



THE UNIVERSITY OF
SYDNEY

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Design and Building Practitioners Regulation 2020
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**Draft Design and Building Practitioners Regulation 2020 (Draft Regulation)
Submission regarding the scope of the statutory duty of care**

The University of Sydney (**University**) is the owner and occupier of many buildings used for the purposes of teaching, research, student accommodation, student facilities and other purposes connected with the functions of the University under the *University of Sydney Act 1989* (NSW) (**University Buildings**).

As such, the University welcomes the opportunity to comment on clause 12 of the Draft Regulation, in the context of the statutory duty of care under section 37 of the *Design and Building Practitioners Act 2020* (**Act**) (**Duty of Care**).

In summary, the University submits that the Draft Regulation should be revised to extend the Duty of Care so that it is owed by persons who carry out work on:

- (a) all buildings used for purposes connected with the functions of NSW universities, including teaching, research, student accommodation and student facilities; or
- (b) alternatively, class 3 buildings and buildings that contain a class 3 part.

The urgency of the above arises from the need to rectify combustible cladding in the short term, based on orders by state and local New South Wales Government authorities. It is of critical importance that universities be able to secure the co-operation of those who originally designed and built the relevant buildings, even where contractual limitation periods have expired. Extension of the Duty of Care, as proposed above, would help achieve this important objective and be consistent with the intention of the Act. This is particularly important in respect of student accommodation buildings.

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The reasons in support of these alternative submissions are outlined below, and we would be happy to discuss any aspect of these submissions further.

BACKGROUND AND CONTEXT

The University is a not-for-profit public charity, specialising in tertiary education, research and its translation for the benefit of the people of New South Wales and Australia.

As a not-for-profit charity, the University relies on grants, donations and external funding to provide new facilities for both the University community and the wider community at large. The University also provides and funds significant infrastructure services, local traffic upgrades and management, as well as a wide variety of open space and community facilities that are available for use by the general public.

Like many universities, the University owns and operates a large number of buildings, used by staff, students and the public. Twenty University Buildings have been recorded on the New South Wales Government External Cladding Register. The University has so far received a number of Fire Safety Orders and Notices of Intention to Issue Fire Safety Orders from relevant authorities, requiring rectification of combustible cladding on University Buildings. The estimated cost of rectifying combustible cladding on University Buildings is expected to exceed \$57,000,000.

The COVID-19 pandemic has had a significant adverse impact on the University and Australian universities in general. As has been widely reported, the tertiary education sector has been amongst the worst affected financially by the impacts of the COVID-19 pandemic. Restrictions and other measures imposed by the State and Federal Governments have resulted in severe financial detriment to the University, exacerbated by the fact that University staff have not been able to benefit from the JobKeeper stimulus scheme.

As a result of the above circumstances, the University will face great difficulty in funding and implementing the rectification of combustible cladding and other defects on University Buildings. Unlike many landowners, universities will need to attend to rectification on a multiplicity of buildings that are diverse and often specialist in nature, function and operation. The University Buildings include specialist research facilities, student accommodation, teaching facilities and administration facilities.

As such, it is of critical importance that universities be able to secure the co-operation of those who originally designed and built the relevant buildings, including the installation of combustible cladding on those buildings. Having regard to the objectives of the Act and the Duty of Care, it is submitted that the legislation should afford the protection of the Duty of Care to the university sector.

Our primary submission is that the Duty of Care should extend to apply to all buildings used for purposes connected with the functions of NSW universities. Our alternative



submission is that the Duty of Care should at least extend to apply to class 3 buildings, so as to cover student accommodation.

While we understand there is discussion regarding extending the scope of the Act to additional classes of buildings in the longer term, our submission is that expansion of the Duty of Care should proceed now, as part of finalisation of the Draft Regulation. Universities are now dealing with a multiplicity of buildings requiring removal of combustible cladding, at the same time as suffering the disastrous impact of COVID-19 on the university sector. As mentioned above, it is of critical importance that universities be able to secure the co-operation of those who originally designed and built the relevant buildings, even where contractual limitation periods have expired. Extension of the Duty of Care, as proposed in the submissions below, would help achieve this important objective and be consistent with the intention of the Act. This is particularly important in respect of student accommodation buildings.

SCOPE OF THE DUTY OF CARE, BASED ON THE CURRENT DRAFT REGULATION

As outlined below, based on the current terms of the Draft Regulation, the Duty of Care will be quite limited in scope. In summary, unless the Draft Regulation is revised to extend the application of the Duty of Care, that duty will likely only apply to persons who carry or carried out work on class 2 residential buildings.

The Duty of Care in section 37(1) of the Act is expressed in the following terms (emphasis added):

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 construction work.*

In identifying whether a duty of care is owed by a person, the focus is on whether a person has carried out 'construction work'. Section 36(1) of the Act defines 'construction work' for the purpose of Part 4 of the Act as follows:

In this Part –

construction work means any of the following –

- (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 any work referred to in paragraph (a), (b) or (c).*

Section 4 of the Act defines 'building work' to mean work involved in the construction of, making alterations or additions to, or the repair, renovation or protective treatment of a "building of a class or type prescribed by the regulations".



Clause 12 of the Draft Regulation prescribes the following class or type of building for the purposes of section 4 of the Act:

- (a) a class 2 building,
- (b) a building that contains a class 2 part.

Section 36(2) of the Act further defines 'building work' (for the purposes of the Duty of Care) as follows:

In this Part, a reference to building work applies only to building work relating to a building within the meaning of this Part.

Section 36(1) of the Act defines 'building' as follows:

*In this Part -
building has the same meaning as it has in the Environmental Planning and Assessment Act 1979.*

Section 1.4(1) of the EP&A Act defines 'building' as follows:

*In this Act, except in so far as the context or subject-matter otherwise indicates or requires—
building includes part of a building, and also includes any structure or part of a structure (including any temporary structure or part of a temporary structure), but does not include a manufactured home, moveable dwelling or associated structure within the meaning of the Local Government Act 1993.*

SUBMISSIONS IN SUPPORT OF EXPANDING THE SCOPE OF THE DUTY OF CARE

It is our submission that the limited scope of the Duty of Care described in the above section should be expanded by amending the Draft Regulation.

1. The intended scope of the Duty of Care

Our submission is supported by the intention of Parliament, including when amendments to the Design and Building Practitioners Bill (**Bill**) were introduced by Mr David Shoebridge MLC of the Greens NSW prior to the Act's assent in the Upper House.

In the Second Reading Speech for the Bill, The Hon. Damien Tudehope (Minister for Finance and Small Business) stated the following (emphasis added):

While the regulations have not been finalised, it is envisaged that the duty of care will apply to construction work in a building that is a class 1, 2, 3 and 10 under the Building Code of Australia.

Therefore, houses, multi-unit residential buildings and other buildings such as boarding houses, hostels, backpackers' accommodation, residential parts of



hotels, motels or schools will all obtain the duty of care provided for under this bill. That is, people will be protected where they live or intend to live or reside.

Further, in the Second Reading Debate of the Bill on 19 November 2019, Mr Shoebridge explained the intention of the amendments that were ultimately passed and adopted in the Act as follows (emphasis added):

I turn now briefly to discuss the various amendments. Amendment No. 1 provides that the duty of care applies to all buildings and includes a definition of "building" for the purpose of the duty of care and that "building" has the broad meaning of "building" in the Environmental Planning and Assessment Act. Amendment No. 2 makes clear that the duty of care extends to building work, including residential building work within the meaning of the Home Building Act. This amendment will ensure that the duty of care amendments will have broad coverage, which is the intent.

2. Extension of the Duty of Care to all buildings used for purposes connected with functions of NSW universities, including teaching, research, student accommodation and student facilities

Our primary submission is that the Duty of Care should extend to all buildings used for purposes connected with the functions of NSW universities.

This submission is based on the matters outlined in the Background and Context section above. Namely, universities will be uniquely adversely affected by construction defects, particularly combustible cladding. Amongst other things:

- (a) The University, like many other NSW universities, is a not-for-profit charity, reliant on grants, donations and external funding to maintain its operations. The financial impost of defect rectification would have a detrimental impact on the university sector.
- (b) This detrimental financial impact is exacerbated by the devastating effect of the COVID-19 pandemic on universities, which were unable to benefit from the JobKeeper scheme.
- (c) As with many universities, the University provides new facilities for both the University community and the wider community at large, including infrastructure services, local traffic upgrades and management, as well as a wide variety of open space and community facilities that are available for use by the general public.
- (d) Unlike many landowners, universities will need to attend to rectification on a multiplicity of buildings that are diverse and often specialist in nature, function and operation. It will be critically important that universities be able to secure the co-operation of those who originally designed and built the relevant buildings, including the installation of combustible cladding on those buildings. In many cases, this will require an extension to the six-year contractual limitation period under the *Limitation Act 1969* (NSW), which is afforded by



the retrospective Duty of Care.

3. Extension of the Duty of Care to class 3 buildings and buildings that contain a class 3 part

In the alternative to the above submission, the University submits that the Duty of Care should at least extend to apply to class 3 buildings (and buildings containing a class 3 part), so as to cover student accommodation facilities.

In addition to the reasons outlined in support of our primary submission, we confirm that:

- (a) safety, including in relation to construction defects and combustible cladding, is an utmost priority in student accommodation facilities;
- (b) students (and sometimes staff) live in student accommodation for long periods of time – often a number of years. The intention of the Act, as described in the extract of the Second Reading Speech above, was clearly to extend to class 3 buildings in the nature of boarding houses and residential parts of schools, which are similar to university student accommodation, so as to protect people “where they live or intend to live or reside”; and
- (c) by its inclusion in the recent Draft Housing Diversity State Environmental Planning Policy, the NSW Government has recognised student accommodation as a distinct type of residential development where people live.

CONCLUSION

For the reasons outlined above, the University submits that the Draft Regulation should be revised to extend the Duty of Care so that the benefit of that Duty of Care can apply to the university sector, either in respect of all buildings used for university functions, or at least in respect of student accommodation facilities.

Such changes to the Draft Regulation would greatly assist universities facing the devastating effects of COVID-19 on the tertiary education sector at a time when universities will be uniquely challenged by the developments relating to combustible cladding and other construction defects. It is accordingly critical that the Duty of Care be expanded at this stage, rather than in the longer term.

Yours Sincerely

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