

DESIGN AND BUILDING PRACTITIONERS ACT 2020 (NSW)

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A NEW ERA IN BUILDING AND CONSTRUCTION

After well-publicised problems at Opal Tower and Mascot Towers, the Design and Building Practitioners Act 2020 (NSW) ('the DBP Act') is the latest manifestation of the State Government's efforts to reform the building and construction industry.

The DBP Act creates a statutory duty of care on all Building Practitioners to avoid the economic loss caused by defects. Additionally (and from 1 July 2021 onwards), Design and Building Practitioners will need to be registered, maintain adequate insurance and provide declarations that the designs comply with the Building Code of Australia (BCA). For the purposes of the DBP Act, a person who agrees to do Building Work under the head contract is regarded as a Building Practitioner.

A NEW STATUTORY DUTY OF CARE

The centerpiece of the DBP Act is the creation of a new statutory duty of care in Part 4. This duty of care for construction work gives an additional cause of action to owners who may have suffered economic loss as a result of defective building work caused by Building Practitioners.

Two things are worth mentioning about the operation of this new duty of care. Firstly, the operation of Part 4 is already in effect having commenced on 11 June 2020. Secondly, Part 4 operates retrospectively for a period of 10 years prior to its commencement i.e. the economic loss must have been apparent in the 10 years prior to the commencement of the Act.

Under Part 4 of the DBP Act, an individual who carries out construction work owes a statutory duty of care to each owner (and any subsequent owners) to exercise reasonable care to avoid economic loss caused by defects (section 37(2)). Economic loss includes the investigative costs in identifying the defects, the costs of rectification of such defects and the reasonable costs of providing alternate accommodation.

If the duty of care is breached by the Building Practitioner, then the person to whom the duty was owed will be entitled to an award of damages as if the duty of care were established at common law.

In the Second Reading Speech in the NSW Legislative Assembly it was said that the goal of the DBP Act was to improve "the redress available to consumers for building defects". Giving consumers another avenue of redress in relation to building defects is likely to lead to greater accountability from Building Practitioners.



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A statutory duty of care to avoid economic loss

PG. 2

New compliance obligations for Building Practitioners

PG. 3

Ensuring compliance: registration, disciplinary action, investigations and enforcement



COMPLIANCE OBLIGATIONS – ‘BUILDING PRACTITIONERS’

Operative from 1 July 2021, the Building Practitioner is required to take a number of steps before an application is made for an occupation certificate. These include making a **Compliance Declaration** and providing a list of the subcontractors who did building work as well as details of the work done (section 8). Among other things, the Compliance Declaration must include a Declaration that the Building Work complies with the requirements of the BCA.

The DBP Act also prevents the principal certifier from issuing an occupation certificate until all compliance declarations have been lodged (section 27(1)). Should the Building Practitioner’s Compliance Declaration reveal instances of non-compliance, the certifier must consider this before issuing an occupation certificate (section 27(2)).

If the Building Practitioner varies the Building Work after commencement of the work then it must ensure; (1) a design with the variation is prepared by a registered Design Practitioner; (2) a Design Compliance Declaration is obtained for the varied design; (3) the Building Work complies with the requirements of the BCA; (4) the design is prepared by a registered Design Practitioner; and (5) all design compliance and principal compliance declarations have been obtained (section 20).

Finally, the DBP Act also prohibits a Building Practitioner from carrying out Building Work for which a regulated design is used, except with reasonable excuse, unless; (a) the Building Practitioner has obtained a Design and Compliance Declaration from a registered Design Practitioner and (b) the declaration states that the design complies with the requirements of the BCA (section 18).

REGISTRATION, DISCIPLINARY ACTIONS, INVESTIGATIONS AND ENFORCEMENT

Operative from 1 July 2021, Part 5 of the DBP Act requires all Design Practitioners and Principal Design Practitioners to be registered. The Secretary of the Department of Customer Service can refuse registration on a number of grounds outlined in section 45 and section 46 (including where the registering person is not a ‘suitable person’).

The Secretary is also given broad power to make registration subject to conditions and to vary, suspend or cancel registrations (sections 50 and 52). A person may appeal the Secretary’s decision by applying to NCAT (section 63).

Part 6 of the DBP Act gives the Secretary expanded power to discipline practitioners on a number of grounds. These grounds include:

- for failure to comply with a statutory duty;
- for a failure to comply with a condition of registration;

- by engaging 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; and/or
- any contravention of the DBP Act.

The Secretary has the power to issue show causes notices to registered practitioners (section 65), caution or reprimand the practitioner, impose a penalty, suspend or cancel the practitioners registration or disqualify if the Secretary is satisfied that a ground for taking disciplinary action has been established. A person may appeal the Secretary's decision by applying to NCAT (section 68).

The DBP Act gives the Secretary for the Department of Customer Service the power to appoint Authorised Officers to investigate, monitor and enforce compliance with the requirements of the DBP Act (section 73). These officers have significant information gathering powers including directing people to furnish information, enter premises to inspect records and execute search warrants (sections 77 – 82).

The enforcement powers of the Secretary can be found in Part 8 of the Act. The Secretary can accept an undertaking (section 88), issue a stop work order (section 89), commence proceedings in the LEC to restrain a contravention of the DBP Act, investigate practitioners (section 92(1) and conduct an audit of a registered practitioners (section 92(4)).

For further information, please contact EA Legal at (02) 8212 8533 or admin@ealegal.com.au for a complimentary consultation.