Supplementary Submission No 129a

INQUIRY INTO REGULATION OF BUILDING STANDARDS, BUILDING QUALITY AND BUILDING DISPUTES

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Overview comments

The Australian Institute of Architects (the Institute) welcomes the opportunity to provide comments to the New South Wales (NSW) Legislative Council Public Accountability Committee Inquiry into the regulation of building standards, building quality and building disputes and on the *Design and Building Practitioners Bill 2019*.

The Institute is the peak body for the architectural profession in Australia, representing around 11,000 members, with around 3200 members residing in NSW. The Institute works to improve our built environment by promoting quality, responsible, sustainable design. Architecture influences all aspects of the built environment and brings together the arts, environmental awareness, sciences and technology. By combining creative design with technical knowledge, architects create the physical environment in which people live, which in turn, influences quality of life. Through its members, the Institute plays a major role in shaping Australia's future.

The Institute has strongly called for all Australian governments to take action and urgently improve how building construction is regulated. It is clear that quality outcomes will not occur and the consumer will not be protected, if time and cost continue to be the prime drivers in the construction industry.

While it is very encouraging to see the NSW government making changes in response to the nationally endorsed recommendations of the Shergold-Weir "Building Confidence" report, the Institute looks forward to supporting the implementation of the full suite of required reforms.

The introduction into NSW Parliament of the *Design and Building Practitioners Bill 2019* is a first step towards rectifying issues around the quality and safety of complex buildings and beyond this, further regulations and legislation will need to be put in place.

The Institute has been working to marshal support for reform from other industry bodies in NSW and working closely with government and regulators, including the Building Commissioner. Despite engaging heavily in the public consultations related to the development of the current Bill, some concerns remain.

Detailed concerns

There are four main areas of concern in the *Design and Building Practitioners Bill 2019* that the Institute would like to highlight to the Committee for detailed consideration:

1. Inequity between obligations for building practitioners and design practitioners.
2. Guaranteeing that there can be no contracting out of proportionate liability.
3. Making sure that design variations throughout construction are certified holistically and retrospectively for the entire development.
4. Strengthening the Bill to cover a wider range of building practitioners.

1. All practitioners should be treated equally, with the same level of obligation

The current Bill is limited to design and building practitioners but treats each category differently. This is inequitable, and all practitioners should be held to the same standards.

Section 12 (1) provides that a registered principal design practitioner must "**ensure**" that design compliance declarations are given as required by section 9 and are issued by registered practitioners. This places a strict liability on the principal design practitioner.

The Institute notes that the building practitioner is not held to the same standard of accountability. For instance, in section 19 the building practitioner is only required to **"take reasonable steps to ensure"** that regulated designs are prepared by a registered practitioner.

The obligations in the Bill come with penalties for non-compliance and therefore it is important that any flexibility granted for one set of practitioners is provided to all practitioners.

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. For example, 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.

Recommendation:
The term "take all reasonable steps" should be used for both registered principal design practitioners and building practitioners throughout the Bill to ensure equal treatment.

2. Contracting out of proportionate liability

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. Section 34 of the *Design and Building Practitioners Bill 2019* 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 the Bill seeks to apply 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 Bill 2019* does state 'no contracting out of Part', clause 34 refers specifically to the *NSW Civil Liabilities Act 2002* which does allow for this to occur. It is clear that this undermines the provisions, as intended, in the Bill:

> 3A(2) This Act (except Part 2) does not prevent the parties to a contract from making express provision for their rights, obligations and liabilities under the contract with respect to any matter to which this Act applies and does not limit or otherwise affect the operation of any such express provision.
>
> (*Civil Liabilities Act 2002*)

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.*

Allowing parties who have a duty of care under the *Design and Building Practitioners Bill 2019 (NSW)* to contract out of the 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 Bill assumes 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 fail, as well as the Building and Construction reform agenda for want of insured practitioners.

Recommendation:
Clause 3A(2) of the NSW *Civil Liabilities Act 2002* be removed or the Bill exclude the application of clause 3A (2) of the *Civil Liabilities Act 2002* to design practitioners and building practitioners.

3. Holistic approval of variations

The level of documentation required at designated approval points remains an additional area of concern, along with the clauses that deal with variations to approved documentation (section 19).

Current building practice emphasises time and cost above quality and safety, we need to work together to improve this and bring back consumer confidence.

The Institute believes it is essential therefore that all variations to approved designs are 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. The proposed legislation does not adequately deal with this issue.

Oversight and quality assurance needs to occur continuously throughout the design and construction stages. Taking the time to ensure that individual variations made as building work progresses are not negatively impacting on the quality, safety and utility of the overall building should be a normal process in all construction projects. The current model of value engineering, minimising cost and time as the overarching goals must be reset.

The current market also sees developers and builders breaking up the design, documentation and construction stage services of the design team, including architects, specialist consultants and engineers. Instead of maintaining continuity throughout the life of the project, building contractors shop around the market mid-project to change the team, ostensibly to reduce fees. This process, by default, mitigates against quality outcomes.

Frequently, even if an architect is still involved in the project throughout construction, for reasons of 'saving time and cost' they are taken out of the holistic evaluation of variations by specialist consultants or contractors. '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 more costly 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?

The "principal design practitioner" would be uniquely positioned to co-ordinate ALL the consultants and contractors and distil the holistic impact on the project. The Bill should support, enable and empower them to ensure quality results through managing the approval of variations throughout construction.

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.

Recommendation:
To ensure quality and safety are prioritised in the construction process, all variations to approved designs must be certified holistically, and retrospectively for the entire development, and not solely for that variation alone.

4. Strengthening the Bill to cover a wider range of building practitioners

There are many practitioners besides architects,engineers and builders, who design, install, construct and manage aspects of the construction process that have not been considered by this Bill. The Institute has been promoting the need for a comprehensive and robust registration/licencing regime for ALL involved in the building chain, potentially modelled on the current registration regime for Architects underpinned by the *Architects Act*.

The Institute believes that all building practitioners including professional engineers, project managers, building designers; drafters and a wide range of tradespeople need to be brought under a regulatory regime and level playing field where all are required to hold public liability and professional indemnity insurance and demonstrate appropriate skills in line with clearly defined competency standards.

The Institute is extremely keen to support reform aimed at rebuilding consumer confidence in the NSW building and construction industry. Owners should have confidence not only that designs meet the Building Code of Australia and they are provided by appropriately qualified professionals, but also that the original design intent is realised in the finished building.

The Bill focuses heavily on designers and design stages but fails to extend that focus to the building professionals doing the building work and the construction stage. While all designers in a project will likely be covered by the Bill not all persons doing building work will be similarly covered. The definition of building practitioner in the Bill should therefore be expanded from "principal contractor" to cover a wide range of building practitioners and tradespeople.

Subsequent regulation could then work through the expansion of licensing and registration of design and building professionals as appropriate, as well as dealing with how existing licensing and registration schemes, for example the *Architects Act*, will interact with an expanded regime.

How the Bill will interact with the *Architects Act*, the *Home Building Act* and the *Environmental Planning and Assessment Act* is also remains unclear. We will have to wait for much of the detail in subsequent regulation before we can be assured that, for example, an appropriate level of licensing and registration will be put in place for all building practitioners. It is likely that limiting the current definition of building practitioner to "principal contractor" will undermine an appropriate level of reform being realised around the licensing and registration of design and building professionals.

Recommendation:
The definition of building practitioner in the Bill should be expanded from "principal contractor" to cover a wide range of building practitioners including a broad range of tradespeople.

Conclusion

Despite the need for reform, the Institute would like to take this opportunity to note that although these issues seem systemic and widespread, there are also many reputable builders, working closely and effectively with design professionals to ensure their own checks and balances are in place to deliver high quality construction projects to the market.

In addressing these challenges, it is critical to also acknowledge that many building practitioners are already doing the right thing and creating robust, safe and high-quality houses and apartments.

Architects are also 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 taking a registration exam and interview.

This makes architects particularly well placed to ensure design quality throughout the construction process, and ready to assist bring consumer confidence back to the building and construction sector. Architects are already well positioned to take on the role of "principal design practitioner" as defined in the Bill.

Finally, we would also urge the government to look at addressing the issue of the gap between when a design practitioner states that drawings and plans comply with the Building Code of Australia and when the building contractor declares that the building is built in accordance with the plans. The Institute strongly supports the concept of re-introducing an on-site independent inspection regime, a new 'Clerk of Works' to address this gap.

We look forward to continuing to work with the NSW government on this important issue.

Yours sincerely

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President NSW Chapter

Australian Institute of Architects