

**Submission  
No 58**

## **PROFESSIONAL ENGINEERS REGISTRATION BILL 2019**

**Organisation:** NSW Government

**Date Received:** 3 February 2020



Customer  
Service

---

# Inquiry into the Professional Engineers Registration Bill 2019

**Submission from NSW Government**

Department of Customer Service,  
Better Regulation Division, Fair Trading

**Dated** January 2020

---



# Contents

<b>Executive Summary</b>	<b>4</b>
<b>Chapter 1 – How engineers and other building industry professionals are regulated and monitored in NSW</b>	<b>5</b>
1.1 Regulation of building professionals in NSW	5
1.2 NSW Government’s reform program for the building industry	7
<b>Chapter 2 – A critique of the proposals under the Professional Engineers Registration Bill 2019</b>	<b>9</b>
2.1 Concerns with the reforms proposed by the Bill	9
2.2 Conclusion	12
<b>Chapter 3 – Possible alternative solutions</b>	<b>13</b>
3.1 Purpose of the Design and Building Practitioners Bill 2019	13
3.2 Increasing accountability for Design Practitioners	14
3.3 Compliance and enforcement framework	15
3.4 Consumer protections provided for under the Bill	16
3.5 Conclusion	17
<b>Chapter 4 – The views of the NSW Building Commissioner</b>	<b>18</b>
<b>Appendices</b>	<b>20</b>
Appendix A – NSW legislative framework for building	20
Appendix B – Fair Trading’s Monitoring and Compliance Program	23

# Terms of Reference

---

## **Inquiry into the Professional Engineers Registration Bill 2019**

That the Legislative Assembly Committee on Environment and Planning conduct an inquiry into the Professional Engineers Registration Bill, including:

1. The most appropriate way to regulate professional engineers in the building and construction industry.
2. How engineers and other building industry professions are regulated and monitored, and proposals for reform under the Bill and consideration of alternate proposals.
3. Any other related matter.

## Executive Summary

---

The NSW Government considers that the *Professional Engineers Registration Bill 2019* (the Bill) is not fit for purpose and does not provide any effective means to improve the quality of design work. Its narrow focus on engineers means that other design practitioners remain unregulated and risks further non-compliance with the Building Code of Australia (BCA).

The Bill does not establish a robust regulatory regime and does not contain standard compliance and enforcement provisions contained in comparable occupational licensing schemes, necessary to ensure compliance. Further the Bill seeks to establish a governance framework by applying a Board, which is likely to be an inefficient use of public money. These omissions and deficiencies are likely to have arisen as the Bill has not been subject to any form of consultation with the NSW public or the engineering profession.

The NSW Government submits that the *Design and Building Practitioners Bill 2019* (DBP Bill) provides a preferable approach to the *Professional Engineers Registration Bill 2019*. It was developed specifically to address deficiencies in building design and construction, introducing a broad new framework to enhance accountability across all practitioners (including engineers) who prepare, or coordinate or supervise the preparation of a regulated design in the design and construction of a building.

As part of this framework, the DBP Bill sets out a new registration scheme and introduces new responsibilities on designers and builders to produce compliant design and construction. These obligations are supported by a rigorous compliance and enforcement framework. In addition, the DBP Bill strengthens consumer protection and introduces a statutory duty of care owed by design and building practitioners to owners.

Together, these elements make for a far more robust regulatory framework that is more capable of delivering meaningful improvements to the NSW building and construction sector.

In the time between the introduction of the *Professional Engineers Registration Bill* and the referral to the Legislative Assembly Committee on Environment and Planning, the Bill has also been proposed as a schedule amendment to the NSW Government's DBP Bill.

The NSW Government considers that this approach is inappropriate as there has been no detailed public consultation on the Bill with the wider construction industry, no regulatory impact assessment undertaken, no regard for how the two registration schemes would interact with each other and it risks creating confusing regulation that is difficult to enforce and is ineffective. For these reasons the NSW Government believes that the *Professional Engineers Registration Bill 2019* should not be included as an amendment to the DBP Bill. Instead it should be considered on its own merits, but only once it has been examined in detail and subjected to detailed public consultation. The work of the Committee in examining the *Professional Engineers Registration Bill 2019* is critical in this process and should be completed before it is then considered in detail by either Chamber of the NSW Parliament.

# Chapter 1 – How engineers and other building industry professionals are regulated and monitored in NSW

## Summary

- The Department of Customer Service, through NSW Fair Trading, regulates many parts of the residential building sector.
- The NSW Government is currently progressing a significant reform agenda to address non-compliance in the building sector that is consistent with the national response to the Building Confidence Report.
- The NSW Government is committed to pursuing further reforms to improve the quality of the built environment and enhance consumer protection.

## 1.1 Regulation of building professionals in NSW

Within NSW, responsibility for regulating building professionals is largely within the remit of NSW Fair Trading (Fair Trading), one of the agencies within the Department of Customer Service.

Fair Trading regulates the residential building industry through the following activities:

- *Licensing and registration*: licensing, authorising or registering specific businesses, practitioners and organisations to perform work, while minimising unnecessary regulatory burden.
- *Setting standards*: mandating standards of conduct qualifications and experience through licensing and registration requirements, including guidelines and codes, and a 'fit and proper person' test for character.
- *Insurance requirements*: certain types of building professionals are required to obtain and maintain professional indemnity cover and other forms of insurance during the life of their licence or registration.
- *Resolving disputes*: actively working to bring parties together to reach a mutually agreeable position through formal and informal dispute resolution.
- *Investigations, monitoring and enforcement*: actively investigating complaints, monitoring industry conduct through inspections and enforcing compliance through various sanctions (e.g. directions, rectification orders, recalls, penalty notices and prosecutions).

Fair Trading administers 10 Acts that regulate those involved in residential building work, specialist building work (gas fitting, plumbing, electrical, air conditioning and refrigeration) and development certification. Under this legislative framework, specific licensing and registration schemes are established, and standards and requirements are imposed. Compliance is supported through Fair Trading's monitoring and enforcement program.

The NSW Government is currently progressing a significant reform agenda to address non-compliance in the building sector that is consistent with the national response to the Building Confidence Report (the BC Report)<sup>1</sup>. Recently the NSW Government embarked on a significant program of reforms. These reforms have been done as part the NSW Government's role and contribution under the National Reform Agenda for building and construction.

---

<sup>1</sup> *The Building Confidence Report* authored by Professor Peter Shergold AC and Ms Bronwyn Weir was commissioned by the Building Ministers' Forum (BMF) to assess the effectiveness of compliance and enforcement systems for Australian buildings.

## Legal framework governing building professionals

In NSW, building practitioners are regulated by a range of laws. These laws contain provisions relating to how building professionals are permitted to conduct their profession, how disputes with consumers are addressed and how complaints are investigated and resolved. A summary of the key laws is provided below. Further details are provided in **Appendix A**:

- *Home Building Act 1989*: regulation and monitoring of building practitioners, under a licensing and certification scheme
- *Building Products (Safety) Act 2017*: regulation of the supply and usage of building products to prevent the unsafe use of building products in buildings and ensure the identification and rectification of affected buildings
- *Architects Act 2003*: regulation and monitoring of architects, under a registration and accreditation scheme
- *Building Professionals Act 2005*: regulation of council and private certifiers, under an accreditation scheme
- *Building and Development Certifiers Act 2018*: will replace *Building Professionals Act*, introducing new obligations and strengthening existing regulatory requirements, obligations and powers, under a registration scheme (expected to commence mid 2020).
- *Environmental Planning and Assessment Act 1979*: regulation of planning and development related processes, including certification.

It is also noted that the NSW Parliament is currently debating the *Design and Building Practitioners Bill 2019*, which was passed by the Legislative Assembly in late 2019. It delivers several key elements committed to by the NSW Government in response to the national BC Report. It introduces a registration scheme and new obligations on design and building practitioners, including engineers. Further explanation of the DBP Bill, its purpose and how it addresses the current issues in the building industry including engineers is presented in Chapter 3.

## Monitoring and enforcement program for the building industry

Fair Trading has a monitoring and enforcement program to ensure compliance with legislative requirements and has a range of regulatory tools available to it. A summary is provided below. Further details are provided in **Appendix B**:

- *Dispute Resolution*: assistance to resolve disputes between builders and their clients
- *Investigations*: investigation of complaints about breaches of legislation
- *Inspections and Audits*: auditing for compliance, with priorities based on a risk
- *Disciplinary action*: deals with matters referred for disciplinary action under the Act against contractor licence holders
- *Regulatory tools*: Rectification Order for defects, Education Letter, Penalty Notice, fines, caution/reprimand, variation, suspension or cancellation of a contractor's licence.

## 1.2 NSW Government's reform program for the building industry

The BC Report highlighted the discrepancy between building approvals, as-designed building documentation and the as-constructed building and documentation as a key failure of the industry.<sup>2</sup>

The report found there is a systemic failure to expressly require documentation to demonstrate compliance with the BCA. As a result, performance requirements provided for in the BCA are not being incorporated into the design process, and therefore not being translated to the built environment. The BC Report noted this as a major issue in the building sector and recommended far-reaching changes.

The NSW Government response to the BC Report, released on 28 February 2019, committed to the following initial reforms to significantly improve the accountability of practitioners involved in design and building:

- appointing a Building Commissioner
- overhauling compliance reporting
- requiring building practitioners with reporting obligations to be registered, and
- ensuring that there is an industry-wide duty of care to homeowners.<sup>3</sup>

### Appointment of the Building Commissioner

On 1 August 2019, Mr David Chandler, OAM, was appointed as the NSW Building Commissioner, to have strategic oversight of building regulation and regulatory changes and advocate for building policy reform. He was also brought on to take a leadership role in driving the necessary reforms and setting up the framework that will play an important role in ensuring the DBP Bill's success.

The Building Commissioner has developed a reform strategy for 2019 to 2025 to regain public confidence in the residential building sector and create a new customer focused facing construction industry. This strategy was recently publicly announced, and when finalised and approved, an implementation plan will be publicly available in the first quarter of this year, as a detailed work plan with key milestones spelled out.

The plan will outline a new regulatory playing field, placing a greater focus on financiers taking an active and constructive role, working to bring private insurers back to the market, and seeing public confidence returned through a chain of stewardship that enables the observation and enforcement of the design and construction of buildings.

In addition to this, building reform working groups are currently being set up to drive the reform agenda outlined in the implementation plan 2019-2025. The working groups consist of six reform pillars that cover legislation and regulations changes, ratings systems, improving skills within the industry, ensuring contracts help meet standards, digitising the industry and establishing NSW as a leader in modern construction methods.

This holistic approach to reform will change the culture of the industry, making risk unviable. Options for increasing professional standards and skills of those working in the building industry including engineers will be a key focus of one of the reform pillars.

Amending legislation is currently being drafted to deliver a suite of compliance and enforcement powers including a stop work order, that will allow the Building Commissioner to make targeted

---

<sup>2</sup> *Building Confidence - Improving the effectiveness of compliance and enforcement systems for the building and construction industry across Australia*, Peter Shergold and Bronwyn Weir, February 2018. Recommendation 13, at page 30.

<sup>3</sup> *NSW Government Response to the Shergold Weir Building Confidence Report*, NSW Government, February 2019, at pages 5 and 6.



interventions in residential building work either under construction or which were completed within the last six years, to enable the detection and rectification of defective building work.

The Building Commissioner has provided a response to the Committee, contained in **Chapter 4**.

### **NSW participation in the national building reform program**

The Building Ministers' Forum (BMF) agreed to progress a national response to the BC Report, forming an Implementation Team within the Australian Building Codes Board. Key workstreams include:

- proposing amendments to the 2019 National Construction Code (NCC) including a best practice process for the development of performance solutions to strengthen their consistency and quality,
- developing a new Continuing Professional Development module on the NCC to ensure building practitioners have a better understanding of the requirements within the NCC, and
- developing a new nationally consistent definition of 'complex buildings' with further consultation on the definition and targeted regulatory interventions to continue in early 2020 with a view to inclusion of the definition in the NCC.

The BMF met on 13 December 2019 and agreed that the following reforms would be pursued as a priority:

- development of a nationally consistent code of conduct for building surveyors with consultation to commence in early 2020
- development of a detailed national specification for inclusion in a building manual for commercial buildings
- development of model provisions to set out the roles and responsibilities for documenting, approving and recording performance solutions
- work on a national data-sharing framework to support the development of a comprehensive national building data portal will also begin next year. This will draw on data from state and territory governments to support education and compliance and enforcement activities.

The NSW Government continues to contribute to this national work.

# Chapter 2 – A critique of the proposals under the Professional Engineers Registration Bill 2019

---

## Summary

- The Bill fails to provide meaningful solutions to a wide range of the deficiencies that have been identified in the Building Confidence Report, in particular it does not provide any effective means to improve the quality of design work.
- The Bill does not have a robust regulatory framework, necessary to ensure compliance. Monitoring and enforcement powers and associated offence provisions afforded to the regulator in other similar occupational licensing schemes have not been mirrored in this Bill.
- The Bill has not been subject to broad consultation with industry or significant impact assessment.

## 2.1 Concerns with the reforms proposed by the Bill

The NSW Government does not support the Bill in its current form. The Bill is unlikely to improve the quality of buildings in NSW, as it regulates only a subset of design and building practitioners in NSW (i.e. professional engineers) and fails to capture body corporates or directors – an issue, as professional engineers typically work for engineering firms. In addition, the Bill's narrow definition of the 'professional engineering services' risks excluding some engineering services for building design. The Bill's regulatory framework is not robust enough to ensure compliance, and its administrative framework is outdated and inefficient. Finally, the Bill has not been subject to adequate stakeholder consultation, considering it will likely impose significant costs on engineers and the community.

### The Bill lacks effective means to improve the quality of design work

The Bill does not provide any effective means to improve the quality of design work. It does not capture all those responsible in the design process, nor does it establish any processes to ensure compliance with the BCA. Also, the inability to hold all legal entities to account is a key weakness of the Bill.

The Bill is targeted at engineers, however, there are a range of other professionals that are responsible for building design. The BC Report noted that the BCA requirements, set out in the building design documentation, were not being incorporated into the design process, and therefore not being translated to the built environment.<sup>4</sup> It made recommendations to register all design practitioners and to put in place a regime to ensure that the final build was compliant with BCA standards. The Bill falls short in meeting the recommendations of the BC Report by only requiring the registration of engineers, overlooking the registration and regulation of other professionals in the design sector, which will lead to registration of professionals in a piecemeal fashion. This will limit the effectiveness of the scheme in improving the quality of design work

Further the Bill narrows the scope of what engineering services are regulated. Only 'professional engineering services' are regulated under a registration scheme. The definition of 'professional engineering services' excludes the carrying out of design and construction that does not include 'advanced scientifically based calculations'. This could result in some engineering services that are

---

<sup>4</sup> *Building Confidence – Improving the effectiveness of compliance and enforcement systems for the building and construction industry across Australia*, Peter Shergold and Bronwyn Weir, February 2018. Recommendation 13, at page 28.

carried out for design and construction, being missed. Also, the reference to ‘advanced scientifically based calculations’ is subject to interpretation and could be prone to lengthy legal debate where a claim for defects is made.

The Bill does not enable body corporates to be registered and does not provide an alternative to registering directors to hold them to account. This approach differs markedly to other regulatory schemes.<sup>5</sup> It also does not acknowledge the practical realities of how the engineering profession operates, as an engineer typically works for an engineering firm, rather than as a sole practitioner.

The effect is that a body corporate and directors are not required to comply with any of the obligations under the Bill, making it difficult to hold directors liable for breaches. The regulator cannot take any compliance or enforcement action against directors or body corporates under the Bill specifically.

Legislative schemes should be able to apportion liability to specific individuals and directors and enable consumers to more readily identify non-compliant work and practitioners in a corporation. Not providing a mechanism under which directors are held to account is a failure of the Bill and likely to make it more difficult to regulate businesses and persons that provide poor quality engineering services.

The Bill does not provide any means to ensure professional engineers comply with the BCA and NCC. The BC Report recommended that there should be a statutory duty on design practitioners to prepare documentation which demonstrates that proposed buildings will comply with the NCC<sup>6</sup>. The Bill does not provide for this duty, nor does it cover all design practitioners.

### **The Bill lacks the key components for a robust regulatory framework**

The Bill is not supported by an appropriate regulatory regime that is necessary to ensure compliance. Further, the introduction of a Board to undertake an administrative and regulatory role when Government has existing skills and systems to administer registration would be inefficient.

#### **Compliance and enforcement powers**

Provisions empowering the regulator in other similar occupational licensing schemes have not been mirrored in this Bill. The Bill’s compliance and enforcement powers do not provide the regulator with the broad scope of powers necessary to adequately enforce the legislation. In addition, provisions to ensure standards of professionalism or ethics are inadequate. These provisions are essential in ensuring compliance and thus quality work.

Particular gaps in compliance and enforcement powers include:

- no ability for the Board to issue a “stop work” order where there is a risk or potential risk of significant harm or loss to persons. The BC Report noted that as a minimum, the range of legislated powers should include powers to evacuate, make all necessary orders and stop works<sup>7</sup>
- the requirement to give notice of an investigation could unreasonably hamper or delay possibly urgent investigations, and is not an investigative practice that is used by Fair Trading.

Common provisions to ensure professionalism and ethics are lacking and the Code of Practice for professional standards is inadequate. The scope of the proposed Code of Practice is vague and

---

<sup>5</sup> Under the *Home Building Act 1989*, which enables the licensing of a corporation, or the *Architects Act 2003*, which provides that a corporation or firm that provides architectural services can nominate one or more architects to be responsible for providing architectural services by the corporation or firm.

<sup>6</sup> *Building Confidence – Improving the effectiveness of compliance and enforcement systems for the building and construction industry across Australian*, Peter Shergold and Bronwyn Weir, February 2018, at page 18.

<sup>7</sup> *Ibid*, at page 23.

thus an opportunity to set suitable standards for professional conduct has not been realised. The Code of Practice is not required to be established until nine months after commencement of Part 4 of the Act. This risks delays improving the professional standards for engineers, which is the aim of this Bill. In addition, reliance alone on a professional conduct or practice to improve the quality of design work is not adequate.

The Bill's inadequate enforcement and offence provisions risks non-compliance. The lack of provisions setting suitable standards for engineers means that improvements to the quality of design work by engineers cannot be assured. This was the primary reason for introducing this Bill.<sup>8</sup>

### **Offence and penalty regime**

It is important to include offences and have adequate penalties to act as a sufficient deterrent to ensure compliance and to protect consumers. The offence provisions are weak in the Bill, in particular:

- there are few provisions with offences, five only, failing to provide this common mechanism for deterrence
- the penalties are not high enough to deter non-compliance and do not reflect the severity of the offences, for example the highest penalty is \$110,000 and there is no term of imprisonment
- the 'fitness to practice' test for registration is inadequate and does not include some criminal offences such as under the *Crimes Act 1900*. Thus, engineers who had committed criminal offences such as fraud could still possibly be registered. The BC Report identified that a "fit and proper person" test is the foundation of public trust in the integrity of practitioners should target such matters as bankruptcy and criminal checks.<sup>9</sup> This reduces the consumer protection and risks persons becoming registered who may not have the appropriate standards of professionalism or ethics.
- the Bill does not list the disciplinary or other decisions that may be made by the Board that may be appealed to the NSW Civil and Administrative Tribunal. This is unusual as compared to most other regulatory legislation in NSW, noting that these types of provisions are important for consistency and fairness.
- the Code of Practice provides no offence provisions. The Code is a "guide" and can be used in disciplinary proceedings taken against an engineer, however, without offence provisions it is otherwise unenforceable. Thus the deterrence effect of the code under the Bill is substantially reduced. This does not emulate best practice as is in other legislation.<sup>10</sup>

### **Administrative framework**

The lack of an efficient administrative framework is a weakness of the Bill.

The Bill establishes a Board for the purposes of administering and monitoring the registration scheme. It is not clear how it would benefit the industry or consumers in NSW. The approach is also inconsistent with similar legislation in Victoria.<sup>11</sup>

---

<sup>8</sup> *Professional Engineers Registration Bill 2019. Second Reading Speech, Legislative Assembly Hansard, 24 October 2019.*

<sup>9</sup> *Building Confidence – Improving the effectiveness of compliance and enforcement systems for the building and construction industry across Australia*, Peter Shergold and Bronwyn Weir, February 2018, Recommendation 2, at page 19.

<sup>10</sup> See for example codes provided for village operators in the *Retirement Villages Act 1999*, and for real estate agents under the rules of conduct in the *Property, Stock and Business Agents Act 2002*.

<sup>11</sup> *Professional Engineers Registration Act 2019 (Victoria)*, passed in the Victorian Parliament late 2019

It is also noted that the Bill is silent on the requirement for professional engineers to hold insurance and associated indemnity. Insurance is an important legal protection for professionals and consumers. The BC Report noted that where it is available, compulsory insurance in the form of professional indemnity and/or warranty insurance together with financial viability requirements, where appropriate, should be a requirement for any registration scheme.<sup>12</sup>

## **Lack of public consultation and detailed consideration of the reform proposals**

According to the information provided to Parliament in the second reading speech, the Bill was developed in consultation with Engineers Australia and Professionals Australia. It therefore appears that input has not been sought from the broader NSW building and construction sector, nor consumers and communities.

The proposed registration scheme, assessment scheme and compulsory professional development regime will impact engineers including imposing costs on engineers for renewals, membership and continuing education.<sup>13</sup>

It would have been preferable for more extensive public consultation to have occurred before the Bill was introduced into the Parliament due to the significant impact the assessment and registration proposals may have on individual engineers, particularly those who are not members of these professional associations.

## **2.2 Conclusion**

The Bill fails to address a range of deficiencies identified in the Building Confidence Report and does not provide any effective means to improve the quality of design work.

The Bill also lacks the necessary provisions for a good and workable regulatory regime, failing to include:

- a comprehensive monitoring and enforcement framework
- a sufficient offence and penalty regime to encourage compliance, and
- an efficient administrative framework.

The lack of comprehensive public consultation and detailed consideration means that the regulatory impacts on engineers and consumers have not been properly identified and contrasted with anticipated benefits.

For these reasons, the Bill will not deliver on what it set out to achieve and is not fit for purpose.

---

<sup>12</sup> *Building Confidence – Improving the effectiveness of compliance and enforcement systems for the building and construction industry across Australia*, Peter Shergold and Bronwyn Weir, February 2018. Recommendation 2, at page 19.

<sup>13</sup> A good indication of the cost of these schemes can be found in the work of the Victorian Parliamentary Budget Office on Professional Engineers Registration Bill 2019 (Vic), Independent advice based on public information, May 2019, [pbo.vic.gov.au](http://pbo.vic.gov.au)

## Chapter 3 – Possible alternative solutions

### Summary

- Significant progress has been made in implementing the recommendations of the Building Confidence Report (BC Report), and NSW is working with other jurisdictions to deliver a national approach to its implementation.
- The *Design and Building Practitioners Bill 2019* (the DBP Bill) delivers on a number of key reforms to strengthen design and construction, while at the same time addressing registration of building professionals not otherwise registered in NSW, including the registration of engineers.
- This DBP Bill is only the first tranche of reforms the NSW Government is making as part of the biggest overhaul of the design, building and construction sector.

The terms of reference of this inquiry call for suggested alternatives to the *Professional Engineers Registration Bill 2019*. The NSW Government submits that DBP Bill provides a better way to regulate professional engineers in the building industry. Its reforms implement BC Report recommendations and address market failures in the building industry which have led to poor quality building work in NSW.

### 3.1 The purpose of the Design and Building Practitioners Bill 2019

The DBP Bill was a commitment of the NSW Government's Response to the BC Report to increase accountability in the building sector through a suite of new obligations for design and building practitioners. Specifically, the DBP Bill reinforces existing obligations under the planning and approvals framework and ensures that compliant plans are developed and that such documentation can and is relied upon to produce construction that is compliant with the BCA.

The DBP Bill introduces an accountability framework that sets out a new registration scheme for design and building practitioners and introduces new responsibilities on these practitioners to produce compliant construction that is in accordance with its designs. These obligations are supported by a rigorous compliance and enforcement framework and proportionate penalty provisions.

Multi-storey residential projects are complex structures, and consumers can face challenges in being able to identify defects. The DBP Bill strengthens consumer protection and introduces a statutory duty of care owed by design and building practitioners to owners who are unable to protect themselves by way of contractual arrangements.

Together, these elements provide for a robust regulatory framework to ensure that buildings and their designs are compliant with the BCA.

The DBP Bill was subject to an extensive consultation process, including the release of a public consultation draft, several roundtables and targeted meetings with key external stakeholders. In addition, the NSW Government contracted Ms Bronwyn Weir, the co-author of the BC Report, to provide further expertise throughout the development of the legislation.

The supporting regulations to the DBP Bill will be developed in conjunction with industry stakeholders to ensure that the new framework is effective, and that industry has an opportunity to provide their views on legislative scheme prior to its finalisation.

## 3.2 Increasing accountability for design practitioners

The DBP Bill establishes an enhanced accountability framework for design and building practitioners through a suite of new obligations, which are supported by a robust registration scheme.

### New requirements for the registration of design and building practitioners

The DBP Bill introduces a new registration framework for design and building practitioners, which is fundamental to the future operation of the scheme. It will ensure that only suitably qualified, competent and insured practitioners are able to perform functions set out under the DBP Bill.

The BC Report recommended registering a broad range of practitioners involved in the design and construction of buildings. The DBP Bill delivers on this recommendation. It requires a range of individual design and building practitioners and body corporates, including engineers, be registered in order to carry out their functions under the Bill. These functions include the issuing of a design and building compliance declarations and preparing, or coordinating and supervising the preparation of a regulated designs. In addition, building practitioners are obligated to record variations and construct in accordance with the BCA. The development of this new scheme will involve the registration of thousands of practitioners who have never previously been registered. As such, and to ensure the scheme is implemented and enforced effectively, it will first apply only to multi-unit residential buildings. The Bill as drafted provides scope to expand the scheme to other classes of buildings in the future and the Minister, in his second reading speech in the Legislative Assembly, has confirmed it is the NSW Government's intention to do this.

The registration requirements will be detailed in the accompanying regulations and developed in consultation with key stakeholders and the public.

### New declaration obligations for design and building practitioners

The BC Report found that the accountabilities of different parties were unclear and there were insufficient controls on the accuracy of documentation.<sup>14</sup> Particularly for design practitioners, there was a systemic failure to expressly require documentation to demonstrate compliance with the BCA. This is important in construction, as inadequate design documentation increases the potential for disputes and non-compliance, ultimately impacting on the final build quality. The BC Report recommended a chain of approval of that documentation throughout the construction process.

The DBP Bill responds to this issue by introducing a new obligation on all 'design practitioners' who prepare 'regulated designs'<sup>15</sup>, including performance solutions for buildings, to declare that the documentation demonstrates compliance with the performance requirements of the BCA. This includes building elements and performance solutions. A building element includes the fire safety systems of a building, waterproofing, a load-bearing component of a building essential to its stability, a component of the building that is part of the building enclosure, and the services for a building. This is considered important, as these designs are more likely to have a greater impact on the compliance and safety of a building if incorrectly prepared.

The requirement for declarations extends to design variations. This will ensure that building work which varies from critical designs will be picked up in the process, and that both design and building practitioners are responsible for making and recording compliant variations.

---

<sup>14</sup> *Building Confidence – Improving the effectiveness of compliance and enforcement systems for the building and construction industry across Australia*, Peter Shergold and Bronwyn Weir, February 2018, recommendation 13, at page 30.

<sup>15</sup> A Regulated Design includes plans, specifications or reports detailing designs, for certain classes of building.

Scope is provided in the regulations to specify other circumstances where the practitioner must provide the declaration, such as where they are required to provide types of designs under the planning system.

To ensure that declared designs are used in construction, the DBP Bill introduces new obligations on registered building practitioners who must obtain, rely upon and build in accordance with these designs. They must also issue a building compliance declaration stating that the final building, including any variation, complies with the BCA.

These obligations on both design and building practitioners will ensure that compliant design documentation is relied upon to produce buildings that are compliant with the BCA.

Through its accountability framework, the DBP Bill also ensures that key practitioners, including engineers, are held responsible for the quality of their work across the planning, design and construction stages of a building.

### **3.3 Compliance and enforcement framework**

The DBP Bill is supported by a robust compliance and enforcement framework to ensure that practitioners comply with their new responsibilities.

The BC Report highlighted the need for effective regulatory powers to ensure the safety of consumers. Accordingly, the DBP Bill provides the regulator with a broad suite of administration, compliance and enforcement powers and associated offences, which are fit for purpose and afforded to the regulator in other similar occupational licensing schemes.

#### **Penalties for offences under the DBP Bill**

The DBP Bill includes extensive offence provisions to deter non-compliant conduct and to ensure that practitioners are held accountable.

The DBP Bill sets out significant penalties to reflect the seriousness of a potential breach on the safety of a building and its occupants. For example, the failure of a practitioner to become registered attracts a maximum penalty of \$165,000 for a body corporate and \$55,000 for individuals. Similarly, a design practitioner must not knowingly make a false or misleading design compliance declaration, or they will be subject to an offence. This attracts a maximum penalty of \$220,000 or imprisonment for 2 years, or both.

#### **Comprehensive compliance and enforcement provisions**

The DBP Bill provides the regulator with a suite of modern powers that are tailored to the building and construction industry.

The DBP Bill ensures that authorised officers have a broad range of powers, including information gathering powers, powers to enter premises and powers to take possession of records and documents. Authorised officers will be afforded important powers to enter any place of business during reasonable hours, including building work, and any common property under a strata scheme or association property under a community title scheme.

These powers will ensure that any person who has important information will be compelled to provide it to an authorised officer and ensure NSW Fair Trading can act quickly to ensure that construction and buildings comply with all necessary requirements under the law.

The Secretary will also be empowered to take action to support the powers of authorised officers. For example, the ability to issue “stop work” orders for building work where there is a risk of significant harm or loss to the public or potential occupiers of a property. The ability also to apply to the Land and Environment Court for an order to remedy or restrain a breach of the legislation, and issue warning notices about registered practitioners and others in breach of the legislation.



## Duty of care

The DBP Bill introduces a statutory duty of care owed for construction work to certain building owners.

Building owners have existing protections for building defects in the form of statutory warranties as well as other avenues of recourse through the legal system. However, two High Court decisions<sup>16</sup> raised doubts about the extent of the protections for owners in the context of negligence. Both cases emphasised that a duty of care could not be imposed unless it was shown that the owner was 'vulnerable' and unable to protect itself from the defendant's lack of reasonable care.

In order to clarify the law, the Bill introduces stronger protections for property owners to ensure that they have clear rights to pursue compensation for defective construction work.

The Bill provides that individuals who are current and subsequent owners, as well as owners corporations and community, precinct and neighbourhood association schemes, are owed a duty of care. This is a duty of care that extends to avoiding pure economic loss for defects in or related to a building, and which arise from construction work. This reform will ensure that property owners have more avenues and easier access to seek redress for defective building and related damages and loss. To ensure that practitioners cannot evade their obligations, the Bill will specifically prohibit a person who performs construction work contracting out or delegating the duty to another party.

The Bill makes it clear that the duty of care applies in addition to, and does not limit, existing duties, statutory warranties or other obligations imposed under other Acts or the common law. This will ensure that affected owners have a breadth of legal avenues to pursue against poor work and are adequately protected by the state's legal system.

This new duty of care, in addition to the strengthened obligations and powers under the DBP Bill, will deliver better protections for consumers and owners of property to ensure they have confidence in the state's legal system.

### 3.4 Consumer protections provided for under the Bill

The DBP Bill builds in a wide range of consumer protections. These include requirements for insurance, accountability provisions and penalties.

Design practitioners, including engineers registered under the new framework, will be required to have and maintain nominated insurance in order to ensure protection of consumers. Additionally, the DBP Bill provides comprehensive regulation making powers to enable the oversight of a range of mandatory insurance factors. These controls include:

- the persons or bodies who may make indemnity
- the period for which a practitioner is indemnified (to provide run off insurance)
- the amount for which a practitioner is indemnified
- the nature and terms of any insurance or arrangement
- has been subject to extensive consultation, including the public release of a draft DBP Bill for public consultation.

The DBP Bill also reflects typical employment arrangements within the building sector and has several provisions which focus on both the director and the body corporate, in addition to individuals.

Companies that register as a body corporate will have several additional obligations. For example, all directors of the body corporate will be required to ensure that appropriate management systems

---

<sup>16</sup> *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185 and *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515.

are in place to ensure compliance with the requirements of the DBP Bill. A registered body corporate will also be required to ensure that any compliance declarations made on behalf of the body corporate are done by an individual registered practitioner only. Significant penalties up to \$110,000 will apply to body corporates who fail to comply with this requirement.

The DBP Bill contains provisions to hold directors and others involved in the management of a corporation accountable for their involvement in breaches of the legislation. If a body corporate contravenes a provision of the Bill or regulations, the director/s or those concerned in the management of the body corporate who authorised or permitted the breach, are taken to have breached the law. This provision ensures that body corporates and key personnel involved in the management of the corporation, are held accountable to the stringent requirements set out by the legislation.

### 3.5 Conclusion

The DBP Bill sets out the appropriate and necessary framework to deliver on the reforms recommended by the BC Report. It establishes new obligations to ensure that design and construction is delivered in a compliant manner, supported by a robust regulatory framework to penalise practitioners who fail to meet these obligations.

The DBP Bill framework is preferred to the *Professional Engineers Registration Bill 2019*, as it focusses on the regulation of engineers as design practitioners. It was developed specifically to address deficiencies in building design and construction, introducing a broad new framework to enhance accountability across all practitioners (including engineers) who prepare, or coordinate or supervise the preparation of a regulated design in the design and construction of a building. It:

- recognises the registration of directors, body corporates or companies, ensuring they are accountable provides mandatory grounds for refusal of an application for registration
- has extensive offence provisions including the imposition of large financial penalties and gaol terms and continuing offences
- provides the regulator with a broader suite of modern powers that are tailored to the building and construction industry including “stop work” orders where work would result in significant harm or loss to the public or potential occupiers of a property
- mandates insurances to be obtained or maintained by engineers, to protect the consumer
- has been subject to extensive public and targeted consultation, including the public release of a draft DBP Bill for public consultation.

The *Professional Engineers Registration Bill 2019* fails to mandate an obligation to make a statutory declaration by those registered that their work is BCA compliant. This omission makes it harder to enforce poor professional conduct. Moreover, the Bill fails to prescribe a statutory duty of care, meaning engineers may not owe a duty of care to subsequent owners, which again is a missed opportunity to strengthen consumer protections. The result of this failure is that practitioners who perform non-compliant work may continue to not bear the risk for their work, placing consumers at a disadvantage.

The DBP Bill delivers on a solution to address compliance in the building industry which is enforceable. This will ensure improvements to the quality of buildings and consumer protection. The DBP Bill is therefore fit for purpose and a good alternative to the *Professional Engineers Registration Bill 2019*.

## Chapter 4 – The views of the NSW Building Commissioner

---

*The NSW Building Commissioner, Mr David Chandler OAM, was requested by the Committee to provide a submission to the Inquiry and his views are provided below.*

To the Chair and members of the Committee on Environment and Planning,

I have been appointed as the NSW Building Commissioner to have strategic oversight of building regulation and regulatory changes and advocate for building policy reform. I have been tasked to make the case for reform and actively support the Government's commitment to achieve and maintain best practice regulation, ensuring the safety, amenity and sustainability of the built environment and protecting consumers who invest their savings in homes and other properties.

As the NSW Building Commissioner, a major priority is to improve the professional standards of practitioners in relation to the built environment. This includes occupational standards, competency, integrity and culture. It covers both design and building. Increased industry involvement in accountability models and increased professionalism should be encouraged including, for example, supporting some types of associations to consider establishing a Professional Standards Scheme. It is preferred that all practitioners in the area of the built environment arrive at a similar level of professionalism rather than singling out engineers. To provide the engineers with their own Bill and Board and treat them differently from most other practitioner groups is not warranted and not consistent with recent reforms of government.

There are various models found in occupational registration/licensing regimes in NSW and various schemes for registration of engineers across Australia. While I note that these matters are discussed elsewhere in this submission, I highlight that the *Professional Engineers Registration Bill 2019* appears to arbitrarily adopt a model without exploring the views of industry stakeholders and consumers.

My aim is that through the *Building and Development Certifiers Act 2018* (to commence in mid-2020) and the *Design and Building Practitioners Bill 2019*, there will be sufficient legislated powers to ensure that all building and design practitioners, including engineers and certifiers are registered. The commencement of this legislation will also ensure that there would be a sector-wide focus on the accuracy of design and documentation, quality control and assurance and compliance with the National Construction Code as practitioners will be required to make declarations about their work.

Under the proposed *Design and Building Practitioners Bill 2019* there is provision to recognise established schemes as pre-requisites or co-regulation. Therefore, some co-regulation may occur to the extent that industry run accreditation schemes are recognised in the administration or granting and renewal of registration.

The initial focus of the *Design and Building Practitioners Bill 2019* will be on class 2 buildings and mixed-use buildings with a class 2 component to ensure that the problems that have emerged over the last couple of years do not happen in the future. The registration for engineers and other design practitioners provided for in the *Design and Building Practitioners Bill 2019* will address the immediate and most high-risk consumer protection that are needed. It will do this by requiring the registration of a range of design practitioners providing services in relation to class 2 and mixed-use buildings with a class 2 component. A broad cross section of design practitioners in the sector will be covered in the short term and this will allow for the proposed declared drawings regime to be implemented and tested before expanding the application of the scheme to other classes of buildings.

Whilst there is scope to expand coverage to other classes of buildings, lessons learned from application of the *Design and Building Practitioners Bill 2019* to class 2 buildings and mixed-use buildings with a class 2 component will inform any adjustments that need to be made to the legislation prior to expanding its operation to other classes of buildings.

During this period of implementation, industry associations can work to improve their professionalism with a view to increasing their contribution to the overall accountability that needs to be brought to bear on the building industry. At this time, I believe that another Board is not warranted, and special treatment for engineers (as compared to other design practitioners that will be covered by the *Design and Building Practitioners Bill 2019*) is also not warranted.

A preferable way forward might be for a broad industry consultation on these models for all types of practitioners to occur. Government would challenge all associations to improve their oversight of members, become more customer facing and public interest focused, and demonstrate their preparedness and capability to be part of a robust regulatory framework. This would include driving out of the industry their members that are not up to community standards. It is noted that Engineers Australia were an approved professional standards scheme in NSW from 1997 to 2016. If Government endorsed such an approach, a discussion paper could be prepared in which future models for government/industry registration are discussed and issued and views widely sought before determining which model may be appropriate.

What is proposed in the *Professional Engineers Registration Bill 2019* will not advance the interests of consumers in any way that is preferable to the *Design and Building Practitioners Bill 2019* and it will be expensive for government to create new infrastructure for a Board when NSW Fair Trading has existing skills and systems to administer registration of design practitioners. It is noted that the *Professional Engineers Registration Bill 2019* has not been the subject of any benefit analysis that properly takes account of these considerations.

Overall, it is premature to proceed with the *Professional Engineers Registration Bill 2019*. Steps are in train to address the immediate area of concern with the built environment and further consultation with all relevant stakeholders is required. I have contributed to and support the submission made by the NSW Government to the Committee on Environment and Planning.

**David Chandler** OAM BSc Build (UNSW)  
**NSW Building Commissioner**

# Appendices

---

## Appendix A – NSW legislative framework for building

---

### The Home Building Act 1989

The *Home Building Act 1989* (HB Act) is one of the primary pieces of legislation for the regulation and monitoring of building practitioners in NSW.

The HB Act sets up a licensing and certification scheme for building practitioners, includes their contractual requirements, and their responsibilities under a set of “statutory warranties” for the work they do. Insurance requirements for builders are also included in the HB Act. All persons undertaking residential building work in NSW, valued at more than \$5,000, must be licensed or certificated.

Strict requirements apply for the issue of licences to help ensure only ‘fit and proper’ persons with appropriate qualifications, skills and knowledge, carry out residential building work. It applies to corporations as well as individuals.

Fair Trading has a range of powers to enforce the Act. For example, Fair Trading can suspend a company’s licence under certain circumstances. Monetary penalties can be imposed for offences deterring individuals and corporations from doing the wrong thing.

### Building Products (Safety) Act 2017

The comprehensive scheme to address unsafe building products under the *Building Products (Safety) Act 2017* (BPS Act) commenced on 18 December 2017. The primary purpose of the BPS Act is to prevent the unsafe use of building products in buildings and to ensure the identification and rectification of affected buildings.

The BPS Act provides for the identification of, and a rectification process and procedure for buildings that have affected building products in their structure. Fair Trading can identify building products that may present a safety risk or be used unsafely. Under the BPS Act, the NSW Commissioner for Fair Trading has the power to issue building product-use prohibition orders in relation to the use of specific building products. On 10 August 2018, the Commissioner used that power to issue the first building product-use prohibition for certain types of aluminium composite panels installed on multi-storey buildings.

### Architects Act 2003

Architects are regulated in NSW under the *Architects Act 2003* (the Act). The Act establishes a registration framework for architects and the NSW Architects Registration Board (the Registration Board). The Registration Board has a range of functions including the registration, cancellation or suspension of architects, the investigation of complaints, disciplinary functions, and the accreditation of architecture courses which meet registration requirements.

The Act prohibits persons purporting to be architects when they are not. Strict requirements apply to help ensure only persons (or architect firms or corporations) who hold the required architectural qualifications or pass a competency test are registered.

## Building Professionals Act 2005

### Accreditation of certifiers

The *Building Professionals Act 2005* (BP Act) regulates the accreditation and professional conduct of council and private certifiers in NSW. The BP Act establishes an accreditation scheme and the Building Professionals Board (Board). Under the accreditation scheme, the Board authorises accredited council and private certifiers to issue building and development certificates in NSW. The Board also undertakes the functions of the regulator for certifiers.

The accreditation scheme sets out the necessary requirements for becoming accredited, including requirements for professional indemnity insurance and the conditions of registration. The scheme also sets out the professional Code of Conduct for standards of behaviour required of accredited certifiers, conflict of interest and other compliance provisions.

The Board can suspend or cancel a person's certificate of accreditation, and can also refuse to issue or renew a certificate for an individual's accreditation on several grounds, including that the person is not a "fit and proper person".

### Accreditation of engineers under the BPB Act

Engineers wishing to issue construction, occupation, subdivision, compliance and complying development certificates under the *Environmental Planning and Assessment Act 1979* (EP&A Act) must be accredited by the Board under the BP Act. Once accredited, these engineers are regulated in relation to functions performed under the Act.

An engineering degree in civil, electrical or fire safety is one of the necessary pathways that an accredited certifier must meet in order to certify structural engineering components. Accreditation under the BP Act is limited to these building and construction activities rather than the full range of engineering services.

### Ensuring the accountability of certifiers

Requirements in relation to the accountability of certifiers are key components of the BP Act. Provisions include compliance with all relevant requirements as 'public officials' and 'public authorities' under the *Independent Commission Against Corruption Act 1988* and the *Ombudsman Act 1974* respectively. A Code of Conduct is incorporated into the BP Act, which outlines the professional and ethical standards expected of certifiers. Breaches of the Code may constitute unsatisfactory professional conduct or professional misconduct under the BP Act.

## Building and Development Certifiers Act 2018 (BDC Act)

The *Building and Development Certifiers Act 2018* (BDC Act) will repeal and replace the BP Act, implementing reforms to enhance the regulation of certifiers. The BDC Act will strengthen regulatory requirements for the registration of certifiers and support the EP&A Act that provides the certifier's role under the integrated planning and approvals framework.

The BDC Act strengthens the Code of Conduct by prescribing it in the regulations and introducing a series of penalties for certain breaches of the Code. While the Code establishes expectations around conduct, the Code will also be used as a tool to enhance certifier independence and to promote the accountability of registered certifiers under the Act.

The BDC Act extends the powers for authorised officers to investigate, monitor and enforce compliance. The powers will be key in promoting certifier accountability, as well as protecting the safety of consumers and the general public. In addition, penalty amounts have been substantially

increased to encourage compliance and act as a deterrent from non-compliance.<sup>17</sup> Key changes to Part 6 of the EP&A Act will support these powers.

Other reforms implemented by the BDC Act include:

- clarifying the role and responsibilities of certifiers
- improving complaints handling and disciplinary procedures for certifiers by introducing a 'show cause' process and streamlined grounds for disciplinary action
- setting out and strengthening the powers of the Secretary of the Department of Customer Service as the regulator of registered certifiers by absorbing the functions of the BPB
- introducing new requirements around the independence of certifiers through more robust conflict of interest provisions and stronger penalties
- allowing the accreditation of persons to carry out regulated work and for the approval of certain bodies corporate as accreditation authorities to exercise accreditation functions
- amending the HB Act to require consumers to be given information about the role of registered certifiers before entering certain contracts and to prevent consumers being unduly influenced in the selection of a registered certifier with respect to work carried out under those contracts
- strengthening concepts and requirements in relation to certifiers having to provide services with impartiality, robustness, and independence
- other reforms to streamline, modernise and update the structure of the legislation to align with other occupational licensing frameworks administered by NSW Fair Trading.

These reforms reflect the NSW Government's commitment to regulate the professional conduct of certifiers in recognition of the important role certifiers play in the building construction sector, and align with the issues and recommendation contained in the BC Report.

The BDC Act is expected to commence in the middle of 2020.

---

<sup>17</sup> Penalty units have been increased from 50 penalty units (\$5,500) to 1,000 penalty units (\$110,000) for a body corporate and 200 penalty units (\$22,000) in any other case for the obstruction of an authorised officer, and in situations where a person fails to comply with a direction.

# Appendix B – Fair Trading’s Monitoring and Compliance Program

---

## Monitoring of Building Professionals

### How Fair Trading resolves building disputes

Fair Trading responds to complaints from consumers about licensed contractors concerning defective or incomplete work. Inspectors inspect the building work on site and try to assist the parties to resolve the matter. If the parties do not reach an agreement on how to resolve the complaint the Inspector can issue a Rectification Order (RO) under the HB Act for the items deemed defective.

The RO requires the contractor to rectify defective building work or complete contracted items by a certain deadline. If a contractor fails to comply with an RO, then compliance action may be taken against the contractor.

Depending on the seriousness of the matter this compliance action can range from a Trader Education Letter, the issuing of a Penalty Notice, or disciplinary action under section 62 of the HB Act. Disciplinary action could result in:

- a caution/reprimand
- a fine
- a variation of the contractor’s licence or the imposing of a condition(s) on the contractor’s licence
- the suspension or cancellation of the contractor’s licence.

### How Fair Trading investigates complaints

Fair Trading investigates complaints about breaches of the Act and other legislation. Matters that are investigated include for example:

- unlicensed work
- non-compliant contracts
- the taking of excessive deposits
- failure to provide mandatory insurance to consumers
- breaches of the *Crimes Act 1900*
- breaches of specialist legislation such as the *Plumbing and Drainage Act 2011* and the *Gas and Electricity (Consumer Safety) Act 2017*.

### How Fair Trading handles disciplinary matters

Fair Trading deals with matters referred for disciplinary action under the HB Act against licence holders.

## Monitoring of certifiers

The NSW Government is focused on ensuring that certification and complying development processes deliver community benefits and that there is strong public confidence in the system.

Investigations are carried out by the Building Practitioners Board (the Board) under section 46 of the BP Act. The purpose of an investigation is to determine if there has been ‘unsatisfactory professional conduct’ or ‘professional misconduct’ as defined in the BP Act and to determine



whether the certifier's conduct was unreasonable. The Board may take a range of disciplinary actions if a person is guilty.

It is noted that the Board commenced a new audit program in mid-April 2019. Audit priorities are determined by a risk assessment, using data to identify high-risk certifiers. These include certifiers previously convicted of disciplinary action and/or subject to a warning notice, caution or reprimand. Significant compliance issues identified during an audit are finalised and referred to the Investigations team in Fair Trading, for further disciplinary action. The Board investigates formal complaints against certifiers, both council-employed and private, and may also conduct proactive investigations.