

## Design & Building Practitioners Act Changes 2021 Members Forum

**Details:** Tuesday 25 May, 6pm, TTW

**Presenters:** Paul Moore, Vice-President ACSE NSW  
Simon Gray, State Manager NSW, Planned Cover insurance

**Attendees:** 60 members, representing 41 companies

### **Presentation and Questions – content overview:**

- The Act & Regulation
- Key Changes to current situation
- Duty of Care
- Design Compliance Certificates
- Lodgement of Regulated Design Drawings
- Transitional Arrangements
- Construction Sign Off
- Insurance Requirements
- Further Information

### **Presentation: Slides 3 - 11**

The new Act covers everything to do with Class 2 buildings, thus even minor works are caught by the Act.

The Key Changes are:

- Duty of Care (slide 3)
  - Biggest risk
  - Liability favors the owners of a building
  - No contract out
  - No caps or limits
- Registration of Design Practitioners & Engineers (slide 7)
  - Structural Engineers to be registered – applications are not open yet
  - Proof of “adequate” insurance is required
  - Note use of “Body Corporate” in the regulations means employer not strata

- Lodgement of Regulated Designs and Design Compliance Certificates (slides 8 - 11)
  - Probably a good thing as it will reduce the continual design changes during a build
  - Biggest concern is that it will delay the start of construction for builders
  - The lodgement procedures and processes will be bureaucratic and cause delays



**Duty of Care**

- The Act provides a Duty of Care liability on Architects, Engineers, Builders & suppliers in favour of the owners of a building
- The Duty of Care extends also to subsequent owners of the building, for a total period of 10 years.
- The Duty of Care cannot be contracted out of, and the Liability cannot be capped or limited.

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**Registered Design Practitioner**

- Structural Engineers will need to be registered as a Registered Engineer and a Registered Design Practitioner in order to lodge Regulated Designs and to provide Design Compliance Statements
- Applications for registration can be made after 1<sup>st</sup> July
- Proof of ‘adequate insurance’ is required in support of applications

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### Lodgement of Design Compliance Certificates

- Design Compliance Certificates and Regulated Designs will need to be lodged on the Govt Portal.
- A PCA will not be able to issue CC until ALL designs have been completed and lodged
- This includes, for example, PT details, concrete set out plans

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### Design Compliance Declarations

- The Guidelines provide full details of what has to be lodged, including drawing details, scales to be adopted, even the Title Block to be used

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### Lodgement of Design Compliance Certificates

- Design Compliance Certificates and Regulated Designs will need to be lodged on the Govt Portal.
- A PCA will not be able to issue CC until ALL Regulated designs have been completed and lodged
- The Regulated Design must be essentially complete. This includes, for example, PT details, concrete set out plans

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### Lodgement of Design Compliance Certificates

- Lodgement before Building Work Commences
- Lodgement after Building work commences (Issued no later than 1 day after commencing variation works)
- Lodgement before Issue of Occupational Certificate (As-builts)

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### Questions / Discussion Points from the floor:

*Q: Who will 'police' it, who will note any changes that have occurred?*

*Q: What level of detail is required in the lodgements?*

No-one knows yet. Seems it is the commissioner's interpretation. The Act says "ANY changes to regulated design elements.

*Q: If supplementing one "equivalent" to another is that ok?*

If the change is made to the design intent, it should be lodged but not every detail. However, who is willing to interpret this and take the risk??

Noted: many voiced opinions that this doesn't fix the root cause of issues

*Q: What is the process once a change is submitted?*

Just a date stamp of the lodgement.

Comment: Lodgement talks about schedule of changes and "as builts" from original regulated design. It is an opportunity to lodge minor changes.

*Q: What is the timeframe for lodging variations?*

No later than 1 day / 24hrs after building commences.

*Q: How do you alter existing buildings?*

It is unclear how you can comply if you are changing an existing building

Comment: Builders change ideas frequently, hopefully this process will reduce frivolous changes

*Q: If there is an error in the registered design how is it addressed? Errors can get replicated in amended designs.*

There is no allowance for checking designs or for third party review.  
A form is filled in that is very broad, a tick box form.

Comment: Is there assessment of increased costs for builders?

*Q: Are "as built" discretionary?*

The Act implies minor changes can be picked up – but caution for engineers

Comment: Is all this extra work actually going to achieve anything?

*Q: Can we feedback to the commission? And how?*

ACSE sub-committee have already provided feedback but not taken up. ACSE Board & members to decide what to do next.

*Q: When doing major repairs, do the rules still apply?*

If it is still part of the building consider making changes vs upgrading or repairing... Yes still have to comply note the "total responsibility clause" – if you touch an element of a building you become responsible for the whole building.

Comment: Are we heading towards the Victorian model?

Comment: Currently the regs are for Class 2 or multi-use including class 2 but we can expect the regs to extend to other building classes.

*Q: If there are changes what affect will it have on builders allowing for time it will take to finalise and lodge changes?*

This is a significant benefit – design will need to be completed before starting which will reduce risk.

Comment: Developers will dump responsibility on to the contractor.

Comment: It might happen earlier & it will change timings of projects.

*Q: What is the impact on builders? Where are they responsible / liable?*

They have to sign off.

But questionable re duty of care. Will they try to rely on Engineers and defer to us?

### **Presentation: slides 12 & 13**

- Record Keeping
- Requirements of Building Practitioners

### Record Keeping

- Requirements around record keeping
- Records maintained for 10 years
- Penalties apply for failure to comply.

### Requirements of Building Practitioner

- Must provide a Building Compliance Declaration in relation to the Building work
- May appoint a principal design practitioner to complete building works and provide a declaration as to the matters to which the declaration relates.
- Leads to Construction Monitoring (Inspection Certificates)

### Questions / Discussion Points from the floor:

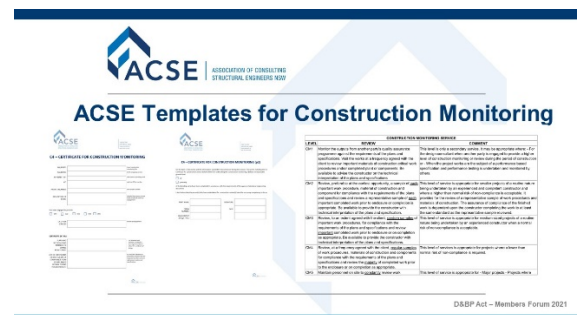
*Q: Great that builders must declare their work but there is a risk that they defer to / rely on engineers so what is our responsibility.*

Building certifiers are requirements – they will rely on our statement of compliance of the build and design.

Comment: We need to specify what builder needs to do before you go to site

### Presentation: slides 14

- ACSE template certificates for construction monitoring
  - There are gaps in monitoring
  - Standard Monitoring service standards can influence fee structures
  - ACSE want to promote agreed level across the industry & solidarity on fees
  - Set up agreements at the outset
  - Certificates are based on NZ model
- All invited to give feedback on the certificates



Comment: You cannot contract out of 'Duty of Care'

Response: Building contractors need certificates and will need to help us specify what evidence we need.

Comment: Reduced level of monitoring is more risky

Comment: Structural Engineers sign off has fewer caveats

Comment: If we use the ACSE certificates at the outset then we can be consistent with each other to set an even playing field.

Comment: Structural Engineers will need to be Project Managers. And because of the increases to P.I insurance we all need to include 5% fee on proposals to cover the additional services.

### Presentation: slides 15

- Transitional Arrangements

### Presentation: slides 16 – 18

- Insurance Requirements

- Reference a more detailed presentation by Planned Cover with Lander & Rogers: <https://vimeo.com/509112302>
- Duty of Care is already law
- Design compliance is important
- Make sure you look carefully for Act exclusions when updating or renewing your policies

The image shows four presentation slides arranged in a 2x2 grid. Each slide features the ACSE logo (Association of Consulting Structural Engineers Ltd) and the Planned Cover logo (Policy Professionals). The slides are titled as follows:

- Top Left: Transitional Arrangements**
  - Any applications to become registered received in the 6 months after 1st July will be 'deemed to be accepted'
  - Two-year grace period to demonstrate 'adequate insurance'
- Top Right: Insurance Requirements**
  - Different issues to consider under the Act and Regulations
    - Duty of Care
    - Design Compliance Declaration
    - Registration
  - Professional indemnity policies (usually) cover "Civil Liability"
    - Note D&BP Act exclusions
- Bottom Left: Insurance Requirements**
  - Design Compliance Declarations - are you covered?
  - Good question!
  - Before we consider exclusions we need to consider the insurance clause.
  - Do you have the professional expertise to sign off on the single or regulated design?
  - Who within your firm has the skill and experience to sign-off?
- Bottom Right: Insurance Requirements – Questions**
  - How much is "adequate" insurance?
  - Are employees "covered"?
  - Tender pricing - How do you tender for work given the new obligations on "front end" design under the Act and Regulations? Caveats/disclaimers in fee proposal.

*Q: How will we deal with the 10yr retrospective 'duty of care'?*

Theoretically we are all covered, but unclear if claims can be made.

Annual renewals might impose exclusions after July 1<sup>st</sup>. Watch out for them.

In older jobs, if a problem arises tomorrow your current policy needs to cover previous jobs. You didn't used to be liable for past things but now you are.

The Insurance Council is lobbying Government on this.

*Comment: We are a small company, and we couldn't get \$10 million cover. Our brokers asked 35 insurers. The cost was 4 times higher and have to get 2 x \$5mil cover.*

*Responses:*

There could be a real crisis and problems with claims from the structural engineering sector. It is already a bad PI market because of exposure due to the climate crisis. Insurers needs to reduce their exposure to risk.

Its common that clients need 3 different insurers to get to \$20 mil cover.

These regulations are likely to expand to other building types so we all need to get ready and figure out how to get 'adequate insurance'!

*Comment: Class 1 is excluded, but regulations are likely to expand to Class 1 buildings. We are required to declare insurance in order to get registered, but if insurers have exclusions how can we get registered?*

Insurers will ask 'can you lodge changes? Are you experienced enough to complete the declaration? Can you sign off the work?

Need to consider how much checking should a director who is signing off actually do?

Note – our regs are not as rigorous as Qld because they are not Statutory Declarations and can be signed by “competent persons”.

*Q: How much is “adequate” insurance?*

Obligation is on the policy holder to determine if it is adequate cover. Government wants \$10mil.  
You need file notes of your considerations to prove that you assessed “adequate cover”.

Comment: If there is a claim on a big project, the insurers will go after everyone on the project – the Structural Engineer, the Architect, and the Builder.

Comment: regarding setting “adequate” insurance levels, there is a project at Engineers Australia about trying to set and cap levels (similar to standards agreed by doctors and lawyers) so that we have a limitation of liability. Needs a united force to make this happen.

Comment about Mascot Towers and the size of the liability.

Important to know your proportional liability

Clauses in contracts are problematic

The new Act specifies no limitation on liability.

It is designed to get builders more involved.

The Act refers to ‘Employers’ as ‘body corporate’. Note that individuals should be indemnified by their employer as long as the company has PI insurance – there are risks for the employee if relying on company cover.

*Q: What will the ‘digital imprint’ be of an individual once registered e.g if you change company or change to another profession?*

The Act implies the every employee could be liable for sign off years later.

There is no clear answer to the length or size of fines and whether liability would be a criminal fine, civil fine or management liability.

*Q: What is the liability period?*

You can be sued in the future for issues not yet known or seen that might appear in 5 – 10 years’ time. It is not clear but there is a generally accepted concept of 10 yrs, because the Environment Act refers to 10 years (although with Mascot Towers the cracks were more than 10 yrs later.

*Q: How does a premium pricing work?*

You need succession planning for past exposure

*Q: When taking on a new employee do you need to take on their previous 10yrs work?*

Potentially that could be the case.

BCA’s sign off as individuals

Liability carries with the individual to the new company but it is unclear how that could play out. Could also be interpreted that it should stay with the “body corporate”/employer.

*Q: Once designs are done and uploaded what is the incentive/reason to be the inspector?*

Engineers could just price out of that part. Don’t certify at the end.

*Q: How do you price for this?*

It is a challenge for our industry

ACSE could try to facilitate a coherent conversation about pricing for the same job.

It is important that we are pricing in for the additional risk, the extra time for producing statements and lodging them.

Maybe there will be an independent body with cost for additional designs and insurance fees.

Need to specify on-costs and risks

Comment: Historically ACSE is a united group against builders and architects

*Q: Will ACSE make a public statement about the impact of compliance costs on the profession?*

Currently ACSE is raising awareness

We need feedback and a consultation process to make a formal response.