



# **General Legal Update**

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# Insurance – traps for young players

- The devil is in the detail.
- Read the policy inclusions and exclusions carefully.
- Notify potential claims and matters that may increase the insurer's risk

# *Design and Building Practitioners Act 2020*

- The new duty of care extends the duty to exercise reasonable care to avoid economic loss caused by defects:
  - (a) In or related to a building for which the work is done; and
  - (b) Arising out of construction work.
- “Construction work” for the purpose of the Act includes the preparation of regulated designs and other designs for building work.
- The duty is owed to each owner of the land in relation to which the construction work is carried out and each subsequent owner of the land.
- Presently, under the common law a consultant producing a design is only liable to the party they contracted with for the design work and not the ultimate or subsequent owners of the land.
- The issue is therefore whether a current professional indemnity insurance covers the new duty of care, including the duty owed to the ultimate or subsequent owners of the land.

- Does the policy operate on a “claims made and notified basis”. This means that the policy only covers claims first made during the period the policy is in force and notified to the insurer as soon as practicable (in writing) while the policy is in force.
- Important to ensure continuing insurance for the purpose of the new duty of care. If a subsequent owner of land makes a claim 5 years after construction, for example, the insured will only be covered if it has in place a policy covering such liability at the time the claim is made in 5 years’ time, regardless of whether insurance was in place at the time of the design or construction work.
- Is cover for a breach of duty owed by the consultant only to a client or customer of the consultant.
- Policy may require that notification be given to the insurer of any material alteration to the risk during the period of cover. There may be an alteration to the risk by reason of the consultant being subject to the extended duty, whether registered under the Act or not.
- Anecdotally insurers applying a blanket exclusion for potential claims arising under the Act.

# Policy conditions leading to refusal of indemnity

- Duty of disclosure.
- Notify potential claims and matters that may increase the insurer's risk.
- No admissions of liability.
- Work within expertise
- eg "...to meet policy conditions our Insured must comply with the relevant Australian Standards here, AS 4349.1-2007 and refer any External Timber Structures to a Structural Engineer for further inspection. External Timber Structures are defined by the policy as "timber decks, verandahs, pergolas, balconies, handrails, stairs, or retaining walls". Unfortunately, as our Insured has not met these policy conditions, there is no cover for any claim relating to the rear deck or stairs and Your Clients will need to address any claims for compensation to our Insured directly."



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