



Australian
Institute of
Architects

DESIGN AND BUILDING PRACTITIONERS REGULATION 2020



Stakeholder Feedback
NSW Department of Customer Service

NEW SOUTH WALES CHAPTER

Submission date: 11 January 2021

OVERVIEW

Architecture influences all aspects of the built environment and brings together the arts, environmental awareness, sciences and technology. By combining creative design with technical knowledge, architects create the physical environment in which people live, work and play which in turn strongly influences our quality of life. Through its members, the Institute plays a major role in shaping Australia's future.

The Institute has continued to call on all Australian governments to take action and urgently improve how building and construction is regulated in response to the recommendations of the Shergold-Weir "Building Confidence" report.

The Institute is therefore extremely pleased to be able to support reform aimed at rebuilding consumer confidence in the NSW building and construction industry. Owners should have confidence not only that designs meet the Building Code of Australia and they are provided by appropriately qualified professionals, but also that the original design intent is realised in the finished building.

The Design and Building Practitioners Act 2020 and associated regulations are an encouraging and very important first step towards rectifying issues around the quality and safety of complex buildings.

The Institute looks forward to supporting the implementation of the full suite of required Shergold-Weir recommendations and welcomes the opportunity provided by the NSW Department of Customer Service to comment on the draft *Design and Building Practitioners Regulations 2020*.

Kathlyn Loseby

PRESIDENT NSW CHAPTER



ABOUT THE INSTITUTE

The Australian Institute of Architects (the Institute) is the peak body for the architectural profession in Australia. It is an independent, national member organisation with around 12,000 members across Australia and overseas. More than 3,000 of these are based in NSW.

The Institute exists to advance the interests of members, their professional standards and contemporary practice, and expand and advocate the value of architects and architecture to the sustainable growth of our communities, economy and culture.

The Institute actively works to maintain and improve the quality of our built environment by promoting better, responsible and environmental design.

PURPOSE

This submission is made by the Australian Institute of Architects' NSW Chapter (the Institute) in response to the consultation led by the NSW Department of Customer Service on the draft Design and Building Practitioners Regulation 2020.

At the time of this submission the NSW Chapter President is Kathlyn Loseby, the NSW State Manager is Kate Concannon and the NSW Policy and Advocacy Manager is Lisa King.

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1 SUMMARY OF RECOMMENDATIONS

1.1 Principal Design Practitioner

The Australian Institute of Architects (the Institute) would like to take this opportunity to reaffirm our enduring concerns around the role and expertise of the Principal Design Practitioner as currently described.

The Design and Building Practitioners Regulation 2020 continue to make the position of Principal Design Practitioner a collector of declarations. This is, in effect, mirroring the same role Certifiers have had, simply to collect certifications. The result has been no role for Certifiers to oversee construction to ensure compliance and quality.

For large and complex projects, continuous oversight and quality assurance is required throughout the design and construction stages, to mitigate errors and manage risk. Without quality controls in the building process, government and industry cannot restore public confidence in the building system when there are building failures.

It is therefore essential that the Design and Building Practitioners Regulation 2020 specifies which high-risk buildings must have a Principal Design Practitioner. The Institute thinks the role of the “Principal Design Practitioner” is presently a post-box service that simply collects the Design Practitioner declarations, and that this is not appropriate for complex building typologies. The Institute believes that the Principal Design Practitioner must be a person qualified, at a minimum, at AQF Level 9 who:

- a. coordinates prescribed building work, and/or
- b. coordinates the provision of design compliance declarations for the purposes of building work done by a building practitioner.

Additional comments on the role of the Principal Design Practitioner are provided at Section 4. The Institute would also be pleased to discuss these issues with the department further.

1.2 Additional Building Elements

The Institute would strongly encourage the department to consider the inclusion of the following additional building elements as ‘building work’:

- ***Acoustics:***

Consumer feedback suggests the acoustic quality of current Class 2 buildings does not meet community expectations. While “The Sound Transmission and Insulation in Buildings Handbook” published by the ABCB in 2018 aimed to assist in improving the outcomes in this area, it admits there are limitations within Part F of the BCA, including that Part F provides minimum requirements only. It is unlikely, without a regulatory incentive, Class 2 builders will seek to improve on the current acoustic outcomes which are inadequate¹:

¹ The Sound Transmission and Insulation in Buildings Handbook © as released by the Australian Building Codes Board on behalf of the Commonwealth of Australia and States and Territories of Australia 2018

- **Vertical Transport:**

With a recent 80% increase in people requiring rescue from lifts, and reports of a number of smaller, less reliable suppliers entering the market, the Institute supports the inclusion of vertical transport as a key element of Class 2 and 3 'building work' to ensure consumer safety and to minimise ongoing costs to body corporates for this significant element.²

The inclusion of both acoustics and vertical transport as building elements is essential to raise standards, improve quality outcomes, reduce unnecessary ongoing costs and ensure consumer safety and building amenity, particularly in the delivery of complex Class 2 construction.

1.3 Listing of Recommendations

Recommendation 1 →	The reform should be immediately expanded to include Class 3 buildings along with Class 2 at the outset.
Recommendation 2 →	The department should prepare a timeline for the expansion of Building Class to give industry and member associations the longest lead time possible to prepare for the impending regulatory changes.
Recommendation 3 →	<p>The definition of "Medium Rise Buildings" must be amended to align with SEPP65 which requires that buildings three (3) or more storeys be designed by an architect. The amendment would include:</p> <p>A class 2 building or a building containing a class 2 part, limited to:</p> <ul style="list-style-type: none"> • a maximum of 2 3 storeys (not including 1 storey classified as 7a building (carpark)) but not including Type A construction (for class 4, 5, 6, 7 and 8).
Recommendation 4 →	Both 'Fire safety systems - 'renovation work' and 'Waterproofing - sole occupancy unit' must be included as regulated designs.
Recommendation 5 →	Additional building elements for 'Acoustics' and 'Vertical Transport' must be included.
Recommendation 6 →	The Institute supports the position held by Engineers Australia that for each class of engineering design practitioner, two other grades should be created in the regulations capturing engineering technologists and associates.

² <https://www.domain.com.au/news/growing-number-of-people-getting-trapped-in-nsw-elevators-data-shows-804042/>

Recommendation 7 →	The Institute supports work toward achieving national consistency in the regulation of professions.
Recommendation 8 →	The Institute supports a co-regulatory approach for the registration of architects under the Design and Building Practitioners Act and Regulations 2020.
Recommendation 9 →	<p>The Institute suggests each Design Practitioner domain should have a 'Standard of Competency' used to assess and maintain:</p> <ul style="list-style-type: none"> - Accreditation of the education programs - Assessment of overseas qualifications - Registration of individuals - Assessment and registration of persons through non-traditional paths
Recommendation 10 →	The eligibility criteria should be that used by the Architects Registration Board as per the Architects Act 2003 and association regulations.
Recommendation 11 →	The Institute does not support a requirement for Architects to have 5 years of recent and relevant practical experience.
Recommendation 12 →	As for architecture, registration as an engineer must be possible through alternative pathways and independent assessment for equivalency and competency. This is essential to support/allow appropriately qualified individuals to practice who have had a non-standard career pathway.
Recommendation 13 →	The department should convene a Working Group to develop an approach to staging approvals for large projects.
Recommendation 14 →	The NSW Planning Portal should have functionality that enables Design Practitioners to be notified when their design has been lodged.
Recommendation 15 →	The term 'company' should be replaced with the term 'firm' on the proposed title block.
Recommendation 16 →	The Institute supports the proposed mandatory CPD requirements for design practitioners.

Recommendation 17 →	The Institute would like to ensure a successful integration between the CPD requirements of the Design and Building Practitioners Regulation 2020 and the Architects Act 2003 with tailored CPD for 'Design Practitioner—Architectural' being developed in consultation with the department, NSW Architects Registration Board and the Institute.
Recommendation 18 →	The department should undertake additional consultations with the NSW Architects Registration Board to map out a sensible co-regulatory approach in terms of penalty notice offences.
Recommendation 19 →	The Design and Building Practitioners Regulation 2020 must prescribe the qualifications and role of the Principal Design Practitioner and they must be qualified, at a minimum, at AQF Level 9.
Recommendation 20 →	The Design and Building Practitioners Regulation 2020 should specify which high-risk buildings must have a Principal Design Practitioner.
Recommendation 21 →	When referring to the role of the 'Design Practitioner—Building Design (restricted)' the term 'architectural design' should be avoided, and 'design' should be used instead.
Recommendation 22 →	The Institute strongly supports the inclusion of a 'Compliance Matrix' and process for 'Prototype Onsite Review' as part of the 'regulated design'.
Recommendation 23 →	Registered architects should not be subject to the Code of Practice contained in Schedule 4 and in a co-regulatory approach should simply be required to continue to comply with the NSW Architects Code of Professional Conduct administered by the NSW Architects Registration Board.
Recommendation 24 →	The department should undertake additional consultations with the NSW Architects Registration Board to map out a sensible co-regulatory approach for penalty notice offences.
Recommendation 25 →	The Institute supports the requirement that practitioners undertake three hours of CPD activity provided that the CPD can be counted toward an architect's 10 hours of compulsory 'Formal CPD' under the Architects Act 2003.
Recommendation 26 →	The Institute would prefer for CPD activities to be tailored to the specific needs of professional groups, such as architects, rather than being general in nature.

2 ROLE OF THE INSTITUTE IN SUPPORTING BUILDING REGULATION REFORM

The Institute has been working constructively with the NSW government to support the building and construction sector reform agenda aimed at implementing the recommendations of the 'Building Confidence - Shergold Weir Report'.

The Institute believes that the *Design and Building Practitioners Act 2020* and associated regulations have the potential to be a significant and positive first step towards rectifying issues around the quality and safety of complex buildings in NSW.

The Institute has been impressed with the high level of engagement of all members of the NSW government and the Office of the Building Commissioner and Department of Customer Service in the development of this important legislation. Throughout this process we have endeavoured to support any efforts to ensure that quality, and by default safety, are re-embedded into the value system of the design and construction process.

The Institute has provided ongoing advice to the NSW Building Commissioner as part of the Building Reform Expert Panel (BREP) Steering Committee and each of the six associated pillars. This submission is informed by the engagement of the Institute's representatives on the BREP Pillars, augmented by ongoing information provided by the broader NSW membership, as the NSW building sector reform agenda has progressed.

3 FEEDBACK: REGULATORY IMPACT STATEMENT (RIS)

3.1 Scope of reforms (page 15)

Question 1: Do you think the reforms should be expanded to other types of buildings over time? Why/Why not? If so, which types of buildings do you think should be next?

Immediate expansion of reform to Building Class 3

The Institute understands that the reforms will be expanded to other classes of buildings over time, however we strongly support the inclusion of Class 3 immediately. Class 3 is a building type very similar to Class 2 as it accommodates separate 'sole-occupancy' units including: boarding houses, hostels, back-packers and residential components of a hotel, boarding school or detention centre.

These buildings are for individuals that we would consider to be more 'vulnerable'. The Institute is particularly concerned that the planned regulation for Class 2, without including Class 3, may make Class 3 developments more attractive to those in the industry unable to meet the new standards of Class 2.

The NSW Department of Planning, Industry and Environment (DPIE) is developing two new State Environmental Planning Policy (SEPP) for introduction by mid 2021:

- **SEPP Design and Place** – likely to combine SEPP65 and Seniors SEPP and the Medium Density Design guide.
- **SEPP Housing Diversity** – likely to include SEPP Affordable Rental Housing, SEPP Affordable Housing Revised, SEPP ARH Boarding Houses, Build to Rent and to also cover other new housing typologies.

We recommend any building within these new SEPPs containing 2 or more sole-occupancy units, each being a separate dwelling, whether they are Class 2 or Class 3, be included within the existing definition. This will ensure all occupants of these typologies are able to access the same level of consumer protection.

Recommendation 1 →	The reform should be immediately expanded to include Class 3 buildings along with Class 2 at the outset.
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Further expansion of Building Class

As noted above Class 3 should be immediately included in the first tranche of reforms.

Following this, the second tranche should apply to buildings with a public nature including schools and hospitals, aged care, buildings that store hazardous materials and buildings which support and enable the housing of vulnerable individuals for which ensuring health and safety are paramount.

The Institute would like to request that a timeline for the further expansion of Building Class be provided as soon as practical by the department. This is particularly important to allow member organisations such as the Institute the longest lead time possible to enable us to develop additional advice and support for members as they transition to the new regulatory environment.

Recommendation 2 →	The department should prepare a timeline for the expansion of Building Class to give industry and member associations the longest lead time possible to prepare for the impending regulatory changes.
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Definition of Terms – Medium Rise Buildings

This definition should be aligned with SEPP65 which requires buildings **three** or more storeys be designed by an architect. Therefore, the definition of medium rise needs to relate to a maximum of two storeys (not three as currently drafted).

For clarity, the amendment to the definition of "Medium Rise Buildings" to align with SEPP65 which requires that buildings three (3) or more storeys be designed by an architect would include:

A class 2 building or a building containing a class 2 part, limited to:

- *a maximum of ~~2-3~~ storeys (not including 1 storey classified as 7a building (carpark)) but not including Type A construction (for class 4, 5, 6, 7 and 8).*

Recommendation 3 →	<p>The definition of "Medium Rise Buildings" must be amended to align with SEPP65 which requires that buildings three (3) or more storeys be designed by an architect. The amendment would include:</p> <p><i>A class 2 building or a building containing a class 2 part, limited to:</i></p> <ul style="list-style-type: none"> <i>• a maximum of 2-3 storeys (not including 1 storey classified as 7a building (carpark)) but not including Type A construction (for class 4, 5, 6, 7 and 8).</i>
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Question 2: Do you agree that the reforms should only apply to existing arrangements where the Complying Development Certificate or Construction Certificate has been applied for on or after 1 July 2021? Why/Why not?

The Institute is comfortable with this approach.

3.2 Regulated design (page 17)

Question 3: Are the proposed exclusions from 'building work' appropriate? Why/Why not?

Proposed Exclusions

The Institute supports the proposed exclusions from 'building work' with the following two exceptions:

- **Fire safety systems - 'renovation' work:** Given even minor alterations and adjustments can have a detrimental effect on the integrity of the entire system, it is imperative recertification is undertaken post 'renovation' to ensure no compromise to the fire safety system has occurred.
- **Waterproofing - sole occupancy unit:** Ensuring wet areas are adequately waterproofed is an issue of such significance we do not believe there should be any exclusions for this building element.

In summary, any renovation related to "fire safety systems" must remain as "building work". This is also essential for "waterproofing – sole occupancy unit". Both these types of building work should not be excluded.

Additional Building Elements

Additionally, the Institute strongly supports the inclusion of the following building elements as 'building work':

- **Acoustics:**
Consumer feedback suggests the acoustic quality of current Class 2 buildings does not meet community expectations. While "The Sound Transmission and Insulation in Buildings Handbook" published by the Australian Building Codes Board (ABCB) in 2018 aimed to assist in improving the outcomes in this area, it admits there are limitations within Part F of the Building Code of Australia (BCA), including that Part F provides

minimum requirements only. It is unlikely, without a regulatory incentive, Class 2 builders will seek to improve on the current acoustic outcomes which are inadequate³:

"Members of the AAAC ([the Association of Australian Acoustical Consultants](#)) have been concerned for some time that there are no building regulations or standards that encompass all aspects of the acoustical qualities of apartments, townhouses and other multi-tenancy dwellings. The Building Code of Australia (BCA) regulates minimum acceptable construction standards for buildings and sets minimum standards for privacy.

*Many in the housing industry have interpreted these as absolute requirements, applicable to all types of dwelling. For instance, Part F of the BCA sets minimum requirements for party walls and floors between apartments and for ducts or bulkheads enclosing hydraulic waste pipes, however, it does not deal with other acoustical issues such as noise intrusion from outside or noise generated by building services."*⁴

- **Vertical Transport:**

With a recent 80% increase in people requiring rescue from lifts, and reports of a number of smaller, less reliable suppliers entering the market, the Institute supports the inclusion of vertical transport as a key element of Class 2 and 3 'building work' to ensure consumer safety and to minimise ongoing costs to body corporates for this significant element.⁵

The inclusion of both acoustics and vertical transport as building elements is absolutely essential to raise standards, improve quality outcomes, reduce unnecessary ongoing costs and ensure consumer safety and building amenity, particularly in the delivery of complex Class 2 construction.

Recommendation 4 →	Both 'Fire safety systems - 'renovation work' and 'Waterproofing - sole occupancy unit' must be included as regulated designs.
Recommendation 5 →	Additional building elements for 'Acoustics' and 'Vertical Transport' must be included.

Question 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).

No comment.

³ The Sound Transmission and Insulation in Buildings Handbook © as released by the Australian Building Codes Board on behalf of the Commonwealth of Australia and States and Territories of Australia 2018

⁴ Association of Australasian Acoustical Consultants Guideline for Apartment and Townhouse Acoustic Rating Version 1.0 June 2017

⁵ <https://www.domain.com.au/news/growing-number-of-people-getting-trapped-in-nsw-elevators-data-shows-804042/>

3.3 Registration of Compliance Declaration practitioners (page 23)

Question 5: Do you support the proposed classes of Design Practitioner? Why or why not?

The Institute supports separate categories for 'Design Practitioner—Architectural' and 'Design Practitioner—Building Design (Restricted)'.

However, the definition of Design Practitioner – Building Design (Restricted) must align with the State Environment Planning Policy No 65 – Design Quality of Residential Apartment Development of the *Environmental Planning and Assessment Act 1979* (NSW) (SEPP65). requires buildings three or more storeys be designed by an architect. Therefore, the definition of medium rise and the aligned building practitioner needs to relate to a maximum of two storeys (not three as currently drafted).

The Institute believes that wherever possible government regulation should be aligned. We are also concerned that by not aligning the definition of the Design Practitioner – Building Design (Restricted) with SEPP65 that this will cause confusion and unnecessarily complicate the regulatory environment for design professionals as per Recommendation 3.

Question 6: Are there other types of Design Practitioners that should be included or any that should be removed? If so, what are they and why?

Engineering Technologists and Associates

The Institute accepts the position held by Engineers Australia that for each class of engineering design practitioner, that two other grades should be created in the regulations to ensure that engineering technologists and associates have the authority to deliver design services appropriate to their level of expertise.

Mutual recognition

The Institute notes the recent announcement by National Cabinet on 11 December 2020 that all Australian jurisdictions (except the ACT) have signed the Intergovernmental Agreement on Automatic Mutual Recognition of Occupational Registrations.

The Institute is supportive of any moves toward achieving national consistency in the regulation of professions, noting that for architecture that the Architects Accreditation Council of Australian has already been successfully working to co-ordinate a national approach to registration for the profession in concert with each State and Territory Architects Registration Board.

Recommendation 6 →	The Institute supports the position held by Engineers Australia that for each class of engineering design practitioner, two other grades should be created in the regulations capturing engineering technologists and associates.
Recommendation 7 →	The Institute supports work toward achieving national consistency in the regulation of professions.

Question 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.

Design Practitioner – Architectural

The Institute supports a co-regulatory approach for the registration of architects under the Design and Building Practitioners Act and Regulations 2020.

This is in recognition that Architects are already regulated in NSW under the *Architects Act 2003* which means that all Australian architects are insured and are required to have ongoing registration, following five years of tertiary education, years of practical experience and the completion of log books before taking a registration exam and interview.

For the purposes of considering the proposed qualification, skills, knowledge and experience requirements for each class of practitioner the Institute defers to the expertise of the NSW Architecture Board noting their high level expertise in maintaining the standards of the profession and ensuring appropriate regulation, including upholding a Code of Professional Conduct, disciplinary procedures and penalty notice offences.

The conduct of Architects in all their professional undertakings are currently regulated under the *Architects Act 2003* and associated regulations. In contrast the Design and Building Practitioners Act and Regulations 2020 aim to regulate the conduct of Architects (and others) only when undertaking work related to 'Building Elements'.

The Institute would ask that the department think carefully about the intersect between this regulation and the existing *Architects Act 2003* with the aim of ensuring that for one of the only professions already regulated in NSW, that Architects are not laboured with additional regulation, or conflicting regulation, as a result of the reform agenda.

Recommendation 8 →

The Institute supports a co-regulatory approach for the registration of architects under the Design and Building Practitioners Act and Regulations 2020.

Design Practitioner – all other

Under Schedule 2 Qualifications, experience, knowledge and skills, the Institute is concerned that for all practitioners other than Design Practitioner – Architectural, there is not a national standard of competency for their professional domain.

In comparison, and as a system that is robust and tested, the Institute refers to the independent Architects Accreditation Council of Australia who maintain the National Standard of Competency for Architects (NSCA) and apply /manage the:

- accreditation of architecture programs (university curriculum) nationally
- assessment of Overseas Qualifications (assessed to the Australian curriculum)
- registration of Architects in every state / territory (through the state registration boards)
- assessment and registration of persons through non-traditional paths

The management of this process includes verifying academic testamur, academic curriculum, experience log books, an examination and an interview with experienced practitioners (this final stage is an important qualitative step).

For example, there are experienced practitioners without formal qualifications in 'façade design' but who are formally qualified Structural Engineers, Material Scientists and/or Architects. Currently Part 3, Clause 11 of the regulations defines only Civil and Structural engineers as suitably qualified.

Therefore, the Institute suggests each Design Practitioner have an associated 'Standard of Competency' for their professional domain with a pathway to assess and register persons who have had a non-standard career pathway (See also Recommendation 12).

Recommendation 9 →	<p>The Institute suggests each Design Practitioner domain should have a 'Standard of Competency' used to assess and maintain:</p> <ul style="list-style-type: none"> - Accreditation of the education programs - Assessment of overseas qualifications - Registration of individuals - Assessment and registration of persons through non-traditional paths
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Question 8: Other than qualifications, skills, knowledge and experience requirements, are there any other eligibility criteria that applicants should meet to be eligible for registration?

The eligibility criteria already used by the NSW Architects Registration Board as per the *Architects Act 2003* and association regulations should be mirrored. The Design and Building Practitioners Act and Regulations 2020 should refer to the "criteria as outlined in the *Architects Act 2003* and association regulations" rather than repeating it.

Recommendation 10 →	<p>The eligibility criteria should be that used by the Architects Registration Board as per the <i>Architects Act 2003</i> and association regulations.</p>
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Question 9: Do you agree that practitioners should be required to have 5 years of recent and relevant practical experience?

The Institute does not agree that individuals in the 'Design Practitioner—Architectural' class should be required to have 5 years of recent and relevant practical experience and also notes that it is not clear what would constitute 'recent and relevant practical experience' for the purpose of the Draft Regulation.

While it is essential to ensure that all design and building practitioners have sufficient experience, the Institute strongly believes that the registration process administered by the NSW Architects Registration Board under the *Architects Act 2003* will ensure that architects have the requisite experience to competently carry out their obligations under the Design and Building Practitioners Act and Regulations 2020.

The Institute recommends that the department engage with the NSW Architects Registration Board to further discuss the already robust process for registration as an Architect in NSW and to better understand that for this design and building practitioner, the 5 years of recent and relevant practical experience is not required to ensure appropriate standards (qualifications, skills, knowledge and experience requirements) or to deliver appropriate consumer protection.

Recommendation 11 →

The Institute does not support a requirement for Architects to have 5 years of recent and relevant practical experience.

Question 10: Some classes of practitioner have been proposed with authority to work on low and medium rise buildings? Do you support this approach?

The Institute supports the approach if the SEPP65 definition is used for medium rise buildings – requiring buildings over three storeys to be designed by an architect.

To be clear, the restricted capacity is for 2 storeys and below to meet the SEPP65 definition as per Recommendation 3.

3.4 Registration of Professional Engineers (page 29)

Question 11: Are there any other areas of engineering that should be captured for the purposes of designing or constructing a class 2 building, or a building containing a class 2 part?

No comment.

Question 12: Do you support a co-regulatory approach for the registration of engineers?

The Institute supports a co-regulatory approach for the registration of engineers as per Recommendation 8.

Question 13: Pathway 1 will require an engineer to satisfy certain qualifications, skills, knowledge and experience requirements. Are there any other eligibility criteria that engineers should meet before being registered?

As per Question 7: The management of this process should include verifying academic testamur, academic curriculum, experience log books, an examination and/or an interview with experienced practitioners (this final stage is an important qualitative step).

Question 14: The Regulation proposes recognition of Washington Accord accredited qualifications. Do you think this is appropriate? If not, what alternative approach do you suggest?

The Institute makes no comment on the use of the Washington Accord

Alternate pathways

The Institute would like to note that as for registration as an architect alternative pathways and independent assessment for equivalency and competency are essential to support/allow appropriately qualified individuals to practice who have had a non-standard career pathway.

Administered by the NSW Architects Registration Board the “NSW Portfolio Program of Assessment (NSW PPA)” is a competency based assessment process that provides a pathway to the [Architectural Practice Examination](#) and following this registration for those

who have substantial skills and experience in the architectural services profession but do not have the approved academic qualification in architecture or overseas equivalent.

The NSW PPA is a challenging registration pathway for exceptional people with exemplary skills and substantial 'Executive' level industry experience in the architectural services profession, but no approved architectural qualification. Eligible candidates will have led the design and delivery of high-quality, complex architectural projects. The NSW PPA should not be regarded as a shortcut to registration as an architect in Australia.

The regulation of engineers should mirror this approach.

Question 15: Under Pathway 2 what criteria do you think the professional engineering body should satisfy to be eligible to perform their function?

No comment.

Question 16: Would you be supportive of professional bodies developing a PSS for Pathway 3 to be available?

No comment.

Question 17: Do you agree that Professional Engineers should be required to have 5 years of recent and relevant practical experience?

No comment.

Question 18: Do you support the proposed generic list of skills and knowledge requirements for all classes of engineering (excluding fire safety)? If not, please outline what you think the specific skills and knowledge for each class of engineer should be.

No comment.

3.5 Compliance Declaration Scheme: practitioner requirements (page 38)

Question 19: Do you support the proposal that all construction issued regulated designs must be lodged before any building work can commence? Why or why not?

Yes, in principle. However, the Institute would be interested in working with the department and other key stakeholders to consider in detail the potential for the staging of approvals for large projects. Conceptualising how a staging process might be able to occur is a complex issue with far reaching ramifications and it is likely that unintended consequences may result.

The Institute strongly encourages the department to bring together a Working Group composed of proactive, open minded and experienced representatives from across the building and construction sector including architects, engineers, builders, and certifiers. Together it is likely that a workable approach to staging can be developed that delivers the intended aims and outcomes of the regulations and reform agenda.

Recommendation 13 →

The department should convene a Working Group to develop an approach to staging approvals for large projects.

Question 20: Do you support the Building Practitioner being primarily responsible for lodging regulated designs on the NSW Planning Portal? Why or why not? If not, who do you think should be responsible at the different lodgement points? Please explain your answer.

The Institute is comfortable with the Building Practitioner being primarily responsible for lodging regulated designs on the NSW Planning Portal.

However, the Institute would strongly support functionality in the NSW Planning Portal that enables Design Practitioners to be notified that their design has been lodged.

Recommendation 14 →

The NSW Planning Portal should have functionality that enables Design Practitioners to be notified when their design has been lodged.

Question 21: Do you support the matters covered in the Design Compliance Declaration? Why or why not?

As agreed with the department the Institute will provide a supplementary submission covering issues related to the Design Compliance Declaration and insurance.

Question 22: Do you consider any other matters should be included in the Design Compliance Declaration?

As agreed with the department the Institute will provide a supplementary submission covering issues related to the Design Compliance Declaration and insurance.

Question 23: Do you support the proposed title block? Are there any other matters that should be included in the title block?

The term 'company' should be replaced with the term 'firm' as many architects work in practice as sole-traders and in partnerships rather than companies listed under the Corporation Act.

Recommendation 15 →

The term 'company' should be replaced with the term 'firm' on the proposed title block.

Question 24: Do you support the title block being available in a .dwg format?

Yes. The title block should be available in .dwg format to assist in integrating with existing architectural documentation systems.

Question 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?

The Institute supports this process.

Question 26: Do you support the proposal that the Building Compliance Declaration, regulated designs and variation statements be lodged prior to the application for the Occupation Certificate? Why or why not?

Yes. However, as previously noted, the Institute strongly encourages the formation of a Working Group to consider in detail the potential for the staging of approvals for large projects.

Question 27: Are there further matters that should be included in the Building Compliance Declaration? If so, what are they?

No comment.

Question 28: Are there further matters that should be included in the Principal Compliance Declaration? If so, what are they?

No comment.

2.6 Insurance (page 51)

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

Question 30: Do you consider additional insurance requirements should be prescribed for Design Practitioners and Professional Engineers? If so, what?

Question 31: Do you support the proposed transitional arrangements that exempt Building Practitioners from being insured for issuing Building Compliance Declarations? Why or why not?

As agreed with the department the Institute will provide a supplementary submission covering issues related insurance.

3.7 Continuing professional development (CPD) (page 54)

Question 32: Do you support the proposed CPD requirements for Design and Building Practitioners? Why or why not?

The Institute supports the proposed mandatory CPD requirements for design practitioners.

As required to maintain registration with the NSW Architects Registration Board, Architects are currently required to complete 20 hours of CPD each year, comprised of at least 10 hours formal, and up to 10 hours informal CPD. The Institute assists with the provision of CPD to the architectural profession as a key membership offering.

The Institute would like to ensure a successful integration between the CPD requirements of the Design and Building Practitioners Regulation 2020 and the *Architects Act 2003* with tailored CPD for 'Design Practitioner—Architectural' being developed in consultation with the department, Board and the Institute.

Recommendation 16 →	The Institute supports the proposed mandatory CPD requirements for design practitioners.
Recommendation 17 →	The Institute would like to ensure a successful integration between the CPD requirements of the Design and Building Practitioners Regulation 2020 and the <i>Architects Act 2003</i> with tailored CPD for 'Design Practitioner—Architectural' being developed in consultation with the department, NSW Architects Registration Board and the Institute.

Question 33: What types of training, education or topic areas would be relevant for the functions carried out by Design and Building Practitioners?

The NSW Architects Registration Board has previously shared with the Institute details of data indicating that 'technical compliance' and 'ethics and professional responsibility' are two areas of weakness would benefit from focused CPD activity.

We are also in agreement with the Board that compulsory CPD that addresses the following issues would be welcomed by the profession:

- skills and learning gaps in the construction sector
- obligations under the Act and Regulation
- understanding of the National Construction Code and Building Code of Australia.

Question 34: Do you support the proposed CPD requirements for engineers under pathway 1?

No comment.

Question 35: Do you support the mandatory CPD topic areas? Why/why not? Please make any suggestions for amendments and explain why they are necessary.

No comment.

3.8 Penalty notice offences (page 57)

The Institute is uncertain how penalty notice offences will intersect with the *Architects Act 2003* and if Architects could also be in danger of attracting punishment under both regimes. We would recommend that the department undertake additional consultations with the NSW Architects Registration Board to map out a sensible co-regulatory approach.

Recommendation 18 →

The department should undertake additional consultations with the NSW Architects Registration Board to map out a sensible co-regulatory approach in terms of penalty notice offences.

Question 36: Do you support the proposed penalty notice offences and amounts proposed in Appendix 1? Why or why not?

No comment other than those already made above.

Question 37: Do you think the proposed penalty notice offences and amounts are fair and reasonable?

No comment other than those already made above.

3.9 Fees (page 59)

Question 38: Do you support the reasons for the proposed fees? Why or why not?

No comment.

Question 39: What do you think NSW Fair Trading should consider in determining the fees?

No comment.

Question 40: Are you interested in being involved in targeted stakeholder consultation on fees?

Yes. The Institute is interested in being involved in stakeholder consultation on fees.

4 FEEDBACK: PROPOSED DESIGN AND BUILDING PRACTITIONERS REGULATION 2020

Overview comments – Principal Design Practitioner

As outlined above in our summary of recommendations, the Institute would like to take this opportunity to reaffirm our enduring concerns around the role and expertise of the Principal Design Practitioner as currently described in the regulations.

The Design and Building Practitioners Regulation 2020 continue to make the position of Principal Design Practitioner a collector of declarations. This is, in effect, mirroring the same role Certifiers have had, simply to collect certifications. The result has been no role for Certifiers to oversee construction to ensure compliance and quality.

Perhaps more importantly, for large and complex projects, continuous oversight and quality assurance is required throughout the design and construction stages, to mitigate errors and manage risk. Without quality controls in the building process, government and industry cannot restore public confidence in the building system when there are building failures.

It is therefore essential that the Design and Building Practitioners Regulation 2020 be used to specify which high-risk buildings must have a Principal Design Practitioner. The Institute thinks the role of the “Principal Design Practitioner” is presently a post-box service that simply collects the Design Practitioner declarations, and that this is not appropriate for complex building typologies.

The Institute believes that the Principal Design Practitioner must be a person qualified, at a minimum, at AQF Level 9 who:

- a. coordinates prescribed building work, and/or
- b. coordinates the provision of design compliance declarations for the purposes of building work done by a building practitioner.

Design practitioners are already required to co-ordinate their own work, but the importance of a Principal Design Practitioner in complex construction is that they will co-ordinate across the top of all the design practitioners. For example, a structural engineer will not be able to understand the complexities of all the other design practitioners work (DDA, BCA, acoustic, landscape, heritage, electrical, mechanical, fire, hydraulic, vertical, transport to name only a few).

The Principal Design Practitioner should be qualified at a minimum at AQF Level 9, in order to ensure that they can adequately synthesise the information to co-ordinate all the design practitioners. The Principal Design Practitioner must also have direct access to the Building Commissioner throughout the construction process (especially for apartment buildings), if required.

The Institute is also very concerned that one potential unintended consequence of the Design and Building Practitioners Regulation 2020 and the failure to adequately prescribe the qualification and role of the Principal Design Practitioners is that they will be unable to obtain PI insurance. Architect’s already have PI insurance and if the role of the Principal Design Practitioner is appropriately expanded to the co-ordination of prescribed building work, which is currently within the definition of architectural services, this situation should

simply continue. The Institute will provide additional commentary related to this issue alongside additional commentary on insurance issues in a supplementary submission as agreed with the department.

Recommendation 19 →	The Design and Building Practitioners Regulation 2020 must prescribe the qualifications and role of the Principal Design Practitioner and they must be qualified, at a minimum, at AQF Level 9.
Recommendation 20 →	The Design and Building Practitioners Regulation 2020 should specify which high-risk buildings must have a Principal Design Practitioner.

Topic 1: Part 2 – Regulated designs and types of work

Requirements for regulated designs and compliance declarations, building work and professional engineering work

Use of the term ‘architectural design’

Part 2 Division 2 of the *Architects Act 2003* creates offences for representing individuals as Architects when they are not registered Architects including that a person cannot use ‘architectural design’ as a description of services.

The Institute is concerned that the use of the term ‘architectural design’ when describing the role of the ‘Design Practitioner—Building Design (restricted)’ may lead to confusion and possible breaches of the *Architects Act 2003*.

Alternative phrasing along the lines of ‘Building design of a type that is also carried out by an architect’, or simply ‘design’ rather than ‘architectural design’ would be an appropriate remedy and would remove potential confusion.

Recommendation 21 →	When referring to the role of the ‘Design Practitioner—Building Design (restricted)’ the term ‘architectural design’ should be avoided, and ‘design’ should be used instead.
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Additional Requirements for Regulated Designs

“A ‘regulated design’ is a design, including a plan, specification or a report detailing a design, that is prepared for a building element, or for a performance solution, for building work.”

The Institute strongly supports the inclusion of the following additional requirements which we recommend be included as part of a ‘regulated design’:

- **Compliance Matrix (see Appendix 1)** – This matrix identifies the relevant NCC/BCA and –Australian Standards addressed in a clear and concise manner cross-referenced with the drawing or document number.

- **Prototype Onsite Review** – To ensure documentation is clearly and precisely implemented, the Prototype Onsite Review gathers the relevant design practitioner, building practitioner and certifier together onsite to ensure all following building elements of the same type will meet the agreed standard of the Prototype and are built in accordance with the regulated design. This is an opportunity to minimise any potential ambiguity and ultimately safeguard outcomes for the consumer. For a Class 2 building the Prototype Onsite Review could be programmed with the Marketing Suite or at the beginning of the construction process.

Recommendation 22 →	The Institute strongly supports the inclusion of a 'Compliance Matrix' and process for 'Prototype Onsite Review' as part of the 'regulated design'.
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Proposed Exclusions

As previously noted above at Question 3 and Recommendation 4 the Institute supports the proposed exclusions from 'building work' with the following two exceptions:

- **Fire safety systems - 'Renovation' work.** Given even minor alterations and adjustments can have a detrimental effect on the integrity of the entire system, it is imperative recertification is undertaken post 'renovation' to ensure no compromise to the fire safety system has occurred.
- **Waterproofing - Sole Occupancy Unit:** Ensuring wet areas are adequately waterproofed is an issue of such significance we do not believe there should be any exclusions for this building element.

Additional Building Elements

Additionally, as previously noted above at Question 3 and Recommendation 5 the Institute strongly supports the inclusion of the following building elements as 'building work':

- **Acoustics:**
Consumer feedback suggests the acoustic quality of current Class 2 buildings does not meet community expectations. While "The Sound Transmission and Insulation in Buildings Handbook" published by the ABCB in 2018 aimed to assist in improving the outcomes in this area, it admits there are limitations within Part F of the BCA, including that Part F provides minimum requirements only. It is unlikely, without a regulatory incentive, Class 2 builders will seek to improve on the current acoustic outcomes which are inadequate⁶.

"Members of the AAAC ([the Association of Australian Acoustical Consultants](#)) have been concerned for some time that there are no building regulations or standards that encompass all aspects of the acoustical qualities of apartments, townhouses and other multi-tenancy dwellings. The Building Code of Australia (BCA) regulates minimum acceptable construction standards for buildings and sets minimum

⁶ The Sound Transmission and Insulation in Buildings Handbook © as released by the Australian Building Codes Board on behalf of the Commonwealth of Australia and States and Territories of Australia 2018

*standards for privacy. Many in the housing industry have interpreted these as absolute requirements, applicable to all types of dwelling. For instance, Part F of the BCA sets minimum requirements for party walls and floors between apartments and for ducts or bulkheads enclosing hydraulic waste pipes, however, it does not deal with other acoustical issues such as noise intrusion from outside or noise generated by building services."*⁷

- **Vertical Transport:**

With a recent 80% increase in people requiring rescue from lifts, and reports of a number of smaller, less reliable suppliers entering the market, the Institute supports the inclusion of vertical transport as a key element of Class 2 and 3 'building work' to ensure consumer safety and to minimise ongoing costs to body corporates for this significant element.⁸

The inclusion of both acoustics and vertical transport as building elements is absolutely essential to raise standards, improve quality outcomes, reduce unnecessary ongoing costs and ensure consumer safety and building amenity, particularly in the delivery of complex Class 2 construction.

Topic 2: Part 3 – Requirements for designs and building work

Lodgement of designs and compliance declarations, requirements of principal design practitioners and building practitioners

As agreed with the department the Institute will provide a supplementary submission covering issues related to the Design Compliance Declaration and insurance.

Topic 3: Part 4 – Registration of practitioners

Applications and conditions of registration and registration obligations

As outlined above at Question 7 and Recommendation 8 the Institute supports a co-regulatory approach for the registration of architects under the Design and Building Practitioners Act and Regulations 2020 noting the exemplary record of the NSW Architects Registration Board in administering the regulation of Architecture in NSW including:

- protecting consumers of architectural services by ensuring that architects provide services to the public in a professional and competent manner;
- establishing and maintaining a register of architects in NSW;
- disciplining architects who have acted unprofessionally or incompetently;
- accrediting architectural qualifications for the purpose of registration;
- informing the public about the qualifications and competence of individuals or organisations holding themselves out as architects; and
- promoting a better understanding of architectural issues in the community.

⁷ Association of Australasian Acoustical Consultants Guideline for Apartment and Townhouse Acoustic Rating Version 1.0 June 2017

⁸ <https://www.domain.com.au/news/growing-number-of-people-getting-trapped-in-nsw-elevators-data-shows-804042/>

Topic 4: Part 5 – Recognition of professional bodies of engineers

Applications and requirements for recognition or registration scheme

No comment.

Topic 5: Part 6 – Insurance

Insurance for design and principal design practitioners, professional engineers, building practitioners and adequacy of cover

As agreed with the department the Institute will provide a supplementary submission covering issues related to the Design Compliance Declaration and insurance.

Topic 6: Part 7 – Record keeping

Record keeping for design and principal design practitioners, professional engineers, building practitioners

No comment.

Topic 7: Part 8 – Miscellaneous

Authorised and penalty notice officers, exchange of information, transitional arrangements for insurance for building practitioners and qualifications for fire system designers and work done under existing arrangements.

As agreed with the department the Institute will provide a supplementary submission covering issues related to the Design Compliance Declaration and insurance.

Topic 8: Schedule 1 – Classes of registration

Classes of registration for practitioners and scope of work

As outlined in the response to Question 5 and Recommendation 3, the definition of 'Design Practitioner – Building Design (Restricted)' must align with SEPP65 which requires buildings **three** or more storeys be designed by an architect.

Topic 9: Schedule 2 – Qualifications, experience, knowledge and skills

For building practitioners, design practitioners, principal design practitioners and professional engineers

As outlined above at the Institute recommends:

- a co-regulatory approach for the registration of architects under the Design and Building Practitioners Act and Regulations 2020 (Recommendation 8);
- a 'standard of competency' to assess qualifications and experience for each Design Practitioner domain and a registration process for all practitioners that includes verifying academic qualifications (including overseas qualifications), experience log books and experience working under the supervision of a registered professional, an examination and/or interview with experienced practitioners (Recommendation 9); as well as;

- alternative pathways and independent assessment for equivalency and competency to support/allow appropriately qualified individuals to practice who have had a non-standard career pathway (Recommendation 12).

Topic 10: Schedule 3 – Continuing professional development

No comment.

Topic 11: Schedule 4 – Code of practice

Code for prescribed practitioners and code for professional engineers

Registered architects in NSW are already required to comply with the NSW Architects Code of Professional Conduct administered by the NSW Architects Registration Board – a detailed code familiar to all Architects. The Code of Professional Conduct covers all of the topics proposed in ‘Schedule 4 Code of Practice’ in the draft regulations, as well as many others.

The Institute believes that registered architects should not be subject to the Code of Practice contained in Schedule 4 given that it is likely that the existence of two overlapping codes would cause confusion among both consumers and practitioners.

Taking a co-regulatory approach for Architects would enable minor alterations to be made to the NSW Architects Code of Professional Conduct that would bring it into alignment with relevant parts of the proposed Code of Practice. Architects could then be required to continue to comply with the NSW Architects Code of Professional Conduct, while at the same time also meeting the obligations for professional conduct under the Design and Building Practitioners Act and Regulations 2020.

Recommendation 23 →

Registered architects should not be subject to the Code of Practice contained in Schedule 4 and in a co-regulatory approach should simply be required to continue to comply with the NSW Architects Code of Professional Conduct administered by the NSW Architects Registration Board.

Topic 12: Schedule 5 – Penalty notice offences

As noted in the response to Question 2.8, the Institute is uncertain how penalty notice offences will intersect with the *Architects Act 2003* and if Architects could be in danger of attracting punishment under both regimes.

We would recommend that the department undertake additional consultations with the NSW Architects Registration Board to map out a sensible co-regulatory approach.

Recommendation 24 →

The department should undertake additional consultations with the NSW Architects Registration Board to map out a sensible co-regulatory approach for penalty notice offences.

Topic 13: Schedule 6 – Forms

Design Compliance Declaration

As agreed with the department the Institute will provide a supplementary submission covering issues related to the Design Compliance Declaration and insurance.

Topic 14: General feedback

Any other comments on the proposed Regulation.

The Institute would like to note that registered Architects in NSW already have existing registration numbers – assigned for life – under the *Architects Act 2003*. There is a risk that the duplication of registration numbers created by the regulations will lead to confusion and uncertainty among architects and consumers.

5 FEEDBACK: PROPOSED CONTINUING PROFESSIONAL DEVELOPMENT GUIDELINES (CPD GUIDELINES)

5.1 CPD Guideline for prescribed practitioners

Question 1: Do you consider that requiring practitioners to undertake three hours of CPD activity is appropriate? Why or why not?

The Institute is supportive of this approach provided that the CPD can be counted toward an architect's 10 hours of compulsory 'Formal CPD' under the *Architects Act 2003*.

Recommendation 25 →

The Institute supports the requirement that practitioners undertake three hours of CPD activity provided that the CPD can be counted toward an architect's 10 hours of compulsory 'Formal CPD' under the *Architects Act 2003*.

Question 2: Do you support that CPD activities must be from the approved platforms? If not, please explain why.

The Institute is supportive of this approach but would prefer that activities were tailored to the specific needs of professional groups, such as architects, rather than general in nature.

Recommendation 26 →

The Institute would prefer for CPD activities to be tailored to the specific needs of professional groups, such as architects, rather than being general in nature.

Question 3: Do you support the guidelines prioritising technical CPD activity (i.e., improving knowledge and understanding of the National Construction Code and Building Code of Australia) over other CPD activities? If not, please explain why.

No comment.

Question 4: The Department is working with industry to develop courses that would assist practitioners. What courses or topic areas should be developed and available on the Construct NSW Learning

Management System? We are particularly interested in providing courses that cover gaps in current learning content.

In addition to the commentary provided at Question 33 the Institute would welcome compulsory CPD that addresses (1) skills and learning gaps in the construction sector (2) obligations under the Act and Regulations (3) deeper understanding of the National Construction Code and the Building Code of Australia.

Question 5: Are there any other general comments you would like to make on the Continuing Professional Development Guidelines for prescribed practitioners?

No comment.

5.2 CPD Guidelines for professional engineers

Question 6: Do you support the proposed CPD structure and allocation of points? Why/why not? Please make any suggestions for amendments and explain why they are necessary.

No comment.

Question 7: Do you support the mandatory CPD topic areas? Why/why not? Please make any suggestions for amendments and explain why they are necessary.

No comment.

Question 8: Are there any activities that should be included/not included as:

- a. Formal education and training activities?
- b. Informal education and training activities?

No comment.

Question 9: Structured training courses available from Construct NSW Learning System and from the Australian Building Codes Board are proposed to count for 2 CPD points. Do you support this approach?

No comment.

Question 10: The Department is working with industry to develop courses that would assist professional engineers. What courses or topic areas should be developed and available on the Construct NSW Learning Management System? We are particularly interested in providing courses that cover gaps in current learning content.

No comment.

Question 11: Are there any other general comments you would like to make on the Continuing Professional Development Guidelines for Professional Engineers?

No comment.



Australian
Institute of
Architects

DESIGN AND BUILDING PRACTITIONERS REGULATION 2020



Stakeholder Feedback (Submission 2)
NSW Department of Customer Service

NEW SOUTH WALES CHAPTER

Submission date: 14 January 2021

ABOUT THE INSTITUTE

The Australian Institute of Architects (the Institute) is the peak body for the architectural profession in Australia. It is an independent, national member organisation with around 12,000 members across Australia and overseas. More than 3,000 of these are based in NSW.

The Institute exists to advance the interests of members, their professional standards and contemporary practice, and expand and advocate the value of architects and architecture to the sustainable growth of our communities, economy and culture.

The Institute actively works to maintain and improve the quality of our built environment by promoting better, responsible and environmental design.

PURPOSE

This submission is made by the Australian Institute of Architects' NSW Chapter (the Institute) in response to the consultation led by the NSW Department of Customer Service on the draft Design and Building Practitioners Regulation 2020.

At the time of this submission the NSW Chapter President is Kathlyn Loseby, the NSW State Manager is Kate Concannon and the NSW Policy and Advocacy Manager is Lisa King.

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1 FEEDBACK: REGULATORY IMPACT STATEMENT (RIS)

1.1 Compliance Declaration Scheme: practitioner requirements (page 38)

Question 21: Do you support the matters covered in the Design Compliance Declaration? Why or why not?

The Institute supports the current matters covered in the Design Compliance Declaration and believes it will assist registered design practitioners to ensure that designs are compliant with the National Construction Code (NCC), Building Code of Australia (BCA) and Australian Standards as well as being harmonised and holistically designed.

Question 22: Do you consider any other matters should be included in the Design Compliance Declaration?

The Institute strongly supports the attachment of a 'Compliance Matrix' (see Appendix 1) to the Design Compliance Declaration. This matrix sets out the relevant NCC/BCA and Australian Standards for the design addressed in a clear and concise manner cross-referenced with the drawing or document number.

No additional matters other than the Compliance Matrix should be routinely included. However, if specialist advice was sought and had a material influence on the preparation of the registered design it would be appropriate to consider including the details of the person who provided the specialist advice so that – if needed – they could be easily identified to assist in interpreting the design during construction.

Recommendation 1 →	The Institute strongly supports the attachment of a 'Compliance Matrix' to the Design Compliance Declaration.
Recommendation 2 →	If applicable the contact details of professionals who provided specialist advice to enable the preparation of a Design Compliance Declaration should be included in the declaration.

1.2 Insurance (page 51)

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

A key area of concern for the Institute is the potential for PI Insurance to be withdrawn from the market for design professionals along with the ability allowed by the *Design and Building Practitioners Act 2020* and Regulations to contract out of proportionate liability as outlined in Recommendation 5 below. There are also some concerns about the introduction of retrospective cover, noting that it is likely that this may simply bring forward liabilities that consultants were always going to be exposed to.

Additional feedback provided to the Institute has been that firms (particularly sole traders) are rarely provided with meaningful choices when sourcing or renewing their insurance products. The requirement to obtain insurance cover, alongside onerous contract provisions including contracting out of proportionate liability, are leading to a conflict between the aims of the Act and Regulations and commercial reality. There is a real risk that unless resolved these issues will significantly impact on the ability of building and design professionals to operate in the Class 2 market with 'adequate' insurance. The Institute also believes that there is uncertainty in the Regulations about what constitutes 'adequate' insurance including the scope of cover, amount of cover etc.

The Institute recommends that the department take the time required to fully investigate and test the likely effect of the insurance requirements of the *Design and Building Practitioners Act 2020* and Regulations on the building and construction industry before finalising the insurance provisions.

Recommendation 3 →	Additional consultation with the insurance industry must be undertaken before finalising the insurance provisions of the Regulations.
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Question 30: Do you consider additional insurance requirements should be prescribed for Design Practitioners and Professional Engineers? If so, what?

Architects are already regulated in NSW under the *Architects Act 2003*. All Australian Architects are insured and are required to have ongoing registration with state and territory bodies, following five years of tertiary education, years of practical experience and the completion of log books before passing a registration exam and undertaking an interview.

The Institute believes that the insurance requirements in order to maintain registration under the *Architects Act 2003* are sufficient and additional insurance requirements are not needed.

Recommendation 4 →	For Architects, the insurance requirements in order to maintain registration under the <i>Architects Act 2003</i> are sufficient and additional insurance requirements do not need to be prescribed.
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Question 31: Do you support the proposed transitional arrangements that exempt Building Practitioners from being insured for issuing Building Compliance Declarations? Why or why not?

As a distinct profession, Architects can and do offer services that directly impact on public health and safety issues and quality issues affecting buildings. The Institute's Code of Conduct expects Architects to 'improve standards of health and safety for the protection and welfare of all members of the community.' This is an important distinction, beyond the basics of safety, and it is not just to serve interests of the client, the developer or the financial institution, but everyone.

Architects have long had mandatory registration with mandatory insurance requirements and adherence to a Code of Professional Conduct while the bulk of the building and construction industry has operated in an unregulated environment. It is imperative that the NSW government delivers reform that ensures that all building and design practitioners are held accountable for their actions in equal part. This means it is essential that the Regulations ensure that no contract or agreement can be made or entered into or amended to exclude the proportionate liability provisions of the *Civil Liability Act 2002* and additionally that an insurance free period must not be provided to any practitioner.

It is critically important that the consideration of any insurance issue must consider the impact of Building Practitioners having an insurance-free period, which when combined with provisions that allow the contracting out of proportionate liability means that design professionals may be liable as a consequence of uninsured building practitioners. This is

unreasonable and further increases the likelihood that PI Insurance will be withdrawn from the market for design professionals. Please see page 4 for a longer discussion around the application and impact of applying the *Civil Liability Act 2002*.

Recommendation 5 →	The Regulations must ensure that no contract or agreement can be made or entered into or amended to exclude the proportionate liability provisions of the <i>Civil Liability Act 2002</i>.
Recommendation 6 →	An insurance free period must not be provided to any practitioner under the Regulations.

2 FEEDBACK: PROPOSED DESIGN AND BUILDING PRACTITIONERS REGULATION 2020

Overview comments - Principal Design Practitioner and PI Insurance

The Design and Building Practitioners Regulation 2020 are currently designed to make the position of Principal Design Practitioner a collector of declarations. This is, in effect, mirroring the same role Certifiers have had, simply to collect certifications. The result has been no role for Certifiers to oversee construction to ensure compliance and quality. This risk, of certifying without co-ordination, is now reflected in the insurance market where insurance for Certifiers became unaffordable before being withdrawn from the market.

The insurance industry has pulled out of PI for Certifiers and insurance to other parts of the construction industry, it is therefore likely that this will occur for Architects who take on the Principal Design Practitioner role under the *Design and Building Practitioners Act 2020* and associated Regulations.

The Institute is therefore very concerned that a potential unintended consequence of the Design and Building Practitioners Regulation 2020 and the failure to adequately prescribe the qualifications and role of the Principal Design Practitioners is that they will be unable to obtain PI insurance. Architects already have PI insurance and if the role of the Principal Design Practitioner is appropriately expanded to the co-ordination of prescribed building work, which is currently within the definition of architectural services, this situation should simply continue.

The Institute believes that the Principal Design Practitioner must be a person qualified, at a minimum, at AQF Level 9 who:

- coordinates prescribed building work, and/or
- coordinates the provision of design compliance declarations for the purposes of building work done by a building practitioner.

For large and complex projects, continuous oversight and quality assurance is required throughout the design and construction stages, to mitigate errors and manage risk. Without quality controls in the building process, government and industry cannot restore public confidence in the building system to prevent building failures.

It is therefore essential that the Design and Building Practitioners Regulation 2020 be used to specify which high-risk buildings must have a Principal Design Practitioner. This would ensure both continuous oversight and quality assurance on large projects, while defining the role of Principal Design Practitioner to include the co-ordination of prescribed building work, which would substantially mitigate the risk that PI insurance may be withdrawn from the market for Architects.

Recommendation 7 →	The Design and Building Practitioners Regulation 2020 should specify which high-risk buildings must have a Principal Design Practitioner.
Recommendation 8 →	The definition of the role of the Principal Design Practitioner must be expanded to include the coordination of prescribed building work.

Overview comments - Contracting out of proportionate liability

The Institute would like to again take this opportunity to comment that it is essential that the Regulations ensure there can be no contracting out of proportionate liability on the principle that all building practitioners should be held accountable for their actions in equal part.

The *Design and Building Practitioners Act 2020* makes it clear that it is not permissible to (attempt to) contract out of duty of care provisions and that these obligations and duties are in addition to those otherwise held under the *Home Building Act 1989 (NSW)* and at common law. The overriding principle is that, where there are multiple wrongdoers, the Court should seek to apportion to those wrongdoers a specific percentage of liability rather than a joint and several liability for the whole of the loss.

While the *Design and Building Practitioners Act 2020* does state 'no contracting out of Part', the Act also refers specifically to the *NSW Civil Liabilities Act 2002* which does allow for this to occur. The Institute is expressly concerned about this issue for the following reasons:

- Contractors will use the provision along with consultants to ensure that there is no proportionate liability – rather joint and several liability will apply.
- This will exacerbate the 'deep pocket syndrome', where those holding PI insurance will be potentially responsible for paying ALL costs, regardless of their professional capabilities, risk minimisation, contribution to the situation and quality management processes to ensure appropriate outcomes.
- The insurance industry will either price for this, making insurance unaffordable, or will not make PI insurance available.
- The present situation where the insurance industry has pulled out of PI for Certifiers and insurance to other parts of the construction industry, is therefore likely.
- Legislative harmonisation is not possible when Queensland, for example, does not allow contracting out of their *Civil Liabilities Act 2002*.
- Exempting Building Practitioners from mandatory insurance during a transitional period will exacerbate this situation. In a situation where an uninsured Building Practitioner is wholly responsible for costly rectifications, and without access to

proportionate liability, the Design Practitioners will be unfairly required to pay through their insurance.

Allowing parties who have a duty of care under the *Design and Building Practitioners Act 2020* to contract out of proportionate liability may seem to be in the interests of the end-user as it would allow them to recover all of their losses from any one party found to bear any (small) measure of liability.

However, the opposite is actually the case as insurers would be reluctant to provide cover as proportionate liability legislation means that defendants with deep pockets – typically, insured professionals – bare the entirety of a plaintiff's loss despite being responsible for only a small part of that loss.

Registration and licensing schemes require proof of PI insurance. Although practitioners must be insured, this insurance is becoming increasingly unavailable and insurers are, simply, withdrawing from the space. The department is assuming that practitioners can find insurers willing to provide insurance on reasonable commercial terms.

In these circumstances, the Institute believes that liability for practitioners should be limited as contemplated in Part 4 of the *Civil Liability Act 2002 (NSW)*. A failure to provide for this may well see the application of the legislation and Regulations fail, as well as the building and construction reform agenda for want of insured practitioners.

As outlined in Recommendation 5 above, the Regulations must ensure that no contract or agreement can be made or entered into or amended to exclude the proportionate liability provisions of the *Civil Liability Act 2002*.

Topic 5: Part 6 – Insurance

Insurance for design and principal design practitioners, professional engineers, building practitioners and adequacy of cover

The Institute believes that the insurance requirements in order to maintain registration under the *Architects Act 2003* are sufficient and additional insurance requirements are not needed as outlined above at Recommendation 4.

Topic 7: Part 8 – Miscellaneous

Authorised and penalty notice officers, exchange of information, transitional arrangements for insurance for building practitioners and qualifications for fire system designers and work done under existing arrangements.

The consideration of any insurance issue must consider the impact of Building Practitioners having an insurance-free period, which when combined with provisions that allow the contracting out of proportionate liability means that design professionals may be liable for uninsured building practitioners. This is unreasonable and further increases the likelihood that PI Insurance will be withdrawn from the market for design professionals.

As outlined in Recommendation 6 above, an insurance free period must not be provided to any practitioner under the Regulations. It is imperative that the NSW government deliver reform that ensures that all building and design practitioners are held accountable for their actions in equal part.

Topic 13: Schedule 6 – Forms

Design Compliance Declaration

As outlined above at Question 21 and 22 the Institute supports the matters currently covered in the Design Compliance Declaration

The Institute also strongly supports the attachment of a 'Compliance Matrix' (see Appendix 1) to the Design Compliance Declaration. This matrix sets out the relevant NCC/BCA and Australian Standards for the design addressed in a clear and concise manner cross-referenced with the drawing or document number.

No additional matters other than the Compliance Matrix should be routinely included.

However, as outlined in Recommendation 2, if specialist advice was sought and had a material influence on the preparation of the registered design it would be appropriate to consider including the details of the person who provided the specialist advice so that – if needed – they could be identified to assist in interpreting the design during construction.

3 APPENDIX 1: COMPLIANCE MATRIX

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