Response to the Draft
Design and Building Practitioners Regulation 2020

The Riverina Joint Organisation, which represents the General Purpose councils of Bland, Coolamon, Cootamundra-Gundagai, Greater Hume, Junee, Lockhart, Temora and Riverina Water and Goldenfields County Councils has consulted with our Members on *Design and Building Practitioners Regulations 2020* ("**the Regulations**") to prepare this response.

Over a long period of time our Member Councils have consistently raised their concerns relating to the inherent conflict of interest that exists when developers pay private certifiers to approve their developments. Our Member Councils recognise that where a developer has influence over a certifier's livelihood a power imbalance exists that can compromise the certifier's work. While our Members recognise that there are many private certifiers whose work is of high quality there can be no question given the litany of building issues that have arisen over the last decade that not all are providing services at the required level.

Our Members welcome increased regulation but remain concerned that the new legislative regime will not adequately address the power imbalance. We do not believe that increased paperwork necessarily equates to increased compliance. A robust compliance inspection regime that provides timely, independent inspections of newly constructed buildings needs to be delivered concurrently with the new legislation.

We note that Fair Trading is increasing its building and compliance capabilities with the recruitment of new inspectors, however given the amount of building work that takes place in NSW we must question whether capacity can meet demand. It is important that there is a significant, concurrent investment in a compliance regime.

Local Government is well place to provide Fair Trading with support in the delivery of a robust compliance regime. Most residents already expect that councils will take responsibility for fixing constructions problems when things go wrong, therefore it would seem a practicable solution to include local government in the compliance regime.

Our Members also believe given the key role that Local Government plays in planning and approvals that the new legislative regime should recognise that role by working closely with the sector to co-design the delivery of the reforms.

We provide the following feedback on the Regulation; our feedback addresses the issues raised in the Regulatory Impact Statement ("**RIS**"):

1. Scope of the Reforms

Our Members strongly support the application of the regime to Class 2 buildings and mixed-use buildings that contain a Class 2 part. Our Members agree with the State's priority to raise the standards of multi-unit residential developments.

It is our understanding that there is a general resolve to expand the reforms to other types of classes and while this is supported it is important that expansion does not result in the costs of maintaining the regime becoming prohibitive. Our Members strongly support increased protections for home buyers and consumers, therefore expansion to Class 1 and 3 buildings is seen as a priority.

We note that it is proposed that the reforms only apply to the preparation of designs, building work or other work done in respect of a building under an existing arrangement if the first application for the issue of a Complying Development Certificate ("**CDC**") or Construction Certificate ("**CC**") is made after 1 July 2021. The Government is asking that building construction be undertaken in accordance with the relevant planning and building standards, the new regime simply puts into place increased requirements to ensure that this occurs. The 1 July deadline will, we expect, result in a flood of CDC and CCs coming through prior to that date in order to avoid the new regime, creating an uneven playing field for consumers.

Our Members strongly recommend that where a Class 2 building will be completed after the 1 July 2021 that the regime should apply. This recognises that it can take many years for a Class 2 building to complete construction and would stop developers from rushing through CDCs and CCs in order to minimise their end-of-build compliance obligations. This approach would also ensure that home buyers are not forced into a situation where, prior to purchase, they must discover when a CDC or CC was issued for their building in order to determine what compliance regime applies to their purchase.

The new legislative regime is not asking developers and builders to implement more stringent building and construction practices than are already in place. It is merely requesting that they provide better and more detailed paperwork demonstrating that they have adhered to the existing building codes. If they have, in fact, adhered to all the required design and construction codes they should be able to demonstrate this to Fair Trading's satisfaction.

At the very least, we argue that where substantial construction has not commenced by 1 July 2021 then the developer must be required to comply with the new compliance regime, regardless of when the CDC or CC was issued.

2. Regulated Design

Our Member Councils support the extension of the operation of the reforms to designs for performance solutions. These solutions can often be hidden and therefore it is imperative that they are properly documented and are compliant with the Building Code of Australia ("**BCA**").

Our Member Councils agree with the decision to exclude "exempt development" from the regime instead of adopting a monetary value approach. Our Members also agree with the proposal to allow work carried out under a Development Control Order ("**DCO**") to be exempted from the regime, we agree that the existing controls through the planning system are sufficient to regulate this work.

Further, our Members agree that work that involves the repair, renovation or protective treatment of a fire safety system, or repair, renovation or protective treatment involving the maintenance of a component of the mechanical, plumbing or electrical system be exempted.

Our Members have not identified any other works that should be exempted under the regime.

3. Registration of Compliance Practitioners

Our Members strongly support the goal that critical building work is completed by competent, qualified, skilled and experienced people.

The concern our Members have is in relation to the fixed classes for registration of Design Practitioners. In remote, rural and regional NSW and particularly within councils, Design Practitioners may wear many "hats". It would appear that these staff will require multiple registrations, which is of great concern to our Members.

We note that the RIS states that *"practitioners who are registered in the class of Design Practitioner – Civil Engineering are not able to prepare or vary designs that are within the scope of the classes of Façade, Geotechnical and Structural Design Practitioner." (pg. 25)* The RIS goes on to state that *"a Design Practitioner who has the qualifications of a civil engineer but intends to prepare designs relating to a specialised area, such as façade, structural and geotechnical will need to be registered under the specific class to ensure that their practical experience relates to the specialised area."*

While we appreciate that the current Regulation only impacts on Class 2 buildings and that the development of these buildings in remote, rural and regional NSW is low, we are aware that the long-term plan is to expand the regime. The requirement for multiple registrations, particularly by council engineers is likely to add significant costs to councils, particularly if multiple CPD requirements are to apply.

In relation to qualifications, our Members strongly support the introduction of a system that recognises extensive experience in lieu of qualifications, which is consistent with the well-

established Recognition of Prior Learning processes. In remote, rural and regional NSW there are many older practitioners that obtained their industry qualifications many years ago. Further formal study as suggested in the Transitional Arrangements is not only unlikely to be attractive but also of limited value. The outcome of rigidly sticking to a requirement for formal qualifications maybe the loss of highly skilled practitioners to the industry.

In order to ensure that we retain highly experienced staff in remote, rural and regional location there needs to be a more flexible approach adopted in relation to the base-line qualifications required for a Practitioner.

4. Registration of Professional Engineers

As stated above our Members are concerned about the single class registration for Professional Engineers and the need for engineers working in remote, rural and regional areas to register in multiple classes and therefore meet multiple requirements for registration and CPD. While we appreciate that current arrangements only apply to Class 2 buildings, our Members recognise that with the expansion of the regime construction in regional areas will be captured.

Again, echoing our above concerns in relation to Design Practitioners, we have many engineers working in regional areas who gained their qualifications at a time when a degree was not a requirement. A number of the senior engineers working in our Region who fall into this category have indicated that they are not keen to undertake further formal study as it is unlikely to provide them with knowledge that they do not already possess. As stated above our Members would like to see a Registration Pathway that allows these highly experience engineers to be recognised for their substantial experience. This could perhaps be accommodated in the suggested Pathway 1, where NSW Fair Trading regulates the aspects of the registration process.

The Riverina JO is currently in discussions with Engineers Australia about whether the Skills Assessment process they currently use to assess the qualifications of overseas engineers could be adapted for use by engineers working in local government who do not hold degree level qualifications. If this approach is successful, then it could be accommodated in Pathway 2.

In relation to the nominated pathways, we note that the RIS states that there will be cost implications with the adoption of Pathway 1, we encourage the Government to keep this cost at a minimum and we argue that as staff in councils are providing services for the public good, fees for registration should not be levied by the State on councils.

In relation to Pathway 2 and 3, it is a given that Professional Engineers will need to be registered with their professional body and pay the appropriate registration fee. Fair Trading will then be responsible for registering the engineers as per the regime. We are concerned that this may result in council paying two lots of registration fees – once for the engineer to become a member of the professional body and again to register as a Professional Engineer with Fair Trading. We again

encourage the Government to waive the registration fees for Local Government employees, particularly where they may be required to register in multiple classes depending on the roles the engineer fulfills.

5. Compliance Declaration Scheme: Practitioner Requirements

Our Members support the increased obligations in relation to reporting that the regime brings. However, as stated earlier increased paperwork does not automatically lead to increased compliance. It is extremely important that paperwork is underpinned by "groundtruthing" by qualified and experienced inspectors who are able to recognise non-compliance with the lodged documentation. Further it is important that non-compliance be identified in time for appropriate rectification to occur.

This we believe will be the most challenging aspect of the regime. If developers find that providing they lodge all the paperwork they are not likely to be challenged, even if it is not matched by what is happening on the ground, then nothing will change. We know that developers already have a set of Codes and regulations by which they are supposed to abide, and they choose not to. If they are not likely to be caught under the new regime, will what is usual practice for some developers change? Private certifiers are still subject to a power imbalance with developers – will the additional paperwork nullify the imbalance?

The system of declarations will certainly point clearly as to who is to blame, but without a robust on-ground inspection regime it may not be sufficient to change entrenched behaviours.

6. Insurance

Our Members support the requirement for Practitioners to have the appropriate level of insurance. We believe that Practitioners that are employees of councils should be adequately covered by council's insurance policies and wish to ensure that there are no additional requirements for those staff.

We note the Transitional Arrangement proposes the exemption of Building Practitioners from being insured for a period of two years. In line with our argument that any Class 2 building that is completed after 1 July 2021 should be subject to the new regime, we believe that consequently the insurance requirements for the Building Practitioner should also apply from that date. This would provide the home buyer with the assurance that providing the property was completed after 1 July 2021 (issued with its Occupation Certificate) that it is subject to the new regime and the appropriate insurances.

An issue that we believe should be raised because it has the potential to significantly impact on the operation of the new regime is the rising cost of insurance for private certifiers and building inspectors. Our Members have recently been made aware that insurance premiums for private

providers operating in the sector have tripled in a 12-month period. We understand this has resulted in some private providers leaving the sector to seek employment elsewhere. We are concerned that this will significantly impact on smaller councils that are often dependent on contractors to fill service gaps.

7. Continuing Professional Development

Our Members support the requirements for Continuing Professional Development ("**CPD**") with the majority of our Members already meeting the cost of this training for their staff.

We believe it is imperative that there be as much flexibility as possible in requirements to meet CPD requirements while maintaining the integrity of the process. The approach that allows Practitioners and Engineers to utilise existing CPD offerings is cost-effective and efficient.

We are concerned about the size of the CPD obligation for Professional Engineers that are registered in more than one Class. It would be onerous to expect that the engineer complete 60 points for each Class and even a further 30 points, making 90 hours of CPD for the year, would be challenging for a senior staff member in council. We note that the suggested make-up of the CPD points is 30 points relating to the area of practice and then at least 10 points for risk management and business skills with the remaining 20 points to activities relevant to the Practitioner's or Professional Engineer's career.

We suggest that where an Engineer is registered in two Classes that the make-up of the CPD be 25 points relating to each area of practice (Class) and that the balance of the points remain the same.

We also suggest that the Government consider a "credits" system, whereby a Practitioner or Professional Engineer who exceeds his or her obligations in any given year can take CPD credits forward to the next year. This approach would support CPD choices that are the most beneficial to Practitioners and Engineers and not just the ones that satisfy the points.

8. Penalty Notice Offences

Our Members believe that it is important that penalties are in place which are commensurate with the level of the breach. We note that the RIS appears to advocate for a stepped approach in relation to the imposition of penalties, however we would suggest that in order to protect consumers penalties should instead reflect the seriousness of the breach.

We envisage times when the breach that is found warrants the immediate issuance of a Penalty Infringement Notice ("**PIN**") rather than a warning or education. The regime should allow compliance officers to issue the PIN in such instances.

9. Fees

Our Members are very concerned about the additional costs associated with the introduction of the new regime. While we appreciate that Fair Trading wants to ensure that the costs associated with the new regulatory functions are covered, councils want to ensure that this does not result in more expense to them. Private providers will add the costs that Fair Trading levies to the fees they levy to their customers while builders will of course include the costs in the price of the homes they sell.

Councils, however, are faced with different issues and many more restrictions on the manner in which they can recoup their costs. It is not a simple matter of passing the costs through to consumers and customers. Given that Local Government is the third tier of government and that its Designated Practitioners and Professional Engineers are providing services for the public good, we believe that staff employed by councils should have their registration fees waived.

Conclusion

Our Members welcome the opportunity to provide input to draft Regulation. Our Members support the introduction of a stronger regime that will lift standards within the building and construction industry, making everyone more accountable for the work they do.

We would welcome the opportunity to provide further feedback on how the new regime will impact on the operations of Local Government and would be happy to participate in the co-design of elements of the regime as they relate to Local Government.