

MAJOR CHANGES TO THE NSW BUILDING INDUSTRY

a handbook for residential
design & building practitioners

Words by: Anthony Herron

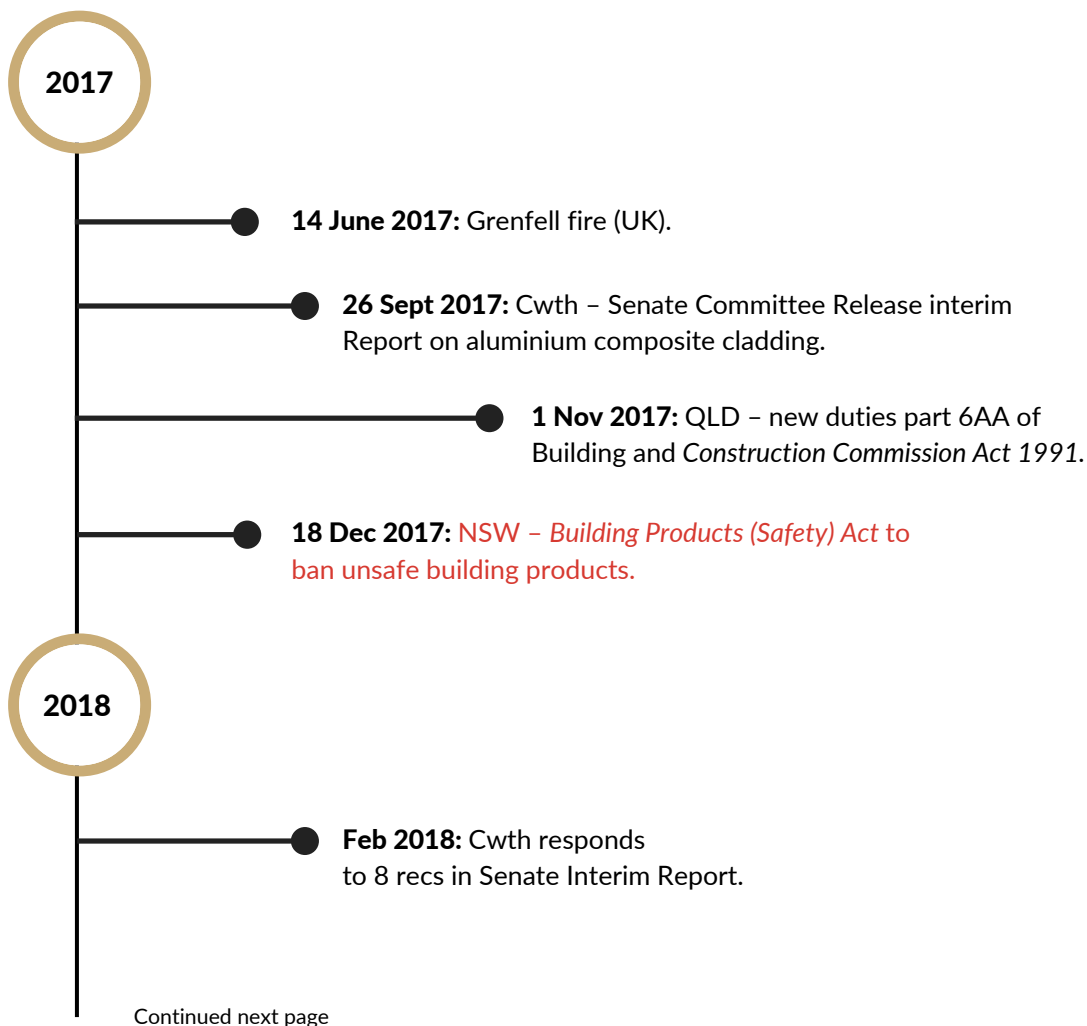
This publication has been prepared for the general information of clients and professional associates of Kreisson Legal. You should not rely on the contents. It is not legal advice and should not be regarded as a substitute for legal advice. The contents may contain copyright.

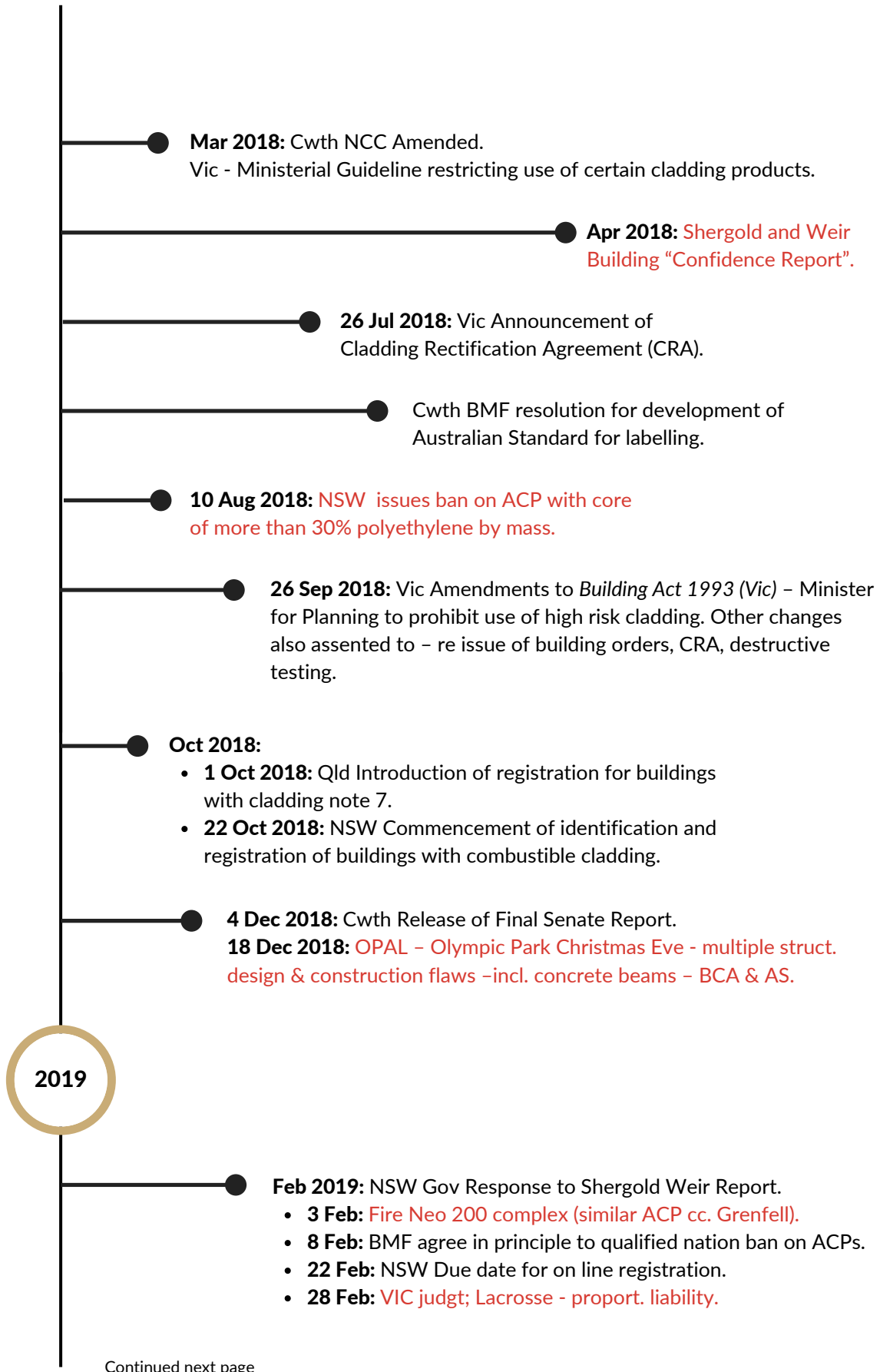
THE GROUNDS FOR CHANGE: A TIMELINE OF KEY EVENTS

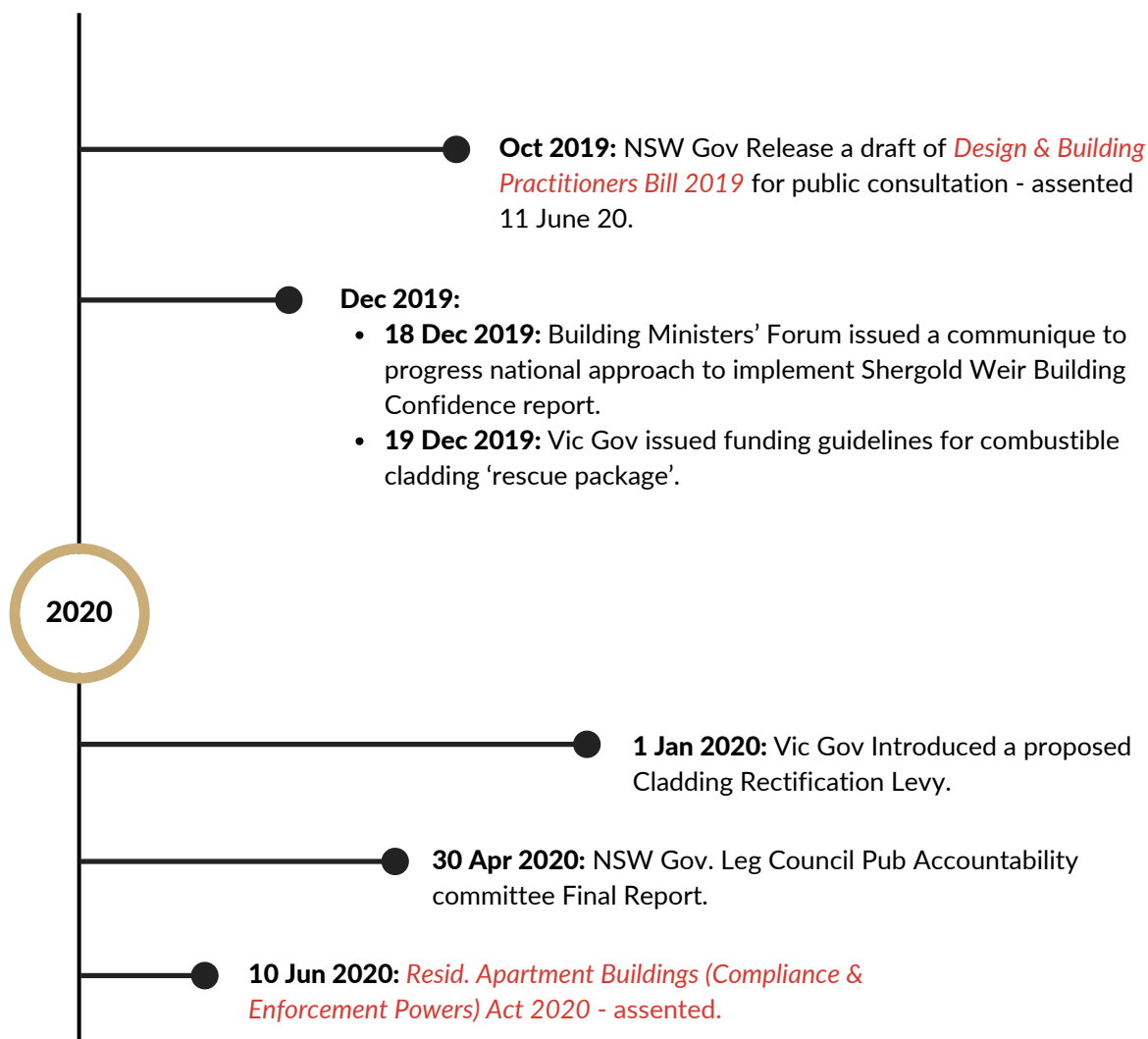
-

Major events over the last 3-4 years have prompted legislative change in favour of increased compliance regulation and enforcement measures to protect consumers where building defects and defective building products are identified.

Below is a timeline setting out these events and various Government responses in QLD, NSW & VIC:







Central to these recent changes are two Acts:

- the *Design & Building Practitioners Act 2020* (NSW); and
- the *Residential Apartment Buildings (Compliance & Enforcement Powers) Act 2020* (NSW).

This Handbook will explore the implications of each Act.

DESIGN & BUILDING PRACTITIONERS ACT 2020 (NSW)

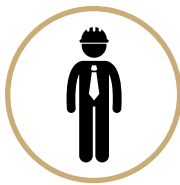
-

An Act that clarifies the accountabilities of design and building practitioners and regulates the accuracy of works in compliance with the Building Code of Australia ('BCA').

KEY PLAYERS

-

The *Design & Building Practitioners Act 2020* (NSW) applies to multi-unit & multi-storey residential apartment buildings. The key practitioners involved are:



ENGINEERS

involved the design and production process.



DESIGN PRACTITIONERS

Involved in the preparation of regulated designs.



PRINCIPAL DESIGN PRACTITIONERS

Involved in the coordination of regulated designs.



BUILDING PRACTITIONERS

Conducting building works - i.e. building elements/waterproofing/fire safety etc.



SPECIALIST PRACTITIONERS

Practitioners involved in specialist work including electrical, air conditioning and/or plumbing works.

KEY REFORMS I: THE DUTY OF CARE

EFFECTIVE: 11/06/2020

Under the *Design and Building Practitioners Act*, design and building practitioners that carry out **construction work** have a duty to exercise reasonable care to avoid economic loss to owners caused by building defects. The definition of “**construction work**” is wide. It includes residential building work under the *Home Building Act 1989* (NSW), design, manufacture, supply and supervision or management of building work. The new duty of care is owed by those who:

- undertake building and/or design work
- supply or manufacture building products, and/or
- supervise others performing building work.

Where the duty has been breached, owners can claim uncapped damages retrospectively up to 10 years against design and building practitioners involved for a breach of the duty as if it were a common law duty, irrespective of whether the owner was a party to the contract for the construction work. This means **head contractors, subcontractors, manufacturers, suppliers** and **consultants** may be found liable for damages.

An 'owner of land' for the purposes of the duty of care is any of the following:

- a person who is entitled to the land for an estate of freehold;
- the owner of a strata lot;
- a proprietor of a lot under the *Community Land Management Act 1989* (NSW);
- a person who receives, or is entitled to receive, rent and profits of the land; and
- an owner's corporation constituted for a strata scheme, as well as other associations for neighbourhood and community schemes.

In addition, a breach of the duty of care means that even if you are already involved in proceedings, the claimant may have an additional cause of action and be entitled to amend its claim to plead a breach of this duty.

The Act also includes the concept of 'regulated designs' which include designs prepared for any building element or in the performance of building works. This includes designs for fire safety systems, waterproofing and/or internal or external load-bearing components.

KEY REFORMS II: COMPLIANCE DECLARATIONS

**FOR DESIGN & BUILDING PRACTITIONERS -
EFFECTIVE: 01/07/2021**

Under the Act, design and building practitioners must be registered from the effective date. Upon preparation of a regulated design, a design and building practitioner is to declare that their design complies with the Building Code of Australia ('BCA') in the form of a compliance declaration. A compliance declaration prepared by a registered design and building practitioner is a written declaration that states the designs that have been prepared comply with the Building Code of Australia or other applicable requirements.

The Act creates three types of compliance declarations:



- Building Compliance Declarations - where the practitioner who carried out the building works declares the the works comply with regulatory standards.



- Design Compliance Declarations - where each design practitioner involved in the regulated design states that the design complies with the BCA.



- Principal Compliance Declarations - where the Principal Design Practitioner states that all requisite compliance declarations have been provided by involved design practitioners for their respective designs.

KEY REFORMS III: INSURANCE

EFFECTIVE: 01/07/2021

The *Design and Building Practitioners Act* has radically changed the risk profile of design and building practitioners. Design and building practitioners are required under the Act to be "adequately insured" with respect to declaration they are required to make and carrying out their work.

S 11 (2) of the Act provides:

(2) *For the purposes of this section, a registered design practitioner is adequately insured with respect to a declaration and work if the practitioner—*

(a) is indemnified by insurance that complies with the regulations against any liability to which the practitioner may become subject as a result of providing the declaration or doing the work, or

(b) is part of some other arrangement approved by the regulations that provides indemnity against the liability.

Given this increased risk profile, the insurance market has been thrown into flux. Design and building practitioners will need to be registered, ensure they provide a declaration regarding a regulated design and in relation to building work, ensure that each regulated design is prepared by a registered design practitioner who is authorised to provide a design declaration. It is inevitable that this process will result in increased work and higher premiums charged by professional indemnity insurers.

RESIDENTIAL APARTMENT BUILDINGS (COMPLIANCE & ENFORCEMENT POWERS) ACT 2020

-

The Act allows for the inspection of residential apartment building works by inspectors.

IN PRACTICE

EFFECTIVE: 01/09/2020

The *Residential Apartments Buildings Enforcement Act* makes provision for the active involvement of inspectors from the Department of Customer Service at an early stage of the construction process to investigate **serious defects** and take various actions including the management of compliance issues, premises investigations and rectification orders.

This applies only to **serious defects** where defective building products or building elements render the building unfit to occupy where there is a threat of collapse. If a serious defect is identified, the Department of Customer Service can issue a remedial rectification order that mandates that the works be rectified within a specified time frame. Consequently, the Secretary of the Department of Customer Service may order that an occupation certificate and strata plan **not** be registered.

FUTURE DIRECTION OF THE INDUSTRY

-

Further changes to the regulation and practice of design and building work for residential apartments are likely. The NSW Government Legislative Council is to report on the outcome of recent legislation in December 2020.

It has recommended further changes including

- Increased powers for Building Commissioner.
- Combustible cladding:
 - Requirements to reveal flammable cladding & remediation measures to inform genuine purchasers & potential tenants;
- High-risk buildings including public buildings, child care and Universities be remediated ASAP.
- The NSW Government will look to:
 - publish criteria re-classifying buildings;
 - provide funding package (i.e. similar to VIC model) to homeowners who have commenced remediation work;
 - identify other potential flammable building products
 - ensure mandatory testing by NATA of all entities that test build. materials;
 - Expand the number & scope of required inspections by accredited certifiers;
 - Amend the *Environmental Planning & Assessment Act 1979* (NSW) – mandatory inspection 2 years after development consent issued;
 - Strengthen public control of certifying i.e. return process to local councils;
 - Appoint a Strata Commissioner & direct funds to affected strata home owners with major defects & no home warranty insurance.

THINK. SOLUTIONS
CREATE. INNOVATION
BUILD. OPPORTUNITY

KREISSON
CONSTRUCTION & ENGINEERING LAWYERS

www.kreisson.com.au

For more information, contact us:

excellence@kreisson.com.au

(02) 8239 6500

THE LAW SOCIETY OF NSW
**PROFESSIONAL
STANDARDS SCHEME**

Liability limited by a scheme approved under Professional Standards Legislation.
Legal practitioners employed by Kreisson Legal Pty Limited are members of the scheme.