



November 2022
**Proposal to reform building
laws in NSW**

SUBMISSION TO NSW GOVERNMENT

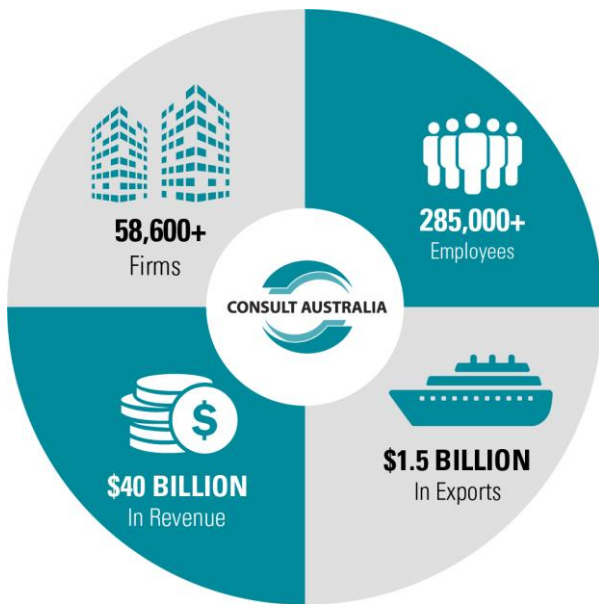
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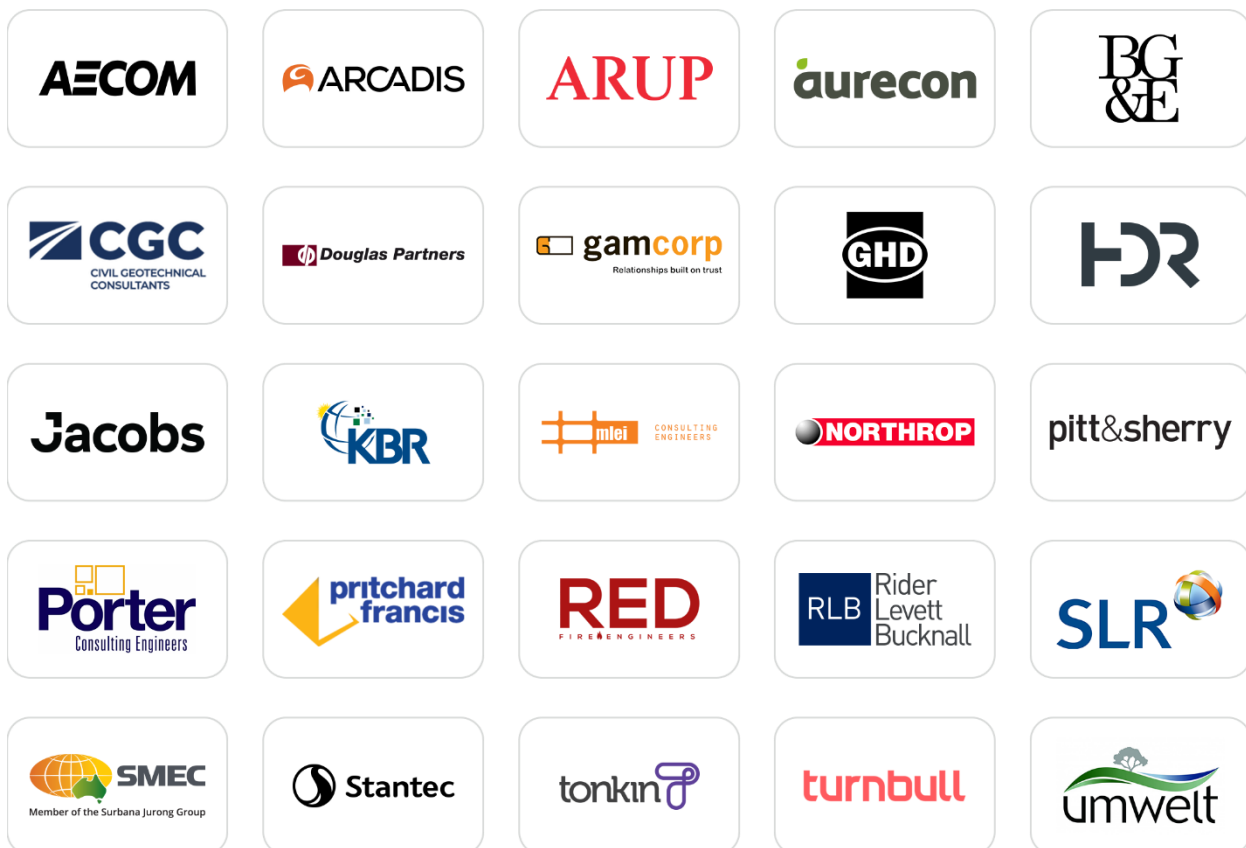
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ABOUT US

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



Our members include:



A full membership list is available at: <https://www.consultaustralia.com.au/home/about-us/members>

EXECUTIVE SUMMARY

Consult Australia welcomes the opportunity to be part of the consultation process on the latest proposed reforms to building laws in NSW and the introduction of the *Building Bill 2022* (NSW). This follows closely the consultation on the proposal to extend the *Design and Building Practitioners Act 2020* (NSW) to other classes of buildings.

Consult Australia supports the role of government to address policy problems and market failures and to ensure consumer safeguards are in place and met. In the lead up to the enactment of the original *Design and Building Practitioners Act 2020* (NSW) there were clearly issues needing government intervention in class 2 buildings, including the need to re-establish consumer confidence in new apartments in NSW. It is for this reason that Consult Australia and its members supported core aspects of that reform, including measures that:

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

We take this opportunity to reiterate that we do not support the extension of the original *Design and Building Practitioners Act 2020* (NSW) to other classes of buildings in the current environment.

Consult Australia is willing to assist the government in developing policy that addresses issues of concern. The end goal should always be solutions that resolve the core policy problem and only imposes burdens on businesses that are justified to achieve that goal. We believe that the proposals of the NSW government will not deliver the improvements sought because they are misdirected and could deliver poorer value for money outcomes for end-users in the NSW community.

We therefore suggest the following next steps for the NSW government:

- Pause the extension of the *Design and Building Practitioners Act 2020* (NSW) requirements to other building classes until two years after the engineering practice standard is implemented.
- Modify the insurance requirements in both the *Design and Building Practitioners Regulation* and the *Building Bill* (NSW) to ensure a practitioner has insurance cover rather than confirming the adequacy of that coverage.
- Modify the duty of care provisions in both the *Design and Building Practitioners Act 2020* (NSW) and the *Building Bill* (NSW) to guarantee proportionate responsibility for design practitioners and engineers.
- Remove the additional duty on practitioners in the *Buildings Bill* (NSW) to avoid certain business associations.
- Reconsider the proposals relevant to statutory duties and the *Limitation Act 1969*.
- Do not proceed with business registration for professional engineering, as it delivers little consumer benefit but significant business burden.
- Commit to true automatic mutual registration for all professional engineers already registered in other government registration schemes.

These regulations are being introduced in a highly constrained market for professionals. Where the government should be encouraging entry to new participants and prioritising the mobility of skills, the government is instead discouraging both.

As always, Consult Australia remains committed to assisting the NSW government to develop and implement effective regulatory solutions to identified policy problems.

EXTENSION OF THE DESIGN AND BUILDING PRACTITIONERS ACT

While the current consultation is about the *Building Bill 2022* (NSW), much of the consultation material provided draws on the policy basis for the *Design and Building Practitioners Act 2020* (NSW), and several elements we have previously submitted on are proposed to be replicated in the *Building Bill 2022* (NSW).

The introduction of the *Design and Building Practitioners Act 2020* (NSW) and the presence of the Office of the NSW Building Commissioner as an active regulator represented a significant shake-up of the industry involved in the design and building of class 2 buildings in NSW. The government is also currently exploring the scope of an engineering practice standard to be implemented soon.

It is vital that sufficient time is given to ensure that those reforms including any proposed engineering practice standard are delivering the change needed before they are extended to other classes of buildings.

Further, the regulatory impact statement does not evidence systemic issues in other building classes to justify strong regulation for buildings of classes 1 to 10c. The use of data on professional indemnity insurance is an over-simplified view and leads to incorrect conclusions. Consult Australia would be pleased to clarify in a workshop with the government the links between professional indemnity insurance to claims and then to proven defects in buildings.

INSURANCE REQUIREMENTS

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

As previously advised, the professional indemnity insurance market is not within the practitioner's control, and neither is the cover. Further, given the potential breadth of the duty of care, it is difficult to assess if coverage would be sufficient or not.

Consult Australia would be supportive of a more generic obligation on each practitioner to be covered by insurance rather than an obligation on a practitioner to confirm the adequacy of that cover.

DUTY OF CARE

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

We remain concerned by the breadth of the duty of care, including no guarantee of proportionate liability for claims against designer practitioners and professional engineers.

DUTY TO AVOID BUSINESS ASSOCIATIONS

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

Consult Australia does not believe that the duty on individual practitioners to avoid business associations with people involved in phoenix businesses will deliver the outcome needed. Individual practitioners within a business rarely have the power to change the business associations their company enters.

We recommend that the government instead empower businesses entering commercial arrangements to consider these issues instead of penalising businesses or individual practitioners. Consult Australia would be pleased to work with government on this approach which could be delivered through education and awareness raising rather than regulation.

EXTENSION OF TIME LIMITS FOR STATUTORY WARRANTIES OR APPLICATION OF THE *LIMITATION ACT 1969*

The NSW government proposes extending the time limits for statutory warranties or extending the application of the *Limitation Act 1969*.

Consult Australia is concerned about the potential impacts on insurance availability. We recommend that this be reconsidered as more information is gathered on the flow-on impact of these proposals.

INDIVIDUAL PROFESSIONAL ENGINEER REGISTRATION

We understand the *Building Bill 2022* (NSW) will incorporate the existing professional engineer registration scheme from the *Design and Building Practitioners Act 2020* (NSW) and expand the registration to capture professional engineers working on other buildings including classes 1 to 10c.

We understand that the extension of professional engineer registration to more engineers is seemingly in line with the registration schemes in Vic and Qld. As previously stated in consultations on engineering registration, the core concern of Consult Australia is the business cost impact of multiple registrations schemes around the country, when we should be moving to a simpler 'one fee, one registration' driver's licence approach. Our members are not concerned about being regulated through a government registration scheme, as many are accustomed to it through the Qld scheme and believe in a strong industry of suitably qualified professional engineers providing services across Australia.

Consult Australia calls on the NSW government to commit to true automatic mutual registration for all professional engineers already registered in other government registration schemes if it continues with the extension of professional engineer registration to engineers working on all building classes.

BUSINESS REGISTRATION

Consult Australia does not support business registration for professional engineering businesses in building laws. As indicated above, the Vic building laws mandates body corporate (aka business) registration for construction businesses as a means to curtail phoenixing of businesses. We support that policy, but not the broad application of regulation to businesses that have no proven history of phoenixing activity.

We do not believe that registering professional engineering businesses will deliver a consumer benefit that outweighs the impost on these businesses.

SUGGESTED NEXT STEPS

Consult Australia looks forward to engaging with the NSW government to ensure that the proposed building reforms achieve the public policy outcome and consumer benefit while also balancing the needs of quality businesses and professionals in a constrained market.

Please contact Alison Kirk, Manager – NSW & ACT to continue the discussion via: Alison@consultaaustralia.com.au.