

Design and Building Practitioners Act 2020 (NSW): a change to the regulatory landscape for designers, builders and engineers?

29 July 2020

On 11 June 2020, the NSW Parliament enacted the new *Design and Building Practitioners Act 2020* (NSW) (the **Act**) to address the public's concerns about quality of apartment buildings in NSW and to reinstate confidence in the construction industry. The reform forms part of the NSW Government's response to the recent structural defects to residential buildings within the state including the Opal and Mascot Towers.

The Act will have wide implications for a range of industry participants (including designers, engineers and builders) as it will change the regulatory landscape in three key ways:

1. a new statutory duty of care will be imposed upon people who carry out construction work;
2. people who perform 'professional engineering services' and 'specialist work' will need to be registered under the Act;
3. builders, engineers and design practitioners will need to comply with new compliance and certification requirements.

Each of these key changes is summarised below with a summary of their likely practical implications.

Except for the duty of care provisions, most of the provisions under the Act will not come into effect until 1 July 2021 to allow industry participants to familiarise themselves with how the Act may affect them and to allow time for regulations to be developed.

Duty of care

The Act imposes a statutory duty of care upon people who carry out construction work to exercise reasonable care to avoid economic loss caused by defects arising from their construction work. That duty is owed to current and any future owners of the land on which construction work is carried out and such duty cannot be delegated or contracted out of.

The duty of care applies retrospectively to work carried out for up to 10 years prior to the commencement of the Act on 11 June 2020.

Registration requirements

The Act creates a mandatory registration regime for people who carry out the following types of work:

1. 'professional engineering services' (i.e. 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);

2. 'specialist work' (i.e. the design, construction or maintenance of a building element or other types of work involving a building element which may be prescribed by the regulations yet to be announced; and
3. the preparation of 'regulated designs' (i.e. a design for a building element (such as fire safety, waterproofing or load-bearing components of a building), a design prepared for a performance solution for building work or any other design prescribed by the regulations). Such work will also require the registered design practitioner to be adequately insured.

If a person carries out the above work without registration, that person may be fined and disciplined and, in the case of professional engineering services, will also not be entitled to receive any money for their services and may in fact be required to refund any monies paid for such services.

Compliance declarations

Registered design practitioners will be required to provide a design compliance declaration if a regulated design is provided to another person for use in connection with building work. The compliance declaration will need to confirm whether the design complies with the requirements of the Building Code of Australia and any additional requirements prescribed by the regulations. The form and contents of the design compliance declaration will also be particularised in the regulations.

A building practitioner will not be permitted to carry out any part of building work for which a regulated design is to be used without a design from a registration design practitioner and a design compliance declaration for that design. Once the works are complete, a building practitioner will be required to provide a compliance declaration before an application for an occupation certificate is made and provide certain documents to the Secretary of the Department of Customer Service (Secretary) within 90 days after the occupation certificate is issued.

Disciplinary action against practitioners

Disciplinary action may be taken against a practitioner who has failed to comply with the Act or the regulations including where the practitioner has engaged in conduct that has fallen short of the standard of competence, diligence and integrity that a member of the public is entitled to expect of a reasonably competent practitioner.

Failure to comply with the Act or regulation will give the Secretary powers to:

- (a) issue show cause notices to registered practitioners;
- (b) caution or reprimand the practitioner;
- (c) impose a penalty of up to \$220,000 (body corporate) or \$110,000 (in any other case);

- (e) suspend or cancel a practitioner's registration;
- (f) disqualify the practitioner temporarily or permanently from registration.

Importantly, directors of a body corporate must report to the Secretary any conduct by the body corporate or a registered individual on behalf of a body corporate that is suspected of failing to comply with the Act. Failure by the director to do so constitutes an offence under the Act.

Any contravention of the Act by the body corporate also means that directors and any person concerned in the management of the body corporate are taken to have contravened the same provisions of the Act.

Investigation powers

From 1 July 2021, the Secretary will also have powers to appoint officers to investigate, monitor and enforce compliance with the requirements of the Act. Officers have broad powers, including powers to:

- (a) give a notice directing a person to furnish information or records;
- (b) direct a person to attend a specific time and place to answer questions; and
- (c) enter premises during business hours.

Likely impacts of the Act

The Act marks a significant change in the regulatory landscape for designers, builders and engineers and will no doubt make building and design compliance a central focus for those industry participants for years to come.

- From a land owner's perspective, it is expected to give land owners a further option to pursue defective work claims for breach of the statutory duty of care. The development and adoption of the regulations (which are yet to be announced) will certainly provide more guidance as to the extent of the Act and its impacts for the participants in the construction industry.
- For engineers who provide 'professional engineering services', they will need to be registered in New South Wales otherwise they run the risk of not being entitled to any payment for their services as well as disciplinary action.
- For design practitioners, they will need to ensure that they comply with their obligations to be registered and be aware of their new certification obligations and how their failure to do so can impact on the delivery of projects.
- For builders, they will need to be aware of their new certification obligations and how they can impact the delivery of a project, particularly the timing requirements for completion which may cause them to be liable for liquidated or general damages for delay.

Anyone affected by the Act should familiarise themselves with the new compliance obligations.

If you have any queries or need specialist legal assistance with your design and building compliance, please contact Doron Rivlin.

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