Building Defects Advanced Edition FAQ – Key Legal Developments | Pafburn Decision

What changed after Pafburn?

The Pafburn decision from the High Court significantly reshaped how liability is distributed under the Design and Building Practitioners Act 2020 (NSW) (D&BPA).

It confirms that developers and builders found liable under section 37(1) of the D&BPA for failing to exercise reasonable care cannot invoke the proportionate liability regime in Part 4 of the Civil Liability Act 2002 (NSW) (CLA) to limit their exposure.

This means that if a builder or developer delegates work to subcontractors or consultants, they remain fully responsible for any breach of the duty to prevent economic loss caused by defects—even if they themselves did not carry out the work. The Court confirmed that this duty is non-delegable and extends to all economic loss flowing from defective construction work within their scope of engagement.

Can owners still sue builders and developers?

Yes. Following Pafburn, owners corporations and lot owners can continue to bring claims directly against developers and builders for breaches of the D&BPA's statutory duty of care. They do not need to include every subcontractor, consultant, or professional involved in the construction process. Instead, developers and builders now bear the full legal burden of any breaches, even where other parties were responsible for the defective work.

What about other parties — professionals and subcontractors?

The High Court confirmed that a developer or head contractor is wholly liable for any defects arising from the work of professionals, consultants, or subcontractors under their control.

Owners are no longer required to chase each party involved in the original construction in order to secure full compensation.

If builders or developers wish to share liability with third parties, they must do so by bringing cross-claims under section 5 of the Law Reform (Miscellaneous Provisions) Act 1946 (NSW).This marks a clear shift in risk. Developers and builders now face greater legal exposure, particularly where subcontractors or consultants are insolvent, uninsured, or otherwise unavailable to contribute.

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What happens if the builder or developer is gone?

This remains a legal grey area. The Pafburn decision dealt with situations where developers and builders were still solvent and present in proceedings. However, it left unanswered the question of what happens when these parties are in liquidation or have otherwise ceased trading.

It is currently unclear whether liability would pass to other actors in the construction chain—such as engineers or architects—where the developer or builder is no longer available. The courts have not yet resolved how these cases should be handled, but the absence of a proportionate liability defence makes the apportionment of risk more complicated and potentially more uncertain for claimants.

What about other parties — professionals and subcontractors?

Even where the cause of the defect is clearly linked to a specific professional—say a plumber or structural engineer—the Pafburn decision prevents developers or builders from reducing their liability by pointing the finger at that individual or firm. The non-delegable nature of the duty under section 37(1) means that the head contractor or developer remains vicariously liable for construction work entrusted to others.

While the developer or builder may still attempt to bring a cross-claim against the subcontractor or consultant to recover part of the loss, they cannot simply avoid responsibility by arguing that someone else was the actual wrongdoer.

Section 41(3) of the D&BPA does indicate that Part 4 of the D&BPA is subject to the CLA, but the CLA itself, via section 5Q, confirms that liability for delegated work rests with those who outsourced the task

How are claims against professionals and consultants affected?

For owners, the practical benefit of Pafburn is clear: they no longer need to identify and include every subcontractor, consultant, or certifier involved in a defective build. If the builder or developer is available, a claim against them will suffice to recover full damages.

For professionals and subcontractors, however, the ruling highlights the need to carefully define the scope of their duty under any contract or engagement. If they worked only on a specific part of the building—such as structural footings or waterproofing—their exposure is generally limited to that part. But the broader the role, the more likely it is they could face claims if joined through a builder's cross-claim.

Importantly, some professionals—such as certifiers, engineers, and project managers—may still try to rely on the proportionate liability defence, but only if they can demonstrate that another concurrent wrongdoer (usually the builder) was involved and still legally present in the claim.

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Practical consequences: Rising litigation costs

A key practical effect of the Pafburn ruling is that defendants—especially developers and builders—will be forced to bring cross-claims rather than rely on proportionate liability defences. This means legal costs will rise, as more parties will need to be brought into proceedings and more extensive factual investigations undertaken.

For owners, this may complicate settlement negotiations, particularly if subcontractors or consultants are likely to resist contributing or deny responsibility. In these cases, developers and builders may be less willing to settle promptly, especially if their own indemnity is uncertain.

Strategic advice for owners

Where owners are still within time to bring a claim for breach of statutory warranties under the Home Building Act 1989 (NSW), that avenue may remain the simplest and most cost-effective route to pursue. Statutory warranty claims are generally more straightforward to prove and less expensive to run than D&BPA claims.

However, if a claim under the D&BPA is necessary, it can always be brought in the alternative or added to proceedings later if required. The main takeaway is to act promptly and seek legal advice early to determine the best course of action while all parties remain available and solvent.

For more information, please visit The High Court Pafburn Decision and a History of the Cases Exploring the Duty of care under the Design & Building Practitioners Act 2020 article here.

How can we help?

Bannermans Lawyers can provide you with the expert legal advice you need in relation to building defects as we understand that your home or investment property is one of your most important assets.

For a FREE 15 minute consultation on how we can help resolve your defects in a cost effective and efficient manner click here.

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