A New Duty of Care: Game Changing Protection for Property Owners

A Response to Notoriously Defective Buildings

The Design and Building Practitioners Act 2020 (NSW) is the major legislative response to public concerns regarding defective buildings in New South Wales. Major developments at Mascot Towers and Opal Towers have received notorious media attention, and residential owners have been exposed to eye-watering rectification costs. At the same time concerns regarding the fire risk associated with common external cladding products, have caused a state-wide need incur serious rectification costs.

The Home Building Act Insufficient

Initially, the Home Building Act 1989 (NSW) provided residential owners with reasonable prospects of recovering the cost of defect rectification against the Builder and Developer. This was backed up with a compulsory insurance scheme to cover builder and developer insolvencies. However, over the years, the burden this has placed on insurers has caused a legislative watering-down of that protection. Most defects (*minor defects*) are now limited to a 2 year warranty period. The insurance provisions no longer apply to strata buildings over three storeys tall. (See separate fact sheet "*Who Pays*" regarding Developer Deposit Scheme.)

Common Law Duty of Care not helpful to residential owners

Where the Home Building Act has not been able to provide owners with a remedy, the next best legal option has been to sue in negligence. However, this has been extremely problematic. The application of Australian case law to building defects has a varied history. In 2014 the High Court of Australia narrowed the availability of such negligence actions in its decision *Brookfield Multiplex Ltd v. Owners Corporation Strata Plan 61288.* A key principle in the application of a negligence claim is *'duty of care'*: does the negligent part owe a duty of care to the party who suffers the damage. The need for a duty of care often evaluated by the courts on the extent to the *vulnerability* of the party serving the loss. In the *Brookfield* case the High Court found that subsequent owners did not have the requisite vulnerability, because in the contract for the purchase of the property determined the risk borne by the subsequent owner.

A new legislative Duty of Care

In the Design and Building Practitioners Act 2020 (NSW) the legislature has attempted to override the obstacles to establishing a Duty of Care arising from the *Brookfield* case and other common law decisions. It mandates the existence of a Duty of Care by all persons who perform construction work in New South Wales to take reasonable care to avoid defects causing economic loss to the owners of the land on which the building is located. Certain points are worth emphasis:

BANNERMANS LAWYERS

T: (02) 9929 0226 ABN: 61 649 876 437
E: dbannerman@bannermans.com.au W: www.bannermans.com.au
P: PO Box 514 NORTH SYDNEY NSW 2059 AUSTRALIA

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- The Duty applies not only to builders and developers, but to a wide range of construction professionals including architects, engineers, project managers, subcontractors, those in the control of the works and the suppliers of goods and materials.
- Building Certifiers have been expressly excluded from the new Duty of Care. This seemingly illogical omission may be due to problems this might have been expected to cause with indemnity insurers. However, common law negligence claims against certifiers may still be available.
- Some of these construction professionals are legally required to have professional indemnity insurance, thereby reducing the risk that any damages awarded will be unrecoverable due to insolvency.
- Where a court decides multiple parties are responsible for defective work, then the court can apportion the damages owed amongst those parties. This complicates matters for a claimant, who must thus ensure that all relevant parties are joined to the proceedings.
- For the avoidance of doubt, Owners Corporations are included within the class of property owners to whom the duty if owed.
- The liability period allows claims to be brought within six years from the date of which the loss caused by the defect became apparent, or should reasonably have been apparent, to the owners, but some of those claims it is capped to 10 years the completion of the works.

Retrospective Opportunity!

The new Duty of Care was assented to on 11 June 2020. But unusually, the Design and Building Practitioners Act makes the Duty retrospective in relation to buildings completed in the past ten years. Allowing for the six year limitation period from the date on which the defect is apparent, this allows claims under the new Duty to be applied to defects only discovered after 11 June 2014. It may even be tenable to argue the Duty applies to even earlier defects – but this has yet to be tested before the courts.

What it means for property owners in New South Wales

- For residential property owners the statutory warranties available under the Home Building Act remains the primary and most straightforward route to the recovery of losses due to building defects.

- However, the availability of negligence claims now made possible by the Design and Building Practitioners Act provides a new and powerful weapon, which in many cases may allow recovery where the circumstances application of the Home Building Act is problematic.

- In many cases it will be wise for claimants to make simultaneous claims under both the Home Building Act and the Design and Building Practitioners Act. Professional legal advice will be necessary.

- Although the negligence claims are a powerful weapon, they are more difficult claims to prove than breach of warranty claims. It involves evidence into considerations such as *causation* and *reasonableness*. There is a large body of case law to consider. It remains to be seen how the courts will apply the interaction of this case law with the statutory provisions of the Design and Building Practitioners Act.

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Over the coming months and years negligence claims in New South Wales building cases are set to change the face of construction litigation, and with it the construction industry itself in terms of the risk management of construction professionals and those that insure them.

The other provision of the Design and Building Practitioners Act

The new Duty of Care provisions are only one part of wide ranging reforms brought in under the Design and Building Practitioners Act.

There are new registration requirements for construction professionals. The design and construction process is to be more centrally regulated and recorded to create clearer lines of responsibility for the work performed. Extensive powers have been granted to Secretary of the Department of Fair Trading and the Secretary's delegates to administer and ensure compliance with the requirements of the Design and Building Practitioners Act. It is understood that the Secretary's main delegate will be the NSW Building Commissioner and members of his taskforce.

Given the exclusion of Certifiers from the new Duty of Care rules, it may be particularly noteworthy that the Design and Building Practitioners Act*,* empower the Secretary, or the Secretary's delegates, to prevent the issue an occupation certificate.

Other legislative efforts

The Government's legislative efforts to address concerns regarding the quality of construction work in New South Wales, do not end with the Design and Building Practitioners Act*.*

Of particular interest to strata property owners will be the Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020, which dovetails with the provisions of the Design and Building Practitioners Act in relation to activities by the Secretary (read NSW Building Commissioner) in the following ways:

- The requirement for developers to give the Secretary notice of an intention to apply for an occupation certificate.
- Empowering the Secretary to not prevent the issue of occupation certificates, but to also issue stop work orders, and to require the rectification of 'serious' defects. Although not expressly stated, it can perhaps be inferred that these powers only apply during the construction period.
- Empowering the Secretary to prevent the issue of an occupation certificate where a building bond is required but has not been lodged.

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E: dbannerman@bannermans.com.au W: www.bannermans.com.au
P: PO Box 514 NORTH SYDNEY NSW 2059 AUSTRALIA

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Key takeaways

- The Design and Building Practitioners Act 2020 introduces a new Duty of Care for construction professionals in NSW.
- This Duty of Care aims to protect property owners from defects causing economic loss.
- Building Certifiers are excluded from this new Duty of Care, which may complicate claims.
- The liability period for claims is set at six years from the date of loss.
- Owners Corporations are included as property owners under this new legislation.

****The information contained in this article is general information only and not legal advice. The currency, accuracy and completeness of this article (and its contents) should be checked by obtaining independent legal advice before you take any action or otherwise rely upon its contents in any way.*

Prepared by Bannermans Lawyers
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BANNERMANS LAWYERS

T: (02) 9929 0226 ABN: 61 649 876 437
E: dbannerman@bannermans.com.au W: www.bannermans.com.au
P: PO Box 514 NORTH SYDNEY NSW 2059 AUSTRALIA

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