

**INQUIRY INTO REVIEW INTO THE DESIGN AND
BUILDING PRACTITIONERS ACT 2020 AND THE
RESIDENTIAL APARTMENT BUILDINGS (COMPLIANCE
AND ENFORCEMENT POWERS) ACT 2020**

Organisation: Engineers Australia

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Review into Design Building Practitioners Act 2020

Engineers Australia Submission

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Introduction

The building and construction industry is an important part of the NSW economy, and its products are critical to the health, security and prosperity of NSW. Engineers Australia commends the NSW Government's efforts to reform the building industry and to implement the recommendations of the Building Confidence Report through the *Design and Building Practitioners Act 2020* and the *Residential Apartment Building (Compliance and Enforcement) Act 2020*.

This submission addresses the Terms of Reference requiring the Public Accounts Committee to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain effective for securing those objectives. Engineers Australia remains committed to helping NSW achieve these objectives, particularly in relation to the regulation of engineers, and is open to further discussions with the NSW government.

Both the review of the *Design and Building Practitioners Act 2020* and the *Residential Apartment Building (Compliance and Enforcement) Act 2020* extend beyond engineering services and Engineers Australia has only provided recommendations and feedback that relate to engineering. This feedback has been prepared in consultation with our members, and in the context of how registration of professional engineers is being implemented in other jurisdictions and with a view to supporting national consistency.

In 2019, Engineers Australia supported the objectives of the legislation to:

- establish a new registration scheme for Professional Engineers
- regulate the preparation and provision of key building designs,
- establish a duty of care owed by persons who carry out construction work.

Engineers Australia continues to support these aims, however, in July 2022, Engineers Australia raised serious concerns with the NSW Minister for Fair Trading about how the regulation of engineers is implemented in the *Design and Building Practitioners Act 2020* (The Act).

This submission from Engineers Australia reinforces concerns raised about terms in the Act that:

1. undermine and limit national consistency of registration
2. put impractical and unreasonable obligations on individual engineers
3. do not accurately reflect the realities of doing engineering work, and
4. may prevent engineering businesses providing services in NSW.

The proposed NSW Building Bill will perpetuate and extend these design flaws, with the likely outcome that the reforms will not achieve the intended objectives.

Key Recommendations

1. Provide for nationally consistent registration of engineers.

To be more aligned with a nationally consistent engineers registration model, it is strongly recommended that NSW:

- a) Establishes a stand-alone NSW professional engineers registration act.
- b) Ensures registration covers all areas of engineering.
- c) Adopts a nationally consistent set of registration standards, definitions of engineering work and assessment processes, including very importantly, competency assessment of engineers in addition to qualification, CPD and experience requirements.

- d) Facilitates Automatic Mutual Recognition for professional engineers.
- e) Approves nationally consistent guidelines for professional associations that operate as assessment entities and validates the operational model and performance of entities.
- f) Creates a mechanism (e.g. professional engineers registration board) to provide independent advice to the secretary on professional engineer registration matters.

2. Alleviate impractical and unreasonable obligations placed on individual engineers working on buildings.

The *Design and Building Practitioners Act 2020* and associated statutory instruments have placed impractical and unreasonable on individual engineers, in areas where the individual is not best placed to manage, control, or minimise the impact of risk. These requirements are inconsistent with requirements in other jurisdictions. Particularly with respect to:

- a) Section 33 - Insurance requirements to do engineering work.

Engineers Australia is concerned about insurance requirements for engineers mandated in the *Design and Building Practitioners Act 2020*. The Act's provisions apply directly to each individual registered professional engineer and not to businesses such as partnerships or corporations. In practice, insurance cover is usually taken out by the business rather than the individual employee. Such insurance, and associated risk, is based on multiple, and changing, business related factors that extend beyond the individual professional engineer who are not trained in insurance risk assessment or interpretation of insurance policies. This limits the ability of individual engineers to make the assessments of adequacy of insurance required under Clause 77(2) of the Regulations.

While professional indemnity insurance is relevant to consultant design services, it is not usually relevant to, or provides cover for, other types engineering work that may be covered by product or public liability insurance. Although the Act requires professional engineers to be indemnified in general terms, the Regulations require professional indemnity insurance to cover all forms of engineering work. This makes it unlawful to do engineering work in NSW that is not covered by professional indemnity insurance.

- b) Section 37 - Statutory duty of care

The Act imposes on engineers a duty of care to avoid economic loss caused by defects. The duty is owed to each owner of the land on which construction work is carried out, and to each subsequent owner of the land, regardless of whether that work was carried out under a contract with the owner or another person. NSW must clarify whether its policy intention is for this duty-of-care liability to fall on all individuals who have worked on the design of a building project in the past, or whether its intention is for the liability to fall on the entities that have contracted to do the work.

It is recommended that NSW Government allocates each risk to the entity most capable of managing that risk, amends the *Design and Building Practitioners Act 2020* and its associated statutory instruments to clearly allocate obligations to the individual or the business as appropriate, and provides guidance on how individuals and companies can fulfil their obligations under the Act.

Key Issues

Registration of engineers

Comprehensive statutory registration for engineers in all Australian states and territories has long been supported as a method of raising professional standards amongst engineers. In the absence of regulation of engineering work, anyone could purport to be an engineer and do engineering work without appropriate qualifications, experience, or competencies and with disregard to professional standards and ethical conduct.

Registration of key occupations is the first recommendation of the Building Confidence report because it is the logical first step; it creates a system to recognise people likely to perform competently, and a mechanism to exclude those found to be unsuitable to work in the relevant field.

The *Design and Building Practitioners Act 2020* is primarily concerned with the regulation of building design and building construction work, and the requirement for practitioners involved in this work to make declarations of compliance. When the Design and Building Practitioners Bill 2019 was introduced to Parliament it made no special provisions for the registration of professional engineers or the regulation of professional engineering work. The provisions of Part 3 of the Act were introduced into the Bill by Parliament to address the concurrent introduction of registration of professional engineers by other states and territories and to ensure that NSW was not disadvantaged by not having a registration scheme consistent with those of other jurisdictions.

However, embedding the registration of professional engineers within narrow, building sector-focussed legislation was inconsistent with other jurisdictions. For example, Queensland, Victoria and the ACT have all enacted standalone professional engineering registration legislation which:

- covers engineering work beyond the building sector – safeguarding the community across a much broader range of industries and disciplines of engineering, and
- is better reflective of the range of individual engineers' models of employment and practice.

Harmonisation of registration schemes across Australia, allowing for Automatic Mutual Recognition (AMR) and/or Automatic Deemed Registration (ADR) is a high priority for industry and professionals so that the unnecessary regulatory frictions and administrative burden associated with navigating different systems does not impact productivity.

The existing *Design and Building Practitioners Act 2020* provided for general professional engineer registration that is somewhat consistent with the national engineer registration model based on the Queensland and Victorian legislation, however there are process inconsistencies which do not fully allow for effective AMR. These inconsistencies include limitations on scope (NSW restricts to certain classes of building), unspecified standard of competence, inconsistent assessment of competence, and variation in what constitutes eligible pathways.

Whilst the established Professional Engineers Acts in Queensland, Victoria and the ACT have slight variations, the move towards legislative national consistency is advancing. Restricting engineer registration to the *Design and Building Practitioners Act* in NSW is inconsistent with all other major jurisdictions in Australia and just transferring these provisions to a Building Bill will only further isolate NSW. Significantly, there are real public safety and economic disadvantages to NSW from not being part of a nationally consistent landscape of registration standards and processes which facilitate effective automatic mutual recognition. This potentially makes it unattractive for engineers to practice in NSW. This is not in the interests of the NSW community or professional engineers resident and working in the State.

To be more aligned with a nationally consistent model, it is recommended that the NSW Government:

a. Establishes an NSW Professional Engineers Registration Act

The best way for NSW to align with other jurisdictions is to develop an NSW Professional Engineer Registration Act based on the Queensland/Victorian model. Engineers Australia strongly advocates for a stand-alone Professional Engineers Act. A separate, specific Act for engineers, would be consistent with the proposed NSW registration approach for Architects, which utilises the nationally consistent Architects Act 2003.

Queensland's Professional Engineers Act 2002 has formed the basis for general registration of professional engineers in Australia. It provides for:

- Registration of professional engineers.
- A definition of professional engineering work or services.
- An offence of carrying out professional engineering work or services when not registered, or under the direct supervision of a registered professional engineer.
- Disciplinary provisions and the investigation of disciplinary offences.
- A co-regulatory scheme which allows for Assessment Entities to assess the qualifications, experience and competence to nationally and internationally aligned standards.

Engineers Australia does not support moving the registration of professional engineers in NSW to a Building Bill as an interim measure pending enactment of an NSW Professional Engineers Act.

Leaving engineer registration requirements within industry sector-specific acts and regulations makes it difficult to expand the registration system to other industries in the future and limits the effectiveness of the scheme. A different registration scheme in NSW, limited to the building industry, means that professional engineers in NSW working in other areas of the economy cannot use Automatic Mutual Recognition to do work in other states and territories that have nationally consistent registration schemes. This requires them to become individually registered in each state or territory where they wish to do work, adding unnecessary economic burden which is ultimately passed on to the end user. Conversely, engineers registered in other states and territories can do work in NSW in all areas of engineering and are not subject to NSW regulation outside of the building sector. This places engineers and engineering businesses in NSW at a significant disadvantage and may encourage engineers and businesses to leave NSW and work in other states with nationally consistent registration where Automatic Mutual Recognition will apply.

b. Ensures registration covers all areas of engineering.

Potentially significant health, safety and economic risks exist beyond the building sector if engineering work is conducted by unqualified or incompetent persons. At present, engineering work is often discussed in the context of the building sector—and often apartment buildings as a sub-set of that industry. However, engineers provide critical services and products as solutions to many complex challenges across many industries, like public infrastructure, power generation, manufacturing, and mining.

Engineers Australia recommends that statutory registration of professional engineers should apply to professional engineers who do professional engineering work in any area of engineering in any industry. Not doing so could encourage those unsuitable to do engineering work to transfer into sectors in which engineering work is not subject to registration, thereby increasing risk in those sectors. It will also disadvantage NSW engineers compared to those in jurisdictions with comprehensive registration with respect to mutual recognition.

c. Adopts an agreed set of registration standards and assessment processes.

The Queensland and Victorian acts require practice standards and assessment processes to be consistent with national and international standards. These should be clearly linked to the International Engineering Alliance (IEA) *Graduate Attributes and Professional Competencies*. Engineers Australia is a member of the IEA and is recognised as the custodian of Australian competency standards by all other IEA members. NSW should adopt registration standards and assessment of competence processes consistent with these national and international standards.

d. Facilitates Automatic Mutual Recognition for a professional engineer registered in NSW.

The *Mutual Recognition Act 1992* entitles an engineer registered in one state to also be registered as an engineer in another with no further competency assessment. Automatic mutual recognition allows engineers to be registered in their home state and practice in other states as deemed registered without reassessment or additional registration fees, similar to the drivers' licence model. However, the engineer is only permitted to do the scope of work permitted in the home state. With NSW severely restricting the scope of engineering work covered by registration, this limits NSW engineers in using automatic mutual recognition, increasing the cost and administrative burdens on engineers and industry and encouraging engineers and engineering businesses to move out of NSW.

e. Approves nationally consistent guidelines for professional associations that operate as assessment entities and validates the operational model and performance of entities.

Under a co-regulatory model in nationally consistent professional engineers registration, regulators can rely on assessment entities to assess the qualifications, experience, and competencies of applicants. The NSW Government should adopt this national process to approve appropriate professional associations as assessment entities. Importantly, it is necessary to validate their scheme's operation and its alignment to national and international standards. This gives confidence to regulators in other jurisdictions and facilitates mutual recognition and national consistency.

f. Creates a mechanism (e.g. professional engineers registration board) to provide independent advice to the secretary on professional engineer registration matters.

Proper registration and regulation of engineers requires expert independent advice. A mechanism is required to provide this advice to the NSW government.

An independent board could be established to provide registration advice to the secretary as needed and would align with the governance structure in Queensland. Engineers Australia advocates for an independent board similar to the Board of Professional Engineers Queensland (BPEQ), which includes engineers, representatives from the law and academia and a representative from Engineers Australia.

Obligations placed on individual engineers

The *Design and Building Practitioners Act 2020* currently does not distinguish between individual employees or members of a design team and the employer or team leader responsible for the overall work. The Act requires declarations from each individual for their individual component of the design work but not from the employer or team leader who ensures the individual components work effectively together. This focus on the individual, which ignores the pivotal role of the businesses that actually undertake, contract and take financial responsibility for work, is an over-simplified assumption that leads to overcomplicated processes for certification, rectification and redress.

Whilst every team member is responsible for identifying and communicating risk, successful risk management requires specific people within the business accepting responsibility for and working together to assess, manage and monitor risk. In a single director or sole practitioner business, a single person may be accountable for ensuring that risk is managed appropriately, along with all other management responsibilities. However, in a larger consultancy, there may be multiple personnel who have direct responsibility or oversight of activities to manage risks.

Engineers Australia acknowledges the intent of the original legislation to provide consumer protection but is concerned that this approach is not in the best interests of NSW or professional engineers who live and work there. In reviewing the Act, NSW has an opportunity to rectify many of the issues affecting its current regulation scheme such as:

- Not fully identifying the differences between consulting engineering businesses which enter into contracts and take out insurance and their employees who do not.
- Placing legal liability and insurance obligations on individual employees rather than the employing business, potentially making it more difficult and more expensive for consumers to get redress for faulty work.
- Limiting professional engineering work in NSW to only those forms of consulting work for which Professional Indemnity Insurance is available.

Section 33 - Insurance to do engineering work

The *Design and Building Practitioners Act 2020* contains provisions that each individual registered engineer must assess and record the risks of their work and the adequacy of any insurance policy that covers the work. If the individual engineer cannot form an opinion that work to be done is covered by adequate insurance, the engineer must not do the work.

Insurance cover is usually taken out by businesses and not individual employees. It is a business capability rather than measure of competence. Competent and ethical engineers still have an obligation to ensure that the work they do is covered by insurance, but the liability should fall on the contracted party rather than an individual engineer.

A major issue for engineers is that there are no uniform insurance policies provided by the insurance market. The underwriters each have their own policies with differences in cover and what is excluded. This is based on the underwriter's risk assessment of each insured business and actuarial assessment of the insurance scheme.

Individual professional engineers are not trained in insurance risk assessment or interpretation of insurance policies and may struggle to make the assessments of adequacy of insurance required under Section 33 of the *Design and Building Practitioners Act 2020*. They may decline to do building engineering work for their employer or move to employers who do not serve the building sector, in order to avoid the risk of prosecution for breach of their obligation to be adequately insured under these laws.

It is inefficient and prone to conflicting interpretations to require each individual employee engineer to carry out and record the assessment of a single insurance policy taken out by the employing business, which in turn may be a standard policy offered by a single insurer to multiple businesses. More centralised assessment of insurance adequacy by people trained in insurance risk assessment is more efficient and reliable.

Legislation should allocate each risk to the entity most capable of managing that risk. Engineers Australia strongly advocates that the *Design and Building Practitioners Act 2020* be amended to separate the roles and obligations of individual employees and the contracting business as appropriate. An example is the *Building Services (Registration) Act 2011* in Western Australia that provides separate registration for individuals as practitioners and sole-traders, partnerships and corporations as contractors.

NSW has also assumed, incorrectly, that all professional engineering work can be covered by professional indemnity insurance and has given very limited guidance on what levels of cover, deductibles, exclusions or what policy wordings gives adequate protection to the individual engineer or consumers. Without adequate guidance, there is a risk that engineers may do work that is not covered by appropriate insurance or not do work that is.

Less than 30% of professional engineers work in the area of professional or technical services.¹ Although this proportion is higher in building design, many professional engineers working on buildings in NSW do so as employees of technical businesses in supply chains and on-site construction. While professional indemnity insurance is relevant to consultant design services, it is not usually relevant to, or provides cover for, other types engineering work that may be covered by product or public liability insurance. Although the Act requires professional engineers to be indemnified in general terms, the Regulations require professional indemnity insurance to cover all forms of engineering work. This makes it unlawful to do engineering work in NSW that is not covered by professional indemnity insurance.

The NSW guidance should include how engineers can:

- Identify and demonstrate the adequacy of insurance cover applicable to their work.
- Rely on an employer or insurance specialist to keep adequate written records specifying how they determined that a policy provides adequate levels of indemnity cover.

This guidance must be comprehensive and practical and accommodate all engineers from those working in large corporations to sole operators. Consideration must be given to the resources available to each of these different types of engineers and what is reasonably practical for them to do to determine the adequacy of their insurance. Preferably, this assessment would be undertaken by insurance experts.

The NSW government must act urgently on these issues to ensure that competent and ethical engineers are not driven away from the building sector due to excessive, unreasonable, and burdensome insurance obligations.

Section 37 - Duty of care and statutory liability for past work

Section 37 of the *Design and Building Practitioners Act 2020* imposes on engineers a duty of care to avoid economic loss caused by defects. The duty is owed to each owner of the land on which building work is carried out, and to each subsequent owner of the land, regardless of whether that work was carried out under a contract with the owner or another person.

Section 5 of Schedule 1 makes this duty of care and liability for damages retrospective to the extent that civil action for loss or damage arising out of or in connection with defective building work or defective subdivision work done at any time in the past if the loss first becomes apparent after the Act came into operation.

This duty of care applies to every engineer, building designer and each member of their teams who prepares or supervises, or has prepared or supervised in the past, a design for building work in NSW.

The Supreme Court in NSW has examined how the statutory duty of care provisions in the DBP Act should apply in the recent decisions of:

- *Goodwin Street Developments Pty Ltd atf Jesmond Unit Trust v DSD Builders Pty Ltd (in liq)* [2022] NSWSC 624 (19 May 2022);
- *Boulus Constructions Pty Ltd v Warrumbungle Shire Council (No 2)* [2022] NSWSC 1368 (12 October 2022);
- *The Owners of Strata Plan No 84674 v Pafburn Pty Ltd* [2023] NSWSC 116 (23 February 2023)

These decisions confirm that:

1. The statutory duty of care applies to individuals, including employees, and not just the contracting party.

¹ [Engineers Australia Statistical Overview 15th edition](#)

2. An award of damages can be made against the individual employee.
3. A defendant business is able to join its employees and subcontractors and thus increase the cost of making a claim while reducing its liability for the work of its employees.
4. The duty of care and liability for damages applies in respect of all buildings and not just the limited classes to which professional engineer registration currently applies.
5. The duty of care and liability for damages attaches to the employee for all work done for all previous employers, regardless of whether they are still in business or maintain insurance.

Engineers Australia understands the consumer protection aims behind these provisions, which are to provide a statutory duty of care in response to the High Court decision in *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288*. Liability for breach of the duty is apportionable pursuant to Part 4 of the Civil Liability Act 2002. However, the consumer is only fully protected under the regime of proportionate liability if they can identify all the concurrent wrongdoers who have contributed to the loss, and each wrongdoer is in a position to pay for its share of the apportioned liability. For engineering design work on a building, the usual capacity to pay comes from insurance.

Goodwin confirms that an owner may need to treat each individual who worked on the design as a concurrent wrongdoer in addition to the business or corporation that contracted for or undertook the design work. This puts a major cost and investigation burden on any owner taking legal action.

The decision in Goodwin is also likely to encourage individuals who may have this duty of care liability to divest themselves of assets to discourage or protect themselves against an award of damages.

All of this undermines the ability of a consumer to recover damages.

The objective of the *Design and Building Practitioners Act 2020* is to establish a duty of care owed by persons who carry out construction work relating to certain buildings to take reasonable care to avoid economic loss caused by defects arising from the work. Engineers Australia recommends that NSW clarify whether its policy intention is for the duty-of-care and insurance liability to fall on all individuals who have worked on the design of a building project in the past, or whether its intention is for the liability to fall on the entities that have contracted to do the work, and which carry insurance cover. As mentioned above, the liability should fall on the contracted party rather than an individual engineer.

In addition to reducing the ability of the consumer to recover damages, the decision in Goodwin has the potential of significantly increasing vulnerability of engineers to claims that rely on the statutory duty, which will result in a commensurate rise in the cost of insurance, and a likely deleterious effect on the availability of insurance products for this. Our members have shown us examples of increases in premiums for professional indemnity insurance to cover this additional risk and where insurers have placed exclusions on cover to avoid liability.

As per section 33, if insurance is not available, professional engineers in NSW cannot do professional engineering work of any kind, even if it is internal development work and not work that will directly affect the public or consumers. This makes it less viable for individual professional engineers to work in NSW and for engineering businesses to be based there.

NSW should amend the duty of care so that liability falls on the entities that have contracted to do the work and work with the insurance industry to develop and identify specific insurance products that cover this duty-of-care liability.

Conclusion

Engineers Australia believes that the provisions in the *Design and Building Practitioners Act 2020* do not support the policy objectives of the original Design and Building Practitioners Bill and are not successfully meeting the policy objectives of the NSW Parliament to provide for the registration and regulation of professional engineers in NSW.

Engineers Australia strongly recommends NSW:

1. Provides for nationally consistent registration of engineers by:

- a. Establishing a stand-alone NSW professional engineers registration act.
- b. Ensuring registration covers all areas of engineering.
- c. Adopting an agreed set of registration standards, definitions of engineering work and assessment processes, including very importantly, competency assessment of engineers in addition to qualification, CPD and experience requirements.
- d. Facilitating Automatic Mutual Recognition for a professional engineer registered in NSW.
- e. Approving consistent guidelines for professional associations that operate as assessment entities and validate the operational model and performance of entities.
- f. Creating a mechanism (e.g. professional engineers registration board) to provide independent advice to the secretary on professional engineer registration matters.

2. Alleviates impractical and unreasonable obligations placed on individual engineers working on buildings by:

- a. Identifying the key risks in the construction process and allocating each risk to the entity most capable of managing that risk.
- b. Amending the *Design and Building Practitioners Act 2020* and its associated statutory instruments to clearly allocate roles and obligations to the individual or the business as appropriate.
- c. Providing clear guidance to professional engineers on their obligations under the existing Act and proposed Building Bill.

About Engineers Australia

Engineering is the essential link between thinking and doing. Between idea, and implementation. It's our means for positive, sustainable change, with an influence on every aspect of modern society. Engineers are the enablers of productivity because they convert smart ideas into new products, processes, and services.

As Australia's national body for engineering, we are the voice and champion of our 120,000-plus members. We provide them with the resources, connections, and growth they need to do ethical, competent, and high-value work in our communities.

A mission-based, not-for-profit professional association, Engineers Australia is constituted by Royal Charter to advance the science and practice of engineering for the benefit of the community. We back today's problem-solvers, so they can shape a better tomorrow.

As Australia's signatory to the International Engineering Alliance, Engineers Australia maintains national professional standards, benchmarked against international norms. Under the Migration Regulations 1994, Engineers Australia is the designated assessing authority to perform assessment of potential migrant engineering professionals' skills, qualifications, and/or work experience to ensure they meet the occupational standards needed for employment in Australia.