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13 November 2019

Design and Building Practitioners Bill 2019

The Australian Institute of Architects (the Institute) is the peak body for the architectural profession in Australia, representing around 12,000 members, with 3200 members residing in New South Wales (NSW). The Institute works to improve our built environment by promoting quality, responsible, sustainable design.

The introduction into NSW Parliament of the *Design and Building Practitioners Bill 2019,* which will shortly be considered by the Legislative Council, is a positive first step towards rectifying issues around the quality and safety of complex buildings.

The Institute has largely welcomed the introduction of the legislation. Never before has there been such a groundswell of both popular and industry support for better regulation and we would urge the NSW Government to maximise this unique opportunity to drive lasting change. The sooner the reform agenda can be finalised and bedded down, the better for the NSW economy, construction industry and most importantly consumers.

The Institute has engaged closely with Government, regulators, the new Building Commissioner and significant other stakeholder engagement groups. We are encouraged to see the NSW Government making changes in response to the nationally endorsed recommendations of the Shergold-Weir Building Confidence report. However, despite engaging heavily in the public consultations related to the development of the current Bill, some concerns remain, and are outlined in detail at Attachment A.

The Institute is concerned practitioners covered by the Bill are not treated equally or with the same level of obligation. In addition, the application of the *Civil Liabilities Act 2002* allows for contracting out of proportionate liability, this undermines fairness and accountability for all practitioners, will lessen availability of Professional Indemnity insurance and ultimately impact consumer protection.

The Institute is extremely keen to support reform aimed at rebuilding consumer confidence in the NSW building and construction industry, for this reason we are asking you to seriously consider amending the Bill as outlined. 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 working with the NSW government on this important issue.

Yours faithfully

K. Loseby

Kathlyn Loseby
President NSW Chapter
Australian Institute of Architects

Australian Institute of Architects

Attachment A: Proposed Amendments

Design and Building Practitioners Bill 2019

1. Proposed amendment to clause 12 - Compliance declarations by registered principal design practitioners

Clause 12 (1) - insert the words “take reasonable steps to” before the word “ensure” in the first line.

The current Bill imposes significantly different standards of accountability between design practitioners and building practitioners, which is inequitable. Both have substantial responsibilities and should be treated equally under the law.

Clause 12 (1) provides that a registered principal design practitioner must “ensure” that design compliance declarations are given as required by clause 9 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.

- In clause 17 (1) the building practitioner is only required to **“take reasonable steps to ensure”** compliance with declaration obligations
- In clause 19 (1) the building practitioner is only required to **“take reasonable steps to ensure”** that a variation is recorded where it deviates from a regulated design
- In clause 19 (2) the building practitioner is only required to **“take reasonable steps to ensure”** that a variation of performance solutions or building elements is prepared by registered design practitioner
- In clause 19 (3) the building practitioner is only required to **“take reasonable steps to ensure”** that a new work (after work has commenced) is designed by a registered design practitioner
- In clause 21 the building practitioner is only required to **“take reasonable steps to ensure”** that work for building elements and performance solutions is carried out in accordance with a design compliance declaration

The obligations in the Bill come with penalties for non-compliance and therefore it is 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 Bill also fails to consider situations where a design practitioner cannot issue a declaration, despite taking all reasonable steps. For example, where a non-design practitioner makes a variation and requests a new design compliance declaration to cover that variation. The design practitioner may not be able to assess if the varied building element or performance solution meets the Building Code of Australia because the design practitioners may not have access to site, or the item may have been covered by subsequent construction and be no longer visible for inspection.

2. Proposed amendment to clause 19 – Variation after building work commences

Clause 19 (2) (a) - after the words *"a design with the variation is prepared by a registered design practitioner",* insert the words *"that takes into account the impact of the variation on the overall design"*

All variations to approved designs must be certified holistically and retrospectively for the entire development, not solely for that variation alone. This is because there can be unknown ramifications if variations are considered in isolation that can negatively impact on the quality, safety and utility of the overall building.

For example, 'saving money and time' by changing a concrete beam design in an isolated section of a building may seem intelligent at the time, but without a holistic analysis of the impact of that change across the whole building it could be far costlier in rectifications AFTER occupation, if the varied beam design is found to be inadequate. For example: holistic considerations could include how is the load transferred elsewhere, how does the cladding detail work and does that have a flow-on effect to details elsewhere in the building such as does the internal cladding now need to be altered?

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 would ensure this occurred.

3. Proposed amendment to clause 33 – No contracting out of Part

Insert a new subclause (3) *"(3) No contract or agreement can be made or entered into or amended to exclude the proportionate liability provisions in Part 4 of the Civil Liability Act 2002."*

The Bill must 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. Clause 33 of the Bill makes it clear that it is not permissible to (attempt to) contract out of duty of care provisions and clause 34 states 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 that should be applied is that where there are multiple wrongdoers, the Court should seek to apportion to those wrongdoers a specific percentage of liability rather than joint and several liability for the whole of the loss.

Clause 34 refers specifically Part 3 being subject to the *Civil Liabilities Act 2002,* which allows for contracting out of proportionate liability. This undermines the concept of fairness and accountability for all practitioners.

By allowing proportionate liability to remain:

- Contractors will use the provision in contracts with consultants to ensure that there is no proportionate liability, which 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*.

- 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 Bill assumes that practitioners can find insurers willing to provide insurance on reasonable commercial terms.

4. Proposed amendments to clause 7 – Building practitioners

Reword clause 7 (1) (b) to ensure that the term ***building practitioner*** includes all persons doing building work, including a broad range of tradespeople.

The Bill focusses on design practitioners and building practitioners, but at this point excludes many practitioners who design, install, construct and manage aspects of the construction process.

All building practitioners, including professional engineers, project managers, designers, drafters and a wide range of tradespeople need to be brought under this regulatory regime to create a chain of accountability that will improve the delivery of building work and consumer outcomes.

All practitioners must hold public liability and professional indemnity insurance and demonstrate appropriate skills in line with clearly defined competency standards.

In addition to registration of building practitioners, provision needs to be made in the Bill for recognition of deemed to comply manuals as is the case in other States and Territories. For example, the Northern territory government has a Deemed to Comply Manual that is referenced in the Building Code of Australia, Volume 2, Part 3.10.1 as an acceptable construction manual for high wind areas. The Manual contains products or systems which have been assessed for structural adequacy for cyclonic wind loads and approved by the NT Building Advisory Committee (BAC). These drawings can be accepted by architects, builders, building certifiers, designers, engineers etc as complying with the structural requirements of the NT Building Act.