The Design and Building Practitioners Act 2020 (NSW) (DBP Act) was assented to on 10 June 2020 and represents the first step in the NSW Government’s reform of the building industry following Shergold and Weir’s review of compliance and enforcement systems and their Building Confidence report of February 2018. There have been many well-publicised cases of major construction defects impacting high-rise residential developments including Grenfell Tower, the Lacrosse fire, Opal Tower, Mascot Towers, the use of combustible cladding and the Aya Eliza building in Auburn. The building industry is a significant contributor to economic activity in NSW and diminishing consumer confidence in the industry remains of significant concern to the government.

There are a number of aspects of the DBP Act that are of particular interest to the insurance industry, particularly the following:

1. The creation of a statutory duty of care owed by persons who carry out construction work to take reasonable care to avoid economic loss caused by defects arising from the work.
2. The requirement for compliance declarations by construction professionals.
3. The imposition of mandatory insurance requirements on construction professionals.

However, much of the detail has been left to the regulations, which have yet to be drafted.

**STATUTORY DUTY OF CARE**

In *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 36, the High Court held that a builder did not owe a duty of care to successors in title to the original owner (developer) to avoid pure economic loss as a result of latent building defects affecting an apartment complex that was operated as a serviced apartment hotel. Although the High Court did not exclude the possibility that a builder might owe a duty of care to a subsequent owner in certain circumstances, there was at least considerable doubt about when the duty would arise.

To overcome this uncertainty, the DBP Act specifically provides for a statutory duty of care. Key components of the statutory duty of care are as follows:
The duty is imposed upon any person who carries out construction work: section 37(1) of the DBP Act. “Construction work” has the following expansive definition (section 36 of the DBP Act):

(a) building work;
(b) the preparation of regulated designs and other designs for building work;
(c) the manufacture or supply of a building product used for building work; and
(d) supervising, coordinating, project managing or otherwise having substantial control over the carrying out of any work referred to in paragraph (a), (b) or (c).

The duty may only apply in relation to residential building work within the meaning of the Home Building Act 1989 (NSW) as “building work” is given a non-exhaustive definition that references such work: section 36 of the DBP Act. The regulations, once promulgated, might further restrict the operation of the statutory duty of care as the second reading speeches foreshadowed the duty being limited initially to class 2 buildings and mixed-use buildings with a class 2 component; that is, a building containing two or more sole-occupancy buildings each being a separate dwelling.

The content of the duty is to exercise reasonable care to avoid economic loss caused by defects:

(a) in or related to a building for which work is done, and
(b) arising from the construction work

(section 37(1) of the DBP Act).

The duty is owed to each owner of the land in relation to which the construction work is carried out and to each subsequent owner of the land: section 37(2) of the DBP Act. Further, it is expressly stated that an owners corporation or a community association is taken to suffer economic loss for the purposes of Part 4 of the DBP Act if the corporation or association bears the cost of rectifying defects (including damage caused by defects that are the subject of a breach of the statutory duty of care: section 38(1) of the DBP Act).

The duty of care is non-delegable: section 39 of the DBP Act.

Contracting out of the duty of care is prohibited: section 40 of the DBP Act.

The statutory duty of care is additional to duties, statutory warranties and other obligations imposed under the Home Building Act 1989 (NSW) and the common law: section 41(1) of the DBP Act. In reality, however, the statutory duty is much broader than the statutory warranties implied to contracts to do residential building work by the Home Building Act 1989 (NSW).

The statutory duty of care is subject to the Civil Liability Act 2002 (NSW): section 41(3) of the DBP Act. Accordingly, whether the duty of care has been breached will be determined by the usual principles applying to a tortious duty of care.

Although not clearly expressed in the DBP Act (save for the note to section 41), the second reading speeches indicate that existing limitation periods prescribed in the Limitation Act 1969 (NSW) (that is, 6 years from the date the cause of action accrues) and the long stop provision in section 6.20 of the Environmental Planning and Assessment Act 1979 (NSW) (that is, 10 years after the date of completion of the work) will apply to the statutory duty of care.
The imposition of a statutory duty of care and the classes of people such a duty is imposed upon (which extends to manufacturers and suppliers of building products) has the potential to significantly expand the liability of participants in the building industry for damages claims by subsequent owners in respect of pure economic loss. It represents a marked shift from the common law, where there was real doubt as to the likely very narrow circumstances in which a duty of care would be imposed.

Further, the statutory duty of care has retrospective effect and applies to construction work carried out prior to commencement in respect of economic loss caused by a breach of the statutory duty of care if the loss first became apparent (defined to mean that owner became aware or ought reasonably to have become aware of the loss) within the last 10 years: clause 5 of schedule 1 of the DBP Act. There are likely to be many buildings that have been completed since June 2010 where construction defects that were previously thought not to be actionable might now result in claims, in respect of which construction professionals will look to their insurers for cover. Insurers may consider it prudent to revisit claims reserves in light of these amendments and to consider re-assessing their underwriting guidelines going forward, including reviewing retroactive dates.

**REGULATED DESIGNS AND BUILDING WORK**

Part 2 of the DBP Act deals with regulated designs and building work. These provisions will not commence until 1 July 2021.

Registered design practitioners and principal design practitioners will be required to provide compliance declarations for regulated designs: sections 9 and 12 of the DBP Act. Regulated designs are designs prepared for a building element (fire safety systems; waterproofing; load-bearing components of a building essential to the stability of the building or a part of it; a component of the building that is part of the building enclosure; and those aspects of the mechanical, plumbing and electrical services for a building that are required to achieve compliance with the *Building Code of Australia*) or a performance solution for building work: section 5 of the DBP Act. The precise content of the compliance declaration will be prescribed by the regulations but will generally be to the effect of whether or not the design complies with the *Building Code of Australia* and whether any other standards, codes or requirements have been applied in preparing the design.

Building practitioners will also be required to provide a building compliance declaration: section 17 of the DBP Act. Other statutory obligations are imposed upon building practitioners, including to take all reasonable steps to ensure that the building work complies with the requirements of the *Building Code of Australia* and other applicable requirements: section 22 of the DBP Act.

It is anticipated the regulations will prohibit the issue of occupation certificates and other building certificates unless compliance declarations have been issued: section 26 of the DBP Act.

Whether any practical benefits will arise from requiring compliance declarations remains to be seen. In the existing regime, certificates are routinely given by construction professionals to private certifiers and there are various common law and statutory rights against construction professionals whose design or workmanship is inadequate. Nevertheless, according to the second reading speeches, the new regime is intended to address issues with compliance and quality of design documentation as well as the not uncommon situation where there are significant discrepancies between designs and the final, as-constructed buildings. Perhaps the
enforcement and penalty provisions in the DBP Act will be influential.

**MANDATORY INSURANCE OBLIGATIONS**

Designers and building practitioners, as well as professional engineers, must not provide compliance declarations or do other work for the purposes of the DBP Act unless they are “adequately insured with respect to the declaration and work”: see sections 11, 14, 24 and 33 of the DBP Act. We await with interest the regulations dealing with insurance as the DBP Act provides that a person is “adequately insured” if that person:

(a) is indemnified by insurance that complies with the regulations against any liability to which the practitioner may become subject as a result of providing the declaration or doing the work, or

(b) is part of some other arrangement approved by the regulations that provides indemnity against the liability.

Further, designers and builders will be required to provide to the Department of Customer Service information to establish they are adequately insured. Whether this information will be publicly available is not yet known, as the regulations are to prescribe what information is to be included on the register of registered practitioners: section 98 of the DBP Act. In the event that insurance information was included on the register, this would remove one impediment to claimants pursuing claims in circumstances where the relevant party has disappeared or been deregistered.

On a related point, building practitioners will also be required to provide to the Department of Customer Service a “contractor document”, which will provide information as persons who performed any of the building work and copies of the final designs that are not regulated designs: section 17 of the DBP Act. The regulations may prescribe other documents to be included. The collation of this material (if it can be publicly accessed) may also make it easier for property owners to identify the relevant parties against whom claims should be made.

**NEXT STEPS**

The precise operation of the DBP Act, and its potential to increase legal liabilities imposed upon construction professionals, will need to be assessed when the regulations are published, which is expected later this year. Much of the devil of the reforms may be in the detail and we will provide our next update when the regulations are drafted.

Other building reforms are underway, with the *Residential Apartments Buildings (Compliance and Enforcement Powers) Bill 2020* (NSW) also being assented to on 10 June 2020 and with the Act due to commence on 1 September 2020. We will shortly issue a separate note discussing the *Residential Apartments Buildings (Compliance and Enforcement Powers) Act 2020* (NSW).

In the meantime, for more information about the DBP Act and its operation or other government reforms, please contact us.