

Professional Indemnity implications of the Design and Building Practitioners Act 2020 (the DBP Act).

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Professional Indemnity implications of the Design and Building Practitioners Act 2020 (the DBP Act).

The Design and Building Practitioners Act 2020 (“DBP Act”) passed through NSW Parliament on 3 June 2020.

The DBP Act “is intended to apply to all parties in NSW involved in the construction of residential or mixed-use developments”. Specifically, it includes “any person or entity that undertakes building or design work, supplies or manufactures building products or supervises building work.”¹

In the second reading speech to the Design and Building Practitioners Bill in the NSW Legislative Assembly Kevin Andres MLA, Minister for Better Regulation and Innovation, noted that:

“Modern buildings are no longer four walls and a roof. Construction is complex, integrated and evolving. Future occupants of buildings deserve to know they are buying a quality design and expert construction that is protected by strong and modernised building laws. They also deserve to have an avenue of recourse available in the event of a defect during a building’s life. This bill is a priority for our Government. It is critical to support the building and construction sector, and provide New South Wales with a built environment where safety and quality is prioritised and where there is strong consumer confidence.”

The DBP Act represents the first tranche of reforms the NSW Government expects to make as part of the biggest overhaul of the New South Wales building sector.²

The DBP Act does three things:

1. It requires mandatory declarations by certain persons involved in construction;
2. It provides for mandatory insurance requirements for certain persons involved in construction; and
3. It establishes a new statutory duty of care for persons who carry out construction to avoid economic loss caused by defects.



“Modern buildings are no longer four walls and a roof. Construction is complex, integrated and evolving.”

¹ Moore, A. & Finnigan, R., A new duty of care changes the liability landscape – the impact of the Design and Building Practitioners Bill 2020, Wotton + Kearney Legal Insights – Construction 9 June 2020

² Kevin Andrews MLA Second Reading Speech to the Design and Building Practitioners Bill 2019, in the Legislative Assembly

Mandatory Declarations

Registered Design Practitioners

Persons who prepare regulated designs and who are registered or recognised under the DBP Act, Registered Design Practitioners, are required to provide a design compliance declaration where:

- they prepare and provide a regulated design, and the design is in a form suitable for use in connection with building work;
- they or another practitioner has previously provided a design compliance declaration for a regulated design prepared by either practitioner in connection with building work, and they provide a varied regulated design in a form suitable for use in connection with the building work before the building work is commenced;
- they 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 they provide the person with a varied regulated design in a form suitable for use relating to the building element or performance solution after the building work is commenced; and
- prescribed by the regulations.

In addition, a Registered Design Practitioner must not make knowingly a false or misleading design compliance declaration in a material particular.³

A design compliance declaration is a declaration as to:

- whether or not a regulated design prepared for building work complies with the requirements of the Building Code of Australia;
- whether or not the design complies with other applicable requirements prescribed by the regulations;
- whether or not other standards, codes or requirements have been applied in preparing the design; and
- any other matter prescribed by the regulations.⁴

Persons who are not Registered Design Practitioners or whose registration does not authorise them to provide such a declaration are prohibited from making a design compliance declaration.⁵

Penalties can be imposed for breach, and in the case of knowingly false and misleading design compliance declarations, a two year imprisonment can also be imposed.

³ Section 9 of the DBP Act
⁴ Section 8(1) of the DBP Act
⁵ Section 10 of the DBP Act



Principal Design Practitioners

Persons who coordinate the provision of design compliance declarations for the purposes of building work done by a building practitioner, Principal Design Practitioners, are required to ensure that each design compliance declaration has been provided:

- for each regulated design prepared for the building work; and
- by a registered design practitioner whose registration authorises the practitioner to provide such a declaration.

In addition, a Registered Principal Design Practitioner appointed in relation to building work must provide a principal compliance declaration. Such a declaration must not be knowingly false or misleading in a material particular.⁶

A principal compliance declaration is a declaration as to:

- whether or not a design compliance declaration has been provided in accordance with the DBP Act for each regulated design prepared for the building work;
- whether or not each design compliance 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; and
- any other matter prescribed by the regulations.⁷

Persons who are not Registered Design Practitioners or whose registration does not authorise them to provide such a declaration are prohibited from making a principal compliance declaration.⁸

Again, penalties can be imposed for breach, and in the case of knowingly false and misleading design compliance declarations, a two year imprisonment can also be imposed.

⁶ Section 12 of the DBP Act
⁷ Section 12(2) of the DBP Act
⁸ Section 13 of the DBP Act



Building Practitioners

A person who agrees under a contract or other arrangement to do building work, or if more than one person agrees to do building work, a person who is the principal contractor for the work and who is registered or recognised under the DBP Act is (Registered Building Practitioner) is (amongst other things) required to:

- provide a building compliance declaration for building work, contractor document and other required documents before an application is made for an occupation certificate for the building to which the work relates; and
- provide a building compliance declaration, contractor document or other required document in other circumstances prescribed by the regulations.

A Registered Building Practitioner must not knowingly make a false and misleading building compliance declaration in a material particular.⁹

A building compliance declaration is a declaration as to:

- whether or not the building work complies with the requirements of the Building Code of Australia;
- whether or not the building work complies with other applicable requirements prescribed by the regulations;
- if the building work does not comply with the requirements referred to above, the steps required to be taken to ensure compliance; and
- 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.¹⁰

⁹ Section 17 of the DBP Act

¹⁰ Section 8(3) of the DBP Act

Persons who are not Registered Building Practitioners or whose registration does not authorise them to provide such a declaration are prohibited from making a building compliance declaration.¹¹

As with Registered Design Practitioners and Principal Design Practitioners, penalties can be imposed for breach, and in the case of knowingly false and misleading design compliance declarations, two years imprisonment can also be imposed.

Professional Indemnity implications of breaches in relation to the above Mandatory Declarations

As most professional indemnity policies exclude or do not otherwise cover fines and penalties, cover is unlikely for the consequences of breach of the above mandatory declaration provisions.

In addition, the definition of building practitioner refers to “the performance of building work”. This is defined as “work involved in, or involved in coordinating or supervising work involved in, one or more of:

- the construction of a building of a class or type prescribed by the regulations;
- the making of alterations or additions to a building of that class or type; and
- the repair, renovation or protective treatment of a building of that class or type”.

Such building work may not fall within the definition of professional services, particularly in relation to design and construction professional indemnity policies as these usually do not include performance or supervision (where such supervision would normally be undertaken by a building contractor, site supervisor, site manager, superintendent or foreman) of construction or alteration of buildings or property.

¹¹ Section 23 of the DBP Act

Mandatory Insurance

The DBP Act requires that the following be adequately insured with respect to declarations and work:

- registered design practitioners;¹²
- registered principal design practitioners;¹³
- registered building practitioners;¹⁴ and
- registered professional engineers.¹⁵

In order to be adequately insured, the above must either:

- be indemnified under insurance that complies with the regulations against any liability to which they may become subject as a result of providing a mandatory declaration or doing work; or
- be part of some other arrangement approved by the regulations that provides an indemnity against the liability.

This requirement may present problems as liability insurance generally and professional indemnity insurance in particular does not cover “any liability”. Cover is limited by the terms of the insurance clause, the exclusions, and any extensions to the relevant policy.

At present, there are no regulations under the DBP Act, including those setting out the ambit of the insurance required.

New Statutory Duty of Care

Section 37 of the DBP Act provides:

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.

Relevantly construction work means:

- A. building work,
- B. the preparation of regulated designs and other designs for building work,
- C. the manufacture or supply of a building product used for building work,
- D. supervising, coordinating, project managing or otherwise having substantive control over the carrying out of any work referred to in paragraph (A), (B) or (C).¹⁶

The duty cannot be delegated¹⁷, nor can it be contracted out of.¹⁸

The duty is in addition to duties, statutory warranties and other obligations imposed under the Home Building Act 1989, other Acts and the common law, and does not limit such obligations or the damages or other compensation that may otherwise be available because of a breach of a duty by a person who carries out construction work.

Whilst this is a new statutory duty of care, breach of the duty will still give rise to a civil liability. As a result, a professional indemnity policy that covers civil liability arising from the provision of professional services may still respond to a claim for breach of the duty, subject to the circumstances of the particular claim and the terms and conditions of the policy relevant to it (including any relevant exclusions).¹⁹

The situation may be different if the insuring clause of the relevant professional indemnity policy requires a breach of professional duty or negligent breach of professional duty to trigger cover, as these terms may be interpreted as limiting cover to tort based or other common law claims.

Conclusion

As the first tranche of reforms that the NSW Government expects to make as part of the biggest overhaul of the New South Wales building sector, the DBP Act imposes a number of new obligations upon construction professionals that are likely to increase insurers’ exposure to claims at a time when the professional indemnity market continues to harden.

Whilst professional indemnity policies available in the market at present should cover some of the new exposures, Marsh is monitoring the situation to see how the market will respond to this and future reforms of the NSW building sector.

For further information, please contact your local Marsh office or visit our website at marsh.com.

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