



New South Wales

# Design and Building Practitioners Bill 2019

## Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

## Overview of Bill

The objects of this Bill are as follows—

- (a) to require compliance declarations for regulated designs to be provided by registered design practitioners and principal design practitioners who provide designs for certain building work (*applicable building work*),
- (b) to impose obligations on registered building practitioners who carry out applicable building work to take all reasonable steps to provide building compliance declarations and to obtain compliance declarations for regulated designs,
- (c) to impose on building practitioners who do applicable building work an obligation not to carry out the work unless regulated designs have been obtained and compliance declarations provided,
- (d) to impose on building practitioners who do applicable building work an obligation to take all reasonable steps to comply with the applicable requirements of the *Building Code of Australia*,
- (e) to establish a duty of care owed by persons who carry out construction work relating to certain buildings to take reasonable care to avoid economic loss caused by defects arising from the work,
- (f) to establish a registration scheme for design practitioners, principal design practitioners and building practitioners who are subject to compliance declaration requirements and to establish insurance requirements for registered practitioners,
- (g) to provide for enforcement of the requirements of the proposed Act,

- (h) to establish a register of practitioners registered under the proposed Act,
- (i) to enact other minor and consequential provisions and provisions of a savings and transitional nature,
- (j) to make consequential amendments to other Acts.

## Outline of provisions

### Part 1 Preliminary

**Clause 1** sets out the name (also called the short title) of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

**Clause 3** defines certain words and expressions used in the proposed Act. A *design practitioner* is defined as a person who prepares regulated designs. A *principal design practitioner* is defined as a person who coordinates the provision of design compliance declarations for the purposes of building work done by a building practitioner. *Registration* means registration (including recognition) under the proposed Act as a design practitioner, a principal design practitioner or a building practitioner.

**Clause 4** defines *building work* as work involved in, or in coordinating or supervising work involved in, constructing, making alterations or additions to or repairing, renovating or carrying out the protective treatment of a building of a class or type prescribed by the regulations. Additional work may be prescribed as building work, and work may be excluded from being building work, by regulations.

**Clause 5** defines a *regulated design* as a design of a class prescribed by the regulations that is prepared for building work (including a building element) or a performance solution for building work (including a building element).

**Clause 6** defines the parts of a building that are *building elements*.

**Clause 7** defines a *building practitioner* as a person who agrees under a contract or other arrangement to do building work or who is the principal contractor where more than one person contracts to do building work. A building practitioner will be taken to *do building work* if the practitioner agrees under a contract or other arrangement to do it or is the principal contractor for the work. Additional persons may be prescribed as building practitioners and persons may be excluded from being building practitioners by regulations.

**Clause 8** sets out the matters that must be in a design compliance declaration made by a registered design practitioner, a principal compliance declaration made by a registered principal design practitioner and a building compliance declaration made by a registered building practitioner. A *design compliance declaration* must set out whether designs for buildings comply with the *Building Code of Australia* and other requirements and whether other standards, codes or requirements have been applied to the designs. A *principal compliance declaration* must set out whether design compliance declarations have been provided as required for designs for building work by registered design practitioners who are authorised to provide the declarations. A *building compliance declaration* must set out whether building work complies with the *Building Code of Australia*, whether regulated designs have been prepared as required by registered design practitioners and design compliance declarations have been obtained for them, whether or not building work was built in accordance with the designs and whether or not a principal design practitioner has been appointed and a principal compliance declaration obtained.

## **Part 2 Regulated designs and building work**

### **Division 1 Obligations of design practitioners**

**Clause 9** requires a registered design practitioner to provide a design compliance declaration if the person provides a regulated design in a form suitable for use by a person or another person in connection with building work. A further design compliance declaration must also be provided if a regulated design is varied before building work commences or if a regulated design for a building element or performance solution is varied after building work commences, and in other circumstances prescribed by the regulations. Copies of design compliance declarations must be provided to the principal design practitioner (if any) appointed for the building work. It will be an offence for a person to make a design compliance declaration that the person knows to be false or misleading in a material particular.

**Clause 10** makes it an offence for a person to make a design compliance declaration unless the person is a registered design practitioner whose registration authorises the person to provide a declaration as to the matters to which the declaration relates.

**Clause 11** prohibits a registered design practitioner from providing a design compliance declaration or preparing a regulated design or holding out that the practitioner is adequately insured unless the practitioner is adequately insured in accordance with the regulations. It will be a condition of registration that a practitioner supply necessary information to satisfy the Secretary of the Department of Customer Service (the *Secretary*) that the practitioner is adequately insured.

### **Division 2 Obligations of principal design practitioners**

**Clause 12** requires a registered principal design practitioner appointed in relation to applicable building work to ensure a compliance declaration is provided for each regulated design prepared for the building work and enables the regulations to prescribe when a practitioner must provide a principal compliance declaration. It will be an offence for a person to make a principal compliance declaration that the person knows to be false or misleading in a material particular.

**Clause 13** makes it an offence for a person to provide a principal compliance declaration unless the person is a registered principal design practitioner whose registration authorises the person to provide a declaration as to the matters to which the declaration relates.

**Clause 14** prohibits a registered principal design practitioner from providing a principal compliance declaration or doing other work or holding out that the practitioner is adequately insured for the purposes of the proposed Act unless the practitioner is adequately insured in accordance with the regulations. It will be a condition of registration that a practitioner supply necessary information to satisfy the Secretary that the practitioner is adequately insured.

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

**Clause 15** requires a person who intends to apply for an occupation certificate for a building after applicable building work has been done to give written notice of that intention to each registered building practitioner who did the building work. Notice must be given within the period prescribed by the regulations.

**Clause 16** requires a registered building practitioner to provide a building compliance declaration and other documents to a person for whom the practitioner does applicable building work before an application is made for an occupation certificate for the building and to provide a declaration in other circumstances prescribed by the regulations. It will be an offence for a person to make a building compliance declaration that the person knows to be false or misleading in a material particular.

**Clause 17** requires a building practitioner who does applicable building work to take all reasonable steps to ensure that regulated designs for the work are prepared by a registered design practitioner and a design compliance declaration is obtained for those designs and, if there is a principal design practitioner for the building work, that a principal compliance declaration is obtained.

**Clause 18** prohibits a building practitioner, except with reasonable excuse, from carrying out any part of building work for which a regulated design is to be used unless a design and a design compliance declaration which declares that the design complies with the *Building Code of Australia* and other prescribed requirements have been obtained from a registered design practitioner.

**Clause 19** requires a building practitioner who does applicable building work to take all reasonable steps to record a variation of a regulated design for the work (other than for a building element or performance solution) that occurs after a design compliance declaration has been provided and building work commenced. The building practitioner must also take all reasonable steps to ensure that a new design is prepared by a registered design practitioner and a design compliance declaration is obtained and, if required by the regulations, a principal compliance declaration is obtained if, after building work commences, a building element or performance solution for which a regulated design has been obtained is varied or a new building element or performance solution is required.

**Clause 20** requires a building practitioner who does applicable building work to 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 prepared by a registered design practitioner and for which a design compliance declaration has been obtained.

**Clause 21** requires a building practitioner who does applicable building work to take all reasonable steps to ensure that the work complies with the applicable requirements of the Building Code of Australia and other prescribed requirements. It will be a defence if the defendant proves that the defendant reasonably relied on and built in accordance with a design for which a design compliance declaration was provided by a registered design practitioner. If a building compliance declaration sets out steps required to be taken to ensure compliance, the building practitioner must give the principal certifier responsible for issuing an occupation certificate for the work a written notice containing the steps.

**Clause 22** makes it an offence for a person to provide a building compliance declaration unless the person is a registered building practitioner whose registration authorises the person to provide a declaration as to the matters to which the declaration relates.

**Clause 23** prohibits a registered building practitioner from providing a building compliance declaration or doing related building work or holding out that the practitioner is adequately insured for the purposes of the proposed Act unless the practitioner is adequately insured in accordance with the regulations. It will be a condition of registration that a practitioner supplies necessary information to satisfy the Secretary that the practitioner is adequately insured.

#### **Division 4      Miscellaneous**

**Clause 24** sets out when the *Building Code of Australia* is taken to be complied with for the purposes of the proposed Act.

**Clause 25** enables regulations to be made to prohibit the issue of a complying development certificate, a planning certificate (including an occupation certificate), a strata certificate or a compliance certificate for a swimming pool unless compliance declarations or regulated designs, or both, have been provided to the issuer of the certificate.

**Clause 26** imposes obligations on directors of a registered body corporate to ensure that the body corporate complies with statutory requirements with respect to the preparation of regulated designs, the carrying out of building work or the provision of compliance declarations. The directors must also ensure that compliance declarations are provided by registered practitioners authorised to provide the declarations. A registered body corporate will also have an obligation to ensure that compliance declarations provided on behalf of the body corporate are provided by registered practitioners authorised to provide the declarations.

**Clause 27** prohibits a registered practitioner from seeking or accepting, or offering or agreeing to accept, a benefit for acting otherwise than impartially in providing a compliance declaration. It will also be an offence to give, or offer or agree to give, a benefit to a registered practitioner on an

understanding that the registered practitioner will act otherwise than impartially in providing a compliance declaration. It will also be an offence to unduly influence or attempt to unduly influence a registered practitioner to act otherwise than impartially in providing a compliance declaration.

**Clause 28** enables regulations to be made relating to insurance requirements under the proposed Act.

### **Part 3 Duty of care**

**Clause 29** defines certain words and expressions used in the proposed Part. *Construction work* will mean building work relating to buildings of a type or class prescribed by the regulations and the preparation of regulated designs and other designs for that building work. *Owners* of land will mean individuals who are entitled to an estate in freehold possession or who are, or would be, entitled to receive the rents and profits of the land and will also include the owners corporation for a strata scheme and the association for a community scheme. Regulations may prescribe additional work that is construction work and exclude work from being construction work, as well as exclude persons from being owners, for the purposes of the proposed Part.

**Clause 30** imposes a duty of care on a person who carries out construction work to exercise reasonable care to avoid economic loss caused by defects in or related to a building for which the work is done and arising from the work. The duty is owed to the present and subsequent owners of the land on which the work is carried out and the owners are entitled to damages for the breach of the duty.

**Clause 31** makes it clear that the cost to an owners corporation for a strata scheme or an association for a community scheme of rectifying defects caused by a breach of the duty of care is an economic loss for the purposes of the proposed Part.

**Clause 32** prohibits the delegation of the duty of care established by the proposed Part.

**Clause 33** provides that the proposed Part applies despite contracts or stipulations to the contrary and that a contract or agreement entered into after the commencement of the proposed Part cannot operate to annul, vary or exclude a provision of the proposed Part.

**Clause 34** makes it clear that the proposed Part is in addition to other duties, statutory warranties and obligations imposed under other laws and does not limit other remedies that may be available. The proposed Part will be subject to the *Civil Liability Act 2002*.

### **Part 4 Registration of practitioners**

#### **Division 1 Applications for registration**

**Clause 35** enables regulations to make provision for or with respect to classes of registration.

**Clause 36** enables applications to be made to the Secretary and sets out requirements for applications.

**Clause 37** enables the Secretary, by written notice, to require an applicant for registration or a close associate of an applicant to provide information or to produce records relevant to investigation of the application. An application need not be considered if the requirement is not complied with.

**Clause 38** provides for the grant or refusal of registration applications and the grounds on which an application must be refused, including if the Secretary is of the opinion that the person does not have the qualifications, skills, knowledge and experience or is not a suitable person to carry out the work for which registration is being sought.

**Clause 39** sets out the grounds on which the Secretary may form an opinion that an applicant for registration or a registered practitioner is not a suitable person to carry out the work for which registration is being sought or to be registered.

**Clause 40** enables regulations to be made as to requirements to be registered, including qualifications, skills and experience.

**Clause 41** provides for registration to remain in force for 1, 3 or 5 years as specified by the Secretary in the notice granting registration, unless registration is cancelled.

**Clause 42** specifies that registration may be subject to conditions imposed by the proposed Act, the regulations or by the Secretary.

**Clause 43** provides that conditions may be imposed on registration to require work to be carried out in accordance with specified standards or methodologies and that a condition may defer authorisation under a registration for a set period or make the authorisation conditional.

**Clause 44** imposes a condition on registration requiring a registered practitioner to provide information to the Secretary when requested to do so. It will be an offence to fail to comply with the condition.

## **Division 2 Variation, suspension or cancellation of registration**

**Clause 45** sets out the grounds on which the Secretary may vary, suspend or cancel a registration. They include not being entitled to be registered, failing to comply with a condition and not being a suitable person for registration.

**Clause 46** enables the Secretary to make suspension or cancellation of registration conditional and to vary or revoke the conditions or add new conditions.

## **Division 3 Recognition as registered practitioner**

**Clause 47** authorises regulations to be made for or with respect to the recognition of persons or classes of persons as registered design practitioners, principal design practitioners or building practitioners.

## **Division 4 Registration offences**

**Clause 48** makes it an offence for a registered design practitioner, registered principal design practitioner or registered building practitioner (a *registered practitioner*) or a former registered practitioner to contravene a condition of registration or of suspension or cancellation of registration.

**Clause 49** makes it an offence for a registered practitioner to let out, hire or lend a certificate of registration or permit another person to use the certificate. The registration of a person who commits the offence must be cancelled by the Secretary.

**Clause 50** makes it an offence for a person to represent himself or herself as a registered practitioner, or allow himself or herself to be so represented, if the person is not a registered practitioner. It will also be an offence for a person to represent another person to be a registered practitioner knowing that the other person is not registered or if the person ought reasonably to know that.

**Clause 51** makes it an offence for a person not to return a registration certificate if required to do so by the Secretary when the person's registration is suspended, varied or cancelled. The person may instead also lodge a statement providing details about why the certificate cannot be returned.

**Clause 52** requires a registered practitioner to notify the Secretary of certain events, including the suspension or cancellation of an equivalent qualification held in another jurisdiction, the commencement of certain proceedings against the registered practitioner or a director of a registered body corporate and bankruptcy or winding up proceedings.

## **Division 5 General**

**Clause 53** provides that registration is not transferable.

**Clause 54** enables a registered practitioner to apply to the Secretary to have the Secretary cancel or suspend the practitioner's registration or extend, cancel or vary a suspension of the registration.

**Clause 55** confers jurisdiction on the Civil and Administrative Tribunal (the *Tribunal*) to review decisions of the Secretary relating to registration.

## **Part 5 Disciplinary action against practitioners**

**Clause 56** enables the Secretary to take disciplinary action against a registered practitioner on specified grounds, including that the practitioner's work or provision of compliance declarations has fallen short of the standard of competence, diligence and integrity that a member of the public is entitled to expect of a reasonably competent practitioner, that the practitioner has contravened the proposed Act or a regulation made under the proposed Act and that the practitioner has contravened another law with respect to fraud or dishonesty or other matters.

**Clause 57** requires the Secretary to issue a show cause notice to a registered practitioner, giving the practitioner at least 14 days to show cause why the practitioner should not be dealt with, if the Secretary thinks there may be grounds for disciplinary proceedings against the practitioner. The Secretary may conduct an inquiry into or investigate the matters to which the notice relates and must take into account any submissions made by the registered practitioner before determining what action to take.

**Clause 58** enables the Secretary, if the Secretary is satisfied a ground for taking disciplinary action has been established, to decide to take no further action, to caution or reprimand the practitioner, to impose a penalty, to suspend or cancel the practitioner's registration or to disqualify the practitioner temporarily or permanently from registration.

**Clause 59** requires each director of a registered body corporate to report to the Secretary conduct by the body corporate that could be a ground for taking disciplinary action under the proposed Part.

**Clause 60** confers jurisdiction on the Tribunal to review decisions of the Secretary relating to disciplinary action against practitioners.

**Clause 61** suspends the registration of a person who fails to pay a monetary penalty imposed by the Secretary and enables the Secretary to recover the unpaid amount as a debt in a court of competent jurisdiction.

**Clause 62** makes it clear that a decision to take disciplinary action against a person under the proposed Part does not affect liability for an offence under the proposed Act or another Act or regulations under the proposed Act or another Act. In addition, proceedings against a registered practitioner do not prevent the taking of disciplinary action in relation to the same matters or incident to which the proceedings relate.

## **Part 6 Investigations**

### **Division 1 Preliminary**

**Clause 63** defines certain words and expressions used in the proposed Part.

**Clause 64** provides that the functions (which include powers) conferred by the proposed Part may be used for investigating, monitoring and enforcing compliance with the requirements of the proposed Act, obtaining information or records for administration purposes and enforcing, administering or executing the proposed Act (*authorised purposes*).

### **Division 2 Authorised officers**

**Clause 65** enables the Secretary to appoint authorised officers.

**Clause 66** provides that an authorisation as an authorised officer may be general or subject to conditions, limitations or restrictions or only be for limited purposes.

**Clause 67** requires the Secretary to provide each authorised officer (other than police officers) with an identification card but enables the Secretary not to provide cards to officers who are also investigators under the *Fair Trading Act 1987*.

### **Division 3 Information gathering powers**

**Clause 68** makes it clear that powers conferred by the proposed Division may be exercised even if a power of entry under proposed Division 4 is not being exercised.

**Clause 69** confers power on authorised officers to issue notices directing persons to furnish information or records or both for an authorised purpose.

**Clause 70** confers power on authorised officers to require persons to answer questions with respect to matters about which knowledge is reasonably required for an authorised purpose. A person may be required to attend at a specified time and place for that purpose. The specified time and place must be reasonable in the circumstances.

**Clause 71** enables questions and answers to questions under the proposed Division to be recorded if the person being questioned has been informed about the recording. A copy of the record must be provided to the person being questioned as soon as practicable after it is made.

### **Division 4 Entry to premises**

**Clause 72** confers power on authorised officers to enter premises at a reasonable hour in the daytime or when business is in progress or is usually carried on and enables an authorised officer to be accompanied by assistants that the authorised officer considers necessary. Entry may be effected with or without the authority of a search warrant.

**Clause 73** prohibits an authorised officer from entering a part of premises used only for residential purposes unless the occupier has given permission or the officer is authorised to enter by a search warrant. The prohibition will not apply to common property under a strata scheme or association property under a community scheme.

**Clause 74** enables search warrants to be granted to authorised officers for the purpose of searching premises if there are reasonable grounds to believe that there has been a contravention of the proposed Act on the premises or there is on the premises a matter or thing connected with an offence under the proposed Act or regulations under the proposed Act.

**Clause 75** enables an authorised officer to direct the owner or occupier of premises, or a person in or on premises (other than a public place), to provide reasonable assistance for the purposes of exercising the authorised officer's functions with respect to the premises.

**Clause 76** sets out the investigative actions an authorised officer may take after entering premises.

### **Division 5 Miscellaneous**

**Clause 77** provides for records taken by an authorised officer for evidentiary purposes to be retained by the Secretary until completion of proceedings in which they may be evidence.

**Clause 78** makes it an offence to obstruct, hinder or interfere with an authorised officer in the exercise of the officer's functions under the proposed Part.

**Clause 79** makes it an offence, without reasonable excuse, to fail to comply with a direction made by an authorised officer in accordance with the proposed Part.

## **Part 7 Enforcement**

### **Division 1 Remedial actions**

**Clause 80** provides for the Secretary to accept written undertakings by practitioners as to the manner in which they will prepare regulated designs, carry out building work, provide compliance declarations and conduct business as registered practitioners.

**Clause 81** confers a power on the Secretary to issue a stop work order for building work if the Secretary is of the opinion that the building work contravenes or is likely to contravene the proposed Act and the contravention could result in significant harm or loss to the public or occupiers or potential occupiers or significant damage to property. A stop work order may be conditional and can be in force for up to 12 months.



**Clause 82** enables an appeal to be made to the Land and Environment Court against a decision to make, revoke or amend a stop work order.

**Clause 83** enables the Land and Environment Court, on application by the Secretary, to make an order to remedy or restrain a breach of the proposed Act or the regulations under the proposed Act. An interim order may also be made.

**Clause 84** confers power on the Secretary (with or without a complaint having been made) to investigate practitioners and former practitioners, the preparation of regulated designs, the carrying out of building work or provision of compliance declarations or other matters that may constitute a breach of the proposed Act or regulations under the proposed Act. The Secretary may also audit a registered practitioner at any time.

## **Division 2      Offences**

**Clause 85** provides for proceedings under the proposed Act to be summary proceedings in the Local Court or the Land and Environment Court and limits the penalty that the Local Court may impose to a maximum of 1,000 penalty units. Proceedings for offences under the regulations are to be summary proceedings in the Local Court. The period within which proceedings for an offence must be taken is not later than 3 years after the offence is allegedly committed or, with the leave of the court, 2 years after evidence of the offence first came to the attention of an authorised officer.

**Clause 86** enables offences prescribed by the regulations as penalty notice offences to be dealt with by the issue of a penalty notice rather than through court proceedings.

**Clause 87** makes a director or person concerned in the management of a body corporate liable for an offence committed by the corporation if the director or person knowingly authorised or permitted the contravention constituting the offence.

**Clause 88** provides for the operation of continuing offences.

**Clause 89** makes it clear that the onus of proving that a person had a reasonable excuse for the purposes of an offence which provides for that exception lies on the defendant.

## **Part 8      Miscellaneous**

**Clause 90** requires the Secretary to maintain separate practitioner registers for design practitioners, principal design practitioners and building practitioners. The registers will contain registration particulars as well as details about disciplinary actions.

**Clause 91** enables the Secretary to issue warning notices about practitioners.

**Clause 92** sets out the manner in which documents may be given to persons for the purposes of the proposed Act.

**Clause 93** enables the Secretary to issue evidentiary certificates, for use in criminal or civil proceedings under the proposed Act, as to matters under the proposed Act.

**Clause 94** excludes the Secretary, an authorised officer or a person acting under the direction of the Secretary or an authorised officer from personal liability for a matter or thing done or omitted to be done in good faith for the purposes of the proposed Act.

**Clause 95** makes it an offence to disclose information obtained in connection with the administration or execution of the proposed Act, except in specified circumstances including in connection with the administration or execution of the proposed Act and with other lawful excuse.

**Clause 96** enables the Secretary to provide information to the Tribunal, a government sector agency or other persons or bodies prescribed by the regulations for the purpose of enabling or assisting the Secretary to exercise the Secretary's functions relating to the preparation of regulated designs, building work, practitioners, compliance declarations and other matters prescribed by the regulations. An information sharing arrangement may also be entered into with the Tribunal or one of those agencies, persons or bodies for sharing information that is reasonably necessary to assist the exercise of functions by the Secretary or another party to the arrangement.

**Clause 97** confers power on the Secretary to direct a person who issues insurance policies to registered practitioners to provide information about the policies. It will be an offence to fail to comply with a direction.

**Clause 98** enables the Secretary and the Minister to delegate their functions under the proposed Act to persons employed in the Department of Customer Service and other persons prescribed by the regulations.

**Clause 99** enables the Governor to make regulations for the purposes of the proposed Act.

**Clause 100** provides for fees payable under the proposed Act to be able to be recovered by the Secretary as a debt in a court of competent jurisdiction.

## **Schedule 1      Savings, transitional and other provisions**

**Schedule 1** contains savings, transitional and other provisions consequent on the enactment of the proposed Act.

## **Schedule 2      Amendment of Acts**

**Schedule 2** amends the Acts specified in the Schedule.