

2020 A YEAR IN REVIEW

Key Legal Developments in the
Building & Construction Industry

CONTENTS

02 **FOREWORD**

03 **LAW REFORM**

- Design & Building Practitioners Act
- Residential Apartment Buildings Act
- Combustible Cladding

07 **SECURITY OF PAYMENT ACT**

10 **WEBINARS**

11 **UPCOMING**

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FOREWORD



There can be no doubt that 2020 has been a year of immense challenge and adversity for all. We've witnessed and weathered an '*unprecedented*' global pandemic and now, as we endeavour to rebuild and move forward, we brace for the economic and industrial impacts.

Yet, in spite of it all, as a nation we have demonstrated an uncanny resolve to unite and overcome. In this, we have proven that we are amongst the world-leaders and we can be confident that Australia is well-equipped to endure whatever further hurdles await around the corner.

As we head into 2021, Kreisson will standby as your trusted legal partner, ready to work with you to overcome any challenges the new year may bring.

In the interim, this short eBook offers a curation of our 2020 content releases relating to the major industry issues we've seen this year; and includes additional commentaries from several of our lawyers.

We trust you'll find it an informative resource as we head into 2021.

LAW REFORM



Words by: Anthony Herron, Special Counsel

The past year has seen a number of key developments impacting the building and construction industry. We set out below a summary of these:

Legislation

In March 2020, the Residential Tenancies Regulation 2019 and The Property and Stock Agents Regulation 2014 were amended to require real estate agents and/or landlords to notify tenants or prospective purchasers where property is, or is part of a building that contains external combustible cladding.

On 11 June 2020, the Design and Building Practitioners Act 2020 (the DBP Act) came into operation and introduced a duty of care owed to consumers and liability for defective design arising from construction work resulting in economic loss. This duty of care also extended retrospectively to construction work carried out before that date where the loss became apparent after 10 June 2010.

The NSW Government also established a NSW Cladding Taskforce and the Cladding Product Safety Panel to advise regarding suitable building products and external wall assembly methods associated in relation to con-compliant panels and other wall cladding systems.

Commencing on 1 July 2020, the Government introduced changes improving the regulation of certifiers, enhanced provisions for avoiding conflicts of interest and enhanced compliance and enforcement powers through the introduction of The Building and Developers Certifiers Act 2018 and Building and Development Certifiers Regulation 2020.

On 1 September 2020, the Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020 (the RAB Act) came into operation providing the Building Commissioner with powers to investigate and rectify building work.

On 17 November 2020, the NSW Minister for Better Regulation and Innovation advised that the NSW Government will establish Project Remediate, a three (3) year program to help remove combustible cladding from a number of the most at risk buildings in NSW. The government announcement stated that its priority is to remove unsafe cladding from buildings as a priority. It has allocated up to \$139m in the Budget to coordinate the remediation process. The commitment will involve payment of interest on loans by commercial lenders to building owners and owners' corporations in relation to removal of unsafe cladding.

By way of comparison, in Victoria a slightly different approach has been adopted. On 1 January 2020, the Victorian Government introduced a proposed Cladding Rectification Levy and establishment of Cladding Safety Victoria. The \$600m program provides funding for eligible buildings to owners' corporations to design and implement cladding rectification solutions which comply with the relevant Victorian building regulations and meet the Victorian Building Authority's Cladding Guidelines for Building Surveyors.

On 4 November 2020, the Cladding Safety Bill Victoria 2020 was assented to. It establishes Cladding Safety Victoria which will administer the cladding rectification program in Vic. The Bill extends the limitation period for homeowners to bring legal proceedings for cladding building actions from 10 to 12 years.

Litigation

On 26 November 2020, an announcement was made to the ASX expanding participants from Vic and Qld as part of Combustible Cladding Class Actions concerning claims involving Alucobond and Vitrabond Polyethelene in the Federal Court of Australia. The group members include owners' corporations, owners of commercial buildings and public bodies throughout Australian states. More than 1,000 buildings are involved as claimants. Total claims are expected to exceed \$500 million. For the moment, no hearing date is known.

Law Reform in 2021

Combustible Cladding

Further details about the NSW project design and in relation to the loan scheme are expected to be announced in December 2020 by the NSW Government. In the coming year, progression of mandatory accreditation by the National Association of Testing Authorities for all entities that test building materials is expected.

Building and design compliance declarations

As part of the DBP Act commencing on 1 July 2021, design and building practitioners are required to issue building and design compliance declarations and supporting documents with the NSW Department of Customer Service.

Adequate insurance

Building and design practitioners are required to hold adequate insurance as a result of any liability to which they may become liable as a result of providing the declaration or doing the work.

In the interim, you will find a curation of relevant reading material released this year, overleaf.



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Article:
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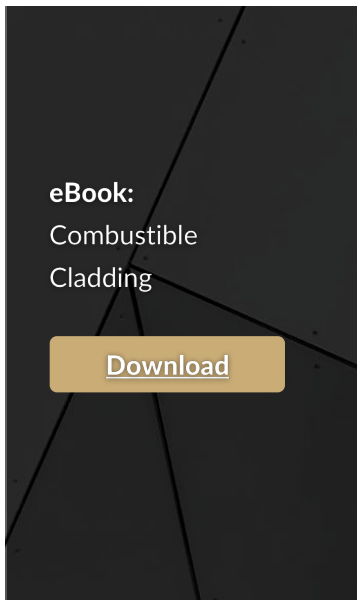
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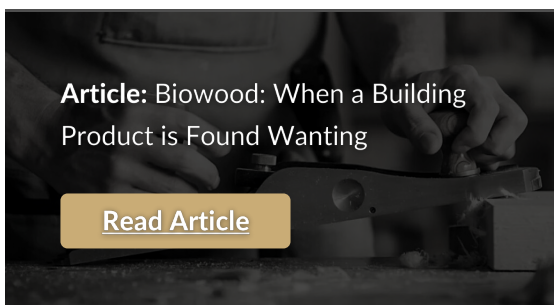
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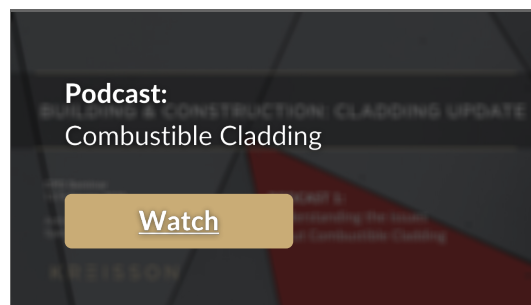
Article: Combustible
Cladding Update 2020

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Article: Biowood: When a Building
Product is Found Wanting

[Read Article](#)



Podcast:
Combustible Cladding

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SECURITY OF PAYMENT



Words by: Anish Wilson, Associate

Cases

This year saw a number of interesting cases regarding the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**the Act**). For example:

- In *Brolton Group Pty Ltd v Hanson Construction Materials Pty Ltd* [2020] NSWCA 63, the NSW Court of Appeal upheld the importance of having a reference date available for the purposes of an Adjudication under the Act. Without a reference date, the adjudicator has no jurisdiction and any adjudication decision will be null and void.
- In *TFM Epping Land Pty Ltd v Decon Australia Pty Ltd* [2020], the Court of Appeal held that a non-compliant supporting statement under section 13(7) of the Act (ie. a statement declaring that all subcontractors have been paid) will not of itself render a payment claim defective.
- In *CPB Contractors Pty Ltd v Heyday Pty Ltd* [2020] NSWSC 1625, the Supreme Court of NSW upheld a long line of authority that stated that adjudicator's determinations should not be examined and criticised with an overcritical or pedantic eye or with undue legality in applications to set them aside, but rather with a common-sense approach.

New Regulation

Furthermore, the *Building and Construction Industry Security of Payment Regulation 2020* (NSW) (New Regulation) commenced on 1 September 2020 and introduced (among other changes):

- Eligibility requirements for adjudicators (Reg 19);

- That supporting statements (ie. a statement declaring that all subcontractors have been paid) only need to be provided with payment claims from subcontractors to head contractors directly; and
- Various amendments and additions regarding trust accounts to be maintained by head contractors, particularly regarding retention monies.

Security of Payment Act in 2021

Application of the Act to Owner Occupier Residential Building Contracts

Also as a result of the New Regulation, from 1 March 2021, owner occupier residential building contracts will become subject to the Security of Payment regime contained in the Act where they were previously excluded.

Disputes Regarding Time Bar Provisions

Furthermore, we also anticipate that 2021 will see a significant increase in the number of disputes relating to time bar provisions. A time bar provision is a contract term that sets a deadline on something that a party must do in order to claim payment, extension of time, delay costs or variations. Past cases (such as *CMA Assets Pty Ltd v John Holland Pty Ltd [No 6] [2015] WASC 217*) have upheld such time bar clauses even if they are harsh.

We anticipate that as a result of the COVID-19 pandemic and the associated disruptions to workplaces, contract administration will have been seriously impacted and strict timeframes may have been missed.

The potential defenses available to a party against whom a time bar provision is being enforced include:

- Conventional estoppel, or an argument that there was a common assumption between the parties that time bar provisions would not apply;
- Waiver, or an argument that the principal waived the need to comply with the time bar provisions, either expressly or impliedly; or

- The contract was varied to the effect that the time bar provisions were deleted from the Contract.

Stay tuned in 2021 as Kreisson will bring you further developments as they arise.

In the interim, you will find a curation of relevant reading material released this year, below.



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Article: Law of Reference Dates Revisited by Court of Appeal

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Article: Court of Appeal Decision Settles Law regarding Supporting Statements

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Article: Keep Payce with the Power of the Security of Payment Act

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WEBINARS



As part of our ongoing commitment to thought-leadership and education within the building and construction industry, we have partnered with the Master Builders Association Northern Suburbs division in the delivery of topical seminars/webinars on a monthly basis.

Below are a curation of several webinars presented by members of the Kreisson legal team over the course of 2020.

In partnership with:



Webinar: Developments in Building & Construction 2020

[Watch](#)

Webinar: Director's Duties During the Pandemic and Beyond

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Webinar: Limits to Quantum Meruit

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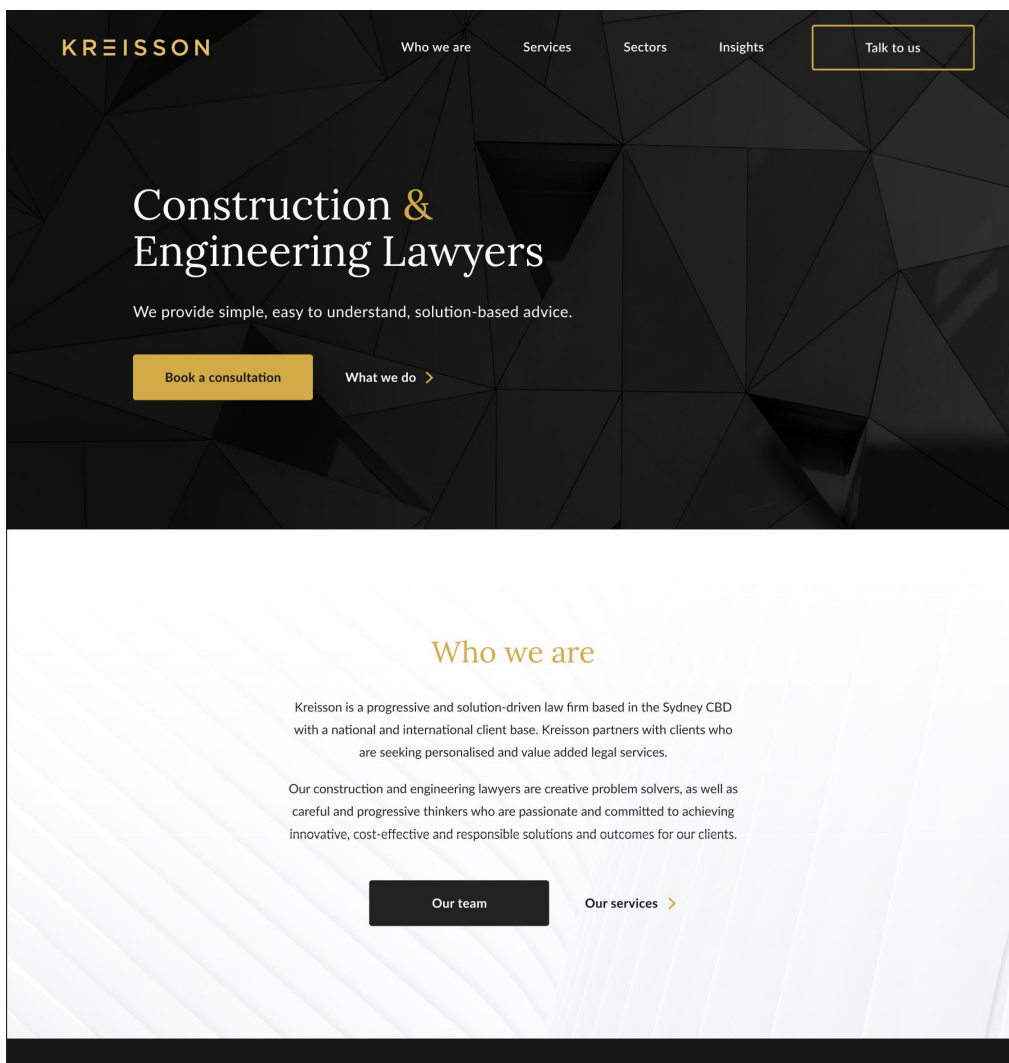
Webinar: Shareholder Disputes

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Webinar: Occupation Certificates

[Watch](#)

NEW WEBSITE COMING SOON



We're overhauling our website and giving ourselves a much needed facelift.
We look forward to returning to you fresh in early 2021.

Wishing you a safe and happy Festive Season!

Best wishes,

the team at

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