



Australian
Institute of
Architects

DESIGN AND BUILDING PRACTITIONERS REGULATION 2020



Stakeholder Feedback (Submission 2)
NSW Department of Customer Service

NEW SOUTH WALES CHAPTER

Submission date: 14 January 2021

ABOUT THE INSTITUTE

The Australian Institute of Architects (the Institute) is the peak body for the architectural profession in Australia. It is an independent, national member organisation with around 12,000 members across Australia and overseas. More than 3,000 of these are based in NSW.

The Institute exists to advance the interests of members, their professional standards and contemporary practice, and expand and advocate the value of architects and architecture to the sustainable growth of our communities, economy and culture.

The Institute actively works to maintain and improve the quality of our built environment by promoting better, responsible and environmental design.

PURPOSE

This submission is made by the Australian Institute of Architects' NSW Chapter (the Institute) in response to the consultation led by the NSW Department of Customer Service on the draft Design and Building Practitioners Regulation 2020.

At the time of this submission the NSW Chapter President is Kathlyn Loseby, the NSW State Manager is Kate Concannon and the NSW Policy and Advocacy Manager is Lisa King.

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1 FEEDBACK: REGULATORY IMPACT STATEMENT (RIS)

1.1 Compliance Declaration Scheme: practitioner requirements (page 38)

Question 21: Do you support the matters covered in the Design Compliance Declaration? Why or why not?

The Institute supports the current matters covered in the Design Compliance Declaration and believes it will assist registered design practitioners to ensure that designs are compliant with the National Construction Code (NCC), Building Code of Australia (BCA) and Australian Standards as well as being harmonised and holistically designed.

Question 22: Do you consider any other matters should be included in the Design Compliance Declaration?

The Institute strongly supports the attachment of a 'Compliance Matrix' (see Appendix 1) to the Design Compliance Declaration. This matrix sets out the relevant NCC/BCA and Australian Standards for the design addressed in a clear and concise manner cross-referenced with the drawing or document number.

No additional matters other than the Compliance Matrix should be routinely included. However, if specialist advice was sought and had a material influence on the preparation of the registered design it would be appropriate to consider including the details of the person who provided the specialist advice so that - if needed - they could be easily identified to assist in interpreting the design during construction.

Recommendation 1 →	The Institute strongly supports the attachment of a 'Compliance Matrix' to the Design Compliance Declaration.
Recommendation 2 →	If applicable the contact details of professionals who provided specialist advice to enable the preparation of a Design Compliance Declaration should be included in the declaration.

1.2 Insurance (page 51)

Question 29: Do you support the approach proposed for insurance requirements for Design Practitioners and Professional Engineers? Why or why not?

A key area of concern for the Institute is the potential for PI Insurance to be withdrawn from the market for design professionals along with the ability allowed by the *Design and Building Practitioners Act 2020* and Regulations to contract out of proportionate liability as outlined in Recommendation 5 below. There are also some concerns about the introduction of retrospective cover, noting that it is likely that this may simply bring forward liabilities that consultants were always going to be exposed to.

Additional feedback provided to the Institute has been that firms (particularly sole traders) are rarely provided with meaningful choices when sourcing or renewing their insurance products. The requirement to obtain insurance cover, alongside onerous contract provisions including contracting out of proportionate liability, are leading to a conflict between the aims of the Act and Regulations and commercial reality. There is a real risk that unless resolved these issues will significantly impact on the ability of building and design professionals to operate in the Class 2 market with 'adequate' insurance. The Institute also believes that there is uncertainty in the Regulations about what constitutes 'adequate' insurance including the scope of cover, amount of cover etc.

The Institute recommends that the department take the time required to fully investigate and test the likely effect of the insurance requirements of the *Design and Building Practitioners Act 2020* and Regulations on the building and construction industry before finalising the insurance provisions.

Recommendation 3 →	Additional consultation with the insurance industry must be undertaken before finalising the insurance provisions of the Regulations.
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Question 30: Do you consider additional insurance requirements should be prescribed for Design Practitioners and Professional Engineers? If so, what?

Architects are already regulated in NSW under the *Architects Act 2003*. All Australian Architects are insured and are required to have ongoing registration with state and territory bodies, following five years of tertiary education, years of practical experience and the completion of log books before passing a registration exam and undertaking an interview.

The Institute believes that the insurance requirements in order to maintain registration under the *Architects Act 2003* are sufficient and additional insurance requirements are not needed.

Recommendation 4 →	For Architects, the insurance requirements in order to maintain registration under the <i>Architects Act 2003</i> are sufficient and additional insurance requirements do not need to be prescribed.
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Question 31: Do you support the proposed transitional arrangements that exempt Building Practitioners from being insured for issuing Building Compliance Declarations? Why or why not?

As a distinct profession, Architects can and do offer services that directly impact on public health and safety issues and quality issues affecting buildings. The Institute's Code of Conduct expects Architects to 'improve standards of health and safety for the protection and welfare of all members of the community.' This is an important distinction, beyond the basics of safety, and it is not just to serve interests of the client, the developer or the financial institution, but everyone.

Architects have long had mandatory registration with mandatory insurance requirements and adherence to a Code of Professional Conduct while the bulk of the building and construction industry has operated in an unregulated environment. It is imperative that the NSW government delivers reform that ensures that all building and design practitioners are held accountable for their actions in equal part. This means it is essential that the Regulations ensure that no contract or agreement can be made or entered into or amended to exclude the proportionate liability provisions of the *Civil Liability Act 2002* and additionally that an insurance free period must not be provided to any practitioner.

It is critically important that the consideration of any insurance issue must consider the impact of Building Practitioners having an insurance-free period, which when combined with provisions that allow the contracting out of proportionate liability means that design professionals may be liable as a consequence of uninsured building practitioners. This is

unreasonable and further increases the likelihood that PI Insurance will be withdrawn from the market for design professionals. Please see page 4 for a longer discussion around the application and impact of applying the *Civil Liability Act 2002*.

Recommendation 5 →	The Regulations must ensure that no contract or agreement can be made or entered into or amended to exclude the proportionate liability provisions of the <i>Civil Liability Act 2002</i>.
Recommendation 6 →	An insurance free period must not be provided to any practitioner under the Regulations.

2 FEEDBACK: PROPOSED DESIGN AND BUILDING PRACTITIONERS REGULATION 2020

Overview comments - Principal Design Practitioner and PI Insurance

The Design and Building Practitioners Regulation 2020 are currently designed to make the position of Principal Design Practitioner a collector of declarations. This is, in effect, mirroring the same role Certifiers have had, simply to collect certifications. The result has been no role for Certifiers to oversee construction to ensure compliance and quality. This risk, of certifying without co-ordination, is now reflected in the insurance market where insurance for Certifiers became unaffordable before being withdrawn from the market.

The insurance industry has pulled out of PI for Certifiers and insurance to other parts of the construction industry, it is therefore likely that this will occur for Architects who take on the Principal Design Practitioner role under the *Design and Building Practitioners Act 2020* and associated Regulations.

The Institute is therefore very concerned that a potential unintended consequence of the Design and Building Practitioners Regulation 2020 and the failure to adequately prescribe the qualifications and role of the Principal Design Practitioners is that they will be unable to obtain PI insurance. Architects already have PI insurance and if the role of the Principal Design Practitioner is appropriately expanded to the co-ordination of prescribed building work, which is currently within the definition of architectural services, this situation should simply continue.

The Institute believes that the Principal Design Practitioner must be a person qualified, at a minimum, at AQF Level 9 who:

- a. coordinates prescribed building work, and/or
- b. coordinates the provision of design compliance declarations for the purposes of building work done by a building practitioner.

For large and complex projects, continuous oversight and quality assurance is required throughout the design and construction stages, to mitigate errors and manage risk. Without quality controls in the building process, government and industry cannot restore public confidence in the building system to prevent building failures.

It is therefore essential that the Design and Building Practitioners Regulation 2020 be used to specify which high-risk buildings must have a Principal Design Practitioner. This would ensure both continuous oversight and quality assurance on large projects, while defining the role of Principal Design Practitioner to include the co-ordination of prescribed building work, which would substantially mitigate the risk that PI insurance may be withdrawn from the market for Architects.

Recommendation 7 →	The Design and Building Practitioners Regulation 2020 should specify which high-risk buildings must have a Principal Design Practitioner.
Recommendation 8 →	The definition of the role of the Principal Design Practitioner must be expanded to include the coordination of prescribed building work.

Overview comments - Contracting out of proportionate liability

The Institute would like to again take this opportunity to comment that it is essential that the Regulations ensure there can be no contracting out of proportionate liability on the principle that all building practitioners should be held accountable for their actions in equal part.

The *Design and Building Practitioners Act 2020* makes it clear that it is not permissible to (attempt to) contract out of duty of care provisions and that these obligations and duties are in addition to those otherwise held under the *Home Building Act 1989 (NSW)* and at common law. The overriding principle is that, where there are multiple wrongdoers, the Court should seek to apportion to those wrongdoers a specific percentage of liability rather than a joint and several liability for the whole of the loss.

While the *Design and Building Practitioners Act 2020* does state 'no contracting out of Part', the Act also refers specifically to the *NSW Civil Liabilities Act 2002* which does allow for this to occur. The Institute is expressly concerned about this issue for the following reasons:

- Contractors will use the provision along with consultants to ensure that there is no proportionate liability – rather joint and several liability will apply.
- This will exacerbate the 'deep pocket syndrome', where those holding PI insurance will be potentially responsible for paying ALL costs, regardless of their professional capabilities, risk minimisation, contribution to the situation and quality management processes to ensure appropriate outcomes.
- The insurance industry will either price for this, making insurance unaffordable, or will not make PI insurance available.
- The present situation where the insurance industry has pulled out of PI for Certifiers and insurance to other parts of the construction industry, is therefore likely.
- Legislative harmonisation is not possible when Queensland, for example, does not allow contracting out of their *Civil Liabilities Act 2002*.
- Exempting Building Practitioners from mandatory insurance during a transitional period will exacerbate this situation. In a situation where an uninsured Building Practitioner is wholly responsible for costly rectifications, and without access to

proportionate liability, the Design Practitioners will be unfairly required to pay through their insurance.

Allowing parties who have a duty of care under the *Design and Building Practitioners Act 2020* to contract out of proportionate liability may seem to be in the interests of the end-user as it would allow them to recover all of their losses from any one party found to bear any (small) measure of liability.

However, the opposite is actually the case as insurers would be reluctant to provide cover as proportionate liability legislation means that defendants with deep pockets – typically, insured professionals – bare the entirety of a plaintiff’s loss despite being responsible for only a small part of that loss.

Registration and licensing schemes require proof of PI insurance. Although practitioners must be insured, this insurance is becoming increasingly unavailable and insurers are, simply, withdrawing from the space. The department is assuming that practitioners can find insurers willing to provide insurance on reasonable commercial terms.

In these circumstances, the Institute believes that liability for practitioners should be limited as contemplated in Part 4 of the *Civil Liability Act 2002 (NSW)*. A failure to provide for this may well see the application of the legislation and Regulations fail, as well as the building and construction reform agenda for want of insured practitioners.

As outlined in Recommendation 5 above, the Regulations must ensure that no contract or agreement can be made or entered into or amended to exclude the proportionate liability provisions of the *Civil Liability Act 2002*.

Topic 5: Part 6 – Insurance

Insurance for design and principal design practitioners, professional engineers, building practitioners and adequacy of cover

The Institute believes that the insurance requirements in order to maintain registration under the *Architects Act 2003* are sufficient and additional insurance requirements are not needed as outlined above at Recommendation 4.

Topic 7: Part 8 – Miscellaneous

Authorised and penalty notice officers, exchange of information, transitional arrangements for insurance for building practitioners and qualifications for fire system designers and work done under existing arrangements.

The consideration of any insurance issue must consider the impact of Building Practitioners having an insurance-free period, which when combined with provisions that allow the contracting out of proportionate liability means that design professionals may be liable for uninsured building practitioners. This is unreasonable and further increases the likelihood that PI Insurance will be withdrawn from the market for design professionals.

As outlined in Recommendation 6 above, an insurance free period must not be provided to any practitioner under the Regulations. It is imperative that the NSW government deliver reform that ensures that all building and design practitioners are held accountable for their actions in equal part.

Topic 13: Schedule 6 – Forms

Design Compliance Declaration

As outlined above at Question 21 and 22 the Institute supports the matters currently covered in the Design Compliance Declaration

The Institute also strongly supports the attachment of a 'Compliance Matrix' (see Appendix 1) to the Design Compliance Declaration. This matrix sets out the relevant NCC/BCA and Australian Standards for the design addressed in a clear and concise manner cross-referenced with the drawing or document number.

No additional matters other than the Compliance Matrix should be routinely included.

However, as outlined in Recommendation 2, if specialist advice was sought and had a material influence on the preparation of the registered design it would be appropriate to consider including the details of the person who provided the specialist advice so that - if needed - they could be identified to assist in interpreting the design during construction.

3 APPENDIX 1: COMPLIANCE MATRIX

