Design and Building Practitioners Act, Duty of Care, Professional Indemnity Insurance & Professional Standards Schemes

Introduction: The mechanics of the Design and Building Practitioner Act 2020 and its interaction with other legislation as related to limitation periods

Part 4 of the Design and Building Practitioners Act 2020 (the 'D&BPA') imposes a statutory 'duty of care' on professionals such as engineers or architects, carrying out construction work to avoid causing economic loss to current and future landowners due to defects. Importantly, the duty of care obligations apply retrospectively – D&BPA runs retrospectively and claims can be brought up to ten years.

The Duty of Care provisions are essentially encapsulated within section 37 of the D&BPA which states:

37 Extension of duty of care

(1) A person who carries out construction work has a duty to exercise reasonable care to avoid economic loss caused by defects-

(a) in or related to a building for which the work is done, and

(b) 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-

(a) under a contract or other arrangement entered into with the owner or another person, or

(b) otherwise than under a contract or arrangement.

These duty of care provisions have been considered in a recent case *Goodwin Street Developments Pty Ltd atf Jesmond Unit Trust v DSD Builders Pty Ltd (in liq)* [2022] NSWSC 642 (Goodwin v DSD).

The NSW Supreme Court held that the section 37 duty of care provision of the D&BPA is not limited to Class 2 (residential apartment) buildings but instead applies to any building caught by the broad definition of 'building' in the Environmental Planning and Assessment Act 1979 (NSW) ("EPAA") and extends to 'building work' (as defined in section of the D&BPA), including (but not limited to) residential building work within the meaning of the Home Building Act 1989 (NSW).

This means that the duty of care obligation under the D&BPA extends well beyond Class 2 buildings and applies to professionals such as engineers and architects preparing regulated designs and other designs for building works, for buildings other than Class 2 buildings.

BANNERMANS LAWYERS

T: (02) 9929 0226 M: 0403 738 996 ABN: 61 649 876 437
E: dbannerman@bannermans.com.au W: www.bannermans.com.au
P: PO Box 514 NORTH SYDNEY NSW 2059 AUSTRALIA

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Moreover and importantly, it is now the case, following an appeal of the Goodwin decision , that section 37 could allow individual professionals to be sued, especially if their role equates to supervision or substantive control of building work or preparation of regulated designs or other designs for building work.

Not only did the Court of Appeal hold that the D&BPA can be applied broadly and is not limited "to building work" in relation to a 'class 2' building, but the Court also effectively held that the so called 'corporate veil' is no impediment to bringing proceedings against individuals.

For example in the Goodwin case, the person against whom judgment was handed down, a Mr Roberts, was the husband of the director of the contracting party, the company DSD. The Court found that he attended all the meetings and supervised the works and therefore, the court held, *en passant*, that he was effectively responsible for the damages caused by DSD, by default.

As we mention above, this duty of care came into effect on 10 June 2020 and applies retrospectively. This means that a scheme may have the opportunity to enforce its rights where economic loss becomes apparent after the commencement of the D&BPA or within the 10 years immediately before the D&BPA commenced.
Time begins to run 6 years from the date a scheme becomes aware or ought to reasonably to have become aware of the loss to bring its claim.

It is open to interpretation however. For example the date that the scheme first becomes aware of the loss can be argued to have commenced when the scheme commissions an expert report in relation to the defects.
In relation to the 10 year limitation period-- pursuant to section 6.20 of the EPAA, there is a 10 year limitation for any loss or damage that has arisen out of or in connection to defective works. This 10 year limitation commences after the date of “completion of the works”.

“Completion” of the works is the date of the first occupation certificate. This provision has effect despite any other Act or law. In essence, this section provides a capped 10 year period after the completion of the works in which a building action may be commenced against builders, architects, certifiers and other building professionals. This means that this section does not apply to any supplier or manufacturer.

Professional Indemnity Insurance related considerations and the D&BPA

Having set out the background above, we can now look at any potential impacts on insurance and related policy run-offs.

As from 1 July 2023 a registered building practitioner under the D&BPA, will need to be adequately insured to perform building work.

Registered building practitioners will need to ensure that they are adequately insured for any work referred to, in a compliance declaration given on and from 1 July 2023. This will include any work done before that date relating to that declaration.

Section 24(1) of the D&BPA provides:

(1) A registered building practitioner must not -

a) Provide a building compliance declaration to do related building work, or

b) Hold out that the practitioner is adequately insured with respect to the provision of the declaration or doing the work, unless the practitioner is adequately insured with respect to the declaration and work.

Clause 75 of the Design and Building Practitioners Regulation 2021 similarly states:

T: (02) 9929 0226 M: 0403 738 996 ABN: 61 649 876 437
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P: PO Box 514 NORTH SYDNEY NSW 2059 AUSTRALIA
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(1) For the purposes of section 24(2)(a) of the Act, a registered building practitioner must be indemnified under an insurance policy, whether a professional indemnity policy or otherwise, that complies with this clause.
(2) An insurance policy must, in the reasonable opinion of the registered building practitioner concerned, provide for an adequate level of indemnity for the liability that could be incurred by the practitioner during the practitioner's work.
(3) In determining whether a policy provides for an adequate level of indemnity, the practitioner must consider the following matters:

a) the nature and risks associated with the work typically carried out by the practitioner,
b) the volume of the work typically carried out by the practitioner,
c) the length of time that the practitioner has been registered,
d) a reasonable estimate of claims that could be brought against the practitioner based on paragraphs (a)-(c),
e) the financial capacity of the practitioner,
f) any limits, exceptions, exclusions, terms, or conditions of the policy

It is important to note that ***practitioners must be indemnified for all liability incurred at any time since they first became registered***.

As already mentioned, under the EPAA a person cannot take civil action for loss or damage in relation to defective building work more than 10 years after the date of completion.

Hence any insurance related consideration in respect of various professionals, would require a careful consideration of retroactive, as well as run-off, cover related to their professional indemnity insurance (PI).

PI can cover claims that are alleged to have occurred before a professional held their insurance policy. It can also be extended to provide cover after they have retired or switched professions, in which case the policy has lapsed. As a Building Designer for example, one owes a duty of care to clients as already explained. However, as we have already seen, D&BPA's section 37 provides an extension to this duty in respect to liability for defective building work.

That duty of care is imposed retrospectively for 10 years (immediately prior to 11 June 2020) and is to be governed alongside principles under common law and the Civil Liability Act 2002 (NSW).
As professionals really have always owed a duty of care to clients, diligent professionals would have always held PI to cover these risks. The difference this time is that the introduction of these reforms specify that certain categories of Building Designers MUST hold a PI policy, including for 'any liability' (and incidentally, buildings MUST meet the Building Code of Australia).

As implied above, builders, building designers, engineers and other design practitioners must also register through an assessment process.

This places a few question marks over various aspects of this issue, including:

- whether the existing PI policies, provide sufficient coverage under the D&BPA regime?
- whether or not a professional under the D&BPA is providing professional services currently, will it suffice to hold 'run-off' insurance coverage for projects completed to date, which run-off extends for a period of at least 6 years? Or
- whether when retiring or leaving a profession, will it be enough for practitioners to choose to obtain run-off insurance to cover an intervening 10-year period?

T: (02) 9929 0226 M: 0403 738 996 ABN: 61 649 876 437
E: dbannerman@bannermans.com.au W: www.bannermans.com.au
P: PO Box 514 NORTH SYDNEY NSW 2059 AUSTRALIA
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Many of these questions have not been answered yet. Perhaps Professional Standards Schemes will provide professionals with more direction and guidance on these essential issues.

Professional standards schemes need to ensure that insurance is adequate

Professional standards schemes in NSW are regulated under the Professional Standards Act 1994 and approved under respective Professional Standards Scheme adopted for each association. Professional standard schemes have their civil liability limited and effectively limit civil claims to the level of professional indemnity insurance which their respective professionals (or public practitioners) are required to hold.

The schemes usually set the conditions of a vocational association so that it can self-regulate its members to protect consumers in exchange for limiting the civil liability that a member of a scheme can be held liable for by a consumer.

Hence it is extremely important that the schemes take into account the provisions of D&BPA in relation to, for example, the retrospective application aspects of the D&BPA and the ten year run-off insurance cover.
As discussed in the foregoing, that question is as yet unresolved. The various professional associations will have to take these issues into account and negotiate with insurers to provide the best cover for their professional members, not leaving any gaps which will result in unforeseen outcomes.

It also is important that each association's scheme limits liability for damages resulting from claims made and notified in line with the effective dates under the D&PBA (for example taking into account the commencement of Part 4 and section 37 of the D&BPA as at 11 June 2020), especially when Part 4 is retrospective in its application.

There is a further matter which needs to be ventilated in this context.

Section 40 of the D&BPA, which relates to the Duty of Care provisions provides as follows:

40 No contracting out of Part

> *(1) This Part applies despite any contracts or stipulations to the contrary made after the commencement of this Part.*
> *(2) No contract or agreement made or entered into, or amended, after the commencement of this Part operates to annul, vary or exclude a provision of this Part.*

On its face this would mean that Professional Associations cannot use agreements in relation to their standards schemes to try and limit liability by 'opting out' of the Duty of Care provisions of the D&BPA.

However it needs to be remembered that professional standards schemes are regulated ultimately by an act of the parliament, namely by the Professional Standards Act 1994, and so, this scenario may well constitute a 'conflict of laws' situation, which in turn means that until the courts decide upon this hypothetical, it will be difficult to be certain as to whether opt out provisions of the D&BPA apply to professional standards schemes.

However, one thing does remain certain for professional associations: in light of the D&BPA, insurance requirements need to be updated to ensure that retroactive and run-off insurance is available in case of claims.

Prepared by Bannermans Lawyers
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BANNERMANS LAWYERS
T: (02) 9929 0226 M: 0403 738 996 ABN: 61 649 876 437
E: dbannerman@bannermans.com.au W: www.bannermans.com.au
P: PO Box 514 NORTH SYDNEY NSW 2059 AUSTRALIA

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