

Piercing the corporate veil with the duty of care under the Design and Building Practitioners Act 2020

The Design and Building Practitioners Act 2020 (**D&BPA**), which was famously the NSW Government's response to the increase in defective works for multi-level construction projects and class 2 building works was a game changer against responsible building contractors and developers escaping liability by introducing a retrospective duty of care. The legislation has recently been tested in the NSW Supreme Court.

Recent NSW Supreme Court decisions of *Goodwin*¹, *Pafbun*² and *Boulus Constructions*³ has provided some much needed clarity to everyone in the industry, from builders, engineers, insurers, lawyers and owners on how the D&BPA can be implemented.

Goodwin Street Developments Pty Ltd atf Jesmond Unit Trust v DSD Builders Pty Ltd (in liq) [2022] NSWSC 624

The NSW Supreme Court has now confirmed that the definition of "building work" in section 4(1) of the D&BPA (which refers to only class 2 buildings) has no application to section 37 "Duty of Care" and can be applied broadly to include buildings such as boarding houses and commercial buildings.

The statutory duty of care in section 37 of the D&BPA is not limited to class 2 buildings, and is perhaps not even limited to residential building works under the Home Building Act 1989 (NSW) ("HBA").

This decision also confirms that building practitioners can be found personally liable for damages under section 37. The project manager and supervisor of the building works was found to be a person who carried out construction work within the meaning of section 36 of the D&BPA.

It should be noted that the decision was appealed by the representative of the liquidated first defendant company, DSD, Mr Daniel Roberts.

As part of its judgment, the Supreme Court at first instance had also found that Mr Roberts was the true representative and supervisor of the works as carried out by DSD and was responsible for the damages.

¹ Goodwin Street Developments Pty Ltd atf Jesmond Unit Trust v DSD Builders Pty Ltd (in liq) [2022] NSWSC 624.

² The Owners – Strata Plan No 84674 v Pafbun Pty Ltd [2022] NSWSC 659.

³ Boulus Constructions Pty Ltd v Warrumbungle Shire Council [2022] NSWSC 1368.



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The Court of Appeal dismissed Mr Roberts' appeal in *Roberts v Goodwin Street Developments Pty Ltd* [2023] NSWCA 5, holding in effect that the D&BPA can be applied broadly⁴:

*As the primary judge noted [the] reference to "building" [must be understood to refer] to the broad definition in the Environmental Planning and Assessment Act[.] Merely because a boarding house is not a "dwelling" for the purposes of the Home Building Act does not have the effect, however, of taking a boarding house outside the scope of s 37. That is because the definition in s 36(1) of "building work" is not an exhaustive definition. Rather, the reference to "residential building work" within the meaning of the Home Building Act simply makes clear that such work constitutes "building work" for the purposes of s 36(1). But there is room left for other work relating to a building to qualify as "building work".*⁵

Incidentally, whilst the Court of Appeal did not directly address this point, the very fact that the Court held that statutory duty of care applied⁶ clearly means that the so called 'corporate veil' is no impediment to bringing proceedings of this kind. It needs to be remembered that Mr Roberts was the husband of the director of DSD, but because of his conduct (e.g. attending all the meetings and supervising the works), he was effectively held out to be responsible for the damages caused by DSD, by default.

The Owners – Strata Plan No 84674 v Pafburn Pty Ltd [2022] NSWSC 659

The NSW Supreme Court considered the question of who may be a "person" carrying out "construction work" for the purposes of the statutory duty of care in section 37 of the D&BPA. The definition of "construction work" under the D&BPA included subparagraphs which include:

(a) building;

...

(d) supervising, coordinating, project managing or otherwise having substantial control over the carrying out of any work referred to in paragraph (a)

The Court considered whether a developer fell within subparagraph (d) of the definition. The conclusion was that the use of the words "otherwise having substantial control" pointed to a person having substantive control over the carrying out of building work even in circumstances where they chose not to exercise it. Those who possess the ability to wield "substantive control" may owe the statutory duty under the D&BPA.

⁴ *Roberts v Goodwin Street Developments Pty Ltd* [2023] NSWCA 5; per Kirk JA and Griffiths AJA, Ward P agreeing, 223-226

⁵ *Roberts v Goodwin Street Developments Pty Ltd* [2023] NSWCA 5; per Kirk JA and Griffiths AJA, Ward P agreeing, at 223-228

⁶ *Ibid.*, at 232

The Court found that it was not the intention of the D&BPA to exclude developers from owing a statutory duty of care and that a “person” who carried out “construction work” as defined under the D&BPA was not limited to builders and contractors.

A degree of separation from physically carrying out the work may not be sufficient to avoid liability and a duty of care under the D&BPA.

Notation: the developer and builder had directors in common.

Boulus Constructions Pty Ltd v Warrumbungle Shire Council [2022] NSWSC 1368

The long standing dispute between the builder and developer of a retirement community has recently been in the spotlight given Council sought to amend its Cross-Claim, Cross-Summons and Cross-Claim List Statement to include a claim under section 37 of the D&BPA against the Builder, as well as against the Managing Director of the Builder and the Project Site Supervisor who were not presently cross-defendants.

The Court was satisfied that the Council had brought their application timeously, bearing in mind the timing of the Builder’s allegations of illegality, the fact that the cause of action under section 37 had only been available since June 2020.

More importantly, the Court having regard to *Pafburn*⁷ stated that a person having substantive control over the carrying out of any work for the purposes of the definition of “construction work” in the D&BPA.

Council pleaded that the Project Supervisor actively supervised, coordinated and project managed all of the primary elements of the building works comprising the project and the wide ranging interpretation of “persons” in section 37 of the D&BPA covered a director of a builder or an employee of a builder, being the Project Supervisor.

The imposition on company directors of the automatic duty under section 37 was poised to be contrary to the independence of a corporation from its directors and members. The Court reasoned that section 37 has any such consequence. The duty imposed on a director of the company who engages in “construction work” by section 37 is the same duty as is imposed on the company itself.

Conclusion

The recent NSW Supreme Court cases have provided clarity over:

- section 37 duty of care can be applied broadly to include buildings such as boarding houses and commercial buildings;
- building practitioners being found personally liable for damages under section 37 and project managers and supervisors of the building works are found to be a “person” who carried out “construction work” within the meaning of section 36 of the D&BPA;

⁷ See 2.

- those who possess the ability to wield “*substantive control*” may owe the statutory duty under the D&BPA and it was not the intention of the D&BPA to exclude developers from owing a statutory duty of care; and
- the duty imposed on a director of the company who engages in “construction work” by section 37 is the same duty as is imposed on the company itself.

The D&BPA is currently being tested in the Court but there still remains ambiguity in the interpretation of the D&BPA, for example the word “*persons*” is sometimes used in the D&BPA to mean a person deemed to be a “*practitioner*”; and sometimes it is not.

Although, as Justice Stevenson states in *Boulus Constructions*⁸, Parliament has taken care to define “*practitioner*” and to define the various activities within that definition by reference to “*persons*” carrying out those activities, it has used the expression “*person*” in section 37(1). That must mean someone who is not necessarily a “*practitioner*” and not necessarily a person acting in their capacity as a “*practitioner*”; nor necessarily acting “*in their own capacity*”. As outlined in *Pafburn*, this will be a question of fact in each case.

The implications of this legislation are far reaching and the extent is continually evolving. If you need help or advice please ask our team of experienced legal practitioners.

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⁸ See 3.