

8 January 2021

Job number NA

Design and Building Practitioners Regulation 2020

Stakeholder feedback

To whom it may concern,

Thank you for the opportunity to make a submission regarding the Draft Design and Building Practitioners Regulation.

We are the Directors of Apex Diagnostics Pty Ltd, an Engineering firm that together with our sister company Apex Façade Design Pty Ltd employs 11 staff. We have a combined experience in excess of 35 years within the Building diagnostic, remediation, and facade industry. This includes extensive experience on commercial and residential projects including many high-profile projects such as the Barangaroo Commercial and Residential precinct. We also regularly provide Expert Evidence to the NSW courts.

Our firms currently undertake a variety of work including diagnostics of building facades and structures, remediation of building and facade defects, superintendency of repair works, facade design including structural certification. We employ qualified structural, mechanical, materials and aeronautical engineers including engineers chartered by Engineers Australia.


Under the draft regulation we anticipate that we will register as Design Practitioners and Professional Engineers.

We have provided comment on what we believe to be the four most pertinent points regarding the draft regulation. We have utilised the headings and question numbers included within the submission template within our submission.

Regulated design (page 17)

4. *Are there other works that should be exempted? Please provide the basis for the exemption and when the exemption should be effective (for example, a description of the works or threshold of the value including the reason for that value).*

The current wording of the act and regulations is not clear (or is ambiguous) in some circumstances as to whether or not work is exempt from being building work. For example, we specialise in remedial building



consulting. We are often involved in the specification of repairs to existing buildings, including for example the repair and/or replacement of windows.

The regulations note that work that is an 'exempt development' is exempt from being building work. Replacement of windows is noted as being exempt development. A window, however, forms the waterproof envelope of a building. Where this is not 'carried out to a sole occupancy unit' – i.e. it is carried out across a large strata scheme – it could be considered waterproofing (of a component) that is not exempt from being building work under clause 13(1)(a) of the proposed Regulation. It is reasonable to expect that replacement windows be compliant with the BCA, however, the question becomes less clear when dealing with repair of older existing windows that are leaking. If, as described above, this is considered to be 'Building Work' under the act (because it is waterproofing work to more than just a single occupancy unit), there would be an obligation to make any repair BCA compliant – under FP1.4, this means it must not leak. We often find with older buildings that there are means of greatly improving the weatherproofing performance of a dilapidated window system at a cost that is significantly less than replacement (noting that in many cases replacement is the only means of achieving a BCA compliant solution due to general aging of components). The level of improvement that is achieved may be acceptable to the Owners (i.e. only minor residual leaks in certain weather conditions), but is still not BCA compliant and could not be certified as being so by a practitioner under the Act.

Taking this scenario further, there is a potential to end up in the situation that the industry in New Zealand finds itself. We are aware of projects in NZ where waterproofing of decking (balconies) is being rectified in accordance with the NZBC. However, due to local regulatory requirements that require strict compliance with building codes, Owners find that, for example, if the balcony doors must be temporarily removed to facilitate waterproofing of the decks, then they may also need to replace those doors if they are unable to be certified as compliant with the NZBC on reinstallation (and due to the harsh penalties of non-compliance, almost all specifiers are too risk averse to ever certify old door systems, even if there is no history of leakage in service).

There hence needs to be some mechanism by which Owners are able to make informed decisions about how they repair and maintain their property to suit their available cashflow, and decide whether a BCA compliant solution is the right solution for their situation. Given that the cost of improvement in these scenarios can be tens of thousands of dollars vs millions for a BCA compliant solution, there is a very real risk that the cost of compliance will force some Owners out of their homes (we have had many conversations to this effect with Owners facing the financial distress of large and unexpected remedial project costs).

While we understand that the intent of the Act is to protect Owners from 'defective' building work, there are legitimate circumstances where repair and maintenance work that is not BCA compliant may be appropriate for the given situation that the Owners find themselves in, provided of course any such decision is made on a fully informed basis.

Further, because the Act imposes on designers a duty of care to future Owners, there is a risk the current proposal exposes designers to claims from future Owners in the event that a non-BCA compliant solution is proposed. There is a potential for future Owners to claim that use of sinking funds to install a non-BCA compliant solution would have been better used to install a more expensive BCA compliant solution, regardless of the financial standing of the Owners at the time the scope of work was agreed between the Owners and the designer. Any future Owner in a better financial standing could make this claim. This clearly means that under the current proposal, designers are going to withhold options that may greatly improve the amenity of a property for the Owner at a cost they can afford if there is the potential for any such claim from a future Owner.

We are not sure how best to address this. Perhaps repair and maintenance work to existing buildings should be treated differently from new building construction and new major building alterations.

Many of our projects also include concrete repair (i.e. 'spalling' repairs for 'concrete cancer'). While these are a 'structural' repair and hence not necessarily considered exempt, we believe that if the repairs are cosmetic or preventative, as opposed to being to elements that have reached the point of structural distress (as assessed by an appropriately qualified and experienced structural or remedial engineer) they should be considered exempt. This is mainly because any such repairs often appear on remedial projects that are otherwise exempt (such as render repairs, of which such concrete repair is essentially similar) and compliance with the Act for this small component of such a project seems overly onerous, non-beneficial, and not necessarily relevant to the main objectives of the Act.

Registration of Compliance Declaration practitioners (page 23)

7. Do you support the proposed qualification, skills, knowledge and experience requirements for each class of practitioner? Why or why not? Please make suggestions for additional or alternative requirements.

With respect of 'Design practitioner-façade engineering'. Clause 11 (1) 'Qualifications' states that they must be 'registered as a professional engineer in the class of professional-engineer-structural engineering or professional engineer-civil engineering'.

Through our experience working for a major international engineering consultancy (Arup) and now for in our own company, we have observed that the façade industry includes engineers from a variety of disciplines including civil/structures, mechanical, materials and aeronautical, to name just a few. This is because there is no specific 'façade engineering' degree and the discipline requires a broad skill set. In the absence of a specific degree, many of the requisite skills and knowledge are gained through professional experience that reinforces and expands on our education. We are concerned that limiting the discipline to civil/structural engineers alone will disqualify a large number of suitably qualified and highly experienced engineers from the field. This could have unintended consequences such as the industry having insufficient numbers of engineers to undertake the design works required by the draft legislation, and many excellent professionals who have been active in the industry for decades will now be disenfranchised.

We therefore believe that the qualifications for façade engineers is expanded to include tertiary degree qualified engineers from all engineering disciplines so long as they can demonstrate sufficient relevant experience (which is already a requirement of the regulation).

Compliance Declaration Scheme: practitioner requirements (page 38)

25. Do you support the proposal that varied regulated designs be lodged within 1 day of the building work being commenced? Why or why not?

No, this is unrealistic. Variations can occur for a number of reasons, and in many cases the variation can be relatively minor. Despite this, there will be significant cost pressure to address latent conditions when they are discovered due to the very high delay costs associated with site access equipment etc. These changes can often be resolved quickly (and in a compliant manner) in collaboration with the builder on site there and then. Documenting these issues and submitting them, however, may take time, and it is unreasonable to expect that every practitioner has the available time to immediately respond to the discovery of a latent condition and to then immediately submit that change to the portal without significant disruption to their other professional commitments (noting that it is neither the designers fault, nor the fault of their other clients who may be impacted by this requirement, that the latent condition occurred).

Insurance (page 51)

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

The regulation puts the onus on Engineers to make sure they have adequate PI coverage. We take our insurance obligations very seriously and go to great lengths to explain our professional risks to our insurers. Despite this, and also having no claims history whatsoever, we are facing significantly harder insurance markets. We are being offered more limited coverage from a very small number of insurers and at extreme cost (we turnover approx. \$1.5M, and our PI policy is in excess of \$115K annually). Simply put, we literally have no control, and no ability to control what insurance will be available to us now or in the future (noting that the Act has onerous ongoing insurance obligations). It is simply impractical and unfair to enforce an act that puts the onus of gaining 'appropriate' cover on the party procuring the policy when those policies may not be available.

If this act is intended to ensure appropriate PI coverage, the act should also place an onus on insurers that want to be in the Australian market (in any sector) to provide appropriate unencumbered policies to engineers. Surely it is more sensible to place the onus on providing proper PI coverage on the parties providing that coverage? The alternative will be an Act that may be impossible to adhere to, or worse, companies will simply have to dissolve if they are unable to place a new policy each year. That, as we understand the purpose of the Act, would be an entirely disadvantageous position for all parties involved.

In addition, we believe the manner in which the Act is drafted neglects the fact that large client bodies all seek to utilise bespoke forms of agreement that variously place onerous and extended liabilities on consultants – does the Act insist that our coverage must also respond to these, and that the onus is again on us to ensure this is the case?

Perhaps a unified set of standard consultant agreements are also required to complement the Act and legal obligations/Indemnity. We are engineers, not lawyers or insurance brokers – if the Act does not deal with this cohesively, we as an industry can never have certainty that proper coverage exists for every project undertaken. The above is not meant to be a 'whinge' about the growing costs of insurance – it is meant to demonstrate that the available terms and cost of PI and their incompatibility with evermore onerous client contracts is currently the greatest risk to the ongoing viability of smaller engineering firms. The position put forward in the Act just does not appear to recognise this, and in fact increases those risks immeasurably.

Thanks once again for the opportunity to provide feedback.

Yours sincerely

Tim Womack
Director

Chris Salz
Director