

RESIDENTIAL APARTMENT BUILDINGS (Compliance and Enforcement Powers) ACT 2020 (NSW)

A Briefing Note prepared by Michael Morrissey of Morrissey Law + Advisory

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What is the Residential Apartment Building Act and what does it entail?

The *Residential Apartment Buildings (Compliance and Enforcement Powers Act 2020 (NSW))* commences on **1 September 2020** and is the latest piece of NSW legislation enacted in response to the serious defects in residential apartment buildings such as those experienced in Sydney's Mascot and Opal Tower developments.

In coordination with the new *Design and Building Practitioners Act* ([see our memo here](#)), the Residential Apartment Buildings Act will provide considerable powers to the NSW Building Commissioner (currently, David Chandler), primarily in allowing the Commissioner to issue a prohibition order against the issuance of an occupation certificate, with the likely impact being the apartments (sold off the plan) are unable to settle and to issue rectification notices.

Critically, the Residential Apartment Buildings Act applies primarily to developers and the liability for design and building defects and legislative compliance rests squarely on developers.

What type of buildings does the Residential Apartment Buildings Act apply to?

The Residential Apartment Buildings Act applies to building work carried out on **class 2 buildings** - typically multi-unit residential buildings where people live in apartments, however they also include single level dwellings above a common area (such as a common basement). It also applies to the whole of a building if the building includes any class 2 works.

The Residential Apartment Buildings Act only applies to buildings that are under construction, or, if the Building Commissioner issues a notice, has been completed in the 10 years prior to that notice.

In summary, it is possible that all apartments that have been completed since September 2010 are captured by the Residential Apartment Buildings Act.

Occupation Certificates

Builders, developers, and owners should all be aware that the Act alters the application process for an Occupation Certificate (OC) on completion of the building work. In summary, the new process involves:

1. Notifying the Secretary of the intended completion date and when the developer expects to make an application for an OC. This must be done within 6-12 months before an OC application is made. (**expected completion notice**)
2. If the work is expected to take less than 6 months to complete, the developer must give an expected completion notice within 30 days of the commencement of the building work.
3. If a change in circumstances alters the expected date of an OC application by more than 60 days, then a new date must be communicated to the Secretary. This must be done within 7 days of the developer becoming aware of the change in circumstances. (**expected completion amendment notice**)

The new process operates to provide the Secretary with sufficient notice so that they can examine the construction of the building and detect any serious building defects before the issuing of an OC.

The Act allows for a 6-month transition period between 1 September 2020 and 1 March 2021 where the requirements above will not apply, however, developers need to notify the Secretary by 14 September 2020 if they intend to apply for an OC during this time.

NOTE: If you are a developer that will be applying for an occupation certificate between 1 September 2020 and 28 February 2021, please contact us to assist you in preparing the relevant application documents by 14 September 2020.

Prohibition Orders

Under the Act, the Secretary has the power to stop the issue of an occupation certificate if:

1. An expected completion notice or expected completion amendment notice is not provided, or provided less than 6 months prior to the OC application (or if that application is within the transition period, the notification has not been provided before 14 September 2020).
2. The Secretary believes a **serious defect** exists in the building.

An OC issued by a principal certifier in contravention of a prohibition order will be invalid and the principal certifier can face penalties of up to \$110,000.

What is a serious defect?

This definition follows similar definitions found in the *Home Building Act (NSW) 1989* and the *Design and Building Practitioners Act (NSW) 2020*, however, is somewhat wider on detailed review, with the inclusion of the following:

A defect in a building product or building element attributable to a defective design, poor workmanship of defective materials that is likely to cause:

1. **Inability to use of any part of the building for its intended purpose;**
2. Destruction of any part of the building; or
3. Collapse of any part of the building.

It is expected that the regulations will contain further examples of what constitutes a serious defect once published.

Are Directors of Developers liable for building defects?

Yes.

Section 58 of the Residential Apartment Buildings Act allows the Secretary to prosecute the directors directly, including those directors of development companies (namely SPVs) that are in liquidation or have been wound up.

What powers will the Secretary have to investigate and enforce compliance with the Residential Apartment Buildings Act?

Information gathering powers: the Secretary or an authorised officer can require the provision of information, records and record questions and answers given by an individual or representative of a body corporate.

Entry to premises: the Secretary or an authorised officer can enter any premises at which business (including building work) is in progress without a search warrant. However, this does not apply to residential premises.

Powers on premises: the authorised officer may inspect, remove samples, take photographs/recordings, inspect and copy records, seize property, open up/cut open or demolish building work and other actions if they believe there has been a contravention of the Act or a serious defect exists.

Stop work order: the Secretary can issue a stop work order commanding the developer to ensure that the building work stops for a period of up to 12 months, if it is believed that the building work is or is likely to be carried out in a manner which could cause significant loss or harm to the public, occupier or future occupiers of the building.

Building work rectification order: the Secretary can require the developer to carry out building work or refrain from carrying out building work to eliminate or minimise the risk of a serious or potentially serious defect. This includes requiring the developer to rectify any defective building work in applicable buildings that have been completed up to 10 years ago.

Compliance cost order: if the Secretary gives a building work rectification order, they may also issue a compliance cost notice requiring the developer to pay the Secretary's reasonable costs and expenses in connection with matters associated with the building rectification order.

Can you appeal an order?

Yes.

However, any appeal must be made **within 30 days** of a stop work order, a building work rectification order or a compliance cost notice.

Potential Impact for Developers

1. A developer who is expecting to apply for an occupation certificate during the 6-month transition period (1 September 2020 to 1 March 2021) must notify the Department of Customer Service by 14 September 2020. If the developer fails to do so, then the Secretary may make an order prohibiting the issue of an occupation certificate in relation to the building and the registration of any relevant strata plan.
2. Subsequently, there is the potential for cashflow issues that arise from settlements affected because of delays with the issue of an OC until specified defects have been rectified or the Commissioner allows for an OC application.
3. Developers should be aware of buyers including clauses allowing for termination of contracts for sale if a prohibition or rectification order is issued.
4. Developers should note, the obligation to rectify the defects or pay the fine, also applies to the directors of the developing entity.
5. Offences for breaching the Residential Apartment Buildings Act can amount to \$330,000 and can continue to accrue each day the orders are not complied with.
6. Developers may also want to reconsider their construction contracts with particular emphasis on:
 - Making final payments (or return of contractor retentions) conditional on receipt of an OC.
 - Inserting additional quality control measures during the building process to ensure that OC can and ultimately will be achieved by the expected date.
 - Allocating the risk that completion is delayed due to the blocking of an OC to the builder by requiring the OC as a condition precedent to practical completion.
 - Adopting new notification requirements in future contracts which satisfies the demands of the Residential Apartment Buildings Act such as a requirement to provide 6 months' notice of the anticipated date of practical completion so that an expected completion notice can be filed.
 - Heightening the importance on EOT notifications so that completion dates can be carefully monitored.

This Briefing Note has been prepared by Michael Morrissey as general advice only.

The Residential Apartment Buildings Act is a considerable shift in the risk allocation for many construction participants.

If you wish to know more, you can reach Michael directly via:

m.morrissey@morrisseylaw.com.au
(02) 8077 0668

