

New Building Legislation promises Accountability and Oversight



Design and Building Practitioners Act 2020 (NSW)

The regulatory landscape of the building and construction industry in New South Wales (**NSW**) is set for major overhaul over the next 18 months as the “first pillar” of the NSW state government’s “six pillar” reform package is rolled out with the aim of returning consumer confidence to the residential property market.

Two legislative instruments recently enacted by Parliament form the bedrock of the government’s legislative reform. The first of these, the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020 (NSW)* (**RAB Act**), provides a wide range of powers for the government to inspect residential apartment building works, and force developer’s to remedy defects before issuance of an occupational certificate (**OC**). Our earlier article on the RAB Act can be found [here](#).

In this article we discuss key components of the government’s second piece of legislation aimed at restoring consumer confidence, the *Design and Building Practitioners Act 2020 (DBP Act)*, which came into force on 10 June 2020.

Overview of the DBP Act

The DBP Act implements a comprehensive scheme providing the Secretary of the NSW Department of Customer Service (**Secretary**) complete oversight of every *building practitioner, design practitioner, engineer or specialist practitioner* who undertakes construction work in NSW.

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On and from 1 July 2021, all professionals involved in the construction process will need to be **registered** to be able to undertake construction work and will need to provide the requisite *compliance declarations* in relation to their designs or work. In particular, designers will be required to provide declarations of compliance for every *regulated design* relating to *building elements* which they design including fire safety, waterproofing, load bearing structural components, and services.

Additionally, new mandatory insurance requirements covering *compliance declarations* will also apply to all building practitioners.

Finally, the DBP Act provides a statutory duty of care to owners, subsequent owners and Owners Corporations of residential building work, allowing them to have an alternative cause of action against building practitioners for economic loss caused by any defective design or work that is suffered.

Notably, the statutory of care commenced on 11 June 2020 and will apply to all building work performed within the last ten years and will supplement the rights and entitlements provided for by the statutory warranties contained in the *Home Building Act 1989 (NSW)*.

What work does the DBP Act apply to?

Section 4 of the DBP defines the scope and meaning of “*building work*” as set out in the regulations which, as at the date of this publication are yet to be released.

It is unclear therefore exactly what classes of building under the Building Code of Australia (**BCA**) will be within the purview of the DBP Act. It is the writer’s view that legislation will most likely apply to buildings that are class 2 and higher.

Professional Registration

The DBP Act introduces a scheme of compulsory registration for building professionals, through which the Secretary will have full oversight of the qualifications, experience and track record of every person engaged in construction, at each stage of building process from concept design to final inspection.

Under Part 5 of the DBP Act, professionals engaged in *building works* will be required to submit an application for registration with the Secretary. The Secretary will then determine whether an application is accepted or refused based on the applicant’s qualifications, skills, knowledge, experience and particularly whether the applicant has:

- previously been reprimanded for breaching the law;
- had relevant registrations previously cancelled; and
- a close associate influencing them who would not be a fit and proper person for registration themselves.

Registration may also be subject to conditions and will be valid for a period between 1 – 5 years as determined by the Secretary.

In short, professionals who consistently perform negligent, defective, and non-compliant work can be refused registration to prevent them from carrying out defective and dangerous work in the future.

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Regulated Designs and Compliance Declarations

The second major component of the DBP Act is the introduction of a scheme of compliance declarations, which must be issued by registered professionals insured in respect of the declaration and must accompany each *regulated design*.

A regulated design is a design in respect of a major component such as: fire safety systems, water proofing, load bearing components (such as foundations, footings, floors, walls, roofs, columns and beams), enclosure components (such as roofs, doors, windows), and services.

Compliance declarations will include statements that the relevant designs and or building works comply with the BCA and ensure accountability of responsible parties if defective works are discovered.

Notably, if variations to building works occur, these changes must also be documented, and new compliance declarations completed in respect of the varied works.

In practice this means the government will have complete information about the design and construction of every building in NSW at its fingertips. The new insurance scheme means that compensation may be sought by homeowners if declarations are proven to be false.

Statutory Duty of Care

In the past, the Courts have limited the scope of recovery for property owners who suffer economic loss as a result of the negligence of builders and other professionals who construct defective work (see *Woolcock Street Investments v CDG Pty Ltd* (2004) 216 CLR 515 and *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 36). This had the effect that homeowners, subsequent purchasers, and strata corporations were faced with significant barriers when recovering for the cost of defect rectification.

The introduction of the statutory duty of care by the DBP Act will mean that persons who carry out building work such as **builders, designers, suppliers, and developers**, will owe subsequent owners and Owners Corporations a duty of care to avoid economic loss caused by defective work carried out within the last 10 years.

The statutory duty is non-delegable, which means that it cannot be assigned to another person and cannot be contracted out of.

This is a major win for homeowners, and strata schemes who previously have been left with little redress by reason of the precedent set by the High Court in cases of *Woolcock Street Investments* and *Brookfield Multiplex*.

Concluding Remarks

The regulatory system proposed by the DBP Act provides for a comprehensive regulatory system that will ensure oversight, compliance and accountability in the building and construction industry. While it will no doubt take time for practitioners to accept and adapt to the changes, we are optimistic that that the scheme proposed will be well received by leading building practitioners who have nothing to lose from oversight, and everything to gain from reinstalling consumer confidence in the property and development market. For homeowners, purchasers, and strata corporations who will benefit from the new Statutory Duty, the changes due to commence June 2021 are strong reasons to believe that the building industry in NSW is moving towards a safer and responsible future.

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