

1. Does the Government support the broad scale registration of engineers?

The Government has always supported the broad scale registration of engineers. However the current focus of the Government has been to first deliver on its commitments in responding to the *Building Confidence Report*, authored by Professor Peter Shergold AC and Ms Bronwyn Weir. The Building Confidence Report identified the accuracy of design and documentation, quality control and assurance and compliance with the National Construction Code as key major issues in the building sector, recommending far-reaching changes. The registration scheme for persons involved in the design and construction of buildings was a key recommendation of the *Building Confidence Report*, and was committed to by this Government in response to the Report and is being delivered in the Design and Building Practitioners Bill (Bill).

The NSW response committed to extending registration to currently unlicensed design and building practitioners. The Bill delivers on that commitment and introduces a comprehensive registration system that will ensure that only persons who are competent, suitably qualified and properly insured will be able to perform the declaration functions under the Bill. Registration details and requirements will be set out in the regulations and will include demonstrating professional competency through prescribed skills, qualifications, knowledge and experience, complying with continuing professional development requirements and holding appropriate forms of insurance. To respond to growing community concerns and provide the greatest benefit to home-owners, the new obligations under the bill will initially apply to class 2 buildings, which are those buildings that are multistorey and multi-unit residential buildings. The reforms will also apply to mixed use buildings with a class 2 component.

The Bill also provides that individuals who are current and subsequent owners (including owners' corporations and community, precinct and neighbourhood association schemes) are owed a duty of care that extends to avoiding pure economic loss for defects in a building which arise from construction work.

Beyond this, consideration will also be given to leveraging existing inter- jurisdictional licensing frameworks for engineers so that they may be recognised as design practitioners for the purposes of the Bill. This approach will avoid imposing unnecessary duplicative registration and licensing requirements on some practitioners and ensure consistency across the sector. Further consideration of professional organisations is being taken up with industry along the lines of those delivered by the Professionals Standards Authority¹. In this context the government believes that professional organisations (including Engineers Australia) have more to offer in the areas of accreditation, governance and member accountability. For more information on the Professional Standards Authority and the role of professional standards schemes working in tandem with the state regulator, please refer to **Attachment A**: the Professional Standards Council's submission to the Inquiry.

Under the D&BP Bill, the development of this new scheme will involve the registration of thousands of practitioners who have never previously been registered. The NSW Government has always made it clear, that while the obligations under the Bill will initially apply to class 2 buildings, additional classes of buildings and the registration of those practitioners who work on the additional classes of buildings are intended to be included in the new scheme through the regulations over time.

The Minister for Better Regulation and Innovation, Kevin Anderson MP, expressly stated this in the second reading speech in the Legislative Assembly. It is simply not feasible to register all design and

¹ <https://www.psc.gov.au/professional-standards-schemes>

building practitioners at once. Nor is it appropriate to register one profession over another, as the scheme is set up to focus on the function the practitioner is performing and registering them according to that function, and not according to their profession. Simply registering all engineers (including those outside of the building and construction industries) within this Bill would be out of step with the design and intention of the Government scheme. By introducing registration in a staged way as is proposed under the new scheme, beginning with class 2 buildings, the Government can ensure that it is implemented and enforced correctly before expanding registration out.

The Government needs to prioritise the registration of Engineers working in the residential construction market, which is where the recommendations of both the Shergold/Weir and Opal Tower investigations were focussed. The Government is not opposed to a scheme that registers engineers working outside of the building industry, however this needs to be done in a way that complements the much broader registration scheme that will be established under the Government's Bill. It is therefore recommended that the registration scheme proposed under the Government's Bill is established and operating first, and the broader engineers' registration scheme can then be designed to work in tandem with the registration scheme.

2. To what extent does the Government support a coregulatory model of registration for engineers that would interact with the Design and Building Practitioners Bill and other relevant legislation?

The NSW Government strongly encourages the development of a strong and robust professional standards scheme so that industry can at the appropriate time, move towards a co-regulatory model of registration for engineers which will work in tandem with the Bill and other key legislation, strengthening consumer protections and in turn, confidence. The same for other professions.

Engineers Australia operated an approved professional standards scheme between 1997 and 2016, however an application for a new scheme by Engineers Australia in 2017 did not progress. Engineers Australia instead began advocating for the compulsory registration of engineers by government. The Government supports the registration of design and building professionals, including engineers, as outlined above in the NSW Government response to the Building Confidence Report. The Bill has set up a registration scheme for those design and building professionals who make declarations that their regulated work complies with the Building Code of Australia on class 2 buildings, including those mixed use building with a class 2 component, in the first instance. The intention of the Government has always been to then extend the scheme out to other buildings. The Minister for Better Regulation and Innovation, Kevin Anderson MP, has met with Engineers Australia and has been openly supportive of them pursuing a professional standards scheme once again.

The increased occupational standards and added consumer protections which come with professional standards schemes, in particular, the requirement to hold mandatory professional indemnity insurance for the practitioners work, is supported by the Government. Insurance is an important legal protection for legal owners and a lack of insurance may significantly reduce a consumer's ability to take action if that practitioner becomes insolvent.

The Bill is focused on consumer protections. That is why it is initially focused on the registration of practitioners engaged in regulated work on class 2 buildings, as it was determined that home owners and subsequent owners are those most vulnerable and require greater consumer protections. The

Bill, through the regulations, has the capability to expand the scheme out to include practitioners involved in other classes of building and construction work.

The registration of all classes of engineers is premature as there is currently no professional standards scheme in place which has the ability to cover all classes of engineers and provide those additional benefits which come with being part of a professional standards scheme. Until such a scheme is stood up, a coregulatory model cannot exist. The Government Bill is supportive of registering engineers involved in building and construction work in the first instance. The Government is supportive of all classes of engineers to be registered in time. The Bill provides for the recognition of established schemes as pre-requisites or co-regulation. The Government is supportive of a professional standards scheme for engineers being established so that over time, a co-regulatory model can exist.

3. What consideration has the Government given to different models for the registration of engineers?

The Opposition's amendments introduced into Parliament on 24 October 2019, propose inserting the *Professional Engineers Registration Bill 2019* in its entirety into the *Design and Building Practitioners Bill 2019* (Bill). This proposal has been considered in depth by the NSW Government and is not supported.

The Government is not opposed to a scheme that registers engineers working outside of the building industry, however this needs to be done in a way that complements the much broader registration scheme that will be established under the Bill. The registration scheme established under the Bill focuses on registering practitioners based on the function they provide, rather than on their occupation.

Standing up the registration scheme for class 2 practitioners alone, as proposed in the Bill is an ambitious undertaking and is a logical starting point as that is the area which has been identified as most in need of attention. To prioritise the registration of one profession over another would slow down the process of introducing much needed increased consumer protections. The Government needs to prioritise the registration of engineers working in the residential construction market, which is where the recommendations of the Shergold/Weir *Building Confidence Report* was focussed and is what the Government committed to in its response to the *Building Confidence Report*.

There has been limited consultation on the *Professional Engineers Registration Bill 2019* being included as an amendment within the Bill and while developed in consultation with Engineers Australia, we believe broader industry consultation should have been undertaken. Following conclusion of the inquiry into *Professional Engineers Registration Bill 2019* by the Legislative Assembly Committee on Environment and Planning, the Minister for Better Regulation and Innovation, Kevin Anderson MP, has offered to work with the Opposition to consider the inquiry's recommendations, and work towards a broader registration scheme for engineers which will operate in tandem with the scheme to be established under the Government Bill. This will reduce the likelihood of duplication and unnecessary costs.

Professional Engineers Registration Bill 2019

Professional standards regulation

The Professional Standards Council of New South Wales administers the *Professional Standards Act 1994* (NSW) supported by its regulatory agency, the Professional Standards Authority. The improvement of occupational standards and protection of consumers is the central aim of the Act using a suite of mechanisms under professional standards schemes to limit economic loss, manage occupational risk and encourage the development of the regulatory capacity of occupational associations.

The existing system of professional standards regulation can work in concert with formal regulation (particularly in the form of state registration) to promote good practice and target specific problems within the profession quickly and systemically.

Complementing formal regulation with professional standards regulation

The *Building Confidence* report in 2018 to the Building Ministers' Forum recognised the need for the building and construction industry to actively participate in lifting standards, competency, integrity and in changing industry culture if it is to produce safe and reliable buildings. The *Building Confidence* report also recognised that industry has a keen self-awareness of the problems that exist and that the work required to bring positive change cannot be done by governments alone.

In this regard, professional standards regulation by occupational associations has an important role to play. Alongside formal regulation, it can have a fortifying effect on the quality, safety and responsiveness of the services provided by professionals.

While formal regulation can be predominately focused on compliance and enforcement, the professional standards regime is predominately focused on rewarding good behaviour and continuous improvement in the professional standards of service providers.

Each form of regulation has its positives, and together provide greater regulatory assurance across an industry. This understanding of the contribution of each form of regulation was summarised in a report commissioned by the Council on *The Value of Contemporary Professional Associations*:¹

¹ Justine Rogers and Deborah Hartstein, *The Value of Contemporary Professional Associations* (Report, Australian Research Council Linkage Grant project, 2018).

Positives of State Regulation	Positives of Professional Associations
<ul style="list-style-type: none"> • State provides uniform certification and entry and practice standards, and a protected monopoly or quasi-monopoly over occupational domain. • Professionals are no longer incentivised by maximised profits. • Secures employment cultivates altruism. • Can address information asymmetry, negative externalities and distributional concerns. • Can discipline substandard professionals. 	<ul style="list-style-type: none"> • Associations generate and enforce more precise certification and entry and practice standards based on insider knowledge of best practice. • Only members of the association (who meet standards) can supply those professional services. • Professionals are incentivised by a mix of values and interests. • Some degree of secure employment cultivates altruism. • Context for group mission, virtues, collegiality and improvement. • Can offer the 'symbolic rewards' and sanctions of peer recognition and reputation.

Professional standards regulation by occupational associations draws on the capacity of their members to exercise peer accountability to determine and regulate the relevant levels of conduct and competence required for their own profession to meet its public interest obligations and social license. This peer accountability is activated through standards setting, data collection and analysis, and behaviour modification strategies. Professional standards regulation by occupational associations can expand coverage and spread the costs of compliance beyond the reach of state registration, through efforts such as audit and quality assurance resources, data analysis and early risk identification coupled with systemic responses such as bespoke educational interventions and deployment of new standards.

The two forms of regulation can be mutually reinforcing so that better regulatory outcomes are achieved for the community than either form in isolation.

Not mere self-regulation

The Council provides ongoing expertise and supervision in the operation of an occupational association's professional standards regulation, ensuring that the association's occupational risk management strategies, professional standards and accountability mechanisms are being enforced by the association on their members.

The Council can use a suite of supervision levers when associations are not improving their standards in competence and conduct. For associations that do not meet professional standards legislation obligations, the Council may instigate a number of corrective actions, including: making recommendations for improvement; initiating the review of a professional standards scheme; conducting or compelling an association to undertake a compliance audit; instituting proceedings to prosecute offences; taking injunctive or other relief relating to certain offences; or initiating the amendment or revocation of an association's professional standards scheme.

Engineers Australia professional standards scheme

Engineers Australia were one of the first professions to operate an approved professional standards scheme in NSW, with a series of contiguous professional standards schemes

from 1997 to 2016.² An application for a new scheme by Engineers Australia in 2016/17, with primary jurisdiction in New South Wales and mutually recognised in other jurisdictions, was not approved after consideration by the Council. Engineers Australia launched the National Engineering Register (NER) and advocated for the compulsory registration of engineers by government. .

In 2019, the Authority engaged with Engineers Australia and other occupational associations to discuss professional standards schemes and the benefits of professional standards regulation.

Operation of professional standards schemes

Professional standards schemes are direct consumer protection mechanisms. In 1994, when the original legislation was introduced in the NSW Parliament, the Minister stated:

“There will be considerable benefits to consumers from choosing to deal with a professional who is part of a scheme under the legislation. First, the consumer will be certain that the professional holds appropriate indemnity insurance and, in the event, that a claim arises, the consumer will know that there are funds available to meet the claim. Second, the consumer will be sure that the professional is a participant in ongoing risk management strategies. Third, the consumer benefits by having recourse to a complaints system in the event of being dissatisfied with the professional’s service”.³

Schemes aim to sustain and embed improvements in professional standards so that members of occupational associations are held accountable to a threshold higher than formal regulation may require, and higher than associations that are not professional standards regulators. It requires and encourages associations and their members to implement a range of measures to improve professional standards and practices – from effective risk management strategies, to codes of ethics and complaints handling systems – for better consumer protection.

A central feature of the professional standards regulatory system is the collection of comprehensive data on a profession-wide basis about claims and complaints, enabling risk management strategies to systemically improve professional practice and reduce the risk that consumers will suffer loss.

Occupational associations that hold their members to account through professional standards supervised by the Council (for example, in the accounting and legal professions) can reinforce state registration with the benefits of a proactive and continuous improvement approach to setting and raising professional standards and protecting consumers.

Assistance to develop professional standards schemes

² Professional Standards Councils, ‘Expired Professional Standards Schemes’ *Professional Standards Schemes* (Web Page) <<https://www.psc.gov.au/professional-standards-schemes/scheme-documents-expired>>.

³ New South Wales, *Parliamentary Debates*, Legislative Council, 14 September 1994, (J P Hannaford, Attorney General, Minister for Justice, and Vice President of the Executive Council).

The professional standards regulatory system can be encouraged to occupational associations in engineering as an established and proactive way to improve the regulation of the conduct of their members and establish robust consumer protection mechanisms.

The Councils' regulatory agency, the Professional Standards Authority, is available to encourage and assist occupational associations to develop professional standards schemes and their regulatory capacity.

More information is available at the Professional Standards Councils website <https://www.psc.gov.au/>

Background

The national system of professional standards regulation was developed in the 1990s, against a backdrop of escalating professional indemnity claims that led to professional service providers either leaving their profession, reducing their insurance or forgoing insurance. This threatened to leave aggrieved clients with the prospect of being unable to recover damages even if successful in their claim.

Governments agreed it was preferable to provide some guarantee of payment for most claimants than to have a system of unlimited liability with no certainty of any. NSW was the first to pass legislation, on 12 December 1994, to set a statutory cap on damages tied to safeguards to protect the interests of consumers. The vision was to strengthen consumer protection and raise standards of service delivery by professionals and others while ensuring better access to professional indemnity insurance.⁴ These arrangements are captured in professional standards schemes, a disallowable instrument underpinned by an occupational association's commitments to monitor, enforce and improve the professional standards of its members.

There are currently 17 Australian occupational associations that operate Schemes. These associations collectively cover more than 77,000 professionals in diverse fields who provide services to millions of Australian individuals and businesses. Generally, schemes are established following an application by an occupational association to the Professional Standards Councils.⁵

The Act constitutes the Professional Standards Council to enable and supervise the operation of professional standards schemes by occupational associations in the regulation of their members. A move to supervised regulation by an occupational association can strengthen the efforts of a profession to exceed minimum requirements and to use their

⁴ See particularly: David Ipp, *Review of the Law of Negligence* (Final Report, 30 September 2002).

⁵ An "occupational association" is defined in professional standards legislation as a body corporate "which represents the interests of persons who are members of the same occupational group" and "the membership of which is limited principally to members of that occupational group." An occupational group is defined to include a "professional group and a trade group." The legislation provides that a scheme may also apply to other persons including officers of body corporates, to which, as well as partners, employees or prescribed associates of persons to whom, a scheme applies.

special knowledge and skills in the public interest and to deliver services of the highest standards.