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LAWYERS



NEW ‘DUTY OF CARE’ LAW MAKES ALL PARTICIPANTS IN BUILDING WORK RESPONSIBLE TO FIX DEFECTS!

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NEW 'DUTY OF CARE'

LAW MAKES ALL PARTICIPANTS IN BUILDING WORK RESPONSIBLE TO FIX DEFECTS!

Introduction

New building laws passed by the NSW Parliament in early June 2020 will have a significant impact on people that own and live in strata buildings and any person involved in property development and construction in NSW. The new laws apply to both existing buildings built in the last ten years and also to the construction of new buildings going forward. Those laws will give many owners corporations rights they did not previously have.

Overview of the New Legislation

The key features of the new legislation include:

1. Design and Building Practitioners Act 2020 (DBP Act)

- Under the DBP Act, a duty of care is owed by a person who carried out construction work to exercise reasonable care to avoid economic loss caused by defects:
 - in or relation to the building at which the work was done; and
 - arising from the construction work.

- Construction work is defined to mean:
 - Building work;
 - Designs for building work;
 - Manufacture or supply of a building product used for building work;
 - Supervising, coordinating, project managing or otherwise having substantive control over the carrying out of any of the above.

- The duty of care is owed to owners of the land on which the building is located. An owners corporation and community association are both expressly defined as an owner and are entitled to rely on the new law, as are the individual owners within strata and community schemes. They may claim for loss caused by the breach of duty of care even though they were not owners of the land at the time of the construction of the building.

- The damages that can be claimed include the costs of rectifying the defects, including consequential loss caused by the defects, and also the costs of reasonable alternative accommodation if this is necessary.
- The duty of care provision in the new DBP Act commenced on the date of its assent, which was 11 June 2020.
- The DBP Act applies to existing buildings if the loss first became apparent within the 10 years immediately before the commencement of the new legislation. In other words, it is retrospective for a period of 10 years.
- This means that an owners corporation can now pursue many of the parties involved in the construction of its building in addition to the builder and developer. An owners corporation can now also directly pursue the architect, engineer, project manager, individual subcontractors and suppliers, and possibly even the private certifier if they were an active participant in the construction work, having substantive control over the carrying out of the building work.
- The DBP Act is intended to overcome the High Court decision of *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 36 which effectively denied an owners corporation, as a successor in title of a developer, the benefit of a common law duty of care for negligent building work carried out by the original builder. The issue was that the owners corporation did not have a close enough relationship with the builder to give rise to a common law duty of care.
- The new DBP Act creates a statutory 'duty of care' thereby removing the difficult hurdle in the case of a successor in title such as an owners corporation of establishing that a common law duty of care was owed by an original builder.
- The DBP Act will apply to residential buildings and is likely to apply to commercial and industrial buildings.
- In the case of residential buildings, the DBP Act will supplement rights that already exist under the *Home Building Act 1989*.
- The limitation period for claims under the DBP Act is still the usual 6 years for breach of duty of care under the *Limitation Act 1969* and the time to make a claim starts to run from the date an owners corporation first suffers loss because of a defect.



- Claims under the DBP Act are also subject to the 10 year long stop period from date of completion of the building under s.6.20 of the *Environmental Planning and Assessment Act 1979*.
- Further, claims under the DBP Act are apportionable claims under the *Civil Liability Act 2002*. This means that building professionals against whom claims are made under the DBP Act will be able to argue that their liability should be reduced if there are other professionals at fault.
- A cause of action for breach of duty of care can be added in existing proceedings that have already been commenced under the *Home Building Act 1989*.

2. Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020 (RAB Act)

- The RAB Act commences on 1 September 2020.
- Developers must give advance notice to the NSW building commissioner before applying for an occupation certificate.
- The building commissioner has the power to:
 - Prevent the issue of an occupation certificate or registration of a strata plan if, for example, there is a 'serious defect' in the building, or the building bond required under the *Strata Schemes Management Act 2015* has not been lodged.
 - Investigate building work for serious defects and compliance with the Building Code of Australia and Australian Standards and can:
 - Issue stop work orders and building rectification orders to developers;
 - Require developers to pay for the Department's compliance costs in respect of building rectification orders.
- The definition of a serious defects includes:
 - failure to comply with performance requirements of the Building Code of Australia;
 - defects likely to deny habitability or use of the building for its intended purpose;
 - use of banned building products.
- The RAB Act also applies retrospectively to buildings completed in the previous 10 years.



Anything Else?

The new laws also introduce a system for regulating design and building work, including registration of designers, engineers, builders and other specialist practitioners. Developers, builders and certifiers will be rated on their record of building failures, finances, complaints and insurance claims which is intended to ensure that only quality practitioners can be engaged in construction work.

Actions You Can Take Now

Strata Managers should:

- Undertake a review of all buildings constructed within the last ten years for defects including those that are out of time for statutory warranty claims under the *Home Building Act 1989*.
- Pursue builders and developers to take steps now to resolve defects on the basis that doing so will minimise the risk of a claim being made under the DBP Act concerning those defects.
- Seek our specific advice in relation to the options available for buildings that have defects that have been built in the last ten years.

Conclusion

The new legislation was enacted following the recommendations in the Shergold Weir Report and due to defects in a number of strata buildings in New South Wales. These new laws support the NSW Government's six-pillar Building Reform package and apply to both existing buildings built in the last ten years and to the construction of new buildings going forward. The new laws will go a long way to ensure buildings, including commercial buildings, in NSW are constructed to keep the occupants safe, and in turn attempt to rebuild and restore public confidence in the NSW construction industry.

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About JS Mueller & Co Lawyers

JS Mueller & Co Lawyers has been servicing the strata industry across metropolitan and regional NSW for over 40 years. We are a specialist firm of strata lawyers with in depth and unmatched experience in, and comprehensive knowledge of strata law, building defects and levy recovery.

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