

NSW'S PROPOSED BUILDING AND CONSTRUCTION INDUSTRY REFORM: WHAT YOU NEED TO KNOW

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Legal Briefings - By **Michael Lake, Katherine Mackellar and Samuel Hoare**

On 27 June 2019 the NSW Department of Finance, Services and Innovation published its [Building Stronger Foundations Discussion Paper](#) (**Discussion Paper**) which outlines the NSW Government's proposals to implement four key reforms to the building and construction sector.

The proposed reforms are directed towards delivering "a more robust regulatory framework for building and construction" and (if implemented) will increase not only the range of building practitioners exposed to direct claims from owners in relation to defective work, but also the range of owners who will have access to such claims. Mindful of this, the NSW Government is seeking industry and community feedback in response to the Discussion Paper's proposals before tabling legislation, which it currently intends will occur later this year.

WHAT THIS MEANS FOR YOU

The proposed reforms are extensive and look set to impact a broad range of participants in NSW's building and construction industry - including in particular owners/developers, builders, designers and insurers - in different ways. The feedback NSW Fair Trading is seeking appears likely to impact the shape of the reforms to be included in the legislation to be tabled later this year. In this article we identify some of the key features of the Discussion Paper and the reform areas it addresses.

BACKGROUND

In February 2018, Shergold and Weir presented their [Building Confidence Report](#) to the Building Ministers' Forum. The NSW Government released its [response](#) to this report in February 2019 (**NSW Response**), which confirmed that the NSW Government supported the vast majority of the recommendations set out in the Building Confidence Report, and proposed four major reforms to be implemented in NSW.

To recap, the four key reforms are to:

1. introduce a new registration scheme for “building designers”;
2. require building designers to declare that plans and performance solutions are compliant with the Building Code of Australia (**BCA**) and require builders to declare that buildings are constructed according to these declared plans;
3. ensure an industry-wide duty of care is owed to building owners; and
4. appoint a Building Commissioner to act as the consolidated regulator for building in NSW.

The Discussion Paper explores in detail the first three of those proposed reforms. It does not explore the role of the Building Commissioner in detail, but flags that “action is proceeding to finalise arrangements” and “further details will be announced soon” in relation to the appointment of a NSW Building Commissioner.

Following a consultation period and further consideration in light of industry and stakeholder feedback, the Government proposes to introduce legislation to implement the reforms described in the Discussion Paper by the end of 2019.

KEY FEATURES OF THE REFORM AREAS

BUILDING DESIGNER REGISTRATION

The Discussion Paper proposes to require a broad range of practitioners – including building designers, architects and engineers – who provide designs or specifications to be registered as “building designers”.

Key features of the proposal being considered include:

- “building designers” being required to meet certain education, skill and experience

competencies, and, as a condition of registration, to hold insurance to a prescribed level and standard; and

- the regulator responsible for administration of the building designer register having various investigatory, monitoring and enforcement powers in relation to registration and registered practitioners.

This registration scheme is intended to enforce minimum standards for those responsible for building design. It is also intended to function alongside the proposed declaration of compliance scheme, which we discuss next.

DECLARATIONS OF COMPLIANCE

A significant feature of the Discussion Paper is the proposal that building designers be required to declare that their designs, specifications, plans and performance solutions comply with the BCA and other relevant requirements. As part of that declaration, it is proposed that building designers will be required to explain how any performance solutions comply with the BCA.

Further, it is proposed that builders be required to declare that the building has been constructed in line with certified, compliant building plans.

The Discussion Paper identifies a range of practical issues arising from the proposals, and seeks industry feedback on such things as:

- the appropriate point in time for declarations – for instance, whether a declaration should be required at the point a development application is submitted, or the point a construction certificate or complying development certificate is issued;
- the extent to which declarations should be required for plan variations – ie, whether a declaration should be required for all variations, or only major/material changes; and
- how and to what extent builders can and should declare that buildings are constructed in accordance with their plans.

ENSURING A DUTY OF CARE IS OWED TO PROPERTY OWNERS

As has been widely foreshadowed, the Discussion Paper highlights that the NSW Government proposes to reform the law to ensure that building practitioners owe a duty of care to homeowners and small business owners.

The Discussion Paper acknowledges that the existing legal framework provides certain owners a degree of protection against building defects, for example through the statutory warranties in the *Home Building Act 1989* (NSW). However, the Discussion Paper proceeds on the premise that this framework has gaps that should be filled. The Discussion Paper expresses particular concern about the High Court's decisions in *Brookfield Multiplex*¹ (which held that a builder did not owe a duty of care to an owner's corporation of a serviced apartment scheme) and *Woolcock*² (which held that an engineer did not owe a duty of care to the subsequent purchaser of a commercial property), and argues that "owners should have clear rights to pursue compensation where a building practitioner has been negligent".

Depending on the form this reform ultimately takes, it has the potential to significantly broaden the classes of building practitioners who will have direct liability to building owners, and increase the categories of building owners to whom building practitioners will be liable. The Discussion Paper seeks feedback not on *whether* a duty of care should be imposed to plug these gaps, but on the *form* and *extent* of that duty, in particular:

- the form the duty should take – whether it should be a statutory duty (with remedies prescribed by statute), or a duty created by affirming the existence of a common law duty of care in the tort of negligence (with remedies left to the courts to determine);
- which practitioners should owe the duty – the Discussion Paper contemplates builders, building designers, contractors and others being accountable; and
- who the duty should be owed to – it is proposed that the duty be owed to persons described in the Discussion Paper as "vulnerable", namely homeowners, owners corporations, subsequent residential title holders and small businesses.

CONSULTATION PERIOD

The consultation and feedback process is being managed by NSW Fair Trading. A full list of the questions for consultation is set out on page 30 of the Discussion Paper.

Fair Trading has invited feedback until 24 July 2019 through their [web form](#) or via [email](#) or post.

If the proposed reforms affect you, consider providing feedback to NSW Fair Trading or contacting us to discuss further.

ENDNOTES

1. *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185.
2. *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515.

KEY CONTACTS

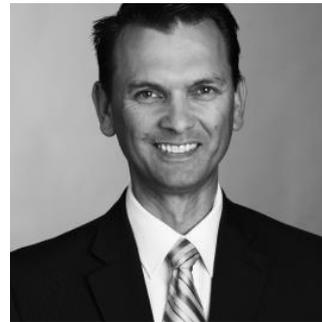
If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



GEOFFREY HANSEN
PARTNER,
MELBOURNE
+61 3 9288 1892
geoffrey.hansen@hsf.com



CLARE SMETHURST
PARTNER, BRISBANE
+61 7 3258 6623
clare.smethurst@hsf.com



DAN DRAGOVIC
PARTNER, PERTH
+61 8 9211 7600
Dan.Dragovic@hsf.com



ANTE GOLEM
PARTNER, PERTH
+61 8 9211 7542
Ante.Golem@hsf.com



GEOFF MCCLELLAN
SENIOR ADVISER,
SYDNEY
+61 2 9225 5419
Geoff.McClellan@hsf.com

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