



Précis Paper

New Laws Change Regulation of the Building and Construction Industry

Abstract –Nicholas Kallipolitis, Principal/Director of Coleman Greig, and Senior Associate Mario Rashid-Ring discuss one of the hottest current topics in law – recent regulation changes in the building and construction industry.

Discussion Includes

- The history
- Design and Building Practitioner's Act
- Registration
- Compliance system)
- Stop work orders
- Transitional phase
- Building and Development Certifiers Act and Regulation
- Residential Apartment Buildings Act

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New Laws Change Regulation of the Building and Construction Industry

1. In this edition of BenchTV, Nicholas Kallipolitis (Principal/Director) and Mario Rashid-Ring (Associate) discuss recent legislative changes in NSW to regulate the building industry and shore up public confidence after increasing concerns, highlighted by the major structural defects revealed in Sydney's Mascot and Opal Towers.

The history

2. Building reform has been a contentious issue in NSW for a few decades now, most recently brought to the spotlight with the structural defects we've seen in the Mascot and Opal Towers in 2018 and 2019 respectively. In each, residents were evacuated from the towers at short notice as cracks were showing in the buildings. The latest figures for repair of the Mascot Tower is \$32 million and repair costs for the Opal Tower about \$30 million.
3. A key question being raised in the media is who pays for this, who is responsible?
4. What does the statutory regime say? *The Home Building Act 1989* (NSW) has changed over the years. Most recently, we have a two-year minor defect statutory warranty and a six-year major defects statutory warranty. What happens if it falls outside that six-year window – as does the Mascot Tower?
5. A catalyst of a lot of the changes we've been seeing has been the outcry and public attention from these two issues.
6. Prior to Mascot and Opal Towers, the federal government commissioned Professor Shergold and Bronwyn Weir's report *Building Confidence*. The NSW government considered its findings and commissioned its own report *Building Stronger Foundations* which detailed specific legislative reform within NSW.
7. Flowing on from that have been a few key pieces of legislation enacted within NSW which seek to address some of the issues in these reports.
8. There is a need for reform – for example, it's estimated in Queensland at least 80 percent of new apartment buildings have defects, in NSW it's up to 90 percent.

Design and Building Practitioner's Act

9. One of the changes is a statutory duty of care regime which really means a duty of care is owed to landowners by those that are undertaking construction work on a residential property.
10. Another key feature of the Act is a new registration system for people classified as construction professionals.

11. There's a requirement that certain people within the industry provide mandatory compliance declarations in relation to the works they've undertaken or designs they've prepared.
12. The power of the Secretary of the Department of Customer Service has been expanded as it relates to enforcement and investigation.
13. In relation to the duty of care, it's a duty to avoid economic loss caused by defects and in its operation it will go back 10 years from 11 June 2020. There's a lot of uncertainty around this aspect of the Act.

Registration

14. Building workers under the Act extends to building practitioners, design practitioners, principal design practitioners, specialist practitioners and professional engineers.
15. It now encompasses pretty much the whole industry. If there are breaches under the other Acts, they can be disciplined by the Secretary under this Act.

Compliance system

16. To complement the registration system the Act also has a compulsory declaration requirement to ensure that building work and building designs are compliant with the requirements of the Building Code of Australia.
17. There are broadly three categories in which declarations must be provided: (i) Design compliance declaration provided by a registered design practitioner to declare that the work they've prepared complies with the Building Code of Australia and any other standards and codes or regulations mandate (ii) similar declaration by a registered principal design practitioner (iii) a building compliance declaration provided by the registered building practitioner. This deals with the work undertaken rather than the design, whether the building work complies with the requirements of the Building Code of Australia, the Regulations and the Act and if not, what steps are being taken to ensure that it will be. Also, that they have appointed a registered design practitioner or registered principal design practitioner and whether or not they obtained the declarations of (i) and (ii). This declaration has to be provided prior to any construction work being carried out.
18. The Act also emphasises making sure you are adequately insured prior to lodging any of these declarations. There are strict penalties – if you don't comply with the compliance requirements you could receive a fine of \$165,000.

Stop work orders

19. A 'show cause' notice provides the building practitioner an opportunity to explain why something was done in a certain way – request providing information, documentation,

answer questions, enter premises - without the need of court intervention to allow the Secretary to deal with some of the aspects they feel need dealing with.

20. That may also include the opportunity for them to open up or demolish a structure. It's a very extensive power.

Transitional phase

21. The duty of care regime commenced on 11 June 2020. The registration requirements commenced on 1 July 2020 with a 12-month transitional provision.

Building and Development Certifiers Act and Regulation

22. One of the main features of this Act is that building certifiers no longer need to be accredited. Instead, they need to be registered and authorised to carry out certification works. Registered certifiers will be required to undertake annual education and training. Depending on their knowledge and experience they'll be placed into different levels of certifiers.
23. The next key feature is the introduction of a new code of conduct. A failure to comply with that code can have fairly steep penalties also.
24. One of the other key changes of this Act and Regulation is a new conflict of interest provision for certifiers. They prohibit a certifier from providing professional services in relation to a design and compliance under the Building Code of Australia as well as acting as a principal certifier on the same development.
25. There are stringent requirements for registered certifiers to have indemnity insurance.

Residential Apartment Buildings Act

26. The Building Commissioner has extensive powers under the Act.
27. If the Department finds any serious defects they can issue a 'building work rectification order'.
28. The Department can issue stop work orders under the Act. These stop work orders can remain in force for 12 months.
29. The Department could also seek orders from the Land and Environment Court to remedy or restrain a breach of the particular Act.
30. The Building Commissioner also has investigative powers to see if there has been a breach of the Act.

BIOGRAPHY

Nicholas Kallipolitis

Principal/Director, Coleman Greig Lawyers, Sydney

Nick is an integral member of Coleman Greig's Litigation and Dispute Resolution Team. He has been an Accredited Specialist in Commercial Litigation since November 2013.

Since joining Coleman Greig in 2011, Nick has developed a particular expertise in the building and construction industry, delivering presentations, working with clients and their employees (including Project Managers) and authoring articles. He has been involved in large and complex disputes relating to both the Home Building Act and Security of Payments legislation amongst others, having acted for developers, builders and homeowners.

Mario Rashid-Ring

Senior Associate, Coleman Greig Lawyers, Sydney

Mario works with a diverse mix of clients, ranging from large multinationals to individuals, and believes that the key to building and maintaining strong relationships is continuous, open and effective dialogue. His technical knowledge of the law, coupled with his degree in Business and Commerce helps Mario deliver tailored and practical solutions to his clients at all times. Mario has predominantly worked within the Litigation and Dispute Resolution team and has played an integral role in a number of notable matters - including many which have seen him gain a high level of specialist experience.

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Legislation

Building and Development Certifiers Act 2018 (NSW)

Building and Development Certifiers Regulation 2020

Building Professionals Act 2005 (NSW)

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Home Building Act 1989 (NSW)

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

Reports

Peter Shergold and Bronwyn Weir, *Building Confidence: Improving the effectiveness of compliance and enforcement systems for the building and construction industry across Australia*, February 2018

Building Stronger Foundations, NSW Fair Trading, June 2019