

Design and Building Practitioners Act: Information on the duty of care provisions

The NSW Fair Trading website has a short FAQ about the duty of care provisions:
<https://www.fairtrading.nsw.gov.au/trades-and-businesses/construction-and-trade-essentials/design-and-building-practitioners/frequently-asked-questions#general>

Detailed information is provided below.

Introduction to the duty of care

The *Design and Building Practitioners Act* (the Act) strengthens consumer protections by establishing a duty of care owed by persons who carry out construction work, which extends to existing buildings in certain circumstances. The duty of care provisions in the Act commenced on **10 June 2020**.

The Act expressly provides that any person who carries out construction work has a duty to exercise reasonable care to avoid economic loss caused by defects in or related to a building for which the work is done and arising from the construction work.

This duty is owed to each owner of the land in relation to which the construction work is done and to each subsequent owner.

What is the intention of the duty of care provisions?

The existence of such a duty in the construction industry is well established in the common law. The Government's intent behind the reform was to remove any uncertainty that may exist in the common law that a duty is owed to the end user in respect of liability for defective construction work.

The duty expressly provides that people who carry out construction work owe a duty of care to certain categories of owners, including individual titleholders and subsequent owners of a building, owners corporations and a community, precinct or neighbourhood scheme association. It is these categories of owner whose protections had been weakened and Government is seeking to protect through the reforms.

Is the retrospective nature of the duty of care subject to the 'long stop' in the EP&A Act?

Transitional provisions in the Act apply the duty retrospectively to construction work that was carried out before the Act commenced, as if the duty was owed at the time the construction work was carried out, but only if:

- the economic loss caused by breach of the duty first became apparent within the 10 years immediately before the duty commenced (i.e. within 10 years before 10 June 2020); or
- the economic loss caused by breach of the duty first becomes apparent on or after the duty commenced.

The duty applies retrospectively as outlined above regardless of whether owners have already taken a separate action for breach of a common law duty of care, and the duty may be taken into account in the proceedings for the common law duty unless the court considers it would not be in the interests of justice to do so.

Section 6.20 of the *Environmental Planning and Assessment Act 1979* provides a long-stop limitation period of 10 years for loss or damage arising from defective building work. This section would apply to claims for damages for breach of the duty imposed under the DBP Act, whether or not the relevant construction work was carried out before or after the commencement of the duty. However, it will not apply to all claims as not all claims rely on the duty will be arising out of or in connection with defective building work as defined in the EP&A Act. This is because the scope of the term “construction work” in the DBP Act probably encompasses work that isn’t “building work” as defined in the EP&A Act. In particular, the “manufacture or supply of a building product used for building work” is unlikely to be captured by section 6.20.

Loss “becomes apparent” when an owner entitled to the benefit of the duty first becomes aware (or ought reasonably to have become aware) of the loss.

This will ensure that owners currently living in existing buildings with a defect will, in certain circumstances, be afforded the strengthened protections, as well as future owners of buildings currently being built.

How is construction work defined, and what is the scope of the duty of care?

Construction work is defined to capture all building work, the preparation of designs for building work, as well as the manufacture or supply of a building product used for building work, and includes anyone who supervises, coordinates, project manages, or otherwise has substantive control over such work is also captured. The duty of care is not limited to class 2 buildings but applies to all building work.

The broad definition of construction work was intended to ensure that owners can directly make claims against all parties responsible for the defective work, such as the architect, engineer, subcontractors and suppliers and project managers, in addition to builders and developers.

The duty complements the other reforms in the Act which seek to ensure that each step of construction is well documented and compliant, and that all people involved in the design and construction of buildings are accountable for the quality of their work.

How does the duty of care apply to certifiers?

While the application of the duty to specific individuals in specific circumstances will be a matter for the courts, the application of the duty to a certifier, whether providing private services that would be taken to be construction work, such as preparing designs, or whether performing their statutory function of certification work, would be consistent with the Government’s intent, i.e. that where a certifier does not exercise reasonable care, skill and diligence in carrying out the work or certification and an owner suffers a loss as a result, that the certifier should be accountable.

How does the registration of Design Practitioners, Building Practitioners and Professional Engineers affect the duty of care?

A registration scheme for Design Practitioners, Building Practitioners and Professional Engineers, and a new compliance declaration scheme for design and building work, commenced on 1 July 2021. The new scheme is currently limited to design and building work on class 2 buildings and buildings with a class 2 component.

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More information: <https://www.fairtrading.nsw.gov.au/housing-and-property/changes-to-class-2-buildings>

The new registration and compliance declaration scheme does not change the operation of the duty of care. The duty of care is owed by anyone involved in the preparation of designs for building work, manufacture or supply of a building product used for building work, and includes anyone who supervises, coordinates, project manages or has substantive control over such work. Therefore, the duty of care could apply to a building or design practitioner even if they are not yet registered or to a person who is not a design or building practitioner.