A Comprehensive Guide to the Design & Building Practitioners Act 2020 – Regulation Update

Introduction

The NSW Government recently made the Designers and Building Practitioners Regulation 2021 ("Regulation") under the Designers and Building Practitioners Act 2020 ("Act"), assisting greatly in establishing how the Act will be phased in and work in practical terms. 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.

We have prepared this article to assist in determining what action you should take in light of the new legislation. This article is aimed at strata schemes, their strata managing agents and others dealing with design and building practitioners. Design and building practitioners will require advice far beyond the scope of this article and should consider obtaining urgent legal advice, as they have a lot to do by 30 June 2021 and may well already be engaged in activities which will be impacted by the new legislation.

The Act imposes new obligations on design and building practitioners, focused on improving performance. Persons dealing with design and building practitioners need to consider the following:

- Design and building practitioners performing most kinds of design and construction work in relation to specified classes of buildings, will need to be registered and to get the most benefit from the new legislation, persons engaging them should ensure that they are registered.

- An important practical consequence is that schemes will have greater scope for pursuing building defect claims, e.g. the legislation potentially extends the range of claims which may be made and the range of practitioners against whom they may be made, as well as potentially extending limitations periods. Accordingly, schemes and their managing agents experiencing building defect issues should obtain legal advice as to the implications of the new legislation. In particular:

    - They may have claims which they had not previously considered.

    - They should exercise care, when negotiating settlement of a claim, not to release additional rights they may have under the Act, unless that is intentional.

- Helpful as it may be, the new legislation is not going to resolve a number of ongoing issues, e.g. whether a design and/or building contract is going to achieve the expected outcome for

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the property owner. That will, as always, turn on the care and attention put into preparing the contract and schemes and their managing agents considering such contracts should obtain legal advice and not rely on this or any other legislation to fully protect them.

The Act commences in stages:

- As from 11 June 2020, the Act imposes a duty of care on design and building practitioners, i.e. the possibility of making a claim against such practitioners is there if they act negligently. This will have potential retrospective effect, i.e. the potential to make a claim in relation to work, which preceded the commencement of the Act.

- As from 1 July 2021, most of the rest of the Act comes into force.

- At a future date not yet determined, the last of the Act will come into force, being registration requirements in relation to specialist practitioners.

And after this:

- The duty of care extends to work involving:

    - Many classes of buildings including class 2, 3 or 9c buildings.

    - residential building works under the Home Building Act 1989, which extends to most forms of work, including repairs, renovations, decoration and application of protective treatments having a cost exceeding $5,000.

- The duty has potential retrospective effect, extending to loss which first became apparent after 11 June 2010, but other legislation restricts the period within which claims must be made and there is currently some doubt as to whether and to what extent, this legislation negates this retrospective effect.

Duty of Care

The Act provides that specified parties owe a duty of care in relation to specified forms of construction work.

Key features:

- Benefit of the duty of care extends to current and future owners.

- Benefit extends to leasehold strata schemes, who do not presently have statutory warranty rights.

- The duty of care extends to persons carrying out construction work and also designers, manufacturers & suppliers of building products and supervisors, coordinators and project managers of construction work, but does not extend to certifiers.

- The duty of care extends to work involving:

    - Many classes of building including class 2, 3 or 9c buildings.

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- residential building work under the Home Building Act 1989, which extends to most forms of work, including repairs, renovations, decoration and application of protective treatments having a cost exceeding $5,000.

- The duty has potential retrospective effect, extending to loss first became apparent after 11 June 2010, but other legislation restricts the period within which claims must be made and there is currently some doubt as to whether and to what extent this legislation negates this retrospective effect.

- The Courts have been providing important decisions about this duty of care and they key cases are explored in our article Piercing the corporate veil with the duty of care under the Design and Building Practitioners Act 2020.

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 design compliance declarations.

- **Building practitioner** for building work, meaning work involving:

  - a class 2, 3 or 9c building.

  - residential building work under the *Home Building Act 1989,* which extends to most forms of work, including repairs, renovations, decoration and application of protective treatments having a cost exceeding $5,000.

- **Registered professional engineer** for professional engineering work, meaning work that requires, or is based on, the application of engineering principles.

- **Registered specialist practitioner** for specialist work, meaning design, construction, installation or maintenance of a building element, in turn 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 BCA compliance and other things prescribed by the 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.

There are some transitional arrangements for current practitioners.

Regulation of Regulated Designs

Key concepts:

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

- **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 BCA compliance and other things prescribed by the regulations.

- **Design Compliance Declaration** means a declaration as to whether a regulated design complies with the requirements of the BCA and other applicable requirements prescribed by the regulations.

Key obligations:

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

- 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 BCA;

    - 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.

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- A principal certifier must not issues an occupation certificate without these documents.
- Transitional arrangements apply for work commenced prior to 1 July 2021 and for work based on designs prepared before that date.

Investigation & Enforcement

The Act impose severe penalties for non-compliance.

The Act also 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 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.

Remedial Works

Fortunately, not all remedial works are captured by the provisions, and a consideration of the complicated exemption provision found at clause 13 of the Design & Building Practitioners Regulation 2021 should be undertaken if you wish to avoid these implications: https://legislation.nsw.gov.au/view/html/inforce/current/sl-2021-0152#sec.13.

Reasonable excuse for not complying
Fair Trading has provided some guidance in relation to where emergency works permit non-compliance with the design and registration requirements of the D&BPA. This is a complex area but you can read more here: Urgent Building Works: Do you need to comply with the Design and Building Act?

Enquiries

Understandably, due to the complexity of this legislation feel free to contact us to obtain advice on:

- pressing or defending a duty of care of right in respect of defects;
- whether or not the exemption for design and registration applies;
- whether or not the reasonable excuse (emergency works) exclusion applies for design and registration; and
- obtain contractual modifications to suit the obligations in the event that compliance with design and registration is required.

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Some other interesting related articles

The Subcontractors Conundrum: How the D&BPA Empowers Owners Corporations to Pursue Justice

Existing Construction Projects: Do they need to comply with the Design and Building Practitioners Act 2020

10 Year Retrospective Right

What is a Class 1 and what is a Class 2 Building?

A history of the cases exploring the duty of care under the Design & Building Practitioners Act 2020

Key takeaways

- The Act imposes new obligations on design and building practitioners, requiring registration for most types of work.
- Strata schemes may have expanded rights to pursue building defect claims under the new legislation.
- The duty of care introduced by the Act may have retrospective effects on claims related to prior work.
- Legal advice is essential for strata schemes to navigate the implications of the new legislation.
- The Act will be phased in, with different provisions coming into force at various times.

****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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Updated 5 September 2023

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