



GREENWAY CHAMBERS

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# DESIGN AND BUILDING PRACTITIONERS ACT 2020 (NSW)

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FRANK HICKS SC

FAHEEM ANWAR

Greenway Chambers  
Level 10, 99 Elizabeth Street  
Sydney NSW 2000  
DX 165 Sydney

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## INTRODUCTION

1. In June 2020, the New South Wales legislature enacted the *Design and Building Practitioners Act 2020* (NSW) (**DBP Act**) as part of its reforms to the building industry.
2. The DBP Act is part of the New South Wales government's response to the national *Building Confidence—Improving the effectiveness of compliance and enforcement systems for the building and construction industry across Australia* report (the **Building Confidence Report**), authored by Professor Peter Shergold, AC, and Ms Bronwyn Weir. The recent high profile problems at Opal Towers and Mascot Towers have provided a power impetus for reform.
3. Among the main conclusions of the Building Confidence Report was that the accountability of different parties involved in the construction process was unclear and there were insufficient controls on the accuracy of documentation, which made it difficult to ascertain whether the building complied with the requirements of the *Building Code of Australia* (**BCA**).
4. The DBP Act seeks to address that concern by requiring building practitioners to provide compliance certificates as to whether the work complies with the BCA.
5. Further, in addition to imposing the regulatory requirements set out above, the DBP Act establishes a statutory duty of care for any person who carries out construction work. This is the response of the NSW Legislature to a series of High Court decisions over the last 20 years which have limited the common law duty of care owed by builders and others to owners for inadequate design and defective works, and the economic loss suffered due to those matters.
6. These key aspects<sup>1</sup> of the new legislation is discussed below in more detail.

## OBLIGATIONS OF DESIGN PRACTITIONERS, PRINCIPAL DESIGN PRACTITIONERS AND BUILDING PRACTITIONERS

7. Part 2 of the DBP Act seeking to regulate design and building work by imposing certain obligations on design practitioners, principal design practitioners and building practitioners.
8. This part of the DBP Act does not commence until 1 July 2021, to allow time for the regulations to be developed.

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<sup>1</sup> Please note, in preparing this paper the authors have not sought to exhaustively summarize every provision of the DBP Act. Rather, this paper is intended to provide an overview of what the authors consider to be the most important provisions of the new legislation.

### ***Who is a design practitioner and a principal design practitioner?***

9. A 'design practitioner' is defined a person who prepares regulated designs.<sup>2</sup>
10. A 'regulated design' is defined as:
  - a. a design that is prepared for a building element for a building work; or
  - b. a design that is prepared for a performance solution for building work (including a building element); and
  - c. any other design of a class prescribed by the regulations that is prepared for building work.<sup>3</sup>
11. In essence, the definition of a design practitioner under the DBP Act is sufficiently broad to capture any person who designs any aspect of a building.
12. The role of a 'principal design practitioner' is to coordinate the provision of the various design compliance declarations by various design practitioners.<sup>4</sup>
13. The DBP Act prohibits both design practitioners and principal design practitioners from discharging their statutory obligations discussed below, unless they are registered.<sup>5</sup> Further, the DBP Act requires both design practitioners and principal design practitioners to be adequately insured.<sup>6</sup>

### ***What are a design practitioner's obligations?***

14. The DBP Act requires a registered design practitioner to provide a design compliance declaration if the practitioner prepares a regulated design and provides it to another person for use in connection with building work.<sup>7</sup>
15. Further, every time the regulated design is varied (whether before commencement of building work or after commencement of building work) the registered design practitioner must issue a further design compliance declaration.<sup>8</sup>
16. The regulations may also require a design compliance declaration to be provided in other circumstances.<sup>9</sup>
17. A design compliance declaration must contain declarations as to the following matters:

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<sup>2</sup> DBP Act, s 3.

<sup>3</sup> DBP Act, s 5. Please note 'building work', 'building element' and 'performance solution' are all defined terms under the DBP Act.

<sup>4</sup> DBP Act, s 3.

<sup>5</sup> DBP Act, ss 10 and 13.

<sup>6</sup> DBP Act, ss 11 and 14.

<sup>7</sup> DBP Act, s 9(1).

<sup>8</sup> DBP Act, s 9(2), (3).

<sup>9</sup> DBP Act, s 9(5).

- a. whether the regulated design complies with the requirements of the BCA;
  - b. whether the design complies with any other requirements prescribed by the regulations;
  - c. whether other standards, codes or requirements have been applied in preparing the design; and
  - d. any other matter prescribed by the regulations.<sup>10</sup>
18. The design compliance declaration must also be in a form prescribed by the regulations.<sup>11</sup>
19. Further, the regulations may require additional supporting documents to be provided with a design compliance declaration.<sup>12</sup>
20. As is apparent from the above, the contents of the design compliance declaration will be governed to a large degree by the regulations. However, as at 2 July 2020 the regulations are yet to be made available. In the absence of the regulations, it is not possible to provide more specific guidance as to the contents of a design compliance declaration.
21. Failure of a registered design practitioner to discharge the obligations to provide a design compliance declaration constitutes an offence under the DBP Act. As does the making of a design compliance declaration that the registered design practitioner knows to be false or misleading in a material particular.<sup>13</sup>

***What are a principal design practitioner's obligations?***

22. A registered principal design practitioner must ensure that:
- a. a design compliance declaration has been provided for each regulated design prepared for the relevant building work; and
  - b. every design compliance declaration is provided by a registered design practitioner whose registration authorises them to do so in respect of the subject matter of the declaration.<sup>14</sup>
23. Further, registered principal design practitioner must provide a principal compliance declaration in the circumstances specified in the regulations.<sup>15</sup> Given that the regulations have not been released as yet, it is not possible to provide any guidance as to what those circumstances may be.

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<sup>10</sup> DBP Act, s 8(1).

<sup>11</sup> DBP Act, s 8(1).

<sup>12</sup> DBP Act, s 9(8).

<sup>13</sup> DBP Act, s 9(7).

<sup>14</sup> DBP Act, s 12(1).

<sup>15</sup> DBP Act, s 12(2).

24. As with registered design practitioners, the failure of a principal design practitioners to discharge their obligations constitutes an offence. As does the provision of a principal compliance declaration which the maker knows to be false or misleading in a material particular.<sup>16</sup>

### ***Who is a building practitioner?***

25. A building practitioner is defined very broadly as any person who agrees under a contract or other arrangement.<sup>17</sup>
26. If more than one person agrees to do building work (as is commonly the case on most projects involving contractors and subcontractors) then, the person who agrees to do building work under the head contract is regarded as the building practitioner.<sup>18</sup>

### ***What are a building practitioner's obligations?***

27. Under DBP Act:
- a. a registered building practitioner must provide:
    - i. a building compliance declaration for the building work;
    - ii. a list of the subcontractors who did building work and details of the work done by each of those entities; and
    - iii. any other document prescribed by the regulation,before an application is made for an occupation certificate is given for the building in question;<sup>19</sup> and
  - b. to enable the building practitioner to do so, written notice must be given to the registered building practitioner who did the building work before an application for an occupation certificate is made.<sup>20</sup>
28. A building compliance declaration must contain declarations as to the following matters:
- a. whether the regulated design complies with the requirements of the BCA;
  - b. whether the design complies with any other requirements prescribed by the regulations;

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<sup>16</sup> DBP Act, s 12(4).

<sup>17</sup> DBP Act, s 7(1)(a).

<sup>18</sup> DBP Act, s 7(1)(a).

<sup>19</sup> DBP Act, s 17(1).

<sup>20</sup> DBP Act, s 16(1).

- c. if the building work does not comply with (a) or (b) above, the steps that need to be taken to ensure compliance;
  - d. for a regulated design used in the building work, whether:
    - i. the design was prepared by a registered design practitioner; and
    - ii. the building work was built in accordance with the design,
  - e. whether a design compliance declaration has been obtained in relation to regulated designs used for the building work;
  - f. whether a registered principal design practitioner was appointed in relation to the building work and, if so, whether a principal compliance declaration was obtained; and
  - g. any other matter prescribed by the regulations.<sup>21</sup>
29. if a building compliance declaration sets out steps that need to be taken in order to ensure compliance with the BCA, then the building practitioner must give a written notice setting out those steps to the principal certifier responsible for issuing the occupation certificate.<sup>22</sup>
30. A principal certifier who is responsible for issuing an occupation certificate:
- a. must not issue an occupation certificate unless all compliance declarations have been lodged;<sup>23</sup> and
  - b. must consider any instances of con-compliance mentioned in the compliance declarations when deciding whether to issue the occupation certificate.<sup>24</sup>
31. Further, the DBP Act imposes a positive obligation on a building practitioner who does building work to take all reasonable steps to ensure that:
- a. if building work is varied after commencement of the work, then:
    - i. a design with the variation is prepared by a registered design practitioner;
    - ii. a design compliance declaration (and, if appropriate, a principal compliance declaration) is obtained for the varied design;<sup>25</sup>

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<sup>21</sup> DBP Act, s 8(3).

<sup>22</sup> DBP Act, s 22(2).

<sup>23</sup> DBP Act, s 27(1).

<sup>24</sup> DBP Act, s 27(2).

<sup>25</sup> DBP Act, s 20.

- b. the building work complies with the requirements of the BCA;<sup>26</sup>
  - c. any regulated design for the building work is prepared by a registered design practitioner;<sup>27</sup> and
  - d. obtain all applicable design compliance declarations and principal compliance declarations.<sup>28</sup>
32. In addition to the positive obligations set out above, the DBP Act prohibits a building practitioner from carrying out building work for which a regulated design is used, except with reasonable excuse, unless:
- a. the building practitioner has obtained a design and a design compliance declaration from a registered design practitioner; and
  - b. the declaration states that the design complies with the requirements of the BCA.<sup>29</sup>
33. The DBP Act is silent on what constitutes a reasonable excuse. However, the legislation does state that the defendant bears the onus of proof regarding reasonable excuse.<sup>30</sup>
34. The DBP Act also prohibits both building practitioners from discharging their statutory obligations discussed below, unless they are registered.<sup>31</sup> Further, the DBP Act requires both design practitioners and principal design practitioners to be adequately insured.<sup>32</sup>
35. The failure of a building practitioner to discharge their obligations constitutes an offence. As does the provision of a building compliance declaration which the maker knows to be false or misleading in a material particular.<sup>33</sup>

### ***Professional engineering work and specialist work***

36. The DBP prohibits a person from carrying out professional engineering work unless:
- a. they are authorised to do so either by virtue of their registration as a professional engineer or under the regulations; or

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<sup>26</sup> DBP Act, s 22(1).

<sup>27</sup> DBP Act, s 18(a).

<sup>28</sup> DBP Act, s 18(b).

<sup>29</sup> DBP Act, s 18.

<sup>30</sup> DBP Act, s 97.

<sup>31</sup> DBP Act, s 23.

<sup>32</sup> DBP Act, s 24.

<sup>33</sup> DBP Act, s 17(4).



- b. the professional engineering work is being carried under the supervision of someone who is authorised to do so by virtue of their registration.<sup>34</sup>
37. Professional engineering work is defined as engineering work that requires, or is based on, the application of engineering principles and data to a design or a construction, production, operation or maintenance activity, relating to engineering.<sup>35</sup> However, professional engineering work does not include:
- a. work done in accordance with a specified criteria or procedure and which does not require the application of any advanced scientifically based calculations; and
  - b. work prescribed by the regulation as not being professional engineering work.<sup>36</sup>
38. The DBP Act requires registered professional engineers to be adequately insured.<sup>37</sup>
39. The DBP also prohibits a person from carrying out specialist work unless they are authorised to do so either by virtue of their registration as a specialist practitioner or under the regulations.<sup>38</sup>
40. Specialist work is defined as:
- a. the design, construction, installation or maintenance of a building element, or
  - b. other work, involving a building element, that is prescribed by the regulations,
- but does not include work prescribed by the regulations as not being specialist work.<sup>39</sup>

## THE STATUTORY DUTY OF CARE

41. The creation or extension of a duty of care is one of the most important reforms enacted by the DBP Act.
42. Pursuant to Part 4 the DBP Act, a person who carries out construction work owes a statutory duty of care to each owner of the land and to each subsequent owner to exercise reasonable care to avoid economic loss caused by defects.<sup>40</sup>

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<sup>34</sup> DBP Act, s 32.

<sup>35</sup> DBP Act, s 31(1).

<sup>36</sup> DBP Act, s 31(2).

<sup>37</sup> DBP Act, s 33.

<sup>38</sup> DBP Act, s 35.

<sup>39</sup> DBP Act, s 34.

<sup>40</sup> DBP Act, s 37.

43. Part 4 not only represents a sweeping change from the pre-existing common law position, it is particularly noteworthy because:
- a. unlike the regulatory provisions of the new legislation (which commence on 1 July 2021), Part 4 commenced on 10 June 2020; and
  - b. Part 4 operates retrospectively for a period of 10 years prior to the commencement of Part 4 of the legislation.
44. To understand the importance of the statutory duty of care created by the legislation, it is necessary to first consider the High Court decisions in respect of the common law duty of care for economic loss arising from inadequate design and / or defective building works.

### ***Bryan v Maloney* (1995) 182 CLR 609**

45. In *Bryan v Maloney*, a majority of the High Court held that a builder who constructs a house owes a duty of care to subsequent owners to exercise reasonable care to avoid pure economic loss in the form of diminution in the value of the house when latent defects become manifest.
46. The facts in *Bryan v Maloney* were as follows:
- a. A professional builder constructed a dwelling house for a landowner.
  - b. Sometime after the construction was complete the landowner sold the house to a subsequent purchaser.
  - c. After the subsequent purchaser had taken possession cracks began to appear in the walls of the house, which was caused by the fact that the house had been built with inadequate footings.
  - d. There was a diminution in the value of the house due to the existence of cracks.
  - e. The subsequent purchaser sued the builder in negligence to recover as damages the diminution in the value of house resulting from the latent defects.
47. The majority of the High Court held that:
- a. A professional builder, who constructs a house for the then owner, owes a duty of care to subsequent owners of the house to exercise reasonable care to avoid pure economic loss (in the form of diminution in the value of the house when latent defects become manifest).<sup>41</sup>

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<sup>41</sup> *Bryan v Maloney* (1995) 182 CLR 609, at 628 (per Mason CJ and Deane and Gaudron JJ) and at 665 (per Toohey J).

- b. The relationship between a professional builder and a subsequent owner (like the relationship between the builder and the first owner) is characterised by the assumption of responsibility on the part of the builder and the likely reliance on the part of the owner. It follows that, as was the case in the relationship between the builder and the first owner, the relationship between the builder and the subsequent owner should be regarded as possessing the requisite degree of proximity necessary to give rise to a duty of care to take reasonable to avoid loss in the form of diminution in the value of the caused by latent defects.<sup>42</sup>
- c. There were also persuasive policy reasons supporting the recognition of a duty of care, as the builder – by virtue of superior knowledge, skill and experience in the construction of houses – will be better qualified and position to avoid and guard against the financial risk posed by latent defects.<sup>43</sup>
- d. Further, the policy consideration underlying the reluctance of courts to recognise a duty of care in cases of pure economic loss, namely liability in an indeterminate amount for an indeterminate time to an indeterminate class, did not arise in the circumstances before the court.<sup>44</sup>
- e. Where the economic loss is that sustained by the owner of a house when a latent defect becomes manifest, there is no basis for thinking that recognition of a duty of care between the builder and a subsequent owner would be more likely to give rise to liability in an indeterminate amount to an indeterminate class than the relationship between the builder and the first owner where a duty of care was owed.<sup>45</sup>
- f. In so far as an indeterminate time is concerned, the extent of the time span in which liability to a subsequent owner might arise would be limited by the element of reasonableness both in the requirement that damages be foreseeable and in the content of the duty of care.<sup>46</sup>

48. Further, the majority rejected the proposition that:

*“as a matter of policy, the sanctity of contract or the compartmentalization of the law dictates that liability under the ordinary principles of ... must be excluded as between parties in a contractual relationship notwithstanding the absence of any actual agreement between the parties to that effect.”<sup>47</sup>*

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<sup>42</sup> Ibid, at 627-8 (per Mason CJ and Deane and Gaudron JJ).

<sup>43</sup> Ibid, at 627-8 (per Mason CJ and Deane and Gaudron JJ).

<sup>44</sup> Ibid, at 626 (per Mason CJ and Deane and Gaudron JJ).

<sup>45</sup> Ibid, at 626 (per Mason CJ and Deane and Gaudron JJ).

<sup>46</sup> Ibid, at 626 (per Mason CJ and Deane and Gaudron JJ).

<sup>47</sup> Ibid, at 624 (per Mason CJ and Deane and Gaudron JJ).

### ***Woolcock Street Investments v CDG (2004) 216 CLR 515***

49. In *Woolcock*, a majority of the High Court found that a consultant engineer who designed the foundations of a building did not owe a duty of care to subsequent purchasers of that building to take reasonable care to avoid pure economic loss.
50. The facts in *Woolcock* were as follows:
- a. An engineering company designed the foundations of a building. For the purpose of preparing the design, the engineering company had obtained a quote for geotechnical investigations. However, the original owner refused to pay for such investigations.
  - b. Some years after the building was completed, the property was sold. The contract of sale:
    - i. did not include a warranty that the property was free from defect; or
    - ii. did not contain an assignment by the vendor of any rights that the venter may have had against others in respect of any defects.
  - c. After the purchaser had taken possession, it became apparent that the building was suffering substantial structural distress due to the settlement of its foundations or the material beneath them or both.
  - d. The subsequent purchaser sued the engineering company for negligence.
51. A majority of the High Court held that the engineering company did not owe a duty of care to the subsequent purchaser to takes reasonable care to avoid pure economic loss for the following reasons:
- a. The conclusion reached by the majority in *Bryan v Maloney* that the builder owed a duty to the subsequent owner to take reasonable care to avoid pure economic loss, depended upon the anterior conclusion reached by the majority that the builder owed a duty to the first owner to take reasonable care to avoid pure economic loss.<sup>48</sup>
  - b. Their Honours distinguished *Bryan v Maloney* as in *Woolcock* it could not be said that the relationship between the engineers and the original owner was characterised by assumption of responsibility by the engineers and known reliance by the owner, given that the original owner “*asserted control over the investigation*” by refusing to pay for the geotechnical investigation. Accordingly, the majority found that the reasoning in *Bryan v Maloney* did not support a finding that the engineer in *Woolcock* owed a duty of care to subsequent owners.<sup>49</sup>

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<sup>48</sup> *Woolcock Street Investments v CDG (2004) 216 CLR 515*, at 527, [14] (per Gleeson CJ, Gummow, Hayne and Heydon JJ).

<sup>49</sup> *Ibid*, at 531-2, [25]-[27] (per Gleeson CJ, Gummow, Hayne and Heydon JJ).

- c. Adopting the 'vulnerability' analysis enunciated by the High Court in *Perre v Apand*<sup>50</sup> (which was decided after *Bryan v Maloney*), it was held at [23]-[24] (with citations omitted):

[23] Since *Caltex Oil*, and most notably in *Perre v Apand Pty Ltd*, the vulnerability of the plaintiff has emerged as an important requirement in cases where a duty of care to avoid economic loss has been held to have been owed. "Vulnerability", in this context, is not to be understood as meaning only that the plaintiff was likely to suffer damage if reasonable care was not taken. Rather, "vulnerability" is to be understood as a reference to the plaintiff's inability to protect itself from the consequences of a defendant's want of reasonable care, either entirely or at least in a way which would cast the consequences of loss on the defendant. So, in *Perre*, the plaintiffs could do nothing to protect themselves from the economic consequences to them of the defendant's negligence in sowing a crop which caused the quarantining of the plaintiffs' land. In *Hill v Van Erp*, the intended beneficiary depended entirely upon the solicitor performing the client's retainer properly and the beneficiary could do nothing to ensure that this was done. But in *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords*, the financier could itself have made inquiries about the financial position of the company to which it was to lend money, rather than depend upon the auditor's certification of the accounts of the company.

[24] In other cases of pure economic loss (*Bryan v Maloney* is an example) reference has been made to notions of assumption of responsibility and known reliance. The negligent misstatement cases like *Mutual Life & Citizens' Assurance Co Ltd v Evatt* and *Shaddock & Associates Pty Ltd v Parramatta City Council [No 1]* can be seen as cases in which a central plank in the plaintiff's allegation that the defendant owed it a duty of care is the contention that the defendant knew that the plaintiff would rely on the accuracy of the information the defendant provided. And it may be, as Professor Stapleton has suggested, that these cases, too, can be explained by reference to notions of vulnerability. (The reference in *Caltex Oil* to economic loss being "inherently likely" can also be seen as consistent with the importance of notions of vulnerability). It is not necessary in this case, however, to attempt to identify or articulate the breadth of any general proposition about the importance of vulnerability.<sup>51</sup>

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<sup>50</sup> (1999) 198 CLR 180.

<sup>51</sup> It has been held that the notion of vulnerability described in *Woolcock* at [24] explains the well-recognised class of case in which it has been held that a professional advisor who has been engaged by a person to provide advice falling within the advisor's area of expertise, in circumstances where the advisor knows that the person will act on that advice and it is reasonable for the person to do so, owes a duty of care when giving that advice - i.e. the existence of a duty of care where there is an assumption of responsibility by one party in circumstances of known reliance

- d. The majority held that the subsequent owners were not vulnerable either entirely or at least in a way which would cast the consequences of loss on the defendant. As noted in *Woolcock*, it was open to the subsequent owners to seek:
  - i. a contractual warranty in the contract of sale that the property was free from defects or seek some other form of contractual protection; and
  - ii. carry out investigations which would have disclosed the latent defect.<sup>52</sup>

There were no facts before the High Court to suggest that the subsequent owners had done so.

52. Further, the majority in *obiter* noted that the contract between the original owner and the builder or engineer is relevant to determining what duty the builder or engineer owed to others as:

*“that contract defines the task which the builder or engineer undertook. There would be evident difficulty in holding that the [engineer] owed ... a duty of care to avoid economic loss to a subsequent owner if performance of that duty would have required the [engineer] to do more or different work than the contract with the original owner required or permitted.”*<sup>53</sup>

53. It is also interesting to note that Callinan J (who was part of the majority) suggested in *obiter* that this particular area is better regulated by legislators,<sup>54</sup> which has now occurred in NSW with the enactment of the DBP Act.

### ***Brookfield Multiplex v Owners Corporation Strata Plan 61288 (2014) 254 CLR 185***

54. The final decision to be considered is *Brookfield Multiplex v Owners Corporation Strata Plan 61288*. In *Brookfield*, the High Court unanimously held that the builder did not owe the owners corporation a duty to take reasonable care to avoid pure economic loss resulting from latent defects.

55. The facts in *Brookfield* are briefly summarized below:

- a. A building company constructed a mixed-use retail, restaurant, residential and serviced apartment building for a developer. The contract between the builder and the developer contained detailed provisions about the

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by the other: per *Brickhill v Cooke* [1984] 3 NSWLR 396; *Tzaneros Investments v Walker Group Constructions* [2016] NSWSC 50 at [191] (per Ball J).

<sup>52</sup> *Ibid*, at 533, [31]-[32] (per Gleeson CJ, Gummow, Hayne and Heydon JJ); at 550, [85], 552-3, [95]-[96] and 558-9, [110]-[111] (per McHugh J) and 587-589, [212]-[213] (per Callinan J).

<sup>53</sup> *Ibid*, at 532, [28] (per Gleeson CJ, Gummow, Hayne and Heydon JJ).

<sup>54</sup> *Ibid*, at 593, [233] (per Callinan J).

performance of the work, rectification of defects, and the sale of lots by the developer to subsequent purchasers.

- b. The contract of sale to the subsequent purchasers also contained provisions about the quality of work and the rectification of defects.
  - c. A strata plan was registered in respect of the part of the building which was to be used as a commercial serviced apartment venture. At the time the strata plan was registered, the lots were owned by the developer. However, the developer subsequently sold lots in that part of the building to purchasers, who leased the lots to a third party for the purpose of operating the serviced apartment venture.
  - d. The common property of the building was vested in an owners corporation upon the registration of the strata plan.
  - e. Some years after the building was completed, latent defects in the common property became manifest.
  - f. The owner's corporation sued the builder in negligence.
56. Although *Brookfield* was a unanimous decision in terms of outcome, there were four separate judgments. Each of those judgements are briefly considered below.

#### *French CJ*

57. French CJ noted that the adoption of vulnerability as the key consideration in determining the existence of a duty of care for pure economic loss in *Perre v Apand* did not overrule the previous cases, such as *Bryan v Maloney*, where the notion of proximity was used to determine whether or not a duty of care existed to avoid pure economic loss.<sup>55</sup>
58. His Honour held that the consideration of whether there was known reliance or dependence on the part of the plaintiff and / or the assumption of responsibility on the part of the defendant or a combination of the two, which were factors that led the majority in *Bryan v Maloney* to find in favour of the existence of a duty of care, should be seen as elements of the notion of vulnerability.<sup>56</sup>
59. In *Brookfield*, the responsibility assumed by the builder *vis-à-vis* the developer was defined in detail by the design and construct contract. Accordingly:
- a. the builder could not be taken to have assumed responsibility, beyond the provisions of the design and construct contract, in respect of pure economic loss flowing from latent defects; and

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<sup>55</sup> *Brookfield Multiplex v Owners Corporation* (2014) 254 CLR 185, at 200 [21] (per French CJ).

<sup>56</sup> *Ibid*, at 200-201 [22] (per French CJ).



- b. the developer (as the initial owner) could not be “taken to have relied upon any responsibility on the part of the [builder]”.<sup>57</sup>

60. Further, French CJ emphasized the need for legal reasoning to proceed by way of analogy in novel cases<sup>58</sup> and held that the relationship between the builder and the owners corporation was not analogous to the relationship between the builder of a dwelling house and the subsequent purchaser of the dwelling house.<sup>59</sup> Accordingly, His Honour found that the builder did not owe a duty of care to subsequent owners to avoid pure economic loss and therefore there was no duty of care owed to the owners corporation.<sup>60</sup>

#### *Hayne and Kiefel JJ*

61. Hayne and Kiefel JJ applied the vulnerability test in order to determine whether the builder owed the owner’s corporation a duty of care.<sup>61</sup> Their Honours held that:

- a. vulnerability is concerned with the plaintiff’s inability to protect itself from the defendant’s want of reasonable care, either entirely or at least in a way which would cast the consequences of loss on the defendant; and
- b. the fact that both the developer and subsequent purchasers entered into standard form contracts, which:
  - i. expressly provided for the quality of work that was promised; and
  - ii. gave them rights to have defects in the common property vested in the Owner’s Corporation remedied

demonstrates the ability of the parties to protect against, and denies their vulnerability to, any lack of care by the builder in the performance of its contractual obligations.<sup>62</sup>

62. Hayne and Kiefel JJ expressly stated that their conclusion regarding the non-existence of a duty of care did not rest upon “making any a priori assumption about the proper provinces of the law of contract and the law of tort”.<sup>63</sup>

#### *Crennan, Bell and Keane JJ*

63. Crennan, Bell and Keane JJ distinguished *Bryan v Moloney* on two grounds:

- a. first, the design and construct contract between the builder and the developer in *Brookfield* contained detailed provisions in respect of the

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<sup>57</sup> Ibid, at 204 [33] (per French CJ).

<sup>58</sup> Ibid, at 201-202 [25] (per French CJ).

<sup>59</sup> Ibid, at 205 [35] (per French CJ).

<sup>60</sup> Ibid, at 205 [36] (per French CJ).

<sup>61</sup> Ibid, at 210-211 [56] to [58] (per Hayne and Kiefel JJ).

<sup>62</sup> Ibid, at 210-211 [57] and [58] (per Hayne and Kiefel JJ).

<sup>63</sup> Ibid, at 211 [59] (per Hayne and Kiefel JJ).



builder's obligations as to the quality of design and construction, whereas in *Bryan v Maloney* the builder was under a general obligation to exercise reasonable skill and care; and

- b. secondly, in *Brookfield* the contract of sale to subsequent purchasers contained provisions requiring the developer to rectify any defects, whereas in *Bryan v Maloney* there were no such provisions in the contract of sale.<sup>64</sup>

64. It was held that the existence of the provision requiring the developer to rectify any defects in the contract of sale to subsequent purchasers "*reflects awareness of the relevant risk as well as a means of dealing with it*".<sup>65</sup> There was no factual basis to conclude that the builder's conduct deprived the subsequent purchasers of the choice of:

- a. bargaining with the developer (i.e. the original owner) for a more extensive warranty as to quality; or
- b. walking away from the negotiation and investing elsewhere.<sup>66</sup>

65. In those circumstances, it could not be said that the subsequent purchasers were vulnerable in the relevant sense.

66. Further, adopting a different approach, Crennan, Bell and Keane JJ observed that:

- a. the law of contract has primacy in the protection afforded by common law against unintended harm to economic interests, where the particular harm consists of disappointed expectations<sup>67</sup> under a contract; and
- b. the common law has not developed with a view to altering the allocation of economic risks between the parties to a contract by supplementing or supplanting the terms of the contract by duties imposed by the law of tort.<sup>68</sup>

67. Crennan, Bell and Keane JJ also observed in *obiter* that as an owners corporation acquires the common property in a strata scheme without any outlay on its part, so long as the assets of the owners corporation are worth more than the cost of repairing the defects (as was the case in *Brookfield*) then it is impossible to see that the owners corporation has suffered loss due to the latent defect.<sup>69</sup>

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<sup>64</sup> Ibid, at 230-232 [136] to [140] (per Crennan, Bell and Keane JJ).

<sup>65</sup> Ibid, at 229 [132] (per Crennan, Bell and Keane JJ).

<sup>66</sup> Ibid, at 234-235 [148] (per Crennan, Bell and Keane JJ).

<sup>67</sup> It was common ground that the loss for which damages were sought was properly understood as a species of economic loss as distinct from damage to its property. The gist of the cause of action was the interest in the common property acquired from the developer was not as valuable as it should have been if there had not been any latent defects.

<sup>68</sup> Ibid, at 229 [132] (per Crennan, Bell and Keane JJ).

<sup>69</sup> Ibid, at 235 [150] (per Crennan, Bell and Keane JJ).

Gageler J

68. His Honour, having considered the reasoning of the majority in both *Bryan v Maloney* and *Woolcock*, held that:
- a. in light of *Woolcock*, the continuing authority of *Bryan v Maloney* should be confined to the category of case in which:
    - i. the building is a dwelling house; and
    - ii. the subsequent owner can be shown by evidence to fall within a class of persons incapable of protecting themselves from the consequences of the builder's failure to take reasonable care (i.e. can be shown by evidence to be vulnerable in the relevant sense);
  - b. outside of that category of case, it should now be accepted that a builder has no duty to exercise reasonable care to avoid a subsequent owner incurring pure economic loss (in the form of incurring the cost of repairing latent defects, because "*by virtue of the freedom they have to choose the price and non-price terms on which they are prepared to contract to purchase, there is no reason to consider that subsequent owners cannot ordinarily be expected to be able to protect themselves against incurring economic loss of that nature*".<sup>70</sup>
69. Unlike the approach taken by some of the other judges, Gageler J noted that it is well recognised that a common law duty to avoid pure economic loss can coexist with a duty in contract and, that being so, "*legal taxonomy alone cannot assign such common law liability as a builder may have to a subsequent owner of a building to the province of contract to the exclusion of the province of tort*".<sup>71</sup>

Summary

70. Notwithstanding the somewhat divergent viewpoints of the four separate judgments, in the opinion of the authors the common thread through all four judgments is that:
- a. whether a subsequent purchaser is vulnerable in the relevant sense is central to determining whether builder owes a duty to take reasonable care to avoid pure economic loss to subsequent purchasers; and
  - b. vulnerability in the relevant sense is unlikely to exist where the contract between the builder and the original owner contained detailed provisions in respect of the builder's obligations as to the quality of design and construction and the contract of sale between the original owner and

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<sup>70</sup> Ibid, at 245 [185] (per Gageler J).

<sup>71</sup> Ibid, at 241 [175] (per Gageler J).

subsequent purchasers contained provisions dealing with rectification of defects.

### **Duty of care under the DBP Act**

71. In a significant departure from the common law position sketched out above, the DBP Act imposes a statutory duty of care to avoid pure economic loss caused by inadequate design and / or defective works.

#### *Statutory Duty of Care*

72. Section 37(1) of the DBP Act stipulates that a person who carries out construction work has a duty to exercise reasonable care to avoid economic loss caused by defects arising from the construction work.
73. The term 'construction work' is defined broadly by section 36 of the DBP Act to include:
- a. building work;<sup>72</sup>
  - b. the preparation of regulated designs and other designs for building work;
  - c. the manufacture or supply of a building product used for building work; and
  - d. supervising, coordinating, project managing or otherwise having substantive control over the carrying out of any work referred to above.
74. It follows that that a statutory duty of care will apply to a wide range of practitioners in the building and construction industry. Further, the statutory duty of care is a non-delegable duty.<sup>73</sup>
75. Pursuant to section 37(2) of the DBP Act, the duty of care is owed to each owner and subsequent owner of the land in relation to which construction work is carried out. The term 'owner' is defined by section 36 to mean:
- a. every person who jointly or severally or at law or in equity is entitled to the land for an estate of freehold;
  - b. for a lot within a strata scheme, the owner of a lot within the meaning of the *Strata Schemes Management Act 2015* (NSW);
  - c. for a development lot or neighbourhood lot within a community scheme, the proprietor in relation to the lot within the meaning of the *Community Land Management Act 1989* (NSW);

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<sup>72</sup> While 'building work' is a defined term under DBP Act, it is not defined exhaustively; section 36 states that 'building work includes residential building work within the meaning of the *Home Building Act 1989* (NSW).

<sup>73</sup> DPB Act, s 39.

- d. every person who jointly or severally or at law or in equity is entitled to receive, or receives, or if the land were let to a tenant would receive, the rents and profits of the land, whether as beneficial owner, trustee, mortgagee in possession or otherwise;
  - e. other persons prescribed by the regulations for the purposes of this definition; and
  - f. for land subject to a strata scheme, the owner includes the owners corporation.
76. Section 37(3) of the DBP Act provides that a person to whom the statutory duty of care is owed is entitled damages for the breach of duty as if the duty was established by common law.
77. The above provisions make it clear that the DBP Act represents a thoroughgoing statutory response to the development of the common law since *Perre v Apand* on the duty of care for pure economic loss in the case of building defects, particularly the decisions of *Woolcock* and *Brookfield*.
78. Under the DBP Act, an owner who suffers pure economic loss due to latent defects has a cause of action in negligence against the builder (or any other person carried out construction work) without having to prove that they were vulnerable in the relevant sense, which has hitherto proven to be a difficult hurdle to overcome.
79. To that end the enactment of the DBP Act is likely the further the stated policy objective of the legislation of “*improving the redress available to consumers for building defects*”.<sup>74</sup> The DBP Act is also likely to lead to greater liability (and more litigation) in respect of building defects.

#### *Relationship between the statutory duty of care and contractual obligations*

80. As discussed above, since *Bryan v Maloney* there has been a distinct trend in the High Court’s jurisprudence emphasizing the primacy of contract law in respect of protection against pure economic loss caused by disappointed expectations under a contract.
81. That trend was epitomised by the joint judgment of Crennan, Bell and Keane JJ in *Brookfield*, where the plurality noted that the common law has not developed with a view to altering the allocation of economic risks between the parties to a contract by supplementing or supplanting the terms of the contract by duties imposed by the law of tort.<sup>75</sup>
82. The approach taken by the legislature in enacting the DBP Act represents a departure from that trend.

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<sup>74</sup> Second Reading Speech, Legislative Assembly, 23 October 2019.

<sup>75</sup> *Ibid*, at 229 [132] (per Crennan, Bell and Keane JJ).

83. The DBP Act expressly provides that:
- a. Part 4 applies notwithstanding any contracts or stipulations to the contrary entered into after the commencement of Part 4;<sup>76</sup> and
  - b. no contract entered into after the commencement of Part 4 will operate to annul, vary or exclude Part 4.<sup>77</sup>
84. Whilst it remains to be seen how section 40 of the DBP Act is interpreted by the Courts, the language of the prohibition against contracting is arguably sufficiently broad to capture limitation of liability provisions.

#### *Retrospective operation*

85. The changes introduced by Part 4 of the DBP Act are also significant because the statutory duty of care applies retrospectively to work carried out prior to the commencement of Part 4, which occurred on 10 June 2020.
86. Claims may be made by reference to section 37 of the DBP Act if the economic loss caused by the breach of the statutory duty:
- a. first became apparent within 10 years before the commencement of Part 4; or
  - b. first becomes apparent on or after the commencement of Part 4.<sup>78</sup>
87. For the purpose of determining whether the statutory duty applies retrospectively, a loss becomes apparent when an owner who is entitled to benefit from the statutory duty first becomes aware, or ought reasonably to have become aware, of the loss.<sup>79</sup>
88. The retrospective operation of the statutory duty of care applies even if the proceedings had already been commenced prior to commencement of Part 4. In those circumstances, it will be open to a plaintiff to amend its pleadings to bring a cause of action for the breach of the statutory duty, subject to the court's power to refuse to do so on the basis that to do so would not be in the interests of justice.<sup>80</sup>

#### *Loss suffered by owners corporation*

89. Under the DPB Act, an owns corporation is taken to have suffered economic loss if it bears the cost of rectifying defects (including damage caused by defects) that the subject of a breach of the statutory duty of care.<sup>81</sup>

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<sup>76</sup> DBP Act, s 40(1).

<sup>77</sup> DBP Act, s 40(2).

<sup>78</sup> DBP Act, Sch 1, s 5(1), (2).

<sup>79</sup> DBP Act, Sch 1, s 5(5)

<sup>80</sup> DBP Act, Sch 1, s 5(3); see also s 64 and s 65 of the *Civil Procedure Act 2005* (NSW).

<sup>81</sup> DBP Act, s 38(1).

90. It appears that this provision is intended to do away with the concerns expressed by Crennan, Bell and Keane JJ in *Brookfield* (discussed in paragraph 67 above) that an owners corporation does not suffer any loss due to the fact that it acquires the common property without any outlay.

#### *Relationship with other legislation*

91. The DPB Act expressly provides that the provisions of Part 4 are in addition to the duties, statutory warranties or other obligations imposed under the *Home Building Act 1989* (NSW), any other legislation and at common law.<sup>82</sup> It follows that the enactment of the DPB Act will not affect any cause of action available therein.
92. The DPB Act also provides that Part 4 is subject to the *Civil Liability Act 2002* (NSW).<sup>83</sup> Importantly, this means the proportionate liability regime applies in respect of a claim for a breach of the statutory duty of care under the DBP Act.
93. Further, section 41 of the DBP Act provides that the limitation periods under the *Limitation Act 1969* (NSW) and the *Environmental Planning and Assessment Act 1979* (NSW) apply to cause of action for breach of the statutory duty.

## **REGISTRATION, DISCIPLINARY ACTIONS, INVESTIGATIONS AND ENFORCEMENT**

### ***Registration***

94. Part 5 of the DBP Act deals with the registration of practitioners, and in effect requires all design practitioners and principal design practitioners to be registered.
95. The legislation gives the Secretary of the Department of Customer Service broad powers to set up an application process for registration (including the power to require the applicant or a 'close associate'<sup>84</sup> of the applicant to provide information or records in connection with an application).<sup>85</sup> Further, the legislation contemplates that the regulations will make provisions with respect to the requirements of registration.<sup>86</sup>
96. Importantly, the DBP Act provides that the registration must be refused if (amongst other things) the Secretary is of the opinion that:
- a. the applicant does not have the qualifications, skills, knowledge and experience to carry out the work for which the applicant is seeking registration; or

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<sup>82</sup> DBP Act, s 41(1).

<sup>83</sup> DBP Act, s 41(3).

<sup>84</sup> 'Close associate' has the same meaning as in the *Home Building Act 1989* (i.e. a 'close associate' includes a business partner, employee, agent etc).

<sup>85</sup> DBP Act, ss 43, 44.

<sup>86</sup> DBP Act, s 47.

- b. the person (including, if the person is a body corporate, a director of a body corporate) is not a suitable person to carry out the work for which the applicant is seeking registration.<sup>87</sup>
97. The Secretary may form an opinion that a person does not satisfy the 'suitable person' test if one or more of the following circumstances exist:
- a. the person (including, if the person is a body corporate, a director of the body corporate) has contravened the DBP Act or any other legal requirement that applies to the work for which registration is sought;
  - b. an equivalent authorisation of the person has been suspended or cancelled (other than at the person's request) under the law of another Australian jurisdiction;
  - c. the person is disqualified (other than on the grounds of not residing in that jurisdiction or on the grounds that the person is a body corporate) from holding an equivalent authorisation under the law of another Australian jurisdiction;
  - d. a close associate of the person who would not be a fit and proper person to be registered exercises a significant influence over the person or the operation and management of the person's business; or
  - e. any other circumstance prescribed by the regulations.<sup>88</sup>
98. The Secretary is given broad power to make registrations subject to conditions and to vary, suspend or cancel registrations.<sup>89</sup>
99. A person aggrieved by the Secretary's decision with respect registration has the ability to apply to NCAT for judicial review of the Secretary's decision.<sup>90</sup>
100. Division 4 of Part 5 of the Act enacts a number of offences in connection with registration. In particular, it is an offence to:
- a. contravene a condition of the registration;<sup>91</sup> or
  - b. to make false representations regarding their registration.<sup>92</sup>

### ***Disciplinary action against practitioners***

101. Part 6 of the DBP Act deals with disciplinary action against practitioners.

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<sup>87</sup> DBP Act, s 45(3).

<sup>88</sup> DBP Act, s 46.

<sup>89</sup> DBP Act, ss 50 and 52.

<sup>90</sup> DBP Act, s 63.

<sup>91</sup> DBP Act, s 56.

<sup>92</sup> DBP Act, s 58.

102. Under the legislation, disciplinary action may be taken against a practitioner on one or more of the following grounds:
- a. in connection with the preparation of regulated designs or carrying out building work, professional engineering work or specialist work, or the provision of compliance declarations (**Regulated Activities**), the practitioner has engaged in conduct that has fallen short of the standard of competence, diligence and integrity that a member of the public is entitled to expect of a reasonably competent practitioner;
  - b. the practitioner has contravened the DBP Act or the regulations;
  - c. the practitioner has contravened a law of NSW or another Australian jurisdiction with respect to any of the following—
    - i. the carrying out of Regulated Activities;
    - ii. the provision of a compliance declaration;
    - iii. registration or an equivalent authorisation;
    - iv. fraud or dishonesty;
  - d. the practitioner has failed to comply with a statutory or other duty, or a contractual obligation, imposed on the practitioner by a law of NSW or another Australian jurisdiction with respect to the carrying out of Regulated Activities;
  - e. the practitioner has failed to comply with a condition of their registration;
  - f. the practitioner has wilfully disregarded matters to which the practitioner is required to have regard to when carrying out Regulated Activities;
  - g. the practitioner has failed to comply with an written undertaking given to the Secretary as to the manner in which the practitioner will carry out Regulated Activities; and
  - h. any other grounds prescribed by the regulations.
103. The Secretary has the power to:
- a. issue show cause notices to registered practitioners;<sup>93</sup> and
  - b. caution or reprimand the practitioner, impose a penalty, suspend or cancel the practitioners registration or to disqualify the practitioner temporarily or

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<sup>93</sup> DBP Act, s 65.



permanently from registration, if the Secretary is satisfied that a ground for taking disciplinary action has been established.<sup>94</sup>

104. A person aggrieved by the Secretary's decision to take disciplinary action has the ability to apply to NCAT for administrative review of the Secretary's decision.<sup>95</sup>
105. Importantly, the DBP imposes an obligation on the directors of a body corporate to report to the Secretary any conduct by:

- a. the body corporate; or
- b. a registered individual on behalf of a body corporate,

if the direct suspects, or should reasonably suspect, that the conduct is a ground for taking disciplinary action.<sup>96</sup> Any failure by a director to do so constitutes an offence under the DBP Act.<sup>97</sup>

### ***Investigations***

106. The DBP Act gives the Secretary for the Department of Customer Service the power to appoint authorised officers to investigate, monitor and enforce compliance with the requirements of the DBP Act.<sup>98</sup>

107. The authorised officers have a range of information gathering powers, including the power to:

- a. give a notice directing a person to furnish information or records;<sup>99</sup>
- b. direct a person, whom the authorised officer suspects on reasonable grounds to have knowledge of matters with respect to which information is reasonably required, to attend at a specific place and time to answer questions;<sup>100</sup>
- c. enter any premises during office hours to, amongst other things:
  - i. examine and inspect any records;
  - ii. seize something that the authorised officer has reasonable grounds for believing is connected with an offence in contravention of the DBP Act or the regulation; and
  - iii. open up, cut open or demolish a building or structure (or part thereof) if the authorised officer has reasonable grounds for

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<sup>94</sup> DBP Act, s 66.

<sup>95</sup> DBP Act, s 68.

<sup>96</sup> DBP Act, s 67.

<sup>97</sup> DBP Act, s 67.

<sup>98</sup> DBP Act, s 73.

<sup>99</sup> DBP Act, s 77.

<sup>100</sup> DBP Act, s 78.

believing that it is necessary to do so because it is connected with an offence in contravention of the DBP Act or the regulation;<sup>101</sup> and

- d. apply for a search warrant to enter into residential premises.<sup>102</sup>

### ***Enforcement***

- 108. The Secretary for the Department of Customer Service is responsible for the enforcement of the DBP Act. The enforcement powers of the Secretary can be found in Part 8 of the statute.
- 109. The Secretary's enforcement powers include, the power to:
  - a. accept an undertaking from a registered practitioner as to the manner in which the practitioner will prepare regulated designs, carry out building work, professional engineering work or specialist work, provide compliance declarations or conduct the practitioner's business;<sup>103</sup>
  - b. issue a stop work order if the Secretary is of the view that:
    - i. the work is, or likely to be, in contravention of the DBP Act; and
    - ii. the contravention could result in significant harm or loss to the public, the occupiers or potential occupiers of the building or significant damage to property;<sup>104</sup>
  - c. commence proceedings in the Land and Environment Court seeking an order to remedy or restrain a contravention of the DBP Act;<sup>105</sup>
  - d. investigate practitioner and former practitioners, the preparation of regulated designs, the carrying out of building work or provisions of compliance declarations or any other matters that may constitute a breach of the DBP Act;<sup>106</sup> and
  - e. conduct an audit of a registered practitioner.<sup>107</sup>

### ***Personal responsibility of directors***

- 110. Significantly, if a body corporate contrives a provision of the DBP Act or the regulations, then:

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<sup>101</sup> DBP Act, ss 80 and 84.

<sup>102</sup> DBP Act, ss 81 and 82.

<sup>103</sup> DBP Act, s 88.

<sup>104</sup> DBP Act, s 89. Please note, a person who is given a stop work order may, within 30 days of the service of the notice of the order, lodge appeal against the order in the Land and Environment Court.

<sup>105</sup> DBP Act, s 91.

<sup>106</sup> DBP Act, 92(1).

<sup>107</sup> DBP Act, 92(4).

- a. each person who is a director of the body corporate; or
  - b. each person who is concerned in the management of the body corporate,
- is taken to have contravened the same provision of the DPB Act, if the person knowingly authorised or permitted the contravention.<sup>108</sup>

## CONCLUSION

- 111. The DBP Act is a comprehensive response by the NSW Legislature to the problems of defects in building works arising from inadequate design and construction error.
- 112. The regime established by the DBP Act requires the registration of design practitioners and building practitioners, compliance declarations for design services and building works, and that insurance be held by design and building practitioners. Specific provisions have also been enacted covering engineering and specialist work. The DBP Act also establishes process for investigation and disciplinary action, as well as a code of offences and remedies in respect of the matters covered by the legislation.
- 113. Perhaps most importantly, it prescribes a statutory duty of care for construction work which provides an additional cause of action to owners who have suffered economic loss as a consequence of defects within building works. Furthermore, this statutory duty of care is retrospective and covers economic loss that first became apparent within 10 years immediately before the commencement of section 37 on 10 June 2020.

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<sup>108</sup> DBP Act, 95(1).