

# HOW LIABLE IS A BUILDER?



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***Two recent court cases where judgements have gone against the builder.***

## **The Owners - Strata Plan 66375 vs King [2018] NSWCA170**

The Kings were the directors of a building development company, Meridian Estates Pty Ltd ("Meridian"). Meridian engaged an architect, Bonus Architects Pty Ltd ("Bonus"). Bonus invited tenders and engaged the builder, Beach Constructions Pty Ltd ("Beach") to undertake a commercial strata development/conversion of an old warehouse building.

There were a number of defects in the completed building notified by the Owners Corporation.

Perhaps the most interesting facet of this case relates to the Court's ruling on Beach's liability. The Court accepted that a number of the defects identified were not in compliance with the law (namely the statutory warranty in section 18B(c) of the Home Building Act [HBA]). They were the result of defects in design supplied to Beach. Bonus does not appear to have been taken to task over the design. Surprisingly, the Court found Beach to be liable for the design defects.

The Court maintained that under the statutory warranties of the HBA, the builder warrants both that the work will be carried out in accordance with the plans and specifications and that it will comply with the law. That is to say, the builder was found liable for the defects (errors and omissions) in the design it was supplied by Bonus, under the terms expressed in the HBA. The basis for this appears to be that the builder ought to have known that the design's defects made it non-compliant with the HBA.

The contract in place between Meridian and Beach was AS2124. Clause 16.3(f) of which exempts the builder from responsibility for defects in the design of the work under contract. It is not known whether this clause was considered by the Court in arriving at its conclusion. However, it is clear that the Court held the builder liable for defects in design supplied to it.

This case demonstrates that the builder can have a legal exposure to design defects when they did not provide the design. Effectively, the Court ruled that builders (and developers) must ensure that the designs forming the basis of construction are compliant with the law. In this case, the exposure occurred despite the AS2124 contract. Had the builder been successful in its defence, the legal defence costs alone for this matter would still have been significant.

So how can a builder better protect itself? A Professional Indemnity policy can be part of the solution. Speak to MECON today to find out more about better protecting your builder clients against this risk.

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## Champion Homes Sales P/L v Commissioner for Fair Trading [2018] NSWCATOD114

Champion carried out works at two properties and subcontracted a water proofer to carry out works at the properties.

Following a leakage complaint at both properties, it was found that there was a failure in the water proofing membrane in one and incorrect installation of roof flashings at the other.

Fair Trading found that Champion was guilty of improper conduct for breaching the statutory warranty under Section 18B(1)(a) of the HBA in both cases. Champion was required to pay Fair Trading a \$3000 penalty. Fair Trading adjudicated that Section 51(1)(c) provides that a holder of a contractor license is guilty of improper conduct if the holder breaches a statutory warranty. It maintained that the purpose of the warranty and disciplinary provisions are concerned with protecting the public.

**Author's Note:** Although the water proofing subcontractor was engaged for its "specialist" knowledge and work, the builder was held liable and fined for the defects caused by the subcontractor. It is therefore perhaps prudent to engage subcontractors under an agreement which allows that the subcontractor will be solely responsible for compensating the builder for any actions caused by it. Further, that it will hold the builder harmless and defend the builder from all claims and actions it causes.

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