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Liability and Loss in Construction Disputes: Beyond Contracts

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Overview

1. In Australia, practice as a building professional (including as a builder, architect, or engineer) is limited by registration,[1] with different categories of practitioner allowed to perform particular work based on their qualifications and experience.[2]

2. Like other professionals, it is implicit in their contracts that building practitioners must exercise skill and care (although that term can be excluded), so as to avoid causing economic loss. This is in addition to any express warranties included by agreement, together with those implied by statute.

3. In contrast, while other professionals, such as solicitors, accountants, and doctors, owe their clients concurrent duties in contract and in tort,[3] the common law primacy of contract over tort is stronger in building cases.[4]

4. Together with limits on subsequent owners claiming loss and damage for a "known" defect,[5] building practitioners rarely owe a duty of care to avoid pure economic loss to an owner. Despite this, many still contend for a duty of care, without considering if, in fact, the law imposes such a duty.[6]

5. While the limitation of non-contractual liability is theoretically sensible, in practice, it means not all parties who have suffered loss and damage can obtain compensation,[7] as not all parties can always be brought to the table. That is assuming that loss has not just accrued, but accrued to the right party.

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[1] *Building Act* 1993 (Vic) pt 11, in particular s 170; *Architects Act* 1991 (Vic) s 4
[2] *Building Regulations* 2018 (Vic) sch 9
[3] *Astley v Austrust* (1999) 197 CLR 1, 22-3 (Gleeson CJ, McHugh, Gummow and Hayne JJ)
[4] *Brookfield Multiplex Ltd v Owners Corporation Strata Plan No 61288* (2014) 254 CLR 185, 229 (Crennan, Bell and Keane JJ)
[5] See *Allianz v Waterbrook* [2009] NSWCA 224
[6] *Sullivan v Moody* (2001) 207 CLR 562, 576 (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ)
[7] Consider the Owners' Corporation in *Brookfield Multiplex Ltd v Owners Corporation Strata Plan No 61288* (2014) 254 CLR 185

6. A common example is where the corporate builder is insolvent or impecunious, and there is no insurance to claim on. An owner may wish to pursue someone else who was "responsible," such as a subcontractor, the registered builder on the building permit, or the director of the building company. It is said that such liability must be limited by contract.

7. In other cases, a builder (or an insurer acting under subrogation) will plead an apportionment defence to a claim by an owner, contending that the builder's own subcontractors owed the owner a duty of care, despite contractual arrangements, on the one hand, between the builder and the owner, and on the other, between the builder and those subcontractors.[8]

8. While often pleaded, these alternate cases face complex factual and legal hurdles.

9. This paper considers what is involved in such alternate cases, including in a claim for pure economic loss, assumptions of responsibility by directors (under the extended *Hedley Bryne* principle),[9] and claims under the Australian Consumer Law.

10. I also examine when loss accrues, including who must suffer the loss, and the issue of "running" warranties and subsequent owners. The paper refers primarily to Victorian legislation.

[8] Tending to suggest that seeking contribution or making a cross-claim is the appropriate remedy, not apportionment, because there is no duty owed to the owner.
[9] *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830, 834 (Steyn LJ)

I. Some issues regarding loss

A. Identifying where losses sit

11. The first question to ask in any action is always: to whom can the loss claimed be said to have accrued?

12. This is an important question, particularly in residential building cases where there are statutory "running warranties" that pass between owners.

13. *Allianz v Waterbrook* [2009] NSWCA 224 stands for the proposition that a successor in title who acquires a building in full knowledge of certain defects suffers no longer loss from the existence of those defects.[10] This does not extend, however, to cases where there has been an assignment of contractual warranties.[11]

14. At trial, McDougall J held that the entitlement of a successor in title '*should be no less*' than the original owner. The intention to do so was '*clear.*'[12] This could be described as a "use it or lose it" theory.

15. The Court of Appeal did not agree.

16. Giles JA explained as follows:[13]

> *In my opinion… a successor in title who acquires a building in full knowledge of its defects, suffers no loss from the existence of those defects. In those circumstances, the builder's breach of statutory warranty could not be said to have diminished the successor's assets, nor increased its liabilities. Any adverse impact to the successor's financial position, and any loss to the successor, would result from the*

[10] As summarised in *Walker Group Constructions Pty Ltd v Tzaneros Investments Pty* Ltd (2017) 94 NSWLR 108, 124 (Bathurst CJ)
[11] *Walker Group Constructions* (2017) 94 NSWLR 108, 145 (Bathurst CJ)
[12] *Waterbrook at Yowie Bay Pty Limited v Allianz* [2008] NSWSC 1451, [54] (McDougall J)
[13] *Allianz v Waterbrook* [2009] NSWCA 224, [110] (Giles JA)

successor knowingly and deliberately paying more for the building than it was worth. The loss would be caused by the successor's own decision to purchase at the agreed price.

17. The rationale of *Allianz* is that loss is only suffered by one person, and that if a defect was visible, the loss was suffered by the original property owner, and the subsequent owner is compensated by a reduction of the purchase price.[14] It also removes the possibility of double recovery from the builder, both by the person for whom the work was done, as well as the successor-in-title.[15]

18. The *Allianz* decision was based on section 18D ('*Extension of statutory warranties*') of the *Home Building Act* 1989 in New South Wales, which then (not later) read:

> A person who is a successor in title to a person entitled to the benefit of a statutory warranty under this Act is entitled to the same rights as the person's predecessor in title in respect of the statutory warranty.

19. Subsequently, an exception was added to the *Home Building Act* 1989 making the warranties unavailable if the predecessor-in-title had already enforced them.

20. The principle in *Allianz* is applied in Victoria to section 9 ('*Warranties to run with the building*') of the *Domestic Building Contracts Act* 1995, which states that

> In addition to the building owner who was a party to a domestic building contract, <u>any person who is the owner for the time being of the building or land</u> in respect of which the domestic building work was carried out under the contract may take proceedings for a breach of any of the warranties listed in section 8 <u>as if that person was a party to the contract</u> (**underlined**).

[14] *Allianz v Waterbrook* [2009] NSWCA 224, [21] (Giles JA); see also *Camcom Nominees Pty Ltd v Kubiak* [2020] VCAT 513, [49] (Edquist M)
[15] *Allianz v Waterbrook* [2009] NSWCA 224, [19] (Giles JA); see also [110]-[112] (Ipp JA)

21. It is not clear, on the Victorian decisions, how the interpretation of a different NSW statute necessarily applies in Victoria without more. Yet, it is the law.

B. When does loss accrue

22. An equally important proposition: non-compliance with a contract does not equal a loss, unless, that is, you have a proprietary interest in the product of the contract. This is consistent with the policy against recovery of uncovenanted profits.[16]

23. The recent decision of *Cubic Metre Pty Ltd v C & E Critharis Constructions Pty Ltd* [2020] NSWSC 479 was commenced by a builder against a subcontractor for defective workmanship, in circumstances where the owner had not themselves begun a claim against the owner. This proved fatal.

24. The Builder, Critharis, retained Cubic Metre (the Contractor) to supply and install sandstone for a residential waterfront property at Watsons Bay, including for use as cladding for a sea wall at the boundary (although the sea wall itself was constructed by another contractor).

25. The supply and installation occurred from 13 April 2011 until 9 March 2012. In November 2012, the owner raised concerns about the suitability of material.

26. A statement of claim was filed by Critharis against the Contractor on 8 March 2018, within the limitation period in the *Home Building Act* 1989 (NSW) for actions under a building contract. Critharis relied on the warranty that a contractor shall use materials which are reasonably fit for the specified purpose or result, together with a term in the subcontract of like effect.

27. The Owners had not commenced a proceeding, and were said to be statute-barred from making their own claim.

[16] *Radford v De Froberville* [1978] 1 All ER 33, 42 (Oliver J)

28. In the NSW Local Court, Critharis claimed either the cost of rectification of the seawall cladding, or in the alternative, damages equal to monies retained by the Owner. It was uncontested that no one – the Owner, or the Builder – had done any work to repair the seawall.

29. This appeared to trouble the Local Court, on the basis it was merely contended that the Builder had a "moral obligation" to repair, which did not crystallise as a loss until the Owner made their own claim. No reference was made to *Bellgrove v Eldridge* (1954) 90 CLR 613, which only occurred on appeal to the Supreme Court, although strictly speaking, *Bellgrove* is about the measure of loss, not when it accrues.

30. In the event, the Local Court awarded damages on the withheld sum of roughly $20,000.00 (which was later struck down for not having been established or properly pleaded), rather than the higher figure for rectification.

31. On appeal, Adamson J asked what loss the Builder had suffered from the unsuitability of the sandstone, holding that:[17]

> *Had the contract been performed, the Builder would have been entitled to be paid in full by the Owner for the work relating to the supply and installation of the sandstone and would have been obliged to pay the Contractor in full under the contract. As the Builder was the plaintiff in the Local Court, it bore the onus of proving that it was in a worse position, financially, as a consequence of the Contractor's breach.*

32. Her Honour proceeded to find that, at trial, there was no evidence Critharis was obliged to, or intended, to rectify the wall, finding that the evidence suggested to the contrary, and that the Owner did not depose to expecting the Builder to do the same. The Court rejected the suggestion it should infer otherwise. This is the reverse of the common

[17] *Cubic Metre Pty Ltd v C & E Critharis Constructions Pty Ltd* [2020] NSWSC 479. [60] (Adamson J)

assumption made by builders that it is their right to rectify, when their contract says no such thing.

33. In finding the loss lay with the Owner, rather than Critharis, the Court relied on *Alucraft Pty Ltd (in liquidation) v Grocon Ltd (No 2)* [1996] 2 VR 386, a decision of Smith J in the Supreme Court of Victoria.

34. In that case, Grocon as head contractor sought damages from a subcontractor. The subcontractor argued that there has been no rectification done in the three years since the work, and to award damages on a *Bellgrove v Eldridge* basis would put Grocon in a better position than if there was no breach.

35. Smith J distinguished the case from the ordinary, finding that:[18]

> *The question before the court [*in Bellgrove v Eldridge*] was the appropriate approach to quantification of the loss of the owner who had a proprietary interest in the finished product. That loss continued whether the rectification work was done. In the present case, Grocon did not have a proprietary interest in the finished product. It had an interest in the result produced by Alucraft not because it wished to enjoy the physical result itself but because Alucraft's work was being used by it in the performance of the head contract. Its interest lay in the financial result which depended in part on whether and to what extent the rectification work was done or required.*

In the event, some damages were awarded to Grocon, because the limitation period had not expired.

36. In *Critharis*, Adamson J, after referring to a number of cases similar to *Alucraft v Grocon*, held that those cases would not have assisted Critharis, and that as the Owner was now statute-barred, Critharis was only entitled to nominal damages to register the infraction of its legal rights.

[18] *Alucraft Pty Ltd (in liquidation) v Grocon Ltd (No 2)* [1996] 2 VR 386, 392 (Smith J)

37. What we learn from this case is that, **first**, because the Builder was not the owner of the property, and **second**, because the Owner had not required the Builder to rectify the work, and no longer could, the Builder had no claim against the Contractor.

38. *Cubic Metre* is not particularly earth-shattering, having relevance in a limited number of cases. Nevertheless, the lesson to take is that the Builder should not have been so generous, and should instead have required the Owner to commence a proceeding, on the basis that the Builder would then seek contribution or make a cross-claim against the Contractor.

39. But we live and learn.

II. Including other parties in an extant proceeding

40. Where a loss has accrued, the next step is to consider from whom that loss can be recovered, either in preparing a claim or a defence, or in the inclusion of further parties in an extant proceeding.

41. Most practitioners will readily appreciate the differences between apportionment and contribution, but it is worth recalling the differences.

42. Apportionment is a statutory defence available to a defendant, where the claim is for economic loss or damage to property arising from a failure to take reasonable care (whether in contract, tort, or otherwise), or alternatively is a claim for damages arising under section 18 of the Australian Consumer Law (noting variations between the different state regimes), and there is said to be a concurrent wrongdoer.[19] These are called 'apportionable claims.'

43. In short, if acts or the omissions of the other person (independent of the defendant, or jointly) caused the loss of damage claimed by the plaintiff, the defendant can require the plaintiff to pursue that other person based on their level of responsibility (although it is not settled if the defence only requires that the named defendant has failed take care, or engaged in misleading conduct, as opposed to both concurrent wrongdoers having done so).[20]

44. If successfully pleaded by a defendant – effectively requiring them to plead the action the plaintiff has against the concurrent wrongdoer – the plaintiff must also pursue that other party if they wish to recover the loss the other party caused. It is consistent with this that the defendant cannot recover contribution from a concurrent wrongdoer,[21] because the plaintiff is the one who has the action.

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[19] *Wrongs Act* 1958 (Vic) s 24AF; *Civil Liability Act* 2002 (NSW) s 34
[20] Graeme S Clarke QC, 'Proportionate Liability in Commercial Cases: Principles and Practice' (2019) 93 *Australian Law Journal* 188, 196-7
[21] *Wrongs Act* 1958 (Vic) s 24AJ

45. In contrast, contribution is not a defence, but a statutory mechanism that enables a defendant to recover a contribution, from another person who is '*liable in respect of the same damage (whether jointly with the first-mentioned person or otherwise)*' (that is, joint and severally liable).[22] Joint and several liability, as opposed to apportionment, remains the rule where there is no failure to take care, or misleading conduct. In practice, the onus remains on the defendant: the plaintiff only needs to seek recovery from the defendant, and it is for the defendant to pursue any joined parties.[23]

46. Contribution is not limited to the same scenarios as apportionable claims (that is, to failures to take care or misleading conduct). The liability must be for the '*same damage*', meaning jointly and severally liable, and in most states (not including Victoria), the other person must be a tort-feasor.[24] This means contribution is broader than apportionment, but the risk remains with the defendant.

47. The practical reason for mentioning these concepts is that it is necessary to identify the underlying liability before seeking to include a third party in an action, which will become particularly clear in the next section where I explain the limitations on claims for pure economic loss.

[22] *Wrongs Act* 1958 (Vic) s 23B
[23] *Hunt & Hunt Lawyers (a firm) v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613, 624 (French CJ, Hayne and Kiefel JJ)
[24] *Hunt & Hunt Lawyers* (2013) 247 CLR 613, 645-6 (Bell and Gageler JJ)

III. Non-contractual building claims

A. Special cases of pure economic loss for negligence in building cases

48. These concepts will be familiar to many practitioners, but a refresher of the exact principles does not harm.

49. In most building cases, it is rare that we have to look for a remedy beyond the contract when something has gone wrong. Yet, sometimes there is, usually for a subsequent owner, but sometimes for an original owner who cannot make a claim on the named builder, or perhaps where the simpler cause of action is statute-barred.

50. Claims for breach of a duty of care are often made, but rarely succeed. Such claims have been possible, in narrow circumstances, since *Hedley Byrne v Heller* [1964] AC 465 abolished the common law 'exclusionary rule' that damages for pure economic loss could not be recovered in negligence.

51. In contrast to claims for personal injury or property damage, a plaintiff who contends that a defendant owes a duty to prevent pure economic loss has to go further than merely proving that the defendant's negligence caused the plaintiff's loss, and the loss was foreseeable. It must make out certain, salient features: the work is in establishing the duty of care, not the breach.

52. The rationale of limiting claims for pure economic loss is that their availability more readily would destroy commercial competition, sterilise many contracts, and expose defendants to indeterminate liability to an indeterminate class.[25]

53. The High Court of Australia has developed the relevant principles in building cases on three occasions: *Bryan v Maloney* (1995) 182 CLR 609, *Woolcock Street Investments Pty Ltd v*

[25] *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515, 529-30 (Gleeson CJ, Gummow, Hayne and Heydon JJ) referring to *Bryan v Maloney* (1995) 182 CLR 609, 632 (Brennan J)

CDG Pty Ltd (2004) 216 CLR 515 and *Brookfield Multiplex Ltd v Owners Corporation Strata Plan No 61288* (2014) 254 CLR 185. In each case, the proceeding was brought by a subsequent owner.

54. *Bryan v Maloney* is often cited for the proposition that, if a builder constructs a residential dwelling (in the sense of a house or unit), they owe a duty of care to avoid pure economic loss to a subsequent owner (where the builder had such a duty to the original owner), though in truth, the principle may not be limited to residential construction.[26]

55. Present day readers should note that, while the case uses the "extended concept" of proximity for identifying duties of care, proximity has since been displaced by the "salient features" approach from *Caltex Oil (Aust) Pty Ltd v The Dredge* (1976) 136 CLR 529.[27] This does not mean cases based on proximity (such as *Bryan*) should be treated as falsified:[28] salient features instead provide a more practical approach where analogy cannot be drawn with previous cases.[29] It also means other factors may create a duty where responsibility and proximity are insufficient.

56. In *Bryan*, Mrs Maloney suffered a diminution in value of her home, when the fabric of the building cracked because the footings were inadequate. As subsequent purchaser, she brought a claim against the original builder, based on a breach of a duty to take reasonable care to avoid economic loss.[30]

57. Mrs Maloney succeeded, with a joint judgment in her favour from Mason CJ, Deane and Gaudron JJ, and a single judgment from Toohey J.

58. The joint judgment examined the relationship between the builder and the original owner (Mrs Manion). The original contract was observed to be non-detailed and contained no

[26] *Woolcock Street Investments* (2004) 216 CLR 515, 528 (Gleeson CJ, Gummow, Hayne and Heydon JJ)
[27] *Caltex Oil (Aust) Pty Ltd v The Dredge (1976)* 136 CLR 529, 576-7 (Stephen J)
[28] *Brookfield Multiplex Ltd v Owners Corporation Strata Plan No 61288* (2014) 254 CLR 185, 200 (French CJ)
[29] *Sullivan v Moody* (2001) 207 CLR 562, 578 (The Court)
[30] As summarised in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515, 526 (Gleeson CJ, Gummow, Hayne and Heydon JJ)

exclusion or limitation of liability, their Honours concluding this did not exclude a tortious duty.

59. Their Honours concluded that there was a duty of care owed by the builder to Mrs Manion to avoid 'mere economic loss' of the sort ultimately suffered by Mrs Maloney, based upon:[31]

> *the ordinary relationship between a builder of a house and the first owner with respect to that kind of economic loss is characterized by the kind of assumption of responsibility on the one part (i.e. the builder) and known reliance on the other (i.e. the building owner) which commonly exists in the special categories of case in which a relationship of proximity and a consequent duty of care exists in respect of pure economic loss.*

60. The joint judgment identified that there was nothing to suggest that the relationship between the builder and Mrs Manion was not characterised by such an assumption of responsibility and reliance.[32]

61. They then examined four features said to warrant a relationship of proximity between the builder and subsequent owner (which could be described as salient features in current terminology, aligning with vulnerability):

- First, the house was identified as a '*connecting link*,' as a permanent structure and significant investment for a subsequent owner (such as Mrs Maloney);[33]
- Second, it was foreseeable that economic loss would result from negligent construction of the house;[34]
- Third, there was no 'intervening negligence or other causative event';[35]
- Fourth, the similarities with the relationship between the builder and the first owner as regards the particular kind of economic loss were said to be '*of much greater*

[31] *Bryan v Maloney* (1995) 182 CLR 609, 624 (Mason CJ, Deane and Gaudron JJ)
[32] Ibid.
[33] Ibid.
[34] *Bryan v Maloney* (1995) 182 CLR 609, 625 (Mason CJ, Deane and Gaudron JJ)
[35] Ibid.

significance than the differences to which attention has been drawn, namely, the absence of direct contact or dealing and the possibly extended time in which liability might arise'.[36]

62. Reflecting on *Bryan* in *Brookfield Multiplex*,[37] French CJ summarises that the decision (footnotes omitted):

> *adverted to factors adverse to the recognition of a duty of care for pure economic loss other than in special cases. The special cases would commonly, but not necessarily, involve an identified element of known reliance or dependence on the part of the plaintiff, or the assumption of responsibility by the defendant, or a combination of the two. The contract between the prior owner and the builder in that case was "non-detailed and contained no exclusion or limitation of liability". The subsequent owner would ordinarily be unskilled in building matters and inexperienced in the niceties of real property investment. Any builder should be aware that such a subsequent owner would be likely to assume that the building had been competently built and that the footings were adequate. Those considerations may be seen as elements of the notion of "vulnerability", which has become an important consideration in determining the existence of a duty of care for pure economic loss. In this context, it refers to the plaintiff's incapacity or limited capacity to take steps to protect itself from economic loss arising out of the defendant's conduct.*

63. The notion of both 'statutory warranties' and 'running warranties' in domestic building legislation has meant that,[38] for all intents and purposes, *Bryan v Maloney* rarely needs to be referred to in domestic building disputes between owners and builders, although there are exceptions.[39]

64. By *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515, the approach to pure economic loss had moved on from proximity, salient features now taking hold. This

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[36] *Bryan v Maloney* (1995) 182 CLR 609, 627 (Mason CJ, Deane and Gaudron JJ)
[37] *Brookfield Multiplex Ltd v Owners Corporation Strata Plan No 61288* (2014) 254 CLR 185, 200-1 (French CJ)
[38] For example, see *Domestic Building Contracts Act* 1995 (Vic) s 9 and *Home Building Act* 1989 (NSW) s 18D
[39] The definition of 'home' in the *Domestic Building Contracts Act* 1995 (Vic), for example, excludes motels, residential clubs, residential hotels, rooming houses, and nursing homes (though consider if the warranties are "revived" if such a building were converted into another use).

included through McHugh J's approach in *Perre v Apand* (1999) 198 CLR 180, his Honour observing (repeated in *Woolcock*) that five 'principles' are relevant when determining if there is a duty, namely:[40]

- reasonable foreseeability of loss;
- indeterminacy of liability;
- autonomy of the individual;
- vulnerability to risk; and
- knowledge of the risk and its magnitude;

although His Honour proceeded to state that, in particular cases '*other policies and principles may guide and even determine the outcome*,' meaning that other salient features could be relevant.

65. "Vulnerability" does not refer to the plaintiff's exposure if the defendant fails to take care, but rather, the plaintiff's inability to protect itself from the consequences of a defendant's want of reasonable care, either entirely or at least in a way which would cast the consequences of the loss on the defendant.[41] It has also been suggested that vulnerability incorporates the notions of 'assumption of responsibility' and 'known reliance'.[42]

66. However, what *Woolcock* confirmed was that the existence of an antecedent duty to the previous owner, as identified in *Bryan*, remains determinative in subsequent owner cases, before the salient features analysis is to be undertaken. The law does not easily create contract-like obligations, where the parties have not established those themselves.

67. CDG was a company of consulting engineers, who designed foundations for a warehouse and offices in Townsville. Some years after it was finished, the premises were sold to Woolcock Street Investments. The contract of sale did not include any warranty

[40] *Perre v Apand* (1999) 198 CLR 180, 220 (McHugh J); *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515, 547 (McHugh J)
[41] *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515, 530 (Gleeson CJ, Gummow, Hayne and Heydon JJ)
[42] *Woolcock Street Investments* (2004) 216 CLR 515, 531 (Gleeson CJ, Gummow, Hayne and Heydon JJ)

that the building was free from defects, and there was no assignment by the vendor of any of the vendors' rights against others for such defects.[43]

68. A year after the purchase, it became apparent the building was suffering substantial structural distress, due to settlement of the foundations, the nature of the material below the foundations, or both. Woolcock Street sued CDG, who indicated that the former owner had instructed them to proceed without soil tests – despite CDG obtaining a quote for those investigations – and to use structural footing sizes used by the builder.[44]

69. In contrast to Mrs Maloney in *Bryan*, Woolcock Street was unsuccessful.

70. In their joint judgment, Gleeson CJ, Gummow, Hayne and Heydon JJ were unconvinced of its vulnerability to the economic consequences of any negligence by CDG in their design work. Their Honours were critical of the Case Stated, observing that Woolcock Street did not address what steps it could have taken to protect itself, such as if it could have obtained the benefit, for example, of an assignment of rights against third parties, or a warranty that the building was free from defects.[45]

71. The judgment also observes that Woolcock Street did not contend that the defects could not have been discovered by appropriate investigations (an evidential question), nor was it argued (as in *Bryan*) that the building represented a significant investment for Woolcock Street.[46]

72. McHugh J approached the matter differently, framing the question as whether the Australian law of torts considers that designers of commercial premises owe a duty to subsequent purchasers of premises to take reasonable care to ensure the building is free from defects so as to prevent pure economic loss to those purchasers.[47]

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[43] *Woolcock Street Investments* (2004) 216 CLR 515, 525 (Gleeson CJ, Gummow, Hayne and Heydon JJ)
[44] Ibid.
[45] *Woolcock Street Investments* (2004) 216 CLR 515, 533 (Gleeson CJ, Gummow, Hayne and Heydon JJ)
[46] Ibid
[47] *Woolcock Street Investments* (2004) 216 CLR 515, 535 (McHugh J)

73. His Honour held it did not, going further and holding that, *absent a contract*, such a duty of care was not even owed to the first owner of the premises (although if there is a contract, notions of assumption of responsibility and reliance may also lead to obligations in tort).[48]

74. His Honour held (for a number of reasons) that *Bryan* did not apply to commercial premises, but accepted a duty might develop separately,[49] and then applied each of the five salient features identified in *Perre v Apand* (primarily faulting Woolcock Street on vulnerability). He also noted a number of other 'policy factors' (responsibility to control third parties, outflanking the law of contract, the floodgates argument, disproportionate liability, lack of a measurable standard of care, circumventing the policy of limitation legislation).

75. McHugh J's judgment is also useful for its comparison of the different international approaches to defective premises (noting that in some jurisdictions it has been classified as physical damage, rather than economic loss).

76. An example of vulnerability, as described in *Woolcock*, is found in *Bevendale Pty Ltd v Equiset Construction (Epping) Pty Ltd* [2010] VCC 805. The defendant builder sought to join a sub-contractor who had supplied and installed structural steel, on the grounds that the sub-contractor owed a duty of care to the plaintiff shopping centre (which suffered the loss), and thus that the claim was an apportionable claim within the meaning of Part IIVA of the *Wrongs Act* 1958.

77. Shelton J rejected this argument, noting the plaintiff had protected itself through obtaining contractual warranties from the defendant. One might suggest that contribution was the appropriate course.

[48] Ibid.
[49] *Woolcock Street Investments* (2004) 216 CLR 515, 546 (McHugh J)

78. *Brookfield Multiplex Ltd v Owners Corporation Strata Plan No 61288* (2014) 254 CLR 185 substantially questioned the proposition advanced by *Bryan*, effectively limiting it to a very narrow class of vulnerable subsequent (and it follows original) home owners, all others effectively required to have a contract.

79. Multiplex built serviced apartments in Chatswood, New South Wales, under a design and construct contract for a developer (Chelsea Apartments). Chelsea then leased out each apartment, to be operated by a hotelier under the "Holiday Inn" brand, and then sold the individual lots. Relevantly, the contracts of sale contained provisions about the quality of work and the repair of defects or faults. Through subdivision, the Owners' Corporation became the agent of the new owners' in respect of the common property.

80. Proceedings began after latent defects emerged, the NSW Court of Appeal holding that Multiplex owed a duty to the subsequent owners for latent defects that were structural, defects that constituted a danger to persons or property in the vicinity of the building, or defects that otherwise made the apartments uninhabitable.

81. The High Court, in four separate judgments, held otherwise, finding there was no vulnerability, and that a duty was neither owed to the original developer or to the subsequent owners.

82. As French CJ expressed it, two questions arose on appeal:[50]
    (a) did Multiplex owe a duty of care to the Owners' Corporation, independent of the duty of care owed to Chelsea, and if so, what is its content? and
    (b) Did Multiplex owe a duty of care to Chelsea and thereby a similar duty of care to the Owners' Corporation, and if so, what is its content?

    Both questions were "required" (in his Honour's words) to be answered in the negative.

83. His Honour readily observed that the *Multiplex case* involved 'special features':[51]

[50] *Brookfield Multiplex Ltd v Owners Corporation Strata Plan No 61288* (2014) 254 CLR 185, 194 (French CJ)
[51] *Brookfield Multiplex Ltd* (2014) 254 CLR 185, 201 (French CJ)

generated by the contractual and statutory matrix in which the duty of care is asserted, that give it an element of novelty not overcome by a straightforward application of precedent.

This required consideration of the salient features between the Owners' Corporation and Multiplex.[52]

84. The responsibility assumed by Multiplex towards Chelsea, the original owner, was defined in detail by their design and construct contract, and as such, Chelsea had not relied on Multiplex assuming any responsibility for pure economic loss, beyond what was set out in the contract.[53]

85. As to whether a duty was owed to the Owners' Corporation (as the owners' proxy under strata law), the contracts of sale included specific repair obligations on Chelsea, which demonstrated against vulnerability. French CJ appears to base his answer to both questions on these particular findings.

86. The joint judgment of Hayne and Kiefel JJ (as her Honour then was) went further in their explanation of vulnerability:[54]

It may be assumed, without deciding, that the developer and the purchaser of a lot from the developer relied on the builder to do its work properly. The purchaser of a lot could not check the quality of the builder's work as it was being done. Perhaps the developer was in no different position. (That would turn on what meaning is given to the superintendence provisions of the developer's contract with the builder.) The Owners Corporation was in no better position to check the quality of the builder's work as it was being done than the original purchaser of a lot. Because these parties could not check the quality of what the builder was doing, it can easily be said that each relied on the builder to do its work properly.

[52] *Brookfield Multiplex Ltd* (2014) 254 CLR 185, 203-4 (French CJ)
[53] *Brookfield Multiplex Ltd* (2014) 254 CLR 185, 204 (French CJ)
[54] *Brookfield Multiplex Ltd* (2014) 254 CLR 185, 210-211 (Hayne and Kiefel JJ)

> *Reliance, in the sense just described, may be a necessary element in demonstrating vulnerability,* ***but it is not a sufficient element. As noted earlier, vulnerability is concerned with a plaintiff's inability to protect itself from the defendant's want of reasonable care, either entirely or at least in a way which would cast the consequences of loss on the defendant****.*
>
> *It is neither necessary nor profitable to attempt to define what would or would not constitute vulnerability. It is enough to observe that both the developer and the original purchasers made contracts, including the standard contracts, which gave rights to have remedied defects in the common property vested in the Owners Corporation. The making of contracts which expressly provided for what quality of work was promised demonstrates the ability of the parties to protect against, and denies their vulnerability to, any lack of care by the builder in performance of its contractual obligations. It was not suggested that the parties could not protect their own interests. The builder did not owe the Owners Corporation a duty of care.*

87. Their Honours make clear, however, that their views on vulnerability do not depend about '*making any a priori assumption about the proper provinces of the law of contract and the law of tort*,' or, perhaps more interestingly '*a detailed analysis of the particular content of the contracts the parties made.*'[55]

88. Of more significance is the dim view taken of the purchasers by Crennan, Bell and Keane JJ for making a claim in tort. Their Honours noted the purchasers had received contractual promises from Chelsea as to defects in quality, before stating:[56]

> It is true that these provisions did not protect purchasers or the respondent against the possibilities that the developer would not be of sufficient substance to meet the liability or that any defect would not be discovered within time to make a claim under the warranty. But as to these possibilities, the appellant had nothing to do with the purchaser's decision to accept the value of the developer's warranty or with the decision by the purchaser not to investigate for defects. **Had a purchaser**

[55] *Brookfield Multiplex Ltd* (2014) 254 CLR 185, 211 (Hayne and Kiefel JJ)
[56] *Brookfield Multiplex Ltd* (2014) 254 CLR 185, 232 (Crennan, Bell and Keane JJ)

> **not been satisfied that its investment was adequately protected in this way, it could have avoided the risk of loss by taking its capital and investing elsewhere**.

89. This tends to indicate that, notwithstanding legal non-compliance of work, there is a freedom to perform it.

90. This also warranted against their Honours recognising a freestanding duty of care to the purchasers (not contingent on any duty owed to Chelsea).

91. *Brookfield Multiplex v Owners Corporation* cannot be ignored, despite its flaws.[57] It highlights the need to show vulnerability of the plaintiff, in the sense of reliance on a defendant who has taken on some responsibility towards the plaintiff.[58] This means, for the moment, only uninformed home owners who are vulnerable enough to benefit from both contractual and tort protection.

92. This Australian strictness is similar to the view taken in the United Kingdom, where the conceptual basis of concurrent liability in tort and contract (and tort liability more broadly) is the concept of an assumption of responsibility.[59]

93. For legal practitioners, this should deter – but in my experience, does not deter –the inclusion of subcontractors in actions by both building owners and builders (often through an expensive interlocutory process), either so the owners can make a direct claim, or so the builder can raise an apportionment defence based on a failure to take reasonable care.[60] The fact of a contract between an owner and a builder demonstrates that vulnerability is just not present, the owner having obtained contractual promises from the builder that cover the same subject matter.

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[57] Consider Matthew Bell and Wayne Jocic, '*Negligence Claims by Subsequent Builders Owners: Did the Life of Bryan End Too Soon*' (2007) 41 *Melbourne University Law Review* 1
[58] *Chan v Acres* [2015] NSWSC 1885, [125] (McDougall J)
[59] Consider *Robinson v PE Jones (Contractors) Ltd* [2012] QB 44, 61 (Jackson LJ)
[60] *Wrongs Act* 1958 (Vic) pt IVAA

94. It should usually not matter, to draw on Crennan, Bell and Keane JJ's judgment in *Brookfield Multiplex*, that the party meant to protect the owner turns out to be a man of straw. That is a risk the owner takes, though one could as easily say that if the subcontractor owed contractual duties to take care towards the builder, it is pedantic to deny the owner that same relief.

95. A good, lawyer, of course, will not be stopped where a man of straw is concerned.

B. Assumption of responsibility by a director from a corporate builder – "special(er)" cases?

96. The rule of thumb in pure economic loss cases is that, where a tortious duty is owed, it is almost always owed by the contracting party.

97. This seems to follow from the relational nature of duties of care (that is, duties and contracts are both the product of relationships, the facts giving rise to a contract often also creating a duty of care).

98. In building cases, this usually means that the same corporate builder on contract is said to owe the duty of care, to the exclusion of any individual who stood behind the company and gave it the benefit of their qualifications and registration.

99. Like other professions, the building industry is highly regulated. Indeed, in Victoria until 2017, only a natural person could apply to become a registered building practitioner,[61] and from 2017, a body corporate must have suitably qualified nominee directors for the work being carried out.[62]

100. Despite this, it is the corporate builder on contract who almost always owes, if one is owed at all, a duty in tort.

[61] *Building Act* 1993 (Vic) s 169
[62] *Building Act* 1993 (Vic) s 171

101. An exception is *Olindaridge v Tracey* [2016] QCATA 34, a vulnerable homeowners case in the same category as *Bryan v Maloney*, but where the director of the contracting building company, who personally carried out the building work, was held to have owed a duty of care in tort to the owners.

102. Carmody J and Member Paratz held the applicant director was answerable for his '*own defaults*' and could not escape by pointing to the company's separate legal personality.[63] In short, the duty arose from the director's own actions, based on his own responsibilities as a building practitioner.

103. The reasoning behind this is regrettably oblique, although the fact that the owners were of the "*Bryan v Maloney* type" probably had some significance. The 2016 judgment is the last of several rulings by different QCAT members, who took different stances on the matter, including the applicability of certain New Zealand authorities.[64]

104. Those cases were not referred to by Carmody J and Member Paratz, who instead footnoted Chesterman J's judgment in *Council of the Shire of Noosa v JE Farr Pty Ltd* [2001] QSC 060 to contradict the proposition that legal policy and principle does not support holding directors of small one man companies liable for any substandard work performed on behalf of the company.[65]

105. The better view then, is that if *Olindaridge* is defensible, it occupies limited territory, such that the default position is that a building practitioner can hide behind the corporate veil for the consequences of their own personal failure to exercise reasonable care.

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[63] *Olindaridge v Tracey* [2016] QCATA 34, [41]-[42]
[64] *Tracey v Rodney Wagner Olindaridge Pty Ltd* [2013] QCATA 48, [19] (Member Brabazon QC), referring to *Morton v Douglas Homes Ltd* [1984] 2 NZLR 548 and *Dicks v Hobson Swan Construction Ltd (in liquidation)* [2006] NZHC 1657
[65] *Olindaridge v Tracey* [2016] QCATA 34, [2], referring to *Council of the Shire of Noosa v JE Farr Pty Ltd* [2001] QSC 060, [86] (Chesterman J)

106. That is, unless the building practitioner (as a director or otherwise) has assumed personality responsibility for the actions of the corporate builder, in accordance with the principle cited by Chesterman J in *Noosa v Farr*.

107. That principle is the 'extended *Hedley Byrne* principle,' the United Kingdom test for when a duty of care to avoid pure economic loss is owed: namely, where there has been an 'assumption of responsibility' (analogous to the Australian concept of vulnerability and reliance).[66]

108. *Hedley Bryne* concerned the liability of a bank for providing an inaccurate credit worthiness reference for a borrower. Its principle was taken further in *Henderson*, Goff LJ considering that *Hedley Bryne* went– [67]

> *beyond the provision of information and advice to include the performance of other services. It follows, of course, that although, in the case of the provision of information and advice, reliance upon it by the other party will be necessary to establish a cause of action (because otherwise the negligence will have no causative effect), nevertheless there may be other circumstances in which there will be the necessary reliance to give rise to the application of the principle.*

Before continuing–[68]

> *Yet the law of tort is the general law, out of which the parties can, if they wish, contract… the same assumption of responsibility may, and frequently does, occur in a contractual context. Approached as a matter of principle, therefore, it is right to attribute to that assumption of responsibility, together with its concomitant reliance, a tortious liability, and then to inquire whether or not that liability is excluded by the contract because the latter is inconsistent with it… But even if I am wrong in this, I am of the opinion that this House should now, if necessary, develop the principle of assumption of responsibility as stated in* Hedley Byrne *to its logical conclusion so as to make it clear that a*

[66] Consider that in *Perre v Apand* (1999) 198 CLR 180, McHugh J comments at 28 that 'assumption of responsibility' is simply an indicator of vulnerability (a salient feature).
[67] *Henderson v Merrett Syndicates* [1995] 2 AC 145, 180 (Goff LJ)
[68] *Henderson v Merrett Syndicates* [1995] 2 AC 145, 193 (Goff LJ)

tortious duty of care may arise not only in cases where the relevant services are rendered gratuitously, but also where they are rendered under a contract.

109. This is what Steyn LJ in *Williams* described as the 'extended *Hedley Bryne*' principle. His Lordship took *Hedley Bryne* further, and considered when a director might be responsible for the actions of a company.

110. The extended *Hedley Bryne* principle is somewhat recognised in Australian law,[69] as the test for holding a director responsible (in place of their company) for torts whose elements include 'assumption of responsibility' in the United Kingdom sense. Where pure economic loss is concerned, this is very confusing: while Australia uses the salient features test, the UK looks for an assumption of responsibility for economic loss. The differences in approach is beyond the scope of this paper.

111. This test is most commonly applied in negligent misstatements (as distinct from negligence *per se*). In torts not involving an assumption of responsibility, the 'direct or procure' or the 'make the tort their own' test will be applied.[70]

112. The extended *Hedley Bryne* principle was enunciated by Steyn LJ in *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830, building on Goff LJ's speech in *Henderson v Merrett Syndicates* [1995] 2 AC 145.

113. In *Williams*, the defendant was the managing director of a health food company which franchised retail health food shops. The plaintiffs approached the company with a view to obtaining a franchise, and received a brochure from the company's employee, which advertised the defendant's experience in the health food trade. The company sent the

[69] The test is referred to in *Johnson Matthey (Aust) Ltd v Dascorp Pty Ltd* (2003) 9 VR 171, 216 (Redlich J), with reference to *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830, but appears not to have been taken further since. Note the comments of *Propell National Valuers (WA) v Australian Executor Trustees* (2012) 202 FCR 158, 187 (Collier J) that *Williams* may not be the law in Australia for negligent misstatement.
[70] See generally Stephan H C Lo, 'Dis-Attribution Fallacy and Directors' Tort Liabilities' (2016) 30 *Australian Journal of Corporate Law* 2015

plaintiffs detailed financial projections, which the defendant was involved in preparing. The parties otherwise had no dealings.

114. The company and the plaintiffs then entered into a franchise agreement, but the trade was not as projected, and the plaintiffs sued the director personally after the company became insolvent.

115. The House of Lords overturned the earlier decision of the Court of Appeal, finding the brochure was insufficient to place personal responsibility on the defendant director. Under the heading of 'the extended *Hedley Bryne* principle,' Steyn LJ explained that, while the principle can extend to a director, it must be remembered that limited liability must not be set at naught.

116. His Lordship proceeded to comment that–[71]

> *What matters is not that the liability of the shareholders of a company is limited but that a company is a separate entity, distinct from its directors, servants or other agents. The trader who incorporates a company to which he transfers his business creates a legal person on whose behalf he may afterwards act as director. For present purposes, his position is the same as if he had sold his business to another individual and agreed to act on his behalf. Thus the issue in this case is not peculiar to companies. Whether the principal is a company or a natural person, someone acting on his behalf may incur personal liability in tort as well as imposing vicarious or attributed liability upon his principal. But in order to establish personal liability under the principle of Hedley Byrne, which requires the existence of a special relationship between plaintiff and tortfeaser, it is not sufficient that there should have been a special relationship with the principal.* ***There must have been an assumption of responsibility*** *such as to create a special relationship with the director or employee himself.*

117. What that actually means is not defined, though his Lordship did refer to Cooke P's comment in *Trevor Ivory Ltd v Anderson*,[72] where the same argument was dismissed because

[71] *Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830, 834 (Steyn LJ)
[72] *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517, 524 (Cooke P)

all that could be said was '*there is nothing out of the ordinary here*' to justify finding the special relationship.

118. What does this mean in practice?

119. You could not contend, for example, that just because a building company has become insolvent, an owner becomes automatically entitled to pursue the registered builder who was the director of the company. The owner chose to contract with the company, and tort law respects that choice. How this was overcome in *Olindaridge* was not really explained, though the fact it was a *Bryan v Maloney* type case could be relevant.

120. It could be argued there are particular statutory considerations that render registered builders who are directors liable in tort, for example, that corporations require the involvement of a builder to perform building work, and to the extent this requires the involvement of the director, the director owes the owner the same duty as they owed the company (although this would tend to be more in line with the 'make the tort their own' test earlier referenced).

121. This, of course, runs into the difficulty of nullifying the corporate veil. The fact a case is in the *Bryan v Maloney* category should not matter.

122. In the absence of special features, such as the director making personal promises to supervise the work,[73] it is hard to contend an owner could pursue in tort someone with whom they had no contract. That said, before the exclusionary rule was abolished, there was an exception for recoverable economic loss if the defendant was part of a conspiracy, or used unlawful means to inflict the harm,[74] so it could be that particular exceptions to the corporate veil emerge. Or not.

[73] See discussion in *Kettyle v E. Cheong Garden Pty Ltd* [2012] VCAT 1097, [103] (SM Walker)
[74] *Brookfield Multiplex Ltd* (2014) 254 CLR 185, 226 (Crennan, Bell and Keane JJ), referring to *Allen v Flood* [1898] AC 1

123. Depending on the extent of negotiations leading to the contract, other options, such as collateral warranties by directors (on the basis of which the contract was entered into) are likely to be simpler.

C. Australian Consumer Law/Trade Practices Act

124. Whether or not the builder is insolvent, parties sometimes include a director or employee[75] of a builder to an action through pleading an action based on the general prohibition on misleading and deceptive conduct in section 18 of the Australian Consumer Law (or section 52 of the *Trade Practices Act* 1974, if the case is old enough), combined with aid and abet provisions.

125. This is often based on contractual representations by the builder to the effect of warranties, which are said to have been misleading because those warranties were unfulfilled. The law concerning future representations is, of course, not as simple as that, but such discussion goes beyond this paper.

126. As the Commonwealth legislation uses standard limitation periods (of 6 years from when the damage is suffered), in contrast to the long-stop limitation periods tied to certifications under building legislation,[76] such tactics might be the only option available, once other limits have expired

127. Whether such cases are open and arguable depends on the facts, noting that for a person to be involved (in the sense of aid, abet, counsel, procure, or be knowingly concerned) in a contravention, the proposition in *Yorke v Lucas* that he or she must have knowledge of the essential elements of the contravention remains.[77]

[75] Consider *Houghton v Arms* (2006) 225 CLR 553
[76] Consider the *Building Act* 1993 (Vic) s 134
[77] *Yorke v Lucas* (1985) 158 CLR 661, 668-9 (Mason ACJ, Wilson, Deane and Dawson JJ); see also *Rafferty v Magwicks* (2012) 203 FCR 1, 62 (The Court). As an example, see *McQueen v Destiny Rise Pty Ltd* [2019] VCAT 1613

128. If we look beyond builders, however, the ACL is more relevant, as is becoming clear in the cladding space.

129. In 2019, a group proceeding was begun by Owners of Strata Plan No 87231, the owners' corporation of the "Shore Dolls Point Apartments" in Sydney, against the German manufacturer of two brands of aluminium composite panels (3A Composites) and the local distributor of those products (Halifax Vogel).

130. The case has, so far, involved three separate rulings from Wigney J,[78] concerning overseas service, costs, apportionment and contribution, limitations periods, the interaction of state and federal laws under the *Judiciary Act* 1903 (Cth), and group proceeding protocols. It is estimated that up to 1000 buildings and their owners may comprise the group, with damages to run into the billions, which may also be paid by the developers, architects, and other registered building practitioners brought in by the respondents from each of the buildings.

131. The action is founded on section 54 of the ACL, which provides that if a person "supplies" goods to a "consumer" in trade or commerce, there is a guarantee the goods are of acceptable quality, including, for example, that it is "fit for purpose for which goods of that kind are commonly supplied" "safe" and "durable."

132. A consumer is defined in section 3 of the ACL as someone who acquires goods that "were of a kind ordinarily acquired for personal, domestic or household use or consumption." The Owners' Corporation contends that either it, or the developer of Shore Dolls Point Apartments, was a consumer under the ACL, based on cladding being for household or domestic use. This extends to a further contention, under section 271, that an '*affected person*' in relation to the manufacture of goods (as opposed to the same "consumer") can make a claim.

[78] *Owners - Strata Plan No 87231 v 3A Composites Gmbh* (2019) 369 ALR 315; *Owners - Strata Plan No 87231 v 3A Composites GmbH (No 2)* [2020] FCA 333; *Owners - Strata Plan No 87231 v 3A Composites GmbH (No 3)* [2020] FCA 748

133. This "affected person" issue is particularly relevant, as the Owners' Corporation did not itself acquire the cladding (for example, for the purposes of a renovation), such that it has a contractual cause of action.

134. Section 2 defines 'affected person' as:

(a) a consumer who acquires the goods; or

(b) a person who acquires the goods from the consumer (other than for the purpose of re-supply); or

(c) a person who derives title to the goods through or under the consumer.

135. As the third judgment makes clear, any claim that the Owners' Corporation might have against the builder or developer is potentially caught by 10-year "long-stop" limitation provisions in state legislation, although in group proceedings, section 33ZE of the *Federal Court of Australia Act* 1976 suspends any limitation to persons in the group. This would not prevent the raising of an apportionment defence (as distinct from the inclusion of the concurrent wrongdoer by the Owners' Corporation).

136. A similar claim is made under section 74D of the former *Trade Practices Act* 1974 (Cth), on the basis that the panels were not of "merchantable quality."

137. The claim against Halifax is limited to representations in misleading and deceptive conduct regarding the fitness for purpose of the cladding.

IV. Statutory duties?

138. It is often pleaded that a building practitioner owes a statutory duty, in addition to any duty at common law. Such duties are common in the personal injuries space, but to my knowledge, are not recognised in building cases.

139. For a statutory duty to arise, a court must consider the statute, the nature of the conduct prescribed, the pre-existing state of the law, and the whole range of circumstances relevant to the question of statutory interpretation, noting that '*the more general the statutory duty and the wider the class of persons in the community who it may be expected will derive benefit, the less likely it is that the statute [confers] an individual right of action for damages for its non-performance.*'[79]

140. In Victoria, the *Building Regulations* 1994 (revoked), *Building Regulations* 2006 (revoked) and *Building Regulations* 2018 all contain a requirement that a registered building practitioner must perform their '*work as a building practitioner in a competent matter and to a professional standard.*'

141. It is commonly argued these regulations give rise to a statutory duty (usually as a bypass for the corporate veil). This is despite the fact that Bryne J held, in a claim by an owner against an architectural draftsman, that the regulations merely inform the duty of care owed by the practitioner, and does not create a duty itself.[80]

142. His Honour's analysis was limited to agreeing with the argument that the regulation did not create a statutory duty. Given the unlikelihood that the Court simply forgot to undertake the analysis, this tends to suggest the argument did not come near the factors needed.

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[79] *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 633 (Hayne J)
[80] *Gunston v Lawley* (2008) 20 VR 33, 44 (Bryne J); see also *Rednual Holdings Pty Ltd & Anor v Loule Pty Ltd & Ors* [2013] VCC 328, [48]-[50] (Ginnane J), *Lu v Li* [2016] VCAT 1998, [115] (Kincaid M)