

Submission on the Design and Building Practitioners Act 2020 (NSW)

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SUBJECT: Submission on the Design and Building Practitioners Act 2020

1. Introduction

This is a submission from Bannermans Lawyers addressing the *Design and Building Practitioners Act 2020* (**'the Act'**), based on our experience acting for owners corporations, lot owners, strata managing agents and contractors within the strata and community title sector.

This submission focuses on the increased costs and time delays forced on owner corporations to comply with the Act, which is compounded by the shortage of qualified practitioners in regional areas of NSW.

2. General Comments

The intention behind the Act, which is currently limited to Class 2, 3 and 9c buildings, was not advertised as depriving independent licensed trades of the right to contract directly for remedial or renovation work, but in effect operates that way.

The legislation should not force independent licenced trades, see examples in the table below, to subcontract their services exclusively through a registered building practitioner rather than having the option to work directly with end users for doing remedial or renovation work in their building.

Examples of affected Trades	
<ul style="list-style-type: none"> • Carpentry • Decorating • Dry and wet plastering • Excavating • Fencing • General concreting • Glazing • Installation of security doors, grilles, and equipment • Joinery 	<ul style="list-style-type: none"> • Minor maintenance, cleaning or tradework • Painting • Roof plumbing • Roof slating and tiling • Stonemasonry • Swimming pool repairs and servicing • Underpinning • Wall and floor tiling • Waterproofing

This has resulted in a tension in the industry with those wishing to comply versus the additional time and cost of doing so. The additional time and cost to complete remedial and renovation work is ultimately borne by the owners of strata units, which feeds into the housing affordability and inflation issues being felt throughout NSW.

The unintended consequences of the Act are being felt throughout the building, trade and strata industries and are negatively impacting owners and tenants. After a number of years of operation it is time for changes to be made to ensure the Act is fit for its intended purpose, which was to address poor building performance during new builds and improve design quality.

3. Key obligations:

- All remedial and renovation work greater than \$5,000 (including GST) in value is captured by the requirements of the Act.
- A builder must not carry out building work that requires a regulated design until a final design is received from a registered design practitioner together with a design compliance declaration.
- A building practitioner bears the responsibility of ensuring where required it:
 - a) won't perform work without a regulated design; and
 - b) will do work in accordance with a regulated design.

4. Exemptions from the Act

Remedial and Renovation Works

Fortunately, not all remedial and renovation works are captured by the Act, but a consideration of the complicated exemption provision found at clause 13 of the *Design & Building Practitioners Regulation 2021 ('Regulations')* needs to be undertaken if these implications are to be avoided.

In addition, given the "exhaustive" nature of minor building alterations under section 2.51 of the *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008*, on a strict reading, the majority of works excluding internal painting and carpets will be captured by the Act and the Regulations.

In many cases the exemption won't apply except for handyman type works.

Reasonable excuse for not complying

Fair Trading has provided some guidance in relation to where emergency works to mitigate risks permit non-compliance with the design and registration requirements of the D&BPA. However, this is also a complex area to navigate.

Perhaps the ability to undertake a pre-DA style consultation with Fair Trading may assist in getting comfort on this.

5. Additional Costs and Delays

The impact of the Act on remedial and renovation work is very large and the number of jobs affected by it also very large.

David Bannerman was the chairperson of the policy and legislation committee at the Strata Community Association NSW ('SCA NSW') when the survey referred to below was undertaken. I include in the following some key extracts from that survey.

In October 2023, a total of 426 work orders valued at \$5,000 or more were placed across 1,300 strata schemes. Whilst not fully accurate a simple extrapolation of this data to encompass the 85,000 strata schemes in NSW over an 11 month period to represent a full year, would lead to a total number of more than **300,000 workorders/jobs** being affected.

From a survey undertaken by SCA NSW the average:

- increase in the additional cost of remedial and renovation work has been found to be approximately **179%**
- additional time to complete remedial and renovation works is **7 months**
- time taken to receive a quote from a registered designer is approximately **1 month**
- time taken to receive a report from a registered designer takes around **3 to 6 months**

The additional delays may also cause an increase in rent and other compensation claims among property owners. Noting for instance an owners corporation's liability under section 106(5) of the *Strata Schemes Management Act 2015*.

These delays and increased risks contribute to a rise in insurance premiums. In certain cases, buildings are only offered 3-month and 6-month policies due to the protracted delays in the remedial and renovation work process.

6. Internal Survey Results from the SCA NSW

SCA NSW members (composed of non-regional and regional members) provided the following feedback:

1. A majority supports permitting additional license holders for remedial and renovation works to reduce unnecessary subcontracting arrangements. This would help reduce costs and improve efficiency, particularly for specialised tasks such as roofing or design consulting.
2. Most are dissatisfied with the clarity and comprehensibility of the Act's provisions related to remedial and renovation works.
3. A majority believe the Act has not effectively promoted accountability among remedial and renovation design and building practitioners.
4. Most are not confident in navigating the regulatory processes under the Act. While some aspects are clear, the overall process could be made more user-friendly.
5. No respondents shared positive experiences related to the Act's implementation in its current form.
6. Respondents are highly dissatisfied with the Act's overall effectiveness in ensuring the quality of remedial and renovation works.
7. The strata remedial and renovation industry generally does not comply well with the Act.

8. **All respondents support the exemption of \$5,000 to be expanded to \$100,000 for all works as it would provide much-needed flexibility and cost relief for users.** However, regional strata members want to make it wider due to a lack of registered designers and building practitioners.
9. A majority supports a complete exemption from the Act for remedial and renovation works as long as alternative mechanisms are in place to ensure quality and safety.
10. The delays in works attributed to the Act are leading to notable hikes in insurance premiums due to outstanding works. In one instance, two strata schemes experienced such delays that insurers only offered three-month policies, nearly tripling the annual premiums as a result of delays.

Please see below some de-identified examples of remedial jobs provided by SCA NSW members:

Example 1

Pre DPBA	Post DBPA (Compliant works)
Price: \$25,000	Price: \$100,000
Timing: 4 months	Timing: 12 months

Description of the Works and Breakdown

- Water penetration repair job for a Blacktown building with 50 lots.
- Engineering costs were approximately \$30,000.
- Once complying with the Act, the water penetration repair job is now \$100,000.

Example 2

Pre DPBA	Post DBPA (Compliant works)
Price: \$30,000	Price: \$100,000
Timing: 3 months	Timing: 9 months

Description of the Works and Breakdown

- Balcony and water penetration job for a Mosman building with 23 Lots.
- Engineering costs were approximately \$30,000.
- Once complying with the Act, the balcony and water penetration repair job is now \$100,000.

Example 3

Pre DPBA	Post DBPA (Compliant works)
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Price: \$15,000	Price: \$271,371
Timing: 2 months	Timing: 6 months

Description of the Works and Breakdown

- Balcony repair job for an apartment building.
- Engineering costs were approximately \$26,300.
- Once complying with the Act, the balcony repair job exceeds \$270,000.

Example 4

Pre DPBA	Post DBPA (Compliant works)
Price: \$40,000	Price: \$100,000
Timing: 1 months	Timing: 3 months

Description of the Works and Breakdown

- Balcony repair job for apartments.
- Engineering costs were approximately \$15,000.
- Once complying with the Act, the job is now \$100,000.

Regional Case Study

Example – Dubbo Strata NSW

Project Overview

In early 2024, Dubbo Strata NSW was required to conduct a roof replacement. A motion was put forward to the owners corporation, prompting them to explore options for a registered building practitioner in terms of availability and cost.

The project is currently underway, but due to the unavailability of qualified building practitioners in Dubbo, one had to be sourced from Bathurst to carry out the roof replacement, adding to the costs for the owners.

7. Enforcement

The Act can impose severe penalties for non-compliance.

The Act also provides for the appointment of authorised officers with wide-ranging powers to investigate compliance, including powers to:

- require the production of documents and records;
- require persons to attend at a specified time and place in order to answer questions;
- enter premises to inspect, and in some circumstances, to seize items;
- obtain search warrants; and
- access or demolish building work if an 'authorised officer' has reasonable grounds for believing that it is necessary because of an offence under the Act.

Section 89 provides for a stop work order if the Secretary of Fair Trading is of the opinion that the work is or is likely to be carried out in contravention of the Act and such contravention could result in significant harm or loss to the public, potential occupiers or significant damage to property.

Section 91 provides for applications for orders to restrain or remedy contraventions to the Land and Environment Court by the Secretary of Fair Trading, even without demonstrating a likelihood of damage.

Section 92 provides for investigations and audits of practitioners by the Secretary of Fair Trading irrespective of whether a complaint has been received. In conducting these audits, the breadth of the section suggests that the Secretary may obligate the grant of access to the property to conduct an inspection for the purposes of the section.

8. Conclusion

Overall, the Act substantially increases costs for remedial and renovation projects.

The Act's primary shortcomings arise from its requirement to involve multiple professionals or trades, leading to unreasonably higher costs and delays that deter users and delay necessary work.

Owners Corporations have a duty under s106 of the Strata Schemes Management Act 2015 to maintain common property. The only defences to this duty are if there is a special resolution deeming the work inappropriate and it is not a safety issue or if the OC has taken action against a party with respect to damage to common property and safety is not an issue.

Anecdotally, it seems that less than 5% of strata remedial and renovation works are complying with the Act when required. When faced with the choice of compliance or non-compliance, owners are taking the non-compliance option due to the time and cost issues highlighted in this submission.

Fair Trading enforcement of these matters in the remedial and renovation space has been minimal. I am only informed of only 1 draft stop work order being issued at a site in the Northern Beaches.

However, if compliance was to increase the time and costs issues would only get significantly worse due to capacity constraints. This situation would be even worse in regional areas, which already struggle with a low level of compliance and the availability of qualified building practitioners.

These complexities underscore an urgent need for a more streamlined and cost-effective system for remedial and renovation building work in the strata industry. It's clear that while the Act serves its

purpose well for new builds, it presents numerous challenges for existing buildings, as outlined in this submission.

Changes to the Act to simplify compliance and reduce costs for users would also dovetail with the Federal Governments' plan to incentivise the reduction of state based red tape and reduce artificially propped up high prices.

Hence, Bannermans and the strata industry urgently calls for changes to the Act and the Regulations in order to improve outcomes for owners/tenants, the trade and building industry and the strata industry. Changes to the legislation could lead to significantly better compliance and ultimately ensure the intentions of the Act are achieved.

Some of the changes we recommend that will assist with this are:

1. the expansion of clause 13(1)(g) of the Regulations to include work outside the repair, renovation or protective treatment of services or a component of a system of the building;
2. the expansion of clause 13(1)(h) of the Regulations to exclude all remedial and renovation works under \$100,000;
3. allowing additional license holders for remedial and renovation works to reduce the need for unnecessary subcontracting arrangements;
4. simplifying the Act and Regulations with regard to remedial and renovation works to improve its clarity and making it easier to use;
5. further reforms to make the Act more suitable for addressing issues related to remedial and renovation works.

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