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RECOGNISED ENGINEERS – LIABILITY CONSIDERATIONS

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Disclaimer – this is general commentary on the possible issues a Recognised Engineer may face in carrying out their duties. It is not specific legal advice and should not be relied upon. You should seek advice from your own legal advisor.

Following discussions with dam safety engineers about the new regulations, Engineering New Zealand sought legal advice regarding the potential liability of Recognised Engineers (Dam Safety). This is a summary of the advice received.

Background

The Government introduced the [Building \(Dam Safety\) Regulations 2022](#) to give operative effect to the post-construction dam safety provisions in the Building Act 2004. The Regulations come into force in May 2024. The Regulations establish the role of Recognised Engineers. A Recognised Engineer is an engineer who is both a Chartered Professional Engineer and has been assessed by [Engineering New Zealand](#), as the Registration Authority for Chartered Professional Engineers, as having the requisite qualifications and competencies to perform this role. Recognised Engineers will have the role of auditing and certifying Potential Impact Classifications (PICs), Dam Safety Assurance Programmes (DSAPs), and annual Dam Compliance Certificates (DCCs). A Recognised Engineer also has a responsibility under section 135A of the Building Act 2004 to notify the regional authority and the dam owner if they believe a dam is dangerous.

Liability

It is expected that the key legal liability for Recognised Engineers will arise in contract and/or negligence.

Contract

A Recognised Engineer would probably be engaged by a dam owner under some form of contract to provide audit/certification services. The engineer could be liable for a breach of contract if they fail to properly perform those services. The dam owner would need to establish a breach of contract causing reasonably foreseeable loss.

Liability can usually be limited by the terms of the contract under which the engineer is engaged. There would be good reasons for limiting liability in the contract, including any liability in tort for liability owed by the dam owner to third parties.

Consideration could be given to drafting standard terms and conditions for Recognised Engineers to apply in this context. However, after speaking to industry representatives, we do not believe this is necessary. Larger firms already have their own contractual templates and standards. Smaller firms and sole practitioners tend to use the standard Short Form Agreement for Consultant Engagement which already addresses liability.

Negligence

The greatest liability risk for Recognised Engineers is probably in negligence. It is likely that a duty of care is owed by the Recognised Engineer to exercise reasonable skill and care in their work. It is likely a Court would find this duty of care is owed to third parties and the type of damage likely caused by a dam failure would be reasonably foreseeable. The key question would be whether the Recognised Engineer breached this duty of care. The test for negligence would be whether a reasonable recognised engineer, with the relevant expertise, would have carried out the audit / certification in the manner which they did. Avoiding any breach of the expected standard of care will be the greatest protection against liability.

Evidence of expected professional standards in performing the Recognised Engineer's task would likely be significant in determining the standard to be applied and whether there has been any breach.

Engineering New Zealand could explore whether or not it would be helpful to develop additional guidance about expected standards or practice when carrying out these tasks. However, we believe this is probably unnecessary. We consider there is already sufficient guidance from NZSOLD (the New Zealand Society on Large Dams) by way of its NZSOLD Dam Safety Guidelines and Engineering New Zealand (Recognised Engineer (Dam Safety) Assessment Guidance and Knowledge Base) about expected standards of practice.

Scope of liability

Notwithstanding the potential for liability in negligence, in reality this risk could be relatively low or limited in scope for a number of reasons.

- The nature of the role is primarily an auditing and desktop exercise based on assessment of documentation. The risk of an engineer acting negligently should be relatively low provided procedures are carefully considered against regulatory requirements.
- Causation is necessary to establish liability for loss. Even if an audit/certification was conducted negligently, it might not be the actual cause of a dam failure.
- Even if causation was established, there would likely be some contributory negligence on the part of the dam owner or designer or another consultant.

Statutory Duty

The single statutory obligation that falls on a Recognised Engineer (section 135A of the Building Act 2004) is to inform the regional authority and the dam owner if the Recognised Engineer who is engaged to provide a certificate for a PIC, DSAP, or DCC becomes aware that a dam may be dangerous. The Act however expressly provides that an engineer is not required to act outside the terms of their engagement by investigating whether or not the dam is dangerous and a breach of the duty to notify does not give rise to any civil liability in damages (section 135A(3)).

Other risks

In addition to the legal liability outlined above, there are also potential risks to the Recognised Engineer in terms of reputation, possible disciplinary action by Engineering New Zealand, and possible public inquiries. A Recognised Engineer is a chartered professional engineer so must act in accordance with the Code of Ethical Conduct which includes obligations to act competently, behave appropriately, take reasonable steps to safeguard health and safety, and report adverse consequences.

Conflicts of Interest

Section 149 of the Building Act 2004 requires the Recognised Engineer must have no financial interest in the dam concerned. However, the Act expressly provides that a financial interest does not include involvement in the design or construction of the dam. Accordingly, it appears that in drafting the legislation, MBIE has determined that a Recognised Engineer can certify a PIC or DSAP for a dam they were involved in designing or constructing. This is probably recognition of the relatively small number of practitioners in this field. The Act expressly allows a Recognised Engineer to both prepare and audit a DSAP.

The Code of Ethical Conduct which applies to Recognised Engineers as chartered professional engineers requires engineers to disclose and appropriately manage conflicts of interest (rule 42F(a)(iii) of the Chartered Professional Engineers of New Zealand (No 2) Rules 2002). The Code doesn't require engineers to refuse to act where they may have a conflict of interest. Rather, it requires that they disclose the conflict and take action to appropriately manage it.

Engineering New Zealand is developing guidance to assist Recognised Engineers with this issue. This guidance will be made available on Engineering New Zealand's website.

Contact

If you have any general questions, please contact hello@engineeringnz.org. If you have specific questions about your own liability, you should seek advice from your own legal advisor.



**engineering
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Engineering New Zealand Te Ao Rangahau

hello@engineeringnz.org

www.engineeringnz.org

04 473 9444

L6, 40 Taranaki Street

Wellington 6011