

# Design and Building Practitioners Act 2020 (NSW)

June 2020

## Improving Standards in the Building and Residential Industry

Confidence in the build quality of residential buildings in NSW is low with the prevalence of defective buildings in the market such as the Opal and Mascot Towers. In response, the NSW government have sought to build consumer confidence by introducing legislation for owners to have recourse to compensation for defective buildings.

In February 2018, the Building Minister's Forum released their Building Confidence Report ('BCR') or ('Shergold-Weir report'<sup>1</sup>) to assess the compliance and enforcement regimes in the building and construction industry. In response to the BCR, the NSW Government accepted the findings, and advised that nine of the recommendations would be (partly or fully) implemented under the *Design and Building Practitioners Bill 2019* (NSW). The purpose of the Bill was to introduce a suite of new obligations for design and building practitioners to ensure compliance with the Code, legislation and regulations<sup>2</sup>. Part IV of this Act commenced on 11 June 2020. However the certification/registration regime under the remaining provisions are expected to commence in July 2021.

The following Newsletter will be divided into three parts:

- I. the new duty to exercise reasonable care to avoid economic loss;
- II. the obligations of the duty for those that are liable; and
- III. the actions to be undertaken.

## 1. Statutory Duty of Care

This Design and Building Practitioners Act 2020 (NSW) has established a statutory duty to exercise reasonable care to avoid economic loss caused by defects. The Duty of Care is outline within Part 4 of the Act.

### 1.1. The elements

The elements of the statutory duty of care are as follows:-

1. The person must be someone who carries out construction work;
2. The person must exercise reasonable care to avoid economic loss caused by defects;

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<sup>1</sup> Shergold P. & Weir B., *Building Confidence Improving the effectiveness of compliance and enforcement systems for the building and construction industry across Australia*, <[https://www.industry.gov.au/sites/default/files/July%202018/document/pdf/building\\_ministers\\_forum\\_expert\\_assessment\\_-\\_building\\_confidence.pdf?acsf\\_files\\_redirect](https://www.industry.gov.au/sites/default/files/July%202018/document/pdf/building_ministers_forum_expert_assessment_-_building_confidence.pdf?acsf_files_redirect)>

<sup>2</sup> Anderson K., Second Reading Speech, <[https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/'HANSARD-1323879322-108381'docid/'HANSARD-1323879322-108381'](https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/'HANSARD-1323879322-108381'docid/'HANSARD-1323879322-108381'>)>

3. The work must be in relation to a building for which construction work is done and arising out of that work.

The following provisions outlines the Duty in detail:

**Section 37 Extension of duty of care**

- (1) **A person who carries out construction work has a duty to exercise reasonable care to avoid economic loss caused by defects –**
  - a) *in or related to a building for which the work is done, and*
  - b) **arising from the construction work.**
- (2) *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.*
- (3) *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.*
- (4) *The duty of care is owed to an owner whether or not the construction work was carried out—*
  - a) *under a contract or other arrangement entered into with the owner or another person,*  
*or*
  - b) *otherwise than under a contract or arrangement.*

## 1.2. What is Economic Loss?

**38 Economic loss—owners corporations and associations**

- (1) *An owners corporation or an association is taken to suffer economic loss for the purposes of this Part if the **corporation or association bears the cost of rectifying defects** (including damage caused by defects) that are the subject of a breach of the duty of care imposed under this Part.*

Importantly, under s 37(2), it recognises that the owners corporations and associations may not be in existence when the construction work is occurring. Hence, it puts to rest that these categories of owners are “beneficiaries” of the duty. Furthermore, under s 37(3) it makes explicit that economic loss includes the reasonable costs of providing alternative accommodation.

According to the Lacrosse judgement, the alternate accommodation aspect for costs were dismissed due to failure with the evidential burden. In *Brookfield Multiplex Ltd v Owners Corporation Strata Plan*, the case defined economic loss as one where the owner is reliant on the building practitioner or unable to protect themselves from suffering the loss.

In *Bellgrove v Edlridge*, the economic loss caused by defects were in relation to rectification costs resulting from the defects. The costs for the rectification were awarded which directly supports this new statutory duty of care.

On the contrary, the more recent case of *Lacrosse* had claims made with respect to the following heads of economic loss:

- (a) Property damage: Emergency alternative accommodation and lost rent;
- (b) No property damage but rectification works in order to prevent safety concerns; and
- (c) Diminution of value of property.

The above claims were not approved due to the difficulty associated with establishing a duty of care in pure economic loss cases in tort. It was determined that there was no duty to avoid pure economic loss using the evidence that, “there is no precedent which, as a matter of principle, that holds an architect liable for pure economic loss suffered by subsequent owners of domestic buildings or an owner’s corporation where the risks are allocated under the contract with the Builder...” (at para 458).

Furthermore, the economic loss claimed for future costs of replacing non-compliant cladding and associated costs, not being costs reinstatement of property damaged by the fire, was not covered by any contractual indemnity and failed to satisfy the “second limb” in *Hadley v Baxendale*. The “second limb” required that the indirect loss, required the actual knowledge of special circumstances outside the ordinary course of things but that were communicated to the defendant or otherwise known by the parties. In para 562, the second limb failed as it depended upon whether the loss was reasonably within the contemplation of the parties at the time they entered into the contract. i.e. “the loss was too remote”.

### 1.3. Statutory Duty of Care

Recent judgements that have put forward warranties for claims in negligence and duty of care have been evident in cases such as the Lacrosse Tower Judgement. This landmark case has put forward a greater liability for each consultant that contributes and executes building design and construction.

The judgement thus pushed builders and designers to attempt rectification works for building cladding that were non-compliant with the new precedent and furthermore, shifted the relationship between the construction workers and designers which is now (rightly) joint obligations for liabilities in their consultant agreements. On the contrary, it was important to note that any claims in negligence for pure economic loss (e.g. the costs of rectifying the combustible cladding where there has been no fire), was not captured and thus difficult to establish a duty of care.

The above example is one of the reasons for the statute being enacted to compensate for the opening within common law. Not only did the enactment of legislation increase the building standards, but the “hurdle of establishing that a duty is owed, will no longer be required, saving valuable court time and expense for the owner”<sup>3</sup>.

Furthermore, the Shergold-Weir report found that the current common-law/legislation failed to identify, particularly for design practitioners, an express requirement for documentation to demonstrate compliance with the national Construction Code.

As such, the shortcomings in the current common-law that relate to establishing a duty of care for economic loss and proper documentation for practitioners, were filled with the D & BP Act 2020. According to the second reading speech, “new regulatory oversight, clarifying roles and responsibilities, and improving competence of building professions and quality of construction materials” was the purpose to satisfy the inadequacies in the current legal system.

Moving forward, this new Design and Building Practitioners Act 2020 will now enable a duty of care that extends to the economic loss. As such, it remedies the void left by the Lacrosse judgement in cases of economic loss, which was historically claimed through the reliance of other causes of action in contract or under statute. Furthermore, with these new regulations that require certification and

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<sup>3</sup> Second reading speech

compliance declarations, the standard of reasonable care is far clearer with respect to how builders and designers should conduct and exercise the proper documentation of their work.

## 2. Obligations of relevant authorities to ensure they have exercised reasonable care

### 2.1. Person(s) captured by the duty to exercise reasonable care

Section 37(1) of the *D & BP Act 2020* (NSW) ensures that this duty extends to **builders, designers, engineers and specialist practitioners**. It is significant to note that the statutory duty of care for economic loss can be **enforced retrospectively** (as per Schedule 1 section 5(2) of the Act) **to existing buildings** where the loss first becomes apparent **within the 10 years prior** to this legislation's commencement (that is from 11 June 2010).

Part 2 of the *D & BP Act* (NSW) outlines the obligations of designers and builders and Part 3 of the Act outlines obligations of Engineering and Specialist work.

### 2.2. What classes of buildings are impacted?

The duty of care applies to 'construction work', which includes residential building work within the meaning of the *Home Building Act 1989* (NSW). Multistorey and multi-unit residential buildings are classified under class 2 buildings and are thus applicable to the Act. Further prescriptions of any other building class or types will be covered by subsequent regulation. The intention of the Act is intended to reach beyond residential work as per section 4(s) of the Act.

In section 36 of the Act, the definition of building work is placed within the meaning of **residential building work** as defined in the Home building Act 1989. The Home Building Act 1989 defines **residential building work** within Schedule 1, clause 2:

#### 2 Definition of "residential building work"

- (1) *In this Act, residential building work means any work involved in, or involved in co-ordinating or supervising any work involved in—*
- (a) *the construction of a **dwelling**, or*
  - (b) *the making of alterations or additions to a **dwelling**, or*
  - (c) *the repairing, renovation, decoration or protective treatment of a **dwelling**.*

Here the fundamental element to note is the term "dwelling". The subsequent clause to the schedule outlines this term and its definition:

Clause 3(1): *"In this Act, **dwelling** means a building or portion of a building that is designed, constructed or adapted for use as a residence (such as a detached or semi-detached house, transportable house, terrace or town house, duplex, villa-home, strata or company title home unit or residential flat)"*

Following from this definition, it is imperative to note that there are exclusions outlined, that limit certain buildings from being classified as a dwelling. This has been attached to the schedule of this memorandum. However, the key exclusion to note is clause 3(3)(d) of Schedule 1 of the Home

Building Act: *“accommodation (other than self-contained units) specially designed for the aged, persons with a disability or children”.*

As a result of the exclusions listed within the Home Building Act, the relevant Buildings that are captured are limited to Class 1 and Class 2 buildings, which include multistorey and multi-unit residential buildings.

What is the classification of Aged care facilities?

An aged-care facility is usually considered as a Class 9c building which are residential accommodation for elderly people, who, due to varying degrees of incapacity associated with the ageing process, are provided with personal care services and 24 hour staff assistance to evacuate the building in an emergency. Class 3 buildings may also be “care-type” facilities such as accommodation building for children, the elderly, or people with a disability, and which are not considered to be Class 9 buildings. As the Aged care facilities do not fall under Class 1 or 2 buildings of the National Construction Code (NCC), they are not captured as “building work” under the Design and Building Practitioners Act.

Future regulations that impact Building Class?

It is important to note that the intention of the Design and Building Practitioners Act is intended to reach beyond residential work through further regulation.

This is outlined in the second reading speech: *“While the obligations under the bill will initially apply to class 2 buildings, additional classes of buildings, such as hospitals, schools and other multistorey buildings are intended to be included in the new scheme as part of the regulations over time.”*

Section 4(s) of the Act also indicates the intention for new regulation to further implement more building classes over time:

*The regulations may—*

- a. prescribe additional work that is building work for the purposes of this Act, and*

Although the current legislation does not capture aged care facilities within its definition of residential building work, there is positive likelihood that these classes of building will be implemented through regulation over time.

### 2.3. Key practices that designers and builders should undertake to exercise “reasonable care”

#### Designers

All registered Designers from 2021 have the obligation to provide a “**design compliance declaration**”. Similarly, Principal Design practitioners must ensure that a design compliance declaration has been provided in accordance with section 9 of the Act for each regulated design prepared for building work. The Principal Design practitioner must also ensure each declaration

provided by a registered design practitioner whose registration authorises the practitioners to provide a declaration as to the matters to which the declaration relates. These sections have been outlined in item 1 of the Schedule to this newsletter.

### **Building practitioners**

Building practitioners must:

- Ensure that the building work is carried out after the procurement of a design compliance declaration from its designer;
- **Provide a building compliance declaration** for building work, contractor document and other required documents to a person for whom the practitioner does the building work before and application is made for an occupation certificate;
- Provide these relevant documents to the Secretary within 90 days of receiving and occupation certificate;
- Be adequately insured; and
- Takes reasonable steps to ensure the building work complies with the Building Code of Australia (BCA).
- contractor document and other required documents to a person for whom the practitioner does the building work before an application is made for an occupation certificate for the building to which the work relates.

The relevant sections to builder obligations have been attached to item 2 of the schedule to this newsletter.

### **Engineers**

According to section 32 of the Act, professional engineering work in a prescribed area of engineering can only be carried out when the person is a registered professional engineer and is thus authorised to carry out professional engineering work. The exception to the above is when a person who carries out the work under the direct supervisions of a registered professional engineer described above.

A prescribed area of engineering has been defined in subsection 32(3):

- (a) structural engineering*
- (b) mechanical engineering*
- (c) fire safety engineering*
- (d) electrical engineering*
- (e) and are of engineering prescribed by the regulations.*

The relevant sections have been attached to item 3 of the schedule to this newsletter.

### **Specialists**

Specialist work is a term which is broadly defined to cover works that can relate to fire safety systems, waterproofing work, works relating to load bearing components of a building and services work. This means the “design, construction, installation or maintenance of a building element, or other work, involving a building element, that is prescribed by the regulations”: section 34. Like the engineers obligations above, the specialist must be a registered specialist practitioner and be authorised by their registration to carry out the specialist work. The sections to specialists have been outlined in item 4 of the schedule to this newsletter.

## 2.4. Insurance requirements

The Design and Building Practitioners Act 2020 has certain regulations that related to insurance requirements. The regulation make provisions for or with respect to the following for the purposes of insurance requirements under the Act –

Furthermore, the secretary may require information about insurance policies. According to section 105 of the Act, the *Secretary may direct a person who issues insurance policies to registered practitioners for the purposes of this Act to provide to the Secretary information, as my be specified by the Secretary, about the following matters relation to policies or particular classes of policies issued for the purposes of this Act by the person –*

- (a) The terms of the policies*
- (b) The premiums payable,*
- (c) The number of policies issued,*
- (d) The registered practitioners to whom policies have been issued,*
- (e) The number and value of claims made under the policies,*
- (f) Any other information prescribed by the regulations.*

## 3. Actions to take now

### For owners

Consider whether the duty can be extended/available to any claim for defective works.

### For building practitioners

All builders, designers, engineers and specialist practitioners should now account of this duty when assessing their risk, pricing and insurance arrangements.

In light of the retrospective element of the duty, they should be aware of the requirements and conditions for any defective work they have produced prior to the 10 years of the commencement of this Act.

## 4. Conclusion

Given the state of defective residential projects such as the Opal and Mascot Towers, the provisions of the D & BP Act (NSW) will likely increase legal disputes between construction practitioners and owners. Overall, this Act is welcomed by owners and consumers to ensure an improving of the current building standards.

## SCHEDULE

### 1. Obligations of design practitioners

#### **9 Compliance declarations by registered design practitioners**

- (2) A registered design practitioner must provide a design compliance declaration to a person if—
- (b) the practitioner provides the person with a regulated design prepared by the practitioner, and
  - (c) the design is in a form suitable for use by that person or another person in connection with building work.

*Maximum penalty—1,500 penalty units (in the case of a body corporate) or 500 penalty units (in any other case).*

- (3) A registered design practitioner must provide a further design compliance declaration to a person if—
- (a) the practitioner or another practitioner has previously provided a design compliance declaration for a regulated design prepared by either practitioner in connection with building work, and
  - (b) the practitioner provides the person with the regulated design as varied by the practitioner in a form suitable for use in connection with the building work before the building work is commenced.

*Maximum penalty—1,500 penalty units (in the case of a body corporate) or 500 penalty units (in any other case).*

- (4) A registered design practitioner must provide a further design compliance declaration to a person if—
- (a) the practitioner or another practitioner has previously provided a design compliance declaration for a regulated design prepared by either practitioner relating to a building element or performance solution in connection with building work, and
  - (b) the practitioner provides the person with the regulated design as varied by the practitioner in a form suitable for use relating to the building element or performance solution after the building work is commenced.

*Maximum penalty—1,500 penalty units (in the case of a body corporate) or 500 penalty units (in any other case).*

- (5) A registered design practitioner who is required by subsection (1), (2) or (3) to provide a design compliance declaration to a person must also provide a copy of the declaration to the registered principal design practitioner (if any) appointed in relation to the building work to which the declaration relates.

*Maximum penalty—1,500 penalty units (in the case of a body corporate) or 500 penalty units (in any other case).*

- (6) A registered design practitioner must provide a design compliance declaration in other circumstances prescribed by the regulations.

*Maximum penalty—1,500 penalty units (in the case of a body corporate) or 500 penalty units (in any other case).*

- (7) Without limiting subsection (5), a regulation made under that subsection may require regulated designs and design compliance declarations to be lodged electronically through an internet site or an application established by or on behalf of the Department.



(8) A person must not make a design compliance declaration that the person knows to be false or misleading in a material particular.

Maximum penalty—2,000 penalty units or imprisonment for 2 years, or both.

(9) The regulations may require a design compliance declaration provided under this section to be accompanied by other documents prescribed by the regulations.

### 10 Declarations by unregistered persons

A person must not make a design compliance declaration unless—

- (a) the person is a registered design practitioner, and
- (b) the person's registration authorises the person to provide a declaration as to the matters to which the declaration relates.
- (c) Maximum penalty—1,500 penalty units (in the case of a body corporate) or 500 penalty units (in any other case).

### 11 Registered design practitioners to be indemnified

(1) A registered design practitioner must not—

- (a) provide a design compliance declaration or prepare a regulated design, or
- (b) hold out that the practitioner is adequately insured with respect to the provision of the declaration or that work,

unless the practitioner is adequately insured with respect to the declaration and work.

Maximum penalty—300 penalty units (in the case of a body corporate) or 100 penalty units (in any other case).

(2) For the purposes of this section, a registered design practitioner is **adequately insured** with respect to a declaration and work if the practitioner—

- (a) is indemnified by insurance that complies with the regulations against any liability to which the practitioner may become subject as a result of providing the declaration or doing the work, or
- (b) is part of some other arrangement approved by the regulations that provides indemnity against the liability.

(3) It is a condition of registration that a registered design practitioner must provide to the Secretary, in the time specified by the Secretary, information that the Secretary may require to satisfy the Secretary that the practitioner is adequately insured in accordance with this section.

## Division 2 Obligations of principal design practitioners

### 12 Compliance declarations by registered principal design practitioners

(1) A registered principal design practitioner appointed in relation to building work must ensure that—

- (g) a design compliance declaration has been provided in accordance with section 9 for each regulated design prepared for the building work, and
- (h) each declaration has been provided by a registered design practitioner whose registration authorises the practitioner to provide a declaration as to the matters to which the declaration relates.

Maximum penalty—1,500 penalty units (in the case of a body corporate) or 500 penalty units (in any other case).

(2) A registered principal design practitioner appointed in relation to building work must provide a principal compliance declaration to the persons, and in the circumstances, prescribed by the regulations.

Maximum penalty—1,500 penalty units (in the case of a body corporate) or 500 penalty units (in any other case).

(3) Without limiting subsection (2), a regulation made under that subsection may require regulated designs and principal compliance declarations to be lodged electronically through an internet site or an application established by or on behalf of the Department.

(4) A person must not make a principal compliance declaration that the person knows to be false or misleading in a material particular.

Maximum penalty—2,000 penalty units or imprisonment for 2 years, or both.

(5) The regulations may require a principal compliance declaration provided under this section to be accompanied by other documents prescribed by the regulations.

### **13 Declarations by unregistered persons**

A person must not make a principal compliance declaration unless—

(a) the person is a registered principal design practitioner, and

(b) the person's registration authorises the person to provide a declaration as to the matters to which the declaration relates.

Maximum penalty—1,500 penalty units (in the case of a body corporate) or 500 penalty units (in any other case).

### **14 Registered principal design practitioners to be indemnified**

(1) A registered principal design practitioner must not—

(a) provide a principal compliance declaration or do other work for the purposes of this Act, or

(b) hold out that the practitioner is adequately insured with respect to the provision of the declaration or that work,

unless the practitioner is adequately insured with respect to the declaration and work.

Maximum penalty—300 penalty units (in the case of a body corporate) or 100 penalty units (in any other case).

(2) For the purposes of this section, a registered principal design practitioner is **adequately insured** with respect to a declaration and work if the practitioner—

(a) is indemnified by insurance that complies with the regulations against any liability to which the practitioner may become subject as a result of providing the declaration or doing the work, or

(b) is part of some other arrangement approved by the regulations that provides indemnity against the liability.

(3) It is a condition of registration that a registered principal design practitioner must provide to the Secretary, in the time specified by the Secretary, information that the Secretary may require to satisfy the Secretary that the practitioner is adequately insured in accordance with this section.

## **2. Obligations of building practitioners**

### **Division 3 Obligations of building practitioners**

#### **15 Provision of relevant documents to Secretary**

(1) A building practitioner who does building work must ensure that the relevant documents for the building work are provided to the Secretary no later than 90 days after the occupation certificate is issued for the building or part of the building to which the building work relates.

Maximum penalty—300 penalty units (in the case of a body corporate) or 100 penalty units (in any other case).

(2) The regulations may make provision with respect to the manner and form in which a relevant document is to be provided to the Secretary.

- (3) Without limiting subsection (2), a regulation made under that subsection may require relevant documents to be lodged electronically through an internet site or an application established by or on behalf of the Department.
- (4) In this section—  
**relevant document** means—
- (a) each regulated design for which a design compliance declaration has been provided that reflects the building work that was carried out, and
  - (b) any other documents (including designs) that relate to the building work and are prescribed by the regulations.

## 16 Notice of application for occupation certificate

- (1) A person must, before making an application for an occupation certificate for a building to which building work relates, give written notice to each registered building practitioner who did the building work of the intention to apply for the certificate.
- (2) A person must, after making an application for an occupation certificate for a building to which building work relates, give written notice to each registered building practitioner who did the building work of the making of the application.
- (3) The notices under subsections (1) and (2) must be given within the periods prescribed by the regulations for the purposes of this section.
- (4) A person who fails to comply with this section is guilty of an offence.  
 Maximum penalty—200 penalty units.

## 17 Compliance declarations by registered building practitioners

- (1) A registered building practitioner must provide a building compliance declaration for building work, contractor document and other required documents to a person for whom the practitioner does the building work before an application is made for an occupation certificate for the building to which the work relates.  
 Maximum penalty—1,500 penalty units (in the case of a body corporate) or 500 penalty units (in any other case).
- (2) A registered building practitioner must provide a building compliance declaration, contractor document or other required document in other circumstances prescribed by the regulations.  
 Maximum penalty—1,500 penalty units (in the case of a body corporate) or 500 penalty units (in any other case).
- (3) Without limiting subsection (2), a regulation made under that subsection may require building compliance declarations, contractor documents and other required documents to be lodged electronically through an internet site or an application established by or on behalf of the Department.
- (4) A person must not make a building compliance declaration that the person knows to be false or misleading in a material particular.  
 Maximum penalty—2,000 penalty units or imprisonment for 2 years, or both.
- (5) A person who is provided with a building compliance declaration under subsection (1) must provide the declaration to the principal certifier who is responsible for issuing an occupation certificate for the building work before or when the application for the certificate is made.  
 Maximum penalty—300 penalty units (in the case of a body corporate) or 100 penalty units (in any other case).
- (6) For the purposes of this section—

**contractor document** means the following—

- (a) a list of persons who have agreed under a contract or arrangement with the registered building practitioner to do any of the building work,
- (b) a list of any other persons prescribed by the regulations who have done building work on the building,
- (c) a list of the work done by each of the persons referred to in paragraphs (a) and (b) in relation to the building work,
- (d) copies of final designs used for the building work that are not regulated designs and are designs of a class prescribed by the regulations for the purposes of this paragraph,
- (e) other documents prescribed by the regulations.

**required document** means a document prescribed by the regulations as a document that is required to accompany a building compliance declaration provided under subsection (1).

### **18 Building practitioners must ensure compliance with declaration obligations**

A building practitioner who does building work must take all reasonable steps to ensure that—

- (a) each regulated design for the building work is prepared by a registered design practitioner, and
- (b) a design compliance declaration is obtained for those designs from a registered design practitioner whose registration authorises the practitioner to provide a declaration as to the matters to which the declaration relates, and
- (c) if a principal design practitioner has been appointed in relation to the building work, a principal compliance declaration is obtained for all of those designs from a registered principal design practitioner whose registration authorises the practitioner to provide a declaration as to the matters to which the declaration relates.

Maximum penalty—3,000 penalty units (in the case of a body corporate) or 1,000 penalty units (in any other case).

### **19 Designs and design compliance declarations to be obtained**

A building practitioner must not, except with reasonable excuse, carry out any part of building work for which a regulated design is to be used unless—

- (a) the practitioner has obtained a design from a registered design practitioner for the work and a design compliance declaration for the design from a registered design practitioner whose registration authorises the practitioner to provide a declaration as to the matters to which the declaration relates, and
- (b) the declaration states that the design complies with the requirements of the *Building Code of Australia* and other applicable requirements prescribed for the purposes of section 8(1).

Maximum penalty—1,500 penalty units (in the case of a body corporate) or 500 penalty units (in any other case).

### **20 Variations after building work commences**

- (1) A building practitioner who does building work must take all reasonable steps to ensure that, if the building work (other than in relation to a building element or performance solution) is varied after commencement of the work from a regulated design for the work, the variation is recorded in the form and manner prescribed by the regulations for the purposes of this section.

Maximum penalty—3,000 penalty units (in the case of a body corporate) or 1,000 penalty units (in any other case).

- (2) A building practitioner who does building work must take all reasonable steps to ensure that, if the building work (in relation to a building element or performance solution) is varied after commencement of the work from a regulated design for the building element or performance solution—
- (a) a design with the variation is prepared by a registered design practitioner, and
  - (b) the registered design practitioner is given (or otherwise has access to in the manner prescribed by the regulations) any of the following that are relevant to the provision, by the registered design practitioner, of a design compliance declaration for the varied design—
    - (i) regulated designs,
    - (ii) design compliance declarations,
    - (iii) principal compliance declarations, and
  - (c) a design compliance declaration is obtained for the varied design from a registered design practitioner whose registration authorises the practitioner to provide a declaration as to the matters to which the declaration relates, and
  - (d) if a principal design practitioner has been appointed in relation to the building work, a principal compliance declaration is obtained that includes the varied design.

Maximum penalty—3,000 penalty units (in the case of a body corporate) or 1,000 penalty units (in any other case).

- (3) A building practitioner who does building work must take all reasonable steps to ensure that, if after commencement of the work the work is varied so as to require a new building element or performance solution for which a regulated design is required—
- (a) a design for the building element or performance solution is prepared by a registered design practitioner, and
  - (b) the registered design practitioner is given (or otherwise has access to in the manner prescribed by the regulations) any of the following that are relevant to the provision, by the registered design practitioner, of a design compliance declaration for the design—
    - (i) regulated designs,
    - (ii) design compliance declarations,
    - (iii) principal compliance declarations, and
  - (c) a design compliance declaration is obtained for the design from a registered design practitioner whose registration authorises the practitioner to provide a declaration as to the matters to which the declaration relates, and
  - (d) if a principal design practitioner has been appointed in relation to the building work, a principal compliance declaration is obtained that includes the design.

Maximum penalty—3,000 penalty units (in the case of a body corporate) or 1,000 penalty units (in any other case).

## **21 Requirements for building elements and performance solutions**

A building practitioner who does building work must take all reasonable steps to ensure that building work relating to a building element or performance solution for which a regulated design is to be used is carried out in accordance with a design for which a design compliance declaration has been obtained from a registered design practitioner whose registration authorises the practitioner to provide a declaration as to the matters to which the declaration relates.

Maximum penalty—3,000 penalty units (in the case of a body corporate) or 1,000 penalty units (in any other case).

## 22 Obligations relating to Building Code of Australia

- (1) A building practitioner who does building work must take all reasonable steps to ensure that the building work, or any part of that work, complies with the requirements of the *Building Code of Australia* applicable to the work and other requirements applicable to the work prescribed by the regulations for the purposes of section 8(1).

Maximum penalty—3,000 penalty units (in the case of a body corporate) or 1,000 penalty units (in any other case).

- (2) If a building compliance declaration provided by a registered building practitioner sets out steps required to be taken to ensure compliance with the *Building Code of Australia* and other requirements, the practitioner must give a written notice containing the steps to the principal certifier who is to be responsible for issuing an occupation certificate for the building work.

Maximum penalty—3,000 penalty units (in the case of a body corporate) or 1,000 penalty units (in any other case).

- (3) It is a defence to an offence under subsection (1) if the defendant proves that—
- (a) the defendant reasonably relied on and built in accordance with a regulated design for which a design compliance declaration was provided by a registered design practitioner stating that the design complied with the applicable requirements of the *Building Code of Australia*, and other applicable requirements prescribed for the purposes of section 8(1), and
  - (b) the registered design practitioner's registration authorised the practitioner to provide a declaration as to the matters to which the declaration related.

## 23 Declarations by unregistered persons

A person must not make a building compliance declaration unless—

- (a) the person is a registered building practitioner, and
- (b) the person's registration authorises the person to provide a declaration as to the matters to which the declaration relates.

Maximum penalty—1,500 penalty units (in the case of a body corporate) or 500 penalty units (in any other case).

## 24 Registered building practitioners to be indemnified

- (1) A registered building practitioner must not—
- (a) provide a building compliance declaration or do related building work, or
  - (b) hold out that the practitioner is adequately insured with respect to the provision of the declaration or doing the work,

unless the practitioner is adequately insured with respect to the declaration and work.

Maximum penalty—300 penalty units (in the case of a body corporate) or 100 penalty units (in any other case).

- (2) For the purposes of this section, a registered building practitioner is **adequately insured** with respect to a declaration and work if the practitioner—
- (a) is indemnified by insurance that complies with the regulations against any liability to which the practitioner may become subject as a result of providing the declaration or doing the work, or
  - (b) is part of some other arrangement approved by the regulations that provides indemnity against the liability.

- (3) It is a condition of registration that a registered building practitioner must provide to the Secretary, in the time specified by the Secretary, information that the Secretary may require to satisfy the Secretary that the practitioner is adequately insured in accordance with this section.
- (4) The regulations may exempt a practitioner or class of practitioner from the operation of this section.

### 3. Obligations of Engineers

#### 32 Professional engineering work only carried out by professional engineers

(1) A person must not carry out professional engineering work in a prescribed area of engineering unless—

- (a) the person is a registered professional engineer and the person’s registration authorises the person to carry out the professional engineering work, or
- (b) the person carries out the professional engineering work under the direct supervision of a person referred to in paragraph (a), or
- (c) the person is authorised by the regulations to carry out the professional engineering work.

Maximum penalty—1,500 penalty units (in the case of a body corporate) or 500 penalty units (in any other case).

(2) If a person carries out professional engineering work in contravention of subsection (1)—

- (a) no monetary or other consideration is payable for the carrying out of the professional engineering work, regardless of any contract or arrangement, and
- (b) an amount paid for the carrying out of the professional engineering work is recoverable as a debt in a court of competent jurisdiction.

(3) In this section—

*prescribed area of engineering* means the following—

- (a) structural engineering,
- (b) civil engineering,
- (c) mechanical engineering,
- (d) fire safety engineering,
- (e) electrical engineering,
- (f) an area of engineering prescribed by the regulations.

#### 33 Registered professional engineers to be indemnified

(1) A registered professional engineer must not—

- (a) carry out professional engineering work, or
- (b) hold out that the engineer is adequately insured with respect to the work,

unless the engineer is adequately insured with respect to the work.

Maximum penalty—300 penalty units (in the case of a body corporate) or 100 penalty units (in any other case).

(2) For the purposes of this section, a registered professional engineer is *adequately insured* with respect to work if the engineer—

(a) is indemnified by insurance that complies with the regulations against any liability to which the engineer may become subject as a result of carrying out the work, or

(b) is part of some other arrangement approved by the regulations that provides indemnity against the liability.

(3) It is a condition of registration that a registered professional engineer must provide to the Secretary, in the time specified by the Secretary, information that the Secretary may require to satisfy the Secretary that the engineer is adequately insured in accordance with this section.

#### 4. Obligations of Specialists

##### 34 Specialist work

For the purposes of this Act, *specialist work* means—

(a) the design, construction, installation or maintenance of a building element, or

(b) other work, involving a building element, that is prescribed by the regulations,

but does not include work prescribed by the regulations as not being specialist work.

##### 35 Specialist work only carried out by registered specialist practitioner

A person must not carry out specialist work unless—

(a) the person is a registered specialist practitioner and the person's registration authorises the person to carry out the specialist work, or

(b) the person is authorised by the regulations to carry out the specialist work.

Maximum penalty—1,500 penalty units (in the case of a body corporate) or 500 penalty units (in any other case).