

Design and Building Practitioners Regulation 2020
Policy and Strategy, Better Regulation Division
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Design and Building Practitioners Regulation 2020 – Douglas Partners Consultation Submission

Dear Better Regulation Division

About us

Douglas Partners (**DP**) is a national specialist engineering consultancy firm with almost 60 years' experience in providing geotechnical, environmental and groundwater engineering services.

DP will be impacted by the proposed Design and Building Practitioners Regulation 2020 (the **Regulation**).



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We are supportive of better regulation to deliver better building compliance and increased consumer confidence. Indeed, the new legislative scheme strikes at the core of DP's values to serve our clients without compromising welfare, health or safety.

However, the new legislative scheme must be certain, consistent and practicable.

We set out below our principal areas of concern regarding the Regulation under corresponding headings to assist you in reviewing our feedback on these particular topics.

The submissions below have been prepared in consultation with Consult Australia, the industry association that represents small, medium, and large businesses in design, advisory, and engineering. We refer to and support the Consult Australia submission on the Regulation.

Executive summary

Regulated designs

1. The Regulatory Impact Statement (**RIS**) states that guidance material will set out the types of designs that are "regulated designs". Guidance material that sets out the types of designs that are "regulated designs" must be made available to industry by 1 March 2021 to provide certainty to businesses on what may be required by the Regulations and the Act.
2. The "regulated designs" should clearly capture the "issued for construction" set of designs only, as distinct from early design-related work.

Registration

3. Individuals registered as a Professional Engineer in a class with a counterpart class for Design Practitioners should be automatically registered in the relevant class of Design Practitioner. This should include where the individual is registered as a Professional Engineer in a different jurisdiction. For example, a geotechnical engineer registered in QLD should be recognised in NSW as a 'Professional Engineer – geotechnical engineering' and a 'Design Practitioner – geotechnical engineering'.
4. There should be no fee for mutual recognition, which should be automatic as per the National Cabinet commitment on occupational mobility (see below).

Insurance

5. There is no practical way of a regulated person complying with Part 6 of the Regulations, which should therefore be removed.
6. Design Practitioners and Professional Engineers should have a two-year transition period on insurance obligations, to ensure that the other changes to practice can embed to improve confidence and compliance. This accords with the transition period provided to Building Practitioners.

Detailed Submission

Part 2 – Regulated designs

The Act allows the Regulations to prescribe the form and content of “regulated designs”.

Regulation issues

A registered Design Practitioner must provide a Design Compliance Declaration to a person if the practitioner provides the person with a regulated design. The Regulatory Impact Statement accompanying the Regulation states that the types of designs that are regulated designs have not yet been finalised.

In particular, it states:

“To assist the public and industry to understand the specific types of designs that are captured by the reforms, the Government intends to publish accompanying guidance material outside the Regulation. The guidance material will set out the types of designs that are ‘regulated designs’. NSW Fair Trading will work with industry to develop the guidance material and to ensure there is common understanding of the specific designs which fall within the scope of the obligations under the Act.”

Without this definition we cannot know the impact on our business. For DP, our geotechnical and environmental engineers may provide early designs on specific ground-related aspects or provide inputs to designs made by other businesses, but it is unclear whether this work would be captured as a regulated design. If captured, this would be problematic as our engineers, who do not carry out building work as such, do not have the expertise necessary to make a Design Compliance Declaration that the design is compliant with the Building Code of Australia. This is outside our area of expertise and would require our staff to be trained in a new area.

Proposed solution

DP supports the sentiment in the RIS that regulated designs will be the “issued for construction” set of designs – as on a plain reading of the Act, regulated design could be any design no matter how early and incomplete. Confining the definition to those designs needed by the builders to construct provides some certainty for industry and prevents the problem of engineers having to make declarations that are not relevant to their work.

Guidance material that sets out the types of designs that are regulated designs must be made available to industry by 1 March 2021.

To ensure a start date of 1 July 2021 and sufficient time for businesses to prepare for that start date, the guidance material confirming what designs are regulated designs must be provided to industry at least three months before commencement.

Part 4 - Registration of practitioners; and Schedule 1 - Classes of registration

Registration as a Professional Engineer should be recognised for the purposes of being registered as a Design Practitioner where the classes match. Without this recognition, the scheme imposes an unnecessary burden on practitioners and businesses.

The solution to this issue, for a 1 July 2021 start date:

1. Individuals registered as a Professional Engineer in a class with a counterpart class for Design Practitioners should be automatically registered in the relevant class of Design Practitioner.
2. This should include where the individual is registered as a Professional Engineer in a different jurisdiction. For example, a geotechnical engineer registered in QLD should be recognised in NSW as a 'Professional Engineer – geotechnical engineering' and a 'Design Practitioner – geotechnical engineering'.

Regulation issues

Although the Regulation allows firms and partnerships of designers to choose whether they register all their designers under the scheme or have designated designers registered to make the Design Compliance Declarations, multiple registrations will still be required to adequately supervise design work and satisfy the regulated Design Practitioner that the design complies with the Act.

Proposed solution

Individuals registered as a Professional Engineer in a class with a counterpart class for Design Practitioners should be automatically registered in the relevant class of Design Practitioner. This should include where the individual is registered as a Professional Engineer in a different jurisdiction.

Automatic registration of a Professional Engineer as a Design Practitioner with the relevant class would assist in reducing the burden of the scheme.

The *Mutual Recognition Act 1992* (Cth) should be applied in accordance with the National Cabinet's recent Intergovernmental Agreement on Automatic Mutual Recognition of Occupational Registrations. The National Cabinet announced on 11 December 2020:

*"All jurisdictions signed the Intergovernmental Agreement on Automatic Mutual Recognition of Occupational Registrations, with the exception of the ACT. The Agreement, which will be subject to revision following consultation and to reflect the legislation agreed by the signatories, will ensure that licenced workers will not bear additional costs to perform the same activities in those jurisdictions and makes it easier to do business across state and territory borders. The ACT will continue to work towards finalising arrangements, with the aim of signing the Intergovernmental Agreement shortly."*¹

The burden on business to keep track on who has what registration in what state for what specialisation must not be underestimated.

¹ <https://www.pm.gov.au/media/national-cabinet-3>.

Part 6 - Insurance

Under Part 6 of the Regulation, each registered practitioner:

1. must ensure that all their regulated design work or Professional Engineering work is indemnified under a PI insurance policy;
2. 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;
3. must keep written records for 5 years that specify how they determined that the policy provides adequate cover; and
4. will 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.

Regulation issues

It will not be possible for businesses to comply with these requirements because:

1. An insurance policy is a commercial in-confidence document between the business and the insurer. Individual employees have no say in the insurance products the business acquires and very few individuals within the business see the policy. The full terms & conditions are not and cannot be shared with employees. Therefore, it will not be possible for regulated practitioners to individually determine or influence “adequate” coverage.
2. 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.
3. We cannot ever be satisfied that a PI policy covers all liabilities for the following reasons:
 - a. As the PI insurance market hardens, it is increasingly difficult to maintain the same level of coverage as more exclusions are added by insurers (including the exclusion of statutory obligations) and as premiums rise exponentially.
 - b. It is almost impossible in the current contracting environment in Australia to get a contract that is 100% covered by insurance.
 - c. The model contract clauses released by the Office of the Building Commissioner are unlikely to be covered by insurance.
 - d. In NSW, contracting out of proportionate liability is permitted, and our business is often asked to do so.
 - e. The duty of care within the Act is retrospective. That combined with the lack of proportionate liability, makes it difficult to determine the potential liability.

DP is a customer of the insurance company, and no customer can guarantee what a commercial supplier will offer over time.

DP strives 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. PI insurance premiums are amongst our largest business expense and year on year premiums are increasing while coverage is decreasing – irrespective of claim history. We have been advised that this is because the number of underwriters providing any sort of coverage has become extremely limited.

Our situation is not unique, as businesses in our industry of all sizes are facing the same challenges securing PI insurance. A recent market update from AON states that the hardening in the market is here to stay for now and that in Australia:



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*"Australian insurers are focused on cost over-runs, loss mitigation, warranties and cross liability, with related exclusions and sub-limits commonplace. As the Australian government tries to kick start the economy with infrastructure investments, capacity may become an issue."*²

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.

Proposed solution

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

1. remove Part 6 of the Regulation, and
2. 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 Regulations 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 mature to the new way of working with more investment in design – which we believe will lead to better outcomes for end-users of buildings.

Yours faithfully
Douglas Partners Pty Ltd

Michelle Golafshan
General Counsel

Nicholas Lee
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² AON Current Global Insurance Market Conditions, *Professional Indemnity Sentinel Issue 14: Q2 2020 Revised*, page 3. See <https://www.aon.com/getmedia/08b10201-d020-440f-b8ff-e88a2951a1e1/current-global-insurance-market-conditions-pl-sentinel-issue-14-Q2-2020.aspx>.