



Shaping the future of insurance law

Compliance declarations – NSW’s new regime for construction professionals set to improve the industry’s risk profile

21 JULY 2020

The NSW Government has introduced sweeping legislative changes that are intended to regain public confidence in the construction industry. This is Part 2 of Wotton + Kearney’s coverage of these landmark legislative changes and the implications for insurers.

AT A GLANCE

- On 10 June 2020, the *Design and Building Practitioners Act 2020 (NSW) (DBP Act)* was passed and the new statutory duty of care commenced with retrospective effect.
- From 1 September 2020, the NSW Building Commissioner will have the power to make prohibition orders preventing occupation certificates from issuing in certain circumstances, including where serious building defects exist.
- With effect from 1 July 2021, design practitioners who prepare regulated designs will be obliged to declare that their designs comply with the Building Code of Australia (BCA) and building practitioners will be obliged to declare that their building work complies with the BCA and the design.
- In order to make declarations under the new regime, practitioners will need to be registered and have ‘adequate insurance’ in place.
- This regime is designed to help contracting parties’ better price and manage risk by making it easier to identify any points during the design and construction phase where errors have occurred.
- We would expect the reforms to positively impact the long-tail nature of construction risk as parties will be able to identify earlier, and with greater precision, where liability arose.
- However, it remains to be seen whether the new disclosure regime will elevate ‘building work’ into a professional service for coverage purposes.

THE NEW REGIME

It has been a little over a year since the NSW Government unveiled its strategy for restoring confidence in the NSW residential construction sector. The first stage of the strategy is to build a better regulatory framework for the building and construction industry through implementing legislative reform.

In [Part 1](#) of Wotton + Kearney's coverage of NSW's landmark changes in the construction industry, we provided a broad overview of the major reforms the NSW Government intends to implement across the construction industry in response to the recommendations in the *Building Confidence Report*¹. That included an outline of the new statutory duty of care owed to current, and subsequent owners of land, whether or not they are a party to, the construction contract.

On 10 June 2020, the DBP Act was passed. The statutory duty of care is now in force with retrospective effect – this paves the way for claims for breach of the new duty where the building defect first became apparent after 10 June 2010 (whether by way of a new claim or an amendment to a currently litigated claim).

In this second article in our series about the reform package, we look at the new compliance declaration regime that will require design and building practitioners with reporting obligations to be registered and 'adequately insured'. This new regime will come into effect on 1 July 2021.

The new regime will overhaul compliance reporting and put precision and rigour around roles and responsibilities in a construction project. It is designed to help contracting parties' better price and manage risk by making it easier to identify the point within the design and construction model where an error occurred.



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¹ In August 2017 the Building Ministers Forum commissioned Peter Shergold and Bronwyn Weir to assess the effectiveness of compliance and enforcement systems in the building industry. Shergold and Weir produced the *Building Confidence Report* in February 2018.

KEY DATES

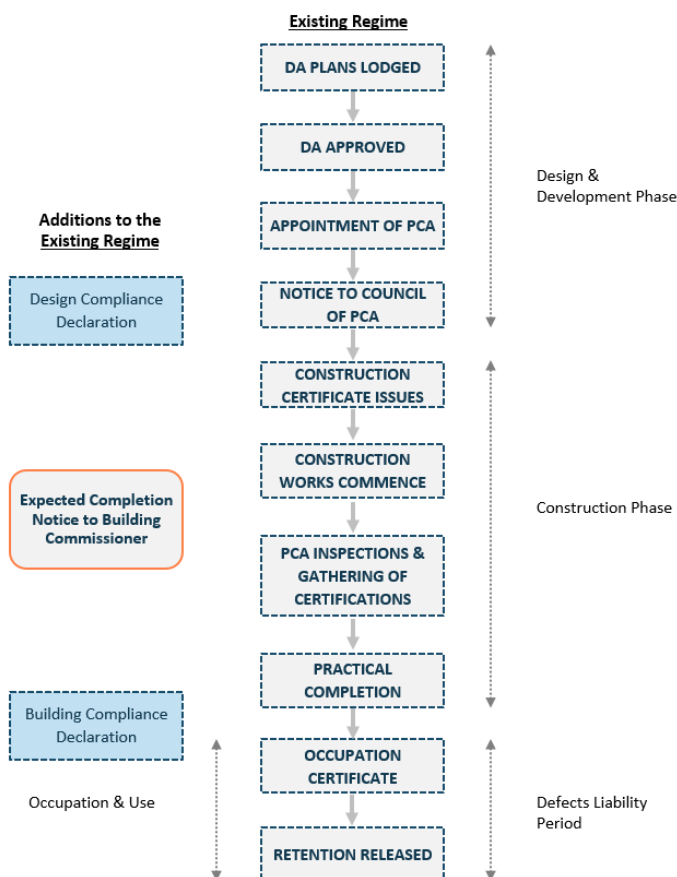
- **10 JUNE 2020** – DBP Act and the new statutory duty of care became law (with retrospective effect).
- **1 SEPTEMBER 2020** – *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020 (RAB Act)* will start requiring developers to issue 'expected completion notices', with the NSW Building Commissioner having the power to prohibit occupation certificates from being issued.
- **1 JULY 2021** – the new compliance declaration regime (which includes mandatory insurance requirements) will commence under the DBP Act.
- **TBC** – a date is yet to be announced regarding provisions for specialist work under the DBP Act (this will include any work involving the design, construction, installation or maintenance of a building element including fire safety systems and waterproofing).

THE KEY LEGISLATIVE CHANGES

Under the existing framework, a building cannot be occupied until an occupation certificate has issued under the *Environmental Planning and Assessment Act 1979 (EPA Act)*. An occupation certificate is issued by an independent certifier who must be satisfied the development meets various regulatory standards.

The independent certifier relies on various certifications provided by the builder, its sub-contractors and design professionals to assess whether the work conforms with the requirements of the Building Code of Australia (BCA). That regime will remain in place.

Figure 1: The New Building Approval Process.



NEW PROVISIONS

The new provisions will commence on 1 July 2021 and govern:

- the new compliance declaration regime for regulated designs and building work and professional engineering work (Part 2, and Division 1 of Part 3)
- the registration of practitioners (Part 5)
- disciplinary action against practitioners (Part 6)
- investigations to monitor and enforce compliance with the obligations under the DBP Act (Part 7)
- enforcement, including the power to issue stop work orders where the Secretary is of the opinion that the work is being carried out in contravention of the DBP Act and could result in significant harm to persons or property (Part 8), and
- miscellaneous issues (Part 9).

The provisions governing specialist work (i.e. design, construction, installation or maintenance of a building element) will commence on a day or days to be appointed by proclamation (Division 2 of Part 3).

As Figure 1 indicates, the DBP Act bolts on additional mandatory obligations to the existing regime. Design and building practitioners will need to declare that:

- designs comply with the BCA, and
- building works comply with the BCA and have been performed under a ‘regulated design’ before an occupation certification can be issued.

It also requires that the design and building practitioners with reporting obligations are registered and hold adequate insurance regarding the declaration or that work.

The intent of the legislative reform is to rebuild customer confidence in the building and construction industry. To achieve this, the Secretary of the Department of Customer Service (which encompasses the Office of the NSW Building Commissioner) will have powers under the DBP Act to take disciplinary action against registered practitioners regarding regulated designs, building works, or compliance declarations.

PROHIBITION NOTICES AND THE RAB ACT

The RAB Act will commence from 1 September 2020. It gives the NSW Building Commissioner (through the Secretary of the Department of Customer Service) the power to issue prohibition notices that would stop occupation certificates from being issued.

Under the RAB Act, the following changes will occur:

- introduction of an expected completion notice – developers will be required to give a minimum of six months’ notice of a proposed application for an occupation certificate, and
- prohibition notices – power to make orders prohibiting issue of occupation certificates in certain circumstances, including where the developer hasn’t complied with the notice requirements or there are serious defects in the building.

IN THE INTERIM

While the mandatory compliance regime under the DBP Act does not come into effect until 1 July 2021, there are likely to be regulations passed in the interim that may prescribe:

- what qualifications, skills and experience are required for registration;
- what details need to be recorded for regulated designs and compliance declarations, and how they should be recorded; and
- how practitioners keep records and provide information to the Secretary.

These regulations may also address:

- classes of registration; and
- the recognition of persons or classes of persons as registered practitioners, including registration with a professional body or registration in a particular state or territory.

Until these regulations are released, the full impact of the regime on insurers and their construction clients – including how the regime will operate in practice and the mandatory insurance requirements – remains to be seen.

PROFESSIONAL SERVICES

The authors of the Building Confidence Report noted that *“It is important that as many practitioners as possible hold professional indemnity and/or warranty insurance in order to support accountability.”*

Practitioner is defined in the DBP Act as including a building practitioner (effectively, the builder). Insurers may want to closely review insurance arrangements and the scope of what is covered by ‘professional services’. The definition of ‘professional services’ is commonly used as a control mechanism in construction professional indemnity policies. The issue is whether making a building compliance declaration will amount to a professional service for policy purposes.

That will obviously depend on the wording of each policy, and how that wording interacts with the new statutory regime. The regulations will be particularly relevant to this issue.

This is because the regulations may prescribe the qualifications, skills, knowledge and experience required of a builder to obtain registration under the new statutory regime. This is an issue that we will continue to monitor and comment on as the regulations are implemented.

WHAT DOES THIS MEAN FOR INSURERS?

The objectives of the DBP Act are *“to improve the quality and compliance of design documentation and to strengthen accountability across the design, building and construction sector”*.

Putting aside the impact of the new statutory duty of care, for insurers who already write risk for construction professionals, the introduction of the new legislation (including the DBP Act) is likely to have a positive impact on the long-tail nature of construction claims as:

- there will be a clearer delineation of responsibility;
- the new regime creates greater opportunity for defects to be picked up and resolved during construction;
- in the event of claims, the new regime will make it easier to establish where liability rests. This should enable claims to be resolved quicker.

CONCLUSION

The NSW Government’s reforms will improve the industry’s risk profile. We would expect this to make the industry a more viable proposition for insurers in the years ahead. For insurers willing to enter this market, the regime change also creates opportunities to write risk on what is now a heavily regulated industry sector.

In Part 3 of Wotton + Kearney’s series on the reform package, we will focus on how the RAB Act will impact the construction and insurance industries.

NEED TO KNOW MORE?

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