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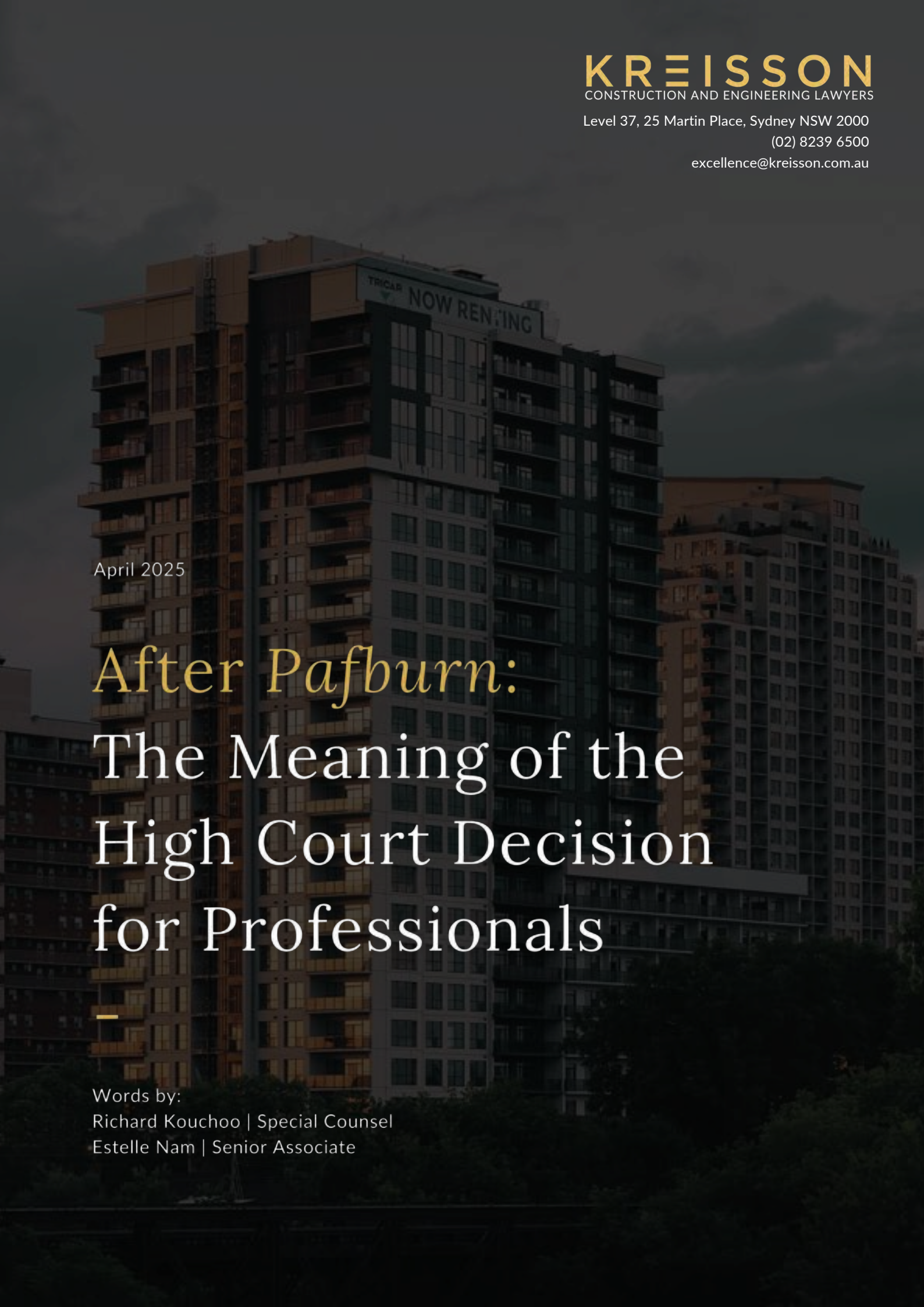

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After *Pafburn*: The Meaning of the High Court Decision for Professionals

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Executive summary

This eBook will briefly look at the impact that the High Court decision in ***Pafburn Pty Limited v The Owners – Strata Plan No 84674*** [2024] HCA 49[2] ("*Pafburn*") will have in relation to construction industry, not only in NSW but Australia-wide[3], particularly in respect of head contractors and very importantly, developers.

We will highlight some of those impacts and we will set the stage for further exploration of the issues, especially as related to the litigation consequences for those involved: the owners and the defendants, the cross-claimants and the cross-defendants (or 'professionals' as we sometimes call developers and contractors), as well others including those financiers and insurers with 'step in' rights, who for example who underwrite construction projects.

The *Pafburn* decision was in fact a decision made with respect to competing public policy considerations. Particularly as related to the issue of 'collective responsibility' which the judges of the High Court raised in both the majority judgment, as well as in the minority opinion.

After *Pafburn*, there now seems to be much uncertainty concerning the High Court's perceived departure from what was before the 'status quo' where apportionment of liability was possible.

Many are also uncertain as to whether the decision and how it was decided, will in fact resolve the purported lack of public confidence problems plaguing the construction industry. There are those who say that the status quo was more 'practical' and should have been left alone. Others beg to differ.

Whatever position one takes, the one thing which is clear is that *Pafburn* has changed the construction industry in Australia forever.

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[2]See the judgment at https://eresources.hcourt.gov.au/showCase/2024/HCA/49, per Gageler CJ, Gleeson, Jagot, Beech-Jones JJ (hereinafter "The Decision"), last visited on 29 January 2025
[3]The case affects the whole of Australia really, especially because it has been handed down by the High Court.

Introduction

Pafburn has finally confirmed the oft-repeated 'wider net' approach which seems to have been cast in NSW in relation to the statutory duty of care scheme affecting the building and construction industry through the *Design and Building Practitioner Act 2020* (NSW) (**DBP Act** or the **DBPA**, as used interchangeably).

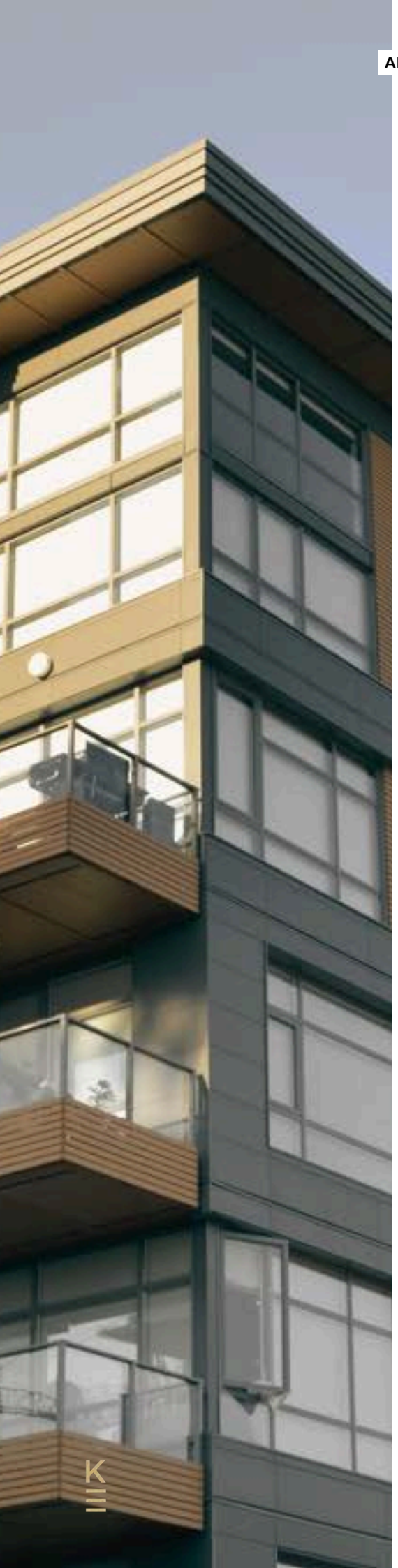
At least at this initial stage of things, the *Pafburn* decision is set to provide a more comprehensive and unified statutory duty of care regime for building work, *at the very least*, in NSW, which duty is owed to both current and future building owners.

Pafburn, on the face of it, seems to be concerned with liability apportionment only (see further below). However, the overall effect of the decision seems to have the consequence that there will be potentially more claimants, bringing claims against builders, developers and other contractors and professionals (including potentially, certifiers)—as well others who are 'deemed' responsible in accordance with the DBP Act, and now *Pafburn*.

In fact, some of the more stringent liability mechanisms enshrined within the DBP Act (and which will likely be strengthened in a newly proposed unified 'Building Bill' scheme) may well mean that those who arranged for or facilitated or otherwise caused, 'whether directly or indirectly', the building work to be carried out[4] may be more easily pursued by owners.

This 'wider net' approach may effectively include the proliferation and the extension of the duty to take reasonable care, to not only the *discrete parts* of the building work, but also effectively, to the various stages of the process, including inspection, subdivision and as alluded to above certification, as well as the building process itself.

[4]E.g. see the proposed section 6 – 'developer' definition -- of the proposed Enforcement Bill 2024, refers to persons who "arranged for, or facilitated or otherwise caused, *whether directly or indirectly*, the building work to be carried out [emphasis added]"



There are also consequences related to the very process of litigating these matters, with differing outcomes, depending on whether owners have added the developers and builders (or the 'head contractors') as defendants or if they have added the sub-contractors.

There are other related consequences that flow from the decision also which are purely economic in nature. Here we will focus exclusively on the issues revolving around the litigation risk these changes pose for professionals post *Pafburn* and we will very briefly analyse the effects of these consequences on professionals.

The case and what the High Court ruled

At this initial stage, we need to set out the essential facts which led to the High Court decision.

Overview of the entire case

Some of our Kreisson colleagues have previously summarised the facts related to the matter in the NSW Court of Appeal, which consequently resulted in the special leave application and the substantive matter being heard in the High Court. Our readers can refer to those publications for more detail.[5]

Briefly, at pre-High Court stage, the NSW Court of Appeal held that the liability owed by the *Pafburn* was to be treated as a form of **vicarious liability** which was by that very fact ***not subject to any limitation on their liability by apportionment*** as between *Pafburn* and concurrent wrongdoers under Pt 4 of the Civil Liability Act [*2002* (NSW) (**CLA**)]" (Basten AJA, at [101][6], emphasis ours) thereby allowing the appeal by the owners corporation.

In the High Court, the case essentially involved the owners' claim against Pafburn (the builder) and Madarina (the developer) which alleged the breach the statutory duty under section 37 of the DBP Act. The pleading was that there was a failure by these defendants ("the Appellants") to exercise reasonable care, resulting ultimately in defects.

[5]See for example, Gretel Wathen & Estelle Nam, "Pafburn: Liability in Construction Defects – the High Court decides – Pafburn Pty Ltd v The Owners – Strata Plan No 84674 [2024] HCA 49", at https://kreisson.com.au/pafburn-pty-limited-v-the-owners-strata-plan-no-84674-2024-hca-49/#:~:text=The%20decision%20was%20split%204,)%20(DBPA)%20(s., last visited 29 January 2025
[6]See headnote re The Owners – Strata Plan No 84674 v Pafburn Pty Ltd [2023] NSWCA 301, at https://www.caselaw.nsw.gov.au/decision/18c5b81daca710a6508c2899, last visited 30 January 2025 ("CA Hearing").

Section 37(1) of the DBP Act states that a person who carries on construction work must take care and avoid economic loss as caused by defects.

Pafburn conceded that it owed this duty but argued that it should not be solely responsible for the same, citing "proportionate liability" as provided for under section 34 of the CLA.

Pafburn argued that other subcontractors, suppliers and manufacturers contributed to the defects.

The Appellants contended that their duty under section 37 of the DBP Act was limited to their specific work, which could be apportioned relative to the contributions which others involved in the work, made.

The Appellants emphasised the contention that the relationship between head contractors and subcontractors differs from that of employers and employees[7], so proportionate liability should apply.

The Appellants also referred to section 39 of the DBP Act, which states that a person owing a duty of care cannot delegate that duty. They argued that this meant each party's responsibility was separate and non-transferable, applying only to the specific part of the work they were responsible for. This reasoning was supported by the minority opinion of the Court, i.e. that each party had a distinct duty of care and could not shift blame to others in relation to ***their*** respective obligations.[8]

[7]E.g. see The Decision, op. cit., at para 17, 50, 95; See argument and transcript of proceeding, Pafburn Pty Limited (ACN 003 485 505) & Anor v The Owners - Strata Plan No 84674 [2024] HCATrans 70 (15 October 2024), at https://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCATrans/2024/70.html (hereinafter "the Argument"), last visited 4 February 2025.
[8]See The Argument, op. cit.

This sounds like a counter-intuitive argument, especially when the Appellants fortified it with the use of section 5Q of the CLA. That section effectively says that the extent of liability of a person such as *Pafburn* (a head contractor or a developer) for the breach of a non-delegable duty of care for work ***delegated*** or otherwise ***entrusted*** to a sub-contractor, is to be determined as if the liability was vicarious liability of the head-contractor and developer for the negligence of the sub-contractor.

This is counter-intuitive because 5Q of the CLA seems to suggest that *Pafburn* was actually vicariously liable. So how could *Pafburn* attempt to use it to its advantage?

The attempt was made by the maintenance of the argument that the 5Q provision would be applicable where a person, in the place of the Appellants, had ***actually opted to continue on carrying out the works even where another (the sub-contractor) was involved in the performance the works***. According to that line of reasoning, in those specific circumstances, the Appellants would still remain persons 'carrying out the works'.[9]

Put another way, the argument was that a sub-contractor effectively becomes a 'current employee' or an 'agent' of the Appellants[10] only if *Pafburn* was ***itself*** involved in the works too – 'somehow' performing some of the work. Only then did section 5Q apply to bring about the vicarious liability issue to the forefront.[11] Hence the Appellants contention was that when there was no work being performed by the developer say, then there could be no vicarious liability.

The Appellants argument really boiled down to two sentences:

> *'If you contract out the work, then you are not vicariously liable. However, if you contract out the work and do some work along with your sub-contractors, then you are vicariously liable'.*

[9]In terms of application, during the course of argument, the Appellants distinguished between Parts 2 and 3 of the DBP Act and the application of the same in respect of persons in specific roles. See The Argument, *op. cit*.
[10]The Argument, *op. cit*.
[11]See The Decision, op. cit., at [48]

This was an interesting way to lay-out the issue, because it would invariably introduce other problems.

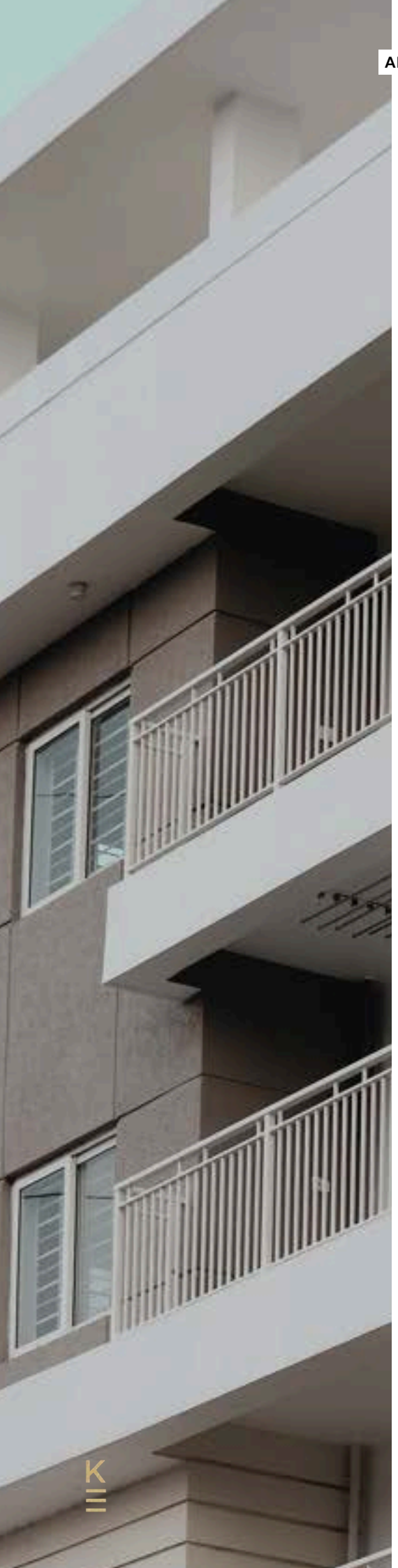
The clear definition of the works as delineated between a sub-contractor and the head-contractor or developer could then become a source of dispute. In other words, not only would disputes not be resolved in these circumstances but they would develop and re-focus on more specific questions concerning the *type* or *kind* of work carried out by different parties, likely complicating any litigation many times over. Questions would relate to the nature of "head contractor's work". For example: was supervision "work"? Was hiring out contractors, work? So on and so forth.

This is why we at Kreisson believe that despite the hypothetical claim (anecdotally made by some lawyers) that the High Court decision will inevitably lead to a proliferation of litigation, the corollary is certainly true: if disputes develop over what the 'work of the head contractor' constitutes and what it actually means, then litigation would certainly proliferate.

The Majority Judgment

Irrespective of all the argumentation, the High Court, effectively following the judgment of the NSW Court of Appeal, found that, to maintain the "unity"[12] of the legislative scheme as between the CLA and the DBPA it was necessarily the case that *Pafburn* could not apportion its liability and could not use proportionate liability as a defence because the duty was not a 'delegable duty' by the operation of section 37 of the DBP Act itself. This was partly because the provision essentially acted to "***fulfil the object of the further 'safeguard' for rights of owners and to [establish] 'individual and collective responsibility***".[13]

[12]Ibid., at [63]
[13]Ibid., at [43]; The 'collective' and non-individual responsibility seems to have been an overriding factor in the majority judgment.



The Court distinguished the case from its earlier decisions, those such as *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288*,[14] in which it had ruled that there was no duty in the specific circumstances of that case to 'subsequent owners'. The distinguishing feature was the very existence of the DBP Act and because the DBP Act (by its section 39) acted not to allow the Appellants to escape their duty under section 37 of the DBP Act.[15]

In essence, the duty under sections 37(1) and 39 of the DBP Act was the very type of non-delegable duty as envisaged under s 5Q of the CLA.[16]

The net effect for the industry is that those in the shoes of the Appellants e.g. head-builders/contractors, developers and others, cannot "exclude or limit their liability by apportioning any part of that liability to any of those persons to whom each, in fact, ***delegated*** or otherwise ***entrusted***[17] any part of the construction work in relation to the Building"[18] and that they, the developers say, are "100% liable"[19] even for "any failure by the local council" or the "principle certifying authority"[20].

In the end, the public policy consideration of a "response to the crisis of confidence in respect of the safety and quality of residential apartment buildings in New South Wales"[21] and the improvement of "the redress [methods] available

[14](2014) 254 CLR 185; e.g. see at 205-206 [38], 206 [42].
[15]The Decision, op. cit., at [51]-[54]
[16]Ibid. at [55]-[56]
[17]This is increasingly becoming an important word in the coming and newly constructed pleadings in respect of these sorts of cases.
[18]The Decision, op. cit., at [57]
[19]Ibid.
[20]Ibid., at [61]
[21]Ibid., at [64]

to consumers for building defects"[22] together and along with the 'collective responsibility (or the 'sharing of the pain' paradigm[23]), seem to have been the deciding factors in respect of the High Court decision.

Indeed, it was ultimately a *public policy* decision and actually, very similar to the minority view as we briefly explain below.

The Minority Opinion

The minority judgment approached the issue from a more practical perspective.

To the minority, the phrase "***a person who carries out construction work***" in the words of section 37, should have been left withing a limited sphere of interpretation and in practical order, should have been construed as per the ordinary meaning that words conveyed: "***a person who [actually] carries out construction work***".

This was because if "***that phrase [was] to be construed as extending beyond the actual carrying out of construction work by a person or their agent, to include strict liability for work carried out by a sub-contractor in breach of s 37, then, [s 37, increased], dramatically, the liability of persons who carry out construction work for defects caused by sub-contractors no matter the care taken by the person in selecting that sub-contractor***[emphasis added]"[24].

Such statutory construction, the minority opined, would be a "dramatic manner"[25] of interpreting the legislation[26], not intended by the legislature.[27] Accordingly, there was no scope for section 5Q of the CLA to have applied to this particular scheme of things, as contemplated by the majority[28] (see above) and there was also support for that notion extraneously – e.g. by the *Ipp Report*[29].

[22]Ibid.
[23]The 'collective' aspect – see the Decision, op. cit., at [64], per Gageler CJ, Gleeson, Jagot, Beech-Jones JJ
[24]The Decision, op. cit., at [68], per Gordon, Edelman, Stewart JJ (hereinafter the **Minority Decision**)
[25]The Minority Decision, op. cit., at [68]
[26]Ibid., at [99]-[102]
[27]Ibid., at [80]
[28]Ibid., at [90]
[29]Commonwealth of Australia, Review of the Law of Negligence: Final Report (2002) at 167-168 [11.9]-[11.16].

Moreover, the Minority calculated that, what seems to have been construed (a least on the face of it as construed by the majority) as a 'prohibition' by section 39 of the DBP Act – to the effect that a person could not delegate the duty of care in s 37 – did not, in fact, "***transform that duty into a common law 'non-delegable duty' to ensure that reasonable care is taken by sub-contractors***"[30].

The reasoning behind this related to the issues as to the limits of the section 39 of the DBP Act. That provision was actually limited in its breadth and its scope, by in effect ensuring that a person (first person) could not avoid responsibility by assigning some discrete parts of the work, for which the first person was *actually* engaged in carrying out, to others.[31] In other words, disavowing liability ought not have been permitted!

In fact, it was the minority's opinion and it seems to have been their view at least as one 'reads between the lines', that there was not a whiff of strict liability encapsulated within the confines of the particular legislative schema in respect of the head contractor. There was no 'guarantee' which emanated from head-contractors, for any defective work by sub-contractors.[32]

The operative words, according to the minority, were work carried out[33], where the duty subsisted in the person who actually "*carried out*" the work, whether that be the head contractor or a sub-contractor.

It would not have been "carries out construction work", but "*agrees to have* construction work *carried out*"[emphasis added].[34] Only then would a contrary construction (i.e. that of the majority) have been more conveniently adopted wherein schema, a "person who agrees to have construction work carried out would [be] liable for a sub-contractor (who is not their agent)".[35]

The implication of the minority opinion was clearly that phrasing was the key to interpretation simply because there was a fundamental difference in "carries out" and "agrees to have carried out".[36]

[30]The Minority Decision, op. cit., at [80]
[31]Ibid., at [81]
[32]Ibid.
[33]Ibid.
[34]Ibid., at [83]
[35]Ibid.
[36]Ibid., at [84]

After *Pafburn*

The *Pafburn* case, as in many other cases, but perhaps in a more pronounced way because of the very nature of the industry it concerns, presents head contractors and developers with some interesting challenges.

In this regard, an important aspect of the minority opinion actually sets out what the situation is now, post *Pafburn* – this is the state in which we find ourselves, a brave new world (some would say a 'dystopian' world)[37]:

> *"It would be an odd result if a head contractor or builder who agreed to procure specialised plumbing, concreting, electricity or woodworking would be personally liable if a carefully chosen specialist independent contractor performed their work carelessly. And it would be even stranger if the head contractor or builder was criminally liable for the reasonably chosen independent contractor. In the basic example where a head builder or developer must rely on independent contractors to perform specialist work, because the head builder or developer is not a 'registered specialist practitioner'"*

Here we examine some of the consequences of this seemingly strange new world, in further detail.

Are commercial construction entities safe?

In NSW, the Supreme Court in various cases – including cases such as *Goodwin Street Developments Pty Ltd atf Jesmond Unit Trust v DSD Builders Pty Ltd (in liq)*[38] – has held that the section 37 statutory duty of care in relation to construction work extends to any 'building'[39] including commercial buildings (under the *Environmental Planning and Assessment Act 1979* (NSW)).[40]

[37]Ibid., at [87]
[38][2022] NSWSC 624
[39]See also *Roberts v Goodwin Street Developments* [2023] NSWCA 5
[40]We point out that in the case of *The Owners – Strata Plan No 84674 v Pafburn Pty Ltd* [2022] NSWSC 659, that the 'owner of land' is to have the requisite duty, even where an owner may not have had effective control over the construction.

The implication is that the *Pafburn* 'methodology' may now also apply to those builders and developers involved in the commercial building space.

This is arguably no longer a case of legislation (the DBP Act) impacting upon residential buildings only – it is no longer a case where only home builders and their sub-contractors are under scrutiny. A whole new class of professionals (natural persons or entities) will be part and parcel of the High Court's overall 'collective responsibility'[41] scheme of things.

Hence a move away by developers and builders from residential construction to commercial-only-construction, to avoid the perceived pitfalls of the 'residential-only' *Pafburn* 'collective responsibility' paradigm, may ultimately be doomed to fail.

[41]The 'collective' and non-individual responsibility seems to have been an overriding factor in the majority judgment. See also the Decision, op. cit., at [64], per Gageler CJ, Gleeson, Jagot, Beech-Jones JJ

Whole or part of the building?

One of the ancillary issues before the Hight Court – at least implicitly – seems to have been whether owners could pursue DBP Act claims against head contractors (the builders) as well as developers.

Of course, as we have already canvassed above, High Court made it clear that the head contractor builder and developer, owed the duty of care required under section. 37 of the DBP Act and that this duty could not be delegated to the sub-contractors or other persons they engaged throughout a building and construction project.

The effect of *Pafburn* is that the developer or the head building contractor who carry out construction work in relation to the whole of the building cannot simply rely on the failure of another person to take reasonable care in carrying out construction work or otherwise perform any function in relation to that work.

It logically follows that if the work was carried out ***on a part*** of the building, then the developer and builder are wholly responsible for ***that part*** of the building as well[42], whether the work involved residential or in fact as we suggest, commercial building projects and so that vein[43].

> *"[The Developer] and [Head-Builder] are 100% liable for any failure to exercise reasonable care to avoid economic loss caused by defects in the Building on the part of wrongdoers who in fact carried out the work or task from which the defects arose."*

We add at this juncture that the developer (whether a natural person or a corporate entity) is responsible to an owner, under the duty of care in Part 4 of the DBP Act, for construction of the whole of the building and for the supervision of the construction of the whole building.

Similarly, the head builder (natural person or a corporate entity) is responsible to the owner, under the duty of care in Part 4 of the DBP Act, for construction of the whole of the building.

[42]The Decision, op. cit., at [51]-[57]
[43]Ibid., at [51]-[57]

In turn – **and this is extremely important** – the head builder (in all cases) ***has been delegated or has been entrusted*** by the developer to construct the whole or part of the building.

Developers' liability

As we have seen, after *Pafburn*, as far as economic loss caused by the breach of the duty of care is concerned, developers and builders are *wholly* responsible for the whole or part of the work, which in turn means that no defence pleading the CLA and proportionate liability will avail itself to developers or 'alleged developers' or head-contractors.

Natural persons?

Prior to *Pafburn*, the courts (the NSW Supreme Court in particular) had ruled that individual directors of builders could be added as defendants. For example, in *Boulus Constructions Pty Ltd v Warrumbungle Shire Council*[44], the Council argued that Boulos, the managing director of the builder company ***"had the power and ability to and did substantively control all of the building works comprising the entire project, such control including the appointment and control of the project delivery staff working for [the Builder,] the supervision of the adequacy of the works performed by such project delivery staff, the selection and appointment of subcontractors to perform elements of the Works for which [the Builder] was ultimately responsible, and the overall supervision and acceptance of the works performed by [the Builder's] employees and subcontractors, for the ultimate benefit of [the Council]. Further, as the managing director of [the Builder], [Mr Boulus] had the ultimate ability to control how the Works performed by [the Builder] were carried out."*** [45]

Hence the NSW Supreme Court held that the term 'person' as used in section 37 of the DBP Act had a wide-ranging meaning and it granted the respondent leave to amend its pleadings so as to join the managing director of the building company to the proceedings in their personal capacity.[46]

[44][2022] NSWSC 1368
[45]Ibid., at [27]
[46]Ibid., at [61]

However, *Pafburn* seems to have – at least on the face of it intentionally or otherwise – well and truly extended that to the sphere of individual builders as well as developers.

The developer, for example, may now and under *Pafburn*, be 'vicariously liable' and the head builder may need to consider bringing 'cross claims' against those other parties including surprisingly the developer itself, in certain cases where the builder has at its disposal tools such as Exclusion Clauses (see further below). As the High Court said in *Pafburn*[47]:

> *"In reaching these conclusions it is also relevant to recognise that: (a) if the owners corporation fails to establish the alleged breaches by Madarina [as the developer] and Pafburn, Madarina and Pafburn will not be found liable at all for the claimed loss; (b) if the owners corporation establishes such alleged breaches but fails to establish that those breaches caused the whole of the claimed economic loss, Madarina and Pafburn will be found liable only to the extent that their breaches caused the loss; and (c) to the extent that Madarina and Pafburn are found liable to the owners corporation, ss 37(1) and 39 of the DBPA do not prevent them from cross-claiming against other persons who they allege breached any applicable duty of care owed to them."*

Again, the notion that vicarious liability has now effectively been confirmed within the DBP Act schema means that that duty can no longer be delegated and is deemed a "non-delegable" duty.

Neither can it be 'contracted out of' by the parties (see above, section 40 of the DBP Act). The duty subsists with the developer and the head building contractor, even where those parties take good care in arranging for other sub-contractors to carry out any discrete part of the work within the building project.

[47]The Decision, op. cit., at [65]

Cross claims and pleadings

We have already touched on the issue of 'cross claims' which may need to be brought by builders and developers in these cases now (see the High Court's reckoning on this, above[48]).

Here we will quickly deal with some of the complications that have now arisen resulting from the decision.

On the face of it, owners' lawyers might perceive these 'tumultuous' developments to be a welcome change of the *status quo* in relation to the costs of litigation. After all, they may reason that because multiple parties may not need to be added to a set of proceedings by the owners, bringing these claims may now not be so cost-prohibitive and it may seem at first glance that it follows that the rights of residential owners at least, may be easier to uphold.[49]

Moreover, it may seem as though that because 'supervisors' (such as developers) are now squarely *in hamo* then it may be that proceedings can be easily commenced and the rest can be left up to those 'fully responsible' to cross claim as they will, because as clarified by the High Court (see above)[50], a developer for example, can actually bring cases against individual sub-contractors later if it deems that to be the most cost-effective course of action.

However, commencing and continuing 'duty of care' cases remains a not-so-insignificant prospect in terms of success because, except as to ensure that developers are not immune and they too, are wholly responsible,[51] *Pafburn* has done little to alleviate the complexity and intricacy involved in proving these breach of the duty of care cases and a brief overview of some pertinent cases in the Supreme Court of NSW (which is the most active jurisdiction in this respect, obviously because of the introduction of the DBP Act in NSW) will be informative.

[48]Ibid., at [65]
[49]At least within the NSW jurisdiction, because of the government's foreshadowed 'building legislation changes,' it remains to be seen whether the government will amend the draft bills (e.g., the 'Building Bill') in light of the *Pafburn* ruling.
[50]The Decision, op. cit., at [65]
[51]Ibid., at [65]

In *The Owners - Strata Plan No 87060 v Loulach Developments Pty Ltd* (No 2) [2021] NSWSC 106[52] the Supreme Court held that the "***DBP Act was not intended to provide a shortcut as to the manner by which a breach of such duty might be established***".

In other words, owners generally will still need to prove their cases to the requisite standard. This is neither a trivial nor a simple matter as the requisite proof in relation to DBP Act duty of care cases has proven to be notoriously difficult.

The Supreme Court in NSW has held to this – high – standard again and again.[53] This is especially challenging because in early stages of the dispute, owners do not have all the information they need in order to produce a well-articulated points of claim document (on a 'list statement").

This is because owners are rarely involved in the construction project from the beginning and are unable to express, in well particularised form, the proper duties of the responsible parties and the standard of care that the responsible parties were obligated to meet and how the responsible parties failed to meet the standard of care, where the Court has at times demanded ***precise particularisation*** or the particularisation of the ***specific*** risks that the responsible party ought to have foreseen and the ***precise*** act or omission which constituted the failure to manage the risk, leading ultimately to the defect.[54]

However, and again, depending on the developing case law, this may at later stages become a secondary consideration, given that a head contractor can no longer apportion its liability under section 37 of the DBP Act with sub-contractors.

[52]Per Stevenson J, at [35-36]
[53]E.g. see *The University of Sydney v Multiplex Constructions Pty Ltd* (No 2) [2023] NSWSC 1019
[54]*Oxford (NSW) Pty Ltd v KR Properties Global Pty Ltd trading as AK Properties Group ABN 62 971 068 965* [2023] NSWSC 343, at [340]; *The Owners – Strata Plan No 87060 v Loulach Developments Pty Ltd (No 2)* [2021] NSWSC 1068, at [42]-[43]

Summation: possible unforeseen results

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What we have set out in the above section, is made even more complicated after *Pafburn*, because as already canvassed above, various iterations of cross claims are possible.

For example, in relation to the developer, the head builder and the subcontractors, the High Court decision holds that these parties can sue each other for contribution in relation to their respective liabilities to the owners for breaches of Part 4 of the DBP Act. In these circumstances the developer will likely seek to recover from a combination of the head builder and subcontractors the entirety of the damages due to the owners. Similarly, the head builder will likely seek to recoup its losses from its various subcontractors in respect of the economic loss due to the owners.

If the owners have already added the developer, the head builder as well as the subcontractors as defendants to the proceedings, a complication may arise where, **section 36** of the CLA (which we will not canvass here – suffice it to say that it is an exclusion of contribution) may well act as a bar, preventing the developer and the head contractor from being able to seek (or actually obtain) a contribution from sub-contractors, resulting from a judgment against them.

The corollary may well be that the effect can work exactly in reverse, with those same sub-contractors being prevented from seeking or obtaining a contribution from the developer and the head builder.

This, what seems to be an unforeseen consequence, follows if the owners succeed in obtaining judgments against each of the parties added as defendants.

However, the situation may be different if express contractual provisions as between the head contractor, the developer and other sub-contractors, provide for an exclusion of section 36 applicability (**Exclusion Clauses**, see above) with the aid of the carve-out under section 3A of the CLA.[55] In those circumstances where one or more of the parties have the benefit of explicit contractual provisions, they may be able to, in a way, circumvent the effect of *Pafburn* by 'apportioning' their liability using another aspect of the CLA (section 36).

All this may well leave owners (or other parties involved in the litigation) in a difficult position, if for example, the developer and the head-builder as well as other sub-contractors are sued in cases where at least some of the parties might have the ability to limit their liability through Exclusion Clauses, those who do not have the benefit of such clauses, may not have the liquidity to meet judgments made against them.

[55]It needs to be noted that sections 3A(2) and 3A(3) of the CLA provide that section 36 related part of the CLA cannot preclude the parties to a contract from agreeing upon provisions which can affect their rights, obligations and liabilities under contract in relation to the CLA, for example provisions in a contract may exclude the operation of section 36 of the CLA allowing the parties to seek contributions after from co-defendants after judgment is handed down against them all in favour of the owners.

Or where cross claims become protracted especially where these cross-claims are instituted separately to the main proceedings brought by the owners or after the conclusion of the main proceedings brought by owners.

Various permutations of such ‘consequences’ are possible and may be worked out in different scenarios and in the circumstances of each case.

Both the owners and contractors, as well as developers, need to navigate this very complicated and what is a substantially new terrain, very carefully, as it may well reveal a landmine.

Conclusion: 'an ounce of prevention is worth a pound of cure'

–

Pafburn at least attempts to bring home the now very tangible idea that 'prevention is key'.

It needs to be remembered that the *Pafburn* outlook – its theory – which is *after Pafburn* put squarely into practice – is that the head contractors and developers may need to be in a position to effectively 'guarantee' the works.

An important consequence of this is that this 'guarantee' could potentially pass on, for example, to the financiers of the works: to the lenders or to the insurers who are involved, especially where a company acting as a developer or a head contractor, is under financial stress or unable to complete the works and where the lender needs to "step in" to complete the works. It may very well be that those with 'step in' rights, may in actuality, from now on find themselves in the line of fire and become liable to owners for defects, entangled in litigation.

These are grave implications indeed and for the whole industry. Grave for those involved at every phase and stage of construction. From the time the supplier of manufactured or 'prefabricated' products supplies those products, to the time the project is complete some ten years after completion ('the long stop'[56]).

In this context, we hope that the reader can appreciate our earlier reference to the 'economic implications of the High Court decision' which discussion will require a whole eBook all its own.

[56]See section 6.20 of the *Environmental Planning and Assessment Act 1979* (NSW). Usually commencing with the date of the issuance of the first occupation certificate or at the completion time, the "long-stop" is generally a ten-year period which forms a limitation time-frame within which claims can be brought against builders or others.

In any event, one needs to remember that the gravity of these changes can be controlled and some will no doubt argue that *Pafburn* is in fact very beneficial over the long haul.

In support of that position, a simple example will suffice for now: instead of awarding contracts to the lowest bidder, who will, if we may put it quite frankly and colloquially, 'do a shoddy job', why not use quality contractors and ensure that they are well supervised?

In this way the actual long-term benefits to contractors which will inevitably follow, will far outweigh any short-term economic gains and long-term risks.

All of this echoes the majority's 'collective responsibility'[57] paradigm which is set to reverberate and revolutionise the construction industry, again from the manufacturing stage through to the end of the construction life cycle: at the long stop.

Confronting the realities of *Pafburn* will be a painful process for many, but in the course of that process, these realities may actually prove true the old maxim '*if you want to do something, do it right the first time'*.

[57]The 'collective' and non-individual responsibility seems to have been an overriding factor in the majority judgment. See also the Decision, op. cit., at [64]

Moving forward

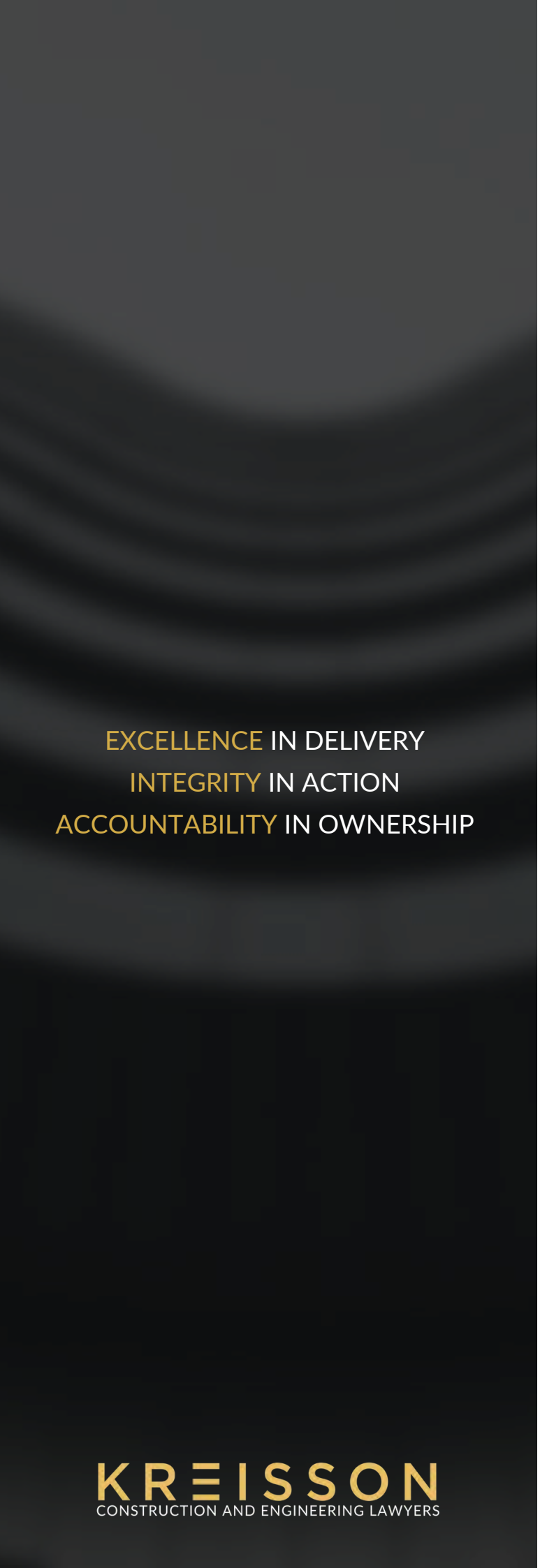
The experts at Kreisson are able to help you with cost-effective advice in relation to *Pafburn* and all the accumulating changes in the industry.

Please contact us for an obligation free consultation.

Finally, we will likely return with the second edition of this eBook as and when required to keep you up-to-date with the further developments in the *Pafburn* saga.

For further publications by Kreisson on building reforms please see:

- Understanding the proposed ”Building Bill” reforms and their potential impact.”, October 2023
- Building Bill” reforms and their potential impact.”; second edition, September 2024
- *Pafburn:* Liability in Construction Defects — the High Courtdecides — *Pafburn* Pty Ltd v The Owners — Strata Plan No 84674[2024] HCA 49
- Update on the *Pafburn* Saga — from the High Court — *Pafburn* & Madarina v The Owners SP 84674
- A Builder’s Guide to the Design and Building Practitioners Act and Regulation — Part 4 — Insurance
- A Builder’s Guide to the Design and Building Practitioners Act and Regulation — Part 3 — ‘Reasonable Excuse’ And Emergency Remedial Building Work
- Expert Evidence and the Design and Building Practitioners Act
- A Builder’s Guide to the Design and Building Practitioners Act and Regulation — Part 2 — Regulated Designs and Compliance Declarations
- A Builder’s Guide to the Design and Building Practitioners Act and Regulation — Part 1 — Introduction to the Legislation, ‘Building Works’ and Registration



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