

## Factsheet

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# PROFESSIONAL INDEMNITY INSURANCE

**Professional indemnity (PI) insurance provides financial cover in the event of an architect's error or omission, or failure in the performance of their professional duty.**

## NSW Architects Code of Professional Conduct

Clause 15 of the [NSW Architects Code of Professional Conduct](#) (the 'Code') requires that:

- (1) Subject to any requirements of the Act or the Regulation, an architect must—
  - (a) maintain a policy of professional indemnity insurance appropriate for the architectural services being provided by the architect, and
  - (b) provide each client of the architect with information relating to the insurance maintained by the architect for the architectural services to be provided to the client.
- (2) On the application of an architect, the Board may, by order in writing, grant an exemption to the architect from the provisions of subclause (1) if—
  - (a) the Board is satisfied that the architect has commenced practice as an architect only very recently, or
  - (b) the Board is otherwise satisfied that it would not be appropriate in the circumstances for the architect to comply with the provisions of subclause (1).
- (3) Subclause (1) does not apply to—
  - (a) any architect in respect of the provision of architectural services if—
    - (i) the person engaged to provide the architectural services is not the architect, and
    - (ii) the architect is providing the architectural services only as an employee of that person and not on the architect's own account, or
  - (b) any non-practising architect, or
  - (c) any architect who has been granted an exemption by the Board under subclause (2).

Architects who do not satisfy the necessary PI insurance requirements may be removed from the NSW Register of Architects (the 'Register') pursuant to [section 24\(2\)\(h\)](#) of the [Architects Act 2003](#) (the 'Act').

## Duty to declare

Architects in the Practising and Temporary Registration categories must, at initial registration and annually, make a declaration that they have PI insurance appropriate for the architectural services being provided, and must submit a copy of the PI insurance Certificate of Currency. They must also provide certain data such as the name of the insurer, class of insurance, name/s of the insured, policy start and end dates, professional services covered (eg. architectural services), limit of liability / indemnity (per claim and in the aggregate), and any other information requested by the NSW Architects Registration Board ('NSW ARB').

Architects in the Non-practising category must, at initial registration and annually, sign an agreement that they will not provide any architectural services in NSW while they are registered in the Non-practising category.

## Amount and type of cover

All Practising architects must maintain a level of PI insurance that is appropriate to the architectural services they provide. Architects should ensure that they have an appropriate level of cover in terms of:

- minimum dollar amount per claim,
- minimum aggregate cover in any year of insurance, and
- maximum excess or deductible.

The limit of indemnity available is typically listed on the policy schedule. The policy wording will then deal with how the limit is applied. Ideally, the policy would define the professional services insured as or including 'architectural services.'

Architects should seek advice from their insurance broker regarding the appropriate level of cover and the information they must provide to clients.

Policies must be from an approved provider authorised to conduct new or renewal insurance business in Australia.

## Information provided to clients

Clause 15(1)(b) of the [Code](#) requires architects to provide each client with information relating to the PI insurance they maintain for the architectural services to be provided to the client. The NSW ARB considers that architects should provide their clients with a Certificate of Currency of the PI insurance they hold.

## Important things to note

It is very important that architects notify their insurer as soon as they become aware of any facts or circumstances that could result in a claim (regardless of whether a claim has in fact been made) as this will increase the likelihood that a subsequent claim arising from those facts or circumstances will be covered by their insurance policy.

While PI insurance generally covers claims for liabilities arising in the performance of professional services, there are variances in the scope of cover provided by policies available in the market and the scope of cover available under a particular policy will depend on the precise wording used in that policy. The insuring clause of the policy sets out the scope of cover, but is typically limited by the other terms, conditions and exclusions contained in the policy.

It is therefore important that architects read their insurance policy carefully and understand the cover that it provides. Advice should be sought from an insurance broker if the architect has any queries or concerns regarding the scope of cover afforded by their insurance policy.

Generally, the NSW ARB does not accept Errors and Omissions Insurance as a substitute for PI insurance.

## Statutory duty of care

Part 4 of the [Design and Building Practitioners Act 2020](#) (the 'DBP Act') imposes a statutory duty of care on architects carrying out construction work to avoid causing economic loss to current and future landowners due to defects. Importantly, the duty of care obligations apply retrospectively.

The duty of care provisions have been considered in a recent case [Goodwin Street Developments Pty Ltd atf Jesmond Unit Trust v DSD Builders Pty Ltd \(in liq\) \[2022\] NSWSC 642](#) (Goodwin v DSD). The NSW Supreme Court held that the section 37 duty of care is not limited to Class 2 (residential apartment) buildings but instead applies to any building caught by the broad definition of 'building' in the [Environmental Planning and Assessment Act 1979](#) and extends to building work, including (but not limited to) residential building work within the meaning of the [Home Building Act 1989](#).

This means that the duty of care obligation under the DBP Act extends beyond Class 2 buildings and applies to architects preparing regulated designs and other designs for building work for buildings other than Class 2 buildings.

It is also possible, following Goodwin v DSD, that section 37 could allow individual architects to be sued, especially if their role equates to supervision or substantive control of the building work or preparation of regulated designs or other designs for building work.

A typical PI insurance policy would usually cover the section 37 duty of care unless the policy has a specific exclusion for the DBP Act. Architects should consult their insurance broker to confirm their coverage.

Architects should speak to their insurer or seek legal advice if they have any concerns about the DBP Act.

## Exemptions and exclusions

### Exemptions

The [Code](#) provides for the NSW ARB to grant PI insurance exemptions. Exemptions may apply to architects who:

- have 'very recently' commenced practice as an architect, or
- are unemployed, or
- are on parental leave, or
- are only providing architectural services to themselves or their immediate family, or
- are only providing architectural services overseas, or
- are in a role that is deemed by the Board to not require PI insurance, such as a role with a government agency, university, or TAFE, or
- are not providing architectural services and hold 'run off' insurance for projects completed to date, which extends for a period of at least 6 years, or
- request and obtain a waiver due to extenuating circumstances such as ill health.

Architects who wish to apply for an exemption from the requirement to hold PI insurance at annual renewal, or on the anniversary of their registration, are required to submit a PI Insurance Exemption Agreement and a letter outlining the circumstances for the exemption request, together with supporting documentation.

Exemptions will not be granted when the application for exemption is based solely on the cost of PI insurance.

The NSW ARB will consider each request for PI insurance exemption individually (including relevant documentation) and advise the architect of the outcome in writing, within 14 days of the NSW ARB Board's decision.

Subject to clause 15(3) of the [Code](#), an architect who has not been granted a PI insurance exemption by the Board will be required to obtain appropriate PI insurance for the services they provide and submit a copy of the PI insurance Certificate of Currency to the NSW ARB within 14 days of notification of the PI insurance exemption request being denied.

Exemptions are only applicable for the current year, and a new application must be made annually if further exemptions are sought in the future.

Where an exemption from the requirement to hold PI insurance is granted by the Board, a note to that effect will appear next to the architect's name on the Register.

Exemptions granted to architects who have 'very recently' commenced architectural practice within the last two months will apply for only two weeks from initial registration.

**Important note:** Any exemption given by the Board in relation to PI insurance obligations under the [Code](#) in no way affects the architect's obligations under the DBP Act if they are a registered design practitioner under the DBP Act. If an exemption is granted by the Board, the architect must ensure that they still comply with any obligation they have under any other legislation, including without limitation the DBP Act.

### **Exclusions and certain employees**

An architect who is an employee of the person engaged to provide the architectural services is not required to hold their own PI insurance provided that their employer has been engaged to provide those architectural services. For example, if an architect only provides architectural services as an employee of an architect corporation or firm, the architect will not need to take out their own PI insurance for the purposes of clause 15(1) of the [Code](#).

Architects who fall into this category should provide the NSW ARB, at initial registration and annually, a copy of their employer's PI insurance Certificate of Currency and a signed agreement that they will not provide any architectural services except as an employee of their employer in circumstances where their employer is engaged to provide the architectural services.

#### **Limitation 1**

If the architect occasionally provides architectural services on their own behalf, the architect will need PI insurance appropriate for these services. For example, if an architect usually employed by an architect corporation or firm undertakes a small project such as a kitchen renovation on the side, they would need to have their own PI insurance appropriate for this service. They would also need to make the declaration that they have appropriate PI insurance in relation to their current circumstances and submit a copy of the PI insurance Certificate of Currency and other information in the usual way.

#### **Limitation 2**

If an architect is working for an individual or organisation who is not providing architectural services, the architect will either need to obtain PI insurance under clause 15(1) or obtain an exemption from the Board under 15(2) of the [Code](#). An example of this situation would be an architect who is working for a developer who builds hotels and also runs the hotels once they are completed. This architect would need to have PI insurance appropriate for this service. They would also need to make the declaration that they have appropriate PI insurance in relation to their current circumstances and submit a copy of the PI insurance Certificate of Currency and other information in the usual way.

### **Exclusion for Non-practising architects**

Architects registered in the Non-practising category are not required to hold PI insurance because they will not be providing any architectural services. These architects must, at initial registration and annually, sign an agreement that they will not provide any architectural services in NSW while they are registered in the Non-practising category. A breach of this undertaking will be considered by the Board to constitute unsatisfactory professional conduct and may attract sanctions under [section 43](#) of the [Act](#).

### **Non-compliance with PI insurance requirements**

As of 1 July 2019, the Board may remove an architect's name from the Register if the architect has failed to comply with any PI insurance requirements, pursuant to [section 24\(2\)\(h\)](#) of the [Act](#).

In the event that an architect is found to have insufficient PI insurance as required by the [Code](#), the architect is then notified of the Board's proposal to remove them from the Register for non-compliance and is given 28 days to provide a written submission to the Board in relation to the proposed action.

Following receipt of the architect's response, the Registrar will consider the architect's submissions and may seek further information before making a recommendation to the Board about the removal of the architect's name from the Register. The architect will not be removed from the Register if they can provide evidence of retroactive PI insurance that covers them for the period that they were previously uninsured.

### **Reinstatement to the Register**

An architect who has been removed from the Register for failing to comply with PI insurance requirements may apply for re-registration at any time. However, prior to having their registration restored, the architect is required to provide evidence of PI insurance appropriate for the architectural services being provided by the architect.

### **Refund of fees**

If an architect's name is removed from the Register for non-compliance with PI insurance requirements, the architect's registration will be "suspended" until such time that the PI insurance requirements for re-registration have been satisfied. If registration is reinstated, the duration of the suspension does not affect the duration of the nominated registration period and no refund will be granted.

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#### **Disclaimer**

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