

GOVERNMENT BRIEFING

Potential Solutions for CSR Issues

DATE: SEPTEMBER 2020



PURPOSE

This briefing has been developed for the Victorian Government setting out potential solutions for the issues Consult Australia has raised with the Construction Supplier Register (CSR).

ISSUES

The CSR is established by Part 11 of the *Building Act 1993* (Vic). While the CSR is administered by the Department of Treasury and Finance, the Planning Minister has responsibility for the Act. The CSR is a resource for government agencies to shortlist consultants and contractors for EOI/tender for construction work. Under the Act a body corporate cannot be on the CSR unless the body corporate has a 'nominee director' for each registration class.

Therefore, a multi-disciplinary business with a board cannot be registered on the CSR under all its disciplines unless at least one director is a registered practitioner in each of the relevant disciplines. For example, if a business works across the engineering fields of; civil, electrical, fire safety and mechanical (to name but few in a large multidisciplinary business), four board places must be taken by practising engineers who must maintain their CPD. This confuses governance with operations. The Australian Institute of Company Directors recommends a diverse mix of competencies on modern boards to ensure proper management of the company – that is across governance, legal, accounting. The CSR is not remaining relevant and responsive to the commercial and regulatory environment as it is failing to encourage innovation and responsiveness of the supplier market and is treating tender participants unfairly and unequally.

There is no evidence that having a 'nominee director' as a registered practitioner provides greater consumer protection or confidence than having a 'nominated person' as a registered practitioner. It is noted that section 171A of the Act include additional requirements on bodies corporate that ensure that the directors are fit and proper persons.

In this briefing we propose solutions that do not undermine the obligation to ensure that a business has suitable qualified persons in the relevant disciplines in order to be included on CSR under those disciplines.

Maintaining the pre-August 2019 status quo

Prior to August 2019, the Department accepted registration of consulting businesses where there was a nominated *person* in the company with the appropriate registration (rather than a director). Our members generally nominate a senior leader in these instances. This approach reflects the approach used in QLD where our members have a 'nominated building practitioner' for each class, who needn't be a director of the company.

In the short-term, the Department of Treasury and Finance could maintain this stance. However, this fails to address the underlying issues in the *Building Act 1993* (Vic) and does not provide certainty for businesses. We therefore propose three other potential solutions which provide more certainty for businesses. Consult Australia is open to discussing other potential solutions.

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OPTION 1 – AMEND THE *BUILDING ACT 1993* (VIC)

We believe that the best solution to the issue is to amend the *Building Act 1993* (Vic) to make clear that a 'nominated person' rather than a 'nominee director' must be registered in the relevant class/es. This maintains the public purpose of registration while removing a barrier to participation. We understand that legislative change is neither easy nor fast, but we believe such a change could be achieved in an Omnibus Bill to address issues of immediate importance to Victoria's recovery from COVID-19. It should be noted that with this change, the obligation under section 174 of the Act to ensure the body corporate complies with the requirements of the Act and the regulations should still attach to the company directors, not the 'nominated person'.

Benefits:

- It maintains the public purpose of registration.
- It removes the unnecessary barrier to participation on the register.
- It is a long-term solution that address the underlying issue with the *Building Act 1993* (Vic) and provides ultimate business certainty for industry.
- It accommodates current market realities and modern board representation.
- It ensures that the CSR remains relevant and responsive to the commercial and regulatory environment.
- It ensures that the government is encouraging innovation and responsiveness of the supplier market.
- It ensures that tender participants are treated fairly and equally.
- It is future-proof, as future boards may not require practising engineers to run the business (as those skills increasingly reside at the operational level).

Risks and challenges:

- Legislative change is not always easy or fast.

The following table is a non-exhaustive list of provisions in the *Building Act 1993* (Vic) that need amendment to address this issue.

<i>Building Act 1993</i> (Vic) provision	Suggested redrafting
3 Definitions (1) In this Act— [...] nominee director , in relation to a body corporate, means a director of the body corporate nominated by the body corporate as a nominee director under Division 1A of Part 11;	3 Definitions (1) In this Act— [...] nominated person , in relation to a body corporate, means an employee of the body corporate nominated by the body corporate as a nominated person under Division 1A of Part 11;
169G Building practitioner body corporate must have at least one nominee director (1) A body corporate must not carry out work, or undertake to carry out work, as a registered building practitioner unless the body corporate has at least one nominee director who complies with the relevant requirements of section 171B. Penalty: 2500 penalty units.	169G Building practitioner body corporate must have at least one nominated person (1) A body corporate must not carry out work, or undertake to carry out work, as a registered building practitioner unless the body corporate has at least one nominated person who complies with the relevant requirements of section 171B. Penalty: 2500 penalty units.

<i>Building Act 1993 (Vic) provision</i>	<i>Suggested redrafting</i>
(2) Subsection (1) does not prevent a body corporate from continuing and completing work in the period applying under section 180C(2) if the work commenced before the commencement of that period.	(2) Subsection (1) does not prevent a body corporate from continuing and completing work in the period applying under section 180C(2) if the work commenced before the commencement of that period.
170A Application for registration—general An application for registration must— [...] <p>(d) in the case of an application by a body corporate, state each nominee director of the body corporate; and</p>	170A Application for registration—general An application for registration must— [...] <p>(d) in the case of an application by a body corporate, state each nominated person of the body corporate; and</p>
171 Registration [...] <p>(1)(ab)(ii) if the applicant is a body corporate, a nominee director of the body corporate referred to in section 171B(2)(a) or (b) has the prescribed knowledge or experience to carry out that type of building work; and [...]</p> <p>(1A) If the applicant is a body corporate that has applied for registration in a class of builder and a nominee director of the body corporate referred to in section 171B(2)(a) or (b) is provisionally registered as a builder in that class, the body corporate can only be granted provisional registration in that class.</p>	171 Registration [...] <p>(1)(ab)(ii) if the applicant is a body corporate, a nominated person of the body corporate referred to in section 171B(2)(a) or (b) has the prescribed knowledge or experience to carry out that type of building work; and [...]</p> <p>(1A) If the applicant is a body corporate that has applied for registration in a class of builder and a nominated person of the body corporate referred to in section 171B(2)(a) or (b) is provisionally registered as a builder in that class, the body corporate can only be granted provisional registration in that class.</p>
171B Additional requirements for registration—nominee directors [...] <p>(5) The Authority must also be satisfied in the case of an application for registration as a building practitioner (other than an application to which subsection (2), (3) or (4) applies) that the body corporate will have— (a) a nominee director who is registered under this Part in the same class or classes of registration as the class or classes of registration sought; or (b) two or more nominee directors each of whom is registered under this Part and who between them are registered in the same class or classes of registration as the class or classes of registration sought.</p>	171B Additional requirements for registration—nominee directors [...] <p>(5) The Authority must also be satisfied in the case of an application for registration as a building practitioner (other than an application to which subsection (2), (3) or (4) applies) that the body corporate will have— (a) a nominated person who is registered under this Part in the same class or classes of registration as the class or classes of registration sought; or (b) two or more nominated persons each of whom is registered under this Part and who between them are registered in the same class or classes of registration as the class or classes of registration sought.</p>
174 General duty of nominee director <p>(1) A nominee director of a registered body corporate must ensure that the body corporate complies with the requirements of this Act and the regulations. Penalty: 500 penalty units.</p> <p>(2) Nothing in subsection (1) affects the obligation on a body corporate to comply with the requirements of this Act and the regulations.</p>	174 General duty of director of a registered body corporate <p>(1) A director of a registered body corporate must ensure that the body corporate complies with the requirements of this Act and the regulations. Penalty: 500 penalty units.</p> <p>(2) Nothing in subsection (1) affects the obligation on a body corporate to comply with the requirements of this Act and the regulations.</p>

OPTION 2 – MINISTERIAL DIRECTION BY THE MINISTER FOR PLANNING

The CSR operates in accordance with the Ministerial Directions and Instructions for Public Construction Procurement in Victoria issued under the *Project Development and Construction Management Act 1994* (Vic). The Minister for Planning is responsible for this Act and has broad powers to issue directions 'relating to public construction'. We understand that the Minister wants to ensure that the CSR remains relevant and responsive to the commercial and regulatory environment so as to encourage innovation and responsiveness of the supplier market (see: <https://www.dtf.vic.gov.au/ministerial-directions-and-instructions-public-construction-procurement/public-construction-procurement-committee-direction-84>).

Under section 32 of the *Project Development and Construction Management Act 1994* (Vic) Ministerial directions may:

provide in a specified case or class of cases for the exemption of departments, public bodies, persons or things or classes of departments, public bodies, persons or things from any provision of the standards or directions, whether unconditionally or on specified conditions and either wholly or to a specified extent.

We suggest that the Minister issue a written direction, or amend an existing direction (such as Direction 6.1 – Use of Registers and Supplier Panels) to make clear that suppliers may nominate registered building practitioners in the relevant class/es rather than nominee directors to be included on relevant registers. This would support the following construction procurement principles:

- reducing unnecessary burden of Public Construction Procurement for all parties
- ensuring appropriate competition and contestability when undertaking Public Construction Procurement
- conducting Public Construction Procurement processes in an efficient and timely manner.

Benefits:

- It maintains the public purpose of registration.
- It provides certainty to industry for as long as the Direction is in force.
- It accommodates current market realities and modern board representation.
- It ensures that the CSR remains relevant and responsive to the commercial and regulatory environment.
- It ensures that the government is encouraging innovation and responsiveness of the supplier market.
- It ensures that tender participants are treated fairly and equally.

Risks and challenges:

- It fails to address the underlying issue with the *Building Act 1993* (Vic).
- It fails to reflect the true capabilities of the business by generalising the profession rather than focussing on the disciplines.
- It fails to be consistent with how the engineering profession is classified in other contexts including by Engineers Australia, the Queensland engineering registration regime, the anticipated engineering regimes in Victoria and New South Wales.
- It could produce more confusion.

OPTION 3 – DEPARTMENT TO ADD A NEW OVERARCHING CATEGORY OF 'REGISTERED ENGINEER'

We understand that the Department of Treasury and Finance has the power to create new categories on the CSR. Consultancy businesses with a board more often than not have at least one board director that is a registered engineer. Therefore, if there was a general category of 'registered engineer' on the CSR, these businesses could meet the obligation and be permitted to bid for government construction work on all engineering disciplines. To make this functional, it would need all the current engineering categories (mechanical, electrical etc) to be removed – otherwise there will be an unfair assumption that those businesses with the general 'registered engineer' category cannot do the specific disciplines.

It is noted that the *Building Act 1993* (Vic) defines building practitioner as including 'an engineer engaged in the building industry' so it is not out of step with the Act to have a broad category of 'registered engineer'.

Benefits:

- It maintains the public purpose of registration.
- It accommodates current market realities and modern board representation.
- It would alleviate industry concerns in the short-term (until such time as no practising engineer is on a company's board of directors).
- It would align the engineering profession more to the legal profession, where specialisation is not a key requirement for registration.

Risks and challenges:

- It fails to address the underlying issue with the *Building Act 1993* (Vic).
- It fails to be future-proof, as future boards may not require practising engineers to run the business (as those skills increasingly reside at the operational level).
- It fails to reflect the true capabilities of the business by generalising the profession rather than focussing on the disciplines.
- It fails to be consistent with how the engineering profession is classified in other contexts including by Engineers Australia, the Queensland engineering registration regime, the anticipated engineering regimes in Victoria and New South Wales.
- It could produce more confusion.

This Briefing provides a summary only of the subject matter covered, without the assumption of duty of care by Consult Australia. The summary should not be relied on as a substitute for legal or other professional advice.