



August 2023

Practice Standard for Professional Engineers

**SUBMISSION TO NSW DEPARTMENT OF CUSTOMER
SERVICE**

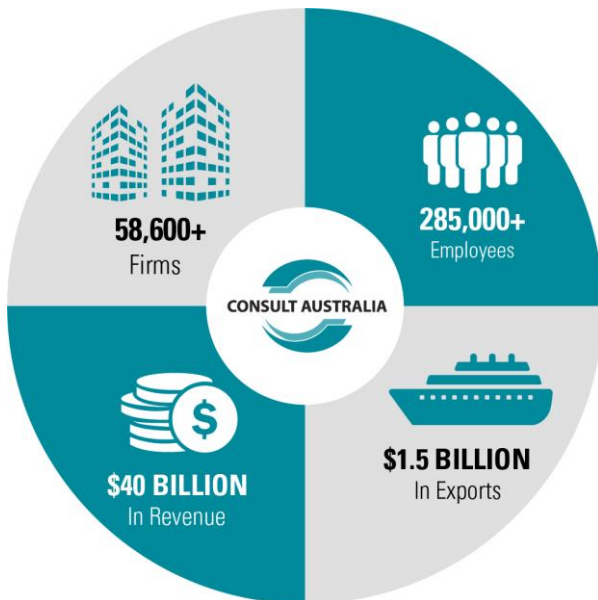
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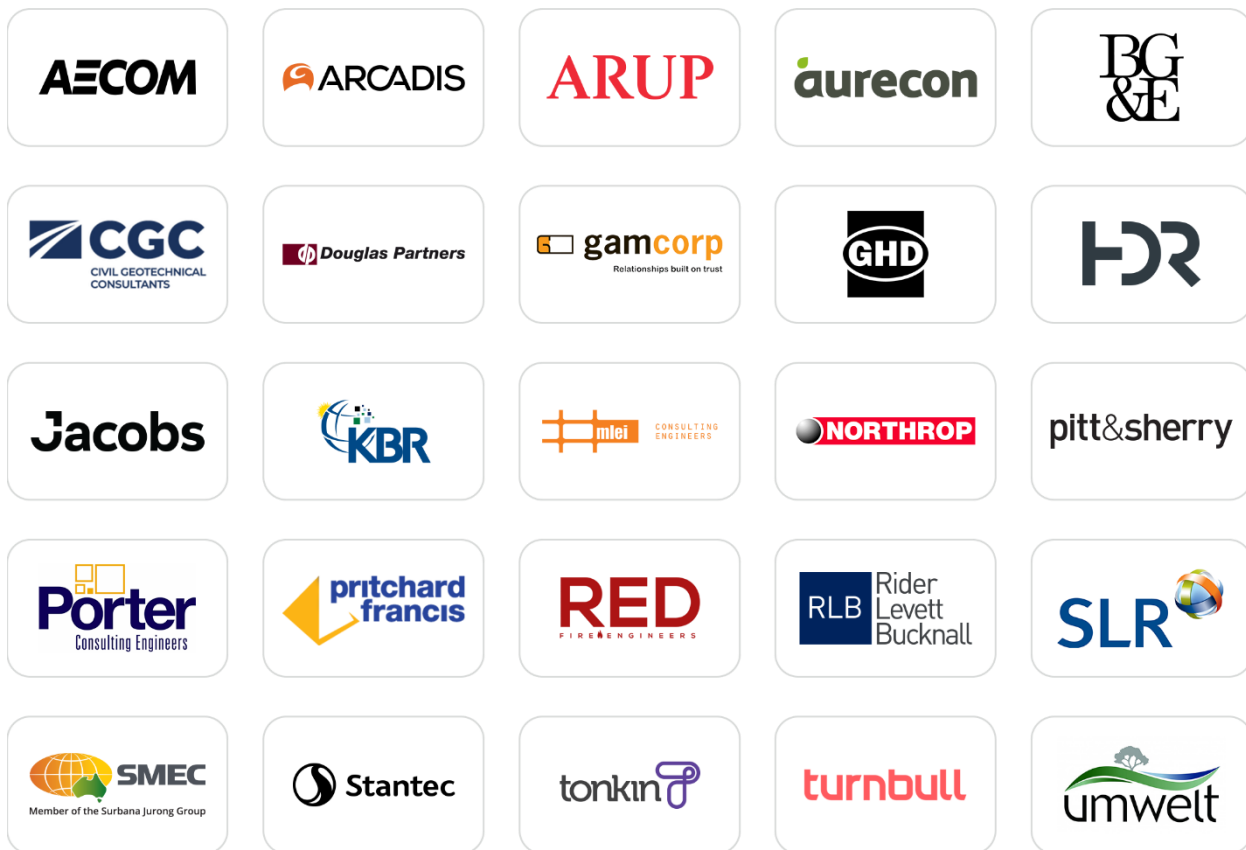
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ABOUT US

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 contribute to the NSW Department of Customer Services' consultation on the proposed Practice Standard for Professional Engineers. Consult Australia has always supported the policy intention of the Department of Customer Service in striving for consumer confidence and community safety.

Our members are passionate about delivering the solutions to the nation's most complex challenges, as well as helping shape, create and sustain our built and natural environment. Our vision is for a thriving, competitive consulting engineering, design and advisory industry that supports a prosperous economy and better outcomes for clients and the community.

The proposed Practice Standard requires urgent review before finalisation as it introduces significant unintended consequences that undermine the government's intent. Consult Australia invites further collaboration between the government and industry to achieve the objectives sought and to ensure any final Practice Standard is a practical tool that enables compliance by professional engineers and therefore delivers better outcomes for all stakeholders.

The core concern of Consult Australia and its members is that, as drafted, the proposed Practice Standard will reduce the availability of professional indemnity insurance for engineering businesses, diminishing the market capacity sustainability in NSW, and will also risk further implications to the Australian economy at large.

In this submission we set out the core problems with the Practice Standard as drafted:

- The 'fit for purpose' obligation is untenable, as it:
 - is not appropriate for professional service providers, such as engineers.
 - would be in direct contradiction with the Australian Consumer Law.
 - cannot be distinguished from the well-understood obligations of a 'fit for purpose' obligation experienced by the market.
 - is not needed as there is a suitable duty of care on engineers as professionals.
 - will create a real risk of a repeat of an insurance crisis in the market with similar impacts on businesses and the community as the one felt with the HIH insurance collapse.
 - will have a significant impact on the market capacity in NSW not just for residential buildings but also flow-on effects to NSW infrastructure.
- There is a confusion of audience, roles/responsibilities, and legal obligations throughout that needs to be clarified.
- The cost to professional engineering businesses, the broader market and the community significantly undermines any potential consumer confidence and community safety sought.
- There is a significant detail and technical requirements which need deeper and more comprehensive engagement and consideration.

To address these core problems and to support the outcomes sought by government, we have made several recommendations supplemented with a marked-up copy of the proposed Practice Standard. Further, we have answered the consultation questions provided.

Our recommendations strike a more pragmatic and effective way to regulate the work of professional engineers to bring about improved standards. Consult Australia remains committed to assisting the NSW Government to return consumer confidence to the NSW building sector. We would be pleased to work with the Department and practitioners to ensure the success of the NSW Government's program of reform.

THE CORE PROBLEMS

The fit for purpose obligation is untenable

Consult Australia advocates in the strongest terms against the fit for purpose obligation in the proposed Practice Standard for Professional Engineers.

The significant risks and concerns outlined in this submission are undiminished by attempts to redefine this term, or assurances or limitations that are near circular in their reasoning. Indeed, these qualifications, and attempts to articulate a limit in the application of the fit for purpose obligation serve only to underscore how unsuitable this term is in its use through the Practice Standard.

Our advocacy is based on:

- a fit for purpose obligation which is an unqualified outcome promise is well established as unsuitable for professional service providers, such as engineers. There is no justification for engineers to be treated differently than other professional service providers (such as lawyers and accountants).
- the inclusion of a fit for purpose obligation on professional engineers in NSW law would be in direct contradiction with the Australian Consumer Law which expressly exempts engineers (and architects) from that consumer guarantee.
- there is no practical and effective way that the term 'fit for purpose' can be used in NSW in a dramatically different way than the legal interpretation that is used in contracting and the Australian Consumer Law to date for that term.
- there being a suitable duty of care on engineers as professionals to take due care and skill in performing their services.
- insurance coverage for fit for purpose obligations on engineers being difficult and expensive to obtain and there is a real risk that the introduction of the obligation in NSW, relying on a small market of willing insurers, will lead to a repeat of the insurance crisis in the market with similar impacts on businesses and the community as the one felt with the HIH insurance collapse.
- the introduction of the fit for purpose obligation will have a significant impact on the market capacity in NSW not just for residential buildings but also flow-on effects to NSW infrastructure.
- there are more pragmatic and effective ways in which to regulate the work of professional engineers to bring about improved standards.

A 'fit for purpose' obligation is an unqualified outcome promise unsuitable for engineers

A 'fit for purpose' obligation is a guarantee of an outcome. That is, that the final product is well equipped or well suited for its designated role or purpose. It is an absolute obligation and is not fault-based. Fitness for purpose provisions are not unusual in construction projects where the final build is guaranteed. However, it should only apply to the parties doing the build.

Strict, no-fault liability is a risk that a professional cannot control or manage, and therefore should not be allocated to (or imposed by government upon) a professional. The promise to exercise care and skill has always been accepted as the appropriate obligation for all professionals.

Professional service providers, such as professional engineers, should not be treated in the same way as constructors. There are different risks associated with the way a consultant engineer and a constructor discharge their respective roles. This is acknowledged in the Australian Consumer Law (detail below).

It should also be noted that the 'purpose' can change over time. The development of design, and costings generated during that process, and development approvals, might mean that the owner's purpose changes. Additionally, for public authorities and government, their 'purpose' may change during design and construction because of public response, political issues, lobbying and more.

Further, an obligation to comply with all applicable standards/codes may be impossible because standards/codes may be incompatible. At times, to comply with one standard, the designer may need to breach another. For example, for a railway station to comply with its heritage protection requirements, cannot include a lift. However, without a lift, the building breaches disability discrimination act requirements. These points of balance are not able to co-exist with the proposed Standard.

Why is fit for purpose suitable for builders and not engineers?

The difference between the work of an engineer to the work of a builder demonstrates why a consultant engineer cannot guarantee the outcome of the final build.

- **Engineers** provide intangibles, in that they provide professional services. They promise to deliver that service to the appropriate level of quality, not to guarantee the future or the outcome. Engineers cannot guarantee the final build as they do not have control of the construction. An engineer's obligation is to perform the services to the standard of skill, care and diligence as is generally exercised by competent members of the engineer's profession performing services of a similar nature at the time the services are provided.
- **Builders** provide tangibles, in providing the final build. Their promise is to deliver that final build. A builder's obligation is to deliver that outcome and for it to be of satisfactory quality and fit for the intended purpose.

There is no justification for treating professional engineers differently to other professional services

Even if the Practice Standard was to successfully apply a discrete fit for purpose obligation on professional engineers for their services, and not the final build, our concerns remain.

As discussed above, it is unfair and unreasonable to impose strict, no-fault liability on any professional. We are not aware of any other profession where governments seek to impose strict liability such as appears to be proposed in the Practice Standard.

Courts have consistently found that:

- a contract of professional services is not a contract to produce a result (see *Roluke v Lamaro Consultants* [2007] NSWSC 349 at [69]).
- a professional does not guarantee against all mistakes and omissions (see *Owners Corporations v LU Simon Builders Pty Ltd & ors* (Lacrosse decision) [2019] VCAT 286 at [302]).

There is no justification for treating a professional engineer differently to other professional service providers (such as lawyers or accountants). The audit findings under the DBP Act by the Department of Customer Service presented in industry forums does not provide evidence that a fit for purpose obligation on engineers is required or would remedy the non-compliance found to date. The Department's findings of non-compliance do need to be addressed but should be done so under the existing Act and Regulations.

NSW law would be in direct contradiction to the Australian Consumer Law

The Australian Consumer Law exempts architects and engineers from guarantees as to fitness for a particular purpose, a provision carried over from the Trade Practices Act.¹ The exemption was discussed in 1986 by Senator Haines, where he stated whilst advocating for the introduction of the exemption:

In amending the Trade Practices Act through clause 38, the Government is attempting to bring to bear, I suppose, a greater responsibility on the part of professionals in their dealings with their clients [...]

The issue with regard to architects and engineers is we believe that they fall into a special category as far as their relationship to their client is concerned; that is that while they come up with designs, specifications and so on in accordance with whatever a particular client wishes, in

¹ See section 61 of the Australian Consumer Law and section 74(2) of the Trade Practices Act.

the implementation of those specifications, designs, contracts and so on a fairly significant third party intervenes [...]

*To imply that the architects or engineers are absolutely responsible and that if a building or whatever turns out to be unfit in some way for the purpose they are wholly responsible is to place a far more onerous provision on them, I would have thought, than is placed in any other dealings between another group of professionals and their clients or patients [...]*²

An engineer/designer cannot guarantee the final build because there are too many factors beyond the consultant's control. The engineer's design is essentially a piece of advice (like lawyer's advice to clients) and it is up to the constructor to implement that design, using their own skills of construction and therefore the engineer cannot guarantee the final build (like a lawyer cannot guarantee the outcome of a trial where the ultimate decision is made by a judge or a jury). Consult Australia, in agreement with the above quote, holds that there is no reason why engineers should be held to a different standard than other professional services.

There is no practical and effective way to use the term 'fit for purpose' without imposing the no-fault liability or contradicting the Australian Consumer Law

In the Regulatory Impact Statement as well as in industry forums the Department has noted that the fit for purpose obligation in the proposed Practice Standard is intended to be distinguishable from the fit for purpose obligation seen in construction contracts, because:

- professional engineers will not be guaranteeing the final build, but their own design.
- professional engineers will be held accountable to the obligation by the regulator (not the contracting party).

The Department appears to hold therefore that the Practice Standard's fit for purpose obligation will not contradict the Australian Consumer Law.

These assurances are incoherent in the context of a legal term now well established and defined as providing a no-fault guarantee of an outcome.

The ambiguity of who determines the purpose and what that purpose is against the comprehensive nature of a fit for purpose obligation renders any attempt to redefine or limit the application unreasonable.

The significant risks and concerns outlined in this submission are undiminished by attempts to redefine this term, or assurances or limitations that are near circular in their reasoning. Indeed, these qualifications, and attempts to articulate a limit in the application of the fit for purpose obligation serve only to underscore how unsuitable this term is in its use through the Practice Standard.

Consult Australia holds that if the NSW Government sees a need to impose a new obligation on engineers to ensure the quality of engineering designs (over and above the obligations already contained in the Act and Regulations), the obligation should be clear, unambiguous and distinct from the well-understood obligations created by any 'fit for purpose' obligation.

There is a suitable duty of care on engineers as professionals without the need for a fit for purpose obligation

Engineers are subject to the common law duty of care, like all professionals to '*exercise care, skill and diligence as a reasonably competent professional*'. This duty of care cannot be contracted out of. Insurers recognise this and provide coverage to engineers in the event they fail to meet this standard.

Consult Australia understands that key outcome underlying a fitness for purpose obligation in the Engineering Practice Standard is to ensure that the engineer will be liable for the work they do. We hold that this can be achieved under the general standard of care, where a consultant promises to '*exercise care, skill and diligence as a reasonably competent professional*'.

² [Senator Haines, Senate Hansard, 30 April 1986.](#)

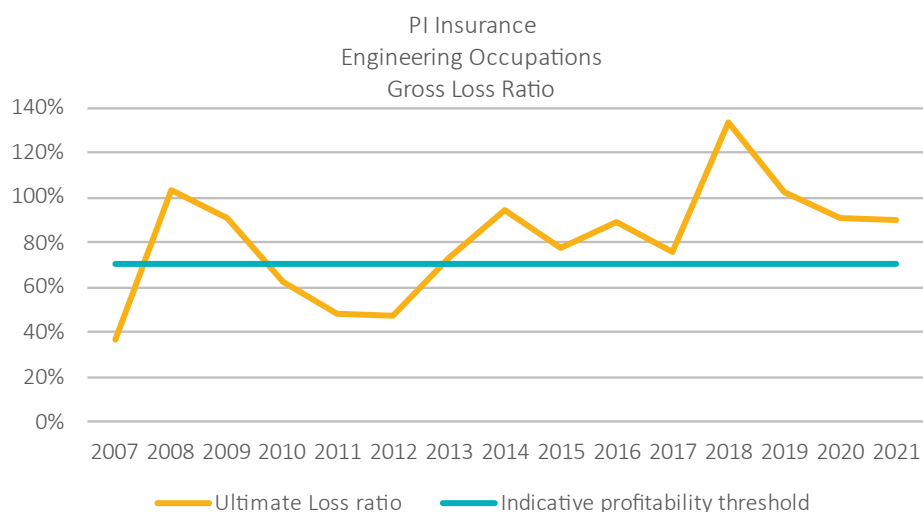
Supplementing this well-known duty of care with a fit for purpose obligation will only increase disputation as lawyers argue what the 'purpose' of a particular design was and we will see untenable rises in professional indemnity insurance premiums.

The potential for a repeat of an insurance crisis in the market having similar impacts on businesses and the community as the one felt with the HIH insurance collapse

Professional indemnity (PI) insurance is crucial business insurance for engineering businesses and holding PI insurance is a requirement of registration under the *Design and Building Practitioners Act 2020* (NSW) (the DBP Act). Engineering consultants (like other professional service providers) rely on PI insurance to cover claims of negligence, malpractice, or professional misconduct. It costs time and money to defend these types of claims and a PI insurance policy provides cover against such claims as well as legal defence costs. A PI insurance policy is intended to provide a business with the ability to settle a claim without jeopardising the entire business (depending on the size of the claim and the sum of insurance held).

The terms of coverage of PI insurance are determined by insurers, not engineers. Like any other business, insurers seek to avoid significant and continual losses. The 'indicative profitability threshold' for PI insurers is a gross loss ratio of around 70% (as indicated in the graph below). Where gross loss ratios are higher, insurers will need to modify their policies (through coverage limitations and policy exclusions) as well as refuse cover to certain businesses or disciplines/sectors.

The unprofitability of the PI insurance pool in general has been of concern for many years. The last seven years has seen gross written premiums growing by 75% since 2015, with average premiums rising by 27%, according to the [Australian Prudential and Regulation Authority](#). For engineering occupations, the story is worse, as we have seen unprofitability since around 2013, with the highest gross loss ratios seen around 2018 (at around 133%). While there has been some improvement in the past 12-18 months for some sectors, for engineering occupations the gross loss remains high. It is worth remembering that not all claims are against (and therefore the flow-on impact is not limited to just) the so-called 'bad engineers'. A small number of large claims on big infrastructure projects can impact small engineering businesses that have a clear claims history and only work on residential builds.



Source: Finity's Marketvue estimates from NCPD data

Historically, the willingness of an insurer to cover certain items has waxed and waned with hard and soft markets. In soft markets insurers tend to offer coverage for a broad range of issues with very few carve-outs. In hard markets the carve-outs increase, and coverage lessens. The hardness of the market is ultimately determined by a range of factors related to perceived and demonstrated risk, levels of disputation and claims. We are currently in a particularly hard market, with insurers seeking to bring balance to the gross loss ratio, as discussed above.

In general, insurers are unlikely to offer coverage for 'contractually assumed liability'. For example, insurers generally do not provide PI insurance to cover a professional that promises a higher standard of care in a contract. Where a higher standard is imposed by legislation (as will likely be the case with the Practice Standard) the insurance industry will need to assess how the legislated obligations impact the risk profile of the engineer. It is a matter for an insurer whether they provide coverage or not.

The NSW Government's Regulation Impact Statement indicates that there is not a high risk that the insurance industry will not cover the increased liability of engineers under the Practice Standard – we disagree. While there is currently a small number of insurers willing to offer PI insurance cover for fit for purpose obligations, that cover is not offered to the whole engineering market and is provided on only selected businesses (generally to very large businesses).

Looking back on the HIH insurance collapse, similar assumptions about the availability of future cover were made. A small number within the insurance market confirmed they could provide cover, but over time could not. The Royal Commission into the HIH collapse found the primary reason for the failure was that adequate provision had not been made for insurance claims and past claims on policies had not been properly priced.³ This collapse had a significant impact for businesses and the community in Australia. The collapse saw a large segment of the market removed which led to the insurance crises'

Consult Australia is concerned that a similar insurance crisis will happen if the NSW Government pursues the fit for purpose obligation, relying on advice that a portion of the insurance market will offer cover. One insurer cannot and will not be able to cover a whole market of professional engineers.

Given the current pressures on the PI insurance market, especially in respect of covering engineers, we cannot risk a repeat of such a crisis. Consult Australia urges substantive engagement with the Insurance Council of Australia and its perspective on fit for purpose obligation on professional services as it informs the position outlined above.

A note from Planned Cover on insurance impacts

Planned Cover is a long-established insurance broking business providing commercial insurance products to Australian professionals. Planned Cover is also a founding member of the largest general insurance broker network in Australia – ASX listed Steadfast Group, giving it buying power and influence in negotiating insurance policy terms, conditions, and price with market insurers. The Planned Cover business has evolved to become one of the more dominant general insurance brokers for consultants in the construction industry, specialising in quality insurance advice, products and risk mitigation strategies for all businesses from sole practitioners through to large international practices.

Planned Cover, having reviewed the proposed Practice Standard noted that imposing a fitness for purpose obligation on professional services providers, such as engineers, raises significant concerns for insurance underwriters. Not only is the purpose extremely difficult to define (raising questions of for who, for what, and for when), it also moves away from the long held common law requirements for engineers.

The market is not equipped to take on this level of insurance risk with only one insurance company willing to offer extensions for contractual fitness for purpose obligations – an offer they are unwilling to offer to every engineer participating in NSW building projects given the level of risk associated. The availability of that extension is at the insurer's underwriting discretion. It also attracts a significant extra premium to an already distressed and at times broken PI insurance market in the construction sector. Without insurance access, engineers cannot practice. The introduction of a fitness for purpose obligation for engineers will create an uninsured exposure in the market and undermine consumer confidence in the construction sector.

³ *Report of the Royal Commission into HIH Insurance Research Note*, Department of the Parliamentary Library (2002-03) No.32, 13 May 2003.

The impact on the market capacity in NSW and flow-on effects to NSW infrastructure

Consult Australia urges the NSW government to consider the broader market when looking to how to improve the building sector in NSW. We have serious concerns that the introduction of the fit for purpose obligation on engineers undertaking building work in NSW will have a significant impact on the market capacity in NSW not just for residential buildings but also flow-on effects to NSW infrastructure.

One of the key reasons for this is that the impact on insurance, as articulated above, will not only be felt by engineers working in the building sector. The available PI coverage pool needs to cover all professionals (and engineers are only a segment of the professional services relying on PI). It is not uncommon for the broader PI pool of service providers to feel the impact on increased claims in other parts of the pool. Similarly, insurers tend to group professions into disciplines rather than sectors, we have seen across the Consult Australia membership accessibility and affordability issues for all structural and fire engineers – not just those that work in buildings.

It is also noted that the NSW government has the ambition to broaden out application of the DBP Act and associated obligations across building classes, which confirms that we must be certain of the impacts now, before it is too late.

Confusion of audience, roles/responsibilities, and legal obligations

Consult Australia is concerned that the Practice Standard, as currently drafted is trying to do too much by:

- talking to different audiences including professional engineers, design practitioners, building practitioners and certifiers.
- confusing the distinct roles and responsibilities of different parties involved in the design, construction and maintenance of buildings. For example, there is confusion about who has the responsibility of; instructing the contractor on the means and methods of construction, such as how to construct or implement something, project management and integration, inspection of construction work, and drafting a client's design brief.
- reiterating obligations from the DBP Act and Regulations unnecessarily.

As the Practice Standard is directed to and enforceable against professional engineers registered under the DBP Act, Consult Australia advocates for clarity throughout the Practice Standard to ensure the audience is that cohort.

It is vital to enforceability and acceptance by all parties, that the Practice Standard does not require professional engineers to undertake the roles and responsibilities of other parties involved in the design, construction and maintenance of buildings. On-site disputation is the most likely result of multiple parties having the same obligations under law and will only further confuse who is responsible for what (rather than provide the clarity of roles and responsibilities sought by the government). For example, the current drafting seems to impose obligations on professional engineers to determine the means and methods of construction, such as how to construct or implement something, which should be the responsibility of the building practitioner.

To reiterate our earlier advocacy, professional service providers and building practitioners have very distinct roles and responsibilities:

- **Professional service providers, such as professional engineers** provide intangibles. Their promise is to deliver that service to the appropriate level of quality, not to guarantee the future or the outcome. Therefore, engineers cannot guarantee the final build as they do not have control of the construction.

An engineer's obligation is to perform the services to the standard of skill, care and diligence as is generally exercised by competent members of the engineer's profession performing services of a similar nature at the time the services are provided.

- **Building practitioners** provide tangibles, in providing the final build. Their promise is to deliver that final build. A builder's obligation is to deliver that outcome and for it to be of satisfactory quality and fit for the intended purpose.

Therefore, a professional engineer should be providing engineering advice, not advice on the means and methods of construction. Advice on the means and methods of construction, such as how to construct or implement something, is the role of a building practitioner. Professional engineers are only one part of the ecosystem that comes together to design, build and maintain the final product. Not all liability can rest with the engineer just like not all liability can rest with the building practitioner.

If the priority of the NSW government is to increase conversations on the means and methods of construction, such as how to construct or implement something earlier in the design phase, that is different to the obligations in the Proposed Standard. Consult Australia supports clients bringing together building practitioners, designers and engineers together early to discuss the means and methods of construction, such as how to construct or implement something. However, we cannot support a unilateral obligation on engineers to bring about this when they often do not have the contractual relationships in place to do so – that is the responsibility of the client. It is vital that the distinct abilities, skills and responsibilities of each party are noted and respected.

The costs undermine any potential consumer confidence and community safety

Consult Australia supports the role of governments to address policy problems and market failures, as well as to ensure consumer safeguards are in place and met. In the lead up to the enactment of the original DBP Act 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 our members supported and continue to support core aspects of that reform. We continue to support a focus on quality design before construction starts and improving the relationship between designers/engineers and builders.

However, we have significant concerns with the drafting of the Proposed Standard and cannot see how it could in practice realise the consumer confidence and community safety aspects sought by the NSW government, especially noting the significant costs not only to professional engineering businesses, but also the wider market and the community.

As indicated above, the introduction of the proposed fit for purpose obligation will have wide reaching impacts on the supply chain. Not only is it likely that businesses providing professional engineering services on Class 2, 3 or 9c buildings in NSW will face increased insurance premiums, which will need to be recouped via client fees, other costs will rise. For example, having various practitioners on-site involved in project management, integration of designs and instructing the contractor on the means and methods of construction, such as how to construct or implement something, will raise the costs of those practitioners, but also increase delays and disputation as the boundaries of each practitioner's role and responsibility becomes unclear. This uncertainty will cost consumers and the community in the longer term rather than deliver the confidence and safety aspects sought. In the view of Consult Australia, the natural market impacts of these increased costs and unreasonable liability risks will severely constrict the market and we may well find that the only business willing and able to provide professional engineering services on NSW buildings will be either very large businesses that can afford whatever insurance is available to cover the risks, or smaller operators who either don't understand the risks or are under-insured for the risks. This begs the question; how will an end-user/occupier of a building get resolution if there is no insurance to cover the liability imposed by the Practice Standard?

It will not just be engineering businesses involved in class 2, 3 or 9c buildings that will feel the impacts of the insurance restrictions. As discussed above, insurers are likely to impose premium increases based on discipline rather than sector. This will therefore impact NSW infrastructure projects.

Our members already heavily invest time and resources in understanding the implications of the NSW regulation to ensure compliance of their people and businesses, as they rightly should. However, our members estimate that the onerous and complex proposals in the proposed Practice Standard will

require a further 20-30% investment to keep abreast of the changes and to check compliance. This is a particularly significant capacity impact, especially in a market that is struggling to meet the people supply required for pipeline demand. Consult Australia advocates for regulations that address policy problems in the most effective and efficient way – this means that regulations should be written in plain language, be clear and concise, and have a focus on comprehension by those being regulated.

The Regulatory Impact Statement for the Proposed Standard explicitly talks about the purpose of the design being linked to community expectations. How would a professional engineer garner the purpose of a design from the community? The professional engineer can only provide advice based on the instructions of the client and in line with technical requirements (such as relevant Australian Standards and the National Construction Code (NCC)).

Determining liability for a professional engineer for meeting a 'purpose' will see increased disputation, we will see lawyers engaged to argue what the 'purpose' of a client's brief was. This will drive up the cost for clients without any increase in consumer confidence or community safety. The Standard as drafted will not increase certainty for professional engineers about what quality engineering practice is in NSW.

The of detail and technical aspects need deeper and more comprehensive engagement and consideration

Consult Australia has not had sufficient time to dive into the detailed and technical aspects of Part 8 of the proposed Practice Standard '8 Additional obligations for specific registrations and specific engineering work'. However, the clear feedback from members specialising in each of the disciplines impacted is that many of the requirements:

- are rigid and unlikely to be suitable for all situations and will negatively impact best practice and market capacity and capability
- are incomplete and not exhaustive, leading to the risk that a professional engineer will rely only on the Practice Standard list of requirements and therefore miss other addition obligations, impacting the quality of design negatively
- are subjective
- blur the roles and responsibilities of different practitioners (as discussed above)
- are not achievable, or cannot be guaranteed (e.g. 'no damage')
- are beyond the scope of their expertise and training given their particular discipline
- include vague and undefined terms unnecessarily exposing the professional engineer to liability
- has extracted detail from other sources (such as the Society of Fire Safety Practice Note) out of context and no fully, which could
- overlap with existing WHS obligations and standards and are therefore unnecessary or could add confusion.

It is unclear what the purpose of the NSW Government mandating these detailed technical obligations are. Comprehensive consultation with practitioners in each discipline is highly recommended.

RECOMMENDATIONS

In the spirit of collaboration, Consult Australia has attached a marked-up version of the Practice Standard to addresses many of the core problems identified above. We believe that there are more pragmatic and effective ways in which to regulate the work of professional engineers to bring about improved consumer confidence and community safety as wanted by the NSW Government.

Our recommendations, as reflected in the marked-up Practice Standard include:

1. Amend the fit for purpose obligation to more clear and certain obligations on professional engineers.
2. Simplify and streamline the Practice Standard to remove sections:
 - a. addressed to audiences other than professional engineers registered under the DBP Act
 - b. that duplicate or explain existing obligations in the DBP Act or associated Regulations (including the Code of Practice)
3. Amend to ensure clarity and consistency on the various roles and responsibilities of different practitioners, particularly the role and responsibility of a professional engineer.
4. Delete unnecessary detailed or technical aspects that seem overly prescriptive (until as least more comprehensive consultation is undertaken with a broad stakeholder group of engineers from relevant disciplines to think through fully the potential impacts).

Consult Australia remains committed to assisting the NSW Government achieve effective and efficient regulation and would therefore seek further discussions where the government does not believe our recommendations achieve the objectives sought.

RESPONSE TO THE COLLATED QUESTIONS

The questions are taken from [the Regulatory Impact Statement: proposed Practice Standard for professional engineers](#)

Application of the practice standard for professional engineers

1. Do you propose any changes to the definition of 'professional engineering work'?

Consult Australia recommends that the Practice Standard use the same defined terms as already in the DBP Act. The definition of 'professional engineering work' for the Standard should therefore be the same as in the DBP Act, unless the Standard is only to apply to a subset of professional engineers registered under the DBP Act.

Insurance

2. Do you support the current insurance approach requiring 'adequate cover'? Why or why not?

In this submission, we restrict our commentary to the Practice Standard.

Consult Australia recommends that the Practice Standard does not include any additional provision on insurance, over what is already in the DBP Act and DBP Regulations. For this reason, our marked-up proposed changes to the Practice Standard delete the section dealing with insurance.

As indicated in this submission, Consult Australia has significant concerns about the insurance impacts of the obligations in the Practice Standard as drafted. As previously advised, the professional indemnity insurance market is not within the practitioner's control, and neither is the cover made available.

We have previously made extensive submissions about the insurance requirements under the DBP Regulations and remain committed to those comments.

3. Do you think mandatory insurance requirements should be prescribed? If so, what should be prescribed?

In this submission, we restrict our commentary to the Practice Standard.

Consult Australia recommends that the Practice Standard does not include any addition provision on insurance, over what is already in the DBP Act and DBP Regulations. For this reason, our marked-up proposed changes to the Practice Standard delete the section dealing with insurance.

4. What alternative approaches to ensuring Professional Engineers and other regulated practitioners under the DBP Act could be considered in providing confidence of an adequate remedy to non-compliant work by practitioners?

This question goes to the heart of the NSW reform, and the underpinnings of the DBP Act. In this submission, we restrict our commentary to the Practice Standard.

In terms of the Practice Standard, we do not believe the current drafting will provide the confidence or remedy needed. Our recommendations and marked-up proposed changes to the Practice Standard should assist the NSW Government. We would be willing to collaborate with NSW Government on alternative approaches, if that is an option.

Design must be fit for purpose

5. Do you support the introduction of the 'fit for purpose' obligation for professional engineers carrying out design work? Why or why not?

Consult Australia, in the strongest terms, does not support the introduction of the fit for purpose obligation for professional engineers carrying out design work. The extensive reasons for this are set out above.

However, to assist the NSW Government implement a pragmatic and practical Standard we recommend the redrafting of relevant provisions as per the attached Proposed Changes to the Practice Standard by Consult Australia.

6. Do you support the proposed criteria for 'fit for purpose'? If no, what changes would you propose (either adding, removing or enhancing criteria proposed)?

Consult Australia, in the strongest terms, does not support the introduction of the fit for purpose obligation for professional engineers carrying out design work. The extensive reasons for this are set out above.

However, to assist the NSW Government implement a pragmatic and practical Standard we recommend the redrafting of relevant provisions as per the attached Proposed Changes to the Practice Standard by Consult Australia.

7. What other measures could be utilised to ensure that designs prepared by professional Engineers are fit for purpose?

Consult Australia, in the strongest terms, does not support the introduction of the fit for purpose obligation for professional engineers carrying out design work. The extensive reasons for this are set out above.

However, to assist the NSW Government implement a pragmatic and practical Standard we recommend the redrafting of relevant provisions as per the attached Proposed Changes to the Practice Standard by Consult Australia.

Minimum standards for design work

8. Do you support the introduction of design obligations on Professional Engineers? Why or why not?

Consult Australia does not support the introduction of detailed technical obligations as drafted in the proposed Standard. The reasons for this are set out above.

However, to assist the NSW government implement a pragmatic and practical Standard we recommend the redrafting of relevant provisions as per the attached Proposed Changes to the Practice Standard by Consult Australia.

9. Do you think additional obligations are required in the design phase to ensure higher quality of designs? If so, what?

Consult Australia does not believe additional obligations are required but is willing to collaborate with the NSW Government to address any perceived gaps observed by the Department.

10. Do you think additional requirements are necessary to ensure consumers receive the information they need from Professional Engineers undertaking work on their behalf?

Consult Australia does not believe additional requirements are required, but is willing to collaborate with the NSW Government to address any perceived gaps observed by the Department.

Independent Third-Party Review

11. Do you support introducing mandatory independent third-party review for engineering designs on high risk or complex building projects?

Consult Australia has been involved in the Commonwealth project on building reform, talking to this point. Essential to any such requirement is consistency across jurisdictions as well as clarity and consistency on the definition of a 'complex building'.

12. Do you support making the developer responsible for seeking third party review when required? If no, who do you think should be held responsible?

As above.

13. Do you support the use of the 'building complexity' definition in the NCC as a baseline to identify high-risk or complex buildings? Why or why not?

As above.

14. How could we better define what 'high-risk' work is to complement the use of 'building complexity' as a measure to ensure independent third party review is proportionate to the risk of the work?

As above.

15. Do you think performance solutions should be subject to independent third party reviews? Why or why not?

As above.

16. This proposal is currently limited to introducing mandatory third party review of engineering designs. Do you think there is a need for expert review of other types of design work?

As above.

17. Do you support the proposed obligations for Professional Engineers when undertaking third party review, as set out in the draft Practice Standard?

Where relevant, Consult Australia has marked up proposed changes to the Practice Standard..

18. What additional obligations or guidance could be created for other practitioners to ensure that the work of a Professional Engineer undertaking independent third party review enhances the compliance, safety and resilience of the relevant building (for example, changes to the Certifier Practice Standard)?

As above.

Carrying out On-Site Inspections

19. Do you support the introduction of a positive obligation on Professional Engineers to carry out on-site inspections? Why or why not?

Consult Australia does not support the introduction of a positive obligation on Professional Engineers to carry out on-site inspections, as it blurs the roles and responsibilities of different practitioners. We have set out the issues we see above.

However, to assist the NSW government implement a pragmatic and practical Standard we recommend the redrafting of relevant provisions as per the attached Proposed Changes to the Practice Standard by Consult Australia.

20. The proposed Practice Standard allows that a Professional Engineer is permitted to use their experience and expertise to determine sufficient inspections for a project. Do you support this approach?

Consult Australia does not support the introduction of a positive obligation on Professional Engineers to determine sufficient inspections. At most the professional engineer could offer advice on this.

However, to assist the NSW government implement a pragmatic and practical Standard we recommend the redrafting of relevant provisions as per the attached Proposed Changes to the Practice Standard by Consult Australia.

21. What guidance would support Professional Engineers to make informed decisions regarding the number of inspections for a project?

Consult Australia does not support the introduction of a positive obligation on Professional Engineers to make decisions on the number of inspections. At most the professional engineer could offer advice on this.

However, to assist the NSW government implement a pragmatic and practical Standard we recommend the redrafting of relevant provisions as per the attached Proposed Changes to the Practice Standard by Consult Australia.

22. If the proposed Practice Standard were to include mandatory inspection schedules for Professional Engineers instead, would you support this approach? If yes, what criteria would you suggest for when an inspection should take place?

Consult Australia would be interested to discuss further this idea of scheduled mandatory inspections. As noted throughout our submission, the roles and responsibilities of the professional engineer and other practitioners in the mandatory inspections would need to be clear.

Additional Obligations for Specific Registrations and Specific Engineering Work

23. Are there any further obligations that should be introduced for specific classes of Professional Engineer? If so, what are they and why? Please be specific on what further obligations you consider necessary, the desired outcome sought and your views on how it could be prescribed.

No.

24. Are there any further obligations that should be introduced for engineering work on specific building parts? If so, what are they and why? Please be specific on what further obligations you consider necessary, the desired outcome sought and your views on how it could be prescribed.

No.

25. Should any of the proposed additional obligations set out in Chapter 8 of the proposed Practice Standard that should be removed? If so, what are they and why?

As stated above, Consult Australia recommends comprehensive consultation on Chapter 8 given the problems with the drafting and the application of the technical additional obligations.

To start the process, we note key concerns as per the attached Proposed Changes to the Practice Standard by Consult Australia.

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