Submission No 28

INQUIRY INTO FURTHER INQUIRY INTO THE REGULATION OF BUILDING STANDARDS

Organisation: Australian Institute of Architects NSW

Date Received: 27 August 2021

Australian Institute of Architects

INQUIRY INTO THE REGULATION OF BUILDING STANDARDS

NSW Legislative Council
Public Accountability Committee

NEW SOUTH WALES CHAPTER

Submission date: 27 August 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 New South Wales.

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 NSW Legislative Council Public Accountability Committee inquiry into the regulation of building standards.

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

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1 ROLE OF THE INSTITUTE IN SUPPORTING BUILDING REGULATION REFORM

The Institute has been working constructively with the New South Wales (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 are a significant and positive first step towards rectifying issues around the quality and safety of complex buildings in NSW and commends the Office of the Building Commissioner and their policy team for their diligence and collaboration.

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 suite of legislation and regulation. 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.

As both the legislation and the regulations were developed, we have been pleased to see that sector concerns have be actively listened to with a number of changes made in response to meaningful consultations such as all variations to regulated designs needing to be certified holistically and retrospectively for the entire project. We have continued to provide ongoing expert 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 Pillar Groups, augmented by ongoing information provided by the broader NSW membership, as the NSW building sector reform agenda has progressed.

The Institute understands there will be a need for amendments and refinements to the system as we move the new regime into reality. We will continue to engage closely with the government to ensure these changes do not undermine the reform as intended for the benefit of consumers. With this in mind, the Institute does have a small number of previously voiced concerns that remain unaddressed, and we have taken the time to outline these in this submission.

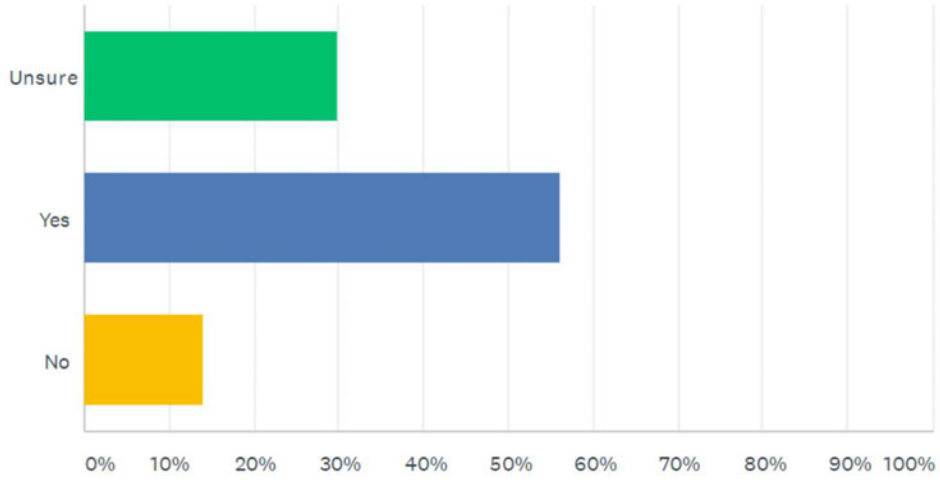
All of these issues have been either raised with the Committee previously during the earlier review of the *Design and Building Practitioner Bill 2020* or with the Office of the Building Commissioner and Department of Customer Service directly. The Institute also surveyed members on the impact of the reform program to date, with insights from the survey included throughout the submission for consideration by the Committee. These survey results brought to light that a large majority of surveyed members believe the reforms will build consumer confidence.

The Institute looks forward to continuing to work constructively with the NSW government on this important reform agenda.

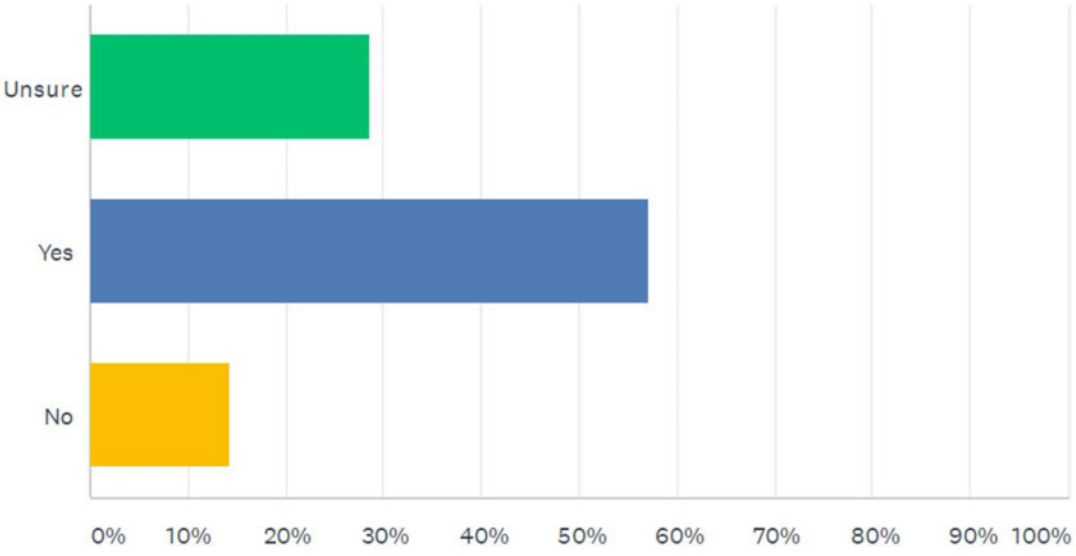
2 MEMBER FEEDBACK: SUPPORT FOR REFORMS

The Institute developed a short member survey to gauge the overarching impacts of the reform agenda so far, and to ascertain how the changes were being perceived by the profession. The survey was completed by 173 architects, and with there being no fixed requirement to answer every question, the result was that approximately 50 architects provided input and comments on each question asked. Questions and results on the capacity of the reforms to rebuild consumer confidence and lift the technical skills of design professionals included:

Do you feel the NSW building reforms will assist in rebuilding consumer confidence in the Class 2 building sector?



Do you feel the NSW building reforms will assist in strengthening the standard of technical excellence required of architects and bolster the skills of the profession in the Class 2 building sector?



Member survey comments included...

"It is a step in the right direction"

"The entire process of enacting this legislation has been done at breakneck speed. It will undoubtedly have teething issues. The speed however, has been absolutely driven by urgent need for action to give consumers better protection against risks which could be financially crippling or at best, exceedingly stressful. While there will be some difficulties, we can already see the effect of the Act in driving clients and builders to have a more responsible approach to many technical aspects of design, particularly in regard to waterproofing."

"Consultants and developers are more aware of achieving quality outcomes due to the increased risks for consultants and clients."

3 CONTRACTING OUT OF LIABILITY

Recommendation 1 →	**The *Design and Building Practitioners Act 2020* must be amended to 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*.**

Architects must be supported to access adequate and affordable insurance products by ensuring joint accountability of building and design practitioners in NSW legislation and regulations.

Changes to the *Design and Building Practitioners Act 2020* and associated regulations must be made to 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*.

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.

While this is changing under the reform agenda – albeit it with a twelve month delay for others to hold adequate insurance - it remains 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 changes are made to the Act and Regulations to 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*.

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*.

The exempting of Building Practitioners from mandatory insurance during the twelve-month transition period will exacerbate this situation and where an uninsured Building Practitioner is wholly responsible for costly rectifications, and without access to proportionate liability, Design Practitioners will be unfairly required to pay through their insurance.

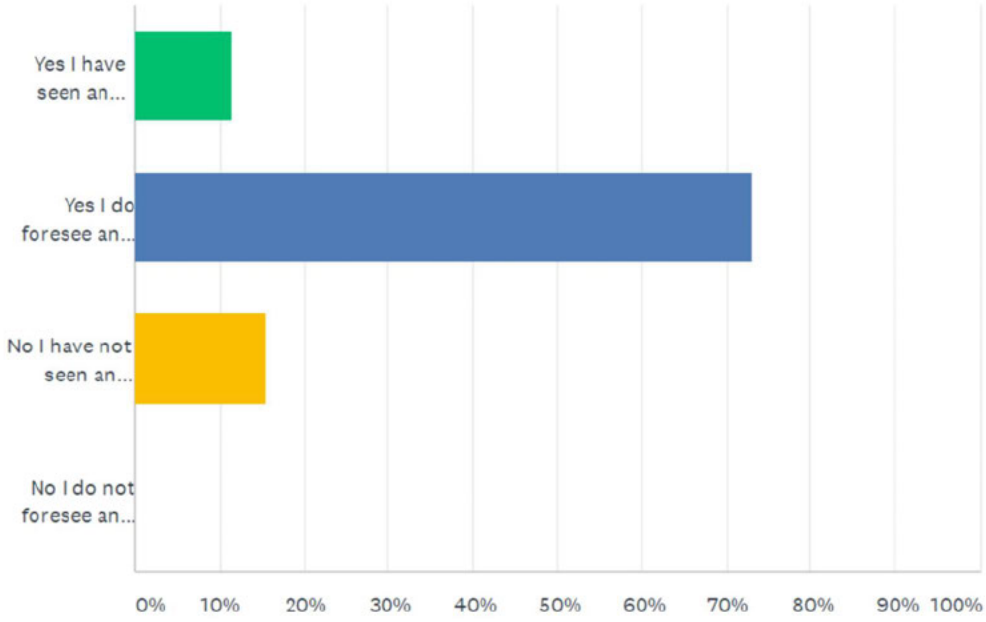
Allowing parties who have a duty of care under the Design and Building Practitioners legislation to contract out of proportionate liability may seem to be in the interests of the end-user as it would allow them to recover all of their losses from any one party found to bear any (small) measure of liability. However, the opposite is actually the case as insurers will be reluctant to provide cover as proportionate liability legislation means that defendants with deep pockets – typically, insured professionals – bear 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. Assuming that practitioners can find insurers willing to provide insurance on reasonable commercial terms does not solve the problem.

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

With over 73% of respondents to our survey believing that they will see an increase in the cost of Professional Indemnity Insurance, and more than 10% having already experienced an increase as a result of the NSW building reforms, the *Design and Building Practitioners Act 2020* and 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*.

As a result of the NSW building reforms, have you seen, or do you foresee an increase in the cost of Professional Indemnity Insurance?



Member survey comments included…

"My insurance costs have increased 35%"

"I had to increase my insurance cover five fold"

"While this has not yet affected my practice's insurance, I am aware of PI insurance premiums for Structural Engineers jumping as much as 50% in this past year. This greatly concerns me in relation to my practice and is a deterrent to undertaking Class 2 work and becoming registered as a Design Practitioner - architectural.

4 TAKE REASONABLE STEPS TO ENSURE

Recommendation 2 →	**The *Design and Building Practitioners Act 2020* should be amended to require both building and design practitioners to "take reasonable steps to ensure". This is essential to stop the common law test of reasonableness being replaced by a strict liability for design professionals only.**

Another continuing and previously voiced concern - which will also impact the availability of Professional Indemnity Insurance - is the inequitable treatment of design professionals as opposed to building professionals in the *Design and Building Practitioners Act 2020*.

The legislation and regulations require that a registered design practitioner must "ensure" that design compliance declarations are given as required and are issued by registered practitioners. This places a strict liability on the registered design practitioner. The building practitioner is not held to the same standard of accountability and is only required to "take reasonable steps to ensure" compliance with declaration obligations.

The Institute remains worried that a number of significant unintended consequences will result from this approach, including the withdrawal of PI insurance from the market for designers. We have continued to have conversations with design professionals and providers within the insurance industry and they have continued to highlight the following potential unintended consequences and associated issues and concerns with this approach:

1. Moving from a negligence "reasonable person" test to "declarations" and "ensuring compliance" may increase PI insurance premiums over time.
2. It will be much easier to find fault in a PI insurance claim against the designer who has strict liability with no reasonableness provisions moderating liability. If there is a defect caused and the designer has signed off on it (as they are required to do) then they will be civilly liable, and the PI policy should respond.
3. We are already in the middle of a PI insurance crisis and introducing strict liability will only worsen things, particularly if by contrast the builder is allowed access to the "reasonable person" test.
4. By imposing a strict liability, the unintended consequence will be that PI insurance will either increase substantially or be unavailable to design practitioners in the same way that it has become for building certifiers. If the risk becomes too high, and insurance is unavailable, the market will shrink significantly, and projects will be delayed or stopped. Design professionals may stop offering their services in NSW.
5. There are significant concerns that the declaration required to be issued by the design practitioner will create a personal liability for the designer. It is unclear what would occur if an employer no longer has PI insurance or ceases to trade and does not take out run-off insurance or if the designer moves to another practice. At the very least it would provide a good base for a lawyer to seek to prosecute the designer if they cannot sue the employer or the employer is uninsured.
6. In the same way that building practitioners rely on contractors and sub-contractors in order to fulfil their obligations, design practitioners are reliant on suppliers, product manuals, numerous sub-consultants, and for the specification of thousands of building components (these come from 100s of suppliers). Imposing a different set of standards for different practitioners sets up "deep pockets syndrome" and it will not be the builder who is sued, but the design practitioners.
7. The June 2019 PWC report for the Queensland Department of Housing and Public Works "Strengthening the professional indemnity insurance environment for building industry professionals in Queensland" documents how the risk of liability for non-conforming building products has already made PI insurance less affordable (and in some cases very difficult to obtain) for building certifiers and engineers. The expectation is that this will also occur for other design professionals in time. Removing the reasonableness test would significantly exacerbate this trend.

The *Design and Building Practitioners Act 2020* imposes significantly different standards of accountability between design practitioners and building practitioners, which is inequitable. Given that the obligations in the legislation come with penalties for non-compliance it is critically important that levels of accountability are the same for each type of practitioner. This way the burden falls equally on those undertaking the work.

If the purpose of the legislation is to achieve better building outcomes, then everyone in the building chain should be held to the same standard as the designer. The common law test of reasonableness should not be replaced by a strict liability, especially for only one set of practitioners.

The compounding risks and myriad of potential unintended consequences from requiring higher levels of compliance from designers that goes beyond common law provisions is of significant concern to the Institute. We would like to see the legislation amended to require both building and design practitioners to "take reasonable steps to ensure" therefore ensuring that the common law test of reasonableness is not replaced by a strict liability for design professionals only.

Member survey comments included…

"We have several architects who qualify as Design Practitioners but do not want to register given the risk of reputational damage. They do not want to sign Declarations on behalf of the company, they believe it is solely the responsibility of the Directors/Shareholders to sign Declarations. There is at present no additional reward for taking on what is perceived to be a greater risk. There is also some anxiety around insurance requirements and the messaging around this for architects who are employees has been unclear."

5 DESIGN PRACTITIONER – ARCHITECTURAL

5.1 Years of recent and relevant practical experience

Recommendation 3 →	**The Institute does not support the requirement for Architects to have 5 years of recent and relevant practical experience in specific building classes in order to be eligible to be registered. This requirement is causing adverse outcomes and must be removed.**

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 in specific building classes. 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* is more than robust enough to ensure that architects have the requisite experience to competently carry out their obligations under the *Design and Building Practitioners Act 2020* and Regulations.

The Institute has previously recommended that the Office of the Building Commissioner and Department of Customer Service engage more deeply with the NSW Architects Registration Board to further discuss the already rigorous process for registration as an Architect in NSW and 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.

For an already regulated profession, nationally standardised and internationally benchmarked through the work of the Architects Accreditation Council of Australia (AACA) and the National Standard of Competency for Architecture (NSCA), 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.

The Institute does agree with the five areas of focus in the Regulations on Fire safety systems, Waterproofing, Structure, Enclosure (façade) and Services. However, what is not currently being adequately considered is that architects work across many building types, some of which are, if not more complex than the nominated classes, certainly comparable. At the very least, relevant experience should apply to any building class rather than be limited to Class 2, 3, 9a and 9c.

However, we maintain architects, who are already registered by a robust and independent process, use a set of skills and experience that are applicable across various building types and classifications – for example, wet area waterproofing is not classification dependent. The toilet and shower detailing in a school, a train station, a laboratory or hospital is similar to that in a domestic house or unit. The practitioner's skill and experience takes the principles and regulatory requirements and applies them to the situation at hand, building classification agnostic. Similar examples can be replicated across all of the five focus areas.

A majority of architectural practices, and certainly many of the medium and large practices in NSW and across Australia do not practice principally in one sector or in one building type. In the last 5 years, government expenditure has been focused in the areas of education, health and infrastructure and many practices have, as a result, procured work in this market particularly due to the uncertainty currently in the Class 2 market. This is due to the loss of consumer confidence, driven by the building failures that precipitated this reform.

The application of the additional 5 years relevant experience is therefore precluding some very knowledgeable and experienced practitioners who are exactly the level of professional who should be designing and documenting these now regulated building classes, and possibly more importantly, leading their firms to engage in the processes now underpinning

the new legislative regime. In the member survey, 68% of respondents indicated that the requirement for 5 years of relevant experience was prohibitive or limiting.

If the intended plan is to further expand the scope of the legislation and regulations to other building classes, limiting now the years of experience to only these regulated classes is even more unnecessarily restrictive. Critically, this requirement is already creating adverse outcomes for the architecture profession, as highlighted by comments provided in response to the member survey.

Member survey comments included…

"Our team is experienced in complex buildings yet not so much in the past 5 years in the designated categories. Technical issues such as waterproofing and structure are challenges on all buildings, so allowing recognition of expertise in other, more complex, building types will be important. This silo-ing of professionals will be to the detriment of the industry, where many in medium practice are generalists, and excel due to that combined experience."

"Some of our most experienced and capable staff with extensive experience in Class 5, 6 & 9b buildings don't have the relevant experience to register as a Design Practitioner, despite having the ability and knowledge to work on complex, multi-storey buildings. This is very frustrating as we want to put our most capable staff on projects which will have to navigate the new requirements of the DBP Act but key staff won't be able to lead them now."

"Our firm works across sectors and in particular across large complex projects that involve more complex solutions for life safety, fire, facade, structure and waterproofing than most of the nominated classes. Some of our most experienced technical personnel are not eligible to register because their work has been in education, laboratories, civic and commercial work. This limits the way in which our team can work across sectors and cross pollinate and grow experience in delivery and construction."

"I work in a large practice with a very wide range of project types. We consciously try to have people move between project types so that their range of experience is as broad as possible. The more broadly experienced our people, the better the outcomes. Of around 80 registered architects, we only have 5 who would meet the required experience threshold of 5 years exclusively on the nominated classes. We have project leaders with significant experience across many project types (all very complex) but who may have only 3 - 4 years (out of the last 10) specifically on these classes."

"We are a practice of 40 with a wide experience across many BCA building classes and a variety of completed complex buildings. That being said, Class 2/3 forms only 20% of our work and so nominating dedicated staff to act as registered design practitioners in this building class is problematic."

"I am a sole practitioner with 25 years experience, but only 1.5 years recent experience in the nominated classes. So I cannot register and there is no way for me to become registered. I am now no longer able to do Class 2 buildings and have lost clients and work because of this."

"I have about 4 years experience on large projects and currently have my own small practice. I am unlikely to get the opportunity to get the needed extra year of experience. My plan was to move into smaller Class 2 work, but now cannot."

"I'm a recently registered architect who was registered only a year ago. Although I've worked on Class 2 buildings through all my career for 14 years, I find it is difficult to be able to register as I now work as a Sole Practitioner."

5.2 Co-regulatory approach: Design Practitioner – Architectural

Recommendation 4 →	**The Institute supports a co-regulatory approach for the registration of architects under the Design and Building Practitioners Act 2020 and Regulations.**

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

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 undertaking an interview. Registration is only maintained through exemplary professional conduct and undertaking ongoing continuing professional development.

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.

Unlike the other professionals now captured and required to be registered under the *Design and Building Practitioners Act 2020*, the conduct of Architects in all their professional undertakings are currently regulated under the *Architects Act 2003*. In contrast the *Design and Building Practitioners Act 2020* and Regulations regulates the conduct of Architects (and others) only when undertaking work related to 'Building Elements'.

It is essential that further work is undertaken to carefully unpack the intersect between this new regulatory system 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 well as additional fees as a result of the reform agenda.