

Crisp Law Newsletter

*Property Developers Act
2024 (ACT)
User Guide*

In this newsletter, we delve into the recently enacted Property Developers Act 2024 (ACT) and outline several key provisions which took effect as of 11 July 2024. We examine the Act's scope and offer a practical user guide identifying key provisions which must be adhered to. This analysis covers rectification orders, stop work orders and undertakings. Additionally, we provide you with the steps we suggest you should take to protect your business. Our aim to equip property developers with a comprehensive understanding of the Act's regulatory framework and its implications for ongoing and future projects.

Introduction

Scope

Commencement

The Property Developers Bill 2023 (the Bill) has been enacted as the Property Developers Act 2024 (ACT) (the Act) on 27 June 2024 and was notified on the 10 July. The Act's key objective is to protect the public and increase confidence¹ by strengthening the ACT's **regulatory and accountability framework** for property developers.

Several sections of the Act are effective from **11 July 2024**, including those related to **Rectification Orders**. The remainder of the Act, notably the provisions relating to the licensing scheme have yet to commence and may not commence for another two to three years.² Consequently, this newsletter will not be exploring the Act's deferred sections and will instead focus upon its operating provisions. The provisions now in effect include part 1 (Preliminary), section 8 (Meaning of *associated entity* and *key person*), part 5 (Rectification orders, stop work orders and undertakings) (other than section 60 (1) (b) and (6), definition of *relevant provision*), part 6 (Enforcement), part 9 (Information sharing), part 10 (Notification and review of decisions), part 11 (Miscellaneous), part 12 (Transitional), schedule 1 (Reviewable decisions) and dictionary.³

Residential Building Work

It is important to note that the scheme applies only to "regulated residential building", defined as **Class 1 or 2 buildings** constructed as part of a project that involved the construction of **three or more dwellings**.⁴ This means that single or dual dwellings and dual occupancies are not captured by the scheme, as they are already appropriately regulated by the *Building Act 2004* and the *Construction*

¹ Property Developers Bill 2024 (ACT) (PDA) s 6 (1).

² Ibid s 2 (3).

³ Ibid s 2 (1).

⁴ Ibid Dictionary.

Occupations (Licensing) Act 2004. This also excludes renovations and alterations to existing buildings from the coverage of the scheme.

Definitions

Property Developer

Examining the scheme reveals that it is quite broad, in the sense that the **definition of property developer** can extend to a variety of people not directly involved in the development process.

46. Meaning of property developer—pt 5

(1) In this part:

property developer, in relation to residential building work, means any of the following:

- (a) a person who contracts or **arranges for**, or facilitates or otherwise causes (whether directly or indirectly) the building work to be done;
- (b) the **owner of the land** on which the building work is undertaken when the building work is undertaken;
- (c) the **principal builder** of the building work;
- (d) for a regulated residential building under a units plan—the developer, as defined in the Unit Titles Act 2001, dictionary, in relation to the units plan;
- (e) a person prescribed by regulation.

S 46 indicates that under the Act, the owner of the land or entity arranging for the carrying out of residential work is considered a property developer even if they weren't directly responsible for the construction. However, the Act has attempted to address these criticisms in relation to the scheme's applications to the layperson and smaller scale development through limiting the class buildings covered by the Act.

Key Provisions

Rectification Orders Scheme

The rectification orders, stop work orders and undertakings provisions applies to residential building work for which development approval is **given on or after 11 July 2024**.⁵ We note that controversially, the Bill had originally proposed for the regime to apply retrospectively to residential building work that had been

⁵ Ibid s 44 (1).

completed for up to 10 years prior to the commencement of the Bill⁶ – this retrospective application has been removed from the Act.

Rectification Order Process

If the registrar believes on reasonable grounds that a regulated residential building could have or has resulted in a **serious defect**, they may issue a written notice (proposed rectification order notice) to the property developer.⁷ The notice should give details of the proposed order, provide reasons why the registrar proposed to make the order, and allow for a written submission in response.⁸ The property developer then has no later than 28 days after the day of receiving the notice to provide a written submission. After considering any submissions, the registrar may make a rectification order specifically requiring – *(a) stated action (the required rectification work) to be taken to rectify the serious defect, or possible serious defect, within a stated period not less than 1 month after the day the rectification order is given;*⁹

Additionally, **emergency rectification orders** can be given without prior notice to the property developer if the registrar is satisfied that a serious or possibly serious defect needs to be urgently rectified to protect the health or safety of people.¹⁰ However, certain requirements must be met, including providing a detailed written statement of reasons for making the order within 7 days of the order's issuance.¹¹

The timeframes within which a registrar may issue a rectification order are outlined in s 49 (4).

S 49 Making Rectification orders

(4) the registrar can make a rectification order before the latest of the following:

- (a) if the registrar first became aware of the serious defect, or possible serious defect, within 6 months before the end of the **10-year period**—1 year after the registrar became aware of the serious defect, or possible serious defect;
- (b) if the registrar gives a proposed rectification order notice before the end of the 10-year period—1 year after the notice is given;
- (c) in any other case—the day the 10-year period ends.

⁶ Property Developers Bill s 47(1).

⁷ PDA s 48 (1).

⁸ Ibid s 48 (2).

⁹ Ibid s 49 2 (a).

¹⁰ Ibid s 50.

¹¹ Ibid s 50 (4).

The 10-year period refers to the timeframe within which a building action can be initiated in relation to the residential building work under the Building Act 2004 (ACT). This period begins on the date the certificate of completion is issued, or, if unapplicable, on the date of the certifier's final inspection. If neither of these applies, the period commences on the day the building was first occupied or used.¹²

Where there is more than one property developer in relation to residential building work and a rectification order is given, the order applies **jointly and severally**¹³. This ensures that each property developer can't escape liability for the entirety of the rectification order by pointing blame at one another.

Personal Liability of directors of the property developer

If the property developer is a corporation that is **deregistered**, wound-up, or in administration, receivership or liquidation,¹⁴ then the rectification order may be **issued personally** against a person who was a **director** of the property developer **at or after the time** the residential building work was undertaken. In considering whether it is appropriate to issue a personal rectification order, the registrar must consider if a latent defects insurance policy or other similar insurance policy covers the work required to rectify the serious defect, or possible serious defect.¹⁵

It is important to note that someone who became director of a company **after the work had been completed** could be liable for any rectification orders for that work even if they were not involved in it or had no knowledge of a contravention. Further, this provision could create significant personal liability for directors as it permits the registrar to **pierce the corporate veil** – a legal action generally reserved for extreme breaches of Australian corporate law, such as instances where the company functions as a mere agent of its directors or shareholders. The authority granted under s 52 challenges the fundamental principle that a corporation is a separate legal entity from its directors and shareholders, which typically shields directors from personal liability.

Stop Work Orders

Where the registrar believes on reasonable grounds that residential building work could result in **significant harm or loss to the public** or occupiers **or significant damage to the property**, a written order (stop work order) requiring the property developer to ensure the work stops may be given.¹⁶ The stop work order must detail the reasons, specify the exact time the work must halt, and include a notice of penalties for non-compliance. The order terminates the earliest of the following

¹² Building Act 2004 (ACT) s 142.

¹³ Ibid s 51.

¹⁴ Ibid s 52 (1) (c).

¹⁵ Ibid s 52 (3) (a).

¹⁶ Ibid s 60 (1) (a).

– the registrar revokes the order in writing, any term stating the order expires or a period of 12 month passes from the date the order was issued.¹⁷

Compliance Undertakings

The registrar may accept compliance undertakings from property developers or, in cases of corporate insolvency, from directors.¹⁸ Developers or directors may agree to take **corrective actions** for serious defects or provide **financial security** (such as a bank guarantee or bond) to cover rectification costs for any defects or legal breaches. The undertaking must specify when and how this security may be claimed or realized by the Territory. This system holds developers accountable, ensuring that necessary actions or funds are available for defect rectification if issues arise.

Failing to comply with a rectification order, stop work order or compliance undertaking constitutes an offence. For example, failing to meet the terms of a compliance undertaking constitutes an offense with penalties up to 2,000 penalty units for intentional non-compliance.¹⁹

Suggested Protective Steps to take

To help you **protect your business** against liability imposed by the Act, we suggest implementing certain steps. These include the following mitigation strategies:

- Update your suite of agreements to align all contracts with the Act's compliance standards and to clarify each party's obligations for defect rectification.
- Update your management systems and processes to ensure that the Act's new reporting and compliance deadlines for serious defects are met. This will promote thorough documentation and enable timely responses to rectification orders.
- Insurance risk audits and reviews to assess your business's current policies, with a particular focus on latent defect coverage, and determine if extra protection is necessary. This measure is crucial for mitigating unforeseen rectification costs, especially since directors may now be personally liable for defects.
- Extending the defects liability period in your contracts is a valuable protective measure against the financial and legal risks associated with the Act's allowance for rectification orders up to 10 years after project completion.

¹⁷ Ibid s 60 (4).

¹⁸ Ibid s 62

¹⁹ Ibid s 63 (1).

- Aim for 'defect-free' completion of works by implementing rigorous quality control standards and thorough inspections, to reduce the likelihood of facing rectification or stop work orders under the Act.

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