

# NEGLIGENCE CLAIMS BY SUBSEQUENT BUILDING OWNERS: DID THE LIFE OF *BRYAN* END TOO SOON?

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*The 2014 High Court of Australia case Brookfield Multiplex Ltd v Owners Corporation Strata Plan No 61288 gave insights into the narrowed field within which a duty of care in negligence to prevent pure economic loss will be found. As recent cases and commentary have recognised, however, the Court’s approach is by no means unproblematic in its underlying assumptions and application. We argue, in particular, that the legislative scheme in existence across Australia is at present more a ‘patchwork quilt’ than ‘security blanket’ for vulnerable owners of residential properties. Thus, the common law’s retreat from the field of liability is, we argue, premature.*

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## I INTRODUCTION

The dispute which led to the High Court of Australia's decision in *Brookfield Multiplex Ltd v Owners Corporation Strata Plan No 61288*<sup>1</sup> ('*Multiplex*')<sup>2</sup> reflects a situation commonly encountered in construction projects.<sup>3</sup> It is one which is especially important given the proliferation of multi-use, multistorey

<sup>1</sup> (2014) 254 CLR 185.

<sup>2</sup> The various ways the defendant parties were referred to throughout the litigation reflects the corporate restructuring and rebranding of the Multiplex construction business since the turn of the millennium. This is partly explained at first instance: *Owners Corporation Strata Plan 61288 v Brookfield Multiplex* [2012] NSWSC 1219, [10] (McDougall J) ('*Multiplex (Trial)*'). It is explained further by the Court of Appeal: *The Owners — Strata Plan No 61288 v Brookfield Australia Investments Ltd* (2013) 85 NSWLR 479, 481 [2] (Basten JA) ('*Multiplex (Court of Appeal)*'). In 2016, the Brookfield group reverted to using the 'Multiplex' name for this business, and we have chosen to use that name here. It seems apt not only because it is its current (and long-established) name but also because, at the time that the relevant work was being done in the late 1990s, it was being done by a builder identifying itself as 'Multiplex': see Part II(A).

<sup>3</sup> See Garth Campbell and Emily Dickson, 'Negligence of Builders for Latent Defects That Arise Long after Completion' (2014) 26 *Australian Construction Law Bulletin* 134; Caroline Kirton, 'The Construction Law Year in Review: Building Dispute Practitioners Society — 19 November 2014' (2015) 49 *BDPS News* 6; Lucas Shipway, 'Negligence in Design and Construction: The Impact of the Contractual Matrix' (2016) 32 *Building and Construction Law* 289; Meghan De Pinto-Smith, 'Vulnerability, Tort and Economic Loss: Protection via Contract' (2016) 24 *Tort Law Review* 65; Adrian Baron, 'Defective Buildings and Pure Economic Loss Claims: The Return to an Exclusionary Rule?' (2016) 32 *Building and Construction Law* 233.

developments around Australian population centres.<sup>4</sup> A builder constructs a building under a contract with the first owner (typically, a developer). The first owner transfers the building to a second owner (or owners).<sup>5</sup> This chain may go on for years. At each stage, there is a risk that one of those subsequent purchasers might discover latent defects in the building which dramatically reduce its value.

The question in *Multiplex* was specific: whether the builder of an apartment complex owes a duty of care in negligence to protect the Owners Corporation (as agent for the owners of apartments in the building) from pure economic loss arising from latent defects in the common property of that building where those defects were structural, constituted a danger to persons or property, or made the apartments uninhabitable. The High Court of Australia found that the builder owed no such duty. In doing so, the Court overturned the decision of the New South Wales Court of Appeal<sup>6</sup> and restored the decision of McDougall J at trial.<sup>7</sup>

This result may be surprising to those not well versed in construction law. However, the decision reflects the trend in Australian law over the past two decades to reverse the expansion of duties of care in negligence, and to leave the question of liability to contract or legislative schemes.<sup>8</sup> In essence, it brings the Australian common law into line with the limited province of tort expressed in the House of Lords by Oliver LJ in *Murphy v Brentwood District Council* more than 25 years ago:

I am able to see no circumstances from which there can be deduced a relationship of proximity such as to render the builder liable in tort for pure pecuniary damage sustained by a derivative owner with whom he has no contractual or other relationship.<sup>9</sup>

Thus, *Multiplex* offers a clear message that those outside the safety net of consumer protection legislation must insist on contractual protection.

<sup>4</sup> See, eg, Michael Shoory, 'The Growth of Apartment Construction in Australia' [2016] (June Quarter) *Reserve Bank of Australia Bulletin* 19.

<sup>5</sup> Most apartment buildings in Australia are subject to a type of strata title, whereby each 'lot' (apartment) is the subject of an individual contract but the lot owners share ownership of common property via an 'owners corporation' (or equivalent body under the relevant state or territory legislation).

<sup>6</sup> *Multiplex (Court of Appeal)* (n 2).

<sup>7</sup> *Multiplex (Trial)* (n 2).

<sup>8</sup> See generally Shipway (n 3) 292–8; De Pinto-Smith (n 3) 74–5.

<sup>9</sup> [1991] 1 AC 398, 489.

However, as we argue in this article, the Court's approach is based on flawed assumptions that subsequent purchaser cases should be subject to the caution appropriate in conventional pure economic loss cases, and that there is sufficient legal protection available to building owners through contractual negotiation or legislation.

The article also engages with the broader issue of the evolution of protection of economic interests through tort in Australia. In *Multiplex*, the High Court reiterated 'the primacy of the law of contract in the protection afforded by the common law against unintended harm to economic interests where the particular harm consists of disappointed expectations under a contract'.<sup>10</sup> The interaction between contract and tort and the status of vulnerability as one of the 'salient features' in determining whether a duty is owed<sup>11</sup> is especially important, yet — as Meghan De Pinto-Smith has recently noted — the subject of limited commentary.<sup>12</sup>

With this background in mind, the article is structured as follows. Part II outlines the facts and central findings in *Multiplex*, focusing on the High Court's underpinning assumptions that the conventional reasons for hesitancy about imposing a duty in negligence to avoid pure economic loss apply to defective building work cases; non-vulnerable parties may avail themselves of contractual protections against the risk of latent defects; and vulnerable parties are adequately protected through legislation. Part III explores how Australian courts have absorbed the *Multiplex* decision, concluding that current practice now reflects the steer given to courts in *Multiplex* that the ambit of pure economic loss claims in negligence is limited to vulnerable homeowners of the class identified in *Bryan v Maloney*.<sup>13</sup> We further argue that the judicial practice in England since *Murphy* supports the view that the Australian courts are unlikely to resile from this limited purview. Part IV examines whether the underpinning assumptions referred to in Part II are realistic. This part challenges the idea that defective building work cases are conventional pure economic loss cases, and identifies significant gaps in the

<sup>10</sup> *Multiplex* (n 1) 229 [132] (Crennan, Bell and Keane JJ).

<sup>11</sup> Allsop P (with whom Simpson J agreed) identified 17 such factors, by way of a 'non-exhaustive universe of considerations', in *Caltex Refineries (Qld) Pty Ltd v Stavar* (2009) 75 NSWLR 649, 676 [103]–[104]. Vickery J recently considered the current status of these features, and confirmed that the position holds in the light of *Multiplex* that 'the exercise involves a judicial evaluation of the various factors which may be relevant to each particular case to arrive at a principled decision': *Perpetual Nominees Ltd v McGoldrick* [No 3] (2017) 317 FLR 227, 244 [105].

<sup>12</sup> De Pinto-Smith (n 3) 66.

<sup>13</sup> (1995) 182 CLR 609.

legal protections that are in fact available via contract and legislation. Part V concludes that, in order for the underpinning assumptions of *Multiplex* to be realised, urgent statutory reform — preferably, by way of uniform national legislation — is required.

## II *MULTIPLEX*: AN APARTMENT BUILDING COMES TO THE HIGH COURT

### *A Case History*

Chelsea Apartments Pty Ltd (‘Chelsea’) engaged Multiplex Constructions Pty Ltd (‘Multiplex’) to build a 22-storey building in Chatswood, north Sydney. The first nine levels were to be sold to investors on the condition that they be let to a company which would in turn sublet them as serviced apartments. Construction of the building reached final completion in 1999. The plaintiff, Owners’ Corporation Strata Plan 61288, was born at the same time. The Owners’ Corporation held the common property in the building and was responsible for the maintenance of those areas. The Owners’ Corporation alleged that there were defects in the work that Multiplex had performed on that common property.

At trial, McDougall J considered it inappropriate for the Court to extend the reach of negligence to protect ‘those who construct, for commercial rather than purely residential purposes, developments,’<sup>14</sup> and found Multiplex did not owe a duty of care.<sup>15</sup>

McDougall J made it clear that he did not regard it as ‘appropriate for a judge of first instance to identify and impose a novel duty of care.’<sup>16</sup> Nonetheless, his Honour’s perception of the commercial and technical framework under which apartment buildings are built and sold ultimately found resonance in the High Court’s conception. In particular, his Honour made two observations which were consonant with the three assumptions underpinning the High Court’s approach.<sup>17</sup> The first of these observations was that the legislature had given due consideration to this situation in deciding to exclude commercial accommodation from the protections under the *Home Building Act 1989* (NSW).<sup>18</sup> The second was that ‘contractors in the position of

<sup>14</sup> *Multiplex (Trial)* (n 2) [102].

<sup>15</sup> *Ibid* [109].

<sup>16</sup> *Ibid* [91].

<sup>17</sup> We discuss the High Court’s approach in detail in Part II(C).

<sup>18</sup> *Multiplex (Trial)* (n 2) [102]–[103].

[Multiplex] price their work, and more generally undertake contractual obligations, with reference, among other things, to the contractual and statutory warranties by which they are bound.<sup>19</sup>

McDougall J thought that any extension to the existing protections was a matter for the legislature or appeal courts, as it required ‘attention to a range of factors, including the additional costs that would be imposed on contractors and the corresponding benefits to those in whose favour the duty of care might extend.’<sup>20</sup> The New South Wales Court of Appeal had such an opportunity. The result there was that the Court was satisfied that, in the words of Basten JA, ‘there are significant features which militate in favour of the existence of a duty of care.’<sup>21</sup> In turn, there were two issues in the High Court. French CJ summarised them as follows:

- 1 ‘Did [Multiplex] owe a duty of care to the [Owners’] Corporation independently of the existence of a duty of care owed to Chelsea, and, if so, what was its content?’
- 2 ‘Did [Multiplex] owe a duty of care to Chelsea and thereby a similar duty of care to the Corporation, and, if so, what was its content?’<sup>22</sup>

The High Court unanimously held that Multiplex did not owe the Owners’ Corporation a duty of care in negligence. Consequently, the Owners’ Corporation’s cross-appeal (to avoid the requirement that any duty Multiplex might owe it was contingent upon a similar duty being owed to Chelsea) was dismissed.<sup>23</sup> This result was conveyed via four sets of reasons: those of French CJ, of Hayne and Kiefel JJ, of Crennan, Bell and Keane JJ, and of Gageler J.

### B *Contract Trumps Tort*

A majority of the High Court (Crennan, Bell and Keane JJ and Gageler J) observed that an approach which better accorded with the coherent development of the common law was desirable.<sup>24</sup> As Gageler J noted, however,

<sup>19</sup> Ibid [104].

<sup>20</sup> Ibid.

<sup>21</sup> *Multiplex (Court of Appeal)* (n 2) 510 [129].

<sup>22</sup> *Multiplex* (n 1) 194 [8].

<sup>23</sup> Ibid 205 [36] (French CJ), 212 [61] (Hayne and Kiefel JJ), 240 [167] (Crennan, Bell and Keane JJ), 245–6 [187] (Gageler J).

<sup>24</sup> Ibid 239 [163]–[164] (Crennan, Bell and Keane JJ), 241–2 [176]–[177] (Gageler J).

‘[m]arkedly divergent approaches ... have now prevailed for more than two decades in other common law jurisdictions.’<sup>25</sup>

The specific question which brought *Multiplex* to the High Court (noted in Part I) arose from the New South Wales Court of Appeal’s endorsement of the Canadian position that a duty of care would arise where (as Crennan, Bell and Keane JJ characterised the test in *Multiplex*) ‘it is foreseeable that a failure to take reasonable care in constructing the building would create defects that pose a substantial danger to the health and safety of occupants.’<sup>26</sup> This had underpinned Basten JA’s finding of a duty of care in the New South Wales Court of Appeal.<sup>27</sup> Moreover, the Owners’ Corporation’s submission in its cross-appeal before that Court, that the duty of care should extend to all latent defects, was supported by the New Zealand position.<sup>28</sup>

In finding that *Multiplex* owed no duty of care to the Owners’ Corporation, the High Court expressly declined to endorse the Canadian approach,<sup>29</sup> preferring (as Crennan, Bell and Keane JJ acknowledged) a view ‘in accord with the position in the United Kingdom’ and ‘the preponderance of judicial authority in the United States.’<sup>30</sup>

Hayne and Kiefel JJ made it clear that their reasoning leading to the finding that *Multiplex* did not owe a duty of care in negligence did not ‘depend ... upon making any a priori assumption about the proper provinces of the law of contract and the law of tort.’<sup>31</sup> That said, the judgments contain several broader observations about the boundaries between contract and tort, and the primacy of the former. For example, Crennan, Bell and Keane JJ said that ‘[t]he common law has not developed with a view to altering the allocation of economic risks between parties to a contract by supplementing ... the terms of the contract by duties imposed by the law of tort.’<sup>32</sup>

<sup>25</sup> Ibid 241 [176].

<sup>26</sup> Ibid 237 [157].

<sup>27</sup> *Multiplex (Court of Appeal)* (n 2) 509–10 [127]–[128].

<sup>28</sup> *Invercargill City Council v Hamlin* [1996] AC 624. As is noted in Part III(A), the New Zealand Supreme Court has recently confirmed in *Carter Holt Harvey Ltd v Minister for Education* [2016] 1 NZLR 78 that there are significant points of divergence between the Australian and New Zealand approaches to the imposition of duties of care for pure economic loss in negligence.

<sup>29</sup> This jurisprudence stems from *Winnipeg Condominium Corporation No 36 v Bird Construction Co Ltd* [1995] 1 SCR 85.

<sup>30</sup> *Multiplex* (n 1) 239 [163].

<sup>31</sup> Ibid 211 [59]. French CJ expressly concurred with this statement: at 205 [36].

<sup>32</sup> Ibid 229 [132].

In a similar vein, Hayne and Kiefel JJ confirmed that the existence of express provisions as to quality of work ‘demonstrates the ability of the parties to protect against, and denies their vulnerability to, any lack of care by the builder’, in turn precluding a duty of care in negligence.<sup>33</sup>

Gageler J seemed to conceive of the task of determining which scheme was to be preferred — contract or tort — as a choice between different calibrations of a solid-state system of liability. Thus, he did not see any ‘reason to consider any one of those approaches to result in a greater net cost to society than any other’.<sup>34</sup> This was based on the assumption that builders and subsequent owners can ‘accommodate’ the (limited or wide) influence of tort in this area in the ‘contractual terms on which they are prepared to build ... [or] purchase’.<sup>35</sup> Despite this general neutrality, Gageler J did express concerns about lack of certainty, noting that ‘[t]here is a net cost to society which arises from uncertainty as to the principle to be applied’.<sup>36</sup>

At least two members of the Court apparently signalled a desire for an even narrower purview for negligence than was provided for in *Murphy*.<sup>37</sup> First, French CJ seemed to suggest that builders will not owe subsequent purchasers a duty of care in negligence where they do not owe such a duty to the original owner:

The responsibility assumed by [Multiplex] with respect to Chelsea, as initial owner of the lots, was defined in detail by the design and construct contract. Chelsea cannot be taken to have relied upon any responsibility on the part of [Multiplex], and [Multiplex] assumed none, in relation to pure economic loss flowing from latent defects extending beyond the limits of the responsibility imposed on it by the contract. The statutory relationship between the Corporation and Chelsea as first owner meant that there was no duty of care owed to the Corporation as a proxy for Chelsea.<sup>38</sup>

Meanwhile, Gageler J offered the clearest and most limited prescription, engaging directly with the landmark 1995 case of *Bryan*, in which the Court had found that a builder owed a duty of care in negligence to protect a

<sup>33</sup> Ibid 211 [58].

<sup>34</sup> Ibid 241–2 [176].

<sup>35</sup> Ibid 242 [176]. See further Part II(C).

<sup>36</sup> Ibid 242 [177].

<sup>37</sup> *Murphy* (n 9).

<sup>38</sup> *Multiplex* (n 1) 204 [33].



subsequent purchaser of a house from the risk of pure economic loss arising from defective work. His Honour said that

[t]he continuing authority of *Bryan* ... should be confined to a category of case in which the building is a dwelling house and in which the subsequent owner can be shown by evidence to fall within a class of persons incapable of protecting themselves from the consequences of the builder's want of reasonable care. Outside that category of case, it should now be acknowledged that a builder has no duty in tort to exercise reasonable care, in the execution of building work, to avoid a subsequent owner incurring the cost of repairing latent defects in the building.<sup>39</sup>

*Bryan* becomes, in this conception, a barnacle on an otherwise smooth hull of common law liability which is to be defined by contract rather than as part of the superstructure of liability.

### C *The Court's Assumptions*

As foreshadowed above, the High Court's severely limited ambit of negligence in defective work cases is based on three assumptions.

The first — that subsequent purchaser cases should be subject to the same judicial hesitancy as other pure economic loss cases — was both central and unstated. The second — that non-vulnerable parties are able to protect themselves through contractual measures — was explicit. The third — that vulnerable parties are sufficiently covered by legislation — was, arguably, implicit in the Court's willingness to allow negligence to vacate the field of protection in all cases but those which closely accord with *Bryan*.

#### 1 *Multiplex Is a Conventional Pure Economic Loss Case*

Common law courts have long been reluctant to impose a duty of care in negligence to avoid pure economic loss, even after the absolute prohibition was rejected in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*.<sup>40</sup> The reasons for this reluctance are well expressed in *Perre v Apand Pty Ltd*,<sup>41</sup> the leading modern Australian case not concerning defective building work.

<sup>39</sup> Ibid 245 [185].

<sup>40</sup> [1964] AC 465.

<sup>41</sup> (1999) 198 CLR 180.

In that case, McHugh J most persuasively records factors relevant in pure economic loss cases: indeterminacy,<sup>42</sup> placing unreasonable burdens on the autonomy of individuals,<sup>43</sup> vulnerability,<sup>44</sup> contract,<sup>45</sup> and knowledge and reasonable foreseeability.<sup>46</sup> Of these, indeterminacy has historically played a starring role, largely because of Cardozo CJ's warning against imposing liability 'in an indeterminate amount for an indeterminate time to an indeterminate class'.<sup>47</sup> Together, these factors amply illustrate why it is appropriate for courts to be reluctant to recognise a duty of care in pure economic loss cases.

In *Multiplex*, French CJ and Hayne and Kiefel JJ expressly treated the case as one of pure economic loss,<sup>48</sup> and that characterisation was implicit in the judgments of Crennan, Bell and Keane JJ, and Gageler J. The judgments are consonant with courts' reluctance to recognise a duty to avoid negligently causing pure economic loss.

## 2 *Contractual Protection Is Available*

The assumption that contractual protections are available to minimise the consequences of discovering latent defects has underpinned the Court's retreat from the *Bryan*-initiated imposition of duties. The retreat began in *Woolcock*, in which Callinan J offered this shopping list of possibilities:

[T]he obtaining of a report by a local authority ... [i]nsistence on a warranty, or condition of fitness or soundness, or the seeking of an inspection and report by an expert, who by making them, will become liable if negligent in not discovering and reporting relevant defects ...<sup>49</sup>

In *Multiplex*, Gageler J focused on the protections that could be negotiated between the purchaser and vendor:

[B]y virtue of the freedom they have to choose the price and non-price terms on which they are prepared to contract to purchase, there is no reason to

<sup>42</sup> Ibid 220–3 [106]–[113].

<sup>43</sup> Ibid 223–5 [114]–[117].

<sup>44</sup> Ibid 225–6 [118]–[119].

<sup>45</sup> Ibid 226–30 [120]–[129].

<sup>46</sup> Ibid 230–1 [131]–[132].

<sup>47</sup> *Ultramares Corporation v Touche*, 225 NY 170, 179 (1931).

<sup>48</sup> *Multiplex* (n 1) 192 [2] (French CJ), 208 [47] (Hayne and Kiefel JJ).

<sup>49</sup> *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515, 589 [213].

consider that subsequent owners cannot ordinarily be expected to be able to protect themselves against incurring economic loss ...<sup>50</sup>

The sale contract that is negotiated clearly could include warranties by the vendor to the purchaser. It could also effect an assignment of rights the existing owner has against parties involved in construction of the property being sold.

As Callinan J's judgment in *Woolcock* suggests, a purchaser could seek further contractual protection from third parties. The most obvious such protection would be for the purchaser to engage a building inspector before purchase, under a contract with full warranties and indemnities.

The assumption that subsequent purchasers can protect themselves by contract is highly significant. If the assumption holds, it would be difficult to argue that that subsequent purchaser was reliant on or vulnerable to the parties involved in the construction. In that situation, a duty of care is properly unlikely to arise.

### 3 Legislative Protection Suffices

The third assumption was, as Gageler J noted, initiated by the plurality in *Woolcock*. There, the plurality observed that the decision in *Bryan* had been 'overtaken, at least to a significant extent, by various statutory forms of protection for those who buy dwelling houses which turn out to be defective'.<sup>51</sup>

This assumption militates against finding a duty of care in two ways. If subsequent purchasers are well protected by legislation, their vulnerability to parties involved in the construction is greatly reduced. The other reason is that, if the legislatures have enacted legislation in particular forms, it may be that there is less room for courts properly to intervene in the area.

Gageler J expressly acknowledged this second reason: 'If legal protection is now to be extended, it is best done by legislative extension of those statutory forms of protection'.<sup>52</sup> Crennan, Bell and Keane JJ recognised that there were gaps in that protective regime, but likewise suggested that the decision to plug — or not to plug — those gaps was properly a matter for the legislature.<sup>53</sup>

<sup>50</sup> *Multiplex* (n 1) 245 [185].

<sup>51</sup> *Woolcock* (n 49) 534 [35], quoted in *Multiplex* (n 1) 245 [186] (Gageler J).

<sup>52</sup> *Multiplex* (n 1) 245 [186].

<sup>53</sup> *Ibid* 230 [134].

### III CURRENT AND FUTURE JUDICIAL PRACTICE IN AUSTRALIA: NEGLIGENCE CORRALLED

#### A *Post-Multiplex* Cases

Since it was handed down, *Multiplex* has become recognised as ‘a most formidable, and quite possibly insurmountable obstacle’ to the imposition of a duty of care in negligence for pure economic loss.<sup>54</sup> Indeed, by the middle of 2017, it seemed apt to describe the practice of inferior courts as being confined to the limited scope for the continued operation of *Bryan* that Gageler J proposed.<sup>55</sup>

The main source of this marginalisation has been the way the assumption of contractual or legislative protections (outlined in Part II(C)) has corralled the touchstone salient feature of vulnerability. As McDougall J has expressed it,

‘vulnerable’ does not mean only that the plaintiff is susceptible to harm as a result of the defendant’s acts or omissions. There is the added requirement that the plaintiff must be unable (perhaps, ‘reasonably’ unable) to take steps to protect itself from that risk of harm.<sup>56</sup>

On that basis, the current working assumption is that the ‘existence of an opportunity to negotiate contractual terms ... can ... prevent a duty of care from arising in the first place. That result can flow even if such protective terms were not in fact put in place.’<sup>57</sup>

The early judicial reaction to *Multiplex* did not completely close the door to finding a duty of care. In *The Owners — Strata Plan No 51077 v Meriton Apartments Pty Ltd*,<sup>58</sup> Bergin CJ in Eq rejected a strike out application on the

<sup>54</sup> *The Owners — Strata Plan 80647 v WFI Insurance Ltd* (2015) 299 FLR 77, 90 [59] (Darke J).

<sup>55</sup> See n 39 and accompanying text.

<sup>56</sup> *Chan v Acres* [2015] NSWSC 1885, [150]. The appeal from this decision was heard by the New South Wales Court of Appeal on 25 November 2016. As at the date of finalisation of this article, judgment on that appeal remained reserved.

<sup>57</sup> Shipway (n 3) 289. De Pinto-Smith (n 3) 74 is a little less forthright in her assessment, noting that courts will be ‘circumspect to impose a duty of care for pure economic loss in cases where contractual protection may be sought and obtained’. Both articles review the relevant cases on vulnerability in detail.

<sup>58</sup> [2014] NSWSC 1761 (‘OSP 51077’). See, similarly, *The Owners — SP69567 v Landson Alliance Australia* [2014] NSWSC 1592.

basis that she did not accept that *Multiplex* made the plaintiff's case 'so clearly untenable that it cannot possibly succeed'.<sup>59</sup>

Specifically, Bergin CJ in Eq did not agree that *Multiplex* restricted the circumstances in which a duty of care will be imposed, as Meriton submitted, to 'situations in which the duty owed by the builder to the subsequent owner is effectively an extension of, and of identical scope and content to, an anterior duty owed by the builder to the original owner with whom the builder contracted'.<sup>60</sup> Her Honour emphasised that courts must still examine the 'salient features':

It will be a matter of fact for the trial judge as to the nature of the events that gave rise to the building of the [building], the contractual characterisation, if any, and the true relationship between the owner and the builder.<sup>61</sup>

Similarly, in *Chan v Acres*, McDougall J reiterated the need to identify and analyse relevant salient features in the circumstances of the case,<sup>62</sup> and provided further guidance on the relative importance of those features. His Honour confirmed the essentiality and paramountcy of vulnerability, noting that no duty will be imposed unless it can be shown that the plaintiff is 'vulnerable' in the sense explained in *Multiplex*.<sup>63</sup> In turn, '[r]eliance on the defendant, and knowledge by the defendant of that reliance', was said to be 'at least an important, and perhaps a necessary, condition of vulnerability',<sup>64</sup> such that the plaintiffs' inability to provide evidence of known reliance was a 'very significant indicator' that they did not meet the relevant threshold of vulnerability.<sup>65</sup> His Honour also noted that reasonable foreseeability of loss is 'an essential consideration', but not of itself sufficient to justify the imposition of a duty.<sup>66</sup>

<sup>59</sup> OSP 51077 (n 58) [15]. See also *McDonough v Owners Strata Plan No 57504* (2014) 17 BPR 33573, 33580 [24]; *Etro Metroplex on Gateway CTS 39623 v Broad Construction Services (Qld) Pty Ltd* [2015] QDC 62, [35].

<sup>60</sup> OSP 51077 (n 58) [8].

<sup>61</sup> *Ibid* [15].

<sup>62</sup> *Chan* (n 56) [105], [118].

<sup>63</sup> *Ibid* [125].

<sup>64</sup> *Ibid*.

<sup>65</sup> *Ibid* [243].

<sup>66</sup> *Ibid* [221].

Whilst it remains the case that a duty of care may be argued at trial in this manner, several recent cases have held that contractual<sup>67</sup> or legislative<sup>68</sup> protections precluded or weighed heavily against a duty of care arising. For example, in *Strata Plan No 74602 v Brookfield Australia Investments Ltd*, Stevenson J considered and dismissed several grounds on which the Owners' Corporation claimed that the legal matrix in relation to their apartment building (coincidentally, also constructed by Multiplex in North Sydney) could be distinguished from that faced by the Owners' Corporation in *Multiplex*. His Honour held that

the fact that the statutory warranties under the [*Home Building Act 1989* (NSW)] are available to the Owners Corporation makes this an even stronger case than [*Multiplex*] for denying the existence of a duty of care owed by [*Multiplex*] to the Owners Corporation. It points strongly to the conclusion that the Owners Corporation is not vulnerable in the relevant sense.<sup>69</sup>

Stevenson J also found that statutory warranties giving rights against Multiplex pointed strongly to the conclusion that Multiplex's subcontractor owed the Owners' Corporation no duty of care.<sup>70</sup>

Similarly, in *The Owners — Units Plan No 1917 v Koundouris*, Mossop ASJ was called upon to decide (amongst other things) whether the builder owed a duty of care in negligence to subsequent purchasers via their Owners' Corporation in respect of defects in an apartment building in Canberra. His Honour observed that

[h]aving regard to the decisions in [*Bryan, Woolcock and Multiplex*], there are a variety of ways in which the absence of a duty of care can be rationalised in a case such as the present: the presence of statutory warranties or contractual provisions inconsistent with a general duty of care, the removal of the element of vulnerability by reason of the existence of statutory warranties or the

<sup>67</sup> See, eg, *Tzaneros Investments Pty Ltd v Walker Group Constructions Pty Ltd* [2016] NSWSC 50, [180].

<sup>68</sup> See, eg, *Owners — Strata Plan No 74602 v Brookfield Australia Investments Ltd* [2015] NSWSC 1916, [131] ('OSP 74602'); *James v The Owners — Strata Plan No 11478* (2016) 18 BPR 36389, 36413 [111]; *The Owners — Units Plan No 1917 v Koundouris* (2016) 307 FLR 372, 472 [556] ('OUP 1917'). Note that, by contrast, the New Zealand Supreme Court has explicitly rejected an argument that statutory warranties should be regarded as 'a comprehensive regime, to the exclusion of the law of torts ... A tortious duty of care standing alongside the statutory protections does not make the law incoherent': *Carter Holt Harvey* (n 28) 101 [62].

<sup>69</sup> OSP 74602 (n 68) [131].

<sup>70</sup> Ibid [132].

confinement of the decision in [*Bryan*] to the limited class of case described in the judgment of Gageler J in [*Multiplex*] ...<sup>71</sup>

Conversely, very few construction-related pure economic loss cases (at least, in the superior courts)<sup>72</sup> have imposed a duty of care in negligence in the light of *Multiplex's* conception of vulnerability. The possibility does remain, however, in appropriate circumstances. So much was indicated in *R v Moore* (although it should be noted that this was a case involving the death of the person to whom the duty was owed rather than the classic situation of defective construction work leading to monetary loss alone).<sup>73</sup> There, Bathurst CJ was willing to find that a bricklayer who died when a wall he was building collapsed upon him was owed a duty of care in negligence by his fellow bricklayer and employer, concurrent with the duty owed via the employment contract.

In his Honour's conception, the deceased would have been vulnerable in the sense required by *Multiplex* because he was unaware of a danger of which the other bricklayer was likely aware due to a conversation with the site supervisor.<sup>74</sup> However, Simpson JA and Bellew J both rejected this novel basis for a duty of care, regarding it as insufficiently articulated by the Crown to justify its imposition here.<sup>75</sup>

Having said that, cases similar enough to *Bryan* to give rise to a duty of care continue to come before Australian courts and tribunals. For example, in *Olindaridge Pty Ltd v Tracey*,<sup>76</sup> the Queensland Civil and Administrative Tribunal was willing to find that the plaintiffs were vulnerable and therefore owed a duty of care. This was because they fell into the *Bryan* class of 'home owners generally unaware [sic] of the need for, and how to obtain, adequate

<sup>71</sup> *OUP 1917* (n 68) 471 [555]. Mossop AsJ chose the existence of statutory warranties (under s 58C of the *Building Act 1972* (ACT), the predecessor provision to s 88 of the *Building Act 2004* (ACT) as discussed in Part IV(C)) as the avenue by which to find that no duty of care existed here: at 472 [556].

<sup>72</sup> Cf *Marsh v Baxter* (2015) 49 WAR 1, where the Western Australian Court of Appeal found, by a majority, that no duty of care was owed by a canola grower to a neighbour in negligence to prevent pure economic loss due to incursion of genetically-modified canola swaths into the neighbour's organic crops. The reasoning on vulnerability was, however, primarily based upon the considerations discussed in *Perre* (n 41) rather than the *Multiplex* conception: at 51 [311]–[313] (McLure P), 110–12 [683]–[692] (Newnes and Murphy JJA).

<sup>73</sup> (2015) 91 NSWLR 276, 301–2 [105]–[116].

<sup>74</sup> *Ibid* 302 [112].

<sup>75</sup> *Ibid* 322 [244]–[245] (Simpson JA), 324 [261]–[263] (Bellew J).

<sup>76</sup> [2016] QCATA 34.

contractual protections that were against structural weakness that may have been undiscoverable for years.<sup>77</sup>

It seems reasonable to expect, however, that the number of cases in which a duty of care is established will continue to dwindle in the post-*Multiplex* environment.

### B English Experience Post-Murphy

As the High Court of Australia has endorsed a preference for the *Murphy* position,<sup>78</sup> a review of how English law has developed since that decision was handed down in 1991 may offer a guide to how Australian law will develop in the short- to medium-term.

David Johnson has noted that *Murphy* ‘came at the high-point of Thatcherite conservatism in the United Kingdom and marked arguably the most restrictive development in the availability of recovery since the formulation of the modern law of negligence.’<sup>79</sup> It reversed (as *Multiplex* now has in Australia) an expansionist tendency (in England, stemming from *Anns v Merton London Borough Council*)<sup>80</sup> which allowed recovery so long as sufficient proximity was established and there were no countervailing policy considerations.

*Murphy* is something of a jurisprudential rarity in its unequivocal and lasting impact. Whilst, as the prominent construction law jurist Sir Rupert Jackson has written, it remains the case that ‘[t]he proposition that a contractual relationship displaces any tortious duty of care is, at least for the time being, untenable’,<sup>81</sup> *Murphy* is, in practice, regarded as having ‘shut the door’ on claims in negligence for economic loss arising from defective work, ‘at least for the foreseeable future.’<sup>82</sup>

While *Murphy* has prevailed, ‘the courts have consistently been striving to find ways to mitigate or circumvent its effect and allow recovery for defects

<sup>77</sup> Ibid [39].

<sup>78</sup> See Part II(B).

<sup>79</sup> David Johnson, ‘Defective Premises Law: Time for Remedial Works?’ (2012) 28 *Construction Law Journal* 132, 133.

<sup>80</sup> [1978] AC 728.

<sup>81</sup> Lord Justice Rupert Jackson, ‘Concurrent Liability: Where Have Things Gone Wrong?’ (2015) 23 *Tort Law Review* 3, 10.

<sup>82</sup> Philip Britton, ‘The State, the Building Code and the Courts: Prevention or Cure?’ (Paper No D152A, Society of Construction Law, December 2013) 48.



sustained as a result of inadequate building work.<sup>83</sup> Such striving has not, however, resulted in significantly better prospects for subsequent purchasers seeking to sue in negligence.<sup>84</sup>

Thus, if the reception of *Murphy* in England is any guide, it seems unlikely that there will be much judicial appetite for a renewed expansion of the reach of negligence in respect of latent defects. Moreover, the reaction by the construction contracting market in England has by no means been to allow direct contractual links of the type which the High Court of Australia assumes to be available. Rather, as Professor Philip Britton has observed,

most builders (including developers) have their own standard sale contracts with consumers and usually tolerate no changes to these: their terms normally give no rights of action against any other project parties and may exclude successors to the first buyer from relying on them.<sup>85</sup>

#### IV CRITICISMS OF THE ASSUMPTIONS UNDERPINNING *MULTIPLEX*

We have argued in Part II(C) that three important and contestable assumptions underlie *Multiplex*. The first is unstated, and so the most pernicious. It is that *Multiplex* is a pure economic loss case that should be subject to traditional judicial caution about liability. The second, express assumption is that subsequent owners are not vulnerable, and so do not require the protection of negligence, because they can typically protect themselves adequately by contract. The final, implicit assumption is that there is adequate legislative protection for subsequent purchasers and that, accordingly, either no further protection is required, or if it is, that is a matter for the legislatures.

##### *A Pure Economic Loss*

The High Court of Australia's recent jurisprudence on recovery for pure economic loss has been dominated by the trio of *Bryan*, *Woolcock* and *Multiplex*. All three cases concern allegedly defective building work. It is

<sup>83</sup> Johnson (n 79) 133.

<sup>84</sup> See, eg, the English Technology and Construction Court's ambivalence in relation to whether a duty should be recognised in *Sainsbury's Supermarkets Ltd v Condek Holdings Ltd* [2014] EWHC 2016 (TCC), [51]–[58].

<sup>85</sup> Britton (n 82) 47.

impossible not to concentrate on the interaction between these cases,<sup>86</sup> but this concentration risks losing sight of the general concern about the pure economic nature of the loss that gives rise to the hesitancy in recognising a duty of care. While these three cases represent an important and distinctive line, they are a subset of the general pure economic loss cases and should be amenable to the same analysis.<sup>87</sup> When this broader analysis is applied to these cases, two observations emerge.

The first is the physical origin of the harm in defective building work cases, which generates legal and conceptual distinctions different from other pure economic loss cases. The second observation is that the fear of indeterminate liability at the heart of hesitancy about pure economic loss should be much less acute in defective building work cases.

### 1 *The Physical Origins of the Harm*

In negligence claims to recover for pure economic loss, there is often no physical harm. This is common in the line of negligent misrepresentation cases.<sup>88</sup> It was also true in *Perre*, where no proprietary tort was arguable. In these situations where there is pure economic loss but no physical harm, there is broadly either a claim in negligence or no common law claim at all.

What is different in defective building work cases is that the pure economic loss typically arises from a physical state of affairs. A reduction in property value might be caused in any number of ways, but even where the potential wrongdoing is a failure in professional services (such as erroneous advice about foundations), there is a physical manifestation of the error, and it is this that leads to the diminution in value.

This observation is trite, but it draws out two consequences. If there is a physical problem with a building, there may be a risk of death or injury. Further, the distinctions between pure economic loss and physical damage rapidly become artificial.

The difference in approach to whether the defendant owes a duty in respect of injury on one hand and pure economic loss on the other is uncontroversial. It was emphasised at the first opportunity in *Bryan*. There, Mason CJ and Deane and Gaudron JJ observed (in the duty of care language of the time):

<sup>86</sup> *Multiplex* (n 1) 208 [48] (Hayne and Kiefel JJ).

<sup>87</sup> For further consideration of the extent to which there are meaningful categories of pure economic loss cases, see Baron (n 3) 234.

<sup>88</sup> Consider the classic case, *Hedley Byrne & Co* (n 40).

In more settled areas of the law of negligence concerned with ordinary physical injury to the person or property of a plaintiff caused by some act of the defendant, reasonable foreseeability of such injury will commonly suffice to establish that the facts fall into a category which has already been recognized as involving a relationship of proximity between the parties with respect to such an act and such damage and as 'attracting a duty of care, the scope of which is settled'. In contrast, the field of liability for mere economic loss is a comparatively new and developing area of the law of negligence.<sup>89</sup>

In short, a builder, engineer or architect might well owe subsequent purchasers and other users of a building a duty of care regarding death and injury. Rational construction professionals must weigh this duty when performing their work, and structure their affairs accordingly. In these circumstances, to impose a further duty in respect of pure economic loss — to a subset of those to whom they already owe a duty — is a much smaller step than to impose a new duty as in a case like *Perre*. This observation is far from decisive, but it does illustrate that conventional concerns about pure economic loss do not necessarily apply with the same force in defective building work cases.

The discussion immediately above compares death and injury with pure economic loss. There, the difference in loss is stark.

Matters are much less clear when contemplating physical damage occasioned by defective building work. Consider, for example, structural design defects that cause plaster to crack. What if the same design defects cause ceiling fixtures to fall, cracking floor tiles? The line between pure economic loss and physical damage can be hard to draw.

In *Multiplex*, Hayne and Kiefel JJ appeared to acknowledge this when they noted that the 'nature of the damage suffered is important to resolving the issue about duty of care.'<sup>90</sup> Having raised the question of the proper characterisation of the damage, their Honours simply stated that, '[i]f the Owners Corporation has suffered damage, that damage is pure economic loss.'<sup>91</sup> The other judgments also seem to take this for granted. This, no doubt, reflects the manner in which the case was argued.

Indeed, the four judgments in the High Court disclose very little about the nature of the underlying defects. As McDougall J noted at trial, however, there were alleged problems with lintels, windows and cowlings, a cracked façade, and a leaking spa. In particular, the Owners' Corporation alleged at trial that a

<sup>89</sup> *Bryan* (n 13) 617–18 (citation omitted).

<sup>90</sup> *Multiplex* (n 1) 208 [47].

<sup>91</sup> *Ibid.*

spa on level one of the building had been improperly constructed, with water leaking into the rooms below.<sup>92</sup>

On the application of ordinary principles, the reduced value of the building because of the allegedly defective spa would appear to be pure economic loss. The damage arising from the leaking water would, by contrast, appear to be physical damage for which Multiplex would be more likely to owe a duty of care.

In some cases, it may be appropriate for a builder to owe a duty of care in respect of the physical damage but not the pure economic loss, but the distinction is fine and verges on the artificial. The uneasy distinction reinforces the point that conventional concerns about pure economic loss are less pressing in defective building work cases.

## 2 *Indeterminacy Is Less Relevant*

The triple-headed hydra of liability for an indeterminate amount, for an indeterminate time, to an indeterminate class is as mesmerising as any mythical beast. Where liability for pure economic loss is genuinely indeterminate in these ways, there are good reasons to decline to impose a duty of care. In defective building work cases, however, liability simply is not so indeterminate.

To begin, the maximum pure economic loss is relatively easy to assess. In the worst situation, the most efficient solution is to demolish the defective building and rebuild it.<sup>93</sup> For construction professionals with knowledge not only of the industry but of that very building, assessing that maximum liability is not difficult. It is much easier to assess than potential liability for death or injury, for example. The liability is very far from indeterminate.

Given the long life of many aspects of the built environment, liability for an indeterminate time might appear to be more concerning. Consider, for example, the general limitation of actions legislation that would have applied in *Multiplex*, the *Limitation Act 1969* (NSW). Section 14 of that Act provides for 'a limitation period of six years running from the date on which the cause of action first accrues to the plaintiff'. Since defective building work will often be latent, and perhaps not detectable without destructive testing, liability might appear to run for a substantial time. In Australian states and territories other than Queensland, Western Australia and Tasmania, however, this is

<sup>92</sup> *Multiplex (Trial)* (n 2) 19 [65].

<sup>93</sup> See, eg, Matthew Bell, 'After *Tabcorp*, for Whom Does the *Bellgrove* Toll? Cementing the Expectation Measure as the "Ruling Principle" for Calculation of Contract Damages' (2009) 33 *Melbourne University Law Review* 684.

addressed by legislation that provides for a long-stop ten-year period of liability typically triggered by some measure of when the building was first occupied.<sup>94</sup> Except in Queensland and Western Australia, temporal liability may be readily determined.

The class of persons to whom the duty might be owed may be stated with similar ease. Pure economic loss will be suffered by the owner of the building. Often, that owner will be a single legal person. Again, no question of indeterminacy arises. As McHugh J held in *Perre*,

[l]iability is indeterminate only when it cannot be realistically calculated. If both the likely number of claims and the nature of them can be reasonably calculated, it cannot be said that imposing a duty on the defendant will render that person liable 'in an indeterminate amount for an indeterminate time to an indeterminate class.'<sup>95</sup>

On this basis, indeterminacy of liability, a factor so pressing in many pure economic loss cases, is of marginal relevance in most defective building work negligence cases.

To reiterate, there are sound reasons in general for courts to remain hesitant to impose duties of care regarding pure economic loss. In defective building work cases, however, the physical origins of the harm and the minimal concerns about indeterminacy mean that the reasons for hesitancy are less pressing.

## B Contractual Protection

Ever since it was first raised in *Woolcock*, the assumption that contractual protections might readily be available for subsequent owners of buildings has been controversial. This is so in respect of both contracts with the vendor and with third parties.

### 1 Contracts with the Vendor

It is a conceptually simple matter for a sale contract to include warranties by the vendor as to the condition of the property sold. That contract could also assign to the purchaser the benefit of contractual warranties the vendor has from parties involved in the construction. For these contractual protections to

<sup>94</sup> *Building Act 2004* (ACT) s 142; *Environmental Planning and Assessment Act 1979* (NSW) s 109ZK; *Building Act 1993* (NT) s 160; *Development Act 1993* (SA) s 73; *Building Act 1993* (Vic) s 134.

<sup>95</sup> *Perre* (n 41) 221 [107].

be incorporated, however, the purchaser must typically first recognise that the protection is required. Standard forms of sale contract promulgated by real estate bodies do not provide detailed warranties, and naturally do not accommodate bespoke assignments. This first step of recognising the need for a customised sale contract in practice requires professional advice.

If the purchaser has such advice, the purchaser must then negotiate contractual drafting with the vendor. Well-advised vendors are unlikely to agree to this drafting. In the case of direct warranties, vendors are themselves probably unlikely to be sufficiently well informed to provide warranties from their personal knowledge. In the case of assignment of construction-phase warranties, the vendor's ability to assign will depend on the original construction arrangements, to which the vendor may not have been party.

These practical difficulties were identified as early as Kirby J's dissenting judgment in *Woolcock*, in which his Honour expressed disquiet about the assumption, noting that there was no evidence indicating that the building owners ought to have negotiated contractual warranties rather than — as they did in that case — relying upon professional advice about the adequacy of the building foundations.<sup>96</sup> He also observed that the assumption involved 'a great deal of wisdom *after* the event' and should not 'represent a general rule of liability exclusion.'<sup>97</sup> Commentators pointed out similar concerns in the wake of *Woolcock*<sup>98</sup> and of *Multiplex*.<sup>99</sup>

## 2 *Contracts with Third Parties*

The difficulties with third party contractual protection are many. Inspections can be costly and difficult.<sup>100</sup> When multiple parties have the same property inspected prior to an auction, the inspection is a waste of money for the disappointed would-be purchasers. And, if an inspection is done, latent defects may not be capable of being detected without invasive testing that is unlikely to be acceptable to the vendor.<sup>101</sup>

<sup>96</sup> *Woolcock* (n 49) 576 [171].

<sup>97</sup> *Ibid* 576–7 [173] (emphasis in original).

<sup>98</sup> See Tracey Carver, 'Beyond *Bryan*: Builder's Liability and Pure Economic Loss' (2005) 29 *Melbourne University Law Review* 270, 294–5; Stuart Connor, 'Protection of the Rights of Purchasers of Commercial Properties where Latent Defects Arise: Assignment of Ongoing Rights under Building Contracts' (2005) 21 *Building and Construction Law* 248, 248–9; Rami Marginean, 'Subsequent Purchasers and Defective Buildings: Making a Case for Greater Clarity in Australia' (2013) 29 *Building and Construction Law* 315, 326–7.

<sup>99</sup> See, eg, Shipway (n 3); De Pinto-Smith (n 3) 74–6.

<sup>100</sup> Marginean (n 98) 328. See also, *Woolcock* (n 49) 576 [171] (Kirby J).

<sup>101</sup> Carver (n 98) 294.

Where contractual measures are available, recovery by the subsequent purchaser remains problematic, especially where it is difficult to establish that the party to the contractual protection has itself suffered the relevant loss.<sup>102</sup> Finally, *Multiplex* itself raised a peculiar difficulty which will be relevant to many apartment developments (albeit one that Hayne and Kiefel JJ thought nothing turned on):<sup>103</sup> the Owners' Corporation could not conduct an inspection because it did not exist before it was saddled with the alleged defects.

There is increasing judicial recognition of the doubtful nature of the assumption that contractual protection is available. In *Chan*, McDougall J observed that it is 'unrealistic' to expect a 'prospective purchaser of a residential property, intended to be used and occupied as the purchaser's dwelling', to obtain assignments or novations of warranties.<sup>104</sup> Similarly, in mid-2016, the New Zealand Supreme Court<sup>105</sup> explicitly rejected the assumption that

it is realistic to expect all those entering into building contracts to protect themselves by the contractual measures suggested by [counsel for the builder]. ... [I]t is probably unrealistic to expect sophisticated property owners like the Ministry to do so.<sup>106</sup>

### *C Legislative Protection*

As a starting point, there is much to be said for the view that the consumer protection-focused statutes operating within Australia's building industry provide a significant measure of protection. Indeed, Professor Britton and Julian Bailey see Australia as having 'a fully trained lifesaving patrol on hand'

<sup>102</sup> See Connor (n 98).

<sup>103</sup> *Multiplex* (n 1) 208 [46].

<sup>104</sup> *Chan* (n 56) [248]. See also Shipway (n 3) 296–8.

<sup>105</sup> The Court's observations in *Carter Holt Harvey* (n 28) should be read in the light of the fact that the Court had insufficient evidence before it to establish whether the defects in the roof cladding sheets (which were the subject of the claims) were in fact in the nature of pure economic loss or whether they also involved property damage or health risks. The Court indicated that it had assumed that there had been damage to structures, and that, if facts established that the question was 'only in relation to the defectiveness of the cladding sheets themselves', this 'may give rise to an issue as to whether liability in negligence should arise': at 102–3 [68].

<sup>106</sup> *Carter Holt Harvey* (n 28) 100 [54].

compared to the mere ‘plank in a shipwreck’ offered by the *Defective Premises Act 1972* (UK).<sup>107</sup>

The relevant statutes are the residential building legislation such as the *Home Building Act 1989* (NSW), which was the subject of judicial purview in the *Multiplex* cases.<sup>108</sup> A key feature of the NSW Act is that it imposes, via s 18B, the following warranties into every contract to undertake ‘residential building work’:

- (a) ... that the work will be done with due care and skill and in accordance with the plans and specifications set out in the contract,
- (b) ... that all materials supplied by the holder or person will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new,
- (c) ... that the work will be done in accordance with, and will comply with, this or any other law,
- (d) ... that the work will be done with due diligence and within the time stipulated in the contract, or if no time is stipulated, within a reasonable time,
- (e) ... that, if the work consists of the construction of a dwelling, the making of alterations or additions to a dwelling or the repairing, renovation, decoration or protective treatment of a dwelling, the work will result, to the extent of the work conducted, in a dwelling that is reasonably fit for occupation as a dwelling,

<sup>107</sup> Philip Britton and Julian Bailey, ‘New Homes and Consumer Rights: England and Australia Compared’ (2011) 3 *International Journal of Law in the Built Environment* 269, 271. See generally Philip Britton, ‘“Make the Developer Get the Job Right”: Remedies for Defects in Residential Construction’ (Paper No D154, Society of Construction Law, March 2013) <[www.scl.org.uk/papers/make-developer-get-job-right-remedies-defects-residential-construction](http://www.scl.org.uk/papers/make-developer-get-job-right-remedies-defects-residential-construction)>, archived at <<https://perma.cc/UMP3-8QSG>>; Philip Britton, ‘Judicial Remedies for Construction Defects: Common Law, Equity or Statute?’ (Conference Paper, Society of Construction Law New Zealand, 17–23 March 2016) <[www.scl.org.uk/papers/judicial-remedies-construction-defects-common-law-equity-or-statute](http://www.scl.org.uk/papers/judicial-remedies-construction-defects-common-law-equity-or-statute)>, archived at <<https://perma.cc/G6SU-VQ9N>>; Julian Bailey, *Construction Law* (Informa Law, 2<sup>nd</sup> ed, 2016) vol 3, 1462–6. For a recent application of the *Defective Premises Act 1972* (UK), see *Rendlesham Estates plc v Barr Ltd* [2015] 1 WLR 3663.

<sup>108</sup> The statutes of primary relevance in the other states and territories are: *Building Act 2004* (ACT); *Building Act 1993* (NT); *Queensland Building and Construction Commission Act 1991* (Qld); *Building Work Contractors Act 1995* (SA); *Residential Building Work Contracts and Dispute Resolutions 2016* (Tas); *Domestic Building Contracts Act 1995* (Vic); *Home Building Contracts Act 1991* (WA). Bailey (n 107) 1487–1507 provides a useful survey of some of the Acts’ relevant provisions. See also Britton and Bailey (n 107) 276–87; Britton, ‘Make the Developer Get the Job Right’ (n 107) 16–19.



- (f) ... that the work and any materials used in doing the work will be reasonably fit for the specified purpose or result, if the person for whom the work is done expressly makes known... the particular purpose for which the work is required or the result that the owner desires the work to achieve, so as to show that the owner relies on the holder's or person's skill and judgment.<sup>109</sup>

Whilst many aspects of these warranties might already be available by way of implication at law,<sup>110</sup> or under the *Australian Consumer Law*,<sup>111</sup> their mandatory inclusion has given rise to remedies for home owners where in many cases they would have had none. This is especially because they 'run with the building' during the relevant limitation period and are thereby available to subsequent purchasers who did not enter into the contract with the original owner.<sup>112</sup>

That being said, the lack of a federal constitutional power to make laws in relation to building work means that no assumption can reasonably be made that the NSW regime applies uniformly across Australia.<sup>113</sup> In fact, the application is far from consistent.

Whilst a detailed analysis of the divergences is beyond the scope of this article,<sup>114</sup> the following brief analysis is offered in support of this view. Table 1 indicates which jurisdictions also substantially offer each of the abovementioned NSW warranties.

<sup>109</sup> Warranty (a) has two separate parts: in *Hometeam Constructions Pty Ltd v McCauley* [2005] NSWCA 303, [158] McColl JA (Ipp and Tobias JJA concurring) noted that it might be possible for work to be carried out in a proper and workmanlike manner yet not conform with the plans.

<sup>110</sup> See, eg, Ian Bailey and Matthew Bell, *Construction Law in Australia* (Lawbook, 3<sup>rd</sup> ed, 2011) 224–5 [9.14].

<sup>111</sup> *Competition and Consumer Act 2010* (Cth) sch 2 pt 3-2 div 1.

<sup>112</sup> *Building Act 2004* (ACT) s 88(3); *Home Building Act 1989* (NSW) s 18D(1); *Building Act 1993* (NT) s 54BB; *Queensland Building and Construction Commission Act 1991* (Qld) sch 1B s 27(1); *Building Work Contractors Act 1995* (SA) s 32(3); *Residential Building Work Contracts and Disputes Resolution Act 2016* (Tas) s 31; *Domestic Building Contracts Act 1995* (Vic) s 9.

<sup>113</sup> In *Woolcock* (n 49) 593–4, Callinan J listed the various provisions then applying across Australia providing for such warranties, but did not offer any analysis as to the whether their approach was uniform.

<sup>114</sup> Further specific examples of disparity are discussed by Matthew Bell and Ravindu Goonawardene, 'Monetary Value: The "Least Worst" Proxy for Vulnerability in Regulation of Construction Contracting?' (2013) 29 *Building and Construction Law* 465, 467.

Table 1: Statutory Warranties<sup>115</sup>

	ACT	NSW	NT	QLD	SA	TAS	VIC
<b>Due care and skill</b>	88(2)(b)	18B(a)	54B(1)(a), (e)	20, 22	32(2)(a)	23, 25	8(a)
<b>Plans and specifications</b>	88(2)(b)(i)	18B(a)		23	32(2)(a)	27	8(a)
<b>Materials</b>	88(2)(c)	18B(b)	54B(1)(b)– (c)	20	32(2)(b)	23	8(b)
<b>Law</b>	88(2)(a)	18B(c)	54B(1)(d)	21	32(2)(c)	24	8(c)
<b>Diligence and time</b>	88(2)(d)	18B(d)	54B(1)(f)	25	32(2)(d)	29	8(d)
<b>Fitness for occupation</b>		18B(e)		24	32(2)(e)	28	8(e)
<b>Fitness for purpose</b>	88(2)(e)	18B(f)		20	32(2)(f)	23	8(f)

<sup>115</sup> References are to the following legislation, as relevant to the listed state or territory: *Building Act 2004* (ACT); *Building Act 1993* (NT); *Queensland Building and Construction Commission Act 1991* (Qld) sch 1B; *Building Work Contractors Act 1995* (SA); *Residential Building Work Contracts and Dispute Resolutions 2016* (Tas); *Domestic Building Contracts Act 1995* (Vic); *Home Building Contracts Act 1991* (WA).

This overview table may suggest that, aside from some gaps (notably, that Western Australia has no regime for mandatory warranties),<sup>116</sup> a broad degree of consonance exists across the Australian states and territories. However, a more detailed analysis would reveal many areas where the wording is by no means uniform, leading to significant disparities in the level of protection provided around the country.<sup>117</sup> For instance, the warranties in South Australia are the subject of a separate, non-extendable limitation period of five years after completion of the relevant building work<sup>118</sup> and, in Queensland, the warranty period for non-structural defects is limited to one year after completion.<sup>119</sup>

Moreover, and quite apart from the fundamental point that these warranties only apply to residential building work (as variously defined), there are some significant exclusions from the ambit of this legislation, including contracts with a value less than \$7,500 or more than \$500,000 in Western Australia,<sup>120</sup> and contracts for two or more detached dwellings in Queensland.<sup>121</sup>

## V CONCLUSION

When *Multiplex* was handed down, the decision was immediately recognised as ‘a victory for contractors [which] will give the construction and property industries some comfort that their contractual risk allocations are now a little less likely to be disturbed by the law of negligence.’<sup>122</sup> With even greater certainty in mind, Adrian Baron has subsequently suggested that the

<sup>116</sup> The *Home Building Contracts Act 1991* (WA) does, however, imply into contracts a duty for the builder to rectify defects: at s 11.

<sup>117</sup> Christopher Kerin and James Qian, ‘The High Court Decides: When Does a Builder Owe a Subsequent Owner a Duty of Care?’ (2014) 158 *Australian Construction Law Newsletter* 9, 10–11 identified a number of particular difficulties for owners of residential apartment buildings across the various states and territories.

<sup>118</sup> *Building Work Contractors Act 1995* (SA) ss 32(5)–(6).

<sup>119</sup> *Queensland Building and Construction Commission Act 1991* (Qld) sch 1B s 29(3)(a).

<sup>120</sup> *Home Building Contracts Act 1991* (WA) s 3(1) (definition of ‘home building work contract’ paras (b)(ii)–(iii)), as modified by *Home Building Contracts Regulations 1992* (WA) reg 2A.

<sup>121</sup> *Queensland Building and Construction Commission Act 1991* (Qld) sch 1B s 3(2)(b).

<sup>122</sup> Greg Richards, ‘Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288’, *Mills Oakley Publications* (Web Page, October 2014) <[www.millsOakley.com.au/brookfield-multiplex-ltd-v-owners-corporation-strata-plan-61288](http://www.millsOakley.com.au/brookfield-multiplex-ltd-v-owners-corporation-strata-plan-61288)>, archived at <<https://perma.cc/TF5M-YWED>>.

Australian common law should now vacate the field entirely in favour of comprehensive coverage by statutory warranties.<sup>123</sup>

The increased measure of certainty provided by the High Court's corraling of the influence of negligence is of itself to be welcomed. It is consistent with the calls by judges for many years for greater 'predictability of outcomes'.<sup>124</sup> However, as we have sought to demonstrate in this article, we believe that the Court's underlying assumption that commercial practice or statute currently offers adequate protection from the economic consequences of defective work to subsequent owners of buildings was, and remains, flawed.

The sense that vulnerable building owners ought to be protected from sharp or careless practice is deeply ingrained in the Australian culture. Indeed, when the Australia Day Council of New South Wales undertook a survey in 2010 as to which film best represents the 'real Australia', 37% of respondents chose the 1997 film *The Castle*.<sup>125</sup> That film's protagonist, Darryl Kerrigan, successfully took a case to the High Court to save his family's dwelling from compulsory acquisition to extend an airport.

Two decades after that film was produced, home owners in the position of the Kerrigans are unlikely to find a remedy in the Court for defective building work sounding in pure economic loss, unless the circumstances are on all fours with *Bryan*. Trial judges and intermediate appellate courts would do their best to achieve justice according to law, but their controlling concern must be the High Court's attempts to limit judicial flexibility not only where there is long-established High Court authority but also 'seriously considered dicta' of a majority of the High Court.<sup>126</sup> As we argued in Part III, courts have perceived a clear message in *Multiplex*. To the extent that the case amounts to a direction for the common law to leave the field, it leaves the most vulnerable plaintiffs subject solely to the vagaries of the legislation in their jurisdiction.

For their part, Australian legislatures have commenced the process of plugging the gaps which exist in the absence of the common law 'security blanket'. For example, the definition of 'residential building' in the *Building Act 2004* (ACT) was amended to remove the previous exclusion of buildings

<sup>123</sup> Baron (n 3) 241–2.

<sup>124</sup> *Perre* (n 41) 272 [252] (Kirby J).

<sup>125</sup> Isabel Hayes, 'The Castle Best Represents Aussies', *The Sydney Morning Herald* (Sydney, 6 October 2010) <[www.smh.com.au/entertainment/movies/the-castle-best-represents-aussies-20101006-1674q.html](http://www.smh.com.au/entertainment/movies/the-castle-best-represents-aussies-20101006-1674q.html)>, archived at <<https://perma.cc/52LF-8MRT>>.

<sup>126</sup> *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 151 [134].

above three storeys,<sup>127</sup> meaning that the warranties in s 88 of that Act apply regardless of the size of the residential building. This was explicitly enacted '[t]o ensure apartment owners and their successors in title have clearly stated warranty rights', in light of *Multiplex*.<sup>128</sup> The process of legislative reform is, however, inevitably slow and contested and, as noted above, there is no guarantee within Australia's federal division of constitutional powers that the states and territories can implement a harmonised scheme.

Ultimately, therefore, with the hindsight of some three years since *Multiplex* was handed down, we believe that the Court was too quick to marginalise the protection for subsequent building owners through duties of care in negligence in respect of pure economic loss. Since Australia's inferior and intermediate courts are unlikely to generate a case allowing the Court to reconsider its approach via a special leave-based appeal, the need for principled legislative reform becomes all the more acute. This is a project well worth undertaking, however: as the tagline to *The Castle* observes, the building in which people live is 'not just a house ... it's a home!'<sup>129</sup>

<sup>127</sup> The amendment is to s 84 of that Act, effected by s 19 of the *Building and Construction Legislation Amendment Act 2016* (ACT).

<sup>128</sup> Explanatory Memorandum, Building and Construction Legislation Amendment Bill 2016 (ACT) 6.

<sup>129</sup> *The Castle* (Directed by Rob Sitch, Working Dog, 1997) 00:31:28.