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Better Regulation Division
Department of Customer Service
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RE: Professional Indemnity Insurance in the Building and Construction Industry

We thank the Department of Customer Service (the Department) and Building Commission NSW for the opportunity to provide feedback on the options for change paper on professional indemnity insurance (PII) in the building and construction industry.

The Property Council has been actively engaged in the building reform work underway in NSW. We commend the NSW Government and the Building Commission NSW on their achievements to date in progressing reforms to ensure the integrity of the industry and quality of the built product.

As Australia's peak representative of the property and construction industry, which employs more Australians than any other sector, the Property Council's members include investors, owners, managers and developers of property across all asset classes across NSW. The property industry shapes the future of our cities and has a deep long-term interest in seeing them prosper as productive, sustainable, and safe places.

Overview

The building and construction PII market has hardened in recent years, with practitioners increasingly concerned about escalating premiums and limited availability of insurers to compare coverage. Insurers have expressed concerns that the surge in claims and changes in the regulatory framework have led to significant losses and increased premiums to account for these high rates of claim.

'*Insurers have identified the inability to rate the insurable risk posed by industry participants and the mounting claims arising from structural defects in buildings as the fundamental cause of escalating premiums and the withdrawal of some underwriters from the construction PII market.*' (Options Paper p.2)

As the Department has identified, the state of the PII market for the building and construction industry is unworkable and requires significant reform. We welcome the Department's identification of this issue and the proactive response to the matter, as well as the acknowledgment that the significant reform of the regulatory environment has created uncertainty in relation to underwriting risk and surging claims for insurers.

Construct NSW reforms have focused on creating clear lines of accountability and significant consequences when practitioners' work does not meet obligation standards, however regulation such as the *Design and Building Practitioners Act 2020* (DBP Act) have consequentially hardened

the PII market by increasing the number of claims and exposing the insurance market to higher risk. In this way, the DBP Act has contributed to the perception of risk amongst insurers.

'The hardening of the insurance market, coupled with recent regulatory reforms has presented significant challenges for practitioners. An increasing number of practitioners are reluctant to take on work subject to PII obligations. '(Options Paper p.3)

This sentiment has become a growing concern of our members, who include practitioners unable to absorb rising premiums or businesses who find it increasingly difficult to find practitioners with the appropriate coverage. Beyond premiums, excess and deductibles are becoming higher and higher with each policy renewal. Excesses have moved from an average of $1 million for each claim to $5 million for some projects – which makes having this type of insurance unnecessary and prohibitive to practitioners.

'The common practice of contracting out of proportionate liability has also played a role in rising premiums. The shift from apportioning liability based on the extent of the practitioner's responsibility in the claim has meant that insurers are forced to adopt a greater degree of risks and costs. These increases have passed onto to practitioners and businesses.' (Options Paper p.3)

The NSW Court of Appeal in The Owners – Strata Plan No 84674 v Pafburn Pty Ltd [2023] NSWCA 301 (Proceedings) has confirmed that the proportionate liability regime does not apply to claims for breach of the statutory duty of care under the *Design and Building Practitioners Act (NSW) 2020* (DBP Act). This will have far reaching consequences for defendants and their insurers who will now have to bring cross claims to defend themselves against allegations of breach, increasing the cost of litigation and risk for PII insurers to bear.

In light of this recent judgment, it is anticipated that claimants will be even more likely to seek recourse against the larger consultants who are perceived to have greater PII available to them.

The Property Council has reviewed the four proposed regulatory intervention. We recommend the NSW Government:

1. Do not pursue setting prescriptive minimum requirements of adequate coverage
2. Reconsider 'adequate' as a descriptor for PII coverage
3. Consider our feedback to the proposed scope of issues in Option 1
4. Develop guidance material
5. Consider adopting the DLI framework in operation in France
6. Pursue Option 4 (addressing PII requirements in NSW Government contracts) with the feedback provided.

If you have any questions about this submission, please contact NSW Deputy Executive Director Helen Machalias at HMachalias@propertycouncil.com.au.

Yours sincerely

Katie Stevenson
NSW Executive Director
Property Council of Australia

Questions for Discussion

Option 1 – Defining 'adequate' insurance

Q1: Do you support maintaining the existing requirements in the DBP Act for 'adequate insurance' in preference to alternative approaches (i.e. prescriptive minimum/maximum requirements)?

A: Yes, it would be difficult to set prescriptive minimum/maximum requirements, as these would be different for every engagement, and it is important to allow for agility in responding to project needs.

However, consideration should be given to whether word 'adequate' is the most appropriate descriptor, especially given that liability under the statutory duty of care cannot be capped, therefore it is possible that no insurance coverage would ever be 'adequate'.

Q2: Do you support the proposed scope of issues to be considered when reviewing the statutory requirements for enhancements? Are there other considerations?

A:

From Options Paper	Response
Clarify the scope of work for which any liability arising from that work must be covered by the PII policy; putting beyond doubt the distinction between liability arising from work carried out within the scope of registration and liability arising from a practitioner's statutory duty of care,	Please also consider contractual liability in the context of PII. Agree it will be helpful to explain what liability is covered by the PII policy (including liability for breach of statutory duty of care) versus liability that is not covered by the PII policy.
Clarify the operation of the statutory requirements in relation to changes in registration status or employment status,	Agree.
Clarify the operation of the statutory requirements in relation to individual, partnership and corporate policies; putting beyond doubt that an individual is not required to hold an individual PII policy where they are operating under a corporate or partnership policy.	Agree.
Refine the operation of the statutory requirements in relation to limitations on liability, i.e. clarifying that reasonable excesses and exclusions are permissible.	Please also consider guidance around the time period for which a PII policy must be maintained. Industry standard is 6 – 7 years after practical completion, but given the 10-year retrospectivity under the DBP Act and *Residential Apartment Buildings Act 2020*, and section 6.20 of the *Environmental Planning and Assessment Act 1979*, some developers are requesting that builders and

From Options Paper	Response
	consultants hold their PII policies for 10 years after practical completion, which we consider reasonable.

Q3: Do you support the development of guidance material to assist practitioners? What specific content would you like included?

A: Yes, we support the development of guidance material. Guidance material should include:

- what an adequate insurance policy should cover
- how long it should be maintained for
- instances where insurance may be held elsewhere, rendering PII unnecessary.

Option 2 - Exemptions from holding adequate insurance - Professional Standards Scheme (PSS)
Q1. Would the proposed exemption encourage professional associations to develop a PSS for the benefit of their members?

A: This option would require significant work and would likely be narrow in its coverage of project types, risks, limits etc., leading many parties to resist joining.

2. What information or support do professional associations need to overcome any challenges in developing a PSS?

A: If this option were to be pursued, the information required would be quite varied and not necessarily comprehensive. For example, project value thresholds, insurance value thresholds, contract terms, relevant industry sectors, generally agreed scopes and liabilities etc.

3. What other regulatory concessions are appropriate for registered practitioners who belong to a participating associations scheme which may further encourage professional associations to develop a PSS for the benefit of their members?

A: No comment.

Option 3 - Exemptions from holding adequate insurance - project-based insurance.

Q1: Noting strong indications of market intent to expand DLI offerings, do you think this option will have a positive impact on PII for practitioners?

A: No. The introduction of DLI will only have a positive impact on PII if the DLI insurer cannot pursue the at-fault party (as in the French system). i.e. the DLI policy should contain a waiver of subrogation.

We understand the current proposed DLI model would allow the DLI insurer to pursue the at-fault party, and therefore we do not consider there to be any positive impact on PII for practitioners.

We also note that if the limitation period is extended to allow DLI insurers to commence proceedings against an at-fault party, then all the parties in the contracting chain would also require an extension of their limitation period. i.e. if the DLI insurer sues the builder, then the builder will sue its subcontractors, and so on down the chain.

Q2: What information or support do practitioners need to overcome any challenges in obtaining project-based insurance?

A: If practitioners are to be exempt from the DBP Act requirement to hold adequate PII in circumstance where there is 'project-based insurance', then presumably such project-based insurance could be DLI or principal-obtained PII (e.g. on government projects).

We note that DLI does not cover the same field as PII, and so most practitioners would likely need to cover the gap with their own PII. This is because the DLI does not contain a waiver of subrogation such that if the consultant is responsible for the defect the DLI insurer will pursue the consultant for the defective design. The consultant will then need its PII to cover it for the losses it must reimburse the DLI insurer for. If there was a waiver of subrogation against the consultant and the DLI policy covered the consultant's common law liability rather than just its statutory liability for breach of the duty of care, then there would be no need for PII. Until these two things occur there will always need to be PII, which seems an unnecessary expense.

If developers are to be encouraged to take out DLI policies, then we would like to see more detail around the mandated terms of the DLI policies, and of course more DLI providers in the market.

Q3: What other regulatory concessions are appropriate for registered practitioners who carry out work on buildings covered by project-based insurance?

A: No comment.

Q4. Are there other alternative arrangements available that provide sufficient indemnity against liability of practitioners that could be examined?

A: We recommend the NSW Government consider adopting the French system for DLI, which would reduce litigation because all parties in the contracting chain are covered by the policy. As discussed above, the DLI policy in France covers the defect whether it is caused by the builder's defective work, the consultant's' defective design or defective products. It is a strict liability test. The question is therefore, 'Is there a defect?' versus, 'has the defect been caused by a breach of a duty?'. There is no right of subrogation against any party, so the DLI insurer pays out and has no right of recourse against a party. This significantly reduces the scope for litigation.

Option 4 - Addressing PII requirements in NSW Government contracts.

Q1: What information or support does industry need to participate in a forum of the nature proposed by this option?

A: We suggest that for such a forum to be useful, it would need to include wide consultation with developers and builders working on a broad range of NSW Government projects.

The question of PII in government contracts should not be assessed in isolation, and any forum should take into consideration the risk profiles the NSW Government generally imposes under its contracts. The starting question should be "what liability are contracting parties taking on?' rather than "what PII is required?'. In this option the NSW Government would have to be prepared to take on more liability in its contracting arrangements.

The NSW Government should also consider the application of the Unfair Contract Terms (under the Australian Consumer Law) regime to standardised government contracts and investigate whether contracting out of proportionate liability would be an 'unfair' term.

Q2: Does industry have access to case examples where government contracts have dictated an unreasonable or disproportional amount of PII to facilitate investigations by Government?

A: Yes, however these projects are typically bound by probity.

Q3: What other sectors have you seen this occur? Is the problem isolated to government contracting?

A: We have also seen instances of private sector developers requiring disproportionate levels of PII compared to scope and fee to cover consequential loss.