

Liability for Concrete Cancer

ASBC seminar

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The prevalence of concrete cancer

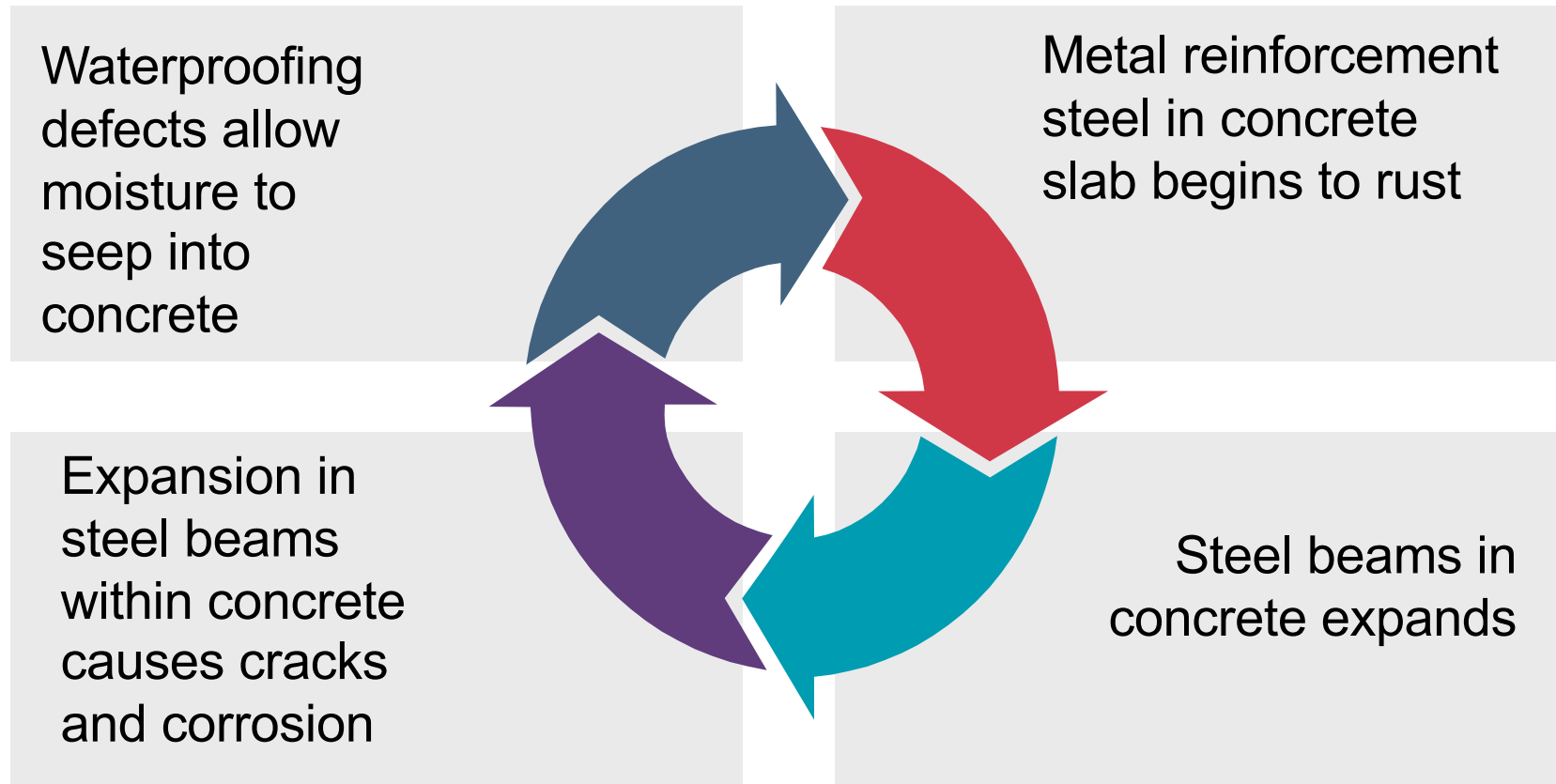
Is it a major defect under the *Home Building Act*?

Is it a serious defect under the *Residential Apartment Buildings Act*?

Who is liable to rectify?

The prevalence of concrete cancer

What is concrete cancer?



Waterproofing defects

2023 Strata Defects Survey Report
November 2023



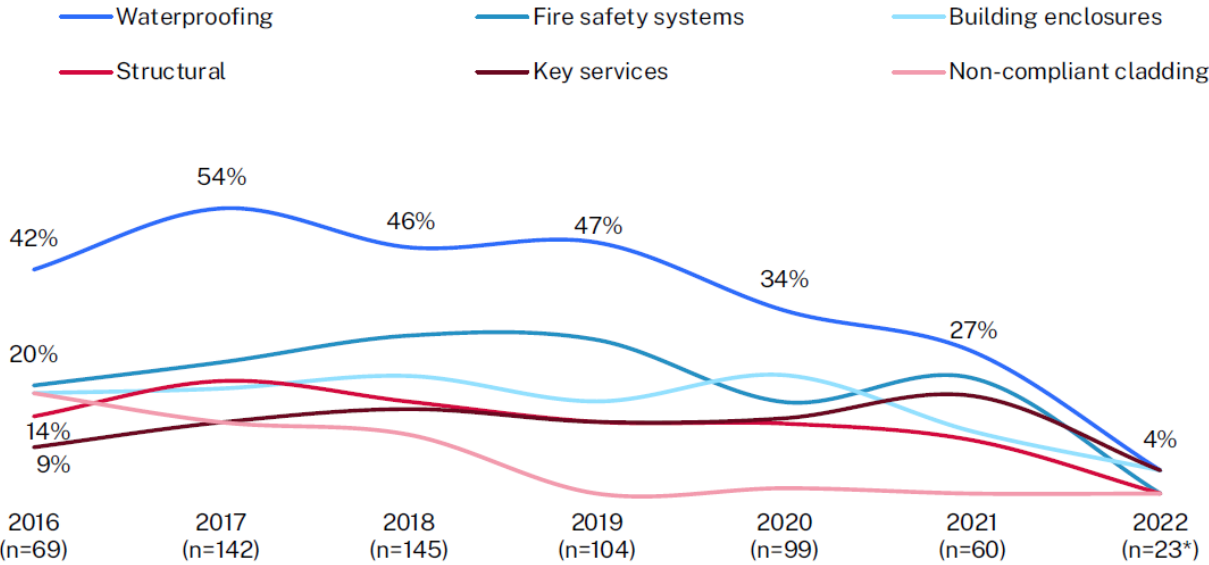



Figure 4 Types of serious defects among all buildings (by building registration year, all 2023 survey data)



Q20 Please select the areas where the building has had serious defect(s). Base: All buildings registered that year. *Caution small base size, results are indicative only

Concrete cancer:

Is it a major defect under the *Home Building Act 1989* (NSW)?

Major defects – 6 year time limitation (1/2)



Test: Is the issue complained of a defect in a Major Element of a building?
Section 18E(4) of the HBA defines a Major Defect as:

- (a) A defect in a MAJOR ELEMENT of a building attributable to defective design/materials, defective or faulty workmanship, or a failure to comply with structural performance requirements of the NCC, and that causes or is likely to cause:



(i)
The inability to inhabit or use the building (or part of the building) for its intended purpose



(ii)
The destruction of the building or any part of the building



(iii)
A threat of collapse of the building or any part of the building

Major defects – 6 year time limitation (2/2)



**Test: Is the issue complained of a defect in a Major Element of a building?
Section 18E(4) defines a Major Defect as (cont.):**



(b)
A defect prescribed by the regulations as a major defect



(c)
The use of a building product (within the meaning of the *Building Products (Safety) Act 2017* in contravention of that Act (e.g. combustible cladding)

Major defects – 6 year time limitation



Section 18E(4) of the Act generally defines a ‘**major element**’ of a building to be:

- 1 An internal or external load-bearing component of a building that is essential to the stability of the building, or any part of it
- 2 A fire safety system
- 3 Waterproofing
- 4 Any other element that is prescribed by the regulations as a major element of a building

Any other defect – 2 year time limit



Any other defect which does not fall within the definition of a major defect will have a 2 year time limit.

Concrete cancer:

Is it a serious defect under the *Residential Apartment Building (Compliance and Enforcement Powers) Act 2020 (NSW)*

Section 3(1) of the RAB Act:



Serious defect, in relation to a building, means—

- a) a defect in a **building element** that is attributable to a failure to comply with the performance requirements of the *Building Code of Australia*, the relevant Australian Standards or the relevant approved plans, or
- b) a defect in a building product or building element that—
 - i. is attributable to defective design, defective or faulty workmanship or defective materials, and
 - ii. causes or is likely to cause—
 - A. the inability to inhabit or use the building (or part of the building) for its intended purpose, or
 - B. the destruction of the building or any part of the building, or
 - C. a threat of collapse of the building or any part of the building, or
- c) a defect of a kind that is prescribed by the regulations as a serious defect, or
- d) the use of a building product (within the meaning of the *Building Products (Safety) Act 2017*) in contravention of that Act.

RAB Act



Building element means any of the following—

- (a) the fire safety systems for a building within the meaning of the Building Code of Australia,
- (b) waterproofing,
- (c) an internal or external load-bearing component of a building that is essential to the stability of the building, or a part of it (including but not limited to in-ground and other foundations and footings, floors, walls, roofs, columns and beams),
- (d) a component of a building that is part of the building enclosure,
- (e) those aspects of the mechanical, plumbing and electrical services for a building that are required to achieve compliance with the Building Code of Australia,
- (f) other things prescribed by the regulations for the purposes of this section.

Who is liable to rectify concrete cancer?

Relevant obligations

Who?	What?	Where?	When?
Builder and developer	Statutory warranties	Home Building Act	2 years from completion for minor defects 6 years from completion for major defects
Developer	Building work rectification orders for serious defects	Residential Apartment Building Act	10 years from completion
Builder and consultants	Contractual and common law obligations	Contract and case law	6 years from when loss becomes apparent
Anyone who does "construction work"	duty of care to avoid owners suffering from economic loss arising from defects	Design and Building Practitioner's Act	6 years from when loss becomes apparent, with a 10 year long stop from completion
Owners corporations	Duty of care to repair and maintain common property	Strata Schemes Management Act	Ongoing

The Design and Building Practitioners Act 2020 (NSW)



The duty of care is found in section 37(1) of the DBP Act:

*A person 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** for which the work is done, and*
- b) arising from the construction work.*

Building: 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.

The Design and Building Practitioners Act 2020 (NSW)



Section 36 of the DBP Act defines “*construction work*” as:

- (a) *building work,*
- (b) *the preparation of regulated designs and other designs for building work,*
- (c) *the manufacture or supply of a building product used for building work,*
- (d) *supervising, coordinating, project managing or otherwise having substantive control over the carrying out of work referred to in paragraph (a), (b) or (c).*

The duty of care – things to note



- The duty extends to all buildings as defined in the EPA Act – it is not limited to residential buildings
- The duty is owed by every person who carries out “construction work”
- The statutory duty of care is owed to current and subsequent owners of buildings.
- The duty of care is owed retrospectively, provided the economic loss became apparent within 10 years immediately before the commencement of the DBP Act, or on or after the commencement, with a 10 year long stop.

The *Strata Schemes Management Act 2015 (NSW) (SSMA)*



Section 106 of the SSMA:

- a) S106(1) Owners corporation (**OC**) must properly maintain and keep in a state of good and serviceable repair the common property and any personal property vested in the OC.
- b) S106(4) If an OC has taken action against owner or other person re damage to common property then it may defer compliance with subsection 106(1) until completion of action.
- c) S106(5) A lot owner may recover from the OC as damages for breach of statutory duty, any reasonably foreseeable loss suffered by owner as result of contravention of this section by OC.
- d) S106(6) A lot owner cannot bring an action under this section for breach of statutory duty more than 2 years after owner first becomes aware of the loss.

Seiwa Pty Ltd v The Owner's Strata Plan 35042 [2006] NSWSC 1157

S 62 SSMA 1996 requires the OC to take preventative measures to ensure that there not be a malfunction including the duty to remediate defects in the original construction of the common property



Metricon Homes Pty Ltd as trustee for Metricon Homes Unit Trust v Lipari [2024] NSWSC 566

Potential spalling and concrete cancer alleged due to insufficiency of concrete cover for the reinforcement beams in the slab.

Engineering designs specified a concrete cover of 65mm, but actual provided was 45mm.

Maximum required cover by AS2870 was 50 mm.

Held engineer's design "exceeds actual code requirements" so the defect claimed was not proven.



Any questions?

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