

WICA 2023

AIDA Working Party:
Civil Liability Insurance

30 August 2023

Building a Better Future – An Australian Perspective

Presenter

Julie Bowker - Partner

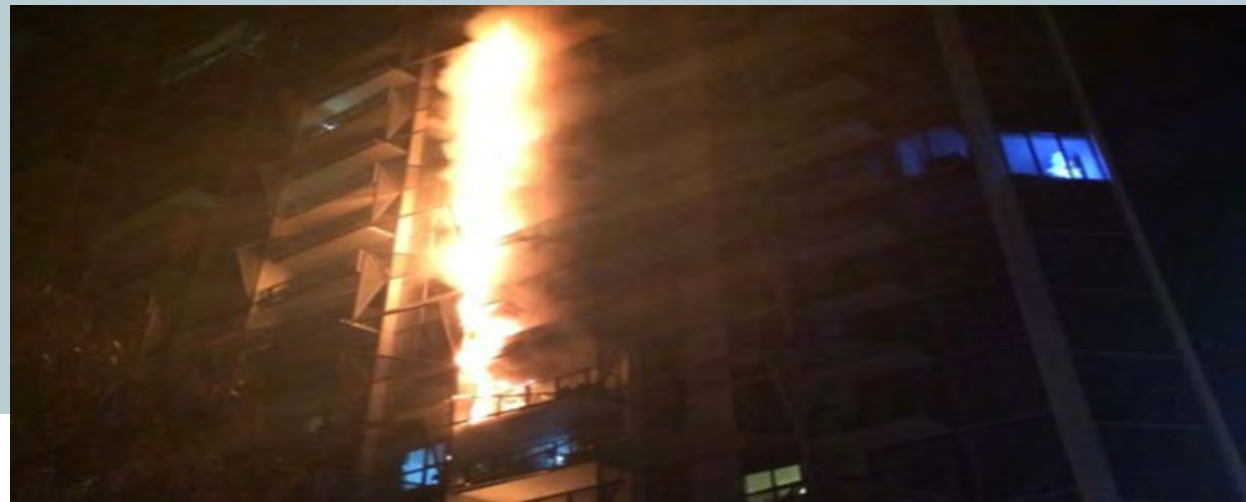
Liability Claims Against Construction Professionals from an Australian Perspective

A brief history of construction defects, legislative changes and the impact on the liability of construction professionals and their insurers

Recent History

2014

Lacrosse, Melbourne



POLITICS VICTORIA DEVELOPMENT

Docklands owners sue for \$24m over fire, as date to fix cladding looms

Clay Lucas, 'Docklands owners sue for \$24m over fire, as date to fix cladding looms', *The Age* (Web Page, 10 September 2018) <<https://www.theage.com.au/politics/victoria/docklands-owners-sue-for-24m-over-fire-as-date-to-fix-cladding-looms-20180909-p502pc.html>>.

2018

Opal Tower, Sydney



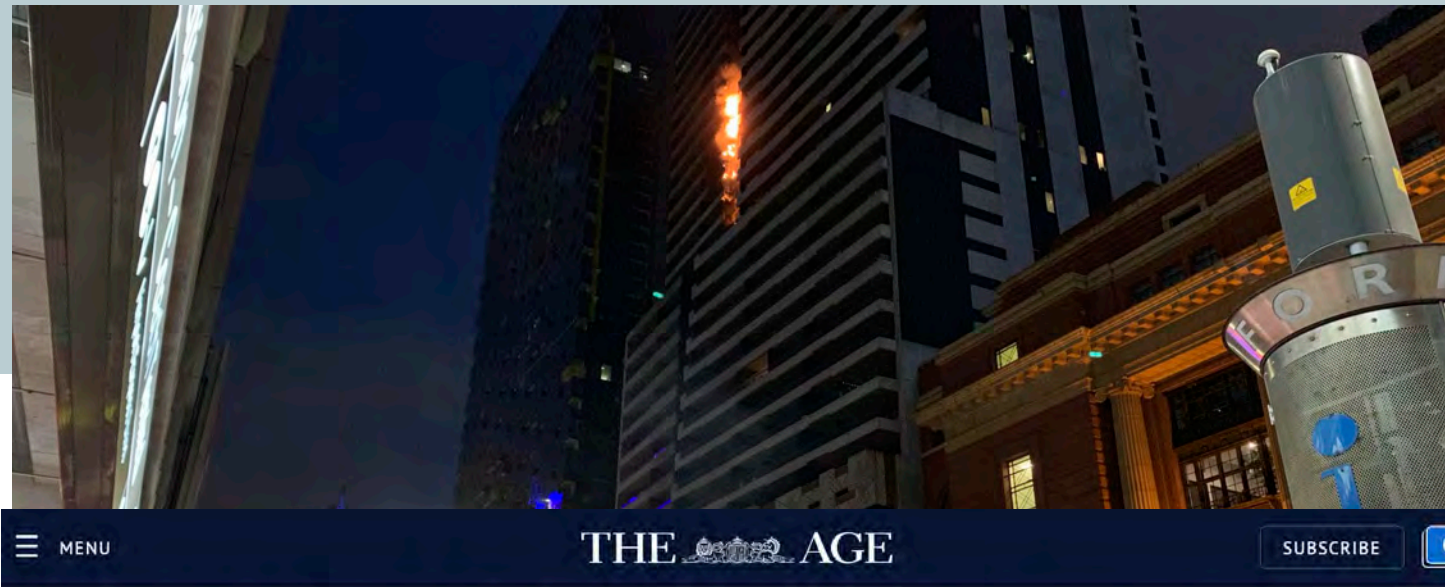
SYDNEY: Police and firefighters stay in front of the Opal Tower during an inspection by engineers.—AFP

Sydney Olympic Park residents evacuated amid concerns building may collapse The Sydney Morning Herald

Megan Lehman, 'Inside Opal Tower debacle', *The Australian* (Web Page, 1 June 2019) <<https://www.theaustralian.com.au/weekend-australian-magazine/falling-through-the-cracks-sydneys-opal-tower-debacle/news-story/b6f780d50823388feafe43f099e63702>>.

Recent History

2019
Neo 200,
Melbourne



'Same as Grenfell Tower': Cladding fears as fire rips through Melbourne CBD apartment building

Simone Fox Koob and Robyn Grace and Liam Mannix, "Same as Grenfell Tower": Cladding fears as fire rips through Melbourne CBD apartment building' The Age (Web Page, 4 February 2019) <<https://www.theage.com.au/national/victoria/same-as-grenfell-tower-cladding-fears-as-fire-rips-through-melbourne-cbd-apartment-building-20190204-p50vgl.html>>.

2019
Mascot Towers,
Sydney



Urgent remediation works needed to avoid 'structural failure' at Mascot Towers

Danielle Le Messurier 'Urgent remediation works needed to avoid 'structural failure' at Mascot Towers' The Daily Telegraph (Web Page, 16 October 2019) <<https://www.dailytelegraph.com.au/news/nsw/urgent-remediation-works-needed-to-avoid-structural-failure-at-mascot-towers/news-story/6561a5fc05ff76588574e79a3b5d1904>>.

BMF - Building Confidence National Framework

- Implement Building Confidence report recommendations (by Shergold / Weir)
- Current issues include:
 - National Registration Framework for building practitioners
 - Model code of conduct for building surveyors
 - Comprehensive building manual for residential buildings
 - Independence of private building certifiers / surveyors

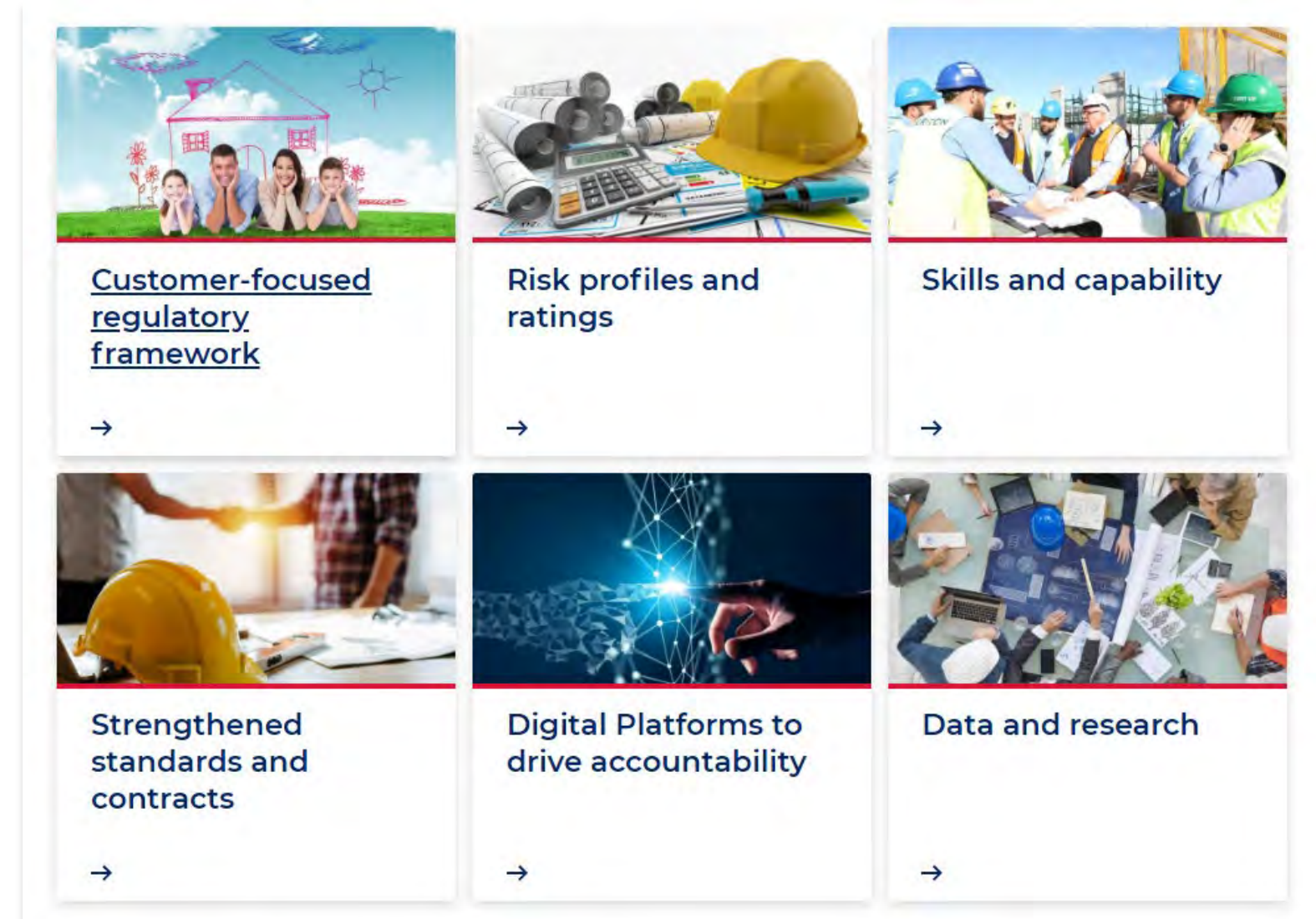


Construct NSW

- Strata Schemes Management Act 2015
- Residential Apartment Buildings Act 2020
- Design and Building Practitioners Act 2020
- (DBP Act)
- Extended duty of care

And out for consultation ...

- Decennial insurance?
- Building Bill 2022, Building and Compliance Enforcement Bill 2022, Building and Construction Legislation Amendment Bill 2022





Legislative reform ongoing

- NSW leading the way with legislative reform
- Extended duty of care (DBP Act) to be adopted across Australia
- Tighter regulation should lead to reduced claims against construction professionals
- Aim to attract insurers back to Australian construction PI cover
- NSW considering decennial (10 year) liability cover for residential apartment buildings – an insurance of first resort to cover rectification of serious defects

Duty of Care - Design and Building Practitioners Act 2020 (NSW) (DBP Act)

The DBP Act introduced a duty on any person who carries out construction work to exercise reasonable care to avoid economic loss caused by defects:

- in or related to a building for which the work is done; and
- arising from the construction work

This duty of care is owed by that person to any current or future owner of the property on which the construction work is carried out, regardless of whether the owner entered into a construction contract relating to that work.



Legislative reform ongoing

- *Goodwin Street Developments Pty Ltd atf Jesmond Unit Trust v DSD Builders Pty Ltd (in liq)* [2022] NSWSC 624

The duty of care applies to all building work - residential and commercial projects

- *The Owners – Strata Plan No 84674 v Pafburn Pty Ltd* [2022] NSWSC 659

The duty of care can apply to directors of construction companies if they control how construction work is carried out

- *The Owners, Strata Plan No 87060 v Loulach Developments Pty Ltd (No 2)* [2021] NSWSC 1068

A plaintiff must allege and prove each risk (defect) the builder was required to manage and the precautions that it is alleged should have been taken

Causation and apportionment of liability

Owners Corporation No.1 of PS613436T v L.U. Simon Builders Pty Ltd

- Builder primarily liable for breach of warranties – combustible cladding
- Builder entitled to pass on liability to its consultants
- Liability apportioned:
 - Building Surveyor 33%
 - Architects 25%
 - Fire Engineer 39%
 - Smoker 3%



MS Amlin Corporate Member Limited v LU Simon Builders Pty Ltd [2023] FCA 581

- Concerned notifications regarding use of combustible cladding in Atlantis Towers in Melbourne
- Report on Lacrosse identified:
 - cladding did not comply with the Building Code Australia
 - LU Simon and others used the cladding elsewhere



MS Amlin Corporate Member Limited v LU Simon Builders Pty Ltd [2023] FCA 581

- LU Simon made two notifications to insurers:
 - The first (“potential claim”) included a media article which suggested cladding widespread
 - The second (“potential claim”) attached (amongst others) the report on Lacrosse

Professional Indemnity Cover Claims Made and Notified Policy

LU Simon's PI Policy provided:

"We the Insurer hereby agrees [sic] to indemnify the Insured up to but not exceeding the Limits of Indemnity:

*a) **for any civil liability** which the Insured may become obligated to pay arising from any claim or claims first made against the Insured ... during the Period of Insurance ..."*



Notification of facts that may give rise to a claim

Section 40(3) of the Insurance Contracts Act 1984 (Cth)

*“Where the insured gave **notice in writing** to the insurer **of facts that might give rise to a claim** against the insured as soon as was reasonably practicable after the insured became aware of those facts but **before the insurance cover provided by the contract expired**, the insurer is not relieved of liability under the contract in respect of the claim, when made, by reason only that it was made after the expiration of the period of the insurance cover provided by the contract”*

Decision- opinion as “fact”

- The fact that an opinion has been given by a person of appropriate expertise is itself a fact.
- *“In circumstances where that opinion is given by a person in a position of public authority ... the publication of that opinion may well be a most important fact that might itself give rise to a claim.”*
- An expert opinion itself might be a “fact” for the purpose of s40(3).
- Ultimately found sufficient connection between the facts notified and the claims made to satisfy s40(3).

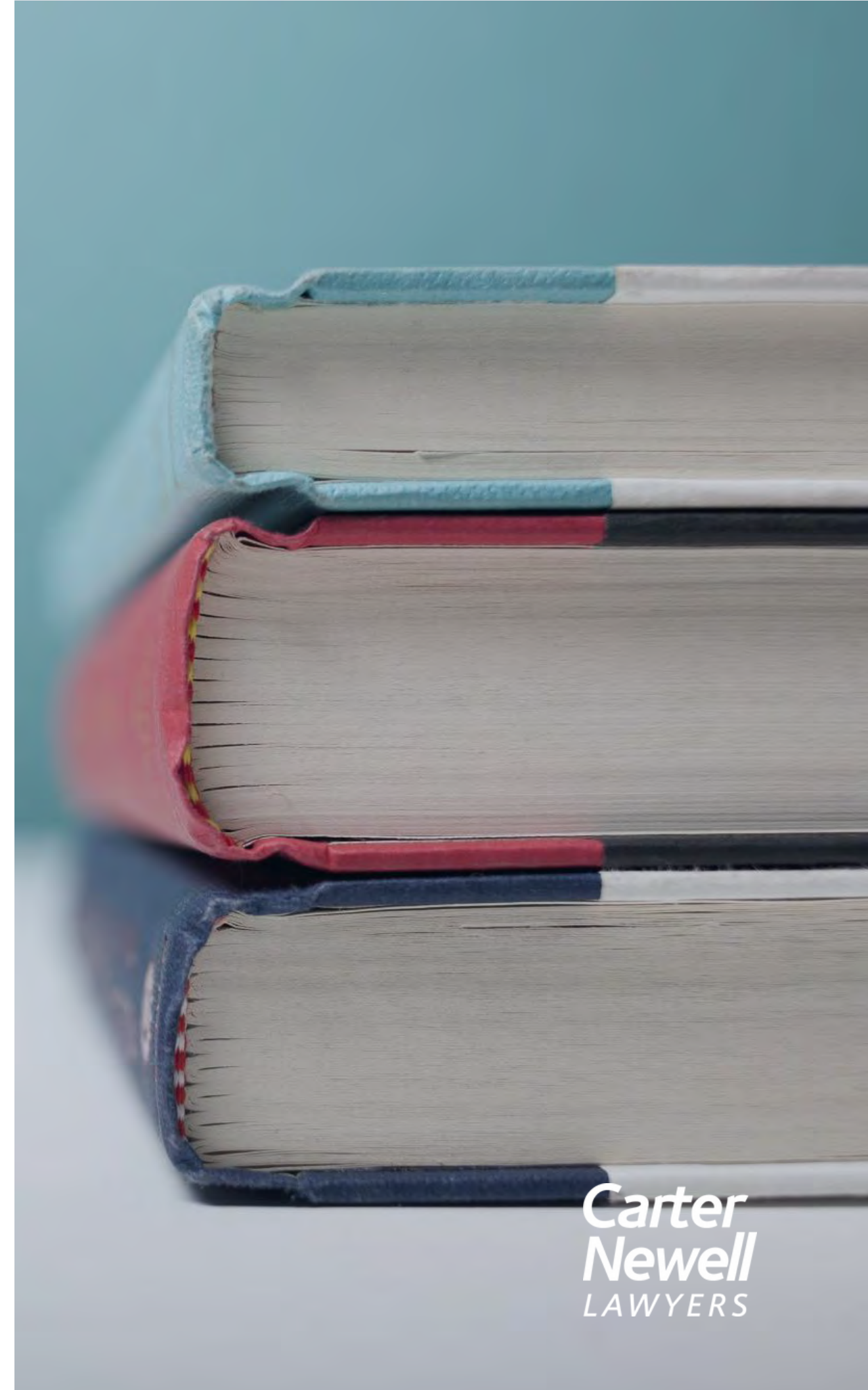
Notifications – where are we now?

- Notification may come from a variety of sources and intention to notify is not required - *Avant Insurance Limited v Darshn* [2022] FCFCA 48
- Notification need not be given in a single document - *Uniting Church in Australia Property Trust (NSW) v Allianz Australia Insurance Ltd* [2023] FCA 190
- Expert opinion may be a fact - *MS Amlin Corporate Member Limited v LU Simon Builders Pty Ltd* [2023] FCA 581 – where notice given in relation to problem in one building notice of claims made in relation to replacement of materials in another building; opinion as “facts”
- Notification of ‘bare possibilities’ as opposed to facts not sufficient - *P & S Kauter Investments Pty Ltd v Arch Underwriting at Lloyds Ltd* [2021] NSWCA 136; BC202105739
- No need to say notifying of a possible claim or identify potential claimants
- Must still be a connection between facts notified and claims made



Insurers perspective

- S 37 of the DBP Act is a more extensive liability risk to construction professionals and their insurers
- Construction professional indemnity issues:
 - Notification of circumstances
 - Which policy period?
 - Who is “insured”?
 - Does the claim arise from the provision of professional services?





Other issues faced by construction PI insurers

1. Dual insurance – who is an “insured”
2. Difficulty obtaining access to other defendant’s policies
3. Administration of building companies and subcontractors
 - joinder of insurer in place of defendant
 - policy becomes relevant in court proceedings

Availability of Insurance

- In recent years Lloyds PI capacity has reduced
- Insurance available:
 - Increased premiums
 - Increased deductibles
 - Lower policy limits
 - Additional exclusions
- Certifiers allowed to have insurance with cladding exclusions

Conclusions

- Legislative changes relevant to construction professionals is ongoing
- Aim to make construction more compliant and reduce risk
- Extended duty of care in NSW – s 37 DBP Act – to be extended across Australia
- Increased scope of duty for construction professions
- Will decennial building insurance make a difference?
- It remains to be seen whether extended duty of care will reduce claims against construction professionals and reduce the risk to their insurers
- Insurers should consider all material provided with notifications

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Julie is a partner at Carter Newell Lawyers, based in Sydney. She qualified as a lawyer in England & Wales in 1992. She practiced in England until her move to Australia in 2012. Julie was admitted as a lawyer in Australia (New South Wales) in 2014.

With an emphasis on defending professional indemnity claims, Julie's experience extends to advising Australian and international insurers across a number of insurance classes, including professional indemnity, contract works and construction risks, property and industrial special risks, management liability, public and product liability, directors' and officers', and public offering of securities.

Julie provides policy coverage advice and defends complex professional liability claims, including acting as defence and coverage counsel in class actions. She has acted for and against professionals including, construction professionals and surveyors, solicitors, accountants, and auditors, and regularly acts for insurers involved in complex coverage disputes.

Julie advocates the use of alternative dispute resolution methods and has acted in numerous mediations in Australia and the UK. Julie is a committee member of the Australasian Professional Indemnity Group.

OUR OFFICES

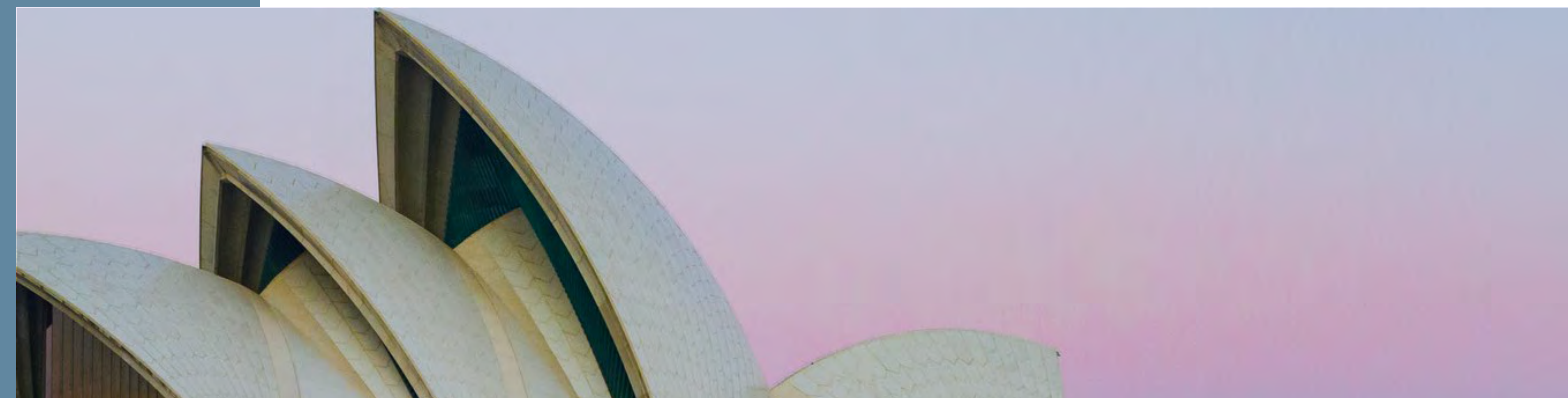
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