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By email:

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Re: Proposed Amendments (c2020-003Q GOVT)
Design and Building Practitioners Bill 2019

Dear Kevin, Gavin and Harriet

Thank you for the opportunity to discuss the *Design and Building Practitioners Bill 2019*. The Australian Institute of Architects (the Institute) believes the Bill is a positive first step towards rectifying issues around the quality and safety of complex buildings. The Institute has been impressed with high level of engagement of all members of the NSW Parliament on the development of this important legislation.

We are pleased to see that a number of our previous concerns have been addressed through the current proposed amendments due to be considered. Of particular note is the proposed amendment to Clause 24 to ensure variations are holistic. This is a wonderful result. Quality, and by default safety, must be re-embedded into the value system of the design and construction process. Ensuring that that all variations to approved designs are certified holistically and retrospectively for the entire development will play a significant role in ensuring this occurs.

However, a number of our previously voiced concerns with the Bill remain unaddressed in the proposed amendments. Of particular concern is that builders and designers covered by the Bill are not treated equally or with the same level of obligation. The Bill imposes significantly different standards of accountability between design practitioners and building practitioners, which is inequitable given that both have substantial responsibilities.

The Bill requires that a registered principal design practitioner must “ensure” that design compliance declarations are given as required and are issued by registered practitioners. This places a strict liability on the principal design practitioner. The building practitioner is not held to the same standard of accountability and is only required to “take reasonable steps to ensure” compliance with declaration obligations.

The arguments outlined by the government for maintaining this inequity in the current proposed amendments are as follows:

> *Under the Bill, the obligations on design practitioners and building practitioners are not like-for-like. Design practitioners are required to provide declarations for desktop-based designs, largely on behalf of themselves or a design team.*

By comparison, building practitioners (largely defined as 'principal contractors' under the Bill) will be required to sign off on the building work of contractors and subcontractors, which may be upwards of 50 individuals per development site.

It is fair to provide a 'reasonable steps' test when determining whether a building practitioner has fulfilled their obligations; this is because it would be practically impossible for a building practitioner to guarantee with certainty that the work of all of their contractors and subcontractors on an entire development site has met the required obligations set out by the Bill.

The Institute is unable to support this argument. In the same way that building practitioners rely on contractors and sub-contractors in order to fulfill their obligations, design practitioners are reliant on suppliers, product manuals, numerous sub-consultants, and for the specification of thousands of building components (these come from 100's of suppliers).

The design practitioner relies on documentation by suppliers and sub-consultants and this is no different to the building practitioner relying on subcontractors and suppliers. If it is appropriate to provide a 'reasonable steps' test when determining whether a building practitioner has fulfilled their obligations; this should also apply to the design practitioner. This is because it would be practically impossible for both a building practitioner or a design practitioner to guarantee with certainty that the work for an entire development site has met the required obligations set out by the Bill.

Given that the obligations in the Bill come with penalties for non-compliance it is critically important that levels of accountability are the same for each type of practitioner. This way the burden falls equally on those undertaking the work.

The duty of care for an architect is illustrated in several cases outlined below, and all of which look at the issue of reasonableness and do not impose strict liability.

In the case of *Owners Corp vs Lu Simon Builders (2019)* (the Lacrosse judgment) provides an example of liability for specifications. The architect's "T2 Specification" is referred to throughout the judgment and is the specification that specifies that the cladding must be a product "indicative to Alucobond". VCAT found this aspect of the T2 Specification breached the architect's duty of care. There are many other factors behind the court's liability findings, but this is a key one. The architect was in breach of duty because a reasonable architect would have known about the need for cladding systems to be non-combustible, and therefore would not have specified "indicative to Alucobond"

Another case is *Robt Jones v First Abbott Holdings* [1999]. This was one of those cases from 1980s buildings where glass façade panels would spontaneously shatter due to nickel sulphide impurities. The main allegation against the architect was that they should have specified heat soaking for the glass – this causes the weak glass panels to shatter before installation. The court ultimately found the architect not liable, because at the time of specification (1986) reasonable architects did not know about this risk or the need for heat soaking. Instead, architects were reliant on the manufacturer and trade sub-contractor for advice about the performance of products. The architects had been involved in discussions with the head contractor, curtain wall fabricator and manufacturer about selection of the glass, and none of those parties had mentioned the nickel sulphide issue. The court ultimate found that the architect did not breach their duty, because they did use reasonable care, even if their specification turned out to be deficient because of factors that reasonable architects did not know about. The case illustrates that the law only requires architects to use reasonable care to specify appropriate products, not to warrant every product they specify, because they are reliant on expertise from builders, trades, manufacturers etc.

These two cases illustrate why the right standard for architects specifying products is *reasonable care* or *reasonable steps,* not an unqualified obligation of compliance.

A third example that illustrates risk and liability of engaging sub-consultants is *Mitchell, Giurgola & Thorp Architects v Borkenhagen Forbes & Assoc* [1999]. The design of parliament house included woollen tapestries. The specification did not call for insect-proofing of the tapestries because in Australia this would be done automatically. After tender, the fabric ended up being manufactured in Europe, where insect-

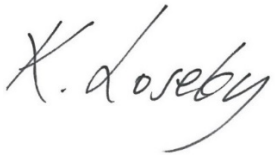
proofing is not done unless called for specifically. Moths damaged the tapestries. The architect paid $300,000 to its client. This case is the architect seeking to recover that $300,000 from its sub-consultant (a fabric specialist). Ultimately the fabric specialist is found not liable (solely because they advised only on the tender specifications, at which point the plan was for Australian manufacture), so the architect ends up liable for the $300,000 damages.

The Institute is keen to support reform aimed at rebuilding consumer confidence in the NSW building and construction industry, for this reason we are asking you to support amending the Bill to require both building and design practitioners to "take reasonable steps to ensure" as outlined above.

With the enacted Bill and these amendments, the consumer will have a robust system, managed by appropriately qualified and regulated building practitioners, giving confidence that the finished building meets the Building Code of Australia and relevant standards.

The Institute looks forward to continuing to work constructively with the NSW government on this important issue.

Yours faithfully



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