



New Proposed Practice Standard for Professional Engineers  
Building and Construction Team  
Department of Customer Service

By email: [bcr@customerservice.nsw.gov.au](mailto:bcr@customerservice.nsw.gov.au)

To whom it may concern,

Thank you for the recent opportunity to provide feedback on the draft practice standard for professional engineers.

The NSW Small Business Commissioner (the Commission) is an independent statutory office of the NSW Government. It provides strategic advice, advocacy and affordable dispute resolution services across NSW.

The Commission's role includes:

- Encouraging government agencies and larger businesses to enter productive working relationships with small businesses.
- Facilitating and encouraging the fair treatment of small businesses.
- Promoting a fair operating environment in which small businesses can flourish.

The Commission is aware of industry concerns regarding the proposed criteria for fit for purpose requirements and impacts on insurance requirements for small business and sole trader professional engineers.

The Commission also has concerns regarding elements of cost benefit analysis in the regulatory impact statement, and a rhetoric focus on introducing new regulatory requirements to rebuild public trust rather than improve building outcomes.

### **Concerns relating to fit for purpose**

The proposed Practice Standard outlines that the building regulator will have regard to a set of criteria when assessing whether a Professional Engineer's work is fit for purpose. This criteria will be influential in defining the fit for purpose obligation.

The Commission is aware of industry concerns that the proposed fit for purpose criteria may be unfairly onerous on professional building engineers, particularly small business and sole trader engineers.

Professional engineers are typically engaged in building and construction through a contractual agreement. Contracts are the mechanism that captures the agreement between two parties, and parties have options to dispute work that does not meet the specifications of the contract.

The proposed fit for purpose obligation and associated enforcement criteria provides further safeguards to parties that engage building practitioners. Criteria that extend contractual safeguards to the non-building engineer party include:

- Criterion 4 – That the work must be completed and ready for use for the stated purpose.
- Criterion 6 – That the professional engineer must take reasonable steps to coordinate with other designers working on a project to deliver the intended outcome as per their contractual arrangement.

- Criterion 7 – That the professional engineer should provide guidance to the building practitioner, where appropriate, on how to implement the professional engineering work.

Criterion 4 has the potential to create areas of ambiguity related to the technical nature of work undertaken by engineers. This may relate to differences in understanding of the role of an engineer, or practical constraints that limit their ability to deliver services for the intended purpose.

Criterion 6 and criterion 7 require professional engineers to coordinate and provide guidance to other practitioners or professionals, as is reasonable and appropriate. However, these criteria do not provide a threshold of what is reasonable or appropriate.

The phrasing of the standards also places the responsibility of collaborating and guidance on the professional engineer, when the broader contract and project may not be structured in a manner that allows for collaboration and guidance. Typically, the non-engineering party has responsibility for the broader design of the project, as such should be encouraged or required to be responsible for cross-professional collaboration.

The Commission recognises that government has a role in safeguarding and ensuring the standards of buildings, and that this is challenging given the range of practitioners and professionals involved in delivering construction.

However, effective regulatory systems generally achieve outcomes without compromising efficient sharing of risk, usually achieved through private contracting and negotiation. Regulatory requirements that interfere with private agreements have the potential to result in suboptimal outcomes as parties are unable to allocate and share risk according to their respective tolerance or capacity to mitigate risks. Further policy development may be warranted to explore and identify opportunities to address the fundamental issue of concern.

## **Insurance**

Industry stakeholders, including those from the insurance sector, have raised concerns about the implications a fit for purpose obligation would have for insurance. There are already a number of factors that are influencing the affordability and availability of insurance in Australia, including the types of insurance required by professional engineers.

Any new obligation which would give rise to new liability risks has the potential increase the cost or restrict the availability of insurance for professional engineers. These challenges will be more profound for small business and sole trader professional engineers, who typically have less access to resources to identify, negotiate and pay for effective insurance cover, and are more vulnerable to access or affordability changes. As insurance become more unaffordable or unavailable, operating a small business or being a sole trader in professional engineering may become unviable, leading smaller operators to exit the sector or be absorbed by larger businesses.

Some sector feedback also suggests the current fit-for-purpose requirements propose a risk threshold that is unappealing to insurers and underwriters, and that the current data does not exist to calculate premiums. As a result, stakeholders are concerned that professional engineers will be unable to access insurance that includes fit-for-purpose requirements. If this is the case, professional engineers will face the choice of operating uninsured or not operating.

## **Cost benefit analysis**

The Commission is of the view that the regulatory impact statement does not adequately consider costs to professional engineers. The regulatory impact statement assesses many of the new requirements or standards as resulting in minimal increases in costs, or as costs already required by the DBP Act. If standards are already substantially captured by requirements in the DBP Act, it suggests the proposed standards may be duplicative and could create an unnecessary complexity with potentially limited improvement to building outcomes.

The Commission recognises it can be difficult to estimate the costs and benefits across building developments, especially given the expense of construction and the potential for defects and issues to emerge many years after a building is constructed. However, costs to professional engineers, especially small business and sole trader professional engineers, should be appropriately considered. This includes considering the scale of costs from the perspective of the engineer and their business operations, compared to only considering the costs associated with a total project or building.

## **Focus on building public trust**

Throughout the regulatory impact statement and associated consultation communication there is a focus on introducing a reform agenda to rebuild public trust. The Commission notes that regulatory reform should focus on improving outcomes, and that improved outcomes will improve broader trust in an industry or system. New requirements and standards should only be introduced where there is significant likelihood that these will lead to improved outcomes in building standards.

Thank you for the opportunity to make a submission. If you require further information, please contact Megan Bennett, at either [megan.bennett@smallbusiness.nsw.gov.au](mailto:megan.bennett@smallbusiness.nsw.gov.au) or (02) 9372 8767.

Yours sincerely

Chris Lamont  
**Commissioner**  
**NSW Small Business Commission**

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