Submission No 35

PROFESSIONAL ENGINEERS REGISTRATION BILL 2019

Organisation: Construction Forestry Mining and Energy Union (NSW Branch)

Date Received: 24 January 2020

CFMEU
CONSTRUCTION

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24 January 2020

The Chair, Committee on Environment and Planning, Parliament House,
Macquarie Street
Sydney NSW 2000

environmentplanning@parliament.nsw.gov.au

Dear Sir/Madam,

Re: CFMMEU Submission concerning Inquiry into Professional Engineers Registration Bill 2019

The Construction, Forestry, Maritime, Mining and Energy Union (**CFMMEU**) represents approximately 20,000 members in the building and construction industry. Between 2013 and 2016 35 workers lost the lives on New South Wales construction sites. Further lives have been lost between 2016 and 2020, with many more workers suffering serious injuries. A safe building and construction site is one that works in accordance with safe work practices and is built in accordance with safe design and professional accreditation standards. Such standards also support investor and resident interests by minimising financial risks in construction and promoting a safe living environment.

The suite of reforms necessary to ensure compliance and enforcement for building and construction standards has been apparent since the Shergold/Weir Report, *Building Confidence,* published in 2018. In New South Wales the need, for reform has been highlighted by the market and regulatory failures associated with Opal Tower and Mascot Towers. While Queensland and Victoria have successfully implemented construction design and accreditation reforms, despite the urgent need for reform an appropriate legislative response remains outstanding in NSW.

Two bills are before Parliament, the *Design and Building Practitioners Bill 2019*, introduced by the government and the *Professional Engineers Registration Bill 2019* introduced by Labor. In response to proposed amendments, the government withdrew attempts to pass the *Design and Building Practitioners Bill 2019* in November 2019. The government now claims that the crossbench and Labor are stymieing a legislative response to the Shergold/Weir Report.

While it is unacceptable that this legislation become the subject of a stalemate the CFMMEU is concerned the reforms genuinely implement the broad range of recommendations proposed by the Shergold/Weir Report. The CFMMEU has previously addressed these issues in our submission of 24 October 2019 to the Legislative Council Public Accountability

Committee, those submissions remain relevant to the current review and we attach a copy of that correspondence for your information.

We support the proper registration of engineers. It is imperative to guarantee that qualified and competent engineers are undertaking engineering work in the Building and Construction industry. We would strongly support the registration procedures should apply to apply to all building practitioners involved in the design, construction and maintenance of buildings, including builders, site/project managers, building surveyors, building inspectors, architects, and designers etc - not just engineers.

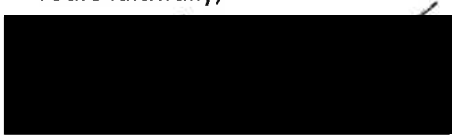
The construction industry is ranked among one of the most dangerous industry's in Australia. We have also reached a crisis point in NSW with the amount of buildings post construction that have encountered issues. The roles that all of these professions play in the construction industry are imperative in ensuring that buildings are both safe in their construction phase, and also when the buildings are occupied by people. Therefore, there is an ever more need to regulate these professions.

The CFMMEU is also concerned with to ensure that the regulatory framework requires that the professionals who are certifying building work are truly independent of the financial interests of the builders and developers associated with the project. The signing off of building certifications through in-house or closely associated professionals continues to present significant risks. Such approvals should be certified by a statutory authority.

Most importantly, the work of the Building Commissioner must be supported by an independent statutory authority which is sufficiently resourced and have the capacity to act on breaches of the legislation.

For the forgoing reasons the CFMMEU remains of the view that the Design and Building Practitioners Bill 2019 does not go far enough in regulating the industry to ensure that adequate standards are met. We urge the NSW state government to implement much more effective legislation to adequately address the crisis the construction industry is presently facing.

Yours faithfully,



Michael Greenfield
Acting State Secretary

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24 October 2019

Legislative Council's Public Accountability Committee
Macquarie St
SYDNEY NSW 2000

Public.Accountability@parliament.nsw.gov.au

Dear Sir/Madam,

The Construction Forestry Mining and Energy Union makes the following comments in relation to the NSW Government Draft Bill Design and Practitioners Bill 2019 ("the Bill").

We note that the time for comment is very short and has not given us time to more comprehensively assess the impact of the Bill, however in the time we have had we are very disappointed that this is the response of the NSW Government. This Bill fails to address the very real crisis in the building and construction industry in NSW in relation to building quality and fireproofing. This is an epidemic nationally and we enclose for your consideration a report commission by the Construction Forestry Mining and Energy Union, titled *Shaky Foundations, The National Crisis of Construction* ("the CFMEU Report") which details the extent of the crisis. The Bill does not address any of these structural issues. We recommend that there be a complete reconsideration of the approach to properly address the problems detailed in the Report.

The Bill does not address the damage ultimately suffered by home owners and the issues detailed in the CFMEU report that go to building quality and life-threatening safety issues.

In terms of the Bill:

Part 1 Sections 4- 8, and throughout the Bill there is reference to regulations. Without seeing the regulations, it is difficult to assess the utility of the Bill. The regulations are said to govern everything from definitions to requirement of insurance. We are concerned about having important matters of substance relegated to regulations that have not yet been drafted. Further regulations are much easier to change and could lead to a further watering down of already weak proposed legislation.

It is also unclear, as distinct from Principal contractors and Subcontractors, whether the duties and obligation of the Bill cover Developers who have been the group who have significantly profited from the crisis in the industry. They have overseen and benefited financially from the cutting of corners in construction.

Part 2 Sections 9-25, whilst the CFMEU supports the registration of those responsible for undertaking construction work these provisions do not go far enough to ensure that those who are responsible for ensuring compliance with all building regulations and codes are independent of developers, principal contractors/builders and subcontractors. There is nothing in the Bill that ensures this independence and just requiring registration does not go far enough. There should be certifiers and inspectors

entirely removed from the project that they oversee.

It is unclear what the adequate level of insurance is going to be. Again, this is left to detail in yet unseen regulation as are many parts of this Bill.

We are also concerned about the lack of strict liability for compliance by registered practitioners and the use of phrases such as "all reasonable steps" (e.g. s17 and s18) which qualifies the obligation and provides a way out of compliance. There is no detail what taking "reasonable steps" means. What is meant by "reasonable excuse" (s18). Given the crisis and the behavior of developers and contractors the duties should be of a strict nature.

Further we do not understand why the requirement to document variations does not extend to "building elements or performance solutions". In the event that a party or end user needs to enforce the Act all works should be documented and that information made available (s20).

In terms of registration, it is unclear who registers these practitioners, the resources the body will have and given the record of other NSW regulators such as SafeWork NSW and the Environmental Protection and Local Councils, we are cynical and doubt there will be real commitment to addressing the corruption in the industry.

The provisions of s18 and 24 for example relate to compliance with the Building Code of Australia. Given the crisis in the industry, it may well be the provisions of the Building Code of Australia are insufficient to secure appropriate building quality, in particular around cladding.

The Section 24 offence of "improper influence", is inadequate to ensure that anyone responsible for building quality and compliance is independent. The requirement to act "impartially" is weak and the penalties are insufficient where developers, builders and subcontractors have profited in the millions of dollars from corrupting the system.

On the myriad of penalties, in the Bill the Union believes they do not go far enough, relegating the jurisdiction in relation to enforcement to the Local Court (an already overworked court jurisdiction) and the Land and Environment Court, a Court that has historically been favourable to developers and builders particularly as against community litigants, we doubt that maximum penalties will ever be awarded and it is highly unlikely that anyone would ever be sentenced to jail.

In terms of Part 3, duty of care, the extension of a duty of care to "exercise reasonable care" is weak and qualifies the duty unnecessarily and provides and out to non-compliant practitioners who have access to legal representation, unlike end consumers who end up owing a substandard property. It is also unclear what happens when developers, builder and subcontractors disappear or are bankrupt. In terms of Section 31 right to claim economic loss and damages, such actions are largely out of reach of ordinary people who have already suffered at the hands of developers, builders and subcontractors. Ordinary people cannot afford to litigate.

In relation to Part 4, registration see comments above but again we do not believe this will sufficiently guarantee the independence of people providing declaration of compliance.

Part 6 Investigations Part 7 enforcement – it is unclear who will carry out investigation and enforce compliance. We are skeptical given the weak nature of the legislation overall that there is a real commitment to addressing the serious issues in the industry. We oppose the use of "undertakings" which is usually a means by which wrong doers escape liability.

Whilst s81 refers to stop work orders, it is unclear what real remedies there are for consumers who acquire or buy into finished buildings. If it is left to these people litigating against practitioners or insurers then there is no real relief for ordinary people in terms of remedies as such actions are largely out of their reach, particularly if they have to find the funds to rectify the problems. Being able to take legal action will be impossible.

The NSW Government needs to do much more and at our recent National Conference the Union supported the following initiatives:

- Developers should demonstrate financial capacity to complete any proposed developments and address any building defects that may arise;
- Effectively demonstrate commitment to ongoing ethical behaviour by the developing entity, its key decision makers or other influential persons;
- To prevent developers, builders and subcontractors engaging in phoenix activity or unfair commercial practices;
- Ensure a requirement that developers not impose, either through their actions or omissions, conditions, requirements or unrealistic timeframes on building contractors that could lead to, or have resulted in, unsafe work practices, breaches of a Commonwealth or Territory law or poor building quality outcomes;
- Establish a project trust account (where funds, including retention payments, are held in trust for head contractors and subcontractors until payments are due) in respect of each project that the develop is responsible;
- Not engage in deceptive or misleading conduct in the in the course of marketing a development to the public;
- Publicly disclose the source of funding of any development;
- Nominate a natural person as a nominee.

More needs to be done to secure the rights of workers on projects and the rights of consumers which we have seen have been left with almost worthless assets.

Therefore, in conclusion this proposed legislation fails to directly address the significant problems set out in the CFMEU report and it is disappointing that given the crisis that this is the best the Government can come up with.

Yours faithfully

Darren Greenfield
State Secretary