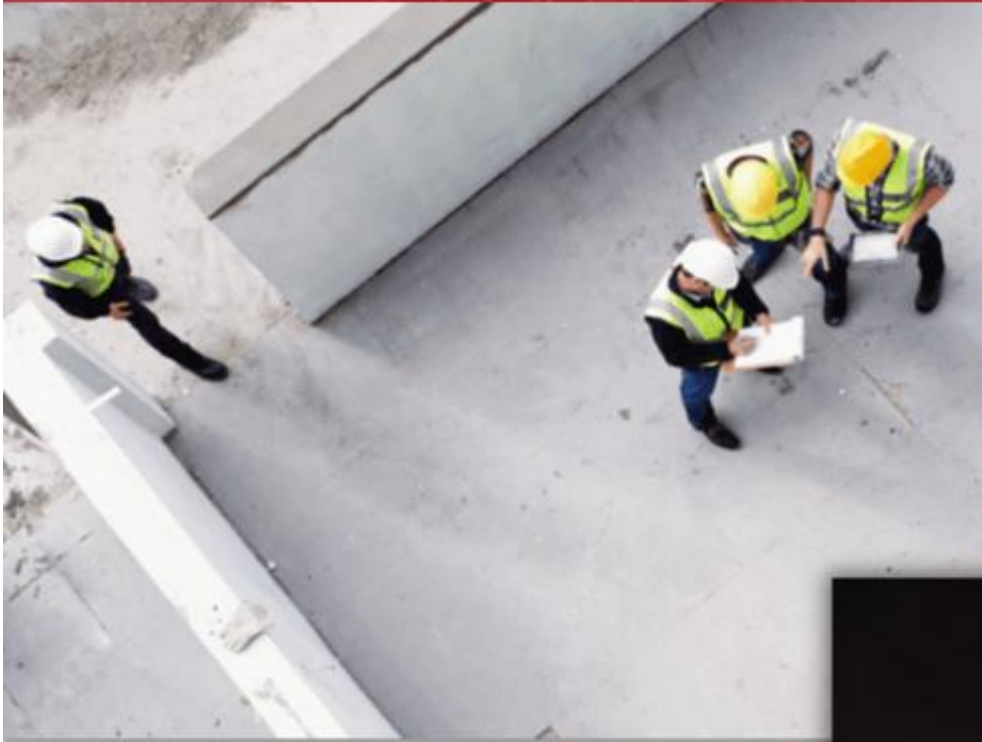


# Unravelling *Pafburn*, *Boulus*, and *Goodwin's* Insights on the Duty of Care



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## Newsletter

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In this Newsletter, we discuss the significant decisions regarding Part 4 of the *Design and Building Practitioners Act 2020* (DBPA). The respective decisions by Stevenson J in the Supreme Court and the Court of Appeal cases of *Goodwin*, *Pafburn*, and *Boulus* are analysed in detail. These decisions focus on the duty of care to avoid economic loss, what persons owe that duty of care, and to what types of buildings that duty is owed to.

## Introduction

Justice Stevenson of the NSW Supreme Court highlights the broad depth and scope of Part 4 of the DBPA<sup>1</sup> in his decisions of *Pafburn*<sup>2</sup>, *Boulus*<sup>3</sup>, and *Goodwin*<sup>4</sup>. In doing so, he emphasises the conclusion that persons who fall under the scope of s 37<sup>5</sup> are characterised as having “supervision, coordination, project management and substantive control over building works”.

To enlighten our readers, we present a summary and takeaway of these judgments below, offering a synoptic perspective into the contents of this newsletter.

Firstly, in *Goodwin*, Stevenson J established that the duty of care to avoid economic loss caused by defects proffers a retrospective statutory duty of care for all classes of buildings (commercial and residential).

Secondly, *Pafburn* saw a director of the Developer who could control how the building work was carried out; arguably falling under the duty of care in s 37.

Finally, in *Boulus*, the Council was granted leave to amend its crossclaim to include Mr Boulous (Managing Director of the Builder) and Mr McCarthy as persons (Project Site Supervisor) in a claim under s 37 of the DBPA. Stevenson J in succumbing to this decision, referred to his judgment in *Pafburn*, in stating that persons (Mr Boulous and Mr McCarthy) under s 37 were characterised as having substantive control of the work.

The common theme in all three of these cases concern the duty of care to avoid economic loss arising from defective workmanship and defective building work. We note that the duty of care in s 37 is to avoid economic loss; by means of costs for the rectification of defects and the costs of providing alternative accommodation where necessary pursuant to s 38.<sup>6</sup> This duty of care applies whether the claimant was the owner of the land when the work was carried out.

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<sup>1</sup> *Design and Building Practitioners Act 2020* No 7 [NSW].

<sup>2</sup> *Owners of Strata Plan No 84674 v Pafburn Pty Ltd (No 2)* [2022] NSWSC 1002.

<sup>3</sup> *Boulus Constructions Pty Ltd v Warrumbungle Shire Council (No 2)* [2022] NSWSC 1368.

<sup>4</sup> *Roberts v Goodwin Street Developments Pty Ltd* [2023] NSWCA 5.

<sup>5</sup> *Design and Building Practitioners Act 2020* No 7 [NSW] s 37.

<sup>6</sup> *Ibid* s 38.

## ***Roberts v Goodwin Street Developments Pty Ltd* [2023] NSWCA 5**

Recently, in *Roberts v Goodwin Street Developments Pty Ltd*<sup>7</sup>, the NSW Court of Appeal unanimously established that the duty of care to avoid economic loss caused by defects, proffers a retrospective statutory duty of care for a broader class of buildings beyond class 2 (multi-residential buildings) and includes commercial and residential buildings. The facts of this case, read as follows:

- Goodwin Street Developments Pty Ltd ('Goodwin') entered a building contract with DSD Builders Pty Ltd (DSD) to construct three boarding houses for student accommodation at the University of Newcastle.
- A dispute arose between DSD and Goodwin relating to late payment, defective works and delays in construction work, and works were suspended. The primary judge (Stevenson J) found that Roberts entered the site and caused malicious damage to the buildings during the period that works were suspended.
- Goodwin terminated the contract and commenced proceedings in the Supreme Court against DSD and Roberts, claiming Roberts, amongst other things, breached his duty of care under s 37 of the DBPA.<sup>8</sup>
- Stevenson J found that 'building work' in Part 4 of the DBPA includes building work relating to a boarding house, and that Roberts was in breach of the statutory duty of care in s 37 of the DBPA.<sup>9</sup>
- Roberts appealed and argued that the primary judge erred, amongst other things, in finding that a boarding house was a 'building' to which s 37 of the DBPA<sup>10</sup> applied.

The issue in *Goodwin*, is whether the definition of building work in section 4(1) of the DBPA<sup>11</sup>, applies to Part 4, which pertains to a statutory duty of care. The court in reaching a unanimous decision, dismissed the appeal and found that building work will include work carried out to a boarding house and that the retrospective duty of care introduced by the DBPA applies to a broader class of buildings.

The Court upholding the primary judge's conclusion, found that the general definition of 'building work' in s 4(1)<sup>12</sup> applies to the inclusive definition of 'building work' in s 36(1)<sup>13</sup> of

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<sup>7</sup> *Roberts v Goodwin Street Developments Pty Ltd* [2023] NSWCA 5.

<sup>8</sup> *Design and Building Practitioners Act 2020* No 7 [NSW] s 37.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid* s 4(1).

<sup>12</sup> *Ibid.*

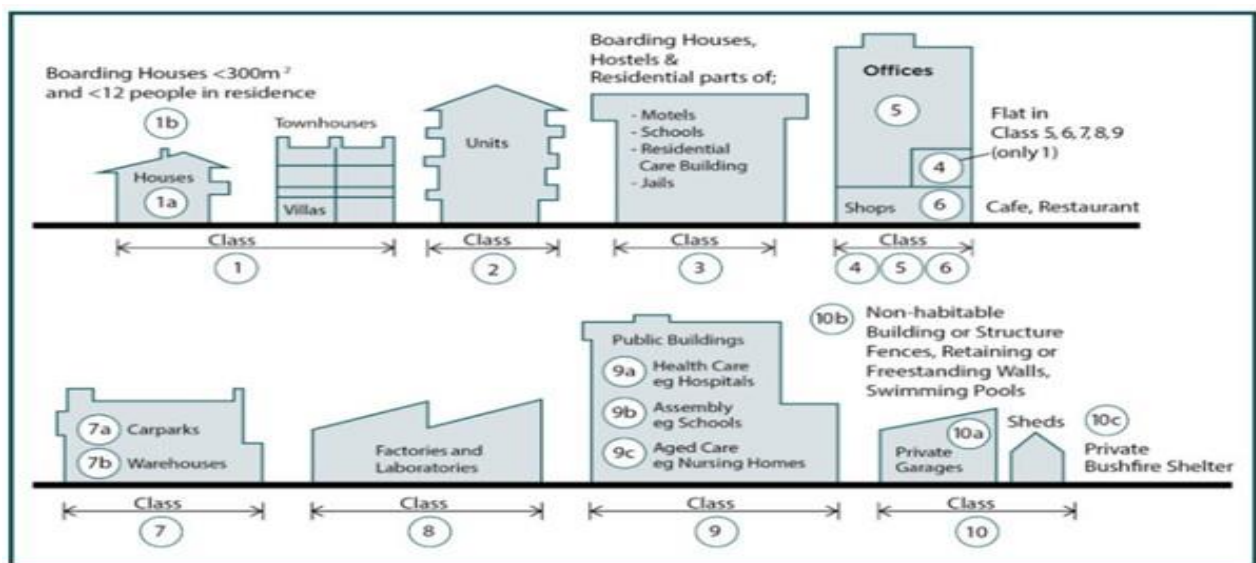
<sup>13</sup> *Ibid* s 36(1).

the DBPA by giving effect to the purpose of the Act and the intention of Parliament per the Minister’s Second Reading speech, which reads as follows:

**[200]** 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’.

**[232]** The parties did not dispute that a boarding house is a “building” within the meaning of the Environmental Planning and Assessment Act, and thus within the meaning of that term in s 36(1). Nor is it disputed that the type of work undertaken fell within the types of work identified in the definition of ‘building work’ in s 4(1).

Accordingly, the statutory duty of care applied to a boarding house. We note that the following image depicts the classification of buildings discussed in *Goodwin*; whereby a duty of care is owed to under the DBPA and the soon to be enacted Building Bills.



(Source: Hall and Wilcox, 2022).

## What are the Building Bills?

Recently, the NSW Government has reinforced its 'Construct NSW' building and construction industry reforms. The agenda is to transform the construction industry to restore consumer confidence and reduce "the costs of substandard work"<sup>14</sup>. The Bills aim to ensure best practice regulation of all building work in NSW pertaining to licensing, workmanship, building quality and materials. Its collective aim is to replace the HBA and RABA and create one mode of regulatory compliance for building and construction work.

Currently, the NSW government is consulting on the following 4 new pieces of legislation:

- The Building Bill 2022
- The Building Compliance and Enforcement Bill 2022
- The Building and Construction Legislation Amendment Bill 2022
- The Building and Construction Legislation Amendment Regulation 2022

The implications for the newly proposed bills are an increase in liability, duty of care and accountability for the various parties involved in the chain of production of any building work. These parties include developers, builders, designers, certifiers/building inspectors and manufacturers of building materials.

The newly proposed legislation will apply to both those operating in the residential and commercial construction space. The estimated dates for when the proposed bills are to be taken in effect are yet to be determined. This is because consultation for the bills have only recently closed on 25 November 2022 and are now under review before assent.

Per section 5 of the NSW Draft Government Bill - Building Bill 2022, building work includes coordinating or supervising work involved in the construction of a building, making of alterations or additions to a building and the repair, maintenance, renovation or protective treatment of a building and work prescribed by the regulations.

Similarly, section 215 of the Draft Building Bill 2022, further characterises building work to include: a) the design or inspection of building work, and b) the issue of a complying development certificate and subdivision work<sup>15</sup>.

Taking both definitions of "building work" into consideration, section 216<sup>16</sup> extends the duty of care against economic loss to every landowner where the building work is conducted,

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<sup>14</sup> *Regulatory Impact Statement, Building Bill 2022* (NSW) 10.

<sup>15</sup> *New South Wales Draft Government Bill, Building Bill 2022* (NSW) Part 8, 88.

<sup>16</sup> *Ibid* s 216.

including subsequent owners. This section also stipulates that individuals have a responsibility to exercise reasonable care to prevent economic loss caused by defects, and those owed the duty of care are entitled to damages for breach of the duty, as if it were a common law duty.

It's important to note that the Building Bill applies to both residential (home building work) and commercial buildings (commercial building work), broadly covering Class 2 to 9 buildings under the National Construction Code.<sup>17</sup>

We note the wording in Draft Building Bill 2022, closely resembles the language in Section 36 of the DBPA<sup>18</sup> which concerns the duty of care. We encourage our readers to explore the side-by-side comparison of the Extension of Duty of Care in the Draft Building Bill 2022 and the Design Building Practitioners Act, available in Schedule 1.

## ***Owners of Strata Plan No 84674 v Pafburn Pty Ltd (No 2) [2022] NSWSC 1002***

In this case, the Owners Corporation alleges that the Builder (Pafburn Pty Ltd) and the Developer (Madarina Pty Ltd) engaged in "construction work" and in so doing acted in breach of the statutory duty of care prescribed by s 37 of the DBP Act.<sup>19</sup> We note that construction work per Section 36 of the DBPA is ascribed to mean:

"... supervising, coordinating, project managing or otherwise having substantive control over the carrying out of [the building work]."

In terms of the Builder's duty of care, Stevenson J said at [16] that:

**[16]** "there is no dispute in these proceedings that the Builder "carried out construction work" for the purposes of s 37(1) of the DBP Act, and thus had a duty of the kind referred to therein".

The critical issue, however, was whether the plaintiff could establish that the Developer itself "carried out construction work" for the purpose of s 37(1). As such proving that the developer had "substantive control over building work remained a question of fact" [see paragraph 26 of the judgement].

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<sup>17</sup> Regulatory Impact Statement, Building Bill 2022, Part 1 – Who can do the work August 2022, 5.

<sup>18</sup> *Design and Building Practitioners Act 2020* No 7 [NSW] s 36.

<sup>19</sup> *Ibid* s 37.

The Court in articulating whether the developer had substantive control, relied on the related body relationship between the builder and the developer.

Relevantly:

- The builder owned all the shares in the developer;
- Mr Antonios Obeid and Mrs Maria Obeid owned all the shares in, and were directors of the builder; and
- Mr Obeid was the sole director of the developer.

As such, Stevenson J, taking these facts into account found that it was arguable that, because of holding both roles, the director may have in fact had the ability to control the building work:

**[44]** On reflection, I think it at least arguable that because Mr Obeid had the concurrent capacities as sole director of the Developer and the Builder's nominated supervisor, he may, as a matter of fact, and in his capacity as a director of the Developer, have had the ability to control how the building work was carried out.

Stevenson J, in granting leave to the Owners to further amend and serve their list statement against the developer said:

**[46]** I am unable to reach that conclusion here because I cannot conclude that the Owners Corporation is incapable of establishing, on the basis proposed in the Amended List Statement, that the Developer was able to and in fact did control how the building work was carried out; and thereby engaged in construction work within the meaning of ss 36 and 37 of the DBP Act.

**[47]** For those reasons I decline to dismiss the proceedings as against the Developer.

Ultimately, the judgment in *Pafbun*, by Stevenson J intrinsically showcases the broad ambit by which a duty of care may apply. As such, a person under s 37 can arguably be understood to be a developer who 'has the ability to exercise substantive control over a builder' and may be found to have carried out 'construction work'. Therefore, they would for the purposes of Part 4 DBPA owe a duty of care to an owner of land.

## ***Boulus Constructions Pty Ltd v Warrumbungle Shire Council (No 2) [2022] NSWSC 1368***

The case of *Boulus Constructions*<sup>20</sup> concerns the design and construct of a retirement village on behalf of the Warrumbungle Shire Council ("the Council"), in the suburb of Dunedoo. We note that the Builder commenced proceedings almost four years ago on 6 November 2018 to seek to be paid what it asserts is due for construction work.

The Council seeks a Crossclaim alleging defective work for 300 defects comprising 30 different kinds of defect in multiple locations in the units within the retirement village. The Cross Claim seeks to ground itself on the retrospective operation of s 37 of the DBPA<sup>21</sup> against the Builder, as well as against the Managing Director of the Builder, Mr Brian Boulus, and the Project Site Supervisor, Mr Bradley McCarthy.

The key issue in this case, is whether Council can amend its pleadings to include a claim for breach of statutory duty, against the managing director of the builder and the project site supervisor?

The Council alleges that:

**[27]** " ... [i]n his capacity as the managing director of [the Builder], [Mr Boulus] had the power and ability to and did substantively control all of the building works comprising the entire project, such control including the appointment and control of the project delivery staff working for [the Builder] (including the appointment and control of [Mr McCarthy]), the supervision of the adequacy of the works performed by such project delivery staff, the selection and appointment of subcontractors to perform elements of the Works for which [the Builder] was ultimately responsible, and the overall supervision and acceptance of the works performed by [the Builder's] employees and subcontractors, for the ultimate benefit of [the Council]. Further, as the managing director of [the Builder], [Mr Boulus] had the ultimate ability to control how the Works performed by [the Builder] were carried out."

In relation to Mr McCarthy, the Council alleges:

**[28]** As the site supervisor for the Project, [Mr McCarthy] actively supervised, coordinated and project managed all of the primary elements of the building works comprising the project, and coordinated and directed how the Works performed by [the Builder] were carried out, including by directing and engaging with [the Builder's] subcontractors in the performance of their works."

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<sup>20</sup> *Boulus Constructions Pty Ltd v Warrumbungle Shire Council (No 2) [2022] NSWSC 1368*.

<sup>21</sup> *Design and Building Practitioners Act 2020* No 7 [NSW] s 37.



Stevenson J in construing this issue, referred to his judgment in *Pafburn*, where he said that “persons” under section 37 were characterised as having “substantive control of the work”. However, Stevenson notes that the word “persons” is sometimes used in the Act to mean a person deemed to be a “practitioner”; and sometimes it is not.

In applying this to Section 36 of the DBPA<sup>22</sup>, specifically the definition of “construction work” which stands as follows:

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).

Stevenson J said the following:

**[57]** The definition, at (a), refers to “building work” and thus to work that a “building practitioner” would undertake.

**[58]** The definition then, at (b), refers to the preparation of “designs ... for building work” and thus to work that a “design practitioner” or a “principal design practitioner” would undertake.

**[59]** The definition then refers, at (c), to the “manufacture or supply of a building product” for use in building work. In that regard, s 36(4) provides that “a person who carries out construction work includes a reference to a person who manufactures, or is a supplier ... of, a building product used for building work”. That “person” could only be the manufacturer or supplier itself.

**[60]** Finally, the definition of “construction work” refers at (d) to the supervision, coordination and project management or having substantive control over the carrying out of “any” work referred to in the three previous elements of the definition; that is “any” “building work”, “any” “preparation of ... designs” and “any” “manufacture or supply of a building product”.

**[61]** Relevantly, the supervision, coordination, project management and having substantive control over building work could be effected by a wide range of actors. Parliament has taken care to define “practitioner” and to define the various activities within that definition by reference to “persons” carrying out those activities, it has used the expression “person” in s 37(1). That must mean someone who is not necessarily a “practitioner” and not necessarily a person acting in their capacity as a

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<sup>22</sup> Ibid s 36.

“practitioner”; nor necessarily acting “in their own capacity”. As I said in *Pafburn*, this will be a question of fact in each case.

As recalled above in our review of *Pafburn*, the finding of substantive control over building work, relied on the related body relationship between the builder and the developer. The relationship saw:

- The builder own all the shares in the developer.
- Mr Antonios Obeid and Mrs Maria Obeid own all the shares in, and were directors of the builder; and
- Mr Obeid was the sole director of the developer.

Distinguishing this, Stevenson J, in granting Council the leave it seeks to amend its Cross Claim to include Mr Boulus and Mr McCarthy as persons in a claim under s 37 said the following:

**[65]** Accordingly, I do not see the Council's proposed identification of Mr Boulus and Mr McCarthy as “persons” for the purposes of s 37 of the Act to be a reason to refuse it leave to make the amendments sought.

## Conclusion

In summation, what can be concluded is that the scope and ambit of s 37<sup>23</sup> is broad, wide ranging and includes anyone who has “supervision, coordination, project management and substantive control over building works”.

In *Goodwin*, the duty of care to avoid economic loss caused by defects, proffered a retrospective statutory duty of care for any building in the confines of the *Environmental Planning and Assessment Act 1979* (NSW) (EPA Act) not just Class 2 buildings.

Whilst *Pafburn*, saw a director of the Developer who had the ability to control how the building work was carried out arguably fall under the duty of care in s 37.

Finally, in *Boulus*, the Council was granted leave to amend its crossclaim to include a Managing Director of the Builder and a Project Site Supervisor in a claim under s 37.

Therefore, persons undertaking works should take extreme precautions in effectively meeting that duty of care, to not cause economic loss. This is provided, that a claim for economic loss is merited to an owner whether they were the owner of the land when the construction work was carried out.

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<sup>23</sup> Ibid s 37.

## SCHEDULE 1 Side by Side Comparison of Extension of Duty of Care Sections in the Design Building Practitioners Act and the Draft Building Bill 2022

<u>Design Building Practitioners Act</u>	<u>Draft Building Bill 2022</u>
<p><b>37 Extension of duty of care</b></p> <p>(1) <u>A person who carries out construction work has a duty to exercise reasonable care to avoid economic loss caused by defects—</u></p> <p style="padding-left: 40px;">(a) in or related to a building for which the work is done, and</p> <p style="padding-left: 40px;">(b) arising from the construction work.</p> <p>(2) <u>The duty of care is owed to each owner of the land in relation to which the construction work is carried out and to each subsequent owner of the land.</u></p> <p>(3) <u>A person to whom the duty of care is owed is entitled to damages for the breach of the duty as if the duty were a duty established by the common law.</u></p> <p>(4) <u>The duty of care is owed to an owner whether or not the construction work was carried out—</u></p> <p style="padding-left: 40px;"><u>(a) under a contract or other arrangement entered into with the owner or another person, or</u></p> <p style="padding-left: 40px;"><u>(b) otherwise than under a contract or arrangement.</u></p>	<p><b>216 Extension of duty of care</b></p> <p>(1) <u>A person who carries out building work or subdivision work has a duty to exercise reasonable care to avoid economic loss caused by defects—</u></p> <p style="padding-left: 40px;">(a) in or related to a building or subdivision for which the work is carried out, and</p> <p style="padding-left: 40px;">(b) arising from the building work or subdivision work.</p> <p>(2) <u>The duty of care is owed to each owner of the land in relation to which the building work is carried out and to each subsequent owner of the land.</u></p> <p>(3) <u>A person to whom the duty of care is owed is entitled to damages for the breach of the duty as if the duty were a duty established by the common law.</u></p> <p>(4) <u>The duty of care is owed to an owner whether or not the building work or subdivision work was carried out—</u></p> <p style="padding-left: 40px;"><u>(a) under a contract or other arrangement entered into with the owner or another person, or</u></p> <p style="padding-left: 40px;"><u>(b) otherwise than under a contract or arrangement.</u></p>
<p>Section 37 (above) is available at:</p> <p><a href="https://legislation.nsw.gov.au/view/whole/html/inforce/current/act-2020-007#sec.37">https://legislation.nsw.gov.au/view/whole/html/inforce/current/act-2020-007#sec.37</a></p>	<p>Section 216 (above) is available at:</p> <p><a href="https://hdp-au-prod-app-nsw-haveyoursay-files.s3.ap-southeast-2.amazonaws.com/8516/9898/1604/43084e577f9699781c4764f84acc1b0_Draft_Building_Bill_2022.pdf">https://hdp-au-prod-app-nsw-haveyoursay-files.s3.ap-southeast-2.amazonaws.com/8516/9898/1604/43084e577f9699781c4764f84acc1b0_Draft_Building_Bill_2022.pdf</a></p>