
Raising Consumer Confidence in Residential Apartment Buildings – The New South Wales Pillar 1 Reforms

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This article examines the NSW Regulatory Reforms enacted to raise consumer confidence in residential apartment buildings. It touches upon the extended duty of care for pure economic loss, its retrospective nature and the impact of the long stop for building actions in s 6.20 of the Environmental Planning and Assessment Act 1979 (NSW).

INTRODUCTION

Confidence in the New South Wales (NSW) residential apartment building market following the highly publicised structural failures in the Opal Tower and Mascot Tower is at an all-time low. However, even prior to these two highly publicised failures, there had been a “cladding crisis” in Australia following the Lacrosse building fire in Melbourne in November 2014 and then the Grenfell Building fire in London in June 2017 that killed 72 people. Both buildings had been clad in Aluminium Composite Panels (ACP).¹ By way of background, the Lacrosse building fire and the responsibility for that fire, is the subject of a recent decision in the Victorian Court of Appeal which in all relevant respects, endorsed the primary judgment of Judge Woodward of the Victorian Civil and Administrative Tribunal (VCAT).² The case highlights how little was known about the fire risks associated with ACP in 2010 and 2011 when the Lacrosse building was designed as well as how this limited understanding has not precluded the liability of the design professionals and building surveyor for their role in the selection and the certification of the use of ACP in the Lacrosse building.

THE LACROSSE BUILDING FIRE

On 24 November 2014, a resident of the Lacrosse apartment tower had inadvertently started a fire when he left his cigarette butt in a plastic food container that served as an ashtray atop a wooden topped table on the balcony of his apartment 805 on level eight (the 805 Resident). The smoke detector in the hallway set off the automatic alarm to the Fire Brigade at 2.23 am. When the first fire crew arrived at 2.29 am, the fire had already travelled up the external cladding spreading to the balcony on each level up to level 14. The building was successfully evacuated and there were no lives lost.

The Lacrosse building had been designed to include the use of a composite metal panel wall (Alucobond) and soffit cladding system manufactured by Alucobond as external cladding for the building. The Builder decided to use a substitute product, Alucobest for the ACP.³ The Alucobest had a 100% polyethylene core. The Architect had signed off on the sample of Composite Panel for Lacrosse (Alucobest – silver).⁴

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¹ David Sawtell and Douglas Maxwell, *The Lacrosse Apartment Fire: Liability for Using Grenfell Style Cladding* (29 March 2019) <<https://www.law.ox.ac.uk/housing-after-grenfell/blog/2019/03/lacrosse-apartment-fire-liability-using-grenfell-style-cladding>>.

² *Tanah Merah Vic Pty Ltd v Owners Corporation No 1 of PS613436T* [2021] VSCA 72 on appeal from *Owners Corporation No 1 of PS613436T v LU Simon Builders Pty Ltd* [2019] VCAT 286. Leave to appeal was refused in respect of all grounds of appeal bar one. Leave was granted and allowed in respect of whether one particular of negligence of the building surveyor was causative of any loss: [259]. However, this does not impact upon the conclusions reached by VCAT in respect of the primary liability of the builder nor the proportionate liability of the design professional and the building surveyor.

³ *Owners Corporation No 1 of PS613436T v LU Simon Builders Pty Ltd* [2019] VCAT 286, [150].

⁴ *Owners Corporation No 1 of PS613436T v LU Simon Builders Pty Ltd* [2019] VCAT 286, [160].

Construction took place in 2011 and 2012.⁵ It would have been clear to anyone attending the construction site that Alucobest panels were being installed as the panels were covered in Alucobest stickers. VCAT accepted that the use of an ACP with a 100% polyethylene core as part of the external walls of the Lacrosse tower was primarily responsible for causing the spread of fire up the side of the building.⁶ VCAT accepted that the external cladding of the building, including an ACP with a 100% polyethylene core, did not meet the performance requirement in cl CP2(a)(iv) of the Building Code of Australia because it did not, to the necessary degree, avoid the spread of fire in the building.⁷

VCAT determined that LU Simon Builder who had entered into a design and construct contract with the developer was primarily liable for the fire but found that the liability should be passed down. The Court of Appeal agreed but re-apportioned liability between the Building Surveyor at 30%, the Architects at 25%, the Fire Engineer at 42% and the 805 Resident at 3%.⁸

VCAT found that LU Simon had breached the warranties as to suitability of products, compliance with the law and fitness for warranties pursuant to s 8 of the *Domestic Building Contracts Act 1995* (Vic) but that it had not failed to exercise reasonable care in the construction of the Lacrosse tower by installing combustible aluminium composite panels with a core containing polyethylene.⁹ The Court of Appeal agreed and said that any submission that VCAT had failed to consider whether LU Simon had failed to take reasonable care was without substance.¹⁰ Further, as the owners had not run their case in VCAT on the basis that LU Simon had failed to exercise reasonable care, it was not open to the Fire Engineer to suggest that VCAT had failed to determine a defence of LU Simon that it was only liable in an amount reflecting that proportion of the loss or damage claimed that the Court considered just, having regard to the extent of LU Simon's responsibility for the loss and damage.¹¹ The Court of Appeal also rejected the submission of the Architect "that a claim that is not apportionable might be transformed into a claim that is apportionable by a party establishing that the circumstances upon which the claimant relies arose out of a failure to take reasonable care".¹²

As a result, the Court of Appeal did not consider the particular issue of whether or not LU Simon owed the owners corporation or the individual owners a duty of care. However, consistently with the principles in *Brookfield Multiplex Ltd v Owners – Strata Plan No 61288*,¹³ it is suggested that an application of the salient features test would inevitably lead to the conclusion that no such duty of care was owed.¹⁴

THE AFTERMATH

States have struggled to come up with a viable replacement program for the ACP.¹⁵ Victoria has established a grossly inadequately resourced cladding safety fund for the replacement of the ACP¹⁶ and New South

⁵ *Owners Corporation No 1 of PS613436T v LU Simon Builders Pty Ltd* [2019] VCAT 286, [162].

⁶ *Owners Corporation No 1 of PS613436T v LU Simon Builders Pty Ltd* [2019] VCAT 286, [193].

⁷ *Owners Corporation No 1 of PS613436T v LU Simon Builders Pty Ltd* [2019] VCAT 286, [194].

⁸ *Tanah Merah Vic Pty Ltd v Owners Corporation No 1 of PS613436T (No 2)* [2021] VSCA 122, [26].

⁹ *Tanah Merah Vic Pty Ltd v Owners Corporation No 1 of PS613436T* [2021] VSCA 72, [75].

¹⁰ *Tanah Merah Vic Pty Ltd v Owners Corporation No 1 of PS613436T* [2021] VSCA 72, [77].

¹¹ *Tanah Merah Vic Pty Ltd v Owners Corporation No 1 of PS613436T* [2021] VSCA 72, [93], [98].

¹² *Tanah Merah Vic Pty Ltd v Owners Corporation No 1 of PS613436T* [2021] VSCA 72, [135].

¹³ *Brookfield Multiplex Ltd v Owners – Strata Plan No 61288* (2014) 254 CLR 185; [2014] HCA 36.

¹⁴ See the approach of Byrne J in *Aquatec-Maxcon Pty Ltd v Barwon Region Water Authority (No 2)* [2006] VSC 117.

¹⁵ See Trivess Moore, David Oswald and Simon Lockrey, "Only a Small Fraction of Buildings with Flammable Cladding Have Been Fixed, and Owners Are Feeling the Strain", *The Conversation*, 22 March 2021 <<https://theconversation.com/only-a-small-fraction-of-buildings-with-flammable-cladding-have-been-fixed-and-owners-are-feeling-the-strain-157307>>.

¹⁶ See Cladding Safety Victoria <<https://www.vic.gov.au/cladding-safety>>, Michael Bleby, "Cladding's Insurance Quandary Costs Victoria \$7m", *Australian Financial Review*, 8 February 2021 <<https://www.afr.com/property/commercial/cladding-s-insurance-quandary-costs-victoria-7m-20210202-p56yvp>>, David Oswald, Trivess Moore and Simon Lockrey, "Combustible Costs! Financial Implications of Flammable Cladding for Homeowners" (2021) *International Journal of Housing Policy*, DOI: <https://doi.org/10.1080/19491247.2021.1893119> and Moore, Oswald and Lockrey, n 15.

Wales is offering owners corporations interest-free loans for the replacement of the ACP.¹⁷ Residential apartment building owners in Australia have been facing hefty special levies for the replacement of the cladding on their apartment buildings often with no recourse to the developers that they had purchased the apartment from, higher insurance levies, higher owners corporation fees, legal fees as well as fire safety orders to fix other fire safety defects, like sprinklers.¹⁸ Further, even though professional indemnity insurers have incorporated exclusion clauses in their policies excluding cover for cladding claims, many certifiers have not been able to obtain insurance cover.¹⁹ For those who have been fortunate enough to secure insurance, insurance premiums for design professionals along with certifiers have experienced steadily climbing premiums with engineers reporting that they are facing 500%–800% increases in premium.²⁰

THE BUILDING CONFIDENCE REPORT

In August 2017, the Building Ministers Forum, a periodical meeting that took place between the building ministers for each State and Territory, commissioned Prof Peter Shergold and Ms Bronwyn Weir to undertake an assessment of the effectiveness of compliance and enforcement systems for the building and construction industry across Australia.²¹ The Building Confidence Report, with its 24 recommendations, has now been accepted throughout Australia via the Building Ministers Forum.²² New South Wales is taking the lead with the implementation of the recommendations with implementation via the adoption of six reform pillars as depicted in the table below.²³

Pillar	Actions	Outcomes
Building a better regulatory framework	Implementing legislation and regulation and transforming the focus of the regulator	Ensure that NSW has a strong customer focused regulatory framework
Building rating systems	Work with ratings agencies, insurers and financiers to assist in better selection of industry participants	Move away from one-size-fits-all participant recognition and better identify risky players
Building skills and capabilities	Improve accreditation of construction related programs through improved standard modules	Shared minimum learning content and open source resources for all institutions
Building better procurement methods	Establish clear standards for engagement and outputs	Viable risk allocation and performance accountability
Building a digital future	Digitise the NSW Building Industry and move away from analogue record keeping	Shared industry wide platforms that build confidence
Building the reputation for quality research	Evidence based approach to accessing and closing the gap via case studies and other research	Baseline and measurement against our ability to improve confidence in the industry

¹⁷ See NSW Government, *Project Remediate* <<https://www.nsw.gov.au/customer-service/projects-and-initiatives/project-remediate>>.

¹⁸ See Oswald, Moore and Lockrey, n 16 and Moore, Oswald and Lockrey, n 15.

¹⁹ See Bleby, n 16.

²⁰ As reported by engineers in industry forums like the Australian Construction Industry Forum. See also Michael Bleby, “Builders, Architects, Insurers Await Lacrosse Cladding Appeal Ruling”, *Australian Financial Review*, 28 February 2021 <<https://www.afr.com/property/commercial/builders-architects-insurers-await-lacrosse-cladding-appeal-ruling-20210222-p574uw>>.

²¹ Peter Shergold and Bronwyn Weir, *The Building Confidence Report* (February 2018) 3 <<https://www.industry.gov.au/data-and-publications/building-confidence-building-ministers-forum-expert-assessment>>.

²² As a result of some States no longer having a dedicated Building Minister, the Building Ministers Forum has been effectively replaced by the Building Ministers Meeting which will be attended by senior members of government and industry stakeholders.

²³ See NSW Government, *Building Reforms Boosted with New Transformation Team* <<https://www.nsw.gov.au/customer-service/news-and-events/news/building-reforms-boosted-new-transformation-team>>.

This article will address the implementation of the first pillar in New South Wales via the package of regulatory reforms which centre around the *Design and Building Practitioners Act 2020* (NSW)²⁴ and the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (NSW)²⁵ and their attendant regulations (NSW Reforms). Adoption in the various States and Territories is awaiting the outcome of the NSW Reforms.

THE NSW REFORMS

The NSW Reforms are designed to ensure that:

- (1) building design is well documented and conforms with the Building Code of Australia;
- (2) contractors utilise the services of design professionals prior to the commencement of construction and throughout the construction process;
- (3) buildings are built in accordance with the Building Code of Australia and Australian Standards; and
- (4) the design team backed by their professional indemnity insurers effectively underwrite the whole construction process.

The mechanism used to achieve this is as follows.

REGISTRATION OF AND INSURANCE FOR DESIGN AND BUILDING PRACTITIONERS

Design practitioners who are going to work on residential apartment buildings²⁶ are required to be registered.²⁷ Design practitioners²⁸ and building practitioners²⁹ are also required to be insured. Whether the level of indemnity is adequate will depend upon a consideration of the nature and risks associated with the work, the volume of work, the length of time the practitioner has been registered, a reasonable estimate of potential claims based on the preceding three factors, the financial capacity of the practitioner and the limits, exceptions, exclusions, terms or conditions of the insurance policy.³⁰ While there is no guidance as to how this assessment is to be made, it is the view of the author that whether the level of indemnity is adequate requires an objective assessment taking into account the factors identified in reg 75. It is difficult to see how the legislature could have intended the assessment to be a subjective one as that would have the ultimate effect of rendering the obligation to obtain adequate insurance discretionary.³¹

The *Design and Building Practitioners Regulation 2021* (NSW) (*DBP Regulation*)³² provides 18 classes of design practitioners. They include architectural, building design (low rise), building design (medium rise) structural and facade engineering, mechanical engineering, fire safety engineering, fire systems design (with multiple subcategories), electrical engineering, drainage design, geotechnical engineering, civil engineering and vertical transportation. By contrast there will be three classes of registration for building practitioners, namely general, body corporate and body corporate nominee.³³

²⁴ The date of assent was 11 June 2020. Parts 1 and 4 had immediate effect. However, Pts 2, 3 Div 1 and 5–9 do not come into force until 1 July 2021. This date will coincide with the passage of the *Design and Building Practitioners Regulation 2021* (NSW).

²⁵ The date of commencement was 1 September 2020.

²⁶ Class 2 buildings or buildings with a class 2 part: see *Design and Building Practitioners Act 2020* (NSW) s 4 and *Design and Building Practitioners Regulation 2021* (NSW) reg 12.

²⁷ *Design and Building Practitioners Act 2020* (NSW) Pt 3 deals with the registration of engineers. *Design and Building Practitioners Act 2020* (NSW) Pt 5 deals with the registration of design practitioners.

²⁸ *Design and Building Practitioners Act 2020* (NSW) s 11 for design practitioners and *Design and Building Practitioners Act 2020* (NSW) s 14 for registered principal design practitioners.

²⁹ *Design and Building Practitioners Act 2020* (NSW) s 24.

³⁰ *Design and Building Practitioners Regulation 2021* (NSW) reg 75 for building practitioners and *Design and Building Practitioners Regulation 2021* (NSW) reg 77 for design practitioners.

³¹ See the discussion in *CGU Insurance Ltd v Porthouse* (2008) 235 CLR 103; [2008] HCA 30 on whether the phrase “a reasonable person in the Insured’s professional position” in a policy of insurance conveys an objective or subjective standard.

³² *Design and Building Practitioners Regulation 2021* (NSW) Sch 1, cl 1.

³³ *Design and Building Practitioners Regulation 2021* (NSW) Sch 1, cl 3.

The *DBP Regulation*³⁴ provides different pathways for the registration of different design practitioners. Under the first pathway, NSW Fair Trading will regulate all aspects of the registration process including eligibility and ongoing registration requirements including continuing professional development and insurance requirements.³⁵

Professional engineers have at least two other pathways to registration.³⁶ Engineers already registered or recognised under a recognised engineering body will be registered by NSW Fair Trading. The recognised engineering body will be authorised to operate a scheme for assessing an engineer's qualifications, experience, skills and knowledge for suitability for registration. The body will be responsible for setting continuing professional development and insurance requirements for the maintenance of the registration of the engineers. A further pathway for engineers is the registration of engineers who are able to satisfy NSW Fair Trading that they have already been registered or recognised by a professional body of engineers that operates with a Professional Standards Scheme. Professional standards legislation in every Australian jurisdiction governs the operation of the Professional Standards Scheme.³⁷ Professionals who operate under the Scheme are entitled to limit their liability and are subject to minimum insurance requirements.³⁸ However, there is currently no existing Professional Standards Scheme for professional engineers.

Building practitioners are similarly required to be insured.³⁹ However, given the unavailability of insurance for defective workmanship, the *DBP Regulation* empowers the Secretary to exempt a registered building practitioner from being adequately insured in relation to the provision of a building compliance certificate so long as the building practitioner is adequately insured for the liability that could be incurred by the building practitioner in the course of the practitioner's work.⁴⁰ It is difficult to envisage how the building practitioner would ever be able to satisfy its insurance obligations unless the State of New South Wales underwrites the risk as it has done for the home warranty insurance scheme pursuant to the *Home Building Act 1989* (NSW). An alternative is project insurance, also known as decennial liability insurance,⁴¹ to cover the building practitioner and all of the design practitioners. Such insurance is not currently available in Australia although it is available in France and typically costs approximately 2% of the project cost. This is a significant cost compared to the typically slim profit margins for residential apartment development.

BUILDING COMPLIANCE CERTIFICATES AND OCCUPATION CERTIFICATES

Registered design practitioners must prepare the design for the critical elements of the building. Critical elements are fire safety, waterproofing, structural, mechanical, plumbing and electrical.⁴² The building practitioner must take reasonable steps to ensure that each regulated design is prepared by a registered

³⁴ *Design and Building Practitioners Regulation 2021* (NSW) Pt 4 Sch 2.

³⁵ See *Design and Building Practitioners Regulation 2021* (NSW) Pt 4 reg 70.

³⁶ See *Design and Building Practitioners Regulation 2021* (NSW) Sch 2, Pt 5, cl 27 for the three pathways to registration for all professional engineers. Compare with fire safety engineers who have five different pathways to registration pursuant to *Design and Building Practitioners Regulation 2021* (NSW) Sch 2, Pt 5, cl 30.

³⁷ In New South Wales, see the *Professional Standards Act 1994* (NSW) and the *Professional Standards Regulation 2019* (NSW).

³⁸ See *Professional Standards Act 1994* (NSW) Pt 2 which sets out which liabilities may be limited and to what extent. Pursuant to *Design and Building Practitioners Regulation 2021* (NSW) reg 106, the insurance requirements for registered design practitioners, principal design practitioners and professional engineers do not apply until 30 June 2023. However, it is anticipated that reg 106 will be amended shortly to reduce the transition period to one year to defeat the disallowance motion that is currently before parliament for the *Design and Building Practitioners Regulation 2021*.

³⁹ Pursuant to *Design and Building Practitioners Regulation 2021* (NSW) reg 106, the insurance requirements for a registered building practitioner do not apply until 30 June 2023. However, it is anticipated that reg 106 will be amended shortly to reduce the transition period to one year to defeat the disallowance motion that is currently before parliament for the *Design and Building Practitioners Regulation 2021*.

⁴⁰ *Design and Building Practitioners Regulation 2021* (NSW) regs 75, 76.

⁴¹ Dr Donald E Charrett, *Is Conventional Insurance for Construction Projects Fit for Purpose?* (2018) 34 BCL 253, 260.

⁴² *Design and Building Practitioners Act 2020* (NSW) s 6.

design practitioner.⁴³ Further, the building practitioner must not without reasonable excuse use a design that has not been prepared by a regulated design practitioner.⁴⁴

Once the design is prepared, prior to the commencement of building work, the registered building practitioner must lodge through the NSW planning portal, a set of construction issued regulated design drawings and compliance certificates that the design and any subsequent major variations comply with the Building Code of Australia.⁴⁵ The intention is to hold key practitioners accountable for their work across the planning, design and construction stages. The contractor must then build in accordance with the declared designs and must at the completion of construction issue a compliance declaration that the final building is compliant with the Building Code of Australia.⁴⁶ Before applying for an occupation certificate, the principal contractor has to give notice to each registered building practitioner⁴⁷ who did the work of its intention to apply for an occupation certificate.⁴⁸ Each registered building practitioner must provide the principal contractor with a building compliance declaration for the building work.

The *DBP Regulation* requires the principal contractor to lodge through the NSW planning portal, the building compliance declaration.⁴⁹ The building compliance declaration must be accompanied by a list of the persons who have been contracted or are under an “arrangement” to do the work, a list of work done by each person, copies of final design designs used, interim as built drawings for regulated designs as well as the principal compliance declaration for all regulated designs from a registered principal design practitioner.⁵⁰ The principal certifier responsible for issuing an occupation certificate must consider the compliance declarations and any instances of non-compliance specified.⁵¹

A developer must notify the Department of Customer Service six to 12 months prior to the proposed application for an occupation certificate of its intention to apply for an occupation certificate.⁵² The Secretary of the Department of Customer Service may issue a prohibition order preventing the issue of an occupation certificate because of the existence of serious defects.⁵³ If a prohibition order is in place then the Secretary must notify council certifiers, the developer, owners and the registrar general of the existence of the prohibition order.⁵⁴ Any occupation certificate issued in contravention of the prohibitions order is invalid.⁵⁵ While a developer may appeal against a prohibition order to the Land and Environment Court, the appeal does not operate as a stay.⁵⁶

⁴³ *Design and Building Practitioners Act 2020* (NSW) s 18.

⁴⁴ *Design and Building Practitioners Act 2020* (NSW) s 19.

⁴⁵ *Design and Building Practitioners Act 2020* (NSW) s 9; *Design and Building Practitioners Regulation 2021* (NSW) reg 16.

⁴⁶ *Design and Building Practitioners Act 2020* (NSW) s 17.

⁴⁷ *Design and Building Practitioners Act 2020* (NSW) s 7 defines: “(1) In this Act, building practitioner means – (a) a person who agrees under a contract or other arrangement to do building work, or (b) if more than one person agrees to do building work, a person who is the principal contractor for the work. (2) In this Act, principal contractor means a person who agrees to do building work under a contract or arrangement (the head contract) and for whom work is to be carried out under one or more other contracts or arrangements as part of or incidental to the work carried out under the head contract. (3) In this Act, a building practitioner is taken to do building work if the practitioner (a) agrees to do building work under a contract or other arrangement, or (b) is the principal contractor for the work. (4) The regulations may – (a) prescribe additional persons as building practitioners for the purposes of this Act, and (b) exclude persons from being building practitioners for the purposes of this Act, and (c) prescribe circumstances in which a person prescribed for the purposes of paragraph (a) is taken to do building work.”

⁴⁸ *Design and Building Practitioners Act 2020* (NSW) s 16.

⁴⁹ *Design and Building Practitioners Regulation 2021* (NSW) reg 18(1).

⁵⁰ *Design and Building Practitioners Act 2020* (NSW) s 17(6); *Design and Building Practitioners Regulation 2021* (NSW) reg 18(2).

⁵¹ *Design and Building Practitioners Act 2020* (NSW) s 27.

⁵² *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (NSW) ss 7(1), 9(1)(a).

⁵³ *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (NSW) s 9(1)(c).

⁵⁴ *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (NSW) s 9(3).

⁵⁵ *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (NSW) s 9(6).

⁵⁶ *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (NSW) s 10.

INVESTIGATIVE AND ENFORCEMENT POWERS

The Secretary of the Department of Customer Service is empowered to investigate complaints and to enforce the provisions of the *Design and Building Practitioners Act 2020* (NSW).⁵⁷ Powers include the acceptance of written undertakings from a registered practitioner with a breach of an undertaking providing grounds for taking disciplinary action against a registered practitioner.⁵⁸ The Secretary may also issue stop work orders which may be appealed against although the appeals do not operate as a stay.⁵⁹ The Secretary may also apply to the Land and Environment Court to remedy or restrain a breach of the *Design and Building Practitioners Act 2020* (NSW). Proceedings for offences may be taken in the Local Court or the Land and Environment Court in its summary jurisdiction. If successful, the courts may impose penalties.⁶⁰

The Secretary is also empowered to issue rectification orders.⁶¹ If the rectification order is not complied with then the Secretary may demolish a building or a part of a building.⁶² More than one building rectification order may be issued⁶³ and each building rectification order may be issued to more than one person⁶⁴ or more than one developer.⁶⁵ Developers may appeal a rectification order to the Land and Environment Court although appeals do not operate as a stay.⁶⁶ The Secretary is subject to natural justice requirements although notice need not be given if there is a serious risk to public safety or there is an emergency.⁶⁷ Developers are also liable for the costs of compliance although they may appeal against a compliance costs notice to the Land and Environment Court.⁶⁸ Interestingly, any work rectification orders must be considered in any proceedings in the NSW Civil and Administrative Tribunal and any other court proceedings relating to building work that is the subject of the order.⁶⁹

Unfortunately, the Secretary does not have the power to declare an occupation certificate void if it subsequently issues a work rectification order for serious defects even if those defects pose a risk to public safety. This preserves the status quo in that there is currently no mechanism available in New South Wales where an occupation certificate that is subsequently proven to be unreliable may be declared void. In the absence of such a power, developers may ostensibly force purchasers to settle their contracts for sale.⁷⁰ It is suggested that the legislature reconsider whether such power would be in order – at least in circumstances where the work rectification orders involve the rectification of major defects, the presence of which indicate that the occupation certificate ought not to have been issued in the first instance. If the Secretary is empowered to demolish a building or part of a building then it ought to be also empowered to declare as void any occupation certificate that has been previously issued. Should

⁵⁷ See *Design and Building Practitioners Act 2020* (NSW) Pts 7, 8 which dovetails with *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (NSW) Pts 3, 4.

⁵⁸ *Design and Building Practitioners Act 2020* (NSW) s 88; *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (NSW) s 28.

⁵⁹ *Design and Building Practitioners Act 2020* (NSW) ss 89, 90; *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (NSW) ss 29, 30.

⁶⁰ *Design and Building Practitioners Act 2020* (NSW) s 93.

⁶¹ *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (NSW) s 33.

⁶² *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (NSW) s 42.

⁶³ *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (NSW) s 53.

⁶⁴ *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (NSW) s 54.

⁶⁵ *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (NSW) s 55.

⁶⁶ *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (NSW) s 50.

⁶⁷ *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (NSW) s 44(3).

⁶⁸ *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (NSW) s 52.

⁶⁹ *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (NSW) s 43.

⁷⁰ Carrie Fellner, "Sydney Building 'Nightmare' Set to Cost Maryam Her Life Savings", *The Sydney Morning Herald*, 20 March 2021 <<https://www.smh.com.au/national/nsw/sydney-building-nightmare-set-to-cost-maryam-her-life-savings-20210319-p57cb5.html>>.

the Secretary exercise its power to demolish a building or part of a building then purchasers may be able to rely upon s 66M of the *Conveyancing Act 1919* (NSW). Section 66M allows a purchaser to seek a reduction in the purchase price by such amount as is just and equitable in the circumstances where land is damaged after the making of a contract for the sale of the land and before the risk in respect of the damage passes to the purchaser. However, on its face, s 66M does not entitle a purchaser to refuse to complete a purchase even if the land is substantially damaged. Such a right typically arises out of the contract for sale.⁷¹ Nevertheless, s 66M does potentially allow a purchaser to recover its deposit if a vendor refuses to provide a reduction in the purchase price and terminates the contract for repudiation if the purchaser in turn refuses to complete the contract for the full purchase price.⁷²

EXTENSION OF THE DUTY OF CARE

The NSW Reforms have addressed the effect of *Brookfield Multiplex Ltd v Owners – Strata Plan No 61288*⁷³ which effectively precluded the existence of a duty of care by builders and design professional to subsequent owners in the absence of vulnerability. The resultant gap in the availability of a cause of action for owners of residential apartment buildings and owners corporations for latent defects that manifest more than six years after the registration of the strata plan pursuant to the *Strata Schemes Development Act 2015* (NSW) has now been overcome in part, by imposing a retrospective duty of care on builders and design professionals to avoid pure economic loss to all subsequent owners of residential apartment buildings.⁷⁴ This includes owners corporations.

The duty of care is non-delegable⁷⁵ and economic loss is defined to include the cost of rectification of defects.⁷⁶ The duties and warranties under the *Home Building Act 1989* (NSW) and other Acts are preserved. The operation of the *Civil Liability Act 2002* (NSW) is also expressly preserved.⁷⁷ The retrospective nature of the duty of care was intended to provide owners with a cause of action for the defective cladding. However, its effect is not so limited. The duty applies if the loss first became apparent within 10 years immediately prior to 11 June 2020⁷⁸ or first becomes apparent on or after 11 June 2020.

The Lacrosse building was designed in 2010 and 2011 although construction did not commence until 2011.⁷⁹ If the Lacrosse building was in New South Wales then LU Simon and the design professionals would fall within the 10-year retrospective shadow of new duty of care for pure economic loss. The retrospective duty of care may not provide a cause of action to all subsequent owners of residential apartment buildings. For example, latent damage in a residential apartment building, completed more than 10 years ago, might only have manifested in the last 10 years and therefore be within the retrospective shadow of the extended duty of care. In such a scenario, s 6.20 of the *Environmental Planning and Assessment Act 1979* (NSW) which provides a 10-year long stop for building actions would operate to preclude a building action being brought.⁸⁰ If this was not the subjective intention of the NSW legislature then either the *Design and Building Practitioners Act 2020* (NSW) or the *Environmental Planning and Assessment Act 1979* (NSW) must be amended to prevent this outcome.⁸¹

⁷¹ See, eg, cl 7.1.1 of the Contract for the sale and purchase of land 2017 edition which entitles a vendor to rescind the contract if the purchaser makes a claim before completion that exceeds 5% of the purchase price.

⁷² *Gorgas v Soon Ok Hwang* (2010) 15 BPR 28,925; [2010] NSWSC 1121.

⁷³ *Brookfield Multiplex Ltd v Owners – Strata Plan No 61288* (2014) 254 CLR 185; [2014] HCA 36.

⁷⁴ *Design and Building Practitioners Act 2020* (NSW) s 37 Sch 1, cl 5.

⁷⁵ *Design and Building Practitioners Act 2020* (NSW) s 39.

⁷⁶ *Design and Building Practitioners Act 2020* (NSW) s 38.

⁷⁷ *Design and Building Practitioners Act 2020* (NSW) s 41.

⁷⁸ *Design and Building Practitioners Act 2020* (NSW) Sch 1 cl 5.

⁷⁹ *Tanah Merah Vic Pty Ltd v Owners Corporation No 1 of PS613436T* [2021] VSCA 72, [33], [34].

⁸⁰ Pursuant to *Environmental Planning and Assessment Act 1979* (NSW) s 6.20(2)(a), time typically starts to run from the issue of the occupancy certificate.

⁸¹ See also the discussion in Laina Chan, “The Enforceability of Extended Contractual Warranties – Can the Hurdle of Applicable Limitation Periods Be Overcome?” (2016) 32(3) BCL 170.

CONCLUSION

The NSW Reforms are several steps in the right direction. They are designed to prevent a builder or developers from cutting corners by mandating the requirement of a fully resolved set of certified construction drawings by registered (and adequately insured) design professionals prior to the commencement of construction.⁸² Variations in respect of essential building elements also have to be designed, documented and certified by the respective design professionals.⁸³ Builders have to certify that they have built in accordance with the set of certified construction documentation and that the completed building complies with the Building Code of Australia.⁸⁴ To complement this, the principal certifier must not determine an application for an occupation certificate unless all compliance declarations required by the *Design and Building Practitioners Act 2020* (NSW) have been lodged and considered by the principal certifier.⁸⁵ As insurance for defective workmanship is not available and is unlikely to become available commercially, the NSW Reforms rely upon the prohibition orders⁸⁶ and potential prosecutions for offences for non-compliance⁸⁷ to encourage builders to comply with their obligations under the *Design and Building Practitioners Act 2020* (NSW).

Yet, as discussed, above there are two areas in which it is suggested that the legislature ought to further intervene. In the first instance, to bolster the power of the Secretary to declare occupation certificates void where a work rectification order is subsequently issued to cover serious or major defects. Second, to clarify the ambit of the retrospective duty of care and whether it was intended to afford subsequent owners a cause of action for buildings completed more than 10 years prior to the enactment of the *Design and Building Practitioners Act 2020* (NSW).

It is noted that the potential effectiveness of the NSW Reforms has been enhanced by the passage of anti-phoenixing legislation in early 2020.⁸⁸ That legislation is designed to preclude directors of builders from escaping their contractual and common law obligations by disposing of a company's assets to avoid the company's obligations to its creditors.⁸⁹ Readers will be aware that historically, some builders have taken advantage of the lack of anti-phoenixing legislation. Such builders have successfully escaped their creditors by disposing the assets of the company contracted to carry out the building work and then resurrected themselves by incorporating new special purpose vehicles to continue their path of destruction on the next project. Hopefully, the NSW Reforms as well as the anti-phoenixing legislation will work together to hold builders accountable for the residential apartment buildings.

Ultimately however, whether the NSW Reforms will be successful in raising the quality of residential apartment building in New South Wales and ultimately consumer confidence depends upon whether the Department of Consumer Affairs is properly resourced. While David Chandler, the NSW Building Commissioner does not lack energy and enthusiasm, he is but one person and without support, he and his Department will not be able to react to complaints, instigate investigations and issue stop work orders, rectification orders or prohibition orders.

⁸² *Design and Building Practitioners Act 2020* (NSW) ss 9, 12.

⁸³ *Design and Building Practitioners Act 2020* (NSW) s 20.

⁸⁴ *Design and Building Practitioners Act 2020* (NSW) s 17.

⁸⁵ *Design and Building Practitioners Act 2020* (NSW) s 27.

⁸⁶ *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (NSW) Pt 2.

⁸⁷ *Design and Building Practitioners Act 2020* (NSW) Pt 8 Div 2.

⁸⁸ See *Treasury Laws Amendment (Combating Illegal Phoenixing) Act 2020* (Cth). The legislation amends the *Corporations Act 2001* (Cth), *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and *Taxation Administration Act 1953* (Cth). There are now anti-phoenixing offences: *Corporations Act 2001* (Cth) Pt 5.7B Div 3 Subdivs B, C as well as sections preventing directors from improperly backdating resignations or ceasing to be a director if this would leave the company with no directors: *Corporations Act 2001* (Cth) ss 203AA, 203AB.

⁸⁹ *Corporations Act 2001* (Cth) s 588GAA.