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UPDATE:

Understanding the Building Bill Reforms, Strata Law Changes & *Pafburn's* Impact

A Guide for Strata Professionals, Owners,
Builders, Developers and other Contractors

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Introduction

In some previous publications² Kreisson explored what seemed at the time to be the impending release and enactment of the then ‘Building Bill’ from the point of view of the builders and developers.

In this publication we look at the changes, not only from a ‘**Building Bill**’³ (**Building Changes**) perspective, but also at the strata reforms, as well as assessing the implications of the important case *Pafburn*,⁴ taking a different point of view in relation to the changing construction and building law landscape (we refer to this guide as the **Building & Strata Guide** or simply **Guide**) catering for Owners as well as Professionals.⁵

In our earlier publications (**Previous Guides**) *we had a close look at* some of the key reforms to the impending building laws as were then proposed by the NSW Government.

We explained at the time that if passed, these reforms would affect the face of residential construction in this state.

In the interim and whilst the ‘Building Bill’ reforms (or simply **Building Law Changes**) are, as at the time of this writing, still pending, the NSW government has taken the initiative to also introduce further changes to strata laws, including changes to *Strata Scheme Management Act 2015 (SSMA)*⁶, introduced on 20 November 2024, which encompass provisions such as disclosure obligations of strata managers and developer accountability.

¹ For those interested in a more detailed overview of the changes outline herein and their consequences, we recommend that this Guide be supplemented with the Kreisson paper “*The Pafburn Controversy*”, due to be released in 2025, (as yet unpublished; release date to be announced imminently).

² Kreisson Legal “Understanding the proposed ‘Building Bill’ reforms and their potential impact.”, October 2023, at <https://kreisson.com.au/insights/?cat=ebooks>; second edition, September 2024, at <https://kreisson.com.au/insights/?cat=ebooks>; see also David Glinatsis, “NSW Government Consultation on Major Building Law Reforms proposed for NSW” 14 November 2022, at <https://kreisson.com.au/nsw-government-consultation-on-major-building-law-reforms-proposed-for-nsw/> (hereinafter *Previous Guides*).

³ In this publication we will refer to the suite of changes foreshadowed by the NSW government as ‘the Building Bill.’

⁴ *Pafburn Pty Limited v The Owners – Strata Plan No. 84674* [2024] HCA 49.

⁵ The term “Owners” in this publication refers primarily to owners and owners corporations but also includes related entities such as strata companies and managers. The terms “Professionals” essentially refers to builders, contractors as well as developers and is further refined inside the document.

⁶ See Strata Schemes Amendment Bill 2024, see generally <https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=18688>, last visited 13 January 2025.

There are also new laws related to matters such as conflict of interest and reporting and compliance requirements of strata managers introduced in the *Strata Managing Agents Legislation Amendment Act 2024*, part of which laws commenced on 8 November of 2024 with the balance of the same to commence on 3 February 2025.

In this Building & Strata Guide we refer to all these changes (enacted or pending) altogether as the **Ancillary Strata Law Changes**.

Although the Ancillary Strata Law Changes are important and some of those changes which relate directly to the topic of discussion will be canvassed, in this publication we mainly focus on the intersection of the *Design and Building Practitioners Act 2020* (**DBP Act**) and the impact it has had through cases such as *Pafbarn*, as well as upon the Building Bill and the above-mentioned and related strata changes. We will review, at a high level, all the major changes that will have an impact on the industry as a whole.

It has been more than a year since the government proposed the new Building Bill changes, with cases such as *Pafbarn* being decided in the meantime and some additional changes being planned or enacted in the strata space. This Building & Strata Guide is designed to help those interested come up to speed with the progress the NSW Government has made in relation to the proposed and complicated changes in the law, including amendments to and consolidation of legislation such as the DBP Act into an overarching set of changes, which are said to regulate (and overhaul) construction and strata in NSW.

Our focus here is on Class 2 buildings — strata buildings — as well as an exploration of the proposed provisions which seek to significantly expand the liability of builders, developers, design practitioners and related entities, as well as other building and construction related professionals (hereinafter, altogether “Professionals”).

In essence the proposed changes will impact significantly upon those who are involved in residential building work, from an “end-to-end” ‘accountability’ view, forming an overall system of control.

As the NSW Department of Customer Service has said, *“the government [is aiming to implement] significant reforms under Construct NSW, focused on creating clear lines of accountability and significant consequences when practitioners deliver substandard work”*⁷.

The very reason why the government is proposing these changes is to ensure that *“all people are held accountable for the supply of safe building products and building work.”*⁸

All these developments will have a great impact on Professionals, Owners and others and it is our hope that this brief Building & Strata Guide will help interested parties find their way through the complicated terrain which today constitutes the NSW strata, building and construction legal regime.

At the outset, we emphasise that the Ancillary Strata Law Changes have already been well socialised within the industry and many are well-aware of the implemented and the coming strata changes. This Guide is not designed to rehash those changes as others have. It is, however, a source for an assessment of this three-pronged approach taking over the NSW construction industry: the Building Changes, the Ancillary Strata Law Changes and the cases impacting the interface between the two areas.

⁷ NSW Department of Customer Service, “Regulatory Impact Statement, Part 3”, at https://hdp-au-prod-app-nsw-haveyoursay-files.s3.ap-southeast-2.amazonaws.com/8016/9896/5251/a8b1060561c0062fbd16152ddcfa53b8_RIS_-_Building_Bill_2022_Part_3_Building_compliant_homes.pdf, last visited 5 September 2024, [hereinafter “Third Regulatory Impact Statement”], at p 4.

⁸ Ibid., at p4.

Progress since our Previous Guides

The changes bring about various law reforms. These include: the consolidation of existing legislation under a single eventual **Building Act** with other pieces of supporting legislation, the standardisation of strata laws through the Ancillary Strata Law Changes, the imposition of more stringent requirements on private certifiers, the introduction of Building Commission NSW (**the Commission**) as a single regulator and the standardisation of trades certification.

Together with the Ancillary Strata Law Changes, already various related legislative changes have taken place, including the *Building Legislation Amendment Bill 2023* (to which herein we refer to as **the Enacted Building Amendments**) passed in November 2023 which amended legislation such as the Home Building Act 1989 (**HBA**) as well as others.

Example changes accompanying the Ancillary Strata Law Changes

Here are some examples of discrete amendments already made or in the offing within the planned Ancillary Strata Law Changes which may seem quite disparate from the Building Law Changes but which may in fact prove to be complementary in a unified regime of changes.

The changes which we will outline here do in fact relate quite closely to the Building Changes as well as to the case law (the *Pafburn* case):

(a) in line with the ‘end-to-end accountability’ regime in respect of the Building Changes (which regime is explored elsewhere in this Guide), there will also be increased accountability for developers (‘original owners’), not only in terms of ‘construction documents handover’ to the owners corporation at the initial Annual General Meeting, but also as related to the handover of the building itself — i.e., as in a well-maintained state. This makes it easier to file claims against developers and identify liable parties;

(b) somewhat related to the more stringent planned changes in respect of the DBP Act and the HBA — and in the same vein — the changes also involve a broader brush approach in relation to the maintenance of buildings under section 106 of the SSMA, with the individual owner being able to bring more robust claims for wide ranging damages against owners corporations in respect of reasonably foreseeable loss and in line with the duty of care law, as embodied within the DBP Act. The plan is to extend the limitation period to six years from the time an owners corporation first becomes aware (or ought to have become reasonably aware) of the relevant damages; and



(c) inclusion of unfair contracts related rights as subsist within the Fair Trading Act 1987 (FTA) schema into contracts with owners corporations. This may have a great impact on building related contracts and prove to be significant in terms of their effect on builders and contractors as well as other Professionals.

Interfacing Ancillary Strata Law Changes and the Enacted Building Amendments

As mentioned above and as if to complement the Ancillary Strata Law Changes in one unitary regime, an important example of the amendments already made within the Enacted Building Amendments¹⁰, is the introduction of “Decennial Liability Insurance” (**DLI**).

This is an insurance product which covers the common property of strata apartment buildings (Class 2 – residential – buildings under the National Construction Code (**NCC**)) as against defects, for a period of 10 years¹¹ i.e., DLI enables owners corporations to have a serious defect remediated up to 10 years after an apartment building is first occupied.

DLI will be consolidated into the ‘Insurance Bill’ (see further below). For completeness, the Insurance Bill maintains the Home Building Compensation scheme (**HBCF**, which continues to apply to work amounting over \$20,000) in class 1 and low-rise class 2 buildings (including renovation works), amalgamating what is already there in various legislation.

It is to be noted that the DLI must be obtained prior to commencement of work and prior to any money being taken under the contract, including as to the deposit.

These changes, whether by accident or design, are ‘contextualised’ in a more ‘unified’ manner along with other pieces of legislation, constituting the Building Changes.

¹⁰ This lays the foundation for the later and more significant changes which will accompany the coming Building Changes and which will have great impact upon the industry as a whole.

¹¹ See the SSMA, new Division 3AA, ‘Decennial Insurance’.

Proposed format of the Building Changes

The unified legislation plan, currently envisages the following bills:

- (a) the Building Bill (**the Building Bill**);
- (b) the Building Compliance and Enforcement Bill (**the Enforcement Bill**); and
- (c) the Building Insurance Bill (**the Insurance Bill**).

As at the time of this writing (24 January 2025) the Building Changes have not been passed into law in this state and still subsist in a proposed format pending what may be further consultation stages. Currently the timing of the passage of the Building Changes seems to be uncertain and this was expected.¹²

The overall strategy seems to be a part of broader effort to reform the building and construction industry, addressing issues such as quality, accountability and consumer protection.

As iterated above, the Building Changes form part of ongoing reforms led by the Commission, which include significant changes like enhanced potential to claim as against developers and other responsible Professionals, along with the DLI requirements for residential buildings, as introduced in the Enacted Building Amendments and as set out above.

These reforms are said to usher in improvement upon the overall standard of building practices in NSW in order to restore public and owners corporations confidence in the industry.¹³

¹² In 2024 the NSW Government was actively seeking feedback on the draft legislation, with the aim that the drafts of the Building Changes would consolidate various building legislation and regulations into a single, streamlined framework.

¹³ Proposed NSW Building Reforms Webinar – Building Commission NSW”, 19 July 2024, at <https://vimeo.com/986952199/2b31d974be>, last visited 4 Sep 2024 [Hereinafter “The Webinar”].

The Building Bill

The Building Bill, which has been amended from its 2022 draft, within its section 4, refers to this all-encompassing goal :

“4 Objects of Act¹⁵

“The objects of this Act are to—

“(a) support an integrated building and approvals system to ensure competent persons create safe, compliant and trustworthy buildings, and,

“(b) establish a modern regulatory framework that protects owners, tenants and other businesses, and

*“(c) implement **end-to-end accountability for building work**, and*


“(d) enable building regulators and industry participants to adapt to new and emerging trends in construction, and

“(e) enable a competitive, professional and capable construction sector to meet built environment needs [emphasis added].”

Owners should be aware of the fact that the Building Changes are onerous upon those who are charged with the “supply [of] safe building products and building work”¹⁶ (i.e., Professionals).

¹⁵ Ibid, at section 4 of the Building Bill.

¹⁶ Third Regulatory Impact Statement,” op. cit., at p4.



The brief background to the Building Changes and the Ancillary Strata Law Changes and some of the Foreshadowed Amendments

In a previous publication entitled “*Major Changes to the NSW Building Industry*”¹⁷ “NSW Government Consultation on Major Building Law Reforms proposed for NSW”, op. cit. we outlined how various developments over a period of time had brought about legislative changes in favour of Owners in NSW, particularly with respect to building defects and defective building products.

We traced these changes to their founding and to two very important pieces of legislation, namely the *Design & Building Practitioners Act 2020* (or as we have defined it above the ‘DBP Act’) and the

Residential Apartment Buildings (Compliance & Enforcement Powers) Act 2020 (the RAB Act) (collectively “the Foundational Changes”).

We also canvassed the more recently proposed NSW reforms in this area including the release by the NSW Government of the three new bills as part of Construction NSW’s “transformation strategy aimed at restoring public confidence and creating a customer facing building and construction sector”¹⁸.

Among other things, these initiatives aim to make the building process “fairer”, “safer”, more regulated and compliant, simplifying the licensing system (for example for builders and other contractors) at the same time as attempting an “[u]p- skilling [of] the building and construction industry”.¹⁹

¹⁸ See “NSW Government Consultation on Major Building Law Reforms proposed for NSW”, at <https://kreisson.com.au/nsw-government-consultation-on-major-building-law-reforms-proposed-for-nsw/>.

¹⁹ Ibid.

Former ‘feasibility surveys’ and the progress of the proposed amendments

In August of 2022, the NSW Government published a series of ‘Regulatory Impact Statements’ which are featured in the Guide’s references and which shed much light on the amendments and the timings of the implementation of the Building Changes. The implementation at this stage seems to ultimately point to 2025.

Again, consultations have included an assessment of proposed changes as related to consumer protections and as related to “the rules around the design, construction, certification and ongoing safety of NSW buildings”²⁰ which impact upon various areas, including strata and the related strata building bond and inspections schemes.²¹

As well as the changes made with the aid of the Enacted Building Amendments, from 3 July 2023, the DBP Act was expanded to include class 3 and 9c buildings.

This was in addition to class 2 buildings in respect of the construction of new buildings²².

Forming part of the totality of the changes, one of the most important features of the Foundational Changes (DBP Act (above) and the RAB Act (above)) was the classification of buildings

²⁰ “NSW Government Consultation on Major Building Law Reforms proposed for NSW,” op. cit.

²¹ The consultations have gone on for a while e.g. see Department of Commerce request for feedback from industry in relation to new licensing proposals See <https://acrassoc.com.au/nsw-news/need-your-comments-by-wednesday-9th-august-2023-re-building-bill-2023/>.

²² <https://www.fairtrading.nsw.gov.au/news-and-updates/notices/changes-to-regulated-buildings-2023>. Alteration or renovation work for existing class 3 & 9c buildings will come into effect on 1 July 2024.



and structures to which the Foundational Changes referred and the steps which Professionals were to take to remain compliant with the Foundational Changes.²³

As we say above, it is — still — not presently very clear when the NSW government will attempt to implement the Building Changes reform package.

Subject to further reports and decisions from the Government²⁴ and following the final closure of any residual consultation processes, herein we will explore some of the more pertinent and salient details of the Building Changes and the accompanying amendments in the event that these proposals all become law.

In essence, this Guide assumes that the proposed reforms will *all* be implemented.

²³ Please see further in this Guide, as well as our publication “Changes to Class 3 and (9) Introduced by NSW Government in July of 2023 regarding Regulated Buildings” at [<https://kreisson.com.au/changes-introduced-by-nsw-government-in-july-of-2023-regarding-regulated-buildings/>].

²⁴ It is unclear whether the *Pafburn* case will be considered in relation to these changes and integrate further amendments into the current planned/proposed changes.

The Building Bill's all— encompassing 'Building Work'

As far as the Building Bill itself is concerned, a single definition for “building work” across all NSW is to be adopted.

This leads to various other results, including new certification requirements, duty of care amendments and the clarification of various obligations etc.

The aim is to ensure that the legislation places great emphasis on “home building work” so that consumers (such as Owners) are protected, with relevant obligations attached to tradespersons and Professionals engaging in “home building work”.

This definition and the protection afforded under the new regime extends to Class 1a, 2 and 10 buildings including buildings which contain class 2 parts.

Certification work, prefabricated building work, professional engineering work and specialist work are also defined and included.

Structure and select parts of the Building Changes

Various legislation (and respective regulations) which are said to be amended and which are to be packaged within the proposed scheme of changes, include:

- the HBA;
- the DBP Act, *Design & Building Practitioners Act 2020*;
- *Architects Act 2003*;
- RAB Act, *Residential Apartment Buildings (Compliance & Enforcement Powers) Act 2020*;
- *Building Products (Safety) Act 2017*;
- *Building and Development Certifiers Act 2018*;
- *SSMA, Strata Schemes Management Act 2015*;
- *Building and Construction Industry Security of Payment Act 1999* (SOP Act);
- *Gas and Electricity (Consumer safety) Act 2017*;
- *Plumbing and Drainage Act 2011*; and
- *Environmental Planning and Assessment Act 1979*.

Again, this exercise is in effect one of consolidating existing building laws — the too many building laws in NSW are said to create duplication and complexity.

It is not only the “modernisation” of the laws which is being looked at. It is also their scalability which has been under review, where the goal is to make amending the myriad of laws at any future point a much simpler exercise.²⁵

For completeness and significantly, we ought to mention at this juncture that the Building Changes package is proposed to replace the long-standing HBA which has been in many ways central in relation to many disputes in NSW.

The Design Building Practitioners Act 2020 (“DBP Act”) and design obligations under the new schema

As is clear by now, one of the major aspects of the proposed changes concerns the DBP Act.

Relevantly the Building Changes refine concepts such as the ‘developer’ allowing Owners or more broadly, the consumers to bring claims as against various Professionals in their respective categories.

For example, ‘developers’ — are entities or people who facilitate, carry out or cause the carrying out of building work.

Even those who simply facilitate building work in some way — may well find themselves entangled in disputes with consumers such as owners corporations.

This is because the Building Changes leave little doubt that developers owe warranties and duties as ‘developers’.

This ‘developer’ category of Professional (and related entities) are liable to be sued in respect of ‘serious defects’ (rather than ‘major defects’ under the HBA, see further below) as well as for minor defects.

The proposed re-cast of this category considers both the Building Code of Australia (“BCA”) and the National Construction Code (“NCC”) standards when assessing performance requirements.

Breaches of these standards may well constitute a ‘serious defect’.

The obligations: more stringent

The changes also bring with them more stringent 'design obligations' (which are integrated within the licensing schema as well, see further below).

Under the DBP Act, registered designers working on Class 2, 3 and 9c buildings, must adhere to the 'design declaration process'. This applies to buildings containing any parts within these classifications.

Under the design practitioner guidelines, the 'issued for construction' drawings will need to have a specified level of detail (which detail includes designs, reports, plans and specifications) before certifiers are empowered to issue building approvals.

The process is focused on 'building elements' (see below), including structure, waterproofing, fire safety, building enclosure, vertical transportation provisions and key services.

If there is a variation in relation to the building works, an updated set of declared drawings are to be produced and placed in a 'planning portal' after which filing, the work can commence.

Serious defects

Owners will need to note that in case of 'serious defects', there is no longer a need for the Owners to show that these have caused (or are likely to cause) an inability to inhabit or use the building, or to show that any defects can cause the destruction of the building or threaten the collapse of the building.

All the Owners need to show is that there are aspects of the building or structure which are non-compliant with the standards.

In other words, a 'serious defect' may be proved much more easily than the current 'major defect', if the proposed changes are enacted.

As an example of this, a 'major element' in a major defect scenario within the current system is limited to the 'loadbearing' parts of a structure.

That is not the case with 'serious defects' which can include any 'building element' (which definition has also been expanded) and which are in turn, simply a part of the building structure.

Moreover, it will not be necessary to prove that the performance of the building element is defective, only that the building element does not meet the relevant standards.

We extract below a side-by-side comparison of the current 'major defects' schema and the proposed 'serious defects' definition within the following table, as produced in Previous Guides:

'Major defect' under HBA (s. 18E (4))	'Serious defect' under the Building Compliance and Enforcement Bill 2022 [NSW]; Schedule 2; Dictionary
<p>a defect in a <u>major element</u> of a building that is attributable to defective design, defective or faulty workmanship, defective materials, or a failure to comply with the structural performance requirements of the National Construction Code (or any combination of these) <u>and</u> that causes, or is likely to cause:</p> <p>(i) the inability to inhabit or use the building (or part of the building) for its intended purpose; or (ii) the destruction of the building or any part of the building; or (iii) a threat of collapse of the building or any part of the building.</p> <p>or</p> <p>a defect of a kind that is prescribed by the regulations as a major defect.</p> <p>or</p> <p>the use of a building product (within the meaning of the <i>Building Products (Safety) Act 2017</i> (NSW)) in contravention of that Act.</p>	<p>a defect in a building element that is attributable to a failure to comply with the governing requirements or the performance requirements of the National Construction Code as in force at the time the building work was carried out, the relevant standards or the relevant approved plans,</p> <p>or</p> <p>a defect in a building product or building element that—:</p> <p>(i) is attributable to defective design, defective or faulty workmanship or defective materials, and (ii) causes or is likely to cause—</p> <p>A. the inability to inhabit or use the building, for its intended purpose, or B. the destruction of the building or any part of the building, or C. a threat of collapse of the building or any part of the building,</p> <p>or</p> <p>a defect of a kind that is prescribed by the regulations as a serious defect,</p> <p>or</p> <p>the use of a building product in the building, if—</p> <p>(i) the use is in contravention of the <i>Building Products (Safety) Act 2017</i>, or (ii) the product or use does not comply with the requirements of the National Construction Code, or (iii) the product or use does not comply with other standards or requirements prescribed by the regulations for the purposes of this definition.</p>

Moreover, in relation to major defects, the definition of 'building element' has now been extended as follows (section 95 of the Building Bill):²⁶

95 Major defects

(1) A defect in a building element of a building is a major defect if the defect—

95 Major defects

(a) is caused by a failure to comply with 1 or more of the following when work is carried out—

- (i) the governing requirements or performance requirements of the National Construction Code,*
- (ii) applicable standards,*
- (iii) approved plans for the work, and*

(b) has a significant impact on the building.

(2) A defect in a building element of a building or a building product used in the building, is a major defect if the defect—

(a) is caused by 1 or more of the following—

- (i) defective design,*
- (ii) defective workmanship,*
- (iii) defective materials, and*

(b) has a significant impact on the building.

*(3) The use of a building product in the building in contravention of the **Building Products (Safety) Act 2017** is a major defect.*

(4) In this section— significant impact on a building means the following—

- (a) the inability to inhabit the building or part of the building,*
- (b) the inability to use the building or part of the building for its intended use,*
- (c) the destruction of the building or part of the building,*
- (d) the threat of collapse of the building or part of the building.*

Duty of care

The Building Changes cast a very wide net upon those who may be deemed responsible for defects, irrespective of whether the defects are serious ones or minor ones.

Generally, given the way in which the Building Changes are currently cast, this 'wider net' will provide a more unified statutory duty of care regime for building work in NSW, which duty is owed to both current and future Owners.

In effect the Building Changes are structured in such a way as to lead potential claimants towards builders, developers (and other Professionals) who are 'deemed' responsible.

For example, the proposed section 6 – 'developer' definition – of the 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]"²⁷.

This 'wider net' effectively includes the proliferation and the extension of the duty to take reasonable care to not only *discrete* parts of the building work, but also effectively to the various stages of the process, including inspection, subdivision, certification, as well as the building process itself, as a whole (see also the explanation on the *Pafburn* case below).





Again, this will mean that all those involved at each and every stage of the building process, including builders, designers and certifiers, owe a duty of care and may be held liable by the Owners.

Importantly and as implied already herein, this 'duty of care net', may extend to the suppliers of building products as well as service-providing Professionals (**significantly, certifiers will also become liable for economic loss**).

Owners' rights under the DBP Act: Pafburn

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In relation to the expansion of the definition of the 'developer', in past cases the courts have largely resisted the temptation to include certain parties who may not have been previously considered as 'developers'.

However, under the new regime these parties will most likely be included. In any event *Pafburn* seems to have made this a foregone conclusion.

In relation to pre-*Pafburn* and pre DBP Act cases, in the case *The Owners – Strata Plan 81837 v Multiplex Hurstville Pty Ltd*,²⁸ the NSW Supreme Court had earlier ruled that the Owners could not sue Multiplex because the basis for having added Multiplex as a defendant, was a 'Development Management Agreement' with the landowners which provided for exclusive access to the property.

The problem, the Court held, was that Multiplex was not an 'owner' and therefore was not a 'developer'.

However, things changed markedly. At the same time as cases such as *Multiplex*, this expansion of the duty of care espoused within the Building Changes and specifically, within the Building Bill, seems to have mimicked some of the 'less regular' approaches taken by the NSW Supreme Court.

In *Goodwin Street Developments Pty Ltd atf Jesmond Unit Trust v DSD Builders Pty Ltd (in liq)*²⁹, Stevenson J held that the statutory duty of care in relation to construction work, extended to any 'building'³⁰ including commercial buildings (under the *Environmental Planning and Assessment Act 1979* (NSW))³¹.

²⁸ [2018] NSWSC 1488.

²⁹ [2022] NSWSC 624.

³⁰ See also *Roberts v Goodwin Street Developments* [2023] NSWCA 5.

³¹ 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.

Under the *Pafbarn* ruling, developers and builders are now vicariously liable for all defects in a project. Builders must ensure compliance at every stage to mitigate risks of being solely responsible for issues. That is, they are responsible for all of the defects related to a building project.

If the building project related to the whole of the building, then the defects related to the whole building are captured and the developer is responsible.

If the project related to only a part of the building, then all the defects within that part are captured and the developer remains responsible for the defects in that specific part.

If the defendant is a developer, it can no longer lodge a defence under the *NSW Civil Liability Act 2002* (CLA) and simply blame others ('proportionate liability defence') and leave it to the Owners to bring claims against those others.

Because the developer is now, under *Pafbarn*, 'vicariously liable', it needs to bring those claims against those other parties, itself.

The vicarious liability obligation means that the duty of a developer under the DBP Act cannot be delegated (as it is termed a "non-delegable" duty), which in turn means that the duty subsists with the developer even where the developer takes good care in arranging for other Professionals to carry out any discrete part of the work within the building project.

At first glance this seems to suggest that because the costs of bringing these claims may now not be so prohibitive (because multiple parties may not need to be added to the litigation), it follows that the rights of Owners can become easier to uphold.³² Moreover it may seem as though some Professionals may not be added to the proceedings, at least not early on in the proceedings.

However, the developer can actually bring cases against individual Professionals later if it deems that course appropriate. Additionally and importantly, bringing the 'duty of care' cases is one thing. Proving them is quite another.

³² It remains to be seen whether the NSW government will make any changes which will impact upon the *Pafbarn* ruling within the Building Changes.

The Supreme Court of NSW in cases such as *The Owners – Strata Plan No 87060 v Loulach Developments Pty Ltd (No 2)* [2021] NSWSC 106³³ has held that:

*“The DBP Act was enacted to alleviate the need for a party like the Owners Corporation to prove a duty of care owed to it by the Builder. This reform was seen as being needed in light of the [previous rulings to the effect that] builders and engineers did not owe a duty of care to subsequent purchasers of commercial property. The **DBP Act was not intended to provide a shortcut as to the manner by which a breach of such duty might be established** [emphasis added]”*

In other words, owners corporations (and Owners generally) will still need to prove their case and will need to be able to prove it to the requisite standard and the Supreme Court has held to this – high – standard again and again.³⁴

This is neither a trivial nor a simple matter since proving DBP Act (duty of care) cases is very difficult.

This highlights the importance of retaining competent legal counsel to navigate the complexities of DBP Act duty of care³⁵ litigation.

³³ Per Stevenson J, at [35-36].

³⁴ E.g. see *The University of Sydney v Multiplex Constructions Pty Ltd (No 2)* [2023] NSWSC 1019.

³⁵ This is both in terms of the evidence needed to prove a case and also in terms of the way a case is cast through a ‘List Statement’ or List Response for example.

Warranties and other consumer protections



Related to all this and particularly as related to the expanded 'litigation net' analogy (*Pafburn* case is informative) which exemplifies this expansion, there is also a possibility that the warranty periods may be extended from 6 to 10 years for the newly defined 'serious defects' and 2 to 3 years for the minor defects.³⁶

Generally, existing statutory warranties are carried through to the Building Bill with some minor changes (for example the term 'successor in title' is simply replaced by the 'owner').

More generally under Chapters 4 (home building work) and 7 (dispute resolution) of the Building Bill, provisions are made in relation to the way Owners are to be protected in a variety of ways, including for example, statutory warranties, duty of care, minimum contracting obligations (boosted also with the 'unfair contracts' provisions under Ancillary Strata Law Changes), dispute resolution mechanisms, enforcement powers, etc.

It needs to be noted that:

- (a) with the exception of duty of care, consumer and Owners' protections only apply to home building works;
- (b) statutory warranties and requirements as to contracting do not apply to design and certification works — at least not under the Building Changes; and
- (c) home building obligations will be in addition to other obligations such as the Australian Consumer Law (ACL) as already owed to the consumer.

Again, given all this, if the reforms proceed in full as they are projected to be right now, it is likely that that litigation will proliferate and all interested parties need to obtain competent legal advice.

Impacts on Professionals

Professionals need to be aware of the following impacts on them, because these will in turn have an impact on the Owners and their rights:

- developers will have to deal with more overall liability³⁷, added to that, will be the potential extension of the 10-year warranty period for the relevant building classes³⁸, encompassing a more robust bond related scheme³⁹;
- there will be a more significant duty of care placed upon builders, designers, engineers, suppliers, installers, certifiers and building inspectors⁴⁰ (see below);
- manufacturers of building materials (including those who manufacture pre-fabricated off-site buildings⁴¹) may face the prospect of increased liability in respect of the materials which they manufacture and supply⁴²; and
- the personal liability of directors and other 'influential' individuals is to increase markedly; for example, the Commission will have powers to 'pierce through the corporate veil' revealing the directors or significant others involved in the construction process.⁴³

³⁷ E.g. see the proposed section 6 of the draft Building Compliance and Enforcement Bill 20242, in The Building Changes, op. cit.

³⁸ E.g. see Third Regulatory Impact Statement, op. cit. at p43.

³⁹ E.g. see the amendments already enacted within the Enacted Building Amendments.

⁴⁰ Second Regulatory Impact Statement, Op. cit., at pp-42-46.

⁴¹ Ibid., at pp31-41.

⁴² Ibid., at pp31-41.

⁴³ E.g. see the amendments already enacted within the Enacted Building Amendments (say section 59 of the Building Products (Safety) Act 2017)

System standardisation

In relation to the duty of care, same is standardised within the Building Bill as between the DBP Act and the *Environmental Planning and Assessment Act 1979*.

The duty is owed to each owner of the land in relation to which the work is carried out and to each subsequent owner of the land and it applies to a person who carries out the work or subdivision work (as defined under the Building Bill). **Importantly, it carries for 10 years, after the completion of the work.**

For completeness and as related to the issue of warranties, the completion aspects of the building work have been further clarified. For example, 'practical completion' has been defined further to mean that work has been completed in compliance with the contract, including in compliance with all the plans, specifications and statutory requirements; or if not carried out under a contract, the work is completed without defects.

Other changes of interest

The Building Bill of course encompasses many other amendments including '**clarification of variations**' within contracts and clarifications of times as related to payment claims and as related to the variations, all of which are included within the ambit of the Building Changes⁴⁴.

In cases involving claims, it is noteworthy for interested parties to know that a strata scheme may be able to access the building bond within 90 days of the issuance of the defects notice by an inspector, if the defects are not remedied.

Information provided by representatives of body corporates is admissible in relation to civil and criminal proceedings in relation to building matters and representatives are not precluded from giving information on the basis of self-incrimination.

Fire safety requirement consolidation is to take effect, from 'concept design', all the way to day-to-day maintenance, encompassing regular auditing of fire safety.⁴⁵ (It should be noted at this juncture that there are significant changes to fire safety within the Building Changes and specifically, the Building Bill). Other changes require the issuance of fire safety schedules with third party assessors working closely along with certifiers. In particular in circumstances where there is an interaction between different fire safety systems.

A key change is that maintenance of these system can only be carried out by those licensed to install these systems (see further below).

⁴⁴ Third Regulatory Impact Statement, Op. cit. at p28.

⁴⁵ Ibid., at p10.

Licensing reforms

The Building Changes introduce licensing changes for contractors such as builders and others working within the building industry.

New licensing provisions are said to ensure that “competent” people are carrying out the building work.

Contractor and supervisor licences remain, but supervisor rules will likely be further clarified, with obligations of smaller operators being at the forefront.

Builder licenses will be changed so that the current single builder licence is effectively phased out and replaced with a ‘gradation licensing system’ which in turn allows for a progressively advanced licensing scheme (ending in level ‘Builder A’).

The licensing scheme includes restrictions on ‘Owner Builder’ permits and the requirement that the work of unlicensed workers be supervised.

Other trade licences will be impacted too. Licences are being proposed for trades like bricklaying, painting, excavating, wall and floor tiling, roof slating, joinery and glazing.

Specialist licensing will also be required. For example, where specific plumbing work on fire safety systems is required, a special licence is needed. Other category examples include medical gas-fitting, water plumbing, plumbing mechanical services, refrigeration and air conditioning specialist licences.

It is to be noted that waterproofing and ducting will also require a new class of specialist work, which will again require licensing.



We also note that there are various levels of licensing under the fire safety design practitioner scheme. For example, for detection and alarm systems, fire sprinkler systems, mechanical smoke controls, etc.

Additionally, the threshold value for requiring a license for building works will be reduced to \$3000, down from \$5000. This means that any work exceeding \$3000 will require a licence.

Finally, work which is considered 'high-risk' and which is not simply 'specialist work' will also require a license irrespective of the cost.

Disputes, dispute resolution and regulator intervention, enforcement

Dispute resolution improvements as between the Owners and Professionals are there in an attempt to ensure that there is more cost efficiency in these processes.

In relation to dispute resolution, where the building dispute is not resolved as between the parties, a party must notify the Commission (the 'dispute resolution process' involves the informing of the Commission, to which all matters must go and which is a key change) and the parties cannot take the matter to the Tribunal without the endorsement of the Commission.

The new process will provide that the warranty limitation period/s be put 'on hold' for up to a maximum of 6 months in order to allow for the dispute resolution procedures including mediation, to take their course or to be continued if required.

Related to disputes, we note that the mix of powers encompasses the taking of remedial actions including undertakings (encouraging voluntary undertakings where possible to avoid costly disciplinary actions against Professionals), injunctive relief and the issuance of orders as to rectification, compliance, enforcement as well as 'stop work' orders.

What does all this have to do with me?

These developments, including the Building Changes, the Ancillary Strata Law Changes and case law development through cases such as *Pafburn*, will have a significant impact on all interested parties and on their rights.

It is not enough to know that Professional obligations now extend widely including to directors and 'nominee supervisors'.

Parties need to be guided in relation upholding their rights and fulfilling their obligations.

This is why it is so important that you obtain good advice in respect of these changes **and to obtain it early** in order to be able to have control over all the legal implications which all these changes will have in relation to any given building project.

Partnering for success in building and strata reforms

The experts at Kreisson are here to provide you with practical and cost-effective advice tailored to your needs.

We invite you to contact us for a no-obligation consultation and discover how we can assist you in navigating the complexities of building reforms.

For more insights and expert publications by Kreisson on building reforms, including topics like building reforms, cladding and the Design and Building Practitioners Act, please explore our comprehensive resources.

1. Understanding the proposed "Building Bill" reforms and their potential impact.", October 2023
2. Building Bill" reforms and their potential impact."; second edition, September 2024
3. *Pafburn*: Liability in Construction Defects – the High Court decides – *Pafburn Pty Ltd v The Owners – Strata Plan No 84674* [2024] HCA 49
4. Update on the *Pafburn* Saga – from the High Court – *Pafburn & Madarina v The Owners SP 84674*
5. A Builder's Guide to the Design and Building Practitioners Act and Regulation – Part 4 – Insurance
6. A Builder's Guide to the Design and Building Practitioners Act and Regulation – Part 3 – 'Reasonable Excuse' And Emergency Remedial Building Work
7. Strata Legislation Amendment Bill 2023 – Proposed Changes
8. A Builder's Guide to the Design and Building Practitioners Act and Regulation – Part 2 – Regulated Designs and Compliance Declarations

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