



GREENWAY CHAMBERS

# Part I: Design and Building Practitioners Regulation 2021 (NSW)

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## Overview

- Definition of 'Building Work'
- Deferral of insurance obligations
- Code of Practice
- Paperwork obligations
- Transitional Provisions



### 'Building Work' for regulatory purposes

- For the purposes of s4(1) definition of 'building work', a building is prescribed if the building, or a part of the building, is a class 2 building.
- What's a class 2 building?
- Exceptions?



### 'Building Work' for statutory duty

- For the purpose of s36(1), building work 'includes residential building work within the meaning of the *Home Building Act 1989*'
- In the same provision, 'building' is said to have the same meaning as under the *Environmental Planning & Assessment Act 1979*.
- Section 1.4 of the EPA Act defines 'building' to include part of a building, and also includes any structure or part of a structure (including any temporary structure or part of a temporary structure), but does not include a manufactured home, moveable dwelling or associated structure within the meaning of the Local Government Act 1993.



## Deferral of insurance obligations

### ***106 Insurance for registered practitioners***

*The following sections, including regulations made under those sections, do not apply to a registered practitioner before the end of 30 June 2023–*

- (a) for a registered design practitioner–section 11 of the Act,*
- (b) for a registered principal design practitioner–section 14 of the Act,*
- (c) for a registered building practitioner–section 24 of the Act,*
- (d) for a registered professional engineer–section 33 of the Act.*



## Code of Practice

- Who does it apply to?
- What does it provide?

(Regulation, Schedule 4)



### More paperwork

- More detail as to what needs to be included in compliance declarations given by:
  - design practitioners;
  - principal design practitioners;
  - building practitioners
- Notice requirements
- Template forms will be available on the NSW Government's Planning Portal (but aren't there yet)



### Transitional Provisions

- Regulation comes into effect on 1 July 2021
- But what about work that has already commenced by then?
  - (Regulation, Schedule 6)







## *The Design and Building Practitioners Act 2020 (NSW)*

Pleading a claim under s.37 for breach of the statutory duty of care



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## Section 37 of the *Design Building and Practitioners Act*

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1. A person who carries out construction work has a duty to exercise reasonable care to avoid economic loss caused by defects in or related to a building for which the work is done, and arising from the construction work.
2. The duty of care is owed to each owner of the land in relation to which the construction work is carried out and to each subsequent owner of the land.
3. A person to whom the duty of care is owed is entitled to damages for the breach of the duty as if the duty were a duty established by the common law.
4. The duty of care is owed to an owner whether or not the construction work was carried out under a contract or other arrangement entered into with the owner or another person, or otherwise than under a contract or arrangement.



## The definitions for Part 4 - "construction work"

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The term "construction work" is defined broadly by section 36 to include:

1. building work;
2. the preparation of regulated designs and other designs for building work;
3. the manufacture or supply of a building product used for building work; and
4. supervising, coordinating, project managing or otherwise having substantive control over the carrying out of any work referred to above.



## The definitions for Part 4 – other matters

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Further:

1. “building work” is also defined for the purposes of Part 4 as simply including residential building work within the meaning of the *Home Building Act 1989* (NSW);
2. “building” is defined to have the same meaning as it has in the *Environmental Planning and Assessment Act 1979* (NSW), which is extremely broad (per section 1.4).

Section 36(2) states that, in Part 4, a reference to “building work” applies only to building work relating to a building within the meaning of this Part.

As such, the statutory duty of care may apply to a wide range of contractors, design consultants and service providers in the building and construction industry.



## Sections 38, 39 and 40

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Section 38 states that, without limiting the claim that may be made, an owners corporation or an association suffers economic loss where it bears the cost of rectifying defects and the damage caused by defects, and economic loss includes the reasonable costs of providing alternative accommodation where necessary.

Section 39 provides that the statutory duty of care is a non-delegable.

Section 40 provides that parties may not contract out of Part 4 by agreements made after its commencement, which would include clauses which limit liability or exclude certain claims or loss.



## Section 41

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The provisions of Part 4:

1. are in addition to the duties, statutory warranties or other obligations imposed under the *Home Building Act 1989* (NSW), other legislation and the common law, and do not limit those duties, warranties or obligations;
2. do not limit the damages that might be otherwise recoverable under another Act or at common law because of a breach of a duty of a person who carries out construction work; and
3. are subject to the *Civil Liability Act 2002* (NSW).



## The *Civil Liability Act* – section 5B(1): General Principles

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A person is not negligent in failing to take precautions against a risk of harm unless–

- (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and
- (b) the risk was not insignificant, and
- (c) in the circumstances, a reasonable person in the person's position would have taken those precautions.



## The *Civil Liability Act* – section 5B(2): General Principles

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In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things)–

- (a) the probability that the harm would occur if care were not taken,
- (b) the likely seriousness of the harm,
- (c) the burden of taking precautions to avoid the risk of harm,
- (d) the social utility of the activity that creates the risk of harm.





## The *Civil Liability Act* – section 5C: Other Principles

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In proceedings relating to liability for negligence—

(a) the burden of taking precautions to avoid a risk of harm includes the burden of taking precautions to avoid similar risks of harm for which the person may be responsible,

(b) the fact that a risk of harm could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done,

(c) the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of harm does not of itself give rise to or affect liability in respect of the risk and does not of itself constitute an admission of liability in connection with the risk.



## The *Civil Liability Act* – section 5D: General Principles

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A determination that negligence caused particular harm comprises the following elements–

- (a) that the negligence was a necessary condition of the occurrence of the harm ("**factual causation**"), and
- (b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused ("**scope of liability**").

In respect of the scope of liability, the Court is required to consider whether or not and why responsibility for the harm should be imposed on the negligent party (per s.5D(4)).



## The *Civil Liability Act* – other matters

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Section 5E – onus of proof.

Section 5O – standard of care for professionals

Section 5Q – liability based on a non-delegable duty.



## What must be assessed and asserted

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A claim under s.37 which is made by simply noting that there are defects in works performed and identifying the role played by a builder, constructor, design consultant, certifier or any other person is liable to be struck out.

Part 4, and s.37 in particular, does not establish a regime of strict liability in respect of defects for any person involved in the construction process.

The existence of defects does not establish, *ipso facto*, a breach of the duty to exercise reasonable care under s.37.

Furthermore, the principle or process of *res ipsa loquitur* is most unlikely to be engaged or be of assistance in these claims.



## Carries out construction work

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What did the relevant person do?

Design Consultant

Builder

Specialist Trade Contractor

Person supervising, coordinating, project managing or otherwise having substantive control over the carrying out of the work - Inspector or Certifier, Project Manager, Developer.



## The relevant duty

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The relevant duty is to “exercise reasonable care to avoid economic loss caused by defects”.

How the person was required or supposed to carry out construction work must be articulated to identify the substance of the duty to exercise “reasonable care” (i.e., what the duty required of the person who carried out construction work)

How the person actually did carry out construction work must be articulated to identify the breach(es) of the duty to exercise reasonable care.

Each of these matters must be stated with adequate particulars.



## Causation

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Critically, how the acts or omissions said to constitute a breach of the relevant duty caused the defects and economic loss must be pleaded and particularised by reference to the principles stated in the *Civil Liability Act*, including:

- factual causation (s.5D(1)(a))
- scope of liability (s.5D(1)(b))
- whether or not and why responsibility for harm should be imposed (s.5D(4)).

Relevant authorities as to the requirements for pleading under the *Civil Liability Act*

*Ucak v Avante Developments Pty Ltd* [2007] NSWSC 367 at [35].

*HSD Co Pty Ltd v Masu Financial Management Pty Ltd* [2008] NSWSC 1279 at [14]- [18].



## No strict regime or *ipso facto* reasoning

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A pleading that defects identified in a schedule or report arose by reason of a failure to exercise reasonable care in that the works were not carried out with reasonable care, in a proper and workmanlike manner, or in accordance with the relevant Australian Standards and the BCA may be familiar when dealing with claims for breach of contract, particularly contractual or statutory warranties.

However, for a claim for breach of the statutory duty under section 37, this may be so vague as to be meaningless and liable to be struck out.

Warranties and contract terms are concerned with the quality of the works as completed.

The duty to exercise reasonable care focuses on what was required to be done, what was done (or not done), if or how what was done had some causal connexion to the harm suffered, and whether the person is or should be liable for negligence.





## The requirements of pleading

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A plaintiff, asserting a breach of the statutory duty to exercise reasonable care, must state the substance or scope of the duty, the alleged breach(es), and the loss and damage suffered as a matter of causation. Specifically, the contentions must articulate, with adequate particulars:

1. how or in what respects a person carried out construction work;
2. what was required of the person in carrying out the construction work having regard to the role or functions;
3. how or in what respects did the person fail to do that which it was required to do, or do what it was required to refrain from doing, such that the person failed to exercise reasonable care;
4. how the failure(s) to exercise reasonable care caused each and all of the defects the subject of claim; and
5. the scope of liability of the negligent person included for the harm, defects and economic loss pursuant to s.37(3).



## *Res ipsa loquitur* – the thing speaks for itself

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A principle or process of reasoning concerned with negligence arising from an unknown or unspecified cause.

It is concerned with an accident or incident that simply does not happen in the ordinary course of things if those who have management exercise reasonable and proper care.

It might be argued that defects in construction work simply do not occur in the ordinary course if proper care is exercised.

However, it does not arise where the facts establish specific or immediate causes, such as a failure to exercise reasonable care when performing works or preparing a design.

*Schellenberg v Tunnel Holdings* [2000] HCA 18; (2000) 200 CLR 121.

*Mummery v Irvings Pty Ltd* [1956] HCA 45; (1956) 96 CLR at 116-7.



## Conclusion

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A claim for breach of the statutory duty may be available against various person involved in the construction process. The pleaded claim must state, with proper particulars:

The source of the duty - how or why, in the circumstances of the case, was this duty assumed or imposed (s.37(1) and s.37(4)).

The content of the such duty - in practical, material and particular terms, what did the duty require of the person.

What the person did or did not do.

How the acts or omissions were a breach of the statutory duty.

Factual Causation - how the breach(es) of the statutory duty caused defects and economic loss.

Scope of Liability - why the person should be liable for the harm caused (s.37(3)).

