

Design and Building Practitioners Act 2020

February 2021

THE DESIGN AND BUILDING PRACTITIONERS ACT: AN OVERVIEW

An Information Memo about the requirements of the Design and Building Practitioners Act (“the Act”) is attached to this newsletter.

There are significant issues which arise about the Act’s operations and reach.

The Act refers to Classes of building to which it applies. Parts 1, 2 and 3 of the DBP Act are limited to Class 2 buildings, which includes mixed-use buildings with a Class 2 component (e.g. shopping centre or office block that has residential apartments located above the block).

Class 2 buildings are defined under the National Construction Code (NCC) as apartment buildings. Typically, multi-unit residential buildings where people live above and below each other. Additionally, Class 2 buildings may also be single storey attached dwellings where there is a common space below such as two dwellings with a common basement or carpark.

There is potential for the Act to be extended to more Classes of buildings in the future:-

“...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.”¹

Both design practitioners and principal design practitioners each must be registered and “adequately insured”.

As to being “registered” the proposed regulation details a mandatory registration scheme (including principal designers), professional engineers, specialist practitioners and builders. Registration is to be applied through the Secretary of the Department of Customer Service. The regulation currently limits the scope of registration to professionals who work on Class 2 buildings, this is to ensure that “only persons who are competent, suitably qualified and properly insured will be able to perform” the functions required by the new scheme.

As to being adequately insured, s 47 of the Act enables the regulations to “provide insurance requirements necessary for all recognised practitioners to hold in order to be able to issue a compliance declaration under the bill”.² Pursuant to s 107 of the Act the Secretary may request information about insurance policies issues to registered practitioners directly from insurance companies.

Also as to being “adequately insured” in accordance with the relevant body (i.e. engineers to comply with insurance requirements of the professional body of engineers), the Regulations propose that all registered design and building practitioners must be indemnified under a professional indemnity insurance policy which covers all relevant work and indemnifies against “all liability” incurred. The Insurance Council of Australia has objected to the wide implementation of this proposed regulation

¹ The Second Reading Speech to the Design and Building Practitioners Bill 2019, Kevin Anderson (Minister for Better Regulation and Innovation).

² Ibid.

as insurers would be exposed to higher risks and unable to adequately provide to all design and building practitioners.³

As to “adequate” this has occurred where the practitioner is indemnified by insurance that complies with the regulations and against any liability to which the practitioner may become subject as a result of providing a declaration or doing the work.

Teasing out what “against any liability” could mean, its likely to include a breach of a consultant agreement, breach of a duty of care (Lacrosse) or for “misleading and deceptive” conduct in breach of the Australian Consumer Law. Given the current limitations and exclusions from liability of current policies including contractual indemnities, ACL claims and the D+BP Act (unless there is another breach as to liability) this is a significant issue for all design consultancies.

The same issues of insurance cover will arise for so called “building practitioners”.

As to contractors, and a “building practitioner”, there are additional administration and supervisory task/issues which arise, including in summary:

- a) An additional issue is the breadth (that is reach) of the building compliance declaration, given section 8(3)(a) and the requirements to ensure how the BCA will be complied with. Given each building will have a number of designers/ compliance certification the builder will need to closely review and assess the content of each.
- b) Section 19, given the reference to “carry out any part of building work” requires, where there is a regulated design to be used, that the design has already been obtained from a registered design practitioner, and the design compliance declaration obtained.
- c) Section 20(2) does not include the same requirement of design before undertaking building work in relation to so called building work that is varied.
- d) Section 21, imposing as it does an obligation to ensure that all reasonable steps were taken to ensure that the building work, for which there is a regulated design, has been “carried out” in accordance with the design, is an additional obligation which requires contractors to look carefully at their relationship, communications and certifications obtained from design consultants.
- e) Given section 35 and the definition of both “specialist work” and “building element” contractors must be vigilant to ensure the appropriate “registration” of all specialist practitioners used for the Project.
- f) Likewise, the obligation in section 22(1) to ensure compliance with the requirements of the Building Code of Australia would require contractors to undertake a careful assessment of their engagement, communications and certifications obtained from design consultancies. There are particular difficulties posed by this in respect of designs which are said to provide a performance solution and/or deemed to satisfy a solution pursuant to the Building Code of Australia. Potentially, contractors need to assess whether there is a risk that is too great about any designs that do not comply

³ Insurance Council of Australia, submissions dated 02 October 2020 to the development of regulations under the *Design and Building Practitioners Act 2020*, https://www.insurancecouncil.com.au/assets/submission/2020/2020_10_02SUB_FINAL_%20PI%20Design%20and%20Building%20Regs.pdf , pages 2 – 3.

with the Building Code of Australia absent performance or deemed to satisfy solutions.

Whilst usual to have a “primary” design consultant coordinating the work of all the design consultants, the Act requires a Builder to have that coordinating consultant complete additional and onerous tasks/obligation(s) namely to ensure there is a design compliance certificate for all regulated designs. Will such consultancies accept these additional obligations as part of their role?

Look at the situation of Principal certifiers: the information/documentation volume has increased significantly. Will it ‘force out’ all but the larger companies offering such services?

The definitions are “strained”. An example is “specialist work” which is said to be the design construction installation and maintenance of a building element. That is all phases of the building process(es).

A further example is the insurance obligation of a principal design consultant. A principal design practitioner has the obligation to obtain insurance “against any liability...as a result of the declaration or doing the work”. Given the obligation seems to be limited to a ‘certify’/certification role, why does subsection 14(2)(a) then refer to “doing the work”. Does that mean it was intended that a review of the sufficiency/completeness of each design compliance declaration is required? Especially seeing this “obligation” has also been imposed upon the building practitioners.

There is a significant issue as to the “obligation” to provide the declaration being limited to when “the design is in a form suitable for use” (refer to s9(1)(b): what does that mean? Surely the drafter of the legislation intended the statement to form part of the declaration (although presently unstated, refer at 8(1).

Design and Building Practitioners Regulation 2021 (the ‘Regulation’)

- (1) It is unclear under the Regulation, as to when a principal design practitioner appointed in relation to building work must provide a principal compliance declaration to the registered building practitioner for the building work for all of the regulated designs for building work other than construction issue regulated designs.
- (2) This is because there is an error in the Regulation.
- (3) It is clear under Regulation 21(a) that principal design practitioner appointed in relation to building work must provide a principal compliance declaration to the registered building practitioner for the building work for all of the construction issued regulated designs for building work before the date specified in the notice given by the Building Practitioner under Regulation 24 (as described in the Process Map).
- (4) However, Regulation 21(b) provides the principal design practitioner appointed in relation to building work must provide a principal compliance declaration to the registered building practitioner for the building work for all of the regulated designs for building work other than construction issue regulated designs “before the date specified in the notice given by a registered building practitioner under clause 25.””

- (5) Regulation 25 relates to section 16 of the *Design and Building Practitioners Act*, which specifies that an applicant must give notice of an intention to apply for occupation certificate to each building practitioner who did building work before making the application (at least 14 days before the application – Regulation 25(1)(a)) and then give notice to each such building practitioner after the application is made (within 7 days after the application is made – Regulation 25(1)(b)).
- (6) Therefore Regulation 21(b) is uncertain as notices under clause 25 are given by the applicant for the occupation certificate rather than the relevant building practitioner.
- (7) Given the uncertainty, our view is that a principal design practitioner appointed in relation to building work should be taken to provide a principal compliance declaration to the registered building practitioner for the building work for all of the regulated designs for building work other than construction issue regulated design at least 14 Days before the applicant applies for the occupation certificate.

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DESIGN AND BUILDING PRACTITIONERS ACT

This Information Memorandum is a “snapshot” of the requirements of the Design and Building Practitioners Act 2020 (“the Act”). Parts 1 to 3 of the Act deal with the so called “regulated designs and building work” and “engineering work and specialist work”. Those parts of the Act are discussed immediately below.

We discuss Part 4, as to the duty of care owed by a person who carries out construction work, towards the end of this newsletter.

What is “building work”

Parts 1 to 3 concern “building work” for Class 2.

Given the very extensive use of definitions used within the Act, and as those definitions are discussed below, we have set out in the Schedule to this Information Memorandum a dictionary of the defined terms and meanings as used in the Act.

Obligations with respect to occupation certificates

First, a person must, before making an application for an occupation certificate, give written notice to each registered building practitioner, who did the building work, of the intention to apply for the certificates (Section 16(1)).

Secondly, a registered building practitioner must provide a building compliance declaration, contract document and any other required document to a person for whom the practitioner does the building work before an application is made for an occupation certificate (Clause 17(1)).

Thirdly, a building practitioner must ensure that the referral documents for the building work are provided to the secretary no later than 90 days after the occupation certificate is issued.

Compliance declarations by registered design practitioners

First, a registered design practitioner must provide a design compliance declaration to a person if the practitioner provides the person with a regulated design prepared by the practitioner and if the design is in a form suitable for use by that person or any other person in connection with the building work. (Section 9(1)).

Secondly, a registered principal design practitioner must ensure that a design compliance declaration has been provided in accordance with section 9 for each regulated design prepared for the building work. (Section 12(1)). (Note the two part test).

Thirdly, in the case of each design compliance declaration, the provider of the declaration must be registered and have obtained adequate insurance with respect to the declaration and the work. We discuss the need for registration and insurance below.

Compliance declarations by principal design practitioners

The principal design practitioner is obliged to ensure there is a design compliance declaration for each regulated design (viz sections 9 and 12 of the Act).

Compliance declarations by registered building practitioners

First, the documents to be provided by a registered building practitioner, are the building compliance declaration and contractor document. Section 8(3) requires the building compliance declaration to state whether the building work complies with the BCA. The contractor document is a listing of all contracts/ agreements and the building work “done” pursuant to each contract/agreement (s 17(1) and (6)).

Secondly, there is an obligation on the building practitioner to take all reasonable steps to ensure:

- a) each regulated design for the building work is prepared by a registered design practitioner;
- b) a design compliance declaration is obtained for those designs from a registered design practitioner;
- c) if a principal design practitioner has been appointed, a principal compliance declaration is obtained from a registered principal design practitioner.

Thirdly, that building practitioner must not carry out building work 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 which includes a statement that the design complies with the requirements of the Building Code of Australia.

Fourthly, where there are variations to the building work, that building practitioner is obliged to take all reasonable steps to ensure variation work that:

- a) A design with the variation is prepared by a registered design practitioner and (section 20(1) and (2)), additionally, where the variation work requires a new building element or performance solution for which a regulated design is required, a design for the building element or performance solution is prepared by a registered design practitioner and a design compliance declaration for that design is obtained. (Section 20(3)). Linked with the above obligations as to variation work is a requirement to take all reasonable steps to ensure that the building work is carried out in accordance with the design for which the design compliance declaration was obtained. (Section 21).

Fifthly, there are additional obligations to ensure that the building work complies both with the design corresponding to the design certificate declaration and requirements of the BCA. The complication here is in the building compliance declaration sets out the steps required to be taken to ensure compliance with the BCA, the building practitioner must give a written notice containing those “steps” to the principal certifier. (Refer to section 22(1) and (2)).

Relevant to compliance with the Building Code of Australia are the provisions of section 25, which purports to provide guidance as to what amounts to sufficient compliance with the requirements of the Building Code in respect of building work, but unhelpfully states the “requirements” to be satisfied if the building work complies with the applicable governing requirements or performance

requirements. (Section 25(1)). As to variation work, section 25(4) requires that the variation must not be considered in “isolation” but seen as to the effect of the variation on other aspects of the building work or other regulated designs for the building work. (Section 25(4)).

Likewise for design practitioners, a building practitioner must not provide compliance declarations unless they are “adequately insured” (that is both as to the declaration and the work).

Professional engineering work

Professional engineering work must not be carried out unless the person is so registered (section 32(1)).

Specialist Work

Interestingly, “specialist work” is then defined to mean the design, construction, installation or maintenance of a building element. (Refer section 34). The following section (section 35) then requires that specialist work can only be carried out by registered specialist practitioner and the person’s registration authorises that person to carry out the specialist work.

Duty of care obligations of Contractors

Given the length and the detail of the descriptions about parts 1, 2 and 3 of the Act we refer you to our earlier newsletter concerning the duty of care obligations of a builder to work subject to the *Design Building and Practitioners Act* to exercising reasonable care to avoid economic loss by defects in construction work.



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SCHEDULE TO THE "INFORMATION MEMORANDUM"

THE "DICTIONARY" TO THE DESIGN AND BUILDING PRACTITIONERS ACT: Parts 1, 2 and 3

1. A Principal Design Practitioner means a person who coordinates the provision of Design Compliance Declarations for the purposes of Building Work done by a Building Practitioner.
2. Building Work means work involved in, or involved in coordinating or supervising work involved in, one or more of the following:
 - a) the construction of a building of a class or type prescribed by the Regulations for the purpose of this definition (currently limited to class 2 buildings);
 - b) the making of alterations or additions to a building of that class or type;
 - c) the repair, renovation or protective treatment of a building of that class or type.

(Refer section 4(1) and (2)).

3. A Regulated Design means:
 - a) a design that is prepared for a Building Element for Building Work; or
 - b) a design that is prepared for a performance solution for Building Work (including a Building Element).

(Refer to section 5(1) of the Act).

4. Building Element means any of the following:
 - a) the fire safety systems for a building within the meaning of the Building Code of Australia;
 - b) waterproofing;
 - c) an internal or external load bearing component of a building that is essential to the stability of the building, or part of it (including but not limited to in ground and other foundations and footings, floors, walls, roofs, columns and beams);
 - d) a component of a building that is part of the building enclosure;
 - e) those aspects of the mechanical, plumbing and electrical services for a building that are required to achieve compliance with the Building Code of Australia;
 - f) other things prescribed by the regulations for the purposes of this section.

(Refer to section 6(1) of the Act).



5. Building Practitioner means:
- a) a person who agrees under a contract or other arrangement to do Building Work; or
 - b) if more than one person agrees to do building work, a person who is the principal contractor for the work.
6. In turn, Principal Contractor means: a person who agrees to do Building Work under a contract or arrangement (the head contract) if residential work is to be carried out under one or more other contracts or arrangements as part of or incidental to the work carried out under the head contract.
(Refer to clause 7(1) and (2) of the Act).
7. A Design Compliance Declaration means a declaration in the form and manner prescribed by the Regulations as to the following:
- a) whether or not a Regulated Design prepared for Building Work complies with the requirements of the Building Code of Australia;
 - b) whether or not the design complies with other applicable requirements prescribed by the Regulations for the purposes of this subsection;
 - c) whether or not other standards, codes or requirements have been applied in preparing the design.
8. A Principal Compliance Declaration means a declaration in the form and manner prescribed by the regulations as the following:
- a) whether or not a Design Compliance Declaration has been provided in accordance with this Act for each regulated design prepared for the Building Work; 8(2)
9. A Building Compliance Declaration means a declaration in the form and manner prescribed by the Regulations as to the following:
- a) whether or not the Building Work complies with the requirements of the Building Code of Australia;
 - b) whether or not the Building Work complies with other applicable requirements prescribed by the Regulations for the purposes of the subsection;
 - c) if the Building Work does not comply with the requirements referred to in paragraph (a) or (b) above, the steps required to take to ensure compliance;
 - d) for a Regulated Design used for the Building Work whether or not the design was prepared by a registered Design Practitioner, and the Building Work was built in accordance with the design;
 - e) whether or not a Design Compliance Declaration has been obtained in relation to Regulated Designs used for the Building Work;
 - f) whether or not a registered Principal Design Practitioner was appointed in relation to the Building Work;
 - g) whether or not a Principal Compliance Declaration was obtained in relation to the Regulated Designs and Design Compliance Declarations relating to the Building Work.



(Refer to sections 8(1), (2) and (3) of the Act).

10. A Contractor Document means:

- 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 person 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.

(Refer to clause 17(6) of the Act).

11. A "referral document" means each regulated design for which a design compliance declaration has been provided that reflects the building work that was carried out (section 15(4)).

12. Professional engineering work means engineering work or is based on the application of engineering perception and data to:

- i. a design; or
- ii. construction, production, operation or maintenance activity relating to engineering (Section 31(1))

13. Specialist work means

- i. the design, construction, installation or maintenance of a building element, or
- ii. 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.

Part 4

b) Building work includes residential building work within the meaning of the *Home Building Act 1989*.

c) Construction work means:

- i. building work,
- ii. the preparation of regulated designs and other designs for building work,
- iii. the manufacture or supply of a building product used for building work,
- iv. supervising, coordinating, project managing or otherwise having substantive control over the carrying out of any work referred to in paragraph (i), (ii) or (iii).

