

Relatively unknown Queensland law sees builders and developers exposed to strict liability

Under the common law in Australia, a landowner has the right to not have the physical support of that land removed by another person. In Queensland, s179 of the *Property Law Act 1974* (Qld) extends this concept further, making it unlawful for any person to do anything on or below land which withdraws support from either:

1. another person's land; or
2. any building, structure or erection that has been placed on or below another person's land.

This means if, in the process of constructing something on one piece of land, a neighbouring property suffers subsidence, cracking or damage caused by a loss of support as a result of the building activity on the adjacent land, the affected owner can sue the person who carried out that activity on the adjacent land and recover damages, or pursue a court injunction to stop the activity.

Liability under s179 is strict

Liability under s179 of the *Property Law Act* (Qld) is strict.

This means it does not require the affected owner to prove that the neighbouring builder or developer was careless or negligent and that this carelessness caused the loss of support for the land or building.

Even if, for example, a builder took all reasonable precautions and followed all reasonable guidelines to protect against damaging the neighbouring property during excavations, and damage still occurred, the builder (and the developer who authorised the builder to do the work), will be liable.

Put simply, all s179 requires in order to attract liability is:

1. 'something' was done on land by a person; and
2. that 'something' caused a withdrawal of support for the neighbouring land, or a building on that neighbouring land.

If damage is caused, what is recoverable?

If the damage to the neighbouring property can be rectified, the rectification cost will usually be recoverable, and this is usually the case even if the diminution in the value of the land caused by the damage is assessed as a lesser amount (provided the rectification work is necessary and reasonable).

If the damage to the neighbouring property cannot be rectified, the cost of demolition and full replacement will usually be recoverable (without discount for any 'betterment' in receiving new for old, particularly if the building damaged is a dwelling).

Whilst the law around 'betterment' is unsettled, courts are typically reluctant to discount damages for economic 'betterment' particularly if the damaged property was a dwelling and the owner had no intention of investing further in that property at the time of the damage.

Practical takeaways:

For builders:

1. consider the risk of damage occurring to neighbouring properties when tendering a project.
2. if the risk of damage to a neighbouring property is considered material but viewed as unlikely, price the risk/contingency.
3. if the risk of damage to a neighbouring property is material and viewed as likely, consider negotiating a transfer of that risk to the project owner, or seek to persuade the owner to reconsider a design of the works to one that lowers this risk.
4. do not leave the risk untreated or overlooked.

For developers:

1. conduct design due diligence (including geotechnical investigations) to ensure the risk of loss or damage to a neighbouring property is minimised.
2. if the builder is engaged on a Design and Construct basis, ensure the builder is obligated to carry out similar investigations (avoiding being drawn into protracted litigation with the neighbour is preferable to the alternative).
3. if the risk is material, reconsider any design that pushes the boundaries on this risk. It may prove costly later.
4. consider this risk in negotiations with the proposed builders and do not leave the risk overlooked.

Note: New South Wales does have a similar law contained in s177 of the *Conveyancing Act 1919* (NSW) however care should be taken to not assume the position is identical to Queensland as there are important distinctions between them.

For further information or assistance



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