

**Judicial guidance on the application of the *Design and Building Practitioners Act 2020* (NSW) (DBP Act)**

Observations on application of DBP Act	Implications	Article Reference
<p><i>Boulus Constructions Pty Ltd v Warrumbungle Shire Council (No 2)</i> [2022] NSWSC 1368 (<b>Boulus</b>)</p> <p><b>Facts</b></p> <ul style="list-style-type: none"> <li>Boulus Constructions Pty Ltd (<b>Builder</b>) entered into a contract with Warrumbungle Shire Council (<b>Council</b>) to build a retirement village (<b>Building Contract</b>).</li> <li>The Builder commenced proceedings against the Council for payment under the Building Contract, to which the Council cross-claimed against the Builder, claiming defective building work.</li> <li>The Council sought to join the Builder’s Managing Director and its project site supervisor to the proceedings under s 37 of the DBP Act.</li> <li>The Builder opposed the joinder on the basis that the Director and Site Supervisor were not ‘persons’ under s 37 and therefore did not owe a duty of care.</li> </ul> <p><b>Judgment</b></p> <ul style="list-style-type: none"> <li>Stevenson J granted leave to the Council to join the Builder’s Managing Director and its project site supervisor to the proceedings.</li> </ul>	<p><i>Boulus</i> confirmed that the duty can apply to directors and employees of building companies.</p> <p>This judgment raised issues for professional indemnity, management liability and D&amp;O insurers that have policies that could potentially respond to s 37 claims against directors, as it allows plaintiffs greater potential defendants to bring a claim against.</p> <p>Further, claims brought against employees and directors are claims against individuals and as such, the individuals’ personal assets are at risk. Stevenson J also noted that whilst those individuals may rely on proportionate liability to dilute their liability, it will not likely absolve them of all liability.</p> <p>These implications infer that there may be an influx of claims brought against directors and create an interplay of cover between D&amp;O, management liability and professional indemnity policies. In such instances, it is recommended that insurers revisit policy wording or pricing in consideration of this duty.</p>	<p>The expanded scope of building practitioners’ duty of care</p> <p><a href="https://www.wottonkearney.com.au/the-expanded-scope-of-building-practitioners-duty-of-care/">https://www.wottonkearney.com.au/the-expanded-scope-of-building-practitioners-duty-of-care/</a></p>
<p><i>Goodwin Street Developments Pty Ltd atf Jesmond Unit Trust v DSD Builders Pty Ltd (in liq)</i> [2022] NSWSC 624</p> <p><b>Facts</b></p> <ul style="list-style-type: none"> <li>In 2017, the plaintiff developer, Goodwin Street Developments Pty Ltd (<b>Developer</b>) contracted builder DSD Builders Pty Ltd (<b>Builder</b>) to construct three residential boarding houses intended for university student accommodation.</li> </ul>	<p>This decision clarified that the statutory duty of care under s 37 is not limited to class 2 buildings and will apply to additional classes which in this case involved residential boarding houses whereby ‘building work’ has been completed.</p> <p>Insurers should be mindful of the now greater scope s 37 has, and though whilst the limits on this scope are yet to be judicially determined, its applicability has been widened to a variety of buildings not previously considered.</p>	<p>NSW Supreme Court clarifies scope of statutory duty of care for construction industry</p> <p><a href="https://www.wottonkearney.com.au/nsw-supreme-court-clarifies-scope-of-statutory-duty-of-care-for-construction-industry/">https://www.wottonkearney.com.au/nsw-supreme-court-clarifies-scope-of-statutory-duty-of-care-for-construction-industry/</a></p>

Observations on application of DBP Act	Implications	Article Reference
<ul style="list-style-type: none"> <li>The second defendant, Daniel Roberts, project managed and supervised the works.</li> <li>The buildings contained a number of defects and were maliciously damaged (by Mr Roberts).</li> </ul> <p><b>Judgment</b></p> <ul style="list-style-type: none"> <li>Mr Roberts was held liable to the developer for the defects and damage to the buildings because he was found to have: <ul style="list-style-type: none"> <li>carried out 'construction work' within the meaning of s 36 of the DBP Act, and</li> <li>breached his duty of care under s 37 of the DBP Act.</li> </ul> </li> </ul>		
<p><i>The Owners – Strata Plan No 87060 v Loulach Developments Pty Ltd (No 2)</i> [2021] NSWSC 1068</p> <p><b>Facts</b></p> <ul style="list-style-type: none"> <li>The Owners Corporation commenced proceedings against Loulach Developments Pty Ltd and others (<b>Loulach</b>) regarding alleged defects in a residential development in Parramatta.</li> <li>The Owners Corporation sought leave to include a claim for breach of the statutory duty of care created by s 37 of the DBP Act.</li> <li>The issue for determination was whether it was sufficient for the Owner's corporation to identify the defects and contend that their existence represented a breach of the statutory duty of care.</li> </ul> <p><b>Judgment</b></p> <ul style="list-style-type: none"> <li>Stevenson J held that it was not sufficient for the Owner's Corporation to simply assert a defect and allege that Loulach was required to take whatever precautions were needed to ensure the defect was present.</li> </ul>	<p>This case reinforced that the statutory duty of care created under the DBP Act is assessed by the usual principles of negligence and does not require a higher standard to be met.</p> <p>Defendants in proceedings where a breach of the statutory duty is alleged, should carefully review the claim and consider whether the breach has been properly pleaded. Where it has not, further and better particulars of the claim should be requested, or alternatively, a Notice of Motion to strike may also be warranted and should be considered.</p>	<p>First Supreme Court judgement on application of new duty of care in DBP Act</p> <p><a href="https://www.wottonkearney.com.au/first-supreme-court-judgment-on-application-of-new-duty-of-care-in-dbp-act/">https://www.wottonkearney.com.au/first-supreme-court-judgment-on-application-of-new-duty-of-care-in-dbp-act/</a></p>

Observations on application of DBP Act	Implications	Article Reference
<ul style="list-style-type: none"><li>• Stevenson J said that the DBP Act was engaged to avoid the need for an Owner's Corporation to provide that a builder owed it a duty of care, not to provide a shortcut to establish a breach.</li><li>• A plaintiff must still meet the other tests for negligence under the common law and the <i>Civil Liability Act 2002</i> (NSW), including breach of the duty and establishing damage was suffered due to that breach.</li></ul>		