Draft Design and Building Practitioners Bill 2019

(NSW)

SUBMISSION TO NSW GOVERNMENT CONSULTATION DRAFT

OCTOBER 2019

ABOUT US

Consult Australia is the industry association representing consulting firms operating in the built and natural environment sectors. These services include design, engineering, architecture, technology, survey, legal and management solutions for individual consumers through to major companies in the private and public sector including local, state and federal governments. We represent an industry comprising some 48,000 firms across Australia, ranging from sole practitioners through to some of Australia's top 500 firms with combined revenue exceeding $40 billion a year.

Some of our member firms include:

AECOM, ARCADIS, ARUP, aurecon, Beca, BG&E, Cardno, Douglas Partners, GHD, GOLDER, HDR, JACOBS, KBR, mlei, NORTHROP, RLB Rider Levett Bucknall, SMEC, Stantec, tonkin, umwelt

INTRODUCTORY REMARKS

Consult Australia welcomes the opportunity to provide this response to the NSW Government's draft *Design and Building Practitioners Bill 2019* ('the Bill').

We support the NSW Government's intention to improve broader community confidence regarding the quality of building construction in the State. Owners and end users of buildings should have certainty that their building complies with all relevant codes and laws and that there is adequate and appropriate enforcement of those codes and laws. However, we doubt that the Bill will deliver the cultural and behavioural change needed – it seems to reinforce the status quo. As the *Building Confidence* (Shergold & Weir)[1] report highlighted, it is the integrity in the system that needs resolving.

Reforms should not only ensure that the designs meet the *Building Code of Australia* and that the designs are provided by appropriately qualified professionals, but also that the original design intent is realised in the finished building. Unfortunately, the Bill fails to deliver on the last element. The Bill focuses heavily on designers and design stages but fails to extend that focus to the persons doing the building work and the construction stage. While all designers in a project will likely be covered by the Bill as design practitioners, with strict registration and declaration requirements not all persons doing building work will be covered as building practitioners or need to be registered. The obligations on building practitioners are also significantly flexible allowing them to only take 'reasonable steps' to comply with the designs. In addition, they benefit from a 'reasonable excuse', allowing them to construct without final designs and compliance declarations.

It is unclear how the declaration regime under the Bill integrates efficiently with current state and federal processes and requirements relevant to the building regulation and approval system – for example the role the certifier has in issuing a construction certificate (CC) and occupation certificate (OC).

The Bill does not demonstrate a clear appreciation that in NSW nearly all buildings, be they residential, commercial or institutional, are delivered through design and construct (D&C) contracts. Under D&C the design documentation at the CC stage falls well short of what is required to fully inform the construction. Therefore, design practitioners will likely only be able to issue the design compliance declarations providing assurance of compliance with the *Building Code of Australia* until just prior to the issue of the OC. The strict obligation on a design practitioner to issue a compliance declaration doesn't account for a situation where the practitioner is unable to assess the compliance of the building element or performance solution against the *Building Code of Australia* – especially in the case of variations made by non-design practitioners. It must be remembered that the skill level and knowledge of building regulations/codes varies significantly across the different participants involved in such a project – from professionals, technicians, skilled trades, and casual trades.

Consult Australia does not support a statutory duty of care. In addition, the duty of care as drafted in the Bill extends liability beyond the obligations imposed by the Bill. Further, the duty of care fails to provide adequate consumer protection as it ignores the building developer. The culture in every building and construction project starts at the top with the commissioner/developer of the project. They establish the priorities for the project, the extent to which time and cost is valued over other factors such as quality and sustainability (which have a significant impact on the outcomes of the project). Developers are the biggest beneficiary of the build and have the ultimate sign-off on design and construction work. Building owners and end-users should therefore be owed a duty of care from the developer.

Below we provide more detail on these points.

1 www.industry.gov.au/sites/default/files/July%202018/document/pdf/building_ministers_forum_expert_assessment_-_building_confidence.pdf

COMPLIANCE DECLARATION REGIME

We refer to Part 1 and Part 2 of the Bill – please find our marked-up suggestions of improvements to the Bill at Attachment A.

The compliance declaration regime in the Bill is unlikely to deliver the needed change in culture and behaviour through the contractual chain from the project commissioner onwards. The Bill puts undue focus on designers without a similar focus on persons doing building work. All persons doing building work should be building practitioners under the Bill and have stricter requirements to build to the designs and/or the Building Code of Australia.

Concerns with the compliance declaration regime

The compliance declaration regime is unlikely to deliver the cultural and behavioural change needed in the industry because it doesn't change the status quo in respect of persons constructing (or not) to the designs. It fails to tackle the key area of risk in the process – the incremental changes to design that are made by unqualified persons involved in the construction phase. It does not ensure that the bar is raised in terms of knowledge of the *National Construction Code* (NCC) and building regulations because it fails to cover all persons doing building work and provides too much flexibility allowing building practitioners to not build to the design or the *Building Code of Australia*.

It is also unclear how the compliance declaration regime interacts and integrates with the current state and federal processes and requirements relevant to the building regulation and approval system – for example the role of certifiers in issuing CC and OC. In practice the design compliance declaration and principal design declaration may not be able to be provided until just prior to the OC, especially in a D&C contract. To ensure the compliance declaration regime works most effectively the design practitioner engaged at the start of projects must be maintained throughout the construction until completion of the build.

Concerns with the design practitioner and design compliance declaration

- The Bill puts significant focus on designers without a similar focus on persons doing the building work on a project. Design practitioner is defined as a person who prepares designs for building elements or performance solutions, essentially leading to most, if not all, designers involved in a project being covered by the Bill (see sections 3 and 5 of the Bill). As a flow on (and discussed further below under registration) all design practitioners will likely need to be registered in order to provide design compliance declarations on their final designs. In contrast, the definition of building practitioner does not cover all persons doing building work. Where there is more than one person contracted, only the principal contractor is a building practitioner (see section 7 of the Bill). This leads to only one building practitioner needing to be registered for a project in order to make the building compliance declaration.
- The Bill is not clear on the interaction of the design compliance declaration with other certificates. For example, the design compliance certificate may not be able to be provided towards the end of the construction – especially in a D&C project. The level of design available at CC stage is generally not sufficient to declare compliance with the *Building Code of Australia*.
- The obligation to provide a design compliance declaration is too strict with no flexibility. The Bill fails to consider situations where a design practitioner cannot issue a declaration, for example where a non-design practitioner makes a variation and requests a new design compliance declaration to cover that variation. The design practitioner may not be able to assess if the varied building element or performance solution meets the *Building Code of Australia*. For example, design practitioners may not have access to site.

- To ensure the compliance declaration regime works most effectively the design practitioner engaged at the start of the project should, as far as reasonably practicable, be maintained throughout construction to ensure that the design intent is carried through and delivered in the final build. Design compliance declarations must be provided by the design practitioner who developed the final design for construction, but this may not be the same design practitioner that developed the original plans, especially in a D&C contract. It seems that any registered design practitioner can provide the design compliance declaration for variations made during construction, not just the original design practitioner.
- The Bill prohibits a practitioner from receiving, and a person offering, a benefit in exchange for a compliance declaration (see section 24 of the Bill). However, there is no countervailing protection for practitioners from undue influence to complete a compliance declaration.
- Section 11 of the Bill requires design practitioners to be indemnified with penalties for non-compliance. The Bill fails to recognise policy exclusions beyond the power of the design practitioner (for example cladding related exclusions) and the significant elevation in premiums. The design practitioner will be liable for non-compliance even if no insurance company offers the insurance the Bill requires.
- Section 98 of the Bill gives the Secretary the power to direct an insurance company to provide certain information – although both the insured and insurer are generally required to treat insurance policies as well as other information listed in this section as commercial in confidence. It is unclear how this section is intended to operate when insurance companies are not Australian – how will it be enforced offshore? What if the insurance cover required by the Bill is not available in Australia because of the contracting market? Further, if an overseas insurer won't comply with this, would a practitioner be required to get a separate local policy just for the purposes of the Bill? There is a potential that such a section could lead to anti-competitive behaviour and concerns regarding confidentiality – it could lead to market access of each other's terms, claims profile, costs etc.

Concerns with the principal design practitioner and the principal design compliance declaration

- It is unclear if the principal design compliance declaration is a mandatory requirement. Subsection 12(1) of the Bill provides that 'where a principal design practitioner is appointed' a principal design compliance declaration is required. However, there is no guidance on whether the appointment of a principal design practitioner is mandatory (or in what circumstances).
- The principal design compliance declaration stage does not seem to add anything to the process. We suggest that the registration of design practitioners combined with the design compliance declaration is sufficient to address any 'rogue' designers/engineers.
- The obligations of the principal design practitioner are unclear, leaving it to the courts to interpret the role – which will only happen at the end of the process which provides no certainty for practitioners:
    - While the definition of principal design practitioner (at section 3 of the Bill) refers to co-ordinating the provision of design compliance declarations, the obligations of the principal design practitioner at section 12 of the Bill does not make that role clear. For example, there is no explicit obligation on a principal design practitioner to note any gaps in the design compliance declarations provided – should the principal design practitioner alert the client, the regulator or the government if they are of the view that not all required design compliance declarations are provided?
    - The Bill does not explicitly state the limits of the principal design practitioner obligations – for example that the principal design practitioner is not required to undertake an independent assessment of the compliance of designs for building elements or performance solutions with the *Building Code of Australia*.
- The obligation to provide a principal design compliance declaration is too strict with no flexibility. The Bill fails to consider situations where a principal design practitioner cannot issue a declaration, for example where a design practitioner is unable to assess a variation's compliance with the *Building Code of Australia* and therefore cannot provide a declaration to the principal design practitioner.

- Section 14 of the Bill requires principal design practitioners to be indemnified with penalties for non-compliance. The Bill fails to recognise policy exclusions beyond the power of the principal design practitioner (for example cladding related exclusions) and the significant elevation in premiums. The principal design practitioner will be liable for non-compliance even if no insurance company offers the insurance the Bill requires.
- Section 98 of the Bill gives the Secretary the power to direct an insurance company to provide certain information, although both the insured and insurer are generally required to treat insurance policies as well as other information listed in this section as commercial in confidence. It is unclear how this section is intended to operate when insurance companies are not Australian – how will it be enforced offshore? What if the insurance cover required by the Bill is not available in Australia because of the contracting market? Further, if an overseas insurer won't comply with this, would a practitioner be required to get a separate local policy just for the purposes of the Bill? There is a potential that such a section could lead to anti-competitive behaviour and concerns regarding confidentiality as it could lead to market access of each other's terms, claims profile, costs etc.

Concerns with the building practitioner and building compliance declaration

- As discussed above, the Bill puts significant focus on the persons doing the design work without a similar focus on all the persons doing the building work. In practice, most, if not all, designers involved in a project will be covered by the Bill as a design practitioner. In contrast, the definition of building practitioner allows only the principal contractor to be a building practitioner where there is more than one person contracted (see section 7 of the Bill). There are no requirements at all for sub-contractors; no obligation to do building work in accordance with regulated designs; no obligation to do building work in accordance with the *Building Code of Australia;* and no obligation to declare that they have built as per the design and/or the *Building Code of Australia*. There is also no requirement to commission systems as there is no declaration for commissioning. This means that, for example, the obligations on building practitioners at section 17 of the Bill to comply with designs will only apply to the principal contractor.
- It is unclear how the Bill interacts with obligations under the *Environmental Planning and Assessment Act* in respect of contractors and sub-contractors.
- The obligations on building practitioners to comply with designs at section 17 of the Bill are not strict and provide too much flexibility. For example, building practitioners only need take 'all reasonable steps' to ensure building work relating to a building element or performance solution is carried out in accordance with a design and also benefit from an exception for 'reasonable excuse'. Given the strict requirements on design practitioners and that the building elements listed in the Bill are known compliance risks (e.g. fire safety and waterproofing) the obligations should be much stricter. 'As far as reasonably practicable' would introduce a risk-based assessment rather than just commercial assessments.
- The Bill does not ensure that the registered building practitioner will have on site oversight of all the building work in order to make the building compliance declaration. It is possible that one registered building practitioner could be responsible for multiple projects in the State and simply rely on statements and declarations by others to make their building compliance declaration.

Proposals to improve the compliance declaration regime

Cultural and behavioural change will only occur if the onus is on the people doing the building work to demonstrate to the design practitioners and owners/end-users of the building that it was built to the designs. This requires all persons doing building work to appreciate that designs are detailed and complex documents that often have elements that are integral to other elements, where one seemingly minor modification can have significant impacts.

We propose a number of drafting changes to the Bill as set out in Attachment A, including:

- The definition of building practitioner at section 7 of the Bill cover all persons contracted to do building work (not just the principal contractor). There needs to be requirements for sub-contractor installation and commissioning sign off. To achieve this, the definition could be amended as per Attachment A.
- The obligation to provide a design compliance declaration should be more flexible to cover situations where the design practitioner is unable to assess if a building element or performance solution meets the *Building Code of Australia.* This will be particularly relevant where a variation has occurred. To achieve this:
    - subsection 8(1) of the Bill be amended to allow the design practitioner to declare whether or not a regulated design was assessed against the requirements of the *Building Code of Australia* and other applicable requirements (in addition to declaring whether or not it complies with it); and
    - subsections 9(1) and (2) of the Bill be amended so the obligation on the design practitioner to provide a design compliance declaration is 'as far is reasonably practicable'.
- The Bill should explicitly require that, where practicable, the design practitioner engaged at the start of the project is maintained throughout construction to ensure that the design intent is carried through and delivered in the final build. This includes requiring that, where practicable, the design compliance declaration for variations made during construction be issued by the original design practitioner.
- The Bill should include protections at section 24 for practitioners against undue influence. To ensure this protection has real effect there will need to be a way a practitioner can report such behaviour without reprisal. This is necessary given the penalties on a practitioner for not providing a declaration.
- Section 12 of the Bill should explicitly state that it is not mandatory to appoint a principal design practitioner, but where one is appointed the principal design compliance declaration is mandatory.
- The obligations and limits of the obligations of the principal design practitioner should be made clear at section 12 including:
    - Making clear that the role is to co-ordinate designs;
    - A potential requirement to check that all building elements and performance solutions have a design compliance declaration and in cases where this has not occurred, a mechanism to notify a relevant authority;
    - An explicit statement that the principal design practitioner is not required to undertake an independent assessment of the compliance of designs for building elements or performance solutions with the *Building Code of Australia*.
- In addition to ensuring there is an obligation on all persons who do building work to comply with designs, the obligations at section 17 of the Bill should be stricter and weigh the risks of not meeting the design. For example, building practitioners should ensure, *as far as reasonably practicable*, building work relating to a building element or performance solution is carried out in accordance with a design.
- The Bill should ensure that the registered building practitioner has real oversight of all the building work in order to make the building compliance declaration. This could be achieved by including a mandatory inspection regime at section 15 of the Bill.
- The Bill should not include impractical provisions related to insurance. For example, sections 11, 14 and 98 require levels of insurance and disclosure of information that will be difficult if not impossible to enforce. It is recommended that these provisions be substantially amended or removed.

REGISTRATION

We refer to Part 4 of the Bill – please find our marked-up suggestions of improvements to the Bill at Attachment A.

The registration scheme in the Bill will essentially ensure that all designers involved in a project will be registered. We are encouraged that the Bill provides for mutual recognition to be addressed in the regulations and look forward to working with the NSW Government to ensure that there are no unnecessary financial or administrative burdens on industry under the scheme.

Concerns with the registration scheme

Consult Australia agrees that while registration alone will not solve all the challenges in the building industry, it does help set a good foundation and minimum criteria necessary to practice. The scheme also provides the ability to de-register individuals who are not maintaining standards.

Despite the Bill providing for mutual recognition to be addressed in the regulations (see section 24), it would be more efficient for the NSW Government to work with other state and territories for a mutual registration scheme. Various state and territory jurisdictions have introduced or flagged a legislative requirement for the registration of professional engineers. For example, the Victorian government recently introduced the *Professional Engineers Registration Act 2019.* Consult Australia, as the only association representing employers in the sector, supports *mutual registration* to ensure that the scheme is both robust and workable for industry. Arguably engineers work across jurisdictions more than any other profession. Without mutual registration, our industry's productivity will be adversely impacted. Undue pressure will be placed on both the cost of doing business and on our workforce, which is already experiencing significant constraints.

There is opportunity for the NSW Government to lead the way especially given the recommendation by the *Building Confidence* (Shergold & Weir) report for '*…a nationally consistent approach to the registration of certain categories of building practitioners*' and the focus of the Federal Deregulation Taskforce on minimising duplication.

We also have concerns about section 87 of the Bill which anticipates the Secretary conducting an investigation and issuing warning notices. It is unclear if the practitioner investigated will be notified of the investigation. We do not support providing only two business days for a person to make representations about a warning notice.

Proposals to improve the registration scheme

We propose a number of drafting changes to the Bill as set out in Attachment A, including:

- Subsection 87(4) of the Bill should explicitly provide that a practitioner is notified where the Secretary conducts an investigation.
- Subsection 87(5) of the Bill should provide a reasonable time period in order for a person to make representations about a warning notice.

Regarding registration, Consult Australia proposes mutual registration and mutual recognition. Mutual registration would see an engineer registered in one Australian state/territory be automatically registered in all others requiring registration – without the need to apply for multiple registrations and assessments. In practical terms this means, one fee, one assessment, one registration, which allows the engineering practitioner to practice in any jurisdiction.

We propose that mutual registration combined with a central government portal could deliver significant benefits to the community and to all state and territory governments. This approach would improve confidence in the building sector as it addresses the purported movement between jurisdictions of 'rogue' operators. We see the portal being akin to the Australian Health Practitioner Regulation Agency (AHPRA) register. The portal could populate the registration information from each state/territory jurisdiction into a central source that could be interrogated by the public and government. The portal would hold information including:

- name;
- contact details;
- qualifications;
- employer (if relevant);
- ABN/CAN (if relevant);
- date of first registration;
- currency of registration;
- actions against the registered engineer (if any);
- conditions on the engineer's registration (if any);
- state/territory of original registration.

This information could be used by citizens and clients of engineering services to search for a registered engineer to assist in making an informed decision about choosing an engineer for their project. State and territory governments/regulators could utilise the portal to monitor any enforcement action taken against an engineer in other states/territories, or restrictions on their registration. The portal might assist state-based regulators to decide on appropriate disciplinary action, if for instance the scheme permitted the regulator to consider actions against the registered engineer in other jurisdictions.

The portal would avoid duplication across jurisdictions and provide consumer confidence in the profession as a whole throughout Australia. By being a government portal, using government information, it would be a trusted source.

DUTY OF CARE

We refer to Part 3 of the Bill – please find our marked-up suggestions of improvements to the Bill at Attachment A.

The statutory duty of care introduced by the Bill fails to provide consumer protection as purported and does not address the key policy problem of building compliance. The duty of care leaves a big gap by not applying to building developers. Building developers are the biggest beneficiary and dictate the spend and the time taken on a build. They have the ultimate sign-off on design and construction work. The application of the duty of care to design practitioners is too wide and uncertain and needs to be limited to the regulated designs provided in accordance with the Bill.

Concerns with the duty of care

Consult Australia *does not* agree that a statutory duty of care should apply. The common law duty of care has been repeatedly and effectively used to apportion responsibility to the range of participants involved in building projects.

Adding a statutory duty of care will further cement the insurance industry's view that the risk of claims relating to building works are high (almost a point of certainty). This will have a substantial negative impact on businesses and practitioners, who will not be able to bear the financial exposure. It will also substantially

increase the likelihood and cost of litigation because claimants will be able to shop between suing under the common law or the statute or both.

Further, the duty of care will have an impact on practitioner's ability to move between employers, it will be in the interest of individual practitioners to only work for big companies that can provide cover which will put significant pressure on smaller firms who are already feeling the pressure from the market. Action can be brought in relation to the statutory duty of care up to 10 years after the completion of the work, this combined with individual liability will mean that practitioners will need substantial run-off cover beyond the end of their career.

We believe that this would be a significant retrograde step. Increasing claims and legal action is both costly and detrimental to industry as well as building owners. Therefore, improving the quality of buildings upfront (including supporting changed behaviours) to reduce legal action is by far the better goal and outcome. The NSW Government should focus on standards and enforcement to substantially reduce the risk of claims and litigation which will help to restore the confidence of the insurance industry, but more importantly public confidence.

If the duty of care is retained, we have concerns about the current drafting:

- The duty of care as proposed in the Bill would apply to 'construction work' which is defined broadly at section 26 to be 'building work and the preparation of regulated designs and other designs for building work'. While regulated designs are defined in the Bill (and will be further defined in the regulations), 'other designs' is too uncertain and broad.
- The duty of care also fails to consider the countervailing duty on owners and occupiers to maintain the building/building elements/performance solutions. To cover themselves design practitioners will have to capture assumptions about maintenance and life of products in declarations.
- Similarly, the requirement to exercise reasonable care to avoid economic loss '…caused by defects in or related to a building…' is far too broad for design practitioners. A design practitioner should not be held liable under a statutory duty of care for designing a building element that meets the Building Code of Australia but later fails. The statutory duty of care should only apply to the obligations imposed under the Bill, that is for design practitioners to take reasonable care in preparation of the design compliance declarations and for principal design practitioners to take reasonable care in preparation of the principal design compliance declaration. Owners should be able to rely on the design compliance declarations to know that the design met the *Building Code of Australia*.

Proposals to improve the duty of care

Consult Australia urges the NSW Government to rethink the imposition of a statutory duty of care without evidence that the common law duty is failing. We propose that addressing compliance problems should be the focus. The duty of care as provided in the Bill fails to provide consumer protection as it does not cover building developers.

If the duty of care is maintained, we propose a number of drafting changes to the Bill as set out in Attachment A, including:

- The definition of construction work at subsection 26(1) must be certain and apply only to the regulated designs as prescribed in the Bill and the regulations.
- The scope of the duty of care at subsection 27(1) must be linked to the obligations within the Bill. For example, the duty of care owed by design practitioners is to ensure they exercise reasonable care in the preparation of design compliance declarations. Design practitioners should only be liable if, for example they made a design compliance declaration that a building element complied with the *Building Code of Australia* and in fact the building element did not comply (assuming also that the builders followed the design).

CONTACT

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

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