

Crisp Law Newsletter

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BUILDING PRACTITIONERS, ARE YOU AWARE OF THE SIGNIFICANT CHANGES TO YOUR DUTY OF CARE OWED TO THE OWNERS?

In this newsletter, we introduce the wide powers of the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020 (NSW) (RAB Act)* and the *Design and Building Practitioner Act 2020(NSW) (DBP Act)*.

This newsletter discusses the definitions and operation of both Acts. In a second newsletter (to be issued in November 2022) we will look at the enforcement powers under both Acts.

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

The background to the enactment of the act

In the past years, at least three major apartment buildings in New South Wales alone have been evacuated because of building faults.¹

Most recently, residents in Mascot Towers were evacuated from the 132-apartment complex after cracks appeared in the building. The residents are left with nowhere to live and no idea when they can return. The owners of apartments in that development have also been left with a hefty repair bill as the 11-year-old building is too old to fall under warranty. This issue ultimately reveals the vulnerabilities of builders and developers and highlights the need for greater protection for the consumers who invest in these types of properties.²

Similar, on Christmas Eve 2018, 3,000 residents were evacuated from the 36-storey Opal Tower in Sydney's Olympic Park due to cracks in the building and reports of movement. Less than six months later, the 132-apartment Mascot Towers (located just south of the CBD) was evacuated when cracks also appeared in that building. While Opal Towers residents have returned to their homes, Mascot Towers remains uninhabitable.³

These evacuation events drew extensive notice to the building defect crisis that had impacted the apartment sector for many years. According to a study by the UNSW City Futures Research Centre, between 2007 and 2017, at least one in four apartment blocks in Sydney had one or more defects, including cracking, fire safety concerns such as non-compliant cladding, or water ingress and

¹ Mascot Towers: The building defects 'crisis' impacting Aussie investors (part one), 24 Jul 2019, <https://www.rentcover.com.au/info-centre/mascot-towers-building-defects>; See, The Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020 (NSW) (RAB Act)

² Ibid.

³ Ibid.

flooding issues. The report revealed that 51 % of the buildings sampled had at least one type of building defect, 28% had at least three, and 12% had more than 10 different defects.⁴

The Residential Apartment Buildings Act is part of the NSW Government's reforms in the building and construction industry, the act commenced on 1 September 2020.⁵ The act considers comprehensive powers to act against developers based on identifying serious defects in residential buildings.

The RAB act was designed to address issues of non-compliance and serious defects to increase community confidence in the construction industry.⁶

The act applies to **residential apartments** buildings,⁷ that are (or were) authorised to commence by a **construction certificate** consistent with the development consent and comply with the Building Code and any other council requirements or complying with the **development certificate**⁸ (development certificate is combined planning and construction approval for straightforward development that can be determined through a fast-track assessment by a council or an accredited certifier).⁹

The Relevant definitions under the Act are as follows:

➤ A Serious Defect

Building element that is related to:

1. any failure to comply with the performance required under the building code of Australia's relevant Australian Standards or the relevant approved plans.
2. Causes or is likely to cause the inability to inhabit part or all of the building.

➤ Developers

The act applies to Developers of residential apartment buildings in NSW, which is defined broadly to include:¹⁰

1. The person who contracted or arranged for, facilitated or otherwise caused (whether directly or indirectly) the building work to be carried out
2. The land owner on which the building work is carried out at the time the building is carried out.
3. The principal contractor for the **building work** (building work definition discusses below) within the meaning of the **Environmental Planning and Assessment Act 1979 (NSW)**.¹¹

⁴ Ibid.

⁵ Section 2 of the Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020 No 9.

⁶ Master Builder association, "RAB Act Comes Into Force", 01.09.2020, <https://www.mbansw.asn.au/media/industry-news/rab-act-comes-effect>

⁷ See s6 of the RAB act, "Act applies only to residential apartment building work".

⁸ See, the RAB act s6 (1)(a) "is or was authorised to commence in accordance with a construction certificate or complying development certificate issued under the Environmental Planning and Assessment Act 1979, or is required to be authorised by a construction certificate or complying development certificate, and..."

⁹ <https://www.planning.nsw.gov.au/complyingdevelopmentn>

¹⁰ The Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020 (NSW) (RAB Act) at: s4.

¹¹ Environmental Planning and Assessment Act 1979, at: s1.4- defined "principal contractor for building work means the person responsible for the overall coordination and control of the carrying out of the building work."

4. The developer of the strata scheme within the meaning of the **Strata Schemes Management Act 2015 (NSW)**.¹²

- **Building Work** definition is broad under s5 of the RAB act and includes:¹³
1. Any physical activity involved in the erection of a building.
 2. Work involved in coordinating or supervising work involved in the construction of a building (or part of) or alterations, additions, repairs, and renovations of a building (or part of the building).

In other words, the RAB Act applies to any size project that requires a construction certificate or a complying development certificate (see the definitions of CC and CDC above).¹⁴

➤ **Residential Apartment Building Work**

Section 6 of the Act defines that the act applies only to **residential apartment building work** that:

- (a) *is or was authorised to commence in accordance with a construction certificate or complying development certificate issued under the Environmental Planning and Assessment Act 1979, or is required to be authorised by a construction certificate or complying development certificate, and*
- (b) *has not been completed or has been completed within the period of 10 years before the exercise of that function.*¹⁵

Notification scheme (s7 of the RAB act)

Under s7 of the RAB act developers are obliged to provide the **Secretary** (Secretary of the Department¹⁶) with an expected completion notice 6-12 months before applying for an **Occupation Certificate**.¹⁷ However, buildings are expected to be completed during the initial transitional 6-month period from the commencement of the Act.

Under this scheme, a developer is required to submit the following notices to the Secretary:

- **Expected completion notice:** a developer must provide at least 6 months, but not more than 12 months, notice before the expected date of application for the certificate. An exception applies for short-term building works to be completed within six months, for which notice

¹² Strata Schemes Management Act 2015 (NSW) s 4 definitions defined- “*developer of the strata scheme constituted on registration of a strata plan proposed under a development scheme means the person who, for the time being, is— (a) the original owner of the strata scheme, or (b) a person, other than the original owner, who is the owner of a development lot within the strata plan.*”

¹³ RAB act, at: s5.

¹⁴ Building and construction update, see 6 above.

¹⁵ RAB act, at s6.

¹⁶ See RAB act, at s3 definitions.

¹⁷ S3 the RAB act defines that occupation certificate means an occupation certificate issued under the Environmental Planning and Assessment Act 1979.

s6.9 of the Environmental Planning and Assessment Act, determines that an occupation certificate is required for the commencement of the occupation or use of the whole or any part of the building or for the commencement of a change of building use for the whole or any part of an existing building.

must be given within 30 days of commencement of the works. The maximum penalty for non-compliance is \$110,000 for a body corporate or \$22,000 in any other case.¹⁸

- **Expected completion amendment notice:** if a developer becomes aware of circumstances such that their expected date of application for an occupation certificate differs from the date stated in an expected completion notice, the developer must provide the Secretary with notice of the new expected date within seven days of becoming aware of those circumstances. No notice is required if the new date falls within 60 days of the originally stated date. The maximum penalty for non-compliance is \$55,000 for a body corporate or \$11,000 in any other case.¹⁹

Non-compliance with the notification scheme is also a basis for the Secretary to issue a prohibition order (this will be discussed in our November newsletter).

Design and Building Practitioners Act 2020 (NSW)

The Design and Building Practitioners Act 2020 (NSW) (DBP Act) imposed significant compliance changes on the construction industry. These reforms are delivered by the New South Wales Government's promise to introduce a suite of new obligations on design and building practitioners to ensure that each step of construction is well documented and compliant.²⁰

The Act creates a statutory duty of care owed by Building Practitioners to Owners and, most significantly, applies retrospectively to all building work (including design and certification).

➤ Construction Work

Under the definitions of the Duty of Care the Act defines construction work as any building work, preparation of regulated design and other design building work, manufacture or supply of any building materials, supervising, coordinating, project managing or otherwise having substantive control over the carrying out of any work under paragraph (a), (b) or (c) (further discussed below).

Subparagraph (d) of the “construction work” definition provides a broad definition that is captured by the provisions of the act and owes a duty of care, this includes builders, engineers, designers, architects, project managers and even manufacturers and suppliers of products for building work, **or like people who have “substantive control”**.

Useful guidance on the interpretation of the definition of ‘**Substantive Control**’ under subparagraph (d) provided in the decision of the Supreme Court of NSW in *The Owners – Strata Plan No 84674 v Pafburn Pty Ltd*-²¹ where Justice Stevenson held that the interpretation of the words “**substantive control**” has the meaning of actual supervision, coordination and project management work was to be undertaken. However, the court held that it does not require a person to actually do something to cause that control, it is a question of ability and power to control.

¹⁸ RAB act, at: s7.

¹⁹ RAB act, at: s8.

²⁰ NSW, Second Reading speech, 8 above.

²¹ *The Owners – Strata Plan No 84674 v Pafburn Pty Ltd* [2022] NSWSC 659.

In the decision of the Supreme Court of NSW in the case of the *Goodwin Street Developments Pty Ltd atf Jesmond Unit Trust v DSD Builders Pty Ltd (in Liq)*²²- the court dealt with the definition of the term “**construction work**” under s 36 of the DPB act as extends to works on building other than class 2 residential apartment buildings and is broader than the definition given to "building work" under section 4 of the Act (see Building work definition under s4 of DPB act discussed below).

➤ **The definition of Duty of Care under part 4 of the DBP**

The duty of care is owed to the owners of the property where the subject building is located by anyone who undertaking “construction work”. The owner of the land may claim for loss caused by any breach of duty of care, and it concludes all subsequent owners.

S37 of the act provides the duty of care owed to a person who carried out construction work, to exercise reasonable care to avoid economic loss by defects. In that regard, *J Stevenson* in the case of the Owners – *Strata Plan No 84674 v Pafburn Pty Ltd (No 2)* stated that the definition of “**Person**” referred to in s 37(1) of the DPB act includes the owner of the land and other people with “**substantive control**” and for this purpose “**developer**” is considered a “**person**” pursuant to s37, if it can be proven that the developer supervised, coordinated, project management or otherwise have substantive control.²³

²² *Goodwin Street Developments Pty Ltd atf Jesmond Unit Trust v DSD Builders Pty Ltd (in liq)* [2022].

²³ *The Owners – Strata Plan No 84674 v Pafburn Pty Ltd (No 2)* [2022] NSWSC 1002, at: [15],[24].