

28 October 2019

Building and Development Certifiers Regulation 2019 Consultation
Better Regulation Division, Regulatory Policy
McKell Building
2-24 Rawson Place
Sydney NSW 2001

Dear Sir/Madam

Building and Development Certifiers Regulation 2019

The Insurance Council of Australia¹ (Insurance Council) appreciates the opportunity to comment on the draft *Building and Development Certifiers Regulation 2019* (the Regulation) and the accompanying Regulatory Impact Statement (the RIS). Our submission focuses on consultation question 9 of the RIS:

“Are the requirements for professional indemnity insurance (PII) contracts and exclusions in the proposed Regulations appropriate?”

As the RIS notes, the Regulation allows “the Building Professionals Board to accept professional indemnity insurance policies with conditions or exclusions. The amendment is a short-term, urgent action to avoid a situation in which the unavailability of PII prevents certifiers from operating”.²

Critically, section 19 of the Regulation provides for an exclusion in relation to cladding. The Insurance Council and its members strongly support an exclusion for cladding, but we suggest that the reference to non-compliance “with the requirements of the *Building Code of Australia*” could be removed to allow more flexibility in the PII market. For example, one insurer currently excludes cladding claims on the basis of the materials used (“aluminium composite panels or like cladding; or expanded polystyrene”) regardless of whether or not the cladding is compliant.

More generally, PII policies typically contain exclusions relating to non-conforming products and practices, and certain other high risk exposures. To the extent that the references in sections 13(2), 14, 15(1) and 16(1) to “all liability” preclude an insurer from offering policies

¹ The Insurance Council of Australia is the representative body of the general insurance industry in Australia. Our members represent approximately 95 percent of total premium income written by private sector general insurers. Insurance Council members, both insurers and reinsurers, are a significant part of the financial services system. June 2019 Australian Prudential Regulation Authority statistics show that the general insurance industry generates gross written premium of \$48.4 billion per annum and has total assets of \$128.4 billion. The industry employs approximately 60,000 people and on average pays out about \$151.4 million in claims each working day.

Insurance Council members provide insurance products ranging from those usually purchased by individuals (such as home and contents insurance, travel insurance, motor vehicle insurance) to those purchased by small businesses and larger organisations (such as product and public liability insurance, professional indemnity insurance, commercial property, and directors and officers insurance).

² p21 of the RIS

that contain these exclusions, insurers will not be able to participate in the market. The Insurance Council would welcome clarity in the drafting that this is not the intent of the legislation.

The Insurance Council also notes that the exclusion relating to cladding will be removed mid-2020 (section 19(2)) on the basis of the “expectation that other reforms and changes in the market dynamics will have improved the operation of the PII market by then”³. While the Insurance Council and its members are working with Australian governments to realise that expectation⁴, the cladding exclusion may be required beyond the currently prescribed date.

Section 18 of the Regulation provides for compensation limits. The Insurance Council suggests that sections 18(3) and 18(4) should refer to a maximum *claim* limit rather than a maximum *yearly* limit. More broadly, our members suggest that sub-limits are commonly included in PII policies. The Regulation, as currently drafted, does not canvass this industry practice.

The Insurance Council and its members support the objective of the Regulation and its enabling legislation, the *Building and Development Certifiers Act 2018*, to “promote public confidence in the certification system and the building and construction industry more generally”.⁵ However, broader reforms beyond ascribing liability to certifiers are needed to support a longer term solution. The Insurance Council and its members are willing to work with the NSW and other Australian governments to achieve that end.

If you have any questions or comments in relation to our feedback, please contact John Anning, the Insurance Council’s General Manager Policy, Regulation Directorate, on (02) 9253 5121 or janning@insurancecouncil.com.au.

Yours sincerely



Robert Whelan
Executive Director and CEO

³ p21 of the RIS

⁴ For example, through the Building Ministers’ Forum

⁵ p4 of the RIS