



Submission

Draft Design and Building Practitioners Regulation 2020

(NSW)

11 January 2021



Australian Institute of Building Surveyors
5th floor
828 Pacific Highway
Gordon NSW 2072
P: 1300 312 427
www.aibs.com.au

Who we are

The Australian Institute of Building Surveyors (AIBS) is recognised nationally and internationally as the peak professional body representing building surveying practitioners in Australia.

Our Mission

AIBS is committed to ensuring a safer Australia through continuous improvement and development of the profession of Building Surveying. The overarching objective of the Institute can best be summarised as follows:

To achieve the highest standard of professionalism through Professional Development, such as education pathways and training, and Advocacy in representing the profession and establishing standards.

Preparation

This submission has been prepared following release of the draft Design and Building Practitioners Regulation 2020 as released by NSW Customer Service for comment.

Discussion

Commencement:

It is noted that the proposed Regulation is intended to commence on 1 July 2021. Proposed Regulation 82 related to savings and transitional provisions establishes a 2 year transition period, only applying to insurance requirements for registered building practitioners. In effect, the proposed commencement provides, at most, 5 months for all other aspects such as to establish appropriate business practices, obtain necessary indemnification, and any registrations needed to operate within the confines of the Design and Building Practitioners Act and Regulations.

Performance solutions:

Proposed Regulation 5(1) differs from the required documentation of performance solutions provisions pursuant to Clause A2.2(4) of NCC BCA 2019 Amendment 1 which will also come into effect on 1 June 2021. The information required to be provided via the proposed regulations is narrower in scope than the NCC requirement. The differences in scope could cause confusion among practitioners regarding what is required, particularly as the legislation will likely be seen to take precedence over the NCC requirement. In this way, NCC compliance is less likely to be achieved as a result of the legislation.

AIBS believes this is a poor outcome and recommends a change to the regulation clause so that it references the NCC requirement in place of specifying what must be documented regarding performance-based design solutions.

Fire resisting building elements:

Proposed Regulation 6(1) references 'managed' in relation to penetrations of building elements having a role in resisting or containing fire spread. Is the requirement about documentation of in-service management of occupant behaviour including service or other technicians to ensure the ongoing integrity of the fire performance of building elements or is 'management' better to be replaced with the word 'stopped'?

Further matters to be included in design compliance declarations:

Proposed Regulation 9(1) establishes requirements around what must be included in a declaration by a registered design practitioner. It is noted that building surveyors will not be obligated to identify insufficient design declaration content as the declaration is not made within the processes set out in the Environmental Planning and Assessment Act. The two legislative schema run in parallel and have very similar objectives – to ensure that design and construction of buildings achieves acceptable standards.

Prescribed classes or types of building – building work:

Proposed Regulation 12 prescribes Class 2 buildings to be building work that is to be the subject of the requirements of the RAB Act and Regulations. In order to avoid the requirements, it is probable that developers will consider making application for a Class 3 building which could, post hand over, be converted, in parts or in full, to Class 2 thus avoiding the additional requirements for practitioners to be registered, insured and obliged to provide declarations.

Additionally, the limitation of the application of the Act and Regulations to only Class 2 buildings will cause practitioners to seek the additional required professional indemnity insurance cover that is also limited to Class 2 buildings which is not a product currently offered to the market. If the insurance sector decides not to make such a product available, and is not willing to provide an insurance product that can economically be used by practitioners seeking to work on Class 2 buildings, the provisions may effectively prevent the development of class 2 buildings.

Lodgement on NSW planning portal before / after building work commences:

AIBS notes that proposed Regulations 16(1)(a) and 17(1)(a) prescribes that design documents that are issued for construction or related to variations during construction respectively must be supplied to the Secretary in an approved manner. Such documents, if not consistent with documents appended and forming part of the CDC issued pursuant to the EP&A Act, must also be submitted to the building surveyor, as the authority having jurisdiction for assessment of the proposal against the technical requirements and any applicable legislative requirement. The work described in design documents may not be commenced unless and until an appropriate authorisation pursuant to the EP&A Act is in place.

It is at this point where a potential conflict can arise between the design practitioner, who has issued the documents with their compliance declaration, and the building surveyor, who, based on their professional expertise, forms an opinion regarding the standard of conformity represented by the design documents. AIBS raised this as a potential issue in its response to the public comment draft of the Design and Building Practitioners Act and we reiterate our advice about potential consequences of this conflict and why we raised those concerns now.

AIBS recommends establishing a mechanism for resolving such conflicts. A simple approach to this would be for Regulations 16(2) and 17(2) to also prescribe that any compliance declaration issued ahead of any EP&A Act decision about the status of conformity represented in design documentation is null and void. Additionally, in respect of proposed Regulation 20, where a registered practitioner is to provide compliance declarations with their design documentation to a principle design practitioner, the design practitioner should be exempted from having to ensure EP&A Act authorisations are in place before giving their declaration. Instead, responsibility should transfer to the principle design practitioner who must obtain EP&A Act authorisations on the totality of the design documentation before proceeding to issue a principle compliance declaration.

Lodgement on NSW planning portal before issue of occupation certificate:

Proposed Regulation 18(3) does not include any requirement for verification of approvals required pursuant to the EP&A Act having been obtained or complied with. AIBS believes that this is an important point of verification that should form part of any building compliance declaration so that the purpose and outcome of implementation of this requirement might give maximum confidence to the community and particularly consumers.

Variations after building work commences:

Proposed Regulation 26(1) is not applicable if related to a 'building element or performance solution' pursuant to proposed Regulation 26(2). There is no definition of a 'building element' so that it is not clear what proposed Regulation 26 does.

AIBS notes that it would be appropriate for there to be a mechanism that makes clear that variations that require authorisation pursuant to the EP&A Act must not be implemented unless and until that authorisation is obtained and considers that proposed Regulation 26 could be adapted to achieve this. AIBS recommends that proposed Regulation 26 is set out firstly, to prohibit the undertaking of work which varies from an approved design that has been declared, secondly to permit work to be undertaken subject to the items listed at (a) to (d) in the proposed Regulation 26(1) with an additional item being a description of how the building practitioner has ascertained that the work does not need authorisation pursuant to the EP&A Act.

Policies extend to all liability:

Proposed Regulations 56, 57, 58, 62, 63, and 64 require insurance cover which includes cover for retrospective claims (all liability). AIBS is not aware of any insurance products available for building practitioners which will provide this form of cover. Instead, the market is providing cover which addresses claims made or notified during the policy period, which is not necessarily when the circumstances giving rise to the claim (or notification of potential claim) took place.

In order that the consumer protection objectives of the insurance requirements in the proposed Regulations can be realised, AIBS recommends that the relevant Regulations be amended to reflect available insurance products.

Matters occurring after expiry date of policy:

AIBS notes that proposed Regulation 69 does not prescribe a period of time post the provision of regulated design documents or the conduct of regulated building work that a practitioner must retain insurance cover. AIBS recommends that insurance cover must be maintained by practitioners who have undertaken any work (design or construction) as registered practitioners for a period not less than 10 years after their last interaction with a project.

In closing

AIBS is committed to working with government, industry and key stakeholders to continually improve the building regulatory system throughout Australia.

Please contact us for any clarification or further information that may assist.