

INDUSTRY UPDATE

Construction Defects – new rights for Owners!



Building & Construction | Corporate & Commercial | Commercial Litigation | Debt Collection | General Litigation | Insolvency | Insurance
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Design and Building Practitioners Act 2020

Whilst the world has been concentrating on social distancing, working from home, getting the washing done and the kids back to school Parliament has been busy.

On 11 June 2020 the Design and Building Practitioners Act 2020 (**DBP Act**) came into force. Big deal you may think.... Well **yes, it is a big deal, a really big deal!!**

This new legislation will change the landscape of construction and is a great step forward in consumer protection. In 2014 we acted for an owners corporation in Chatswood who lodged a claim against the builder. The case ran all the way to the High Court which found that the builder didn't owe a duty of care to the Owners Corporation (*Brookfield Multiplex Ltd v SP61288* [2014] HCA 36).

Since that time, we have advocated (with SCA NSW) that there must be some form of statutory duty of care against people involved in building construction and not just across residential buildings but the consumer market as a whole.

What are the major changes?

The legislation is being implemented in 2 stages. The first is the commencement of the duty of care for buildings. The second (starting next year) will concentrate on the construction element and those involved in the construction (we will comment on this in the future).

There are 3 major changes as a result of this new legislation:

1. Builders, designers, product manufacturers and suppliers, and supervisors now owe a duty of care to the building owners, which cannot be delegated or contracted out of;
2. There is increased scope of powers given to the Secretary of the Department of Customer Service (also under the *Residential Apartment, Building (Compliance and Enforcement Powers) Act 2020*;
3. A registration and certification process for design practitioners, professional engineers, specialist and building practitioners.

How far does this new law extend?

Naturally, there are no cases on the interpretation of the new provisions and there has already been many comments made on the new provisions. From a basic review of the duty of care obligations they extend to any building that is approved (and built) under the Environmental Planning and Assessment Act, so in short almost every building!

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The legislation goes on to include any strata scheme registered under the *Strata Schemes Management Act 2015*. ***It is here that it all gets interesting!***

If read broadly (and we think correctly) the new legislation does what we have all been waiting for – to give owners of ALL strata schemes rights under a duty of care in the construction of their building including commercial, retail, industrial and of course residential.

It is even retrospective!

This new duty of care is **retrospective** (for a period of 10 years from the date of its commencement). Naturally there will be some conditions surrounding how this will work but the basics are that if you become aware of defects within the last 10 years you need to seek advice on whether you now have a claim under the DBPAct.

Who owes this Duty of Care?

The DBPAct allows actions against basically those involved in the construction of your strata scheme (including builders, developers, designers, certifiers, suppliers, installers, sub-contractors etc).

The catch is that because you can now blame/claim against a number of people, they can in turn can claim/blame against each other for what is called “proportionate liability”. This is where the Court/Tribunal apportions blame (and therefore compensation) for the defects and may divide up who pays what amount of any successful claim.

What impacts does it have on my scheme?

There will be a range of impacts on your strata scheme:

- As a commercial, industrial, retail strata previously you couldn't use the *Home Building Act 1989 (HBA)* but had to rely on other civil remedies to seek restitution (misleading certification, misleading statements etc), now at first blush, the DBPAct allows a direct right to take action against those involved in the design and construction (and effectively overturning the Brookfield decision);
- You may have new rights to action against those involved in your development. This will be a major increase in liability for those involved in the construction of a strata scheme;
- If you are out of time under the *Home Building Act 1989 (HBA)* then you may be able to take action now for those defects;
- If more defects have manifested after the statutory warranty periods in the HBA have expired then you may be able to take action;
- If there are defects that were not part of the original claims then you may have rights;
- If the builder went into liquidation before or during your HBA claim then your rights against others involved in the development may now be covered;

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- If there were design defects in your building which were difficult to pursue then this new legislation allows a claim against those involved in the design;

It appears, that these new rights extend well beyond those rights under the *Home Building Act 1989* and will create rights over defective building work that wasn't previously covered. It also covers the situation where some or all defects were outside of the statutory warranty periods under the HBA or other restrictions. These claims may now be valid claims.

This is a major benefit to Owners Corporation's and something that the Owners Corporation should seriously consider obtaining advice on.

What do we need to do?

At first, the Owners Corporation need to determine whether there are any defects that fall within these new provisions. In order to assess this, the Owners Corporation should do the following:

1. Review all previous reports concerning defect construction work and previous claims (and any settlements);
2. Determine whether there are any defects that apply to the new legislative provisions. Some of these defects would include design defects that were not part of any HBA claim;
3. Determine whether the Owners Corporation has undertaken any rectification works to defects that have occurred previously (and not part of any previous claim that was resolved). There may be avenues for Owners Corporation's to recover these costs;
4. Have your previous claims or any new claims reviewed by your legal team to determine the applicability of these new provisions.