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## CONSTRUCTION LAW REFORM:

***The Design and Building Practitioners Act 2020 (NSW); and***

***The Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020 (NSW)***

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Two significant pieces of legislation have come into effect in NSW recently which have retrospective application, which means that they apply to buildings that have already been constructed.

They are:

1. The *Design and Building Practitioners Act 2020 (NSW)* (the “**DBPA**”), which, amongst other things, introduced a statutory ‘duty of care’ to avoid economic loss caused by defects for those who carry out construction work (and the term ‘construction work’ is broadly defined); and
2. The *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020 (NSW)* (the “**RABA**”), which most importantly:
  - a. Provides a wide range of investigative, rectification and enforcement powers to the regulator (being the Secretary of the Department of Customer Service and the Building Commissioner); and
  - b. A mandatory notification scheme whereby developers must notify the regulator at least six months before completion of a project.

### ***Why such significant building reform?***

Significant construction law reform has occurred in NSW including the DBPA and the RABA due to:

1. The perceived need for greater regulation to the residential construction sector, together with accountability for key industry players;
2. To restore public confidence in the NSW building industry;

3. Recent issues in the building industry, such as:
  - a. the Lacrosse Tower fire in Melbourne;
  - b. the significant building defects in the Opal Towers at Olympic Park; and
  - c. only months later, the significant defects that became apparent in the Mascot Towers.
4. In response to a report titled 'Building Confidence – Improving the effectiveness of compliance and enforcement systems for the building and construction industry across Australia' dated February 2018 and authored by Peter Shergold and Bronwyn Weir, which was commissioned by the Building Ministers' Forum (now known as the Building Ministers' Meeting). This report can be accessed [here](#).

## ***The Design and Building Practitioners Act 2020 (NSW) (“DBPA”)***

### **THE DUTY OF CARE**

Section 37 of the DBPA imposes on anyone who carries out 'construction work' a duty to exercise reasonable care to avoid economic loss caused by defects.

The duty of care is owed to each owner of the land and each subsequent owner of the land. Therefore, the duty is owed to owners, developers, future lot owners and Owners Corporations.

If the duty is found to have been breached and loss is suffered by the owner or subsequent owner, an amount for damages will be payable.

The DBPA is retrospective and applies to works carried out within 10 years before the introduction of the Act (Schedule 1, Part 2, clause 5 of the DBPA).

Under sections 39 and 40 of the DBPA, the duty of care cannot be delegated or excluded by a contractual provision.

However, the new duty of care provisions need to be considered together with other traditional elements that need to be established for a negligence claim (and those include for example the reasonable foreseeability of risk, what precautions a reasonable person in the practitioner's position would have taken, etc) which all need to be taken into account.

It is likely that these provisions will lead to increased litigation regarding developments that were completed within the last 10 years. It also covers a gap where a party might be out of time with respect to the 6 year major defects statutory warranty period under the *Home Building Act 1989* (NSW).

### **WHAT WORK DOES THE DBPA APPLY TO?**

The duty of care presently applies to class 2 buildings (which is a building, or part of a building, containing 2 or more sole-occupancy units, each being a separate dwelling. In other words, a residential apartment building), although the Commissioner has hinted at this and other legislative changes potentially being increased to apply to other classes of building.

The duty of care is owed by anyone who carries out 'construction work'.

'Construction work' is defined very broadly in the DBPA and includes:

1. 'Building work', which is defined as work involved in, or coordinating or supervising work involved in:
  - a. The construction of a residential apartment building;
  - b. The making of alterations or additions to a residential apartment building; and/or
  - c. The repair, renovation or protective treatment of a residential apartment building.
2. The preparation of regulated designs and other designs for building work.
3. The manufacture or supply of a building product used for building work.
4. The supervising, coordinating, project managing or otherwise having substantive control over the carrying out of any of the above work.

### WHO OWES THE DUTY OF CARE?

Based on the above definition of 'construction work', it can be seen that the duty of care is owed by:

1. Design practitioners, who prepare regulated designs;
2. Principal Design Practitioners, who coordinate and provide design compliance declarations;
3. Builders, who carry out building work;
4. Property developers, who coordinate and supervise building work;
5. Engineers, who are involved in the design and production process; and
6. Specialist Practitioners, who conduct specialist works (such as plumbing, gas fitting, electrical wiring work, air-conditioning works, etc).

## ***The Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020 (NSW) ("RABA")***

### INTRODUCTION TO THE RABA

As mentioned earlier, the RABA introduced a wide range of investigative and other powers to the regulator (Department of Customer Service and the Building Commissioner) and their authorised officers for the main purpose of preventing defects in residential apartment buildings.

Under section 6 of the RABA, the reforms and powers have retrospective application to buildings completed within 10 years before any action taken by the regulator under the RABA, and 10 years after a building is completed (RABA, section 6).

The RABA is tailored primarily towards developers, but the definition of a developer in the RABA is broad and includes principal contractors and any person who contracts or arranges for, or facilitates or otherwise causes, building work to be carried out.

## Expected Completion Notice

Under section 7 of the RABA, a developer must notify the regulator that it intends to apply for an occupation certificate between 6 and 12 months before doing so and provide the date it intends to apply (or any amended date) (**Expected Completion Notice**).

## Regulator's Powers

### Prohibition Order

Section 9 of the RABA enables the regulator to issue a Prohibition Order stopping the issue of an Occupation Certificate in relation to a residential apartment building and/or the registration of a strata plan if:

- a. An Expected Completion Notice was not provided by the developer;
- b. The building bond required under section 207 of the *Strata Schemes Management Act 2015* (NSW) (i.e. a developer's security bond of 2% of the construction contract price) in relation to the building has not been given; and/or
- c. The regulator is satisfied that a 'serious defect' exists in the building.

'Serious Defect' is also broadly defined and includes:

- a. A defect in a building element caused by a failure to comply with the performance requirements in the Building Code of Australia (**BCA**), the relevant Australian Standards or the relevant approved plans;
- b. A defect in a building product or element that is:
  - i. Attributable to defective design, defective or faulty workmanship or defective materials; and
  - ii. Causes or is likely to cause inability to inhabit, the destruction of or the threat of collapse of any part of a building
- c. The use of a banned product under the *Building Products (Safety) Act 2017* (NSW) (e.g. Aluminium composite panels with 30 percent or greater polyethylene in mass).

### Building Work Rectification Orders

Section 33 of the RABA enables the regulator to issue an order to carry out work or refrain from doing work if it has a reasonable belief that the work being carried out could result in a serious defect.

### Stop Work Orders

Section 29 of the RABA enables the regulator to issue an order to the developer to ensure that building work stops if the regulator is of the opinion that the work is, or is likely to be, carried out in a manner that significantly harms or will cause loss to the public, potential occupiers or to the property generally.

### Breaches

Breaches of any of the Orders issued by the regulator can be prosecuted through the Local Court of NSW or Land and Environment Court within a period of 3 years from the date of the alleged offence.

Significant penalties apply for non-compliance (a minimum of \$330,000 for companies and \$110,000 in any other case).

Further, there is potential personal liability for directors and managers of corporations for contravening any provision of the RABA if the director/manager “knowingly authorised or permitted the contravention” (section 58(1) of the RABA).

### Appealing Orders

There are avenues to appeal Prohibition, Building Work Rectification and Stop Work Orders through the Land and Environment Court. Such applications need to be made within 30 days after the Order.

However, the appeal application does not ‘stay’ or ‘stop’ the effect of the Order whilst the matter is being determined.

### Investigative Powers

Sections 17 and 18 of the RABA give the regulator and its authorised officers powers to issue notices requiring information, records and documents, and/or answers to questions (by interview) pertaining to ensuring compliance of the building work with the BCA, Australian Standards and relevant approved plans.

Section 20 of the RABA gives the regulator and its authorised officers the power to enter into any premises at a reasonable hour in the daytime (or other time which business or building work is in progress). Residential premises can only be entered into with consent or a search warrant.

Section 25 of the RABA allows the regulator and its authorised officers the power to take possession of records to be used as evidence in proceedings.

## ***Key Take-Aways***

As can be seen, the DBPA and the RABA have wide-ranging implications to participants in the residential construction sector.

Builders in particular should:

1. Co-operate with developers in the proactive identification and rectification of legitimate defects so that future claims and litigation under the statutory duty of care can be avoided;
2. Be aware that developers and/or current owners and Owners Corporations can claim for defects for 10 years after becoming aware of defects, even if the work was done prior to 2020 when the DBPA was enacted;
3. Ensure that their contracts with subcontractors contain provisions regarding the duty of care, apportioning of claims, and also potential requirements for those subcontractors to comply with orders issued under the RABA, even after the subcontractors’ defects liability periods have expired;
4. Ensure that if any notice is issued under the RABA (given the definition of “developer” under the RABA arguably extends to builders), advice is sought swiftly given the potential personal liability for directors and managers of corporations; and
5. Train their teams to understand the new regimes.

## ***Contact Us***

For further information or assistance with training regarding the DBPA or RABA, please do not hesitate to contact **Anish Wilson** on (02) 8239 6514 or email us at [excellence@kreisson.com.au](mailto:excellence@kreisson.com.au).