



ENGINEERS
AUSTRALIA

The issue with insurance requirements for engineers

Engineers Australia submission – NSW Reforming Building Laws

Nov 2022



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1. Introduction

1.1 Purpose of this document

In July 2022 Engineers Australia, Consult Australia and the Insurance Council of Australia raised serious concerns with the NSW Minister for Fair Trading about the insurance requirements for engineers in the *Design and Building Practitioners Act 2022*. This submission from Engineers Australia reinforces the concerns raised about these requirements that put unreasonable burdens on individual engineers and may prevent engineering businesses providing services in NSW. The NSW Reforming Building Laws proposals will perpetuate and extend these design flaws, with the likely outcome that the reforms will not provide the intended protections.

Engineers Australia has prepared three submissions in response to the proposed building reform laws and associated Regulatory Impact Statements. These submissions are:

1. *NSW Reforming Building Laws submission*
2. *Registration of engineers in NSW submission*
3. *The issue with insurance requirements for engineers submission* (this document)

This paper clarifies the reasons why Engineers Australia does not support some of the existing provisions in the Design and Building Practitioners Act, proposed provisions in the Building Bill, and suggests an alternative way forward for the NSW Government.

1.2 Engineers Australia

Engineers Australia (EA) is the peak member-based professional association for engineers. Our work is supported by around 100,000 members, including about 25,000 in NSW. Established in 1919, Engineers Australia is constituted by Royal Charter to advance the science and practice of engineering for the benefit of the community.

The term 'community' is used in its widest sense, and the issues raised in this submission seek to improve outcomes for everyone. Engineers Australia's contribution is designed to help create a legislative framework to deliver a better-performing engineering sector with clearer accountability of those involved.

Engineers Australia maintains national professional standards, aligned with the International Engineering Alliance standards. As Australia's signatory to the International Engineering Alliance, we have authority to accredit higher education engineering programs and credential experienced engineers against international independent practice standards. Engineers Australia also manages Australia's largest voluntary register for engineers, the National Engineering Register (NER).

2. Recommendations

Engineers are not insurance experts

NSW to provide guidance and training to individual professional engineers on their obligations under Section 33 of the *Design and Building Practitioners Act 2020* and how these might change under Clause 35 of the Building Bill 2022, including levels of cover, deductibles, exclusions and policy wording that would be acceptable.

The liability of individuals vs companies and statutory liability for past work

NSW to clarify whether its policy intention is for the duty-of-care and insurance liability is to fall on all individuals who have worked on the design of a building project in the past, or whether its intention is for the liability to fall on the entities that have contracted to do the work.

Increased Statutory Obligations and the Availability of Insurance

NSW to work with the insurance industry and insurance underwriters to identify suitable policies that meet the statutory requirements, including duty of care liability, at an affordable cost.

Conflict between the *Design and Building Practitioners Act* and the new Building Bill

NSW to clarify the intention of both the *Design and Building Practitioners Act* and Building Bill in regard to the limitation on time when action for defective building work or subdivision work maybe brought against engineers.

3. The Insurance Requirements to do Engineering Work

3.1 The Issue

The Building Bill contains provisions that each individual registered engineer must assess and record the risks of their work and the adequacy of any professional indemnity insurance (PII) policy that covers the work. If the individual engineer cannot form an opinion that work to be done is covered by adequate PII, the engineer must not do the work. These provisions are carried over from the *Design and Building Practitioners Act 2020*.

The proposals in the Building Bill do not address issues from the *Design and Building Practitioners Act* and Regulations that our organisation has with the insurance requirements placed on design practitioners, specifically engineers.

These issues include:

- Engineers are not trained in insurance risk assessment and interpretation of insurance policies. Engineers need to be able to rely on the advice provided by their employer, insurance and commercial professionals.
- It is inefficient and prone to conflicting interpretations to require each individual employee engineer to carry out and record the assessment of a single PII policy taken out by the employing business, which in turn may be a standard policy offered by a single insurer to multiple businesses. More centralised assessment of PII adequacy by people trained in insurance risk assessment is more efficient and reliable.
- PII cover is usually taken out by businesses and not individual employees. Competent and ethical engineers still have an obligation to ensure that the work they do is covered by insurance, but the liability should fall on the contracted party rather than an individual engineer.
- The PII market for professionals in the building sector is volatile, with underwriters adding exclusions to policies to reduce exposure, raising premiums to maintain margins, refusing cover or leaving the market completely. New insurance products may be needed to cover Building Bill liabilities.

The NSW government must act urgently on these issues to ensure that competent and ethical engineers are not driven away from the building sector due to excessive, unreasonable, and burdensome insurance obligations.

3.2 Engineers are not insurance experts

A major issue for engineers is that there is no uniform PII policy provided by the insurance market. The underwriters of PII each have their own policies with differences in cover and what is excluded. This is based on the underwriter's risk assessment of each insured business and actuarial assessment of the insurance scheme.

Individual professional engineers are not trained in insurance risk assessment or interpretation of insurance policies and may struggle to make the assessments of adequacy of insurance required under Section 33 of the *Design and Building Practitioners Act* or the proposals in Section 35(2) of the Building Bill. They may decline to do building engineering work for their employer or move to employers who do not serve the building sector, in order to avoid the risk of prosecution for breach of their obligation to be adequately insured under these laws.

The proposals in the Building Bill 2022 would transfer many of the issues that engineers were having with the *Design and Building Practitioners Act 2020*. Engineers are still seeking further guidance to understand their insurance obligations under the *Design and Building Practitioners Act*. Justice Stevenson commented in his *Goodwin* decision that interpretation of some parts of the Act is *fiendishly difficult*. This means individual engineers may not understand their obligations or liabilities without clear advice and training. This is not addressed by moving the provisions to a Building Bill.

NSW has given very limited guidance on what levels of cover, deductibles, exclusions or which policy wordings give adequate protection to the individual engineer or consumers. Without adequate guidance, there is a risk that engineers may do work that is not covered by PII or not do work that is. NSW should provide guidance on the impact of any changes.

There must be further guidance given to how engineers can:

- Identify and demonstrate the adequacy of their insurance cover.
- Keep adequate written records specifying how they determined that a policy provides adequate levels of indemnity cover.
- Provide a self-assessment tool or similar for engineers to use

This guidance must be comprehensive and practical and, accommodate all engineers from those working in large corporations to sole operators. Consideration must be given to the resources available to each of these different types of engineers and what is reasonably practical for them to do to determine the adequacy of their PII. Preferably, this assessment would be undertaken by insurance experts.

3.3 The Liability of Individuals vs Companies

The Building Bill 2022 licensing provisions generally apply to registered persons, which includes corporations and bodies corporate or politic. The Design and Building Practitioners Regulations were used to prohibit the Secretary from registering bodies corporate, with the practical effect that only individuals have been registered as professional engineers. This applies the insurance provisions to each individual registered professional engineer rather than to businesses such as partnerships or corporations. However professional indemnity insurance (PII) cover is usually taken out by the business and not the individual employee. It is a business capability rather than measure of competence.

Competent and ethical engineers still have an obligation to ensure that the work they do is covered by appropriate insurance, but the liability should fall on the contracted party rather than an individual engineer.

3.4 Statutory Liability for Past Work

The Building Bill will replicate the problems that engineers encountered with the *Design and Building Practitioners Act*, including the statutory liability for past work placed on individual engineers.

The recent Supreme Court decision in *Goodwin Street Developments Pty Ltd atf Jesmond Unit Trust v DSD Builders Pty Ltd (in liq)* [2022] NSWSC 624 (19 May 2022) confirms that:

1. The statutory duty of care applies to individuals, including employees, and not just the contracting party;
2. An award of damages can be made against the individual;
3. The duty of care and liability for damages applies in respect of all buildings and not just Class 2 buildings.

Engineers Australia understands the consumer protection aims behind these provisions, and that they are to provide a statutory duty of care in response to the High Court decision in *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288*. Liability for breach of the duty is apportionable pursuant to Part 4 of the *Civil Liability Act 2002*. However, the consumer is only protected under the regime of proportionate liability if they can identify all of the concurrent wrongdoers who have contributed to the loss, and each wrongdoer is in a position to pay for its share of the apportioned liability. For engineering design work on a building, the usual capacity to pay comes from Professional Indemnity Insurance (PII).

Goodwin confirms that an owner may need to treat each individual who worked on the design as a concurrent wrongdoer in addition to the business or corporation that contracted for or undertook the design work. This puts a major cost and investigation burden on any owner taking legal action. There is no obligation on, or guarantee that, each of these individuals will have assets or PII cover that responds to a claim.

The decision in *Goodwin* confirms that the duty of care owed under section 37 of the *Design and Building Practitioners Act* applies to individuals carrying out construction work. This has the potential of significantly increasing vulnerability of engineers to claims that rely on the statutory duty, which will result in a commensurate rise in the cost of insurance, and a likely deleterious effect on the availability of insurance products for this. Our members have shown us examples of increases in premiums for professional indemnity insurance to cover this additional risk and where insurers have placed exclusions on cover to avoid liability.

The decision in *Goodwin* is likely to encourage individuals who may have this duty of care liability to divest themselves of assets to discourage or protect themselves against an award of damages.

All of this undermines the ability of a consumer to recover damages.

Engineers Australia recommends that NSW clarify whether its policy intention is for the duty-of-care and insurance liability is to fall on all individuals who have worked on the design of a building project in the past, or whether its intention is for the liability to fall on the entities that have contracted to do the work, and which carry PII cover. As mentioned above, the liability should fall on the contracted party rather than an individual engineer.

3.5 Increased Statutory Obligations and the Availability of Insurance

The global insurance market is experiencing a 'hardened' cycle. For the engineering profession this is impacting the availability and affordability of PI insurance. The PII market for professionals in the building sector is volatile, with underwriters adding exclusions to policies to reduce exposure, raising premiums to maintain margins, refusing cover or leaving the market completely. The introduction of new statutory obligations will serve only to exacerbate current market pressures and the hard state of the PI market without necessarily addressing the principal issues.

If insurance is not available, owners will not have the protection intended by the Building Bill or *Design and Building Practitioners Act*. This may affect the ability of engineering businesses in NSW to do building design work. It will hit small businesses much harder than national or international consulting firms.

If insurance is not available, professional engineers in NSW cannot do professional engineering work of any kind, even if it is internal development work and not work that will directly affect the public or consumers. This makes it less viable for individual professional engineers to work in NSW and for engineering businesses to be based there.

Engineering consulting businesses are moving out of the building sector because of increased statutory obligations, cost or unavailability of insurance, and lack of margins. This is viable for large firms able to compete in the general construction, infrastructure or resources sectors but is not viable for small and medium businesses focussed on the building sector.

3.5.1 Extension of the Duty of Care

Section 37 of the *Design and Building Practitioners Act* imposes on engineers a duty of care to avoid economic loss caused by defects. This duty is carried over in the same terms in Clause 216 of the Building Bill. The duty is owed to each owner of the land on which *building work* is carried out, and to each subsequent owner of the land, regardless of whether that work was carried out under a contract with the owner or another person. Clause 215 defines *building work* to include the design and inspection of building work.

Clause 217 of the Building Bill makes this duty of care and liability for damages retrospective to the extent that civil action for loss or damage arising out of or in connection with defective building work or defective subdivision work may not be brought more than 10 years after the date of completion of the work.

This duty of care applies to every engineer, building designer and each member of their teams who prepares or supervises a design for building work in NSW.

PII insurance is offered on a "claims made" basis. That is, insurance covers claims made during the period of cover, not the work done during that period. If individual engineers or businesses move out of the sectors covered by the Building Bill, there is no statutory obligation to have insurance or impediment to insurers applying exemptions for past work done in those sectors.

It is likely that these further duty of care obligations will force more engineers to move out of the building sector.

For engineers to meet their insurance obligations, NSW Government needs to work with the insurance industry and individual underwriters to identify suitable policies that meet the statutory requirements at an affordable cost. New products may be needed to cover *Design and Building Practitioners Act* and Building Bill liabilities.

3.6 Conflict between the *Design and Building Practitioners Act* and the new Building Bill

There is uncertainty about which legislation will govern how engineers perform their work. The obligations in Clause 217 of the Building Bill (the 10-year limit) are less onerous than the retrospective obligations in the Schedule to the *Design and Building Practitioners Act*. It is unclear how these obligations will interact when dealing with an engineer performing building work that may also be considered design practitioner work. The RIS (p51) for the Building Bill says “There will be no implications from the transfer of the professional engineers registration scheme...it will continue to operate as it does currently.

NSW should clarify the intention of both the *Design and Building Practitioners Act* and Building Bill in regard to the limitation on time when action for defective building work or subdivision work maybe brought against engineers and outline a timeline on when the scheme in the Design and Building Practitioners legislation will cease and the provisions within the building legislation will begin.

4. Conclusion

The *Design and Building Practitioners Act 2020* put in place insurance requirements that put unreasonable burdens on individual engineers. The NSW Reforming Building Laws proposals will perpetuate and extend these design flaws, with the likely outcome that the reforms will not provide the intended protections. The NSW government must act urgently on these issues to ensure that competent and ethical engineers are not driven away from the building sector due to excessive, unreasonable, and burdensome insurance obligations.

Engineers Australia recommends:

1. NSW provide guidance and training to individual professional engineers on their obligations under Section 33 of the *Design and Building Practitioners Act 2020* and how these might change under Clause 35 of the *Building Bill 2022*, including levels of cover, deductibles, exclusions and policy wording that would be acceptable.
2. NSW clarify whether its policy intention is for the duty-of-care and insurance liability is to fall on all individuals who have worked on the design of a building project in the past, or whether its intention is for the liability to fall on the entities that have contracted to do the work.
3. NSW work with the insurance industry and insurance underwriters to identify suitable policies that meet the statutory requirements, including duty of care liability, at an affordable cost.
4. NSW clarify the intention of both the *Design and Building Practitioners Act 2020* and *Building Bill* in regard to the limitation on time when action for defective building work or subdivision work maybe brought against engineers.

Engineers Australia appreciates the continued opportunity to support the NSW Government in reforming building laws. For further discussion about this submission, please contact the Engineers Australia's team at policy@engineersaustralia.org.au

Yours sincerely,



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