

Design and Building Practitioners Act 2020 – Duty of Care

Reform Finally

After years of rising concern about declining standards of residential property construction and narrowing of options available to strata owners corporations and lot owners in defective buildings, the NSW Government has passed reform legislation, the Design and Building Practitioners Act 2020 (“Act”). This will likely be game changing for owners corporations and lot owners in defective buildings.

The Act commences in stages:

- Some of the Act commenced on 11 June 2020, especially Part 4 imposing a new statutory duty of care on builders and certain designers, manufacturers, suppliers and supervisors. This is a duty of care owed to current and future owners to avoid economic loss caused by defects in respect of certain buildings.
- The rest of the Act, including registration of practitioners and regulation of designs, commences on or after 1 July 2021.

This article deals with the new duty of care. A separate article [Design and Building Practitioners Act 2020 – Registration and Regulation of Design and Building Practitioners](#) considers the pending registration and regulation regime.

Extension of Duty of Care

Prior to the Act, the common law position established by several High Court cases was that a builder does not owe a duty of care to avoid economic loss to the subsequent owners of the property the builder has worked on.

Under the Act, specified parties owe a duty to current and future owners “to exercise reasonable care to avoid economic loss caused by defects ... in or related to a building for which the work is done and arising from the construction work”.

Key features:

- Parties caught – The duty of care extends to persons carrying out construction work and also designers, manufacturers & suppliers of building products and supervisors, coordinators and project managers of construction work.

- Persons benefitted:
 - The duty of care extends to current and future owners.
 - It is not limited to residential buildings. Construction work is presently defined so as to include residential building work under the Home Building Act 1989, but the Act permits additional categories of work to be specified by regulation, although this has not as yet happened.
 - If the land is subject to a strata scheme within the meaning of the Strata Schemes Management Act 2015, the owner includes the owner of a lot and the owners corporation constituted for the scheme.
 - If the land is subject to a community, precinct or neighbourhood scheme within the meaning of the Community Land Management Act 1989, the owner includes the proprietor of a lot as well as the association for the scheme.
 - It extends to leasehold strata schemes, who do not presently have statutory warranty rights.
- Loss caught – An owners corporation or an association is taken to suffer economic loss if it bears the cost of rectifying defects (including damage that defects have caused) that are the subject of a breach of the duty of care imposed under the Act, and include the reasonable costs of providing alternative accommodation where necessary.
- Cumulative rights – The duty of care is additional to any other obligations, e.g. contractual or pursuant to statutory warranties under the Home Building Act 1989.
- Retrospective application - Owners may enforce the statutory duty of care for economic loss which “first became apparent within the 10 years immediately before the commencement of section 37 [11 June 2020] or first becomes apparent on or after the commencement of that section, regardless of whether an action for breach of a common law duty of care has commenced before the commencement of the statutory duty.
- Limitations periods – The duty of care is subject to Section 6.20 of the Environmental Planning and Assessment Act 1979, previously known as Section 109ZK, which essentially imposes a limitations period with respect to pursuing actions in relation to defective building and subdivision work, being a period of 10 years from the date of completion of the work. However, the scope of work covered by the duty of care is broader than the scope of work to which the limitations period applies and some claims may persist notwithstanding expiry of the 10 year period.
- Delegation and contracting out – Owners are given some protection in relation to construction contracts, contracting out of rights being precluded. However, they need to be careful when settling disputes, as it will still be possible for settlements to extend to rights under the new duty of care. Specifically, they need to either exclude claims under the new duty of care from the settlement or ensure that the settlement includes appropriate compensation for such claims. What will be the impact of limitation of liability schemes negotiated by professional bodies for their members, e.g. under the Professional Standards Act 1994 NSW. Will this be seen as an invalid attempt at “contracting out” of duty of care under the Design and Building Practitioners Act 2020 or prevailing inconsistent legislation?

- Proportionality claims - Proportionality claims under the Civil Liability Act 2002 will apply to claims under the new duty of care. However, this could lead to anomalous situations, due to different types of liability pertaining to different practitioners. For example, as the new duty of care does not extend to certifiers, an owners corporation probably cannot pursue a certifier directly, although a builder may be able to make a cross-claim against a certifier and an owners corporation may be able to pursue the builder's cross-claim in the event of insolvency of the builder.

Moving forward

The Act suggests the need for at least the following:

- Design and building professionals need to consider whether their work has been priced appropriately, given the additional liability and compliance costs to which they will now be exposed.
- Owners of buildings with defects need to take legal advice about whether they may have claims under the Act, even if they would previously have been out of time to pursue claims.
- Owners of buildings with defects considering settlement of claims need to proceed carefully and ensure that claims under the Act are either properly compensated or preserved.

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16 July 2020



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