider whether their work has been priced appropriately, given the additional liability and compliance costs to which they will now be exposed.
- Owners of buildings with defects need to take legal advice about whether they may have claims under the Act, even if they would previously have been out of time to pursue claims.
- Owners of buildings with defects considering settlement of claims need to proceed carefully and ensure that claims under the Act are either properly compensated or preserved.

### **Duty of Care**

Prior to the Act, the common law position established by several High Court cases was that a builder does not owe a duty of care to avoid economic loss to the subsequent owners of the property the builder has worked on.

Under Part 4 of the Act, specified parties owe a duty to current and future owners “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”.

Key features:

- Parties caught – The duty of care extends to persons carrying out construction work and also designers, manufacturers and suppliers of building products and supervisors, coordinators and project managers of construction work.
- Persons benefitted:
  - The duty of care extends to current and future owners.
  - It is not limited to residential buildings. Construction work is presently defined so as to include residential building work under the Home Building Act 1989, but the Act permits additional categories of work to be specified by regulation, although this has not as yet happened.
  - If the land is subject to a strata scheme within the meaning of the Strata Schemes Management Act 2015, the owner includes the owner of a lot and the owners corporation constituted for the scheme.
  - If the land is subject to a community, precinct or neighbourhood scheme within the meaning of the Community Land Management Act 1989, the owner includes the proprietor of a lot as well as the association for the scheme.

- It extends to leasehold strata schemes, who do not presently have statutory warranty rights.
- Loss caught – An owners corporation or an association is taken to suffer economic loss if it bears the cost of rectifying defects (including damage that defects have caused) that are the subject of a breach of the duty of care imposed under the Act, and include the reasonable costs of providing alternative accommodation where necessary.
- Cumulative rights – The duty of care is additional to any other obligations, e.g. contractual or pursuant to statutory warranties under the Home Building Act 1989.
- Retrospective application - Owners may enforce the statutory duty of care for economic loss which “first became apparent within the 10 years immediately before the commencement of section 37 [10 June 2020] or ..... first becomes apparent on or after the commencement of that section, regardless of whether an action for breach of a common law duty of care has commenced before the commencement of the statutory duty.
- Limitations periods:
  - The duty of care is subject to Section 6.20 of the Environmental Planning and Assessment Act 1979, previously known as Section 109ZK, which essentially imposes a limitations period with respect to pursuing actions in relation to defective building and subdivision work, being a period of 10 years from the date of completion of the work. However, the scope of work covered by the duty of care is broader than the scope of work to which the limitations period applies and some claims may persist notwithstanding expiry of the 10 year period.
  - The duty of care is also subject to the 6 year limitation period under section 14 of the Limitation Act 1969 and there are two main views on how far this further limits claims under Part 4:
    - The prevailing view seems to be that the 6 year period within which claims must be brought commences on the date on which the loss first became apparent, i.e. the period could have partly or wholly expired by the time Part 4 commenced.
    - An alternate view is that, because the 6 year period operates from the date on which the relevant cause of action arose and because a cause of action conferred by legislation cannot arise before commencement of the relevant legislation, the 6 year period operates from the latter of the date of commencement of Part 4 and the date on which the loss first became apparent.

Until we have judicial guidance on this point, some care will be required not to pursue claims which are out of time or to neglect to pursue claims which are within time.

- Delegation and contracting out – Owners are given some protection in relation to construction contracts, contracting out of rights being precluded. However, they need to be careful when settling disputes, as it will still be possible for settlements to extend to rights

under the new duty of care. Specifically, they need to either exclude claims under the new duty of care from the settlement or ensure that the settlement includes appropriate compensation for such claims. What will be the impact of limitation of liability schemes negotiated by professional bodies for their members, e.g. under the Professional Standards Act 1994 NSW. Will this be seen as an invalid attempt at “contracting out” of duty of care under the Design and Building Practitioners Act 2020 or prevailing inconsistent legislation?

- Proportionality claims - Proportionality claims under the Civil Liability Act 2002 will apply to claims under the new duty of care. However, this could lead to anomalous situations, due to different types of liability pertaining to different practitioners. For example, as the new duty of care does not extend to certifiers, an owners corporation probably cannot pursue a certifier directly, although a builder may be able to make a cross-claim against a certifier and an owners corporation may be able to pursue the builder’s cross-claim in the event of insolvency of the builder.

## Registration Regime

The Act restricts 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



T: (02) 9929 0226

E: [dbannerman@bannermans.com.au](mailto: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](http://www.bannermans.com.au)

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regulations.

For registration, an application to the Secretary is required, who must be satisfied as to qualifications, skills, experience and professional indemnity insurance, with the possibility of registration being varied, suspended or cancelled in certain circumstances.

## 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.



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

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

- 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.

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.

**Prepared by Bannermans Lawyers**

**17 June 2021**



T: (02) 9929 0226

M: 0403 738 996

ABN: 61 649 876 437

E: [dbannerman@bannermans.com.au](mailto:dbannerman@bannermans.com.au)

W: [www.bannermans.com.au](http://www.bannermans.com.au)

P: PO Box 514

NORTH SYDNEY NSW 2059

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