

CONSTRUCTION LAW

*The changing legislative landscape of
Australia's construction sector in FY24*

LANDER
& ROGERS



Guide

INTRODUCTION

FY23 saw several legislative and regulatory developments in Australia's construction sector on a federal and state level.

In this guide, Lander & Rogers' construction & infrastructure and insurance law experts analyse recently passed and proposed legislation impacting building and construction professionals in each jurisdiction in Australia, and the changes anticipated in the year ahead.

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COMMONWEALTH

The *Treasury Laws Amendment (More Competition, Better Prices) Act 2022* (Cth) (**TLA**) will take effect on 10 November 2023, bringing significant changes to consumer legislation on a federal level.

The TLA amends the unfair contract terms (**UCT**) provisions of the *Competition and Consumer Act 2010* (Cth) (**CCA**) and the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**). These amendments include:

- the introduction of a civil penalty regime prohibiting the use of, and reliance on, unfair contract terms by businesses;
- expansion of protections to parties to a small business contract;¹
- clarification of factors the courts must consider when determining whether a contract is a standard form contract;
- clarification of court powers to determine an appropriate remedy for breaches of the UCT regime;
- clarification of the contractual provisions that are required, or expressly permitted, under Commonwealth, state or territory laws that are excluded from the UTC regime; and
- new categories of contracts, which are excluded from the operation of the UCT regime.

Takeaway:

The TLA reforms apply to all business that use standard-form contracts when supplying goods or services to consumers and small businesses, including in the construction industry. Insurance policies and trade contracts are equally affected. We recommend insurers, underwriters, consultants and even brokers revise their contracts prior to 10 November 2023 to ensure compliance with the TLA reforms.

Participants in these markets are reminded that any clause in a contract affected by the TLA reforms that creates a significant imbalance in the rights and obligations of parties, without being reasonably necessary to protect the legitimate interests of the advantaged party and that would cause detriment to a party if relied upon, may be considered unfair. This may include common terms such as time bars on claims, liquidated damages regimes, and termination for convenience without compensation clauses.



1. A contract is a small business contract if the contract is for the supply of goods or services, or a sale or grant of an interest in land; and at least one party to the contract satisfies either or both of the following conditions: (i) the party makes the contract in the course of carrying on a business and at a time when the party employs fewer than 100 persons; or (ii) the party's turnover for the last income year that ended before or at the time when the contract is made is less than \$10,000,000.

AUSTRALIAN CAPITAL TERRITORY

Professional engineering services

The ACT's *Building Act 2004* regulates the building industry in the nation's capital. Although there appear to be no significant amendments to the Act in the pipeline for 2023, the introduction of the *Professional Engineers Act 2023 (ACT Act)* – passed by the ACT legislative assembly on 23 March 2023, with provisions in force no later than 12 October 2024 – points to radical changes to the engineering profession in the ACT.

The ACT Act seeks to protect the public by ensuring professional engineering services are carried out by, or under the direction and oversight of, professional engineers. It intends to maintain public confidence in the standard of professional engineering services and uphold standards of practice for professional engineers in the ACT. The Act establishes a registration scheme for professional engineers (initially in the civil, electrical, fire safety, mechanical, and structural areas of engineering, but with provision being made to add to these areas by regulation). It also provides for the monitoring and enforcement of compliance with the Act, and imposes obligations on registered individuals in relation to the provision of professional engineering services.

Construction occupations

The *Construction Occupations (Licensing) Act 2004 (ACT) (COA Act)* administers the licensing of construction participants in the ACT. Construction participants provide (or will provide) a construction service, which is the doing or supervision of work in a construction occupation.

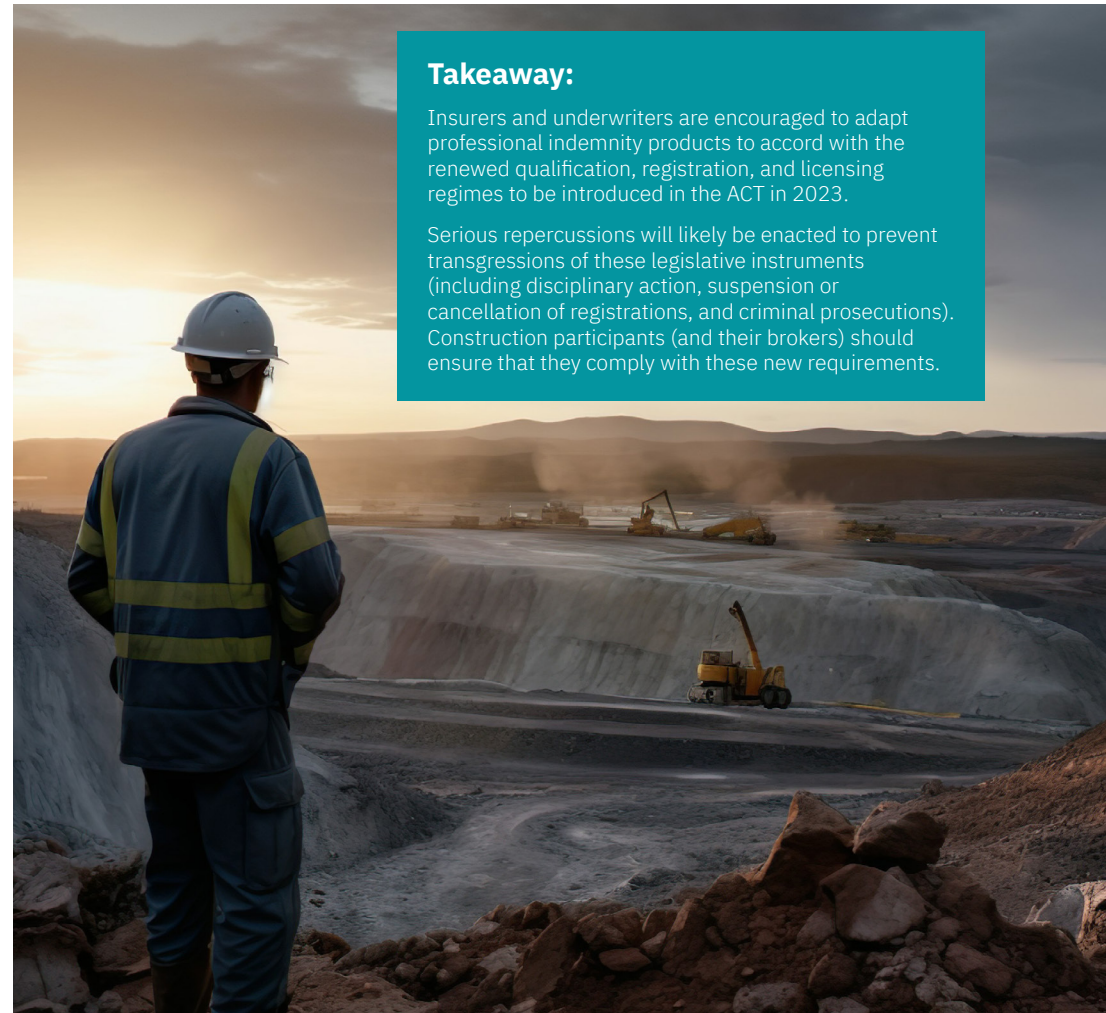
Section 13 of the *Construction Occupations (Licensing) Regulation 2004* issued in pursuance of the COA Act permits the Minister to declare the qualification requirements necessary for an entity to be eligible to be licensed in a construction occupation. Presently, the Minister has two current qualification declarations, which will be consolidated in 2023 by the *Construction Occupations (Licensing) (Qualifications) Declaration 2023 (Declaration)*.

The Declaration details the qualifications necessary for an individual to be eligible to be licensed in several listed construction occupations (including building assessors, drainers, electricians, gasfitters, gas appliance workers, plumbers, builders, and building surveyors). It also updates the qualifications schedule to reflect new training packages from the Australian Skills Quality Authority. Notably, the Declaration prescribes qualifications for applicants for new licences. It does not prescribe general requirements for renewing licences or for financial requirements.

Takeaway:

Insurers and underwriters are encouraged to adapt professional indemnity products to accord with the renewed qualification, registration, and licensing regimes to be introduced in the ACT in 2023.

Serious repercussions will likely be enacted to prevent transgressions of these legislative instruments (including disciplinary action, suspension or cancellation of registrations, and criminal prosecutions). Construction participants (and their brokers) should ensure that they comply with these new requirements.



NEW SOUTH WALES

New South Wales saw remarkably few legislative developments affecting the construction industry in 2022. This was likely the proverbial calm before the storm, given the NSW Parliament's ambitious legislative agenda for the remainder of 2023.

Amendments to building legislation

The Office of the NSW Building Commissioner (**OBC**) was established in late 2019 to lead what the NSW Government terms a “*once-in-a-generation reform of the design and building industry*.”²

In 2020 the OBC developed Construct NSW, a strategy to drive the government's agenda to reform the construction sector. A customer-focused regulatory framework is a foundational pillar for Construct NSW. During Construct NSW's first regulatory development phase, the OBC:

- implemented the *Residential Apartment Buildings (Compliance and Enforcement) Act 2020* (NSW) (**RAB Act**) and used its powers to establish a new inspection program in residential high-rise construction;
- implemented the *Design and Building Practitioners Act 2020* (NSW) (**DBP Act**) and its regulations, which seek to restore trust in the construction sector and its role-players; and
- published the Certifier Practice Standards,³ with its enforceable requirements, which is a first for NSW.

Notably, on 24 February 2023 the *Building Legislation Amendment (Building Classes) Regulation 2023* was published. It expands from 3 July 2023 the DBP and RAB Acts to apply to class 3 (larger shared accommodation buildings) and class 9c buildings (aged care buildings). Alteration and renovation work for existing buildings of these classes will be subject to the reforms from 1 July 2024.

Building Bill 2022

The second phase of the OBC's legislative agenda is due to kick in with the introduction of the *Building Bill 2022*, anticipated to be enacted later this year. The new Act will regulate all building work in NSW and is intended to focus on strengthening consumer protections and enforcement powers; ensuring trade practitioners are suitably skilled to carry out their work; making all persons accountable for the supply of safe building products and building work; and ensuring fair and prompt payment.⁴ The new Act will replace the *Home Building Act 1989* (NSW), and will transfer and combine part 6 of the *Environmental Planning and Assessment Act 1979* (NSW) and part 4 of the DBP Act. This will result in:

- expansion of the statutory duty of care in s 37 of the DBP Act to include “inspection” and “certification” of building work, thereby imposing new and more onerous statutory duties on certifiers. This will render certifiers liable to both the current and subsequent owners of the property for defects causing economic loss;

- a change to the definition of “major defect” (a defect in a major building element caused by defective design, workmanship, building materials or non-compliance with the National Construction Code (**NCC**) resulting in inability to inhabit or use a building) to the more onerous “serious defect” (a defect in a building element caused by a failure to comply with the NCC, the relevant standards or the approved plans – which, incidentally, no longer requires proof that a building cannot be inhabited – or the use of a building product in contravention of the *Building Products (Safety) Act 2017*, or which does not comply with the NCC or other standards or regulations);
- increasing the time to bring defect claims from two to six years after completion of building work;
- expansion of the categories of persons considered to be “developers” subject to statutory warranties, including the person who contracted or arranged for, or facilitated or otherwise caused the works; the owner of the land on which a building is constructed; the principal contractor, and the developer of a strata scheme; and
- the welcome clarification that a domestic developer (i.e. someone who develops buildings containing fewer than three self-contained dwellings, and a company that owns a building under a company title), is not considered a “developer” for purposes of the Act.

The reforms are scheduled to commence in 2024. Some provisions, including a new licensing scheme, will come into effect over a two to five-year period.

Takeaway:

These changes all widen the liability of builders, developers, certifiers and other persons performing building work.

Insurers and underwriters should take note that certifiers and building inspectors are now also liable to future, as well as current, owners if liability is established for defects causing economic loss. This is a burdensome addition to the risk profile of members of this profession. Risk profiles will also be affected by the increased limitation period (six years), which now aligns the period with the *Limitations Act 1969* (NSW).

Consultants and brokers should also be aware that the broadening of the definition of defects to “serious defect”, and especially the removal of the requirement that a defect is only a defect when the building is uninhabitable, will markedly increase the scope of actionable defects and omissions. The increased focus on the use of outlawed building products (such as asbestos or combustible cladding) elevates the scrutiny to which consultants will be subjected.

The wider net cast upon developers is also noteworthy, as is the exclusion of domestic developers. The former creates actionable liability where it may previously have been thought it did not exist, whereas the latter is likely to stimulate growth in that specific limb of the profession – a welcome step towards addressing the detrimental effects of the ongoing housing crisis.

2. <https://www.nsw.gov.au/sites/default/files/2021-02/Construct%20NSW%20Update%20Report%20February%202021.pdf>
3. <https://www.fairtrading.nsw.gov.au/trades-and-businesses/business-essentials/building-certifiers/certifier-responsibilities>
4. Regulatory impact statement, Building Bill 2022 Part 3 - Building compliant homes - <https://www.haveyoursay.nsw.gov.au/75583/widgets/379760/documents/238627>

CONSTRUCTION LAW

The Building Compliance and Enforcement Bill 2022

The construction industry's compliance requirements are currently spread across different laws with differing enforcement powers. The *Building Compliance and Enforcement Bill 2022 (BCE)* will replace the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020 (RAB Act)* and is intended to provide a single legislative framework for the regulation of building compliance and enforcement,⁵ and to ensure effective oversight of all building work in NSW.⁶ The BCE is currently under review following public consultation.

The RAB Act's expected completion notice (**ECN**) scheme is retained in the BCE. The scheme requires developers to notify the Secretary of the date they intend to apply for an occupation certificate for building work. The BCE seeks to expand the ECN requirements to any "notifiable building", which will now include class 2 buildings and any building where the building work requires a building compliance declaration under the DBP Act. In accordance with the changes brought about by the *Building Legislation Amendment (Building Classes) Regulation 2023*, this will now also include class 3 and class 9c buildings.

The BCE also seeks to standardise the general investigative powers of NSW Fair Trading to enable authorised officers to effectively carry out inspections and audits. It will also include specific powers as required, such as the security of payments for subcontractors and the obligations of strata committees to maintain common property.⁷

The BCE will also retain the existing powers held by the NSW Building Commissioner under the RAB Act to deal with non-compliant developers and serious defects in buildings. The power to order the rectification of building work will be expanded to all classes of buildings where a serious defect may exist, as will the power of the Secretary to prohibit the issue of occupation certificates where there are non-compliant and serious defects in buildings.⁸

The BCE⁹ will also empower commissioners to hold company directors and other persons of influence personally liable if the entity commits an offence. This includes introducing executive liability offences that make a director personally liable for failure to comply with regulatory directions.

Takeaway:

Directors and officers, insurers and underwriters should take note of the increased exposure of not only directors, but any other "person of influence". Developers should carefully evaluate their role and procure insurance cover should they be appointed as directors or be able to influence the affairs of the company.

Consultants and brokers should also note:

- the expansion of the ECN requirements to more building classes; and
- the stricter oversight provisions and enhanced investigatory and enforcement powers of building commissioners and investigators.



5. Section 3(a).

6. <https://www.haveyoursay.nsw.gov.au/strengthening-building-compliance>

7. Regulatory Impact Statement, Building Compliance and Enforcement Bill 2022 - <https://www.haveyoursay.nsw.gov.au/75583/widgets/379760/documents/238624>

8. Regulatory Impact Statement, Building Compliance and Enforcement Bill 2022 - <https://www.haveyoursay.nsw.gov.au/75583/widgets/379760/documents/238624>

9. Sections 156 and 157.

The Building and Construction Legislation Amendment Bill 2022 and the Building and Construction Legislation Amendment Regulation 2022

Key proposals featured in the Amendment Bill and Amendment Regulation, which are under review, include:

1. Introducing new responsibilities on individuals in the building product supply chain to ensure they are accountable for safe and suitable building products.

Part 2A of the Amendment Bill will impose a range of duties on persons in a building product supply chain, including any person who:

- designs, manufactures, imports or supplies building products;
- designs, drafts, or writes any plans or specifications for a building or any part of a building and recommends or incorporates the use of building products (for example, architects, building designers, and engineers); and
- installs or does building work where a building product is used, including those who physically do the work and those who coordinate or supervise the doing of the work.

The new duties include:

- a duty to ensure a non-compliance risk does not exist (section 8E). Such risk will be deemed to exist if the product does not (or even may not) comply with the NCC;

- a duty to provide required information (section 8F) such as the suitability of the product for each intended use, including any conditions, instructions or maintenance information that must be observed to ensure the suitability and compliance of the product in its intended use; and
- a duty on everyone in the chain of responsibility to notify the Secretary within seven days if they become aware of or reasonably suspect that a non-compliance risk or safety risk exists in relation to a building product or its intended use (section 8H).

A breach of any of the duties attracts penalties under the legislation of up to \$22,000 plus \$11,000 per day that the offence continues for an individual, and \$55,000 plus \$22,000 per day that the offence continues for a corporation.

2. Enhancing the rectification of strata buildings by permitting building inspectors to note additional defects in their final inspections. If a developer does not rectify the defects in a timely fashion, the strata committee may have access to the relevant statutory building bond for purposes of remediation. It is also anticipated that the three-year maturity date for bonds will be extended to four years. NSW Fair Trading will also be enabled to assist in resolving disputes for strata building work. This will likely take the form of its highly effective dispute resolution service, which resolves over 70% of building disputes at the initial mediation or inspection stage.

3. Various interventions to the *Building and Construction Industry Security of Payment Act 1999* and the *Building and Construction Industry Security of Payment Regulation 2020 (SOP legislation)* to ensure fair progress payments that are promptly made. This includes:

- a mandatory homeowners notice (under owner-occupier construction contracts) which must accompany a payment claim, to enable early and quick resolution of payment disputes; and
- securing greater protection of retention money for more projects, by reducing the \$20 million contract value threshold to \$10 million. This is designed to safeguard consumers against the significant risks of insolvency, as funds held in trust under SOP legislation are not available for distribution to the general body of creditors in such an event.

4. Improving professional standards and competencies in the industry through standardising continuing professional development (CPD).

Takeaway:

Insurers and underwriters should carefully consider the expanded ambit and increased exposure of responsible parties in the supply chain that could be held accountable. The new duties place significant responsibilities on relevant parties and pose a real risk of disciplinary and other actions for non-compliance. The penalties are significant and adequate adjustments should be made to insurance products to positively address these risks.

Consultants and brokers are also recommended to consider the expanded duties and make adequate provision for compliance within their businesses and when negotiating insurance cover.

Developers should take note of the expanded powers of building inspectors, and the entitlement of bodies corporate to access security bonds on the failure to remedy defects. The anticipated further one-year extension to bond maturity dates will undoubtedly adversely affect cashflow in a market that is already under pressure.

NORTHERN TERRITORY

Following the discovery of structural non-compliance with the National Construction Code across nine buildings in the Darwin and Palmerston areas, the Northern Territory government has acted to implement reforms that increase regulation and oversight of the construction industry.

Commencing 31 January 2022, amendments to the *Building Regulations 1993* (NT) introduced a requirement for third-party peer review of medium complexity or higher buildings – in short, those with three or more stories. This review must be conducted by a qualified independent reviewer before a building permit can be issued by a building certifier, reducing the burden on certifiers to ensure compliance with design documents but opening the door to new claims against these third-party reviewers.

A revision of the National Construction Code 2022 (**NCC**) also commenced in the Northern Territory from 1 May 2023, with some territory-specific deviations from the national provisions:

- The Northern Territory will not be adopting the increased minimum energy efficiency standards for residential buildings and will maintain current efficiency requirements for class 1 buildings and apartments at 5 stars.
- Energy efficiency requirements for commercial buildings will be introduced for the first time under the NCC, with a delayed start date of 1 October 2023. All class 3 and class 5 to class 9 buildings will subsequently be required to comply with the energy efficiency provisions under NCC Section J.

These changes, and in particular the variation between requirements for residential and commercial buildings, will likely require greater awareness from construction professionals during design and construction of new buildings.

Looking to the future, it appears greater accountability for construction professionals is a priority for the Northern Territory government. In the pipeline are several additional oversight measures, including reform to builders' registration. The current model endorsed by the relevant Ministers includes:

- a requirement for all new buildings in NT to have a registered building practitioner involved in construction;
- modification to the categories of registered commercial building contractors based on building heights;
- exclusion of renovations and fit-outs from the registered contractor requirements, provided no structural changes occur; and
- “grandfathering” of Northern Territory builders based on experience, without the need to meet qualification requirements during the transitional period.

These changes largely impact persons undertaking work on class 1b and class 3 to class 9 buildings, who presently do not need to be registered. In addition, the Northern Territory government is proposing the introduction of CPD for all registered practitioners, as a condition of their registration's two-yearly renewal.

Takeaway:

Greater oversight, training and certification of construction professionals may act to improve compliance with standards in the Northern Territory. While insurers may ultimately benefit from a reduction in defective works, these more rigorous obligations are likely to cause a short-term increase in non-compliant or unregistered construction works. Detractors of the proposed reforms have also argued that more stringent requirements will drive up construction costs – a significant consideration in the current market.



QUEENSLAND

While 2022 saw Queensland ramp up building and construction in preparation for hosting the 2032 Olympics in Brisbane, many industry players continued to experience the combined effects of the pandemic, natural disasters and rising materials costs in the face of global unrest.

Government supports findings of review into QBCC governance

In November 2021 the state government commissioned an independent review into the governance of the Queensland Building and Construction Commission (QBCC). The QBCC is the independent regulator that manages over 80 available industry licences including building, plumbing and drainage, mechanical services, fire protection, termite management, building and hydraulic design, and building inspection and certification.

The review report was delivered in May 2022 and made 17 recommendations, including:

- refocusing the QBCC's regulatory role to licensing and compliance of the industry;
- enhancing the QBCC's reputation based on consistency, transparency, and fair and impartial decision-making;
- fostering a culture of continuous improvement, respectful engagement, and effective reporting;
- strengthening and enhancing management, licensing, investigative and technical staffing capability;

- implementing a comprehensive and public compliance and enforcement strategy; and
- supporting the independent review of the role of developers within the industry.

In June 2022 the government released its response to the report, confirming that it supported all the review's recommendations in principle.

Proposed reforms to developer involvement in construction

In November 2021 the government also announced its long-awaited review into the role of developers within the construction industry. The review had been legislated in July 2020 in response to industry feedback regarding the role of developers and the need to examine the impact of their financial and operational capacity, work practices and behaviours.

In April 2023 the Developer Review Panel released its final report, setting out potential reforms to developer involvement in the construction process. It made five key recommendations, including:

1. foremost, establishing an accreditation, disclosure and registration framework for developers to prevent them from entering into a contract that requires a project trust account unless an accreditation is obtained and maintained;
2. improving education of developers by implementing minimum CPD requirements;

3. clarifying developer responsibilities in relation to non-conforming building products, working in conjunction with the accreditation framework to ensure developers are included in the chain of responsibility for non-conforming building registration works;
4. delineating developer responsibilities in relation to fairness in contracting through amendments to the *Queensland Building and Construction Commission Act 1991 (QBCC Act)*, ensuring developers do not pass risk downstream via onerous contractual terms; and
5. promoting the update of digital tools for recording design and construction information, to facilitate greater transparency and simplify post-contractual enquiries into contractor responsibilities.

Many of these recommendations are proposed as enforceable by disciplinary action, with accreditation cancellation for serious or repeated breaches. It remains to be seen if the Queensland government will implement such stringent reforms in this previously unregulated sphere.

While the actual legislative changes applying to the industry that occurred in 2022 were relatively limited, amendments to the *Building Regulation 2021* (Qld) brought in the following changes effective May 2022:

- Building certifiers are now allowed to hold an external cladding-related exclusion on their PI insurance until 30 June 2023, with licences benefitting from that exclusion continuing to apply until the licence expires.

- The inspection requirements for stages of assessable building work in respect of single detached class 1a or relevant class 10 structures have been clarified to confirm that although building certifiers are responsible for signing the certificate of inspection for the excavation, footing or slab, and final stages, they may rely upon an inspection certification given by a "competent person" for each aspect of the stage, rather than conducting a personal inspection.
- Competent persons assisting in the inspection of reinforcement of footings systems, and formwork and reinforcement for a slab on a detached class 1a building, must be a registered professional engineer.
- Building certifiers of single detached class 1a and relevant class 10 buildings must sign the certificate of inspection after the placement of foundations, and formwork and reinforcement, but before the concrete for footing or slab is poured.

Takeaway:

Industry reception to these reforms has been mixed, with some commentators questioning their efficacy and others applauding them as being critical to fixing problems that have plagued the industry in Queensland for many years. Nevertheless, examining the role of developers and how they are governed by regulators and others in the industry is timely as Queensland embarks on its ambitious development strategy in preparation for the Olympics.

SOUTH AUSTRALIA

The first session of the Festival State's 55th Parliament does not presently appear to propose significant changes to either the *Building Work Contractors Act 1995* (SA) (**SA Act**) or the *Planning Development and Infrastructure Act 2016* (SA).

For the moment, domestic building work will remain governed, as before, by part 5 of the SA Act, including its statutory warranty provisions. Future changes may well be modelled on the advances made by Construct NSW's regulatory developments, depending on the success of its rollout.

The South Australian government has set an official start date for implementing its obligations under the National Construction Code (**NCC**). The main provisions were adopted in South Australia in May 2023, including all provisions excluding those relating to liveable housing and energy efficiency, which will commence on 1 October 2024. The longer transitional arrangements for some provisions acknowledge the current challenges of the state's construction industry, including market capacity, supply chain disruption and workforce uncertainty.

Under the NCC, new homes are to meet the seven-star level of energy efficiency, an increase from the current six-star standard. New homes will also be required to meet improved accessibility standards, including wider doors and corridors, and step-free access to improve entry spaces inside homes. These standards are targeted at reducing the cost of future mobility-related home modifications.

The Minister for Planning is also considering further state amendments to some provisions as part of an implementation plan during the transition period. The Ministerial Building Standard MBS 007 will be updated to incorporate further edits to the NCC 2022.



TASMANIA

The Tasmanian government announced the re-introduction of its Home Warranty Insurance (**HWI**) scheme on 1 January 2023, providing cover for incomplete or defective building work in circumstances where a builder dies, disappears, or becomes insolvent. The HWI is currently proposed to cover projects with a value exceeding \$20,000.00, with a limit of 5 per cent for deposits and 20 per cent for incomplete or defective work, up to a maximum of \$200,000.

While consumers will doubtless welcome these protections, the Tasmanian government has sought to implement further reforms in the *Residential Building (Miscellaneous Consumer Protection Amendments) Bill 2022* (TAS) in a likely attempt to abrogate some of the cost liability that will arise under the HWI scheme. These reforms include major changes to the responsibilities and discipline of construction professionals, such as:

- the introduction of defective work orders, which allow a building surveyor to impose an obligation on the person responsible for defective works to repair at their cost, within 24 months of the building's completion;
- if the relevant building surveyor is no longer available, the regulator may issue an order for rectification;
- expanded powers for the Tasmanian Civil & Administrative Tribunal (**TASCAT**) to hear and determine a range of residential building matters, and introduction of compulsory mediation;

- amendments to the *Occupational Licensing Act 2005* (TAS), allowing disciplinary action for failure to comply with orders under the *Building Act 2016* (TAS), the *Residential Building Contracts and Dispute Resolution Act 2016* (TAS), or by the TASCAT; and
- amendments to consolidate the role of the permit authority on local council, to transfer accountability in decision-making away from individual council employees and onto the council itself.

Takeaway:

The effect of these additional responsibilities on building surveyors is unclear, with no indication if they will be liable for a failure to issue a defective work order in circumstances where defective building work was reasonably discoverable. Certainly, for other construction professionals there is likely to be greater oversight and an increase in claims for rectification under these defective work orders. TASCAT's expanded powers will work in conjunction with the introduction of disciplinary action for non-compliance with its orders. As a result, it is crucial that individuals work proactively to ensure fulfillment of any court orders.



VICTORIA

There have been few developments to the existing legislation governing the construction industry in Victoria.

Changes to the regulatory landscape

The *Building Legislation Amendment Act 2023* (Vic) (**Building Amendment Act**) has become law, with a commencement date of no later than 24 February 2024.

The Building Amendment Act revives the stalled *Building, Planning and Heritage Legislation Amendment (Administration and Other Matters) Bill 2022*. It represents the delivery of stage 1 of the review and overhaul of Victoria's building regulatory system, which in turn is based on the Building Reform Expert Panel's findings in its published Framework for Reform Discussion Paper¹⁰. This outlined several proposed regulatory changes:

- Delivering safe, compliant, durable, affordable and sustainable housing and buildings efficiently and effectively.
- Protecting consumers and improving confidence in the industry and regulators.
- Supporting skilled and experienced practitioners to carry out compliant and safe practices.
- Supporting regulators to effectively and efficiently enforce compliance.

The Amendment Act contains a raft of legislative amendments and several key reforms, including:

- the establishment of a Building Monitor, who will assist consumers affected by issues in the domestic building industry;
- expanding on new categories of building practitioners who should be registered (building consultants, project managers, supervisors and architectural draftspersons);
- the creation of a State Building Surveyor, who will have the power to make binding determinations with respect to building standards and assist stakeholders in providing technical guidance and training;
- a mechanism for and creating a more equitable means of allocation for the existing cladding rectification levy; and
- a mechanism for the automatic mutual recognition of building practitioners across jurisdictions.

A new Building Act?

While it is hoped the Building Amendment Act will foreshadow the creation of a new Building Act, the reality is that wider reforms continue to be delayed.

Nevertheless, with the industry impacted by a raft of builder insolvencies and as claims concerning defective building work and the Building Amendment Act continue to increase, consumers will be relieved to see that there is political will to take real action to reform the regulatory system in Victoria.

State intervention and funding of cladding remediation works

Cladding Safety Victoria provides funding to owners corporations for the costs of removing and replacing combustible cladding.

Section 137F of the Building Act provides that the Victorian government has rights of subrogation against any person in relation to the use or installation of non-compliant cladding.

The extended limitation period (15 years after the issue of an occupancy permit or certificate of final inspection) affords the Victorian government ample time to bring recovery proceedings. Consequently, the government is being joined to several cladding disputes, given its interest in their ultimate outcome.

The application of subrogated recoveries remains to be seen and this is likely to give rise to uncertainty and risk for building practitioners.

Building practitioners, and the market more widely, should continue to consider the implications of the extended limitation period and the risk of recovery proceedings, and follow appropriate practices to manage this risk.



10. <https://www.vic.gov.au/building-system-review>.

WESTERN AUSTRALIA

Few changes are scheduled in 2023 to existing legislation regulating the construction industry in Western Australia. Future changes will likely be modelled on the advances made by Construct NSW's regulatory developments, but this will depend on the success of its rollout.

From 1 February 2023, changes to the *Building Services (Registration) Act 2011* pursuant to the *Building and Construction Industry (Security of Payment) Act 2021* came into effect. These amendments introduced new powers of the Building Services Board (**the Board**) to manage the commercial conduct and behaviour of building service providers. The legislation, under Part 7, is targeted at "phoenixing" and other commercial conduct:

- Non-payment of building services debts (unsatisfied court or adjudication judgments) is a disciplinary matter for the Board, facilitating fines and registration sanctions. Significantly, persons cannot be registered or renewed if they have unpaid building services debt.
- The Board will have the power to exclude any person (including individuals, associations, or corporations) from registration as a building service contractor if a relevant insolvency event has previously occurred. The exclusion will be for a period of three years, or permanently if repeated phoenixing is demonstrated.

- The Board may not exclude a contractor if involved officers are removed from a phoenixing business, including their removal from any "shadow" position of influence.

Parties may avoid exclusion by showing that reasonable steps were taken to avoid the circumstances that resulted in insolvency, or that they have sufficient arrangements in place to ensure the business will be managed in a competent and proficient manner. A non-exhaustive list of reasonable steps (including obtaining appropriate financial or legal advice, and ensuring there are sufficient assets to meet guarantees) and sufficient arrangements (including engagement of financial or legal advisers on an ongoing basis, and the provision of sufficient working capital and equity) are included in the legislation.

Further changes to the *Building Services (Registration) Regulations 2011* will come into effect on 1 July 2024, pursuant to the *Commerce Regulations Amendment (Building Services) Regulations 2023 (Amendment Regulations)*. Significantly, the Amendment Regulations introduce registration for building engineering contractors in Western Australia, including those involved with design, construction and production of building fire systems and structures. Engineering practitioners may be registered by demonstrating:

- five years of full-time, relevant experience in the 10 years prior, of which at least four years must be postgraduate experience;

- experience showing competency in engineering knowledge, safe and sustainable solutions, risk management and ethical matters; and
- a relevant tertiary qualification.

In accordance with their registration, additional insurance requirements are now imposed on building engineering contractors. Contractors are required to obtain professional indemnity insurance "appropriate to manage the risk associated with the work the applicant is likely to take out", taking into account the nature, risks, size and volume of work they are likely to carry out as well their financial capacity; or otherwise seek membership with a professional standards body and satisfy the body's insurance requirements. Interestingly, the Amendment Regulations mirror this requirement for building surveying contractors, who were previously required to have professional indemnity insurance with a minimum level of indemnity of \$1,000,000 for any one claim and \$2,000,000 in aggregate during any one period of insurance.

Takeaway:

The registration of building engineering contractors is expected to enhance oversight and accountability within this often-overlooked sphere, aligning Western Australia's registration framework with other Australian jurisdictions. Inevitably, the heightened scrutiny brought by this new regulatory scheme will increase the volume of disciplinary proceedings brought against these previously unregulated contractors.

Additionally, the ad hoc approach to insuring building surveying contractors and building engineering contractors may lessen the adequacy of cover held by many contractors, exposing parties affected by defects to commercially unrecoverable losses. Developers and other head contractors are encouraged to closely review the professional indemnity cover held by the building surveying contractors and building engineering contractors they engage, to ensure it remains adequate for the risks associated with their project.

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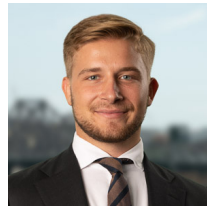
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