# Consultation Report

Design and Building Practitioners Regulation 2021

April 2021

NSW GOVERNMENT

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Minister's Message

I am proud to present this Consultation Report on the Design and Building Practitioners Regulation 2021.

Recent building incidents have emphasised the devastating impacts that building defects have on residential owners and occupants. The NSW Government is committed to supporting the building and construction sector and providing NSW with a built environment that puts safety and quality at the top of the list.

In June 2020, this commitment was achieved through the passage of the *Design and Building Practitioners Act 2020* through Parliament. This regulatory scheme ensures those who control the risks – Design and Building Practitioners as well as Professional Engineers – are held responsible for their work. This complements existing obligations on developers and builders.

The Government has consulted extensively with industry and the community in developing the supporting regulations in readiness for commencement on 1 July 2021. This Consultation Report outlines the Government's positions on key aspects of the Regulation, informed by the recent public consultation on the draft Regulation as well as targeted consultation that occurred with industry experts.

Submissions were received from industry associations, people working in the building and construction industry, owners or people who live in apartments, associations representing apartment owners and members of the general community. My sincere thanks to all who took part. Your feedback has been critical to refining the Regulation and ensuring we get the balance right between raising standards and supporting growth in the building and construction sector.

Publishing the Regulation is a significant milestone towards realising the benefits of these reforms in restoring public confidence. It will enable businesses and people working in the industry to begin preparations for transitioning into the scheme.

I look forward to the Government continuing to work in partnership with industry and the NSW community to ensure a smooth implementation.

Kevin Anderson MP

**Minister for Better Regulation and Innovation**

# Glossary

The following is a list of terms and acronyms used in this document.

| Term | Description |
|---|---|
| **2019 Government Response** | NSW Government Response to the *Building Confidence Report* released on 19 February 2019. |
| **ABCB** | Australian Building Codes Board – a Council of Australian Government standards writing body that is responsible for the development of the *National Construction Code*. |
| **BCA** | *Building Code of Australia* – contained within the *National Construction Code* and provides the minimum necessary requirements for safety, health, amenity and sustainability in the design and construction of new buildings (and new building work in existing buildings). |
| **Building Compliance Declaration** | The declaration a Building Practitioner is required to make declaring matters such as whether the building works comply with the *Building Code of Australia*, whether building work was built in accordance with the regulated design for that work and whether a registered Principal Design Practitioner was appointed (s. 8(3) of the Act sets out the matters to be declared in full). |
| **Building Confidence Report** | '*Building Confidence: Improving the effectiveness of compliance and enforcement systems for the building and construction industry across Australia*' report by Professor Peter Shergold AC and Ms Bronwyn Weir, commissioned by the Building Ministers' Forum in 2017. |
| **Class 2 building** | Class 2 buildings are apartment buildings. They are typically multi-unit residential buildings where people live above and below each other. Class 2 buildings may also be single storey attached dwellings where there is a common space below. For example, two dwellings above a common basement or carpark.<br><br>A building, with a class 2 part, is a building of multiple classifications that has a class 2 as well as another class, making it a "mixed-use building" (for example, a class 2 with a class 5 which are office buildings used for |

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| | professional or commercial purposes or a class 6, which are typically shops, restaurants and cafés). |
| **Compliance Declaration Practitioners** | Design Practitioners, Principal Design Practitioners and Building Practitioners who are registered under the Compliance Declaration Scheme. |
| **Compliance Declaration Scheme** | The registration of Design Practitioners, Principal Design Practitioners and Building Practitioners to provide compliance declarations. |
| **Design Compliance Declaration** | The declaration a Design Practitioner is required to make declaring matters such as whether the design complies with the *Building Code of Australia*, whether the design integrates other relevant designs, whether other standards, codes or requirements have been applied in preparing the design (s. 8(1) of the Act and cl. 9 of the Regulation sets out the matters to be declared in full). |
| **EP&A Act** | *Environmental Planning and Assessment Act 1979.* |
| **EP&A Reg** | Environmental Planning & Assessment Regulation 2000. |
| **Low rise building** | A class 2 building or a building containing a class 2 part, limited to:<br>• a maximum gross floor area of no more than 2,000m$^2$, but not including Type A or Type B construction.<br>*For further information on Type A and Type B construction refer to Volume 1 Specification C1.1 of the Building Code of Australia* |
| **Medium rise building** | A class 2 building or a building containing a class 2 part, limited to:<br>• a maximum of 3 storeys (not including 1 storey (ground or first storey) classified as 7a building (carpark)) but not including Type A construction (for class 4, 5, 6, 7a, 7b and 8).<br>The Dictionary at the end of the Regulation sets out the definition in full. |

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| **NCC** | *National Construction Code* – a performance-based code containing all performance requirements for the construction of buildings. The *Building Code of Australia* sits within the NCC. |
| **NSW Planning Portal** | The digital portal where documents such as regulated designs and compliance declarations will be lodged. |
| **OBC** | Office of the NSW Building Commissioner sitting within the Department of Customer Service. |
| **OC** | Occupation Certificate – authorises the occupation and use of a new building or building section. |
| **Pathway 1** | For engineers – person applies to Fair Trading providing evidence of required qualifications, skills, knowledge and experience requirements set by Fair Trading and in the Regulation. Fair Trading sets all ongoing requirements for insurance and CPD and monitors compliance. |
| **Pathway 2** | For engineers – person applies to Fair Trading providing evidence of registration or recognition from professional engineering body who has a scheme approved by Fair Trading. Engineering body sets all ongoing requirements for insurance and CPD in accordance with the scheme approved by Fair Trading and both the body and Fair Trading monitor compliance. |
| **Pathway 3** | For engineers – person applies to Fair Trading providing evidence of registration or recognition from professional engineering body operating with a Professional Standards Scheme (PSS). Engineering body sets ongoing registration requirements in accordance with the requirements of the PSS and both the body and Fair Trading monitor compliance. |
| **Principal Compliance Declaration** | A declaration made by a Principal Design Practitioner, if one is appointed, as to:<br>• whether or not a Design Compliance Declaration has been provided in the required manner for each regulated design prepared for building work |

| | |
|---|---|
| | • whether or not the Design Compliance Declarations were prepared by a registered Design Practitioner who is authorised to do so. |
| **Professional Engineers Scheme** | The registration of engineers to carry out professional engineering work. |
| **PSS** | Professional Standards Scheme – a scheme approved by the Professional Standards Council within the meaning of the *Professional Standards Act 1994* that is in force. |
| **Recognised engineering body** | Professional body of engineers that has been assessed by the Secretary to recognise or register Professional Engineers. |
| **Regulated design** | A design that is prepared for a building element for building work, or a performance solution for building work (including a building element). |
| **RIS** | Regulatory Impact Statement. |
| **The Act** | *Design and Building Practitioners Act 2020.* |
| **The Regulation** | Proposed Design and Building Practitioners Regulation 2020. |
| **The Regulator** | NSW Fair Trading/Office of the NSW Building Commissioner. |
| **Variation statement** | A record of building work that is varied from a regulated design for the work after the commencement of the work but does not involve a building element or performance solution (see cl. 27 of the Regulation for complete requirements). |
| **Washington Accord** | The Washington Accord is an international agreement between engineering bodies responsible for the recognition of engineering qualifications. For Australia, these qualifications are listed in the 'Accredited Engineering Program Directory.' Please see website link at: https://www.engineersaustralia.org.au/About-Us/Accreditation/Accredited-Engineering-Program-Directory |

# Executive summary

The Design and Building Practitioners Regulation 2021 (**Regulation**) intends to give legislative support for the operation of the *Design and Building Practitioners Act 2020* (**Act**) to facilitate its commencement on 1 July 2021.

The Act and Regulation deliver on the reforms committed to by the 2019 Government Response to the *Building Confidence Report*, commissioned by the national Building Ministers' Forum and authored by Professor Peter Shergold AC and Ms Bronwyn Weir. The Act and Regulation aim to improve compliance and enforcement systems for the building and construction industry in NSW.

Key features of the Regulation include:

- setting the scope of 'building work' to be work on a building if the building, or a part of it, is a class 2 building, and additionally exempting specific building work. This scope of building work serves to trigger requirements for registration of certain practitioners and obligations for making Compliance Declarations under the Act;
- setting the scope of 'professional engineering work' to be work carried out directly in relation to designing or constructing a building if the building, or a part of it, is a class 2 building. The scope of professional engineering work serves to trigger requirements for registration;
- classes of registration for Design Practitioners, Principal Design Practitioners, Building Practitioners and Professional Engineers, including the relevant insurance, qualification, skills, knowledge and experience requirements for registration in each class;
- establishing Codes of Practice that Design Practitioners, Principal Design Practitioners, Building Practitioners and Professional Engineers must comply with to maintain registration;
- Continuing Professional Development (**CPD**) requirements that apply to Design Practitioners, Principal Design Practitioners, Building Practitioners and Professional Engineers to maintain registration;
- obligations for lodging regulated designs and compliance declarations;
- processes for registering Design Practitioners, Principal Design Practitioners, Building Practitioners and Professional Engineers, including the recognition of professional bodies of engineers to assess and monitor compliance of Professional Engineers they register or recognise; and
- prescribed penalty notice offences.

The legislative scheme requires the registration of practitioners involved in design and building work and creates new obligations on these practitioners to declare their work complies with the *Building*

*Code of Australia* (**BCA**). It also provides for the registration of engineers carrying out professional engineering work.

This Consultation Report has been prepared to:

- outline the Government's positions on key aspects of the Regulation,
- provide a general overview of the feedback received, and
- explain the rationale for any key changes from the draft Regulation.

The draft Design and Building Practitioners Regulation 2020 (**draft Regulation**), accompanying Regulatory Impact Statement and draft Continuing Professional Development (**CPD**) Guidelines, were released for public consultation on the NSW Government Have Your Say website from 20 November 2020 to 11 January 2021. Stakeholders were given the opportunity to provide feedback through a quick poll, survey or by providing a formal submission. There were 231 submissions received (133 survey responses and 98 formal submissions) and 25 quick poll responses received during the consultation period. Further meetings were held with a number of key industry stakeholders to receive targeted feedback on specific policies.

Overall, stakeholders were generally supportive of the nature of the reforms and their aim to strengthen standards and improve accountability in the design and construction of apartment buildings. However, there was some concern about the impact these reforms may have on the industry in terms of the regulatory burden associated with some of the obligations and the potential for delays that will arise as people learn how to adapt to the new rules. There was also a strong view, particularly in relation to the registration of Professional Engineers, that the reforms needed to be extended beyond class 2 building work.

We received a significant number of submissions which provided constructive feedback on the detail of the reforms with suggested amendments, refinements and additions. Key areas which were the focus of submissions included:

- obligations on the Building Practitioner to lodge designs and documents, including the timing of lodgement;
- registration of Design Practitioners including the classes and the qualification and experience requirements for those classes;
- insurance requirements for all registered practitioners;
- scope of the Professional Engineers Scheme;
- registration of Professional Engineers including the classes and Continuing Professional Development requirements; and
- transitional arrangements for work in progress when the reforms commence.

Further information about the public consultation, including some of the submissions received, is available on the Have Your Say website.

Further information about eligibility requirements and how to register under the reforms is available on the Fair Trading website.

# Scope of the reforms

The Regulation applies to design and building work and professional engineering work carried out on class 2 buildings and buildings that have a class 2 component. Class 2 buildings are typically multi-unit, multi-storey residential apartment buildings, but less commonly they can also include single-storey attached dwellings where there is a common space below (for example a granny flat above a principal dwelling, or two dwellings above a basement carpark). The decision to apply the reforms to class 2 buildings first is consistent with the NSW Government's commitment to resolve significant failures in apartment building standards in recent years.

Overall, feedback on the scope of the reforms was mixed with some stakeholders suggesting that class 2 buildings should not capture buildings of 3 storeys or less. These stakeholders were concerned that applying the reforms to low-rise buildings would result in increased costs to consumers carrying out low-budget building work. Other stakeholders recommended the scope of the reforms should be expanded to include other National Construction Code (**NCC**) classes of buildings, either initially or in a staged process after 1 July 2021.

In particular, several stakeholders considered that class 3 buildings (such as boarding houses and backpacker hostels) and class 9 buildings (public buildings such as hospitals, schools, theatres, sporting facilities and aged care buildings) should be prioritised as the next focus for the reforms. Amongst the diverse feedback relating to the scope of the reforms, many stakeholders agreed the reforms should be applied to class 2 buildings in the first instance.

In the Regulatory Impact Statement (**RIS**), the Government acknowledged that while a significant proportion of class 2 buildings are multi-storey buildings, there are also a variety of low-rise buildings that are classified as class 2 developments. Classes of Design Practitioner have been incorporated into the Regulation to recognise the work of building professionals and designers that have the expertise to work on smaller class 2 developments who are not necessarily architects or engineers. This was intended to address concerns about increased costs of small, low-budget projects under the scheme while also ensuring consumers are afforded the benefits of the scheme through better design and construction.

Stakeholder recommendations to exempt smaller class 2 buildings from the reforms entirely were considered, however it was ultimately determined that all class 2 buildings should be regulated given the significant failures in class 2 building standards in recent years. The fact that class 2 dwelling units are not independent of each other also means they have unique requirements under the BCA that are designed to protect the health, safety and welfare of all occupants that should be comprehensively addressed in the reforms. For example, the joining of units by wall, roof or floor can affect each resident's risks in the event of fire and therefore require special rules to reduce the effects of heat, smoke and fire throughout the building.

The Government acknowledges that owners of buildings subject to the Home Building Compensation Fund already have access to protections for incomplete and defective building work in some circumstances. However, the reforms under the Design and Building Practitioners legislation aims to prevent defects from occurring in the first instance by improving transparency in the industry and raising the accountability of designers, builders and engineers.

Many stakeholders recommended the reforms should be extended beyond class 2 buildings, and the Government maintains its commitment to including other NCC building classes in the reforms after the immediate changes are established. The Government will continue to work closely with the industry to progress the reforms. This will involve thorough analysis of the existing arrangements to ensure scheme is not unnecessarily burdensome to practitioners and customers.

In response to feedback, the Regulation has been amended at clauses 12 and 14 to clarify that the reforms are intended to apply to all parts of a mixed-use building, not just the class 2 part.

### Application of the reforms to existing work

The Act and Regulation applies to building and design work where building work on a construction certificate or complying development certificate (the building certificate) has not commenced as of 1 July 2021. This means that for staged building work, building work for a construction certificate that commenced prior to 1 July 2021 is not subject to the reforms. The reforms will apply to design and building work under subsequent construction certificates.

To allow industry to adapt to the reforms, for projects where building work is carried out in the first twelve months of the scheme, lodgement will be permitted on a staged basis for the life of the project. This means that rather than requiring regulated designs for the entire building before building work can commence, regulated designs and declarations only need to be lodged for the building work approved under the particular building certificate. For projects where building work commences on or after 1 July 2022, regulated designs and declarations will be required for the entire building before any building work commences.

As designs prepared before 1 July 2021 may have been prepared by a Design Practitioner who is ineligible for registration, the Regulation will allow those designs to be declared by a registered Design Practitioner who was not involved in supervising or coordinating the design where they are satisfied that the designs comply with the BCA. Ordinarily, a declaration can only be made by a Design Practitioner who has prepared a design, which includes coordinating or actively supervising the design. The extension of who can make a design compliance declaration is a further transitional arrangement to assist industry to adjust to the reforms so that designs that have been prepared by designers who are ineligible for registration can be checked and if compliant, declared by a registered Design Practitioner.

As some projects will be captured by the Act mid-construction, the Building Practitioner will be required to lodge the designs relied upon for the building works, even though the designs and works may not be captured by the Act. These designs may not meet the requirements of the Act and will not have been declared. The Building Practitioner's compliance declaration will not need to cover these building works.

Stakeholders who provided feedback on the transitional arrangements queried how it would impact existing projects and designs that had been prepared before the Act commenced. There was concern the reforms would disrupt building work and designs underway.

The priority for Government is to raise industry standards, restore community confidence and ensure buildings being constructed from July 2021 are designed and built in accordance with the BCA. To realise these goals, the reforms must apply to as many projects as possible from commencement. The transitional arrangements allow industry to catch up with their obligations by phasing in requirements such as lodgement and declarations whilst ensuring the standards upon practitioners that are foundational to the reforms are met.

### Building work

The Regulation excludes certain building work that is not intended to be captured by the scheme. A complete list of these exemptions has been captured under clause 13 of the Regulation.

During the consultation process, stakeholders had a mixed response to the exemptions proposed in the draft Regulation. The majority of stakeholders supported the approach of exempting specific types of building work and generally agreed that a monetary threshold should not be prescribed. However, a minority of stakeholders were not in favour of the exemptions proposed for fire safety and waterproofing. In addition, some stakeholders had suggestions for additional types of work that should be excluded which have been incorporated into the Regulation.

Exemptions relating to maintenance of fire safety have been retained on the basis that these systems are subject to periodic checking and maintenance under existing legislative controls. This allows maintenance work to be carried out so that they continue to comply with the requirements that were in force at the time they were installed. Without the exemption, maintenance on a fire safety system would potentially require the systems to be replaced to meet the requirements of the Building Code in force at the time that the maintenance works are undertaken. The exemptions relating to fire safety orders allow fire safety works to be carried out to improve the fire safety of a building where compliance with the BCA may not be possible or practical.

The Regulation has been amended to ensure that where an individual owner seeks to renovate their bathroom or kitchen, the waterproofing work for the wet areas is not captured. However, where a developer is required to rectify the waterproofing across multiple units, either before or after occupation, this work is captured, despite each waterproofing work being contained within individual

units. This is in response to concerns raised by stakeholders that the exemption for waterproofing may be interpreted too broadly.

Some stakeholders suggested that the Regulation should exclude work under the *Local Government Act 1993*. Councils can use these laws to order an owner or occupier to address issues related to the health and safety of a building. Councils have discretion in relation to the manner of work to be completed, the controls which the work must comply with and the person who is to undertake and/or endorse the work. Similar to development control orders made under the *Environmental Planning and Assessment Act 1979,* it is intended that this work is not captured by the requirements of the Act or Regulation and will be excluded as building work. This is because the existing measures to control how this work is carried are considered sufficient.

The Government acknowledges the HomeBuilder program which provided eligible owner-occupiers with a grant to build a new home, to substantially renovate an existing home or to buy an off the plan home/new home. HomeBuilder was extended to 31 March 2021. While the majority of builds are unlikely to be subject to the reforms, it is possible that a small number of granny flats could be captured (if they fall within the classification of a class 2 development). In response to this issue, an exemption has been added to exclude work that is undertaken using a grant under the HomeBuilder program. Our intent is to ensure that any such work is not subject to delays or increased costs through the need to comply with the new requirements. Accordingly, this type of work is not captured under the Act.

### Professional engineering work

The Regulation continues to limit ‘professional engineering work’ to class 2 buildings and buildings that have a class 2 component. The Regulation has been amended slightly to further define the scope of professional engineering work to engineering work carried out *directly* in relation to the design or construction of a building if the building or part of the building is a class 2 building.

This is in response to concerns raised by stakeholders that the definition of ‘professional engineering work’ was too broad and further clarification was necessary to clearly identify what is and is not professional engineering work. Guidance material will be provided to further clarify the details of what would be captured as professional engineering work.

Feedback was received from some engineering bodies advocating for registration under the Professional Engineers Scheme to beyond class 2 and related mixed-use buildings. Some engineering stakeholders specifically sought extending beyond NCC classified buildings to cover more broadly all types of engineering work.

The Government is limiting the application of the registration scheme to class 2 and related mixed use buildings to complement the compliance declaration scheme while these new requirements on design and Building Practitioners are initially established. This is consistent with the NSW Government’s

response to the *Building Confidence Report*, which identified class 2 and related mixed use buildings as being at the greatest risk in terms of building quality, competencies of practitioners and impacts on end consumers. These risks have been highlighted by significant failures in building standards in this class in recent years.

After the commencement of the new regulatory scheme under the Act, the Government will continue to engage closely with the sector to identify and agree the scope of the broader registration scheme and map out a timeframe for staged implementation of the scheme across other classes of buildings under the NCC. However, it is not the Government's current intention to expand the registration of engineers beyond those working in construction.

In reaching this position, the Government had regard to the findings of the *Building Confidence Report*, and the need to ensure that this new scheme is supported by appropriate regulatory effort to secure the uplift in practitioner capability and building quality. While the scheme as proposed by the Government was initially focused on only Design and Building Practitioners, the expansion to Professional Engineers has created a new part of the industry that must be regulated by Government.

The expansion to regulate engineers under the Act has created an estimated increase in the number of applications received by roughly 250-300% for class 2 alone. To ensure that the Government can design licensing and compliance systems that support practitioners' transition into the new scheme, and ensure that there is also clear accountability for building work on class 2 buildings, it is necessary to stage implementation of the new scheme beyond class 2 buildings, while remaining within the NCC building classes.

The Government remains committed to rolling out to other classes of building and other engineering classes after standing up this fit for purpose model for class 2 buildings.

# Compliance Declaration Scheme: registration

## Design Practitioner classes of registration

The Regulation prescribes the following 18 classes of Design Practitioner. The classes in bold are new classes since the draft Regulation:

Design Practitioner – Architectural

**Design Practitioner – Body Corporate**

Design Practitioner – Building Design (Low Rise)

Design Practitioner – Building Design (Medium Rise)

Design Practitioner – Civil Engineering

Design Practitioner – Drainage

Design Practitioner – Drainage (Restricted)

Design Practitioner – Electrical Engineering

Design Practitioner – Façade

Design Practitioner – Fire Safety Engineering

Design Practitioner – Fire Systems (Detection and Alarm Systems)

Design Practitioner – Fire Systems (Fire Sprinkler)

Design Practitioner – Fire Systems (Fire Hydrant and Fire Hose Reel)

Design Practitioner – Fire Systems (Mechanical Smoke Control)

Design Practitioner – Geotechnical Engineering

Design Practitioner – Mechanical Engineering

Design Practitioner – Structural Engineering

**Design Practitioner – Vertical Transportation.**

Stakeholders were largely supportive of the proposed classes of Design Practitioner as appropriately capturing the types of practitioners who ordinarily prepare regulated designs for class 2 buildings. For the most part, the proposed classes of Design Practitioner, including the scope of authority and eligibility requirements, have not changed significantly since the draft Regulation. However, there were some minor changes made in response to feedback received which are detailed below.

**Changes to classes of Design Practitioner**

The class **Design Practitioner – Body Corporate** was added to clarify that body corporates can register, and to ensure that the scope of authority and eligibility requirements reflect the nature of a corporation and how it can operate as a registered practitioner.

There are no requirements for a body corporate to have experience, qualifications, knowledge or skills to be registered as a Design Practitioner – Body Corporate. The body corporate is authorised to do anything that a registered Design Practitioner who holds any other class of registration can do but only by way of an individual who is an employee of the body corporate and who holds that class of registration.

For example, a registered body corporate would be authorised to make a Design Compliance Declaration for a regulated design for stormwater drainage if they have at least 1 employee who is registered in the appropriate Design Practitioner – Drainage class.

An identical corporate class has also been added for Principal Design Practitioners which operates in the same way.

The class **Design Practitioner – Vertical Transportation** has also been added in response to audits carried out by the Building Commissioner that identified poor quality and incorrect installation of lifts with the building interface. This class of Design Practitioner is highly specialised, and the inclusion of the new class intends to remedy the lack of clarity regarding which practitioner is responsible for designing the interface for the installation of lifts into a class 2 building.

This class of Design Practitioner will not be responsible for declaring the design of a lift as lifts are generally designed and tested overseas under international standards and typically have limited scope for customisation. The approval of the use of lifts in NSW is regulated under the *Work Health and Safety Act 2011.*

Instead, a Design Practitioner – Vertical Transportation will be responsible for designing the interface of the lift with the building to ensure the higher standards required under the BCA and relevant Australian Standards are met. Building Practitioners must then build in accordance with the design signed off by a competent practitioner.

The Regulation also aims to raise industry standards by prescribing higher qualifications for practitioners who specialise in lift interfaces. The Government is working with industry professionals to introduce a specific class of vertical transportation engineering to do this work in the future.

In the meantime, a transitional period has been provided to enable practitioners with the qualifications, skills, knowledge and relevant experience set out in the Regulation to be registered. All applicants will need to have either a specialist qualification in vertical transportation or complete an assessment approved by the Secretary that tests a person's competency to do this design work.

The class of **Design Practitioner – Electrical Design (Restricted)** has been removed in response to stakeholder feedback due to the very limited scope of work for electrical services that is covered by the BCA. It was deemed the requirement for these practitioners to be registered would be overly burdensome with very little overall benefit.

Examples of electrical work covered in the BCA include requirements relating to energy efficiency, emergency lighting, heat and smoke detection and alarm systems. Designs relating to this work can instead be declared by other classes of Design Practitioner such as architectural, building design, and some fire systems designers.

Outside of the reforms, electricians will continue to be required to install systems in accordance with the National Wiring Rules and have their work certified under the *Gas and Electricity (Consumer Safety) Act 2017*. However, the carrying out of this work will not require additional registration under the Act.

Two classes of Design Practitioner included in the draft Regulation have been split into further classes to clarify the difference in the scope of work that the classes are authorised to do. Design Practitioner – Building Design has been split into two classes: **Building Design (Low Rise)** and **Building Design (Medium Rise)**, and Design Practitioner – Drainage Design has also been split into two classes: **Drainage** and **Drainage (Restricted)**. The scope of authority for these classes has otherwise not changed. Both sets of classes ensure that a broader range of qualifications are recognised to enable practitioners to continue to prepare designs for smaller low-risk buildings, preventing consumers from incurring unreasonable costs if they were instead required to contract registered engineers or architects to declare the designs.

The scope of authority for the two building design classes: **Building Design (Low Rise)** and **Building Design (Medium Rise)** was also changed in response to feedback received. Some stakeholders were concerned that the description of work undertaken by building designers conflicted with existing planning obligations under the *State Environmental Planning Policy No. 65* (**SEPP65**) and would cause confusion for practitioners. To resolve this issue, the Regulation now aligns the scope of work done by the two classes with existing planning requirements while maintaining tiers in line with the proposed National Regulatory Framework. This will ensure the transition into this new scheme will not be confusing for practitioners, who are already familiar with the scope of work that can be undertaken by a Building Designer.

The Regulation has added mechanical engineering qualifications as an additional pathway into the **Design Practitioner – Façade** class. This is because feedback suggested that façade engineers with a background in mechanical engineering will have specialist knowledge in materials selection, light reflection and emissivity, thermal conductivity, and sealing for weathertightness (having studied computational fluid dynamics, heat transfer through two- and three-dimensional constructions and the behaviour of materials).

**Changes not adopted**

While many changes to the classes of Design Practitioner under the Regulation were adopted in response to stakeholder feedback, there are some changes that have not been incorporated at this time.

For example, some stakeholders requested that **engineering technologists and engineering associates** should be incorporated as restricted classes of Design Practitioner engineers. This suggestion was not adopted due to the existing requirements of the legislation that limit the scope of work to class 2 buildings and compliance with the BCA. Given these limitations, there would have been little relevant work that would not be more appropriately managed by one of the existing classes of Design Practitioner captured under the new scheme. The requirement for registration would have also been overly burdensome on engineering technologists and engineering associates. Although deemed unnecessary at this point in time, their inclusion may be a relevant consideration when the reforms are expanded to capture other building types in the future.

**Bushfire consultants** were among several other classes of practitioner recommended for inclusion in the Regulation. However, it was determined that where the advice of specialists or consultants feeds directly into the design of a building, it would be captured under the legislation as 'specialist advice', which does not require registration. Instead, this type of advice will be acknowledged in a Design Compliance Declaration prepared by the relevant Design Practitioner who has relied on the advice in preparing regulated designs.

Likewise, **passive fire work** has not been adopted as a separate class of Design Practitioner. This work is already incorporated, and therefore would be declared, within the regulated designs of existing classes (such as architectural, building designers, façade, structural, mechanical and civil).

A number of submissions sought recognition of **geological engineering** as either a separate class of Design Practitioner, or for the class of Design Practitioner – Geotechnical to incorporate geological work. This suggestion raised concerns about the overlap and interrelation between the work of geological engineers and geotechnical engineers. At this time, the Regulation will not prescribe an additional class for engineering geologists. It is understood that an engineering geologist would provide specialist advice which would be taken into consideration in the regulated design prepared by a registered Design Practitioner - Geotechnical.

Recognising the overlap of the work carried out by an engineering geologist and geotechnical engineer, if the applicant can satisfy the qualifications, experience, knowledge and skills to be registered as a Professional Engineer – Geotechnical, they can subsequently be registered as a Design Practitioner – Geotechnical.

This means that the person would only require registration to carry out the work that falls within the role of a geotechnical engineer and not that of a geologist. Amendments have been made to the

scope of work within the '*area of geotechnical engineering'* to specifically indicate that this area of engineering does not include geology or earth science.

This change is intended to exclude the substantive work of geologists from 'professional engineering work' as it is understood that the work of geology and earth science is more indirectly involved in the understanding, behaviour and performance of rock and soil under changes and stress. Guidance material will be provided to ensure this approach is clear. This means that for the most part geologists are intended to fall outside the scope of the reforms and may continue their usual work unregistered.

It is acknowledged that some applicants may have the experience, knowledge and skills to be registered as a geotechnical engineer, but not the required qualifications. An alternative competency pathway is available in these circumstances to ensure that appropriately skilled workers are not prevented from continuing to work under this scheme. While not providing an automatic recognition pathway for engineering geologists, a pathway is nevertheless available for registration as a Design Practitioner – Geotechnical if they meet the competency requirements to be able to declare geotechnical regulated designs.

## Design Practitioner registration pathways

### Experience

Practitioners are required to have at least 5 years' recent relevant practical experience in the last 10 years in their area of practice to be registered under this legislation. This requirement was generally supported by stakeholders. Some stakeholders were concerned that the Regulation should specify that a component of the experience should have been undertaken in Australia, for practitioners to fully understand the BCA.

The Government supports the inclusion of Australian experience in the Regulation as the purpose of the reforms is to ensure compliance with the BCA, and practitioner understanding of BCA requirements is fundamental to the success of the scheme. The Regulation has been amended to prescribe that a minimum of 2 years' recent relevant experience must have been completed in Australia. Where a practitioner cannot meet this minimum Australian experience, they need to demonstrate a minimum of 10 years' recent relevant practical experience and complete a competency assessment conducted by the Secretary or a person approved by the Secretary.

Some stakeholders expressed concerns about the definition of 'relevant' experience, which required that 5 years' experience must be undertaken specifically on class 2 buildings. They felt that this would impractically limit the number of practitioners that would be eligible for registration, given that many practitioners gain experience working across multiple building classes.

To provide flexibility and ensure practitioners can meet the experience requirements, the Regulation now prescribes that 'relevant' experience can be obtained not only on class 2 buildings but also classes 3, 9a or 9c buildings. These classes were considered appropriate due to their comparable

qualities and similar complexity to class 2 buildings. Preparing designs, carrying out building work or doing professional engineering work in the practitioner's area of practice on any of these building classes will be considered 'relevant experience' for the purposes of registration.

Under the Design and Building Practitioners legislation, registration as an architect is a prerequisite for a person to be eligible to also hold registration as a **Design Practitioner – Architectural**. The Regulation will prescribe that the experience for this class, can include the practical experience required for a person to be registered as an architect under the *Architects Act 2003*. For an architect to be registered they must demonstrate to the Architects Board they have completed 3,300 hours of work experience, by submission of a logbook, covering the mandatory elements of competency in the architectural profession.

Taking into account the scope and supervision requirements of the work experience mandated under the *Architects Act 2003*, it is recognised that the experience would be of an adequate standard to be considered equivalent to the relevant practical experience required for registration as a Design Practitioner – Architectural.

This means that the 3,300 mandatory work experience hours accrued prior to a person's application for registration as an architect can be included in the total 5 years' recent relevant practical experience that must be demonstrated to be eligible for registration as a Design Practitioner – Architectural under this legislation. This is the only class where experience accrued prior to registration will be accepted due to the strict controls and mandated requirements that must be demonstrated to the Architects Board for registration.

**Competency pathways: transitional**

Stakeholders raised concerns that the qualifications prescribed in the Regulation would prevent highly experienced and skilled practitioners from continuing to undertake the work they have done for many years. In particular, it became evident that business owners, managers and supervisors who would ordinarily prepare and sign off on regulated designs in their day-to-day work would no longer be able to do so as a result of these reforms.

While the legislation intends to raise competency standards and improve transparency and accountability in the building and construction sector, the intention was never to remove highly skilled and experienced practitioners from the industry.

To mitigate these concerns, alternative pathways have been established for building designers, fire system designers and vertical transportation designers who may not hold the requisite qualifications specified in the Regulation but have extensive experience in their field. Details on the pathways that will be available for these practitioners are described below.

A transitional pathway has been provided for both classes of **Building Designers (Low Rise and Medium Rise)** where an applicant may not hold the prescribed qualifications. This pathway will only be available until 30 June 2022.

The Building Designer must meet the knowledge and skills requirements prescribed in the Regulation and must successfully complete a competency assessment offered by the Secretary or a body approved by the Secretary. The applicant must have 10 years, or equivalent part time, practical experience within the last 15 years, including at least 2 years Australian experience. The practical experience must be on a class 2, 3, 9a or 9c building (or if overseas, a similar building).

Additional pathways have been added for **Fire Systems Designers (except Mechanical Smoke Control)** to allow the Secretary to recognise accredited practitioners (fire safety) in the relevant level 3 – advanced design categories if they also satisfy the five years' experience.

A grandfathering provision has also been incorporated to allow those who have completed the Diploma in Hydraulics design to be registered for the wet fire safety system Design Practitioner classes so long as they are able to satisfy the skills, knowledge and experience. Completion of the Diploma in fire systems design and relevant units will be required for those wanting to be registered as a Design Practitioner for the wet fire safety systems going forward.

The Regulation prescribes various pathways for the new class of **Design Practitioner – Vertical Transportation**. While it is recognised that the engineering university degrees are currently not available in Australia, the intention is to futureproof the Regulation for future courses that will be made available. It will also enable those that may have completed these qualifications overseas to be registered if they meet the prescribed skills, knowledge and experience requirements. To enable persons that are currently working in this industry to be registered, the Regulation will prescribe two transitional pathways.

<u>Option 1:</u> An applicant that holds a Certificate III in the field of electrical or mechanical can apply for registration before 31 December 2021. The Design Practitioner must meet the knowledge and skills requirements prescribed in the Regulation and must successfully complete a competency assessment offered by the Secretary or a body approved by the Secretary. The applicant must have 10 years, or equivalent part time, practical experience within the last 15 years, including at least 2 years Australian experience.

<u>Option 2:</u> An applicant that holds a Certificate IV and above in the fields of electrical, or mechanical, or electronic, or similar technical fields or has a Graduate Certificate in vertical transport engineering can apply for registration before 30 June 2022. The Design Practitioner must meet the knowledge and skills requirements prescribed in the Regulation and must successfully complete a competency assessment offered by the Secretary or a body approved by the Secretary. The applicant must have 10 years, or equivalent part time, practical experience within the last 15 years, including at least 2 years Australian experience.

## Principal Design Practitioner class of registration

The Regulation does not make significant changes to the role of a Principal Design Practitioner. Certain classes remain ineligible to perform this role including the new Design Practitioner – Vertical Transportation. As explained above, a new class of **Principal Design Practitioner – Body Corporate** was added to clarify that body corporates can register.

The role of the Principal Design Practitioner is to coordinate the provision of Design Compliance Declarations for the purposes of building work done by a Building Practitioner. It is not compulsory to have a Principal Design Practitioner, but it may assist the Building Practitioner to have one appointed on large or more complex developments, particularly in relation to complying with their lodgement obligations. To register as a Principal Design Practitioner, you must first be registered as an eligible class of Design Practitioner.

Overall, minimal feedback from stakeholders focussed on the role of a Principal Design Practitioner. Some stakeholders considered that the role should be expanded to other types of building professionals or that the role itself should be expanded to have more oversight over all designs. At this time, it is considered that Design Practitioners (with some exceptions detailed below) are the most appropriate professionals to carry out the role of Principal Design Practitioner. This may be re-examined as the scheme is expanded.

Certain classes of Design Practitioner are not eligible to be registered as a Principal Design Practitioner. This is to ensure that this role is undertaken by a practitioner with a holistic understanding of the design and construction process. That is, the classes of **Design Practitioner – Building Design (Low Rise)**, **Design Practitioner – Building Design (Medium Rise)**, **Design Practitioner – Drainage (Restricted)** and **Design Practitioner – Vertical Transportation** will not be eligible to be registered as a Principal Design Practitioner.

It is important to note that a practitioner who holds multiple classes of registration as a Design Practitioner, including a class that is ineligible for registration as a Principal Design Practitioner, will remain eligible to apply for registration as a Principal Design Practitioner.

## Building Practitioner class of registration

The Regulation will prescribe three classes of Building Practitioner: **Building Practitioner – Body Corporate**; **Building Practitioner – Body Corporate Nominee;** and **Building Practitioner – General**.

The class of **Building Practitioner – Body Corporate** was added to clarify that body corporates can register and ensure that the scope of authority and eligibility requirements reflect the nature of a body corporate and how it can operate as a registered practitioner. For this registration type, the body corporate will be required to hold a contractor licence under the *Home Building Act 1989* and

nominate a person who is a registered **Building Practitioner – Body Corporate Nominee** or **Building Practitioner – General**.

The nominated person would be required to hold an endorsed contractor licence or supervisor certificate under the *Home Building Act 1989* and have the relevant experience working in class 2, 3 or 9 buildings. The nominated person would be responsible for making Building Compliance Declarations on behalf of the corporation and would not be able to operate in their own right unless they hold a **Building Practitioner – General** class. A person registered in this class must hold an endorsed contractor licence under the *Home Building Act 1989* and have the relevant experience working in class 2, 3 or 9 buildings. These Building Practitioners can operate as a sole trader or be nominated by a registered corporate Building Practitioner.

This system is similar to existing licensing obligations under the *Home Building Act 1989* that require a corporation to hold a contractor licence (to enter contracts) and have an employee or director who holds a supervisor licence (holds the qualifications and skills) to contract out building work.

The difference under this scheme is that the nominated person would not need to be an employee or director of the corporation. If the corporation seeking registration intends to nominate a Building Practitioner who is not an employee or director of the corporation, the corporation will need to apply for an exemption under the HBA for a contractor licence on these grounds.

The changes made to the classes of Building Practitioner were a result of the feedback received regarding developers being able to be registered as a Building Practitioner. A number of stakeholders questioned whether a developer would have the required qualifications, knowledge and skills to adequately perform the role.

The legislation intentionally requires whoever is principally contracted to do or coordinate the building work to be registered as the Building Practitioner, which in some cases will be developers if they are in that contractual position. The developer will be required to be registered as a Building Practitioner – Body Corporate and have nominated a person with the qualifications, knowledge and skills to make the declarations on behalf of the developer.

### Deemed registration

The Regulation provides a six-month transitional arrangement for the registration of practitioners. Until 31 December 2021, a person will be able to apply for registration and continue to work under this registration until the application has been processed by the Secretary. This form of registration is known as ‘deemed registration’ and still requires all the same eligibility criteria to be met by the applicant as prescribed by the Regulation. The requirements for the deemed registration have not been amended from the consultation draft of the Regulation. For further information please refer to the RIS.

Feedback received from stakeholders generally raised concerns about the ability for all practitioners to be registered by 1 July 2021 and that a delay in processing applications may result in many not being able to work during this time.

The deemed registration enables persons to continue to work while their application is being assessed by the Department. If a person's application is not approved, their registration will be cancelled immediately.

The Government will work with industry associations to ensure members are prepared for registration. The aim is for practitioners to be able to actively prepare themselves for registration prior to commencement by organising the necessary documents to support their application. This will mean that as soon as a person lodges their paperwork they can continue to work in NSW until their registration has either been formally approved or refused.

The Government will also work with associations to ensure that members understand whether the work they do requires registration and if so, at what stage registration is required. Not all practitioners or work will require registration from 1 July 2021.

To be clear, a person who lodges a complete application between 1 July and 31 December 2021 will be eligible to work in the class of practitioners they have applied for until they are told otherwise (i.e. their application has been refused). The Government will ensure that there is adequate guidance given to individual practitioners, body corporates and peak bodies on this to ensure that there is no unnecessary concern about a person’s ability to work from 1 July.

# Professional Engineers Scheme: registration

## Areas and classes of registration

The Regulation prescribes the area of geotechnical engineering, in addition to the areas of structural, civil, mechanical, fire safety and electrical which are prescribed in the Act. The Regulation also prescribes corresponding classes of registration for these areas of engineering. This has not changed from the consultation draft. The Regulation clarifies that only an individual can apply for registration as a Professional Engineer.

Aside from submissions which sought to expand the scope of the registration scheme beyond class 2 buildings, stakeholders generally supported the 6 areas of engineering. Feedback suggested that these classes covered all aspects of engineering work that would be required for class 2 buildings. Some stakeholders suggested that additional classes of engineering should be considered such as building services engineering, environmental engineering and acoustics engineering.

The suggestions for additional classes were considered but not included in the Regulation as they were either already captured as specialisations of an existing class or otherwise outside the scope of the initial focus of the reforms for commencement on 1 July 2021. Additional areas and classes of engineering will be considered as the reforms are expanded in the future.

Consistent with the approaches for the registration of Professional Engineers in Queensland and Victoria, the Regulation clarifies that only an individual can apply for registration as a Professional Engineer. This means that it is not possible for body corporates to register as Professional Engineers, which differs from the Compliance Declaration Scheme which provides for body corporate registration for practitioners under that scheme.

As Professional Engineers are being registered to carry out professional engineering work it is considered appropriate to ensure that all individuals are appropriately registered and held accountable for the work they do, similar to other occupational licensing schemes. This ensures consistency for engineers who operate across different states.

## Pathways for registration

The Regulation maintains the following three options for the registration of Professional Engineers:

> **Pathway 1:** Person applies to Fair Trading providing evidence of required qualifications, skills, knowledge and experience requirements set by Fair Trading and in the Regulation. Fair Trading sets all ongoing requirements for insurance and CPD and monitors compliance.
>
> **Pathway 2:** Person applies to Fair Trading providing evidence of registration or recognition from Professional Engineering body who has a scheme approved by Fair Trading. Engineering

body sets all ongoing requirements for insurance and CPD in accordance with the scheme approved by Fair Trading and both the body and Fair Trading monitor compliance.

**Pathway 3:** Person applies to Fair Trading providing evidence of registration or recognition from Professional Engineering body operating with a Professional Standards Scheme (**PSS**). Engineering body sets ongoing registration requirements in accordance with the requirements of the PSS and both the body and Fair Trading monitor compliance.

No significant changes have been made to the operation of Pathways 2 and 3, but there have been amendments to the eligibility requirements for engineers registering under Pathway 1 to ensure a smoother transition for the industry on 1 July 2021.

Overall, stakeholders were largely supportive of having multiple pathways for registration available. However, specific feedback on each pathway was mixed. Some stakeholders expressed concern that Fair Trading does not have the knowledge or technical expertise necessary to be able to appropriately assess individuals for registration and regulate engineers once registered under Pathway 1.

While stakeholders were supportive of a co-regulatory approach under Pathway 2, there were some concerns over whether the expectations of professional bodies to assess and regulate the behaviour of engineers was too high, effectively prohibiting bodies to be able to apply under that pathway.

While stakeholders were supportive of engineers as a profession committing to the improvement of standards in the industry, some stakeholders had concerns about the practical operation of Pathway 3 and whether it was a viable option in the short-term. Stakeholders supported its inclusion as a pathway in the Regulation, provided it was not a mandatory pathway.

### Pathway 1: eligibility requirements

The Regulation maintains that all classes of Professional Engineer must have at least 5 years recent and relevant practical experience. The Regulation clarifies these concepts to ensure that the applicant's experience:

- has a duration of 5 years, or equivalent part time, experience in the last 10 years,
- includes at least 2 years practical experience relating to work carried out in Australia by the individual,
- involves carrying out professional engineering work in the area/s of engineering being applied for, and
- involves a class 2, 3, 9a or 9c building.

Stakeholders were largely supportive of the requirement for five years' experience although some suggested that more than 5 years' experience should be required to be registered as a Professional Engineer. There was some concern that engineers that gain their qualifications and experience overseas may not meet the requirements for registration. Due to changes made in the Regulation to

include a requirement for two years' Australian experience, an alternative pathway for a Professional Engineer with only overseas experience has been created.

This pathway will require the applicant to meet the qualification, skills and knowledge requirements and successfully complete a competency assessment offered by the Secretary or a body approved by the Secretary. The experience requirements for this option will take into consideration overseas experience which must be at least 5 years in the last 10 years working on buildings similar to a class 2, 3, 9a or 9c building.

The skills and knowledge requirements for Professional Engineers remains largely the same. The specific knowledge and skills requirements relating to fire safety engineering has been removed. This is so the knowledge and skills requirements are consistent across all classes of engineering. Stakeholders were generally supportive of a standard knowledge and skills list across all classes of engineering.

The qualifications that an applicant must demonstrate for registration as a Professional Engineer under Pathway 1 have not changed significantly from the draft Regulation, and still require:

- a 4-year full-time or equivalent part-time undergraduate bachelor's degree or postgraduate master's degree in engineering relevant to the class of engineering that is accredited by a body that is a signatory to the Washington Accord, or
- a qualification that is not accredited by a body that is a signatory to the Washington Accord, but has been assessed as being equivalent by an Australian signatory to the Washington Accord, or an Australian assessing authority for the skilled occupation and class of engineer.

Minor changes have been made to the class of **Professional Engineer – Civil** to narrow the qualifications that are considered suitable for eligibility. The Regulation has been changed to remove the structural qualifications as a relevant pathway for a Professional Engineer - Civil.

Stakeholders raised concerns that 'structural engineering' qualifications were not appropriate for registration as a Professional Engineer – Civil, as structural engineering is a sub-discipline of civil engineering and they may not have adequate specialist knowledge in civil engineering. A person with structural engineering qualifications will be able to be registered under the class of a Professional Engineer – Structural.

On the other hand, a person with both structural and civil qualifications will be able to be registered under the class of Professional Engineer – Structural. A few stakeholders raised concerns over whether permitting a person with a civil degree to be eligible to be registered in the structural engineering class would lead to a lowering of standards. Given that there are no stand-alone structural degrees, and that a civil degree is the base level degree held by many structural engineers, the Regulation maintains civil as an eligible qualification. Concerns over lowering of standards are

addressed through the additional requirement of needing 5 years' recent and relevant experience, which is relevant to the carrying out of professional engineering work in structural engineering.

Overall, stakeholders were largely supportive of the proposed qualification requirements for the classes of Professional Engineer and the standard being equivalent to the Washington Accord. However, some stakeholders were concerned that engineers with extensive experience in their field but without the required qualifications prescribed in the Regulation, may be prevented from continuing to work from 1 July 2021.

Acknowledging this feedback and the concerns raised by stakeholders, the Regulation will include two new competency pathways to enable these engineers to be registered.

Option 1: This pathway is available for a Professional Engineer who has a qualification in engineering that was completed before the establishment of the Washington Accord in 1989.

This option will be available if the qualification is not considered equivalent to a Washington Accord qualification but has been assessed by an approved body as suitable. The applicant will still need to meet the knowledge and skills requirements prescribed in the Regulation and successfully complete a competency assessment offered by the Secretary or a body approved by the Secretary.

The experience requirement will be 5 years recent and relevant experience in the last 10 years with at least 2 years Australian experience.

Option 2: This pathway is only available until 30 June 2022 for a Professional Engineer where their qualification may not be *equivalent* to a qualification under the Washington Accord.

To be eligible the applicant must have a qualification that is 'relevant to that class of engineering' and the qualification is assessed as being suitable by an approved body. They must be able to meet the knowledge and skills requirements detailed in the Regulation.

The experience requirements will be 10 years, or equivalent part time, practical experience within the last 15 years, including at least 2 years Australian experience. The practical experience must be on a class 2, 3, 9a or 9c building (or if overseas, a similar building). The applicant must successfully complete a competency assessment offered by the Secretary or a body approved by the Secretary.

While the legislation intends to raise competency standards and improve transparency and accountability in the building and construction sector, the intention was never to remove highly skilled and experienced engineers from the industry.

### Pathway 2: Professional Engineering body requirements

Part 5 of the Regulation sets out certain minimum requirements that must be met for a Professional Engineering body to be eligible to become a recognised engineering body under Pathway 2. Two key changes have been made to these requirements to strengthen how a professional body deals with conflicts of interest and membership.

The Regulation will require Professional Engineering bodies to include a process that provides for the body to make a written declaration that they do not have a conflict of interest, whether actual, perceived or otherwise, in carrying out an assessment of an application. The mechanics of this process will be determined when Fair Trading recognises a Professional Engineering body to balance the concerns in relation to conflicts of interest with a process that is not too administratively burdensome.

Amendments have been made to the Regulation to clarify that a recognised Professional Engineering body must accept applications for assessment from both members and non-members of their organisation.

Stakeholders were concerned that the dual role of Professional Engineering bodies in setting the process for registration and also benefiting monetarily from this process may cause a conflict of interest. By ensuring that the registration scheme provided by a Professional Engineering body is available to all applicants irrespective of membership, this clearly identifies that the scheme is not intended to link to an existing membership scheme of the organisation.

The additional provisions included in the Regulation will build on existing provisions that require an impartial process for registration under Pathway 2. In addition, it is proposed that both Fair Trading and Professional Engineering bodies will be responsible for monitoring compliance.

While these measures will ensure a level playing field between members and non-members of the body, the Government remains committed to industry bodies standing up registration or recognition processes. It is critical to the ongoing success of these reforms that industry takes on co-regulatory functions, and it is appropriate that these functions are directly funded by industry.

# Compliance Declaration Scheme: practitioner requirements

## Lodgement

The Regulation continues to require the lodgement of certain documents on the NSW Planning Portal at four key points throughout the life of the building work:

Stage 1 – before building work commences,
Stage 2 – as variations arise after building work commences,
Stage 3 – before the issue of an Occupation Certificate (**OC**), and
Stage 4 – 90 days after an OC is issued.

Only minimal changes have been made to the obligations from the draft Regulation. Stakeholders were largely supportive of Stage 1 and Stage 3. Some noted that these stages are a necessary change to reform the industry. However, numerous stakeholders noted the potential impacts that may arise through delays or increased costs from these obligations.

**Stage 1: before building work commences**

The Regulation requires a Building Practitioner to lodge the following documents to the Secretary on the NSW Planning Portal before commencing building work:

a) copies of the *construction issued regulated designs* for the building work,
b) copies of the design compliance declarations for each of those designs, and
c) a principal compliance declaration for those designs (if a Principal Design Practitioner has been appointed).

A *construction issued regulated design* is a regulated design that:

a) contains the necessary detail to produce building work that would achieve compliance with the BCA, including detail specifying –
    i. the proposed dimensions of the completed building, and
    ii. the characteristics and materials comprising the proposed building, and
    iii. the location of the building elements and systems proposed to be built, and
b) can be used by a Building Practitioner to carry out the work in accordance with the regulated design and the BCA.

Some stakeholders raised significant concern over this stage of lodgement. Specifically, stakeholders suggested that the lodgement of regulated designs should be at key stages that correlate with the building work under each Construction Certificate, rather than for all designs to be lodged before any

construction can commence. The key concern from stakeholders was the cost and delay for implementing this process as it is a significant departure from the current practice.

In maintaining its position, the Government considers that it is necessary to require all regulated designs to be lodged before any building work commences. This is designed to ensure that the Building Practitioner cannot carry out building work until they have the complete set of declared designs for the critical elements of the building that would enable them to start building.

This decision serves to uphold the overarching intention of these reforms – to ensure buildings comply with the BCA and Australian standards and to improve accountability and transparency throughout the design and construction process.

Requiring the designs to be lodged before building commences serves several purposes. Firstly, it means that consideration has been given to the holistic design of the development and Design Practitioners have had the opportunity to consider and integrate relevant designs. It also means that the Building Practitioner has had the opportunity to consider the construction issued regulated designs before building work begins. As building work must adhere to the regulated designs, this aspect is essential. Once the construction issued set of regulated designs are lodged, it signals to the Regulator that building work is pending which may inform the timing of potential audits.

Acknowledging that this lodgement point will be a significant departure from how some parts of the building industry currently operate, transitional provisions have been included to modify the lodgement obligations for work nearing completion on commencement of the new scheme. Staged lodgement will be available for the life of a project where building work has already commenced before the legislation comes into force on 1 July 2021 or commences within the first year of the Scheme (i.e. building work commences before 1 July 2022).

**Stage 2: as variations arise after building work commences**

The Regulation requires a Building Practitioner to lodge the following documents to the Secretary on the NSW Planning Portal no later than 1 day after commencing a variation to building work:

a) a copy of each design compliance declaration for a varied regulated design,
b) a copy of the varied regulated design,
c) a copy of each design compliance declaration for a new building element or performance solution,
d) a copy of the regulated design for the new building element or performance solution.

There was a mixed response from stakeholders to this stage of lodgement. Some stakeholders suggested variations should be lodged before any building work on the variation commences, while others were concerned that the obligation to lodge a varied design within one day of the building work commencing on the variation was unworkable. Many stakeholders also sought a threshold to be imposed on what constituted a ‘variation’ which triggered the lodgement obligations.

The Government has maintained its position in requiring new designs and declarations to be lodged within a day after commencing a variation to building work, in circumstances where building work relating to a building element or performance solution is varied after building work has commenced. This is to ensure that building work relating to a building element or performance solution is built in accordance with a properly declared and compliant design, signifying the importance of these designs and work to the overall building quality.

The Government has not increased the period available to Building Practitioners to lodge after building work on the variation commences as it believes that the current period appropriately recognises the demand on Building Practitioners and balances this against ensuring that substantial work is not commenced without complete designs.

As noted in the RIS, as behaviours change and industry adapts to the reforms, the other obligations should result in better quality and detailed designs at the start of a project. This should reduce the need for, and volume of, variations during construction and may ultimately result in efficiencies which will service to minimise costs, including the costs of delays.

In response to submissions which sought a threshold to be imposed on what constitutes a ‘variation’, the Act already appropriately provides for this, being where building work relates to a building element or performance solution is varied.

In these circumstances, all variations whether they may be considered minor or not, are required to be reflected in a regulated design which has been appropriately prepared and declared by a registered Design Practitioner. All other variations to building work, which do not relate to a building element or performance solution, only require the Building Practitioner to record the details of the variation in a document known as the variation statement.

For example, if a regulated design made provisions for cabinetry unrelated to a building element or performance solution that needed to be varied, the Building Practitioner could make the variation and record it in a variation statement with the necessary detail. The Building Practitioner is responsible for ensuring the building work for the variation complies with the BCA. The Regulation has been amended to further highlight the distinction between the requirements for the different types of variations.

The requirement for building work for building elements or performance solutions to be built in accordance with regulated designs goes to the heart of the reforms. Introducing a threshold that allows a Building Practitioner to deviate from the designs for such works would jeopardise the reforms.

While stakeholders proposed the introduction of a threshold, few suggested where that threshold should be set. Given the broad nature of the works, the difficulty of articulating a threshold that could be applied without having unintended consequences for different circumstances cannot be

understated. The Government will instead monitor and evaluate this aspect once the reforms are commenced.

### Issuing building certificates

Under the Regulation, a principal certifier must not issue an OC for a building to which the building work relates unless satisfied that all building compliance declarations have been provided. This requirement formed part of the draft Regulation which was subject to consultation. In addition, the Regulation now also integrates the role of the certifier from the outset by providing that regulated designs and associated design compliance declarations are provided to the certifier as part of the CC/CDC process.

While there was not any specific feedback on the draft Regulation in relation to the prohibition of an OC, some stakeholders raised concerns about the need to ensure that designs were not only compliant with the BCA but also the relevant development approval. Stakeholders were also keen to ensure that the Design and Building Practitioners scheme integrates seamlessly with the Planning system and that there are no inconsistencies between the two which will lead to confusion.

By integrating the role of the certifier from the outset, this closes a critical gap by ensuring that regulated designs not only comply with the BCA but also comply with the relevant development approval. Overlooking this important consideration could prove problematic if the certifier is provided with documents to determine the OC and the designs do not comply with the relevant planning approval. This would also ensure consistency between the documents being provided to the relevant regulators and certifiers. The role of the certifier would be unchanged, with the declaration operating similarly to a compliance certificate under the *Environmental Planning and Assessment Act 1979*.

It is important that the regulated designs' compliance with the planning approval is considered and confirmed before construction commences. Incorporating the certifier to approve the regulated designs in the beginning may minimise variations, as the certifier can confirm that designs that are lodged are compliant with both the BCA and the relevant planning approval. It also clarifies that the role of the certifier is still integral to the construction process as the independent checker of the documents and work.

The intention is not to displace the Planning process but to align the operation of the schemes. The Regulation prescribes that the documents to be provided to the certifier are those required by the certifier to issue the CC/CDC. The certifier can still issue conditions, for example, that plans for relevant fire safety systems, are to be provided to the principal certifier after issue of the CC/CDC. However, regulated designs will still need to be lodged on the portal before construction can commence as required in the Regulation.

This provision will also deliver more holistically on recommendation 13 of the Building Confidence Report that requires designers to declare their design complies with the NCC and for certifiers to then review the documentation to support the building approvals process.

# Insurance

The Regulation will continue to outline the requirements that Design Practitioners, Principal Design Practitioners and Professional Engineers, registered under Pathway 1, will need to comply with to be considered adequately insured under the Act. However, the Regulation will specifically exempt all practitioners from these requirements for the first two years of the scheme's operation. This means that practitioners will not be required to prove that they hold adequate insurance to be registered under the new reforms from 1 July 2021 until 30 June 2023. No other significant amendments have been made to the requirements at this point.

Stakeholders raised significant concerns regarding the availability of compliant insurance and limitations on the insured being able to make demands on the insurance coverage in a restricted market. Other submissions provided specific feedback on the detail of the insurance requirements and sought clarification about its operation.

Following further consultation with the insurance industry and other key stakeholders, it was determined to include the limited exemption. While it is likely that commercial arrangements for practitioners contracted to work on class 2 buildings will call for insurance, this will not be regulated by the Department for the first two years, subject to the availability of marketable products. This approach will allow more time for insurance products to be developed and ensure that practitioners have time to prepare to meet the insurance requirements.

This decision has not been made lightly and has been made on the basis that the insurance industry and key professional bodies will commit to working with Government to develop insurance products to satisfy the insurance requirements in the Regulation. Work will continue to ensure that the requirements in the Regulation are further refined to ensure that the legislative intent is clear.

The intention of the legislation is to lift standards in the NSW construction sector, which will reduce the risk profile of the sector for insurance. Requiring individuals to be adequately insured for the work they are doing is one way to increase consumer confidence. However, the rest of the scheme which sets standards around the accountability, knowledge and integrity of practitioners who work in the building industry will also achieve this outcome and should make longer term insurance approaches more viable and effective.

Practitioners should be aware that other insurance requirements imposed by other Acts and Regulations still need to be followed.

# Codes of Practice

The Regulation establishes a Code of Practice for Design Practitioners, Principal Design Practitioners and Building Practitioners registered under the Compliance Declaration Scheme, and a separate Code of Practice for Professional Engineers (**DBP Codes**). All practitioners must comply with these Codes to maintain registration. The Codes clearly outline the standards of ethics and professionalism expected of registered practitioners. The substance of the Codes has not changed from the draft Regulation.

Based on the feedback received, there was not any significant opposition to the establishment of Codes of Practice. The feedback largely focused on identifying duties to be included in the Codes, and clarification sought on the operation of the Codes and the meaning of specific duties.

Many stakeholders provided feedback on the types of duties that should be included in the Codes. The majority of suggestions were determined to be already addressed either directly in the Codes or within the body of the Regulation. Some suggested duties were too specific to individual classes of practitioner to be included in a Code of Practice. Other stakeholders suggested mirroring the codes of practice of other professions. In most instances, the key duties of industry codes of practice were already reflected in the DBP Codes, but occasionally the content of non-binding industry Codes was not considered appropriate to be regulated by Fair Trading in the enforceable DBP Codes.

Some stakeholders expressed concerns about the interaction of the DBP Codes with enforceable industry codes. In particular, architects worried that being bound to two distinct enforceable codes could create confusion. The Regulation addresses the interaction of the DBP Code with other industry codes by providing that the Code only applies to practitioners insofar as they are acting within their role as a registered practitioner under the DBP scheme.

However, given that the duties of Design Practitioners and architects and the intended outcomes of both codes are aligned, it is considered unnecessary for practising architects to be bound to both codes for the work that they ordinarily carry out in their capacity as an architect. To reflect this, the Regulation has been amended to provide that persons who are registered in the class of Design Practitioner – Architectural will only be bound to the Code of Practice in the Regulation in relation to the provision of Design Compliance Declarations, leaving the Code of Professional Conduct under the *Architects Act 2003* to regulate their remaining obligations and work carried out as an architect.

Clarification on specific duties within the Code of Practice will be provided in guidance material.

# Continuing Professional Development (CPD)

## Compliance Declaration Scheme

Practitioners under the Compliance Declaration Scheme will be required to complete CPD annually to maintain their registration. Specifically, Design Practitioners and Building Practitioners will need to complete at least 3 hours of CPD activities approved by the Secretary in the guidelines. Principal Design Practitioners will continue to be exempt from the CPD obligations provided they satisfy their CPD obligations under their Design Practitioner registration.

The CPD guidelines provide information about approved education and training, how to calculate CPD, record keeping, exemptions and penalties for non-compliance. This contains only minor changes from the draft. For instance, an additional section has been added to explain how multiple classes of registration operate. For example, if a practitioner is registered as a Design Practitioner in the classes of civil engineering and structural engineering, they will only need to complete 3 hours of CPD activities, with the activities being relevant to both classes. However, if a practitioner holds registration as a Building Practitioner and registration as a Design Practitioner, the practitioner must complete CPD for each type of registration, meaning 6 hours of CPD activity are required.

Stakeholders were generally supportive of imposing CPD obligations on these practitioners and that requiring at least 3 hours annually was reasonable. However, some stakeholders raised concerns that 3 hours was not sufficient, and others were concerned about practitioners having multiple CPD obligations across other licensing or memberships schemes.

While stakeholders were supportive of CPD activities needing to be from approved platforms to ensure quality and consistent outcomes, some stakeholders were concerned that the existing platforms are limiting and do not recognise industry as a relevant player in designing and delivering CPD. Stakeholders also provided valuable feedback on the types of CPD topics and courses that should be developed and made available. These suggestions are being considered.

The requirement for 3 hours has been maintained as it is considered to strike the right balance between addressing skills and learning gaps in the industry and recognising that practitioners also have CPD obligations under other licensing and registration schemes. The Regulation continues to provide the Secretary with the power to require practitioners to complete additional CPD which allows the Secretary to prescribe learning in areas identified as requiring strengthening or that are deemed to be essential to particular practitioners.

The guidelines are limited to approved education and training from the Construct NSW Learning Management System and the National Construction Code CPD programs as these platforms are operational and already have a number of courses available which specifically target knowledge and

understanding of the National Construction Code and Building Code of Australia which is critical to the role of Compliance Declaration Practitioners.

The Construct NSW Learning Management System has been developed to specifically address the skills and learning gaps in the construction sector by creating, sponsoring and approving training courses in partnership with TAFE NSW. Over time, the platform will become a virtual marketplace for industry education and host courses from a range of external bodies.

### Engineers Registration Scheme

Professional Engineers will also be required to complete CPD annually to maintain their registration. Under Pathways 2 and 3, Professional Engineers must complete CPD requirements imposed on them by the professional bodies they are recognised or registered by.

Professional Engineers, under Pathway 1, however, will need to complete at least 50 hours of relevant education and training complying with requirements outlined by the Secretary in guidelines. This is a key change from the draft Regulation which required CPD to be measured in ‘points’. The Guidelines have also changed the number of hours required to meet a Professional Engineers CPD program to reflect the change in approach from ‘points’ to ‘hours’.

Despite these changes, the guidelines will continue to mandate the following minimum requirements for Professional Engineers to meet their CPD requirements:

a. at least 20 hours that are relevant to the Professional Engineer’s area of practice (including reinforcing and updating knowledge of the National Construction Code),
b. at least 3 hours covering risk management,
c. at least 3 hours addressing business and management skills,
d. the remainder addressing activities relevant to the Professional Engineer’s career and interests, provided it is relevant to the engineer’s work and class of registration.

The CPD Guidelines have also been changed to provide information on CPD obligations where an engineer holds registration in multiple classes of engineering. That is, if a Professional Engineer is registered in multiple areas of registration, 15 hours of CPD per year must relate to their area/class of engineering. For instance, if a Professional Engineer is registered as a Professional Engineer – Civil and Professional Engineer – Structural, 15 hours must relate to structural engineering and 15 hours must relate to civil engineering.

We do understand that some CPD activities may relate to multiple areas and so in some circumstances may apply to both areas of engineering. For example, if a Professional Engineer earned 10 hours of CPD relevant to structural engineering and 10 hours of engineering relevant to civil engineering as well as 5 hours of CPD activities that related to both areas of engineering, his would satisfy the requirement when registered under multiple classes of registration.

Stakeholder feedback was largely supportive of the CPD Guidelines including the mandatory topics. Numerous stakeholders advocated for CPD requirements to be in ‘hours’ as opposed to ‘points’. Minimal feedback was received on the proposed formal and informal activities but some support was indicated for this approach. Some stakeholders indicated that the CPD program is overly complex or that consideration should be given to flexibility where engineers work across numerous disciplines.

To provide the consistency with other jurisdictions, the CPD requirements changed from being ‘points’ focus to ‘hour’ requirements and reduced the amount from 60 points to 50 hours. It was clear from the feedback received from stakeholders that they felt it was important to align CPD requirements with other jurisdictions.

In Victoria and Queensland, an engineer is required to complete 150 hours of CPD over a period of 3 years. Consistency across jurisdictions makes it easier for engineers to understand and comply with their CPD requirements if working in Queensland or Victoria as well. The approach aligns with use of hours for the Design and Building Practitioner CPD requirements in the Regulation.

A significant portion of the CPD hours will continue to be formal/structured learning to improve the level of competence, knowledge and skills in the building and construction industry. The intention of this approach is to ensure that a robust CPD program can lift learning outcomes for Professional Engineers.

CPD Guidelines for the Compliance Declaration Scheme and the Engineers Registration Scheme detail specific requirements relating to how practitioner will successfully complete CPD. These guidelines will be available on the Fair Trading website in April 2021.

# Penalty notice offences

The Regulation designates 39 offences under the Act and Regulation as offences where a notice can be issued to the effect that, if the person served does not wish to have the matter determined by a court, the person can pay the amount of the penalty prescribed. The offences and the amounts payable are contained in Schedule 5 of the Regulation. Changes from the draft Regulation include the addition of three new penalty notice offences and increases to the amounts payable for some offences.

One penalty notice offence that has been added is the provision that documents may only be lodged by a registered Design Practitioner, Principal Design Practitioner or Building Practitioner. This has been added to provide sufficient deterrent so that only the appropriately registered people can perform these obligations. Two penalty notice offences are for obligations on Building Practitioners under the transitional arrangements for work already underway relating to lodgement before work commences and providing notice before an application for OC is made. The offences and penalties for the transitional arrangements are consistent with what is in the Act and Regulation for those obligations.

Stakeholders who commented on the proposed penalty notice offences were largely supportive of the offences and the proposed amounts. Some stakeholders requested higher or lower penalty notice amounts for certain offences. Comments included higher amounts for improper registration, fraudulent declarations and insurance. Other feedback suggested staging increased penalty amounts over the first number of years from implementation.

Following a further review, the penalty notice amounts for some offences have been increased to ensure proportionality and consistency. The penalty notice amounts are set at a level designed to deter offending but are a considerably lower penalty than the maximum penalty for prosecution in court.

The amounts that have increased are for the offences that have a maximum penalty of less than $110,000 (1,000 penalty units) if the offence was to be prosecuted in court. These offences include contravening conditions of registration, falsely representing to be a registered practitioner, not being adequately insured and when a registered practitioner fails to notify Secretary within 7 days in writing about certain matters. These penalty notice amounts have been increased so that they are approximately 15% of the maximum penalty to reflect the seriousness of the offences and the intent of the legislation which is to change behaviours and have a positive impact on the building and construction sector.

The remaining penalty notice amounts in the Regulation remain at approximately 10% of the maximum penalty if the offence was to be prosecuted in court.