



DESIGN AND BUILDING PRACTITIONERS ACT 2020 (NSW) – TOWARD A POTENTIALLY INCREASED LIABILITY

On 11 June 2020, the new *Design and Building Practitioners Act 2020 No 7 (NSW)* (the Act) was enacted.

The Act seeks to address the issues identified in the Building Confidence report¹, in particular clarifying the accountabilities of different design and building practitioners and imposing controls on the accuracy of the construction documentation in order to be compliant with the National Construction Code. The Act therefore creates a new suite of obligations on design and building practitioners to ensure that each step of construction is well documented and compliant in order to restore confidence in the building sector.

Save for the duty of care regime which applies immediately, most provisions under the Act will not apply until 1 July 2021.

¹ *Building Confidence—Improving the effectiveness of compliance and enforcement systems for the building and construction industry across Australia* report prepared by Professor Peter Shergold, AC, and Ms Bronwyn Weir.

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Highlights

The Act contains several key reforms in order to ensure the safety, accountability and proper construction of a building:

- New registration scheme for design and building practitioners
- New requirements of compliance declarations for regulated designs and building works
- New duty of care owed by persons doing construction work to avoid economic loss caused by defects in respect of certain buildings to current and new owners with a retrospective application for existing buildings
- Enforcement powers

What type of building?

The Act applies to construction work, which includes residential building work within the meaning of the *Home Building Act 1989* (NSW) and any other building class or type which may be prescribed by the regulations.

Registration of practitioners and compliance declarations

The Act requires that all parties involved in the design and building process be sufficiently qualified and accountable.

In respect of design, the Act now provides for “Regulated Designs” which are designs that are considered and critical (e.g. fire safety systems for a building, waterproofing, an internal or external load-bearing component of a building).² A regulated design can only be prepared by a registered design practitioner or a registered principal design practitioner.

To achieve accountability in the industry, the Act creates three categories of practitioners (design practitioners, principal design practitioners and building practitioners) who each will be required to:

1. be registered under a new registration system, in order to ensure that practitioners involved in the design and building process are competent, qualified and suitably insured; and
2. make “compliance declaration” (either as a design compliance declaration, a principal compliance declaration and/or a building compliance declaration)³. This means that all registered practitioners will be required to declare that their regulated design or their building work comply with the Building Code of Australia (BCA).⁴ Any major variations to the designs must also be declared as compliant

before being provided to the building practitioner.

All compliance declarations for building work must have been issued before an application for an occupation certificate can be made. Accordingly, the Act provides that written notice must be given to each registered building practitioner who did building work of the intention to apply for an occupation certificate as well as written notice that such application has been made.⁵

These declarations and their detailed content are yet to be finalised (and will be set out in the regulations) but could include for example, details of any methods used to assess and verify compliance with the BCA, proposed methodologies and choice of materials for building works etc.

Retrospective duty of care

Part 4 of the Act establishes a statutory duty of care owed to the owner of the land by those who carry construction work in respect to liability for defective building work.

The aim of this duty of care is to avoid economic loss caused by defects in or related to a building for which the construction work is done or arising out of that work. This duty is owed to

² See s5.

³ See s8.

⁴ See s8, 9, 12 and 17.

⁵ See s16.



both current and future owners of the land (whether owner of an estate of freehold, a lot within a strata scheme or the proprietor in relation to the lot within a community scheme).

It is worth noting that the duty of care applies retrospectively to construction work carried out before 11 June 2020 however, it is limited where:

1. the loss first became apparent (or the owner ought reasonably to have become aware of the loss) 10 years before the commencement of the statutory duty; or
2. the loss first became apparent (or the owner ought reasonably to have become aware of the loss) on or after the commencement of the statutory duty.⁶

It is designed to work alongside other common law duty of care and cannot be delegated to another person, nor can it be contracted out.

Enforcement

To ensure compliance and enforcement with these new requirements, the Act allows the Secretary of the Department of Customer Service to issue *stop work orders* for up to 12 months (which can be challenged in the Land and Environment Court of NSW),⁷ and/or seek an order from the Land and Environment Court of NSW to

remedy or restrain a breach of the Act.⁸ Lastly, the Secretary of the Department can also (with or without a complaint having been received) to investigate registered practitioners (current or former) at any time.⁹

The Act also provides for heavy fines. For example:

1. in the event that a practitioner fails to make a declaration or makes a declaration when they are not registered (up to \$165,000 as a body corporate),
2. if a person who makes a declaration knows it is false or misleading (up to \$220,000, two years imprisonment, or both),
3. if a registered design practitioner does not make and provide further declarations after major variations to the design are made (up to \$330,000 in the case of a body corporate).

Getting ready

As a builder or developer, these new obligations could have a significant financial impact on new (and existing) projects. Accordingly, we would recommend: reviewing of your insurance policies, risk profile and pricing mechanisms in order to anticipate any potential increased liability.

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⁶ See Schedule 1, clause 5.

⁷ See s89 and 90.

⁸ See s91.

⁹ See s92.

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