Raising Consumer Confidence in Residential Apartment Buildings in New South Wales – Will the Pillar 1 Reforms fix what is broke?

By Laina Chan[1]

Introduction

Confidence in the New South Wales residential apartment building market, following the highly publicised structural failures in the Opal Tower and Mascot Tower, is at an all time low. However, even prior to these two highly publicised failures, there had been a 'cladding crisis' in Australia, following the Lacrosse Building fire in Melbourne in November 2014 and then the Grenfell Building fire in London in June 2017 that killed 72 people. Both buildings had been clad in Aluminium Composite Panels (ACP).[2] At the time that the Lacrosse Building was designed in mid-2010 and 2011, very little was known about the fire risks associated with ACP. The Victorian Court of Appeal[3] has confirmed the decision of the Victorian Civil and Administrative Tribunal that the builder of the Lacrosse Building was primarily liable for the fire but that the liability should be passed down to the fire engineer at 42%, building surveyor at 30%, the architects at 25% and the smoker at 3%.[4]

The Aftermath

States have struggled to come up with a viable solution to put in place a viable replacement program for the ACP.[5] Victoria has established a grossly inadequately resourced cladding safety fund for the replacement of the ACP[6] and New South Wales is offering owners corporations interest free loans for the replacement of the ACP[7]. Apartment owners in Australia have been facing hefty special levies for cladding replacement often with no recourse for recovery, higher insurance levies, higher owners corporation fees, legal fees, as well as fire safety orders to fix other fire safety defects, like sprinklers[8]. Further, even though professional indemnity insurers have incorporated exclusion clauses in their policies excluding cover for cladding claims, many certifiers have not been able to obtain insurance cover.[9] Otherwise, insurance premiums for design professionals along with certifiers have experienced steadily climbing premiums with engineers reporting that they are facing 500% to 800% increases in premium.[10]

This paper will consider the regulatory reforms in New South Wales designed to raise consumer confidence in residential apartment buildings. These reforms centre around the *Design and Building Practitioners Act 2020 (NSW)* (***DBP Act***)[11] and the *Residential Apartment Building (Compliance and Enforcement Powers) Act 2020* (NSW) (***RAB Act***)[12] and their attendant regulations (**NSW Reforms**). Adoption in the various states and territories is awaiting the outcome of the NSW Reforms.

The NSW Reforms

The NSW Reforms are designed to ensure that:

- building design is well documented and conforms with the Building Code of Australia;
- contractors utilise the services of design professionals prior to the commencement of construction and throughout the construction process;
- buildings are built in accordance with the Building Code of Australia and Australian Standards; and
- the design team, backed by their professional indemnity insurers, effectively underwrites the whole construction process.

The mechanism used to achieve this is as follows.

Registration of and Insurance for Design and Building Practitioners

Design practitioners who are going to work on residential apartment buildings[13] are required to be registered[14] and insured[15]. Building practitioners[16] are also required to be insured. All insurance obligations do not come into force until 1 July 2023.[17]

Building Compliance Certificates and Occupation Certificates

Registered design practitioners must prepare the design and any variations of the design for the critical elements of the building. Critical elements are fire safety, waterproofing, structural, mechanical, plumbing and electrical.[18] The building practitioner must not without reasonable excuse use a design that has not been prepared by a regulated design practitioner.[19] The contractor must build in accordance with the declared designs and must at the completion of construction issue a compliance declaration that the final building is compliant with the Building Code of Australia.[20]

A developer must notify the Department of Customer Service six to 12 months prior to the proposed application for an occupation certificate of its intention to apply for an occupation certificate.[21] The Secretary of the Department of Customer Service may issue a prohibition order preventing the issue of an occupation certificate because of the existence of serious defects.[22] If a prohibition order is in place then the Secretary must notify Council certifiers, the developer, owners and the registrar general of the existence of the prohibition order.[23] Any occupation certificate issued in contravention of the prohibitions order is invalid.[24] While a developer may appeal against a prohibition order to the Land and Environment Court, the appeal does not operate as a stay.[25]

Investigative and Enforcement Powers

The Secretary of the Department of Consumer Service is empowered to investigate complaints and to enforce the provisions of the *DBP Act*.[26] Powers include the acceptance of written undertakings from a registered practitioner with a breach of an undertaking providing grounds for taking disciplinary action against a registered practitioner.[27] The Secretary may also issue stop work orders which may be appealed against although the appeals do not operate as a stay.[28] The Secretary may also apply to the Land and Environment Court to remedy or restrain a breach of the *DBP Act*. Proceedings for offences may be taken in the Local Court or the Land and Environment Court in its summary jurisdiction. If successful, the courts may impose penalties.[29]

The Secretary may also issue rectification orders.[30] If the rectification order is not complied with then the Secretary may demolish a building or a part of a building.[31] More than one building rectification order may be issued[32] and each building rectification order may be issue to more than one person[33] or more than one developer[34]. Developers may appeal a rectification order to the Land and Environment Court although appeals do not operate as a stay.[35] Developers are also liable for the costs of compliance although they may appeal against a compliance costs notice to the Land and Environment Court.[36] Interestingly, any work rectification orders must be considered in any proceedings in NCAT and any other court proceedings relating to building work that is the subject of the order.[37]

Unfortunately, the Secretary cannot declare an occupation certificate void if it subsequently issues a work rectification order for serious defects even if those defects pose a risk to public safety. This preserves the status quo in that there is currently no mechanism available in New South Wales where an occupation certificate that is subsequently proven to be unreliable may be declared void. In the absence of such a power, developers may ostensibly force purchasers to settle their contracts for sale.[38] It is suggested that the legislature reconsider whether such power would be in order – at least in circumstances where the work rectification orders involve the rectification of major defects, the presence of which indicate that the occupation certificate ought not to have been issued in the first instance. If the Secretary is empowered to demolish a building or part of a building then it ought to be also empowered to declare as void any occupation certificate that has been previously issued.

By way of illustration, the writer has had the benefit of sighting a rectification order, the response of the developer as well as the reply from the Commissioner in a significant development at Homebush which has serious waterproofing issues that have rendered the property not fit for purpose. Unfortunately, the occupation certificate has already been issued for the building. The developer is resisting the rectification order and it appears that proceedings in the Land and Environment Court are imminent. Unless the Commissioner exercises the powers available to him by demolishing parts of the apartment building so that the purchasers may potentially rely upon s 66M of the *Conveyancing Act 1919* (NSW) to negotiate a decrease in the purchase price then consumers may find themselves in the unhappy position of having no option but to complete their purchases at the contract price.

Extension of the duty of care.

The NSW Reforms have addressed the effect of *Brookfield Multiplex v OC SP 6128839* which effectively precluded the existence of a duty of care by builders and design professional to subsequent owners in the absence of vulnerability. The resultant gap in the availability of a cause of action for owners of residential apartment buildings and owners corporations for latent defects that manifest more than six years after the registration of the strata plan pursuant to the *Strata Scheme Development Act 2015* (NSW) has now been overcome in part, by imposing a retrospective duty of care on builders and design professionals to avoid pure economic loss to all subsequent owners of residential apartment buildings.[40] This includes Owners Corporations.

The duty of care is non delegable[41] and economic loss is defined to include the cost of rectification of defects[42]. The duties and warranties under the *Home Building Act 1989* (NSW) and other Acts are preserved. The operation of the *Civil Liability Act 2002* (NSW) is also expressly preserved. [43] The retrospective nature of the duty of care was intended to provide owners with a cause of

action for the defective cladding. However, its effect is not so limited. The duty applies if the loss first became apparent within 10 years immediately prior to 11 June 2020[44] or first becomes apparent on or after 11 June 2020.

It is unknown what the subjective intention of the New South Wales legislature was in relation to the intended reach of the retrospective duty of care for pure economic loss. However, the retrospective duty of care may not provide a cause of action to all subsequent owners. For example, latent damage in a residential apartment building, completed more than 10 years ago, might only have manifested in the last 10 years and therefore be within the retrospective shadow of the extended duty of care. In such a scenario, s 6.20 of the *Environmental Planning and Assessment Act 1979 (*NSW*)* which provides a ten year long stop for building actions would operate to preclude a building action being brought.[45] If this was not the subjective intention of the New South Wales legislature then either the *DBP Act* or the *Environmental Planning and Assessment Act 1979 (*NSW*)* must be amended to prevent this outcome.[46]

Conclusion

The NSW Reforms are several steps in the right direction. They are designed to prevent a builder or developers from cutting corners by mandating the requirement of a fully resolved set of certified construction drawings by registered (and adequately insured) design professionals prior to the commencement of construction.[47] Variations in respect of essential building elements also have to be designed, documented and certified by the respective design professionals.[48] Builders have to certify that they have built in accordance with the set of certified construction documentation and that the completed building complies with the Building Code of Australia.[49] To complement this, the principal certifier must not determine an application for an occupation certificate unless all compliance declarations required by the *DBP Act* have been lodged and considered by the principal certifier.[50] In addition to requiring building practitioners to be adequately insured,[51] the NSW Reforms rely upon the prohibition orders[52] and potential prosecutions for offences for non-compliance[53] to encourage builders to comply with their obligations under the *DBP Act.* It will be curious to see if the State government ends up underwriting the risk for the building practitioners as it is unlikely that insurance for defective workmanship will ever be available commercially.

Yet, as discussed, above there are two areas in which it is suggested that the legislature ought to further intervene. In the first instance, to bolster the power of the Secretary to declare occupation certificates void where a work rectification order is subsequently issued to cover serious or major defects. Secondly, to clarify the ambit of the retrospective duty of care and whether it was intended to afford subsequent owners a cause of action for buildings completed more than 10 years prior to the enactment of the *DBP Act.*

Ultimately however, whether the NSW Reforms will be successful in raising the quality of residential apartment building in New South Wales and ultimately consumer confidence depends upon whether the Department of Consumer Affairs is properly resourced. While David Chandler, the New South Wales Building Commissioner does not lack energy and enthusiasm, he is but one person and without support, he and his Department will not be able to react to complaints, instigate investigations and issue stop work orders, rectification orders or prohibition orders. BN

ENDNOTES

1 Laina Chan is a barrister at the New South Wales Bar and the Chair of the Society of Construction Law Australia. The views expressed are mine but were developed during discussions with the Hon Robert McDougall QC prior to their joint presentation to the NSW Bar on 9 March 2021.
2 David Sawtell and Douglas Maxwell, *The Lacrosse Apartment Fire: Liability for Using Grenfell Style Cladding*, 29 March 2019, https://www.law.ox.ac.uk/housing-after-grenfell/blog/2019/03/lacrosse-apartment-fire-liability-using-grenfell-style-cladding.
3 *Tanah Merah Vic Pty Ltd (ACN 098 935 490) v Owners Corporation No 1 of PS613436T* [2021] VSCA 72.
4 *Tanah Merah Vic Pty Ltd (ACN 098 935 490) v Owners Corporation No 1 of PS613436T* [2021] VSCA 122 at [26].
5 See Trivess Moore, David Oswald, Simon Lockrey, Only a small fraction of buildings with flammable cladding have been fixed, and owners are feeling the strain, *The Conversation*, 22 March 2021, https://theconversation.com/only-a-small-fraction-of-buildings-with-flammable-cladding-have-been-fixed-and-owners-are-feeling-the-strain-157307. (**Moore Article**)
6 Moore Article.
7 See https://www.nsw.gov.au/customer-service/projects-and-initiatives/project-remediate.
8 Moore Article.
9 See Michael Bleby, Cladding's insurance quandary costs Victoria $7m, *AFR*, 8 February 2021, https://www.afr.com/property/commercial/cladding-s-insurance-quandary-costs-victoria-7m-20210202-p56yvp.
10 As reported by engineers in industry forums like the Australian Construction Industry Forum. See also https://www.afr.com/property/commercial/builders-architects-insurers-await-lacrosse-cladding-appeal-ruling-20210222-p574uw.
11 The date of assent was 11 June 2020.
12 The date of commencement was 1 September 2020.
13 Class 2 buildings or buildings with a class 2 part: see s 4 of the *DBP Act* and reg 12 of the *Design and Building Practitioners Regulations 2021* (NSW) (**DBP Regulations**).
14 Part 3 of the *DBP Act* deals with the registration of engineers. Part 5 of the *DBP Act* deals with the registration of design practitioners.
15 S 11 of the *DBP Act* for design practitioners and s 14 of the *DBP Act* for registered principal design practitioners
16 S 24 of the *DBP Act.*
17 Reg 109 of DBP Regulations.
18 S 6 of the *DBP Act.*
19 S 19 of the *DBP Act.*
20 S 17 of the *DBP Act.*
21 Sections 7(1) and 9(1)(a) of the *RAB Act.*
22 S 9(1)(c) of the *RAB Act.*
23 S 9(3) of the *RAB Act.*
24 S 9(6) of the *RAB Act.*
25 S 10 of the *RAB Act.*
26 See Parts 7 and 8 of the *DBP Act* which dovetails with Parts 3 and 4 of the *RAB Act.*
27 S 88 of the *DBP Act* and s 28 of the *RAB Act.*
28 Sections 89 and 90 of the *DBP Act* and ss 29 and 30 of the *RAB Act.*
29 S 93 of the *DBP Act.*
30 S 33 of the *RAB Act.*
31 S 42 of the *RAB Act.*
32 S 53 of the *RAB Act.*
33 S 54 of the *RAB Act.*
34 S 55 of the *RAB Act.*
35 S 50 of the *RAB Act.*
36 S 52 of the *RAB Act.*
37 S 43 of the *RAB Act.*
38 Carrie Fellner, Sydney building 'nightmare' set to cost Maryam her life savings, *Sydney Morning Herald*, 20 March 2021, https://www.smh.com.au/national/nsw/sydney-building-nightmare-set-to-cost-maryam-her-life-savings-20210319-p57cb5.html.
39 (2014) 254 CLR 185.
40 S 37 and Schedule 1, cl 5 of the *DBP Act.*
41 S 39 of the *DBP Act.*
42 S 38 of the *DBP Act.*
43 S 41 of the *DBP Act.*
44 Schedule 1 cl 5 of the *DBP Act.*
45 Pursuant to s 6.20 (2)(a) of the *Environmental Planning and Assessment Act 1979* (NSW), time typically starts to run from the issue of the occupancy certificate.
46 See also the discussion in Chan, The enforceability of extended contractual warranties – can the hurdle of applicable limitation periods be overcome? (2016) 32(3) *BCL* 170.
47 Sections 9 and 12 of the *DBP Act.*
48 S 20 of the *DBP Act.*
49 S 17 of the *DBP Act.*
50 S 27 of the *DBP Act.*
51 See regs 75 and 76 of the DBP Regulations.
52 Part 2 of the *RAB Act.*
53 Part 8 Div 2 of the *DBP Act.*