

Duty of Care under the Design and Building Practitioners Act

The *Design and Building Practitioners Act 2020* (NSW) (**DBP Act**) and the *Design & Building Practitioners Regulations 2021* (NSW) brought architects a range of new legislative obligations which, since its enactment, must be complied with and cannot be contracted out of. This note solely concerns the duty of care provisions in Part 4 of the DBP Act, and the recent case of *Goodwin Street Developments Pty Ltd atf Jesmond Unit Trust v DSD Builders Pty Ltd (in liq)* [2022] NSWSC 642 (**Goodwin v DSD**).

What is the duty of care obligation under s37 of the Act?

An architect has a duty to use reasonable care to avoid economic loss caused by defects relating to the building and arising from 'construction work' (as defined by Part 4 the DBP Act).

S37(1) of Part 4 the DBP Act states that an architect 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 where the work is done and
- b) arising from construction work (including preparation of registered designs, other designs for building work and other services such as supervision, contract administration and project management of building work or designs for building work).

Architects carry out 'construction work' for the purpose of the statutory duty of care. S36 of the DBP Act defines 'construction work' which, in part, means *'the preparation of regulated designs and other designs for building work'*.

This duty of care is owed to each owner of the land and to each subsequent owner of the land. If the duty is owed, a person is entitled to damages for breach of that duty.

It is important to perform your services to the duty of care imposed by the DBP Act as well as with 'reasonable skill and care of a competent consultant' which has been established at common law. Remember that an architect's Professional Indemnity (**PI**) insurance is an important resource and risk management tool. Although there are some policies which contain exclusions stating that all or some obligations under the DBP Act are not covered, this is rare. Most PI insurance policies do not specifically refer to or exclude the DBP Act. PI insurance policies cover you for the provision of professional services noted in the policy schedule (e.g. Architecture). If your experience and professional expertise extended to the provision of services under the Act, your PI insurance policy would be expected to cover you for your obligations under it, subject to the other terms and conditions of your PI insurance policy. If you are concerned as to the amount of coverage your PI insurance provides, then please discuss this with your broker or insurer.

Retrospective application of duty of care

The duty applies to economic loss caused by a breach of the duty of care under the DBP Act if:

1. *The loss first became apparent within the 10 years immediately before the commencement of s37 of the Act (i.e. immediately before 10 June 2020) or*
2. *The loss first becomes apparent on or after the commencement of s37 of the DBP Act.*

Importantly, the duty of care obligations in s37 apply retrospectively. Specifically, the DBP Act states that Part 4 extends to construction work carried out before the commencement of the DBP Act as if that duty of care was owed by the person carrying out construction work to the owner of the land and to the subsequent owner of the land when the construction work was carried out.

The DBP Act states that the loss is 'apparent' when an owner first becomes aware (or ought reasonably to have become aware) of the loss. For this reason, systematic and thorough record keeping, research and document management and retention are vital. Make sure your consultancy agreements contain clauses that allow you to retain a copy of all documents for this reason.

Does the duty of care obligation under the DBP Act extend beyond class 2 buildings?

Yes. The duty of care applies to all 'buildings' broadly defined within the Environmental Planning and Assessment Act (EPPA) and extends to building work, including (but not limited to) residential building work within the meaning of the Home Building Act (HBA).

Initially, there was a widespread view within the construction industry that the duty of care obligation under the DBP Act was only applicable to class 2 buildings or buildings with a class 2 part. However, following the recent case of *Goodwin v DSD* this duty of care obligation appears to go beyond simply class 2 buildings to the complex interpretation of the definitions within s36 of the DBP Act of 'construction work', 'building work' and 'building'

The statutory duty of care must relate to 'construction work'. The definition of 'construction work' under s36 of the DBP Act includes 'Building work'. 'Building work' is defined under the DBP Act to include residential building work within the meaning HBA relating to a 'building'. 'Building', in turn, is defined under the DBP Act as having the same meaning as defined under the EPPA. S1.4 of the EPPA broadly defines 'building' to include:

'...part of a building, and also includes any structure or part of a structure...but does not include a manufactured home, moveable dwelling or associated structure within the meaning of the Local Government Act 1993'

His Honour held that '*... the definition of 'building work' in s36 of the DBP Act is an inclusive, not an exclusive, definition*'. That is, just because the boarding house in this case is not a dwelling within the meaning of the HBA does not prevent it from still being 'building work' relating to a 'building' under the DBP Act.

Following *Goodwin v DSD*, the extension of the DBP Act to new classes of buildings applies only to part 4 of the DBP Act and the statutory duty of care (rather than other aspects of the DBP Act such as regulated designs, Design Compliance Declarations and registrations which are still linked to class 2 buildings, or part thereof).

Can an architect be held individually liable even if they are not the nominated registered design practitioner, or performing the design services?

The statutory duty of care under Part 4 of the DBP Act can be owed personally, even if you are not a director of a company, or the nominated registered design practitioner under the DBP Act, if your services include:

- (a) the preparation of regulated designs and other designs for building work; or*
- (b) the acts of supervising, coordinating, project managing or otherwise having substantive control over the carrying out of any building work or regulated designs or other designs for building work.*

Stevenson J in *Goodwin v DSD* considered a similar question with respect to an individual, Mr Roberts, acting as a representative of the builder. In that matter the Developer entered into a building contract with DSD Builders Pty Ltd (Builder) to construct 3 residential boarding houses intended for student accommodation near the University of Newcastle. The Developer commenced proceedings against the Builder in August 2018 and in April 2019 Mr Roberts was added as the second defendant. Soon after, DSD was put into liquidation.

The Developer alleged that Mr Roberts performed 'construction work' under the meaning of Part 4 of the DBP Act in negotiating the building contract, administering the building contract and controlling and supervising the construction work on the site on behalf of the Builder and breached his statutory duty of care under s37 of the DBP Act to avoid economic loss by failing to identify defects in the buildings

the subject of the construction work. The developer claimed \$300,000 from Mr Roberts, being the cost to rectify the building defects.

On consideration of the evidence, Stevenson J [at 137-138] held that Mr Roberts had performed construction work and *'...was not only engaging in project management of the site but also in supervision of the construction. He was therefore engaging in 'construction work' for the purpose of Pt 4 of the DBP Act'*.

His Honour also held [at 19 and 20] that Mr Roberts breached of his duty of care under the DBP Act and was personally liable to pay the Developer the costs of rectifying the defects.

Employees are usually covered under the practice's PI Insurance policy. The main issue if is the practice (i.e. your employer) does not exist in the future or does not have insurance. This is something to be aware of and you can still be sued personally. It may be possible for an individual architect to obtain a 'personal liability' policy sitting alongside the employer's policy, however there may be issues of duplicate insurance and obviously additional costs associated with this, so it is best discussed with the architect's relevant insurance broker.

Key Take-Aways

- s37 of the DBP Act gives architects a duty of care to each owner and subsequent owner of the land to which the architect's design relates
- the s37 duty of care is retrospective, and enables the owner and subsequent owner of the land to sue you for defects that were first discovered after 10 June 2010 even if the work you did was earlier than that and even if you did not work directly for that owner
- Following *Goodwin v DSD*, architects performing design services for building work for a building under the definition of 'building' under the EPPA, i.e. other than Class 2 buildings, may be held to the s37 duty of care.
- As the definition in s36 of 'construction work' includes *'the supervision, coordinating, project managing or otherwise having substantive control over the carrying out of any work'* including building work, the preparation of regulated designs or other designs for building work, it is possible, following *Goodwin v DSD*, that s37 could allow individual architects to be sued, especially if their role equates to supervision or substantive control of the building work or preparation of regulated designs or other designs for building work.

Managing Your Risk

- The s37 statutory duty of care applies automatically and cannot be contracted out of. This means there is not much you can do to avoid it, especially for past projects.
- A typical PI Insurance policy would usually cover that s37 duty unless the policy has a specific exclusion for DBP Act. Consult your insurance broker to confirm what coverage you have.
- Employees concerned about being individually liable under s37 could discuss with their insurance broker obtaining a 'personal liability' policy, to protect against the risk of their current employer not maintaining insurance in future years.
- Be very wary of consultancy agreements that give you obligations to comply with the DBP Act. If the consultancy agreement gives you any liability that exceeds your DBP Act obligations (e.g. to 'warrant' outcomes, to 'indemnify' or to assume liability to parties other than the owners captured in s37) then the additional liability is likely to be uninsured.
- Have a clear and explicit scope for your services. If providing contract administration, project management services, or similar, define your role carefully and clarify that you are not 'supervising' or having substantive control over the carrying out of any building work or design of any building work.
- Keep good records, including of older projects, for at least 10-15 years from completion due to the extended liability period introduced by s37
- Notify your PI Insurer promptly if you do become aware of a potential claim against you under s37 or otherwise

Ultimately, you should always see legal advice and advice from your insurer should you have any concerns about the DBP Act, especially as we start seeing more cases and matters relating to it evolve.