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Building and Construction Policy Review Team
Better Regulation Division
Department of Customer Service
NSW Government
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KBR INFRASTRUCTURE SERVICES – RESPONSE TO THE DRAFT DESIGN AND BUILDING PRACTITIONERS REGULATIONS 2020 – CONSULTATION PROCESS

Dear Review Team,

I am writing to submit our response to the consultation process underway regarding the draft *Design and Building Practitioners Regulation 2020*. KBR also supports the submission made by Consult Australia as our industry sector peak body.

KBR's full response is provided in the attached templated form. However I would like to particularly point out that it is Part 6 Insurance of the Regulation which is of the greatest concern to our business.

Under Part 6 of the Regulation each registered practitioner employed by KBR:

- 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 if they hold out that they are adequately insured and they are not.

KBR's employees will not be able to comply with these requirements because:

- Our insurance policy is a commercial-in-confidence document between the KBR's global business entity and the insurer. Staff have no say in the insurance products the business acquires and very few individuals within our business see the policy. The full Terms and Conditions are not and cannot be shared with employees so they would not have sufficient facts to determine that they have adequate coverage or not. In general terms most employees never take these issues into their minds at all, that's why they chose to be employees instead of independent practitioners. They are in a similar position to a public sector worker considering if they need to take out PI for their jobs.
- 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 annually. This is because our services are provided under contract – liabilities change contract to contract. Our staff move on and off projects all the time.
- It is difficult to ever be satisfied that a PI policy covers all liabilities:



- 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 KBR 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 liability.

KBR buys PI insurance from our brokers and no customer can guarantee what a commercial supplier will offer into the future. For 2020 we had to spread our Australian business over three separate underwriters to obtain the coverage we sought, as no single one was prepared to cover the level of business given what is happening in Australia construction litigation. 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.

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.

Our business is already experiencing the reduction in the capacity of the PI insurance market. This is an untenable position for an industry that heavily contributes to the Australian and NSW economies, especially as we strive for recovery from COVID-19.

Therefore, I am concerned about our ability to comply with Part 6 of the Regulations. The NSW government's policy intent of improving consumer confidence and industry compliance is one we support – however Part 6 will not result in this. For these reasons, I urge you to:

- remove Part 6 of the Regulation
- 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 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.