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23 December 2020

Dear Sir/Madam

Response to Design and Building Practitioners Regulations 2020 Public Consultation

Dear Review Team,

Arup is an independent firm of designers, planners, engineers, architects, consultants and technical specialists, working across every aspect of today's built environment.

Arup came to Australia in 1963 to undertake the structural design of the Sydney Opera House and we now work from eight offices across four key areas of influence: cities, connectivity, health, resources. Our desire to shape a better world ensures our clients receive smart design ideas with a social purpose, which will have a positive influence for current and future generations.

Consequently, we are keen to support changes in legislation in NSW that bring about improved community outcomes, whilst reducing regulatory burden in a sustainable way for the industry.

We are therefore writing to you about the key impacts of the Design and Building Practitioners Regulation 2020 (the **Regulations**). We would like to confirm that we fully support, and reiterate the specific comments submitted by Consult Australia on behalf of our business. However, we also have the following additional key areas of concern:

- An expanding myriad of Fire Safety definitions, roles and responsibilities across three separate pieces of legislation;
- Unworkable and unsustainable insurance requirements;
- Omitted disciplines and classes of design practitioners; and
- Compliance declaration concerns.

Fire Safety

The requirements for the categories and classes of registration for fire safety practitioners including fire safety engineers and fire systems designers are in addition to those set out in the Building and Development Certifiers Regulations 2020. Such complexity and inconsistency will lead to ineffective application and poor consumer outcomes, while also

creating a significant burden, both administrative and financial, in relation to compliance and costs.

We strongly urge the NSW government to work with industry to resolve the complex arrangements between the different regulations and legislative instruments, to ensure there are consistent requirements that provide for a certain, cost effective and stable regulatory environment for business to operate in.

Insurances
There are highly onerous requirements for our business and employees under Part 6 of the Regulation.

Our concerns regarding Part 6 of the Regulation include:

- The practical application of the reforms which remains undefined, or unclear – including what designs will be considered 'regulated designs'.
- The cost impact of the scheme noting that our employees need to be registered multiple times (both as design practitioners and as professional engineers), and the specific costs of such registration remain unspecified.
- Part 6 of the Regulation relating to PI insurance prescribing impractical and unworkable requirements on individual practitioners and failing to address market concerns.

Under Part 6 of the Regulation each registered practitioner we employ must ensure that all their design work is indemnified under a PI insurance policy and needs to determine that the PI policy provides for an adequate level of indemnity for the liability that could be incurred by them in the course of their work. Our employees must keep written records for 5 years that specify how they determined that the policy provides adequate cover. Further, those individuals can be subject to a penalty of $1,500 (or $5,000 if a corporation) if they hold out they are adequately insured and they are not.

Our employees will not be able to comply with these requirements because:

- The insurance policy is a commercial-in-confidence document between the business and the insurer. Our employees have no say in the insurance products the business acquires and very few individuals within our business see the policy. The full terms & conditions are not and cannot be shared with our employees – therefore their determination of adequate coverage will need to be based on advice we provide.

- The process of determining adequate coverage would need to occur each time a new project is undertaken, not only once a year when the PI policy is renewed. This is because our services are provided under contract – liabilities change contract to contract.

We cannot ever be satisfied that a PI policy covers all liabilities – as the market hardens more exclusions are added by insurers, such as excluding statutory obligations, consequently it is almost impossible in the current Australian contracting environment to get a contract that is 100% covered by insurance.

When a new cover restriction comes in, it automatically has retrospective effect due to PI cover applying on a 'claims made' basis, meaning that work which was previously insured can become uninsured at a subsequent renewal. To this point the Regulation contains contradictions between the provisions of paragraph 71, which permit a building

practitioner's PI cover to contain exclusions, and the requirements of 56-58/62-64 which require the practitioner to ensure that the insurance covers 'all liabilities'.

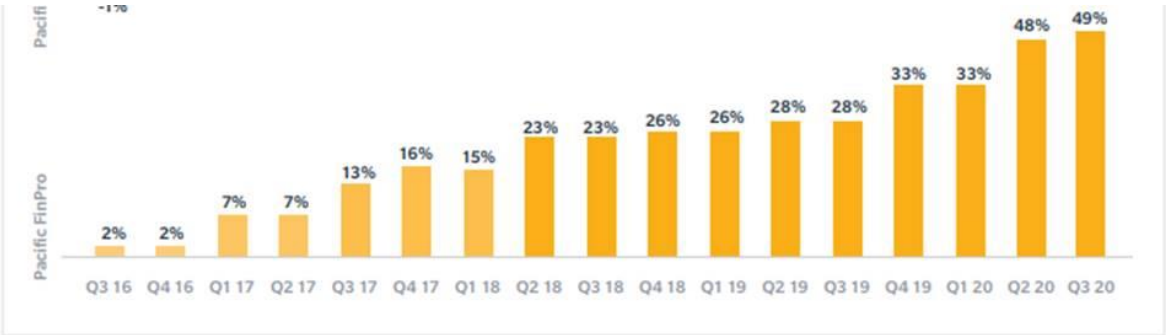
The above is further compounded as the current insurance market affords almost no ability to negotiate the terms and conditions of the policy offered by the insurer. There is also a shortage of competition in the market, as numerous insurers withdraw due to the increasingly unattractive commercial performance of PI policies, which makes it difficult to obtain competing quotes with different or more favourable policy terms and prices.

Additionally, contracting out of proportionate liability legislation is permitted in NSW, and our business is often asked to do so. The duty of care within the Act is retrospective and combined with the lack of proportionate liability legislative provisions make it difficult to determine the potential liability.

Our business is a customer of the insurance company, and no customer can guarantee what a commercial supplier will offer over time. We strive to uphold the highest professional standards as expected by our communities and our clients. Despite the care and professionalism with which we operate, we are facing significant challenges regarding the availability and affordability of PI insurance in the current market where prices are rising 20-30% a year. Practitioners cannot be expected to carry more cover than they can reasonably afford, nor than they can reasonably pass on to clients in the form of on-costs/overhead charges built into professional services rates.

Our situation is not unique, as businesses in our industry of all sizes are facing the same challenges securing PI insurance. Professional firms face uncertainty about what PI cover they will be able to buy at the next and subsequent renewals. The figures below, from the latest Marsh global insurance pricing index (**Marsh Report**), show the average increase in financial and professional liability premiums for the Australasia region (average renewal premiums rose by 49% in Q3 2020).

For many firms the cost of PI will have doubled over the past 4 years. The Marsh Report also makes the point that insurers are generally also making numerous changes to their policy wordings to mitigate pricing increase (in other words, they are cutting or limiting the cover provided by their policies in order to avoid increasing premiums even further). The full Marsh Report is accessible here:
https://www.marsh.com/uk/insights/research/global-insurance-market-index-q3-2020.html



Our business is already experiencing the reduction in the capacity of the PI insurance market. This is an untenable position for an industry that heavily contributes to the Australian and NSW economies, especially as we strive for recovery from COVID-19. Therefore, we are concerned about our ability to comply with Part 6 of the Regulations.

The NSW Government's policy intent of improving consumer confidence and industry compliance is one we support – however Part 6 will not result in this. For these reasons, we urge you to:

- remove Part 6 of the Regulation, and
- put in place a two-year transition period for design practitioners and professional engineers.

The transition period is consistent with that provided under clause 82 of the Regulation for building practitioners. This transition period will allow the Building Commissioner to continue the work of improving compliance and confidence as well as for all of the industry to invest more in quality design, which we believe will lead to better outcomes for end-users of buildings.

Omitted Disciplines and Classes of Practitioners

The Regulation provides prescriptive and specific classes of practitioner which must be registered in order to validly provide professional engineering services in accordance with the Design and Building Practitioners Act 2020 (NSW) (the **Act**). However, this also means that any individuals providing services of a kind similar to, overlapping with, or a necessary contribution to, professional engineering services, and for which no relevant class applies or exists, or the requirements of registration do not recognise, would be precluded from providing such services.

The flow-on effect would mean that registered design practitioners would not be able to rely on the services provided by these individuals to be compliant with the Act and would therefore undermine the requisite design compliance declarations.

Two specific examples of the above situation are engineering geologists and hydrogeologists working in relation to geotechnical engineering. Both these classes of professional contribute absolutely necessary services to the discipline of geotechnical engineering, however the current classes do not allow for these professionals to be registered.

We propose that the classes of "design practitioner – geotechnical engineering" and "professional engineer – geotechnical engineering" (including the relevant descriptions of work, and qualifications, experience, knowledge and skills requirements) be expanded to include registration for engineering geologists and hydrogeologists, or a new class(es) is created to cater to these disciplines.

Additionally, to ensure the Regulation can be responsive to further such situations as this, we propose that the Regulations, or Act, make provision for the registering body to have discretion to register additional classes or disciplines of professional services providers, in circumstances where the individuals have relevant or equivalent qualifications, experience, knowledge and skills, and their services contribute to, or overlap with the engineering services covered by the Act.

Design Compliance Declarations

Under the Act registered design practitioners are required to provide design compliance declarations regarding regulated designs, and any variations to those designs.

Without having clarity regarding what constitutes a regulated design, we have a concern that the compliance declaration regime does not properly address the existing system of

certification and reliance in relation to ancillary or niche services, products or materials. There is also ambiguity regarding which classes of registered design practitioner must provide the design compliance declaration, as many components of building work are often overlapping, with different disciplines taking precedence in different situations.

Currently, there exists a system whereby product manufacturers or developers provide product certifications, detailing the specifications of a product or material. This is also the case for individuals who provide specific and niche services, not usually in the scope of traditional engineering disciplines. Our engineers rely on these certifications to then perform the relevant services and provide the ultimate design certification. This is particularly the case in relation to façade engineering, with one specific example being structural sealant for which our engineers rely on the manufacturer's recommendations and the fabricator's certification of bond strength.

We request that the forthcoming design compliance declaration regime will allow for registered design practitioners to explicitly rely on such certifications (especially in circumstances when such certifications are not provided in accordance with the Act) in providing design compliance declarations.

There are also situations in which numerous classes of registered design practitioner will have a common or overlapping degree of responsibility or oversight for common components of a building. Consequently, numerous classes of registered design practitioner may be responsible, to varying extents, for the production of regulated designs. One specific example, which also relates to façades, is circumstances in which architects nominate façades, and the façade engineer must facilitate this nomination. In such circumstances, it is unclear which class must provide the design compliance declaration. To address this, we propose there should be a mechanism by which multiple registered design practitioners can, or must, assume shared responsibility for a design compliance declaration.

In Summary

We welcome the need to provide for improved community outcomes. However, we require a regulatory environment that supports a strong and sustainable platform for consultancies to operate in.

In that way we can best support the NSW Government to deliver improved quality in the construction sector.

Yours sincerely

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For Arup

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Legal Advisor

cc The Hon. Kevin Anderson, MP
Ms Yasmin Catley, MP
The Hon. Mark Speakman, SC MP
The Hon. Christian Porter, MP