15th Dec 2020

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 I employ:

- 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.

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 say in the insurance products the business acquires and very few individuals within my business see the policy. The full terms & conditions are not and cannot be shared with my employees – therefore their determination of adequate coverage will need to be based on advice I provide.
- The process of determining adequate coverage would need to occur each time a new project is undertaken, not only once a year when the PI policy is renewed. This is because our services are provided under contract – liabilities change contract to contract.
- I cannot ever be satisfied that a PI policy covers all liabilities:
    - o as the market hardens more exclusions are added by insurers, including excluding statutory obligations
    - o it is almost impossible in the current contracting environment in Australia to get a contract that is 100% covered by insurance
    - o the model contract clauses released by the Office of the Building Commissioner are unlikely to be covered by insurance
    - o in NSW, contracting out of proportionate liability is permitted, and my business is often asked to do so
    - o 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.

My business is a customer of the insurance company, and no customer can guarantee what a commercial supplier will offer over time. We strive to uphold the highest professional standards as expected by our communities and our clients. Despite the care and professionalism with which we operate we are facing significant challenges regarding the availability and affordability of PI insurance. PI insurance premiums are amongst our largest business expense and year on year

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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 PI insurance policy costs has more than doubled in the past two years even before consideration of the new requirements. In fact is was even difficult for the broker to find one insurer interested in providing cover. in spite of a zero claims record to date.

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:

(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.

Yours faithfully

Sydney Strata Consulting Engineers

Gráinne Keaney BE, MES, FIEAust, CPEng, NER

Principal