



NSW Government overhauls construction industry following introduction of legislative reforms

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Introduction

The issue of defective work in the construction industry, particularly as it concerns residential developments, has been an issue of public concern for many years and has attracted significant publicity.

Forming part of the suite of reforms recently introduced by the NSW Government, the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020 (the Act)* seeks to enhance consumer protection and improve transparency and accountability in the construction sector.

The overarching aim of this legislation is to prevent developers from carrying out building work that may result in serious defects. In the Act, 'Developer' is widely defined to include any person who arranges for, facilitates or otherwise causes (directly or indirectly) residential apartment building work to be carried out.

Importantly, the Act grants retrospective inspection powers, allowing the Secretary of the Department of Customer Service (**the Secretary**) or its delegate such as the Building Commissioner, to inspect residential building work that has been completed in the last ten years.

Whilst this legislation is still in its infancy, this article will explore the sweeping powers provided under the legislation, particularly the significant power to require an enforceable undertaking from a developer to remediate any serious defects to building work.

What powers are granted by the Act?

In a bid to protect apartment owners and residents from poor construction, the Act grants unprecedented powers allowing the Secretary or its delegate to:

- Issue a **Prohibition Order**, prohibiting the issue of an occupation certificate, or if relevant, prohibiting the registration of a strata plan for a strata scheme.
- Issue a **Stop Work Order**, preventing a developer from continuing work.
- Issue a **Building Work Rectification Order**, requiring a developer to carry out or refrain from carrying out building work to eliminate, minimize or remediate a serious or potential serious defect.
- Enter into an **Enforceable Developer Undertaking**.
- Issue a **Compliance Cost Notice**, allowing the government to recoup any costs and expenses incurred by the Secretary.

Orders issued under the Act are publicly available on the NSW Fair Trading Register (**the Register**). A brief summary of the available orders is set out below.

Prohibition Orders

A prohibition order may be issued by the Secretary if:

1. The developer does not notify the Secretary of when it expects to apply for an occupation certificate, or notifies the Secretary less than six months before the occupation certificate application was made;
2. A serious defect exists in the building; or
3. A building bond, being 2% of the contract price for the building work, is not lodged with the Secretary by the developer.

In the event that an occupation certificate is issued by a certifier in contravention of a prohibition order, the certificate will be considered invalid.

Stop Work Orders

Stop work orders can be given if the Secretary or its delegate is of the opinion that the building work is, or is likely to be, carried out in a manner that could result in significant harm or loss to the public, occupiers or potential occupiers of the building, or cause significant damage to the property.

Breach of a stop work order constitutes a serious offence, and corporations risk a fine of up to \$330,000 if they act in contravention of such an order.

Building Work Rectification Orders

The Act empowers the Secretary to issue a building work rectification order (**rectification order**) if it holds a reasonable belief that building work was or is being undertaken in a way that could lead to a serious defect. Prior to issuing a rectification order, the Secretary must provide a notice of intention to issue a rectification order to the developer, in addition to any relevant parties such as council.

Developers are entitled to appeal the order to the Land and Environment Court within 30 days of receipt, however developers must be aware that lack of compliance with the order may also result in a monetary penalty of up to \$330,000.

Enforceable Developer Undertakings

A key component of the Act is the introduction of enforceable developer undertakings. An enforceable developer undertaking involves a legally binding arrangement between a developer and the Secretary. The undertaking represents a sign of good faith that a developer will refrain from contravening the Act and remediate any serious defects should they arise.

Enforceable developer undertakings are voluntary in nature, operating primarily for the benefit of the owners' corporation. The purpose of the undertaking regime is to create a cost effective way for an owner's corporation to resolve defective work. The regime requires the government to hold a security supplied by the developer for the warranty period of six years, aimed at instilling confidence in the owner's corporation.

As the Act is quite new, only one published enforceable undertaking appears on the Register to date. However, it appears that the enforceable developer undertaking regime is gaining momentum and there are recent reports of more developers entering into these undertakings.

Compliance Cost Notice

In circumstances when a building work rectification order is issued, the Secretary is also permitted to issue a developer with a compliance cost notice. A compliance cost notice requires a developer to pay all reasonable costs incurred by the Secretary for exercising their powers under the Act and investigating compliance with a building work rectification order.

Conclusion

Given the Act has only been recently introduced, the true effectiveness of its powers and the enforcement of those powers in the Courts and/or Tribunals is not yet known. However, it is clear that any regime which seeks to streamline the resolution of issues concerning defective work between developers and Owners Corporations is a step in the right direction, particular for owners of affected lots.

If you would like any further information, or are subject to an order issued under the Act, please contact [Chris Kintis](#) or your usual ClarkeKann contact.