
NSW opens door to thousands of defect claims

Michael Bleby *Senior reporter*



Jun 15, 2020 – 12.01am

Thousands of apartment owners in NSW now have a way to launch claims over cladding, water proofing and fire safety defects after a new law created [a duty of care](#) for builders, consultants and developers to end users in the construction chain, even without a contractual relationship linking them.

The Design & Building Practitioners Bill 2020, which came into effect last week, gives the state's apartment owners the first chance to seek damages for past building defects. It overturns the precedent set by [a 2014 High Court decision](#) that found a builder had no longer-term responsibility to the occupants of a high-rise apartment building.



'It's a great first step': Karen Stiles, executive officer of advocacy group Owners Corporation Network. **Louie Douvis**

There are limits to the scope for claims. The law requires negligence actions for defects to be launched within six years of a defect becoming known and within 10 years of a building's completion.

But this is a game-changer for owners of buildings – particularly those with combustible cladding – as it allows them to make a claim even after statutory warranties have run out, or where there was no statutory warranty in the first place. Owners of buildings that are part of existing legal actions are unable to make negligence claims under the new law, however.

It also has profound implications for the professional indemnity insurance market as it exposes companies in the building chain, which already struggle to get cover, to a raft of potential new claims based on historical liabilities.

But for the buyers of apartments who have traditionally had weaker consumer protection than someone buying a fridge, it's a big gain.

"The legislated duty of care will assist thousands of apartment owners now grappling with major defects, including fire safety installations and serious water leaks," said Karen Stiles, the executive officer of Owners Corporation Network, an advocacy group that has long campaigned for the change.

"It's a great first step towards re-regulating the industry and restoring confidence in new apartments."

Strata lawyer David Bannerman agreed.

"It's recognition that current consumer protection is woefully inadequate," he said.

It's too early to say how many buildings and owners will be able to bring negligence claims. Mr Bannerman said his firm was still drawing up a list of clients to advise of the potential for negligence claims.

Negligence claims are harder and more expensive to prosecute than breach of statutory warranty claims, the main redress method available to NSW apartment owners, but they provide a shorter window for action.

"It's more difficult litigation to run," Mr Bannerman said. "There are more defence points to raise. People can argue all sorts of things like contributory negligence."

Whatever the hurdles, consultants, builders and developers are worried. They already face a crisis as insurers, unable to price risk accurately, beat a retreat from the professional indemnity coverage market. The prospect of new liabilities for work claimed retrospectively will only make matters worse.

"The whole thing about duty of care is proving how it happened, what went wrong," Kathlyn Loseby, president of the Australian Institute of Architects' NSW chapter, said.

"What, then, is the impact on professional indemnity insurance? It will skyrocket. We're already in a difficult situation."

Jane Fitzgerald, the Property Council of Australia's NSW executive director, said regulating retrospectively was "challenging" for the industry as it would deepen the insurance problem.

"We've seen the impact of that with cladding and the fact that an entire industry couldn't get insurance," Ms Fitzgerald said.

"Accommodations had to be made around that, carving people out from requirements. That's just creating a different problem than solving the problem in front of you."

But for the many apartment owners with no other way to seek redress for problems they had no say in creating, the new law is good news.

"The passing of this bill was a great day for consumer protection," Ms Stiles said.