

Article Information

Authors: Tim Coleman, Tudor Filaret

Service: Construction Litigation, Projects, Infrastructure & Construction, Property & Development

Sector: Energy & Resources, Infrastructure, Real Estate

Managing risks for certifiers and design practitioners - the Design and Building Practitioners Act and Regulations 2021

The Design Building Practitioner Act 2020 and Regulations 2021 (NSW) (DBP Act) requires Registered Design Practitioners to provide Design Compliance Declarations. To ensure that there is personal accountability, these declarations can only be provided by individuals who are Registered Design Practitioners (Certifiers).

Certifiers are required to produce Design Compliance Declarations for Class 2 (residential) buildings. Prior to the DBP Act, the owners of residential buildings would make claims against builders - but could not make claims against designers, unless the owner contracted directly with the designer. Under the DBP Act, owners are now able to make claim directly against designers in tort (negligence).

In many cases it is difficult to ascertain whether the defect of which the owner complains of, is a result of poor workmanship or poor design. It is now likely that owners will bring proceedings that join the builder, the designer and the Certifier.

By acting as a Registered Design Practitioner and by providing a Design Compliance Declaration, Certifiers are exposed to the risk that they will be named as a Defendant in litigation which alleges that the design is not compliant with the Building Code of Australia (BCA) and that the certification provided by the Certifier is both incorrect and misleading.

Below, Tim Coleman (Partner) and Tudor Filaret (Lawyer) discuss how certifiers may effectively manage these risks.

How certifiers can manage the above risks

It is not unusual for certifier to require as a condition of providing certifications that they be afforded protection via a Certifier's Deed of Indemnity. The primary areas of risk relate to the scope of the indemnity given to the Certifier - including the types of claims, losses, damages and costs it should indemnify against, and the circumstances in which the Certifier should not be entitled to claim indemnity (**Disentitling Conduct**).

Claims that should be covered by the Deed

The claims that may be made as a result of a Certifier acting as a Registered Design Practitioner (including providing an incorrect Design Compliance Declaration) are not limited to claims made under the DBP Act. The failure to provide an accurate Design Compliance Certification may also give rise to a variety of other claims, including claims for common law misrepresentation and negligence, as well as both civil and criminal claims under various statutes including the Australian Consumer Law and the Crimes Act.

As a result, the "Claims" which the Certifier ought to be indemnified against needs to be broadly defined. By way of example, a broad definition of a "Claim" may read as follows:

"Claim" means a claim, action, proceeding or demand made against the person concerned, however it arises.

Warranties and standard of conduct

Some Deeds of Indemnity that the authors of this article have reviewed include a requirement that the Certifier comply with the requirements of the DBP Act. If this requirement is expressed in absolute terms and without qualification, then

any failure to comply with the DBP Act (including the failure to provide a correct Design Compliance Declaration) will mean that a Certifier would have breached their contract. The damages which the Certifier may be exposed to (that flow from those breaches) may be significant.

To remove the risk that the employer of a Certifier will bring an action against the Certifier for breach of contract, the obligations to comply with the requirement of the DBP Act should be expressed as a “best endeavours” obligation.

Disentitling conduct - exclusions to the obligation to indemnify

A Certifier will be exposed to claims where an allegation is made that the certification that they have been provided is incorrect. Unless a Certifier is provided with an indemnity against any liability and costs resulting from these claims, it is likely that an individual will not want to provide Design Compliance Declarations in their personal capacity.

Conversely, employers will not be willing to offer blanket indemnities to Certifiers and can fairly argue that they should not be required to indemnify where the claim has arisen as a result of the fraud or wilful misconduct of the Certifier. Equally, an employer can fairly argue that to the extent that the Certifier knowingly gave an incorrect Design Compliance Declaration (and the employer was not complicit), then the indemnity should not apply.

However, it is not arguable that a Certifier should be denied indemnity on the basis that the Design Compliance Declaration was negligently given or that it was misleading.

What costs should be covered by the Deeds

Certifiers will likely incur a range of costs if claims challenge the correctness of the Certifiers’ Design Compliance Certificate. These costs will include legal costs and other outlays incurred by Certifiers, as well as the Certifiers’ own labour costs expended in preparing a defence justifying the basis on which the Design Compliance Certificate was provided.

The Certifiers’ entitlement to claim these costs is discussed under the following sub headings

Reimbursement of legal and defence costs

Certifiers should be entitled to legal representation that is separate to that of their employers, and should be entitled to reimbursement of all legal costs that which Certifiers reasonably incur.

Employers will naturally be concerned as to the extent of the costs that might be incurred. However, there appears little that can be done to address this concern in a legitimate way - other than to agree to a capped amount prior to any claims being made and include in the Deed of Indemnity a panel of law firms (that are not conflicted) from which a Certifier can choose a firm to represent them.

Legal costs should be reimbursable on demand until a court finds the certifier is not entitled to be indemnified

When a claim is made against a Certifier, the employer may take the position that the Certifier is not entitled to be indemnified and is not entitled to have its legal costs paid on the basis that the Certifier had engaged in Disentitling Conduct.

To protect Certifiers against this risk, Certifiers should ensure that the deed requires the employer to pay all legal costs until such time that a Court finds that the Certifier is not entitled to be indemnified.

Ask if you have questions

The DBP Act and DBP Regulations have created significant liabilities for Certifiers following July 2021. We encourage building practitioners, Certifiers and designers who may have a question about the DBP Act to contact us.