

The Design and Building Practitioners Bill 2019 (Bill) introduces a suite of new reforms that seek to improve the quality and compliance of design documentation and strengthen accountability across the design and construction sector.

The Bill, which was initially released for public consultation and is now before the Legislative Assembly, addresses the recommendations made in the Shergold Weir Report and seeks to rebuild public confidence in the industry.

It is intended that the Bill will apply to certain categories of regulated designs and to multiunit and multistorey residential apartment buildings (which are yet to be prescribed in the regulation). In the second reading speech, it was indicated that "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". Class 2 buildings are buildings containing two or more sole occupancy units each being a separate dwelling (i.e. typically multiunit residential apartment buildings).

The Bill mainly affects:

- "Design practitioners" (engineers, architects, etc.), being a person that prepares "regulated designs" (which will be prescribed in the regulations)
- "Building practitioners", being 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

It would be stretching things to say that the current definition of "building practitioner" would capture developers, but the Bill contemplates that by regulations this could be further defined. This could leave it open for the legislature to extend the application to developers in much the same way that the Home Building Act 1989 (NSW) did.

The Bill introduces a registration scheme requiring design and building practitioners to be registered and insured and to be held accountable through the provision of compliance declarations. The Bill also imposes a statutory duty of care owed to owners of land by any person that carries out building work and the preparation of regulated designs and other designs for building work.

Key Reforms

The major reforms proposed in the Bill include:

1. **Introduction of "regulated designs"** (Section 5 of the Bill) – The reforms will apply to "regulated designs" to be prescribed in the regulations and may include a design for a building element or a performance solution for building work (including a building element).
2. **Compliance declarations by "design practitioners"** (Part 2, Div 1 of the Bill) – Mandatory requirement for "registered design practitioners" to provide "design compliance declarations" declaring that their designs comply with the BCA.
3. **Compliance declarations by "principal design practitioners"** (Part 2, Div 2 of the Bill) – Introduction of the optional role of "registered principal design practitioners" (being a registered person who coordinates the provision of design compliance declarations for the purposes of building work done by a building practitioner) to ensure that design compliance declarations have been provided for regulated designs and to provide a "principal compliance declaration" to prescribed persons.
4. **Compliance declarations by "building practitioners"** (Part 2, Div 3 of the Bill) – Mandatory requirement for "registered building practitioners" to provide a building compliance declaration before making an application for an occupation certificate declaring:
 - Whether the building work complies with the BCA, and if not, steps proposed to be taken to ensure compliance
 - For regulated design used for building work, whether the design was prepared by a registered design practitioner and the building work was built in accordance with the design
 - Whether it obtained a design compliance declaration in relation to regulated designs
 - If a registered principal design practitioner was appointed, and if so, whether it obtained a principal compliance declaration

- 5. Other obligations of “building practitioners”** (Part 2, Div 3 of the Bill) – Requirement that building practitioners take all reasonable steps to ensure that:
- Regulated designs are prepared by a registered design practitioner and that a design compliance declaration is obtained for each of those designs
 - If 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 that work, the variation is recorded
 - If building work in relation to a building element or performance solution is varied after commencement of the work from a regulated design for that work, those varied designs are prepared by a registered design practitioner and a design compliance declaration is obtained for those varied designs
 - 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
 - Building work complies with the BCA
- 6. Variations to regulated designs** (sections 9(2)-(3) and 19 of the Bill) – Requirement that variations to regulated designs (for a building element or a performance solution) are prepared and declared by a registered design practitioner.
- 7. Duty of care** (Part 3 of the Bill) – Introduction of a statutory duty of care owed to owners of land (including subsequent owners and owners corporation in a strata scheme) by a person who carries out construction work, to exercise reasonable care to avoid economic loss caused by defects in, or related to, the building for which the work is done and arising from the construction work. “Construction work” is defined as building work and the preparation of regulated designs and other designs for building work. The duty will be owed regardless of whether the construction work was carried out under a contract or other arrangement entered into with the owner, and the duty cannot be delegated or contracted out of. An owner will be entitled to damages for breach of that duty, in addition to any other damages or compensation that may be available at common law, under the Home Building Act or other acts.
- 8. Registration of practitioners** (Part 4 and sections 11, 14, 23 and 28 of the Bill) – Requirement that design, principal design and building practitioners who make compliance declarations register under a new registration scheme. It will be a condition of registration that all registered practitioners must satisfy the secretary that the practitioner is adequately insured in respect of any liability to which that practitioner may become subject to, as a result of making a declaration or carrying out work for the purposes of the act. The insurance requirements are to be prescribed by the regulations.
- 9. Penalties** – The Bill imposes penalties on design and building practitioners for non-compliance with the requirements of the proposed Act.

The Bill is a priority for the NSW government, with further work to be undertaken to develop and consult on the supporting regulation in 2020.

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