
From: Frank Cerra
Sent: Wednesday, 13 January 2021 3:49 PM
To: Building Confidence Response
Cc:

Subject: NSW Building Reforms

Dear Review Team,

I am writing to you about the impossible requirements on myself, my business and my employees under Part 6 of the draft *Design and Building Practitioners Regulation 2020*. I support the submission made by Consult Australia and make the following submission on behalf of my business.

There is much of the practical application of the reforms that remains unclear to me as a business owner – including what designs will be considered ‘regulated designs’ and the cost impact of the scheme noting that my employees appear to need to be registered multiple times (both as design practitioners and as professional engineers). However, it is Part 6 of the Regulation which is of the greatest concern to my business (and will have a significant impact on many businesses in NSW – not just consulting businesses – because it relates to PI insurance).

Under Part 6 of the Regulation each registered practitioner, BG&E employs:

- must ensure that all their design work is indemnified under a PI insurance policy
- 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
- must keep written records for 5 years that specify how they determined that the policy provides adequate cover
- 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.

It is inappropriate for this obligation to fall on registered practitioners rather than the corporate entity providing the services. My 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. My employees have no control over the insurance products the business acquires. It is impracticable for each registered practitioner to access company insurance policies which can change in each renewal year and may invoke confidentiality issues. Further, insurance policies are difficult to interpret and BG&E would need to provide training and resources such that each registered practitioner held the skills to understand the detail of each policy each year such that they were in a position to comply with the regulations. Therefore their determination of adequate coverage will need to be based on advice BG&E provides.
- The process of determining adequate coverage would need to occur each time a new project is undertaken, not only when the PI policy is renewed. This is because our services are provided under contract – risk profile and liabilities change for each contract.

- It is important to emphasise that the insurance market changes each year. BG&E is unlikely to be satisfied that a PI policy covers all liabilities, especially over any period of time:
 - as the market hardens more exclusions are added by insurers, including excluding statutory obligations
 - it is almost impossible in the current contracting environment in Australia to get a contract that is 100% covered by insurance
 - the model contract clauses released by the Office of the Building Commissioner are unlikely to be covered by insurance
 - in NSW, contracting out of proportionate liability is permitted, and my business is often asked to do so
 - the duty of care within the Act is retrospective, that combined with the lack of proportionate liability makes it difficult to determine the potential future liability or possible legacy liabilities that may arise due to retrospective application of the Regulations.

BG&E strives to uphold the highest professional standards in providing its services 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 BG&E has experienced significant premium increased over the last few consecutive years, despite its exemplary claim history. We have been advised that this is because the number of underwriters providing any sort of coverage and their capacity and appetite for broad insurance 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:

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.

BG&E is extremely concerned about its ability to comply with Part 6 of the Regulations and therefore its ability to provide services in this market compliant with the proposed 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, I 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.

If you would like to discuss, please do not hesitate to contact me.

Regards,

Frank Cerra—
Managing Director



Opportunities Through Excellence—

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