Engineers Australia Submission

Mandating Decennial Liability Insurance

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ENGINEERS
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Contents

Mandating Decennial Liability Insurance

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Executive Summary

Engineers Australia welcomes the proposal by the NSW Government to introduce a form of Decennial Liability Insurance (DLI) for class 2 buildings in New South Wales and supports the establishment of a mandatory DLI requirement after an acceptable transition period.

Engineers Australia is a strong supporter of building regulatory reform and our response to the 2018 Building Confidence Report, Building Confidence: How to use engineers to improve building and construction, proposes a new paradigm for building engineers that can support the introduction of DLI. However, Engineers Australia remains concerned at the piecemeal introduction of reforms across Australia and the effectiveness of some reforms built on over-simplified assumptions and over-complicated processes. Engineers Australia's support for DLI is contingent upon:

1. **Nationally consistent reforms including a national DLI market.**

The building industry in Australia is not localised to any one state or territory. There are many national and international businesses involved, especially in the high-end commercial sector. Engineering design and documentation for buildings in NSW can be done in any state or territory, or even overseas, and building components and modules can be sourced from anywhere. A national industry is best supported by nationally consistent regulations, insurance schemes and underwriting. Engineers Australia strongly advocates for nationally consistent registration of professional engineers in Australia and the mobility of engineers and engineering services through automatic mutual recognition. DLI will work best if it is available in all states and territories. A larger insurance pool will stabilise the market and encourage competition. Engineers Australia urges the NSW Government to work with other states and territories on nationally consistent reforms.

2. **The establishment of an Engineer of Record for each engineering system in the building.**

Traditional commercial building procurement saw owners commission a team of engineers and other specialists to design, inspect and document the building and its major engineering systems. This was done to ensure the building was constructed properly and defects were promptly corrected. There are now much more complex procurement methods available, and developers do not have a similar long-term interest in the quality of construction. There is often no consistent oversight of critical engineering systems. Engineers Australia strongly recommends that the project owner appoints an Engineer of Record for each engineering system in the building who can endorse the drawings, reports and documents for the project and the final construction and installation. An Engineer of Record is an efficient risk-mitigation measure that will give insurers greater confidence to underwrite DLI. Legislation change may be needed to ensure the contract with the Engineer of Record is passed on to the new owners after strata titles are issued.

3. **Rationalisation of liability and insurance requirements for engineers.**

Engineers Australia welcomes DLI as an overriding, one-stop-shop for unit owners to deal with building defects. However, the current overly complex liability regime focusses on individual employees rather than the contracting businesses. This will complicate the task of insurers acting in subrogation to owners and cause the cost of DLI policies to be higher than they need be. Owners' and industry's money are better spent on quality control and quality work rather than lawyers' fees. DLI will work best as part of a simpler, better integrated, national scheme of liability, dispute resolution and insurance that properly distinguishes between businesses and their employees and that allocates risk to the party best able to manage it.

4. **A straightforward claims and redress processes.**

DLI must have an easy-to-understand claims and redress process to ensure the ongoing sustainability and reputation of the scheme and the trust placed in it by consumers.

Introduction

Engineers Australia is the peak body of the engineering profession with representation from a vast array of engineering disciplines. We are constituted by Royal Charter and our mission is to advance the science and practice of engineering for the benefit of the communities in which we live. Engineers Australia is the collective voice of over 115,000 members across Australia with approximately 25,000 in NSW alone.

Engineers Australia supports the establishment of mandatory DLI for class 2 buildings in NSW and believes engineers will play a critical role in the implementation of the policy. However, Engineers Australia remains concerned at the piecemeal introduction of reforms across Australia and the effectiveness of some reforms built on over-simplified assumptions and over-complicated processes. Engineers Australia's support for DLI is contingent upon:

1. Nationally consistent reforms including a national DLI market.
2. The establishment of an Engineer of Record for each engineering system in the building.
3. Rationalisation of liability and insurance requirements for engineers.
4. A straightforward claims and redress process.

Engineers Australia thanks the Department for the opportunity to provide comments on the Discussion Paper – Decennial Liability Insurance, which was distributed in June 2023.

National Consistency

The building industry in Australia is not localised to any one state or territory. There are many national or international businesses involved, especially at the high-end commercial sector which includes class 2 buildings. Architectural and engineering design and documentation for buildings in NSW can be done in any state or territory, or even overseas, and building components and modules can be sourced from anywhere.

Inconsistency and fragmentation in regulation causes a number of problems, including unjustified compliance burden and cost, impediments to information sharing and national initiatives, and confusion about who to approach. National consistency, therefore, should be one of the goals of building regulation.

Engineering services are vital to national economic prosperity and social well-being, yet there is no uniform regulatory regime covering engineering practitioners in Australia. Engineers Australia strongly advocates for nationally consistent registration of professional engineers in Australia and mobility of engineers and engineering services through automatic mutual recognition.

Engineers Australia strongly supports the consistent legislation to register professional engineers in Queensland, Victoria and the ACT and the adoption of similar legislation by other states and territories to deliver a nationally consistent registration framework. Whilst the established Professional Engineers Acts have slight variations, the move towards legislative consistency is advancing. Placing engineer registration in the *Design and Building Practitioners Act* in NSW is inconsistent with all other major economies in Australia and proposals to transfer these provisions to a Building Bill will further isolate NSW.

DLI will work best if it is available in all states and territories. For this to happen, the building industry needs nationally consistent regulations, insurance schemes and underwriting. This will mean insurers only need to deal with a single set of regulations and trade barriers instead of multiple ones at the state level.

A larger insurance pool will:

1. Stabilise the market: A national insurance market encompasses a larger population base, allowing for a larger risk pool. This can help spread the risk more effectively and reduce the impact of adverse events on insurance premiums.

2. Encourage competition: A national market can foster greater competition among insurance providers, leading to a wider range of options for consumers. Increased competition may drive down prices and improve the quality of insurance products and services.
3. Improve efficiency and cost savings: A national insurance market can benefit from economies of scale and streamline administrative processes. This can potentially result in cost savings for insurers, which can be passed on to developers and consumers in the form of lower premiums.

Engineers Australia urges the NSW Government to work with other states and territories on nationally consistent regulations, insurance schemes and underwriting.

The role of an Engineer of Record

An Engineer of Record, for each engineering system within a building, oversees the design, construction, and commissioning of the system. This provides a sign-off to the owner that the system is free of defects and will work effectively. This replicates the traditional consultant role used by long-term building owners to control quality in the more complex building industry of today. This role provides the continuity lost when developers sell apartments on practical completion. A certificate from an Engineer of Record can be relied on by subsequent owners, insurers and building regulators to give assurance that each system is properly designed, constructed and commissioned.

A fundamental problem with the way strata-titled apartments are procured and sold is that the contractual arrangements entered into by the original developer do not carry over to the strata company or the purchasers of individual apartments. An Engineer of Record contracted initially by the developer, and whose contract passes over to the strata company, can continue to monitor each engineering system during the defects liability period, which follows completion of the building, and sign off on the system when it is fully commissioned, and any defects have been rectified. Some provision must be made in strata titles; residential apartment buildings design; and building or approval legislation for the initial owner of the project to appoint and pay for the necessary Engineers of Record.

Sign-off by an Engineer of Record is not currently covered by the declaration provisions in Part 2 of the *Design and Building Practitioners Act*. This Part requires each registered design practitioner who prepares a regulated design to provide a design compliance declaration to any person to whom they provide the design. It does not provide a for a person such as an Engineer of Record who oversights design, construction or commissioning work done by others to provide a certificate of compliance. While Engineer of Record appointment and responsibilities can be set out and managed through contracts, it is highly desirable to have some statutory provision for systemic certification and to regulate the form of contract that provides for them.

A certificate of compliance by an Engineer Record is consistent with the recommendations in the Building Confidence Report that the design documentation presented for building approval has a certificate from the registered practitioner responsible for the overall work. The *Design and Building Practitioners Act* currently does not distinguish between individual employees or members of a design team and the employer or team leader responsible for the overall work. It requires declarations from each individual for their individual component of the design work but not from the employer or team leader who ensures the individual components work effectively together. This focus on the individual, which ignores the pivotal role of the businesses that actually undertake, contract and take financial responsibility for work, is an over-simplified assumption that leads to overcomplicated processes for certification, rectification and redress. Amending the *Design and Building Practitioners Act* to provide for an Engineer of Record and similar roles in other disciplines is an opportunity to fix these defective provisions.

One of the difficulties Engineers Australia sees with the NSW proposals for DLI is that it is marketed as covering latent defects. These are usually defined as defects that could not have reasonably been identified and dealt with at the time of practical completion or during the defects liability period. So the proposal may not effectively tackle the current situation where construction work is not properly inspected and defects are not identified and dealt with by the developer before selling the units on. Currently, the developer sells units off the plan and settles the sale on practical completion, leaving

obvious and apparent defects to be dealt with by the new owners and the strata company. It is not clear that DLI will cover these. Having in place Engineers of Record for each engineering system of the building can help strata companies, new owners and DLI insurers acting on their behalf apply the defects liability provisions under the original contract with the developer and ensure the obvious and apparent defects are dealt with during the defects liability period and are not claimed against DLI.

For more information on the role of an Engineer of Record, please see Engineers Australia's document: Building Confidence: How to use engineers to improve building and construction.

Insurance requirements for engineers

Under DLI, an apartment owner or the strata company notifies the insurer of a defect and the insurer is obliged to fix it. Engineers Australia supports this as a useful protection for apartment owners that avoids them having to fund rectification and take legal action to recover economic loss. However, the insurer is entitled to pursue rectification costs from any person liable for the defect.

Currently the *Design and Building Practitioners Act* and Regulations have liability and insurance requirements that put unreasonable burdens on individual engineers. These duties and statutory requirements add to the cost of recovery and will increase DLI premiums making entering the market less attractive to insurers. It also makes it less attractive for individual engineers to work in the building sector in NSW.

The *Design and Building Practitioners Act* has introduced a strict, non-delegable duty on each person who carries out construction work to avoid economic loss to each owner and subsequent owner of the land. This bottom-up approach targets individual employees and workers rather than their employing businesses. This has significantly increased the number of people whose individual contribution must be assessed, quantified, and who must be joined in legal action.

Similar problems arise with insurance requirements in the *Design and Building Practitioners Act* and the proposed Building Bill that require each individual registered engineer to assess and record the risks of their work and the adequacy of any professional indemnity insurance (PII) policy that covers the work. If the individual engineer cannot form an opinion that work to be done is covered by adequate PII, the engineer must not do the work.

This has created many issues for NSW engineers including:

1. Engineers are not trained in insurance risk assessment and interpretation of insurance policies and may struggle to make the assessments of adequacy of insurance required under Section 33 of the *Design and Building Practitioners Act* or the proposals in Section 35(2) of the Building Bill. Engineers need to be able to rely on the advice provided by their employer, insurance and commercial professionals.
2. It is inefficient and prone to conflicting interpretations to require each individual employee engineer to carry out and record the assessment of a single PII policy taken out by the employing business, which in turn may be a standard policy offered by a single insurer to multiple businesses. More centralised assessment of PII adequacy by people trained in insurance risk assessment is more efficient and reliable.
3. The Design and Building Practitioners Regulations were used to prohibit the Secretary from registering bodies corporate, with the practical effect that only individuals have been registered as professional engineers. This applies the insurance provisions to each individual registered professional engineer rather than to businesses such as partnerships or corporations. PII cover is usually taken out by businesses and not individual employees. Competent and ethical engineers still have an obligation to ensure that the work they do is covered by insurance, but the liability should fall on the contracted party rather than an individual engineer.

4. The PII market for professionals in the building sector is volatile, with underwriters adding exclusions to policies to reduce exposure, raising premiums to maintain margins, refusing cover or leaving the market completely. The *Design Building Practitioners Act* and associated regulations and standards introduce new statutory obligations on engineers which are not covered by current insurance providers. New insurance products may be needed to cover engineer's liabilities.

For further details please see Engineers Australia's submission, The issue with insurance requirements for engineers.

Introduction of DLI provides an opportunity to amend the *Design and Building Practitioner's Act* to ensure that:

1. The complex liability arrangements for engineers do not complicate the task of insurers acting in subrogation to owners and cause the cost of DLI policies to be higher than they need be.
2. Competent and ethical engineers are not driven away from the building sector due to excessive, unreasonable, and burdensome insurance obligations.

Proposed DLI Scheme

Other Concerns

While supporting the overall thrust of introducing DLI for apartment buildings in NSW, Engineers Australia has some concerns with the details of the proposal and is happy to work with the NSW Government to address them. These include:

- It is unclear what happens if an individual DLI insurer, or the DLI market, collapses. Relying on a commercial product without some safety valve to prevent the process or industry stopping dead if the market fails, is misguided. How the mechanism would react in such a situation is critical to the ongoing sustainability and reputation of the scheme and the trust placed in it by consumers.
- It is not clear how an interim Occupancy Certificate (OC) may affect the commencement of a DLI policy, as the final OC may be issued much later after the first interim OC.
- It is suggested that compensation payment timeframes, especially for carrying out emergency maintenance works, be prescribed.
- DLI should only be mandatory if the market is mature otherwise in order to maintain profits developers may be inclined to squeeze contractors (engineers) to perform for lower fees.

Questions

1. **Do you consider there should be an extension of time to enable an insurer to initiate proceedings to protect their right of subrogation against the at-fault party where a claim is made under a DLI policy towards the end of the limitation period? Why?**
   No comment

2. **Do you consider 24 months from the time the claim is made under the policy is reasonable? Why?**
   No comment.

3. **What impacts do you consider the extension of time to initiate proceedings will have upon practitioners in the industry?**
   The extension of time to initiate proceedings can have significant impacts on practitioners in the industry. By effectively extending the period to 12 years, practitioners may face prolonged exposure to potential claims and litigation. This can result in increased costs and uncertainties for practitioners, as they may need to maintain insurance coverage and documentation for an extended period. It may also impact their ability to plan and allocate resources effectively, considering the potential liabilities that may arise even years after completing a project. Therefore, practitioners in the industry may need to adapt their practices, insurance coverage, and risk management strategies to account for the

extended timeframe. NSW must ensure that PII coverage for this is available for practitioners before making DLI mandatory.

4. **What other means should be considered to balance the rights of the insurer to recover their loss against those of practitioners operating in the industry?**
   DLI will work best as part of a simpler, better integrated, national scheme of liability, dispute resolution and insurance that properly distinguishes between businesses and their employees and that allocates risk to the party best able to manage it. See 'Insurance requirements for engineers' above for more details.

   The duty of care provisions in Part 4 of the *Design and Building Practitioners Act* and its focus on individuals and not businesses seriously complicate the process of obtaining redress for economic loss, whether by an owner or an insurer acting on the owner's behalf. Reforming these provisions to reduce the number of people who must be drawn into legal proceedings will increase the ability of insurers to recover the principal part of their loss from the relevant business and shield individual employees from ruinous personal claims.

5. **Do you agree that the indicators outlined in the proposed evaluation matrix (at Appendix D) will appropriately indicate market maturity? Why?**
   No comment

6. **Do you consider any other indicators are necessary for the assessment of market maturity? If so, please specify what these are.**
   No comment

7. **Do you agree that if performance against the evaluation matrix indicates the market is not ready to transition to a mandatory model, then mandatory DLI be deferred for an extended transitional period?**
   In terms of deferring the mandatory DLI if the market is not ready, Engineers Australia agrees that extending the transitional period would be appropriate. It is crucial to allow sufficient time for market participants to adapt and prepare for the mandatory model. If the evaluation matrix indicates that the market is not adequately mature or prepared for the transition, a deferred implementation would provide the opportunity for further development and readiness. This would help prevent potential disruptions and ensure a smoother and more successful implementation of the DLI in the future.

   DLI should only be mandatory if the market is mature otherwise in order to maintain profits developers may be inclined to squeeze contractors (engineers) to perform for lower fees. The average cost of premiums and deductible amount payable will be key indicators that must be considered before switching to mandatory DLI.

   Expanding to a national DLI market will accelerate the maturing of the market. A national market would allow for a larger risk pool which would stabilise the market, encourage competition which lowers prices and improve market efficiency. For this to happen, the building industry needs nationally consistent regulations, insurance schemes and underwriting. See 'National Consistency' above for more details.

8. **Do you agree the building types outlined above should be exempted from the DLI scheme? Why?**
   Engineers Australia considers DLI should be available to the widest range of buildings possible. This will encourage a robust and financially stable market and will reduce complication from having different requirements for different types of buildings.

9. **Should other building types be exempted from the DLI scheme? If so, which other building types should be exempted and for what reason?**
   No

10. **Should smaller Class 2 buildings be captured by the SBBIS instead of being exempt, during the transitional period?**
    No comment


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