

Article Information

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Your risk allocation just changed (no matter what your contract provides)

On 10 June 2020 Part 4 of the Design and Building Practitioners Act 2020 (DBP Act) extended exposure to claims for defective design and building work in New South Wales well beyond the terms of the contract under which the work was done. It imposes a new duty of care upon those carrying out “construction work”.

The new duty of care^[1] is a duty to exercise reasonable care to avoid economic loss caused by defects:

1. in or related to a building for which the work is done, and
2. arising from the construction work.

The new duty of care is owed to each owner of land in relation to which the construction work is carried out and to each subsequent owner of the land.

“Economic loss” whilst not defined in the DBP Act, is loss **other than** physical loss, physical loss being: loss arising out of injury to persons (including that resulting in death) and damage to property. The courts have struggled with the issue of whether the law of tort (which includes negligence) provides relief to owners who suffer economic loss due to a building defect, when that relief may not otherwise be available under a contract or statute.

Whilst conceding the possibility of recovery for economic loss in negligence, the courts have progressively constricted it. In doing so they have been vague around the circumstances in which a duty of care to prevent economic loss due to a building defect exists. So much so it became very difficult to predict the outcome of a claim, in tort, for economic loss, a typical example of which is a claim by a subsequent owner against the original owner’s builder, architect, certifier or engineer of various descriptions.

As of 10 June 2020 the fog lifted and the law is now much more certain. *It is now clear that those:*

- designing building work
- constructing building work
- supplying building of products; and
- supervising, co-ordinating, project managing or otherwise having substantive control out of the carrying out of the above;

have a duty to exercise a reasonable care to avoid economic loss caused by defects and are therefore exposed to claims when the duty of care has been breached.

Part 4 of the DBP Act has wide application. “Construction work” is defined very widely 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,
4. supervising, coordinating, project managing or otherwise having substantive control over the carrying out of any

work referred to in paragraph (a), (b) or (c).[\[2\]](#)

The DBP Act makes it clear that owners corporations will have the benefit of the extended duty of care[\[3\]](#).

The new duty of care is retrospective in that it applies to work carried out many years before the commencement of the relevant part of the DBP Act[\[4\]](#). It is also retrospective in respect of defects in respect of which legal process has already been commenced. Indeed it is retrospective to any defect that manifest after 10 June **2010** !! (subject to the usual 6 year limitation period[\[5\]](#) applying). It also does not matter when the agreement to provide the defective services or materials was entered into. Not much is missed!

The duty of care is owed whether or not the construction work was carried out under a contract or other arrangement[\[6\]](#) and, the Act prohibits contracting out of the new statutory duty of care in respect of economic loss, which is a huge blow particularly for design consultants. Limitation periods in design consultancy and service agreement are practically boilerplate, but have now had their teeth removed.

The legal articulation (pleading) of most defects claims in court or tribunal action is likely to be longer, more often. The opening up of defects claims to economic loss will see the duty of claim being pleaded after the claim in contract, the claim for breach of statutory warranties but perhaps before misleading and deceptive and/or unconscionable conduct. You might notice it is not getting any simpler!

[\[1\]](#) Section 37 [DBP Act 2020](#)

[\[2\]](#) Section 36 DBP Act 2020

[\[3\]](#) Section 38 DBP Act 2020

[\[4\]](#) The DBP Act, Schedule 1 Part 2, clause 5

[\[5\]](#) From the date the owner first became aware of the defect.

[\[6\]](#) Section 37(4) DBP Act 2020