Regulatory Impact Statement and draft *Design and Building Practitioners Regulation 2020*

Submission

ABOUT US

Consult Australia is the industry association representing consulting businesses in design, advisory and engineering. Our industry comprises some 48,000 businesses across Australia, ranging from sole practitioners through to some of Australia's top 500 companies, providing solutions for individual consumers through to major companies in the private sector and across all tiers of government. Our industry is a job creator for the Australian economy, directly employing 240,000 people. The services we provide unlock many more jobs across the construction industry and the broader community.

Some of our members are:

Executive summary

Consult Australia welcomes the opportunity to have input into this formal consultation process on the Regulatory Impact Statement (RIS) and draft *Design and Building Practitioners Regulation 2020* (the Regulation). It is noted that many of the core requirements are set out in the *Design and Building Practitioners Act 2020* (the Act), and the Regulation is intended to translate the overarching framework of the Act into operational requirements.

Consult Australia continues to support appropriate and proportionate regulation that can deliver the policy outcomes of better building compliance and increased consumer confidence. We have consistency called on the NSW government to ensure that the legislative scheme is certain, consistent and considers the state of the professional indemnity (PI) insurance market. We see some of our member concerns addressed in the Regulation (for example which individuals within a business will need to be registered and who will be permitted to do regulated designs). Unfortunately, there is still a significant lack of certainty and consistency in the Regulation – as demonstrated by the lack of detailed cost-benefit analysis in the RIS. Further, there is significant duplication and inconsistency with the *Building and Development Certifiers Act 2018* and the *Building and Development Certifiers Regulation 2020* placing unnecessary regulatory burden on the industry.

The insurance requirements in Part 6 of the Regulation displays a significant lack of understanding about the insurance market. We expect all design practitioners and professional engineers will be in breach and remain in breach of these requirements. There is no way a practitioner can be determine and hold the '*reasonable opinion'* that their PI insurance policy provides *'an adequate level of indemnity for the liability that could be incurred by the practitioner of professional engineer in the course of their work'*. We explain in detail the reasons why in the body of this submission.

Consult Australia members are unable to provide information on the financial/administrative costs and other burdens of the regime as too many questions remain including:

- What designs will be a regulated design?
- How much will registration cost? Will the cost differ if the practitioner is seeking mutual recognition?
- If an individual is registered as a professional engineer and prepares regulated designs within their competency, will their registration as a professional engineer be recognised for the purposes of being registered as a design practitioner (for example where there is a class of design practitioners and professional engineers; civil, electrical, fire safety, geotechnical, mechanical and structural engineering)?
- How does the regime for fire safety and fire systems correlate with other relevant legislation – noting there are conflicts and overlaps?

In addition, we have concerns about the practicality of a number of the obligations – including the obligation on building practitioners to submit new regulated designs within one day of the varied building work. More detail is provided below.

Solutions

If there is any chance of having a workable system from 1 July 2021, the following actions are needed:

1. Part 6 of the Regulations must be deleted – no requirements should be passed into law if there is no practical way that a regulated person can comply, especially when there are penalties attached.
2. Design practitioners and professional engineers should have a two-year transition period on insurance obligations, to ensure that the other changes to practice can embed to improve confidence and compliance. This accords with the transition period provided to building practitioners.
3. Guidance material that sets out the types of designs that are regulated designs must be made available to industry by 01 March 2021.

4. The cost of registration must be set by 01 March 2021. There should be no fee for mutual recognition which should be automatic mutual recognition as per the National Cabinet commitment on occupational mobility.
5. Individuals registered as a professional engineer in a class with a counterpart class for design practitioners should be automatically registered in the relevant class of design practitioner. If an individual satisfies the requirements for multiple classes, that individual should automatically be registered in all those classes. This should include where the individual is registered as a professional engineer in a different jurisdiction. For example, a structural engineer registered in QLD should be recognised in NSW as a 'professional engineer – structural engineering' and a 'design practitioner – structural engineering'.
6. The obligations, requirements and definitions that apply to fire safety engineers across the different legislation need simplifying, clarifying and made consistent (with one set and location of definitions and requirements for training and experience). This includes the role of fire safety professionals in certification work.
7. Provide some flexibility on the commencement of building work – so that building work can commence where there is agreement between relevant design practitioners and the building practitioner
8. Change the obligation regarding variation of designs – so that the obligation is on the building practitioner to notify the design practitioner within one day (where the variation is not initiated by the design practitioner) and the lodgement of the varied regulated designs to be as soon as reasonably practicable after the building practitioner receives the varied design from the design practitioner.

In the longer term, the NSW government will need to consider what other actions it can take to de-risk the NSW market to improve PI insurance availability and affordability:

- Replace the 'model contract terms' released by the Office of the Building Practitioner' with terms that reflect the statutory obligations, and which are more likely to be covered by a design practitioner's and professional engineer's PI insurance policy
- Amend the *Civil Liability Act 2002* (NSW) to prohibit contracting out of proportionate liability in professional services contracts[1]
- Revise the duty of care in the Act, especially the retrospective application of the duty
- Ensure that government client contracts are the exemplar, for example by meeting the Model Client Policy.

[1] It is proposed that section 3A of the *Civil Liability Act 2002* (NSW) be amended so that it continues to expressly permit the contracting out *except for* personal injury damages *and* proportionate liability for professional services contracts.

Part 6 of the Regulations and the PI insurance market

The insurance requirements in Part 6 of the Regulation displays a significant lack of understanding about the insurance market. Consult Australia cannot see how any design practitioner or professional engineer can meet the obligations set out in the Part.

Consult Australia proposes the following solution to these issues, for commencement on 1 July 2021:

- Remove Part 6 of the Regulation – no requirements should be passed into law if there is no practical way that a regulated person can comply, especially when there are penalties attached.
- Design practitioners and professional engineers should have a two-year transition period on insurance obligations, to ensure that the other changes to practice can embed to improve confidence and compliance. This accords with the transition period provided to building practitioners.

Background – the PI insurance market

PI insurance is just one insurance product, it provides cover for professional services, such as those provided by design practitioners and professional engineers (as well as a vast array of other professionals such as lawyers, bankers and accountants). An individual or business applies for coverage and is not guaranteed it. When determining whether to insure and the terms of the policy, the insurance provider considers:

- the claims history of the applicant
- the type of work the applicant does
- the market conditions for that type of work
- the market conditions for the type of insurance applied for.

We are seeing that the market conditions are having a significant impact on policies – businesses with no claims history are facing significant premium increases and cover reductions. This means that there is very little that a business can do to 'fix' their PI problem.

Insurance is a commercial product, and an insurance underwriter needs to *earn* approximately $1 for every 70 cents of claims incurred to breakeven.[2] At the end of 2017 the average insurer *lost* 16 cents for every dollar earned on the Australian PI market – unsurprisingly the insurance market hardened following 2017. As a result of these losses, a number of insurers no longer offer PI insurance lines. This market hardening has resulted in:

- increased premiums:
    - while previously the increase was 1-2% each year, on average the market is increasing premiums by 10-20% and higher and some professions are much higher (e.g. 100%-1,000% for building certifiers)
    - across engineering businesses increases in premiums are at 20% and for hotspots such as structural engineering the increases vary wildly from 20% to 200%
- reduced coverage, by way of:
    - new exclusions
    - increased excesses
    - reduced limits.

[2] AON Professional Indemnity Insurance Market Insights Q3 2018.

While larger businesses can weather the changes better than smaller operators, the hardening of the insurance market affects all business. Our small and medium enterprise (SME) members advise that PI insurance is the biggest cost to their business, and many are struggling with the affordability of their PI insurance. One member recently advised that their newly quoted premium for 2020/21 has gone from $30,000 for a $2million policy in the previous year, to over $100,000 for a $1million policy. This is not an isolated case, and it is occurring all around Australia for consultants of all disciplines.

Problems with the Regulation

The RIS and Part 6 of the Regulation displays a significant lack of understanding about the insurance market:

- the practitioner's insurance policy is not to protect consumers or clients, it protects the practitioner
- no PI insurance policy can cover 'any' or 'all' or liabilities a practitioner may be subject to as a result of delivering their services – the cover and conditions of cover are set by the insurance underwriter
- liabilities change over time (e.g. contract to contract not year on year renewal of the insurance policy) therefore the obligations to make the determination as well as keep records becomes unmanageable
- individual practitioners within a business (except where the individual is a sole trader etc) cannot generally access the full terms of the PI policy, as most commonly the policy is taken out by the business and the business itself may be unable to disclose its coverage terms without insurer approval (i.e. because such action may potentially prejudice an insured's coverage position in the future)
- individual practitioners do not have a role in commercial contract negotiations and therefore cannot control the liabilities that might attract to their work (except where the individual is a sole trader etc)
- the insurer maintains the right to accept or reject claims made under a policy – meaning that the insured is never guaranteed coverage
- no person or body (such as a recognised engineering body) can determine if a practitioner/engineer has adequate coverage as they are not party to the commercial contractual arrangements of the practitioner/engineer
- there are many more factors that need to be considered before a practitioner could hazard a guess as to whether their insurance policy provides 'adequate' cover, including:
    - what are the broader market conditions?
    - what additional indemnities and warranties are being sought in the various contracts for services?
    - how litigious is the other party to the contract, for example will litigation be threatened/pursued for minor contractual issues such as time delays etc?
    - where I am in the supply chain? The further down I am the less power I have to ensure that I am given the time and access to develop the design fully pre-construction and to be involved in any variations
    - is proportionate liability guaranteed for professional services in the jurisdiction?
    - what government policy and advice impacts on insurance?

Consult Australia does not believe that any design practitioner or professional engineer can meet the obligations of Part 6 of the Regulation if they truly understand the nature of insurance as well as contractual liability.

The NSW government is essentially asking practitioners to guarantee they will be offered a commercial product that will cover all scenarios. This is worse than asking a homeowner to guarantee they will have access to a home and contents policy that covers all risks including bushfire, flood etc. The home insurance market is at least more stable than the PI market and the conditions facing the homeowner don't change nearly as rapidly as they do for a consultant who works under contract.

Solutions

Remove Part 6 of the Regulation – no requirements should be passed into law if there is no practical way that a regulated person can comply, especially when there are penalties attached.

To make Part 6 of the Regulation workable, significant redrafting is needed in consultation with the insurance industry and impacted professionals as well as considerable de-risking of the PI market. The core policy problem sought to be addressed by the Regulation and the Act was building compliance and consumer confidence. We hold that the other reforms (including the lodgement of regulated designs and the inspection regime by the Building Commissioner) go to the heart of the policy problem and should be the focus.

Noting that the NSW government is committed to a 1 July 2021 start date, we suggest that this Part needs to be removed to ensure that the government does not pass into law requirements that a regulated person has no practical way to comply with.

This is not to say that design practitioners and professional engineers will provide services without PI insurance – as they are required to hold it if they are on Engineer Australia's National Engineer Register, the majority of contracts for professional services require it and the vast majority of our members hold it as good business practice.

There is a real risk that passing Part 6 of the Regulation into law will lead to further deterioration of the market, as insurers exclude NSW building work from coverage and as businesses are forced to shift focus or close down as they cannot meet the obligations.

Consult Australia is keen to work with the government and the insurance industry to resolve outstanding issues.

Design practitioners and professional engineers should have a two-year transition period on insurance obligations, to ensure that the other changes to practice can embed to improve confidence and compliance. This accords with the transition period provided to building practitioners.

We have previously raised concerns with how the Act deals with insurance for design practitioners and professional engineers. Noting the significant issues with Part 6, and the NSW government's committed start date of 1 July 2021, we suggest that design practitioners and professional engineers have a two-year transition period for insurance obligations. This will ensure that the other changes to practice can embed and we can see if confidence and compliance improves. This accords with the transition period provided to building practitioners in clause 82 of the Regulation.

This does not undermine the core policy outcome sought which is improved building compliance and consumer confidence. We hold that the other reforms (including the lodgement of regulated designs and the inspection regime by the Building Commissioner) go to the heart of the policy problem and should be the focus.

Regulated designs

The RIS states that the types of designs that are regulated designs have not yet been finalised. This means that Consult Australia members cannot be certain of the impact the Regulations and the Act will have on their business. A certain and stable regulatory environment is necessary for business continuity and certainty.

Consult Australia proposes the following solution to these issues, for commencement on 1 July 2021:

- Guidance material that sets out the types of designs that are regulated designs must be made available to industry by 1 March 2021.

Problems with the Regulation

Consult Australia supports the advice in the RIS that the regulated designs will be the 'for construction' set of designs – as on a plain reading of the Act regulated design could be any design no matter how early and incomplete. Confining the definition to those designs needed by the builders to construct provides some certainty for industry.

It is disappointing that the RIS advises that the final definition of regulated designs has not been included in the Regulation and will instead be in guidelines yet to be developed. Without this definition the industry cannot know the impact on business and have certainty regarding compliance. It is also disappointing that to understand the obligations a person needs to look at an increasing list of resources, the Act, the Regulation and the guidelines. This is not ideal regulatory design.

Solution

Guidance material that sets out the types of designs that are regulated designs must be made available to industry by 1 March 2021

To ensure a start date of 1 July 2021 and sufficient time for businesses to prepare for that start date, the guidance material confirming what designs are regulated designs must be provided to industry at least three months before commencement.

While Consult Australia and other industry associations can support and share government communication and resources with members – government will be enforcing the rules so should educate widely on those rules. This is essential for increasing business certainty and to avoid unintended compliance breaches, which is costly for both government and business and undermines public confidence in the reforms. The availability of educational resources will be key to success.

Registration cost

The RIS does not set out the proposed registration fees nor does it consider any of the administrative costs on business. The costs on business of registration (both financial and administrative) must be considered in light of COVID-19 impacts on the economy. Consult Australia is concerned to ensure that the costs do not outweigh the benefits.

Consult Australia proposes the following solution to these issues, for commencement on 1 July 2021:

- The cost of registration must be set by 1 March 2021. There should be no fee for mutual recognition, and this should be automatic mutual recognition as per the National Cabinet commitment on occupational mobility.

Problems with the Regulation

The RIS and the Regulation fail to provide information on the financial cost of registration and consider the other burdens on business from the registration scheme. This is a significant oversight for a regulatory impact assessment which is meant to be a detailed cost-benefit analysis.

Without an indication of fee amounts, and whether mutual recognition will be the same fee, a lesser amount, or free, Consult Australia members find it difficult to determine the cost on business of the scheme.

Consult Australia has provided advice to the Department of Prime Minister and Cabinet on some indicative costs (to further National Cabinet's consideration and now commitment to occupational mobility). This information has also been provided to NSW Treasury. We collected initial feedback from Consult Australia members on:

- current costs of engineering registration, particularly in Queensland, including the cost of registration, administration and compulsory professional development (CPD)
- likely burdens on business if the current registrations by Queensland Board of Professional Engineers (QBPE) are not automatically recognised in other state/territories
- any other barriers because of the way in which registration works across borders in Australia, which would benefit from a move to automatic mutual recognition.

We note that the only fully implemented engineering registration scheme is the QBPE, while some other states and territories have selected schemes for building works and/or certification. For example, in Victoria 'building practitioners' need to be registered for building work[3] and public construction[4] while in Tasmania 'building services providers' need to be licensed[5] and in the Northern Territory 'certifying engineers' need to be registered.[6] Engineers Australia also maintains a National Engineering Register (NER) which is non-compulsory, but registration on the NER is recognised under many of the above schemes.

Snapshot of results

We received input from 23 businesses, 91% of which are classified as small and medium enterprises (SMEs). All but three businesses provide services in more than one state or territory.

- 100% of respondents have at least one engineer registered on the NER, and all businesses that provide services in Queensland have at least one engineer registered on the QBPE.

[3] See detail of Victorian scheme for 'building practitioner registration': https://www.vba.vic.gov.au/building/registration/engineer

[4] See detail of the Victorian Construction Supplier Register: https://www.dtf.vic.gov.au/infrastructure-investment/construction-supplier-register

[5] See detail of Tasmanian scheme for 'licensed engineers': https://www.cbos.tas.gov.au/topics/licensing-and-registration/licensed-occupations/building-provider-licences/engineer

[6] See detail of the Northern Territory scheme for 'certifying engineers': https://nt.gov.au/industry/licences/certifying-engineers-and-architects

- All businesses indicated that while engineering registration on the NER and QBPE is on an individual basis, the employer covers registration costs for employees as well as funding CPD (between $200 and $1000 per employee).
- The financial cost of registration is not a multiplier of registration fee by the number of engineers employed. This is because businesses do not always register all engineers, for example as the Queensland scheme permits registered engineers to supervise unregistered staff, some businesses register enough senior staff to supervise other staff.
- Many businesses found it difficult to put a dollar value on the current administrative costs of registration, although one member estimated that initial registration took 15 hours, while renewal takes two hours per individual. Sole practitioners see it as a necessary task and couldn't calculate the time spent on registration as distinct from other administrative aspects of the business. One large multi-disciplinary business advised it tracks professional memberships now, but this could easily grow to a full-time position if every state and territory has separate schemes.

Current costs of engineering registration

All respondents advised that they had at least one engineer registered on the NER. For those based in Queensland, the number of employees registered on the QBPE is usually equal to or higher than on the NER. Larger businesses advise that they do not record the engineers registered on the NER (as it is not a mandatory scheme).

Where businesses operate in Queensland as well as other jurisdictions, some engineers based in Queensland are registered on the QBPE, but there are also a smaller number of engineers based interstate that are registered on the QBPE so they can supervise unregistered engineers providing services to Queensland. Because of this supervision allowance, many businesses do not register all engineers providing services in Queensland on the QBPE. Businesses advise that this can be a logistical challenge, ensuring there are sufficient numbers of engineers registered on the QBPE to supervise the work of others on all Queensland projects. It is expected the number of interstate engineers being registered on the QBPE will increase off the back of large infrastructure projects in Queensland and the need to move more staff to those projects.

Financial costs

In terms of financial costs, our members understand that registration cannot be free, however as the various state/territory government schemes recognise registration on the NER, there is a feeling of 'double dipping' of fees. There seems to be no discount for mutual recognition. This is compounded when a practitioner wants to be registered in more than one discipline.[7]

There is also a concern that where schemes recognise businesses, sole practitioners do not just pay as an individual but must pay an increased fee as a body corporate.

- An individual registered to provide civil engineering services (at the 'chartered' level) in Queensland alone could spend up to $1,106 annually in fees (plus the cost of CPD) [8]
- An individual registered to provide civil engineering services and certification (at the 'chartered' level) in Queensland, Victoria, Tasmania and the Northern Territory could cost up to $2,737 annually in fees (plus cost of CPD).[9]

[7] The cost of adding an additional discipline on the NER is the same as for the first registration. Under the Victorian building practitioner registration, an additional category or call only costs $60.40 (where initial registration costs $130.90).

[8] Based on Engineers Australia NER membership of $767 (it can range between $574 to 767) with 'chartered' status costing $109. Then $230 to Queensland government for recognising the NER registration.

[9] Based the costs for NER and QBPE as above plus $388 for Tasmanian licence, and $1,112 for registration in the Northern Territory and $130.90 for registration as a 'building practitioner' in Victoria.

Administrative costs

The administrative burden on businesses of registration comes from the time spent by each engineer to register and renew registration. One member estimated that initial registration takes 15 hours per applicant, while renewal takes two hours per applicant (per year). Many businesses indicate that the process of registration and renewal was the responsibility of the individual, even where the employer pays the fees etc. It is essentially the same process each time for each registration/renewal no matter the jurisdiction. This means that significant hours of productivity are lost spent on several iterations of generally the same task:

- For initial registration:
  - demonstrating competency, completing forms, getting and attaching passport photos, and providing a PI certificate of currency.
- For renewal:
  - completing forms, providing a PI certificate, reporting on CPD, making payments and processing receipts.

Assuming a modest charge-out rate of $250 per hour per engineer (it could be significantly more for a more senior engineer) the time impost costs the business $3,750 for each new registration and $500 per individual for each renewal. That is per scheme. As indicated above, engineers working on Queensland projects will often be registered on the NER and QBPE, then there is the registration and renewal for other schemes such as in Victoria, Tasmania and the Northern Territory.

- An individual seeking initial registration to provide civil engineering services and certification (at the 'chartered' level) in Queensland, Victoria, Tasmania and the Northern Territory could spend up to 15 hours per jurisdiction, that is 60 hours to be registered, losing $15,000 in charge out costs.
- An individual seeking renewal of existing registration to provide civil engineering services (at the 'chartered' level) in Queensland, Victoria, Tasmania and the Northern Territory could spend up to two hours per jurisdiction, that is eight hours, losing $2,000 in charge out costs.

Members advise that there is also a fair amount of undocumented time and energy spent clarifying aspects of the current requirements. For example, where government clients require registration on the QBPE for certain roles when those roles may not be necessary for the particular project.

Barriers of separate state/territory schemes

The above already indicates the financial barriers of operating across state/territory borders with only the limited schemes in place, many with mutual recognition already. While the vast majority of members that provided responses work in multiple jurisdictions, they also advise that they have avoided work in some jurisdictions because of these existing costs. Businesses often make strategic decisions on renewing registration/licensing depending on the likelihood of work in that jurisdiction.

Members advised that they have walked away from work in other states/territories because the time to get registered results in inability to hit deadlines plus it's not worth the cost of registration if you only get a hand-full of jobs in that jurisdiction. In another example, a business may have licensed two civil engineers in Tasmania for a project, but now the project is completed the business needs to decide if/when the licence will be needed again.

One SME member advises that while they were anticipating opening offices in other jurisdictions, the rollout of separate registration schemes in those areas would dissuade the business from expanding. SMEs (including sole traders) that provide specialist or niche services advise that the fees of registration in every state, if they reflect the current fees, could severely hamper the businesses ability to operate in those states/territories. These members advise that often, because of the specialist nature of their work there are very few experts in Australia and it would not be possible for them to work under the supervision of other practitioners in each jurisdiction.

All businesses that operate in multiple jurisdictions acknowledge that there will be additional fees to ensure the business can continue working around the country. However, as all Australians undertake more work on a distributed office basis, it is becoming increasingly evident that unless there is a national system or automatic cross border recognition there will be barriers in being able to get engineers to practice or be registered in each state/territory.

Even now, with only limited schemes in place businesses cannot move engineers to projects quickly – as the administrative time taken to apply and assess applications (even where it is merely recognition of an existing registration) impacts on project timelines. Automatic mutual registration would enable businesses to move engineers around Australia more quickly and freely. Without this, there will be a hurdle to being able to react quickly, and it will increase the base cost of running the businesses.

Separate state/territory schemes will necessitate businesses to have capability in People (HR/legal) teams to keep abreast of all of the individual state requirements to ensure no requirements are breached by accident or omission. Our members advise that this simply introduces unnecessary complexity into an industry that is already complex enough. A large business operating across jurisdictions will need to ensure every state/jurisdiction is tracked and managed independently instead of having the benefit of one national approach enabling the business to efficiently place the best resources to meet client needs at the right time.

It is anticipated that a large business would need a full-time role to manage this including to ensure compliance with the administrative differences between each state/territory and to be aware of the transition required for those that may be registered internationally. Although developed from similar roots, the legislation in Queensland, Victorian and New South Wales for example are different, as are their relationships with the relevant government authority.

Other government client requirements

In addition to the schemes discussed above in Queensland, Victoria, Tasmania and the Northern Territory there are also a range of other mandatory schemes around the country, including (but not limited to):

- Authorised Engineering Organisation (AEO) in NSW – managed by Transport for NSW, the AEO 'ensures that outsourced engineering services are delivered by capable and competent organisations'
- Metro Trains Melbourne (MTM) registered training – managed by MTM, this scheme provides mandatory training for qualified individuals that wasn't to work on MTM projects.

It should also be noted that some government departments require registration on Engineer Australia's NER as a pre-qualification for tender.

The myriad of schemes and arrangements are difficult for business to navigate. A national register that could be utilised by all government clients could alleviate some of this burden.

Cost of other technical memberships etc

There are a significant number of professional memberships/registrations that are often required by government clients. While this of most impost on multi-disciplinary businesses, small businesses often need technical memberships in addition to registration. For example, a civil engineer working on roads in Queensland would likely be registered on the NER and on the QBPE as well as be a member of the Australian Institute of Traffic Planning and Management as well as the Australian College of Road Safety.

Conclusion

The response from Consult Australia members makes clear that engineering registration in Australia already imposes significant burdens on business – which will only increase as more states and territories introduce separate schemes. The burdens and barriers are not exclusive to big business – with a vast majority of SMEs providing advisory, engineering and design services doing so in more than one jurisdiction.

Registration of engineers as design practitioners

It is unclear if registration as a professional engineer will be recognised for the purposes of being registered as a design practitioner where the classes match. Without this recognition, the scheme imposes an unnecessary burden on practitioners and businesses.

Consult Australia proposes the following solution to this issue, to allow commencement on 1 July 2021:

- Individuals registered as a professional engineer in a class with a counterpart class for design practitioners should be automatically registered in the relevant class of design practitioner. If an individual satisfies the requirements of multiple classes, that individual should automatically be registered in all those classes. This should include where the individual is registered as a professional engineer in a different jurisdiction. For example, a structural engineer registered in QLD should be recognised in NSW as a 'professional engineer – structural engineering' and a 'design practitioner – structural engineering'.

Problems with the Regulation

The RIS fails to consider the burden on practitioners and businesses of having similar classes of design practitioners and professional engineers and the multiple registrations needed.

Solution

Individuals registered as a professional engineer in a class with a counterpart class for design practitioners should be automatically registered in the relevant class of design practitioner. If an individual satisfies the requirements of multiple classes, that individual should automatically be registered in all those classes. This should include where the individual is registered as a professional engineer in a different jurisdiction. For example, a structural engineer registered in QLD should be recognised in NSW as a 'professional engineer – structural engineering' and a 'design practitioner – structural engineering'

Consult Australia is of the view that registered professional engineers are qualified to prepare regulated designs and making design compliance declarations, especially where the classes of engineers matches the classes of design practitioners. Automatic registration of a professional engineer as a design practitioner with the relevant class would assist in reducing the burden of the scheme.

The burden on business to keep track of who has what registration in what state for what specialisation must not be underestimated.

Fire safety and systems

Consult Australia members that work in fire safety and systems struggle to understand their obligations under the various NSW legislation and therefore cannot be certain of the impact the Regulations and the Act on their business. A certain and stable regulatory environment is necessary for business continuity and certainty.

Consult Australia proposes the following solution to these issues, for commencement on 1 July 2021:

- The obligations, requirements and definitions that apply to fire safety engineers across the different legislation need simplifying and clarifying. This includes the role of fire safety professionals in certification work.

Problems with the Regulation

There is significant overlap between the Regulation and other legislative instruments including the *Building and Development Certifiers Act 2018* (the BDC Act) and the *Building and Development Certifiers Regulation* (the BDC Regulation) in terms of fire safety and fire systems. It seems that a practitioner will need to be registered in NSW as a fire safety certifier under the BDC Act and as a design practitioner and a professional engineer under the Act and Regulation. The insurance requirements are also different which is not desirable or efficient.

NSW consumers should expect a consistent standard of competency which should apply regardless of the class of building. Therefore, the requirements for fire safety and fire systems should be within one set of regulations to avoid duplication and inconsistency to maintain a high standard for NSW consumers.

Overlap of fire safety and systems

Consult Australia is aware that some businesses have engineers that do both fire safety and fire systems, considering it a broad competency. The Regulation includes a number of classes of design practitioner for fire systems engineering:

- fire systems (detection and alarm systems)
- fire systems (fire sprinkler)
- fire systems (fire hydrant and fire hose reel)
- fire systems (mechanical smoke control).

It seems therefore that an experienced fire systems engineer will need up to four registrations as a design practitioner as well as a registration as a 'professional engineer – fire safety engineering'. This is in addition to the existing requirements for an accredited fire safety practitioner under the BDC Act and associated schemes, which adds further confusion and burden on the industry.

The burden on business to keep track of who has what registration in what state for what specialisation must not be underestimated.

Requirement on engineers to complete Diploma

In terms of fire systems engineering, the RIS correctly identifies that very few engineers have completed the Diploma. Consult Australia members believe this is most likely because their experience was obtained many years ago, and/or overseas in the absence of the existence of the Diploma. The content of the Diploma is at entry level, and many existing fire engineers will be operating well above this level of qualification.

There will be substantial cost on business to have all fire engineers complete the Diploma no matter their experience. This includes both financial and administrative costs, such as hundreds of hours of lost work by experienced fire engineers. It should also be noted that engineering is a very mobile profession – many fire engineers that provide services to NSW do not reside in NSW and therefore additional time and cost may be incurred if they need to attend NSW TAFE for the Diploma.

The NSW government should include transition arrangements to allow full registration without the Diploma based on prior experience.

Insurance requirements

The recently introduced *Building and Development Certifiers Regulations 2020* includes insurance requirements that exceed the coverage that some Consult Australia members can obtain in the current market. Introducing insurance requirements in the Regulation is problematic for the reasons above but also because it is on top of existing excessive requirements, especially for fire safety engineers. Inflexible insurance obligations do not improve the insurance market, as distinct from obligations that de-risk the market (such as improved compliance). Where insurance is still available the costs will ultimately be passed on to the client and end-user of the building. Where insurance is unavailable there will be a significant impact on the NSW economy as businesses cannot operate in the state under the Regulation and the Act.

Solutions

The obligations, requirements and definitions that apply to fire safety engineers across the different legislation need simplifying and clarifying. This includes the role of fire safety professionals in certification work.

The NSW government needs to work with industry to resolve the complex interplay between the different regulations to ensure there is a certain and stable regulatory environment for business to operate in.

Building work and variations

The Regulation requires no building work to commence until the 'for construction' set of designs is completed and requires the building practitioner to submit new regulated designs within one day of starting building work on a variation. Consult Australia members are concerned about the practicality of these requirements, especially that the one-day time requirement is not workable in practice.

Consult Australia proposes the following solutions to these issues, for commencement on 1 July 2021:

- Provide some flexibility on the commencement of building work – so that building work can commence where there is agreement between relevant design practitioners and the building practitioner
- Change the obligation regarding variation of designs – so that the obligation is on the building practitioner to notify the design practitioner within one day (where the variation is not initiated by the design practitioner) and the lodgement of the varied regulated designs to be as soon as possible after the building practitioner receives the varied design from the design practitioner.

Problems with the Regulation

No building work before completed designs

The Regulation proposes that building work cannot commence until the 'for construction' set of regulated designs are complete. Consult Australia members do not believe this is a workable proposal as early works are often conducted in parallel with design. Ideally design practitioners will have the time to largely finalise designs before construction, this is not usually possible as client schedules drive both the constructor and designer to meet demanding (and at times unrealistic) schedules agreed under competitive tendering. The behaviour of government clients indicates what is acceptable to the private sector and especially in design & construct situations there is more onus put on getting shovels in the ground that investing time and energy in up-front design.

Consult Australia has consistently advised that more time up-front design needs to happen, however we cannot ignore real world and commercial realities. Therefore, the Regulation should find a middle ground so that some building work can commence before all designs are complete. This should be by agreement between the building practitioner and relevant design practitioners.

Lodgement within one day of varied building work commencing

The Regulation proposes that varied regulated designs be lodged within one day of the building work being commenced. Consult Australia members do not believe this is a workable proposal. In practice it is very unlikely that building work will stop for a designer to do a varied design. The Regulation doesn't consider the very usual practice of building practitioners doing variations on site without notifying the designer.

A one-day timing requirement will add pressure on the design practitioner, it also works against careful and considered design. In some cases, the designer will need to visit site to see the construction conditions, understand the builder's variation, assess the impact and develop the varied design.

Consult Australia continues to advocate for a requirement on building practitioner to notify design practitioners of a variation – the one-day time period would be suitable for this notification provision. As no definition of variation is provided in the Regulation, such a notification requirement would ensure that design practitioners can decide with the building practitioner whether the variation is of such a nature as to require a new design.

Solutions

Provide some flexibility on the commencement of building work – so that building work can commence where there is agreement between relevant design practitioners and the building practitioner.

This solution balances the need for up-front design with the commercial realities of getting construction underway. It also goes to improving collaboration between the parties.

Change the obligation regarding variation of designs – so that the obligation is on the building practitioner to notify the design practitioner within one day (where the variation is not initiated by the design practitioner) and the lodgement of the varied regulated designs to be as soon as possible after the building practitioner receives the varied design from the design practitioner.

This solution removes an unrealistic timing requirement and also delivers on the need for designers to be notified of variations, which in Consult Australia's view is key to improving building compliance and goes to the heart of the public benefit that could come about as a result of these reforms. It also goes to improving collaboration between the parties.

Contact us

We would welcome any opportunity to further discuss the issues and solutions raised in this submission. To do so, please contact:

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