

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

Organisation: Consult Australia

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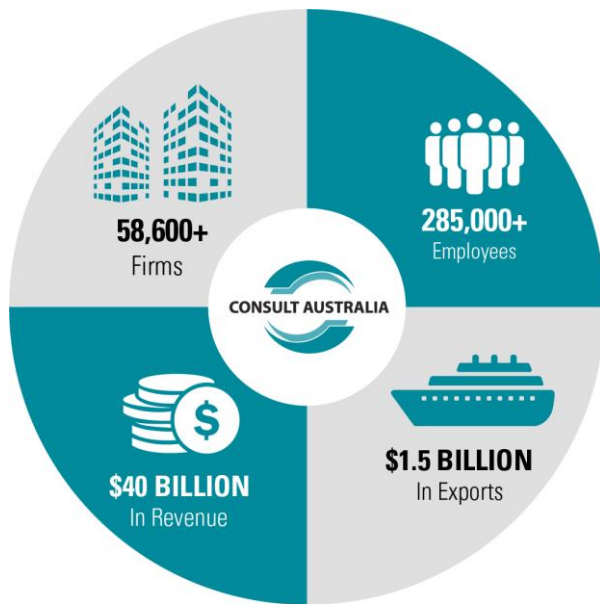
July 2024

Review into reforms to building laws in NSW

**SUBMISSION TO NSW PUBLIC ACCOUNTS
COMMITTEE, NSW PARLIAMENT**

Consult Australia





About us

Consult Australia is the industry association representing consulting businesses in design, advisory and engineering, an industry comprised of over 58,600 businesses across Australia. This includes some of Australia's top 500 companies and many small businesses (97%). Our members provide solutions for individual consumers through to major companies in the private sector and across all tiers of government. Our industry directly employs over 285,000 people in architectural, engineering and technical services and many more in advisory and business support. It is also a job creator for the Australian economy, the services we provide unlock many more jobs across the construction industry and the broader community.

Our members include:



Consult Australia's members are listed in full [here](#).

Executive summary

Consult Australia welcomes the opportunity to provide this submission to the Public Accounts Committee for the review into the NSW Government's reforms to building laws in NSW, notably the *Design and Building Practitioners Act 2020* (NSW) and the *Residential Apartment Building (Compliance and Enforcement) Act 2020*.

Consult Australia notes that the Terms of Reference of the review includes:

- (a) To consider the functions exercised or delegated by the Secretary, and
- (b) To determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain effective for securing those objectives, and
- (c) To consider the desirability of establishing an independent NSW Building Commission to instead exercise the regulatory and oversight functions under this Act and other Acts relating to the construction of buildings.

Consult Australia supports the role of government to address policy problems and market failures as well as to ensure consumer safeguards are in place and met.

In the lead up to the enactment of the original *Design and Building Practitioners Act 2020* (NSW) there were clearly issues needing government intervention in class 2 buildings, including the need to re-establish consumer confidence in new apartments in NSW. It is for this reason that Consult Australia and its members support core aspects of the reform, including measures that:

- ensures a focus on quality design before construction starts
- improves the relationship between designers/engineers and builders.

However, there are numerous elements that we do not support, especially where the reforms:

- impose unreasonable requirements that do not accord with usual business practice
- are not suitable for certain situations (such as remedial works and existing buildings)
- go beyond the policy problem established.

In this submission we explore the following key issues:

- application of the *Design and Building Practitioners Act 2020* (NSW) and *Practice Standard for Professional Engineers* to existing buildings
- extension of the *Design and Building Practitioners Act 2020* (NSW) beyond class 2 buildings
- insurance requirements of the *Design and Building Practitioners Regulation 2021* (NSW)
- duty of care in the *Design and Building Practitioners Act 2020* (NSW)
- proposed [Practice Standard for Professional Engineers](#)
- business registration under the *Design and Building Practitioners Act 2020* (NSW)
- additional and/or duplicate requirements in the *Building Bill 2024* (NSW)
- realisation of automatic mutual registration of engineers
- need to streamline and educate to reduce the financial and administrative burden of the whole scheme – especially with the overlap and interplay between the *Design and Building Practitioners Act 2020* (NSW), the *Design and Building Practitioners Regulation 2021* (NSW), the Code and the Practice for engineers within Schedule 4 of the *Design and Building Practitioners Regulation 2021* (NSW) and the *Practice Standard for Professional Engineers*.

Our recommendations

We suggest the following next steps for the NSW government and this review:

- Exclude existing buildings from the *Design and Building Practitioners Act 2020* (NSW) and the *Practice Standard for Professional Engineers*.streamline the regulatory regime, especially to remove duplication and overlap between the *Design and Building Practitioners Act 2020* (NSW), the *Design and Building Practitioners Regulation 2021* (NSW), the Code of Practice for engineers within Schedule 4 of the *Design and Building Practitioners Regulation 2021* (NSW), the *Practice Standard for Professional Engineers* and *Building Bill 2022* (NSW).
- Pause the extension of the Design and Building Practitioners Act 2020 (NSW) requirements to other building classes until two years after the Practice Standard for Professional Engineers is implemented.
- Conduct a thorough data collection and evaluation exercise along with industry consultation to inform whether and how the Design and Building Practitioners Act 2020 (NSW) should be extended.
- Remove the insurance requirements in both the Design and Building Practitioners Regulation 2021 (NSW) and the Building Bill 2022 (NSW) where a practitioner must confirm the adequacy of insurance coverage. The regulatory regime should simply include a requirement that a practitioner holds insurance.
- Modify the duty of care provisions in both the Design and Building Practitioners Act 2020 (NSW) and the Building Bill 2022 (NSW) to guarantee proportionate responsibility for design practitioners and engineers.
- Remove the additional duty on practitioners in the Building Bill 2022 (NSW) to avoid certain business associations.
- Reconsider the proposals relevant to statutory duties and the Limitation Act 1969 (NSW).
- Commit to true automatic mutual registration for all professional engineers already registered under other government registration schemes.
- Evaluate the true cost to businesses (both financial and administrative costs) to operate and provide services in NSW under the regulatory regime and use that evaluation to:
 - develop and deliver education to industry on the regulatory regime included materials to provide guidance for engineers, designers and building practitioners to comply with the obligations of the Act to ensure focus on quality, efficiency and relationships.

The current market is highly constrained, and the NSW government should be encouraging entry to new participants and prioritising the mobility of skills. Unfortunately, the complex regulatory regime discourages both.

Consult Australia is solutions-focussed and welcomes the opportunity to assist the government in modifying the regulations and developing clear guidance materials that addresses the issues of concern. The end goal should always be solutions that resolve the core policy problem and only imposes burdens on businesses that are justified to achieve that goal.

There is a better way to achieve the improvements to buildings and community confidence that also delivers better value for money for the government and reduced unnecessary burdens for practitioners and businesses. As always, Consult Australia remains committed to assisting the NSW government to develop and implement effective regulatory solutions to identified policy problems.

Application to existing buildings

Our recommendations on the application of the *Design and Building Practitioners Act 2020* (NSW) to existing buildings:

1. Exclude existing buildings from the *Design and Building Practitioners Act 2020* (NSW) and the *Practice Standard for Professional Engineers*.

Consult Australia members that do remedial work on existing buildings have concerns about the applicability of the *Design and Building Practitioners Act 2020* (NSW) and the *Practice Standard for Professional Engineers* to existing buildings.

The Act in its current form is simply inappropriate for existing buildings that are beyond their warranty period and that are going through service-life maintenance issues. Many existing buildings have non-compliances due to age or changing standards, rather than creating a safety issue. In such instances, it is cost prohibitive to make the building compliant with current codes. Designers are therefore forced to recommend complete replacement rather than maintenance, despite what the owners want or need.

Currently, there is no means for a practitioner to apply for a reasonable exemption. Instead, practitioners must have lengthy discussions with inspectors from the Building Commission/ Fair Trading to explain reasons why all the different elements of each existing building cannot meet current codes and therefore why the practitioner cannot meet their obligations under the Act (and soon the Practice Standard). This is a productivity drain for the industry as well as government.

The implementation of NCC 2025 is a good example – virtually all existing buildings will be non-compliant with the new waterproofing requirements (no existing buildings have structural roof slabs laid to falls or integrally cast hobs). As things stand, we will not be able to simply apply a new waterproof membrane to the roof of a 20-year-old building because of this, and there is currently no solution. There will be many similar instances that come to light only once NCC 2025 is released, and work will come to a stop because there is no mechanism.

Quote from a Consult Australia small business member working in NSW

Extension to other building classes

Our recommendations on extension of the *Design and Building Practitioners Act 2020* (NSW) to other building classes:

2. Pause the extension of the *Design and Building Practitioners Act 2020* (NSW) requirements to other building classes until two years after the *Practice Standard for Professional Engineers* is implemented.
3. Conduct a thorough data collection and evaluation exercise along with industry consultation to inform whether and how the *Design and Building Practitioners Act 2020* (NSW) should be extended.

The introduction of the *Design and Building Practitioners Act 2020* (NSW) and the presence of the Office of the NSW Building Commissioner as an active regulator was grounded in needing to resolve a clear policy problem with the design and building of class 2 buildings in NSW. The Act represented a significant shake-up of the industry.

Since introduction, the Act has now extended to cover certain class 3 and 9c buildings. As part of the consultation on the *Building Bill 2022* (NSW) it was proposed that the existing professional engineer registration scheme from the *Design and Building Practitioners Act 2020* (NSW) would be transferred and expanded to capture professional engineers working on other buildings including classes 1 to 10c.

We hold that the government has not demonstrated the policy problem to justify the extension of the original Act and registration scheme to other classes of buildings. The impacts of applying this Act to a broader set of buildings (and potentially infrastructure) has not been fully considered in collaboration with industry and transparently with government clients. We therefore advocate strongly for a pause and evaluate phase to allow time for a comprehensive analysis of whether the regime should be further extended or not.

Relevant to this is the recently proposed the *Practice Standard for Professional Engineers* which will become a mandatory condition on registered profession engineers in NSW from September 2024.

Consult Australia has provided advise to the NSW Government in prior submissions on the [core problems with the proposed engineering Practice Standard](#), especially in respect of professional indemnity insurance for engineering businesses. We also have concerns about the duplication and overreach of the obligations within the standard.

It is vital that sufficient time is given to ensure that the proposed engineering Practice Standard is delivering the change needed before any reforms are extended to other classes of buildings.

Insurance requirements

Our recommendation on the insurance requirements:

4. Remove the insurance requirements in both the *Design and Building Practitioners Regulation 2021* (NSW) and the *Building Bill* (NSW) where a practitioner must confirm the adequacy of insurance coverage. The regulatory regime should simply include a requirement that a practitioner holds insurance.

Consult Australia has consistently pointed out concerns about the insurance obligations under Part 6 of the *Design and Building Practitioners Regulation 2021* (NSW). These same concerns remain with the similar insurance requirements proposed in the *Building Bill 2022* (NSW).

We have previously advised, in both our [submission on the regulation in 2021](#) and a further submission in [January 2024 on professional indemnity insurance](#) that the market availability is not within the practitioner's control, and neither is the cover provided by the business in most cases. Further, given the potential breadth of the duty of care, it is difficult to assess if coverage would be sufficient or not.

Consult Australia suggests the solution is to keep the obligation in the Act that the practitioner be covered by insurance rather than an obligation on a practitioner to confirm the adequacy of that cover.

Business is now very challenging in the face of increasing regulatory run off periods combined with rising insurance costs, this is a massive change in the playing field since many businesses were started. We are facing the need to fund run off costs in the high hundreds of thousands of dollars, and possibly millions by the time I come to retire. When I started, this was more like \$20,000 total. There is simply no way a small business can set aside something like \$100,000 per year for the last 10 years of business to fund \$1M of run off costs over the following 10 years (which takes us until we reach 75 years old!). This is a huge challenge, and one that is putting people off of starting new businesses now and is causing significant stress amongst most business owners that are over 50.

Quote from a Consult Australia small business member working in NSW

Duty of care

Our recommendation on the duty of care:

5. Modify the duty of care provisions in both the *Design and Building Practitioners Act 2020* (NSW) and the *Building Bill* (NSW) to guarantee proportionate responsibility for design practitioners and engineers.

Consult Australia strongly encourages further discussion with stakeholders such as the Insurance Council of Australia (ICA) on the duty of care elements contained in the *Design and Building Practitioners Act 2022* (NSW) and the proposal to replicate/transfer these elements to the *Building Bill 2022* (NSW).

We remain highly concerned, as we were when we [submitted to the Bill in 2019](#), by the breadth of the duty of care, including no guarantee of proportionate liability for claims against designer practitioners and professional engineers and suggest modification of these obligations.

Additional requirements in building bill

Our recommendation on the additional requirements in the *Building Bill* (NSW):

6. Remove the additional duty on practitioners in the *Buildings Bill* (NSW) to avoid certain business associations.
7. Reconsider the proposals relevant to statutory duties and the *Limitation Act 1969*.

Avoiding business associations

Consult Australia supports the NSW government's intent of eliminating the practice of 'phoenixing' businesses escaping liability or regulatory impost. The practice is more prevalent in building companies rather than consultancy businesses and explains why the Victorian building laws mandates body corporate registration for construction businesses but not professional services businesses (e.g. engineering and consultancy businesses). We also note the significant amount of work the NSW government has already done to curtail phoenixed businesses.

Consult Australia is concerned that the requirement on individual practitioners to avoid business associations with people involved in phoenix businesses is overreach and has the potential to

conflict with competition law. Not all individuals within a business are responsible for a business failing. This requirement could unfairly tarnish an individual's reputation and future employment. Further, individual practitioners rarely have the power to change the business associations their company enters.

We recommend that the government remove this obligation and instead train and empower businesses entering commercial arrangements to consider these issues. Penalising businesses or individual practitioners for business relationships is not the right approach. Consult Australia would be pleased to work with government on this.

Extension of time limits for statutory warranties and application of the *Limitation Act 1969*

The NSW government purports to extend the time limits for statutory warranties and extended the application of the *Limitation Act 1969*. Consult Australia is concerned about the impacts on insurance availability. We recommend that this be reconsidered with evaluation of the information on the flow-on impacts. Further, the government should discuss this issue further with the ICA.

Automatic mutual registration

Our recommendation on automatic mutual registration:

8. Commit to true automatic mutual registration for all professional engineers already registered under other government registration schemes.

Consult Australia has consistently raised the unnecessary business cost and administration burden of multiple registrations schemes around the country, when we should be moving to a simpler 'one fee, one registration' driver's licence approach. Our members are not concerned about being regulated through a government registration scheme, as many are accustomed to it through the Queensland scheme, and more recently the Victorian scheme and believe in a strong industry of suitably qualified professional engineers providing services across Australia.

Consult Australia calls on the NSW government to commit to true automatic mutual registration for all professional engineers already registered in other government registration schemes.

Streamline and educate

Our recommendation on streamlining regulatory policy:

9. Evaluate the true cost to businesses (both financial and administrative costs) to operate and provide services in NSW under the regulatory regime and use that evaluation to:
 - streamline the regulatory regime, especially to remove duplication and overlap between the *Design and Building Practitioners Act 2020* (NSW), the *Design and Building Practitioners Regulation 2021* (NSW), the Code and the Practice for engineers within Schedule 4 of the *Design and Building Practitioners Regulation 2021* (NSW) and the *Practice Standard for Professional Engineers*.
 - develop and deliver education to industry on the regulatory regime included materials to provide guidance for engineers, designers and building practitioners to comply with the obligations of the Act to ensure focus on quality, efficiency and relationships.

NSW is one of the toughest markets in the world to operate in for engineering and design businesses. This contrasts to some other Australian jurisdictions that have introduced laws and regulations without the onerous obligations to business and the flow on impact to the ability to operate and provide services. The interconnected issue with the building reforms is that across Australia there has been no coordination or uniform approach.

The issues facing business are not to be understated. Costs are not just financial, but include time, administration, training and compliance. Across all sizes of businesses, these issues are a concern but are obviously magnified as a pressure point for small businesses. Across our membership we are aware of quality businesses avoiding providing services in NSW because of the burden of the regulations – despite the projects being within their competency. This impost must be viewed in light of the other pressures that come with running a small business, especially in the engineering sector (e.g. insurance accessibility and availability).

The NSW government could alleviate business burdens by streamlining the regulatory regime, especially to remove duplication and overlap between the *Design and Building Practitioners Act 2020* (NSW), the *Design and Building Practitioners Regulation 2021* (NSW), the Code and the Practice for engineers within Schedule 4 of the *Design and Building Practitioners Regulation 2021* (NSW), the *Practice Standard for Professional Engineers* and the *Building Act 2022* (NSW).

Consult Australia is concerned about the rate of change of the building reforms and would strongly support the development and introduction of new processes and materials to provide guidance for engineers, designers and building practitioners to comply with the obligations of the Act, the Regulations, the Code and the proposed Practice Standard to ensure focus on quality, efficiency and relationships. For example, there is a high degree of uncertainty around the requirements of site inspections for certifications and how changes are managed.

A major issue is where small businesses get help in navigating what is poorly written technical legislation. The building commission gives virtually no assistance to practitioners seeking help with unusual situations to determine how to apply the regulations in a reasonably manner. Larger organisations have in-house counsel etc to review requirements and to provide legal advice. We do not, and given how regularly such questions arise, it is not practical to consult with lawyers every time there is a judgement call to be made. This ultimately impacts end users, as the natural response is to take the most conservative view because our personal security is on the line. Why would a consultant risk their own personal security for the benefit of helping lower the costs of an owner? I have seen many practitioners simply turn down such projects because they are 'too risky'. This is a real shame, as all good consultants are absolutely able to tell an owner how best to spend the money they do have to make their situations better.

Quote from a Consult Australia small business member working in NSW

Contact

We would welcome any opportunity to further discuss the issues raised in this paper.

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Thanks to our Industry Champions

For their outstanding leadership and engagement on behalf of the industry.

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an su company**Jacobs**

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