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Building and Construction Policy Team
Better Regulation Division
Department of Customer Service

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Re. Practice Standard for Professional Engineers, Design and Building Practitioners Act 2020

The Property Council welcomes the opportunity to provide input to the new proposed Practice Standard for Professional Engineers.

As Australia's peak representative of the property and construction industry, the Property Council's members include investors, owners, managers and developers of property across all asset classes across NSW. Professional engineers play an essential role in ensuring high-quality design work on residential buildings in NSW.

The Property Council has welcomed the government's commitment to work with industry to enable a consumer-focused building and construction industry. It is positive that many features of the draft proposed standard, such as the introduction of design obligations, reinforce or clarify existing practices within industry,

Our submission emphasises the importance of the recognition of existing safeguards and ensuring that the sector can make informed decisions based on level of project risk, rather than approaches such as mandated minimum insurance requirements. Our submission also highlights that alignment with existing frameworks, such as the National Construction Code, will support understanding of, and compliance with, the draft Practice Standard.

The Property Council endorses the proposed transition period following the publication of the final Practice Standard before it becomes mandatory. This will enable industry to adjust and plan for the rapid program of regulatory reform currently underway.

The Property Council would be pleased to meet with you to provide further advice on the recommendations contained within this submission. Should you have any questions, please contact me on 0437 630 043 or kstevenson@propertycouncil.com.au.

Yours sincerely,

A handwritten signature in black ink, appearing to read "K Stevenson".

Katie Stevenson
NSW Executive Director
Property Council of Australia

Answer Sheet – Practice Standard for Professional Engineers

Application of the Practice Standard for Professional Engineers

Q1: Do you propose any changes to the definition of ‘professional engineering work’?

A: No.

Insurance

Q2: Do you support the current insurance approach requiring ‘adequate cover’? Why or why not?

A: Any definition of ‘adequate cover’ should be determined based on project specific risks such as complexity, scale and location, rather than a minimum financial amount of cover. A mandated level of insurance would not allow for an informed determination of an appropriate level of insurance cover.

We caution against the introduction of specific requirements, which may act as a barrier to new entrants to the market or smaller operators, and increase the expense of obtaining coverage. The personal liability requirements of the profession are already acting as a barrier to employee retention.

Q3: Do you think mandatory insurance requirements should be prescribed? If so, what should be prescribed?

A: Related to the position outlined above, we do not support mandatory insurance requirements.

Q4: What alternative approaches to ensuring Professional Engineers and other regulated practitioners under the DBP Act could be considered in providing confidence of an adequate remedy to non-compliant work by practitioners?

A: No comment.

Design must be Fit for Purpose

Q5: Do you support the introduction of the ‘fit for purpose’ obligation for Professional Engineers carrying out design work? Why or why not?

A: If this obligation is introduced, the components of ‘fitness for purpose’ need to be carefully defined, as it is a subjective concept and has the potential to create ambiguities relating to the extent and nature of the obligations of the professional engineer to design or provide a service that is “fit for its intended purpose”, potentially leading to confusion about when and how a professional engineer will discharge this obligation.

In particular, the requirements that ‘final work must be complete and ready for use for the stated purpose’ and ‘ensur[ing] that designs for all building elements will deliver a compliant, safe and resilient building’ should be refined to ensure they are not too open to interpretation.

It is also important that the standard provides guidance for situations where there is a difference of opinion between developer and engineer on the definition of ‘fit for purpose’. An option for this might be where a developer can direct a professional engineer not to undertake some elements of ‘fit for purpose work’, similar to 18F of the Home Building Act provision, where an owner can direct departed work to be undertaken.

The current challenges in securing comprehensive FFP coverage in project specific and corporate Professional Indemnity insurance policies need to be considered, as obtaining FFP indemnification under these Professional Indemnity insurance policies will be prohibitively expensive for industry, given the current level of activity in the sector. If not managed carefully, a fit for purpose obligation will expose professional engineers to uninsurable risk.

The introduction of a fit for purpose obligation would also need to align with the existing exemption for engineers under Australian Consumer Law.

Q6: Do you support the proposed criteria for ‘fit for purpose’? If no, what changes would you propose (either adding, removing or enhancing criteria proposed)?

A: As set out above, requirements need to be reviewed to ensure they are not too open ended.

Even with engineering design and documentation being reviewed and verified, it is challenging to absolutely ensure ‘the work is completely free of defects, errors and omissions’, so we recommend that ‘so far as practically possible’ is added.

Q7: What other measures could be utilised to ensure that designs prepared by Professional Engineers are fit for purpose?

A: No comment.

Minimum Standards for Design Work

Q8: Do you support the introduction of design obligations on Professional Engineers? Why or why not?

A: Yes. Most professional engineers would likely be adhering to similar obligations voluntarily, so setting a minimum for industry is a good approach to standardise and clarify requirements.

Q9: Do you think additional obligations are required in the design phase to ensure higher quality of designs? If so, what?

A: An area that could be considered is a mandatory requirement for professional engineers to hold ISO9001 accreditation (the international standard for quality management systems).

The Technically Assured Organisation (TAO) scheme currently in operation in the transport sector provides a potential model for recognition of technical capability and allowing entities to provide self-assured services on assets and could be adapted to suit the building and construction context.

Q10: Do you think additional requirements are necessary to ensure consumers receive the information they need from Professional Engineers undertaking work on their behalf?

A: No. Existing market-led options are available for consumers, such as iCIRTs.

Independent Third-Party Review

Q11: Do you support introducing mandatory independent third-party review for engineering designs on high risk or complex building projects?

A: For high-risk or complex projects, there should be mandatory independent third-party reviews for structure.

Independent third-party reviews for other engineering disciplines should not be mandated.

For the review process to function effectively, the legislation must define the scope and parameters of the review. It also needs to be clear that liability rests with the professional engineer, not the peer reviewer, as professional engineers maintain discretion in adapting comments from the third-party reviews.

The definition of high-risk or complex building projects should align with what is already provided in the National Construction Code.

Q12: Do you support making the developer responsible for seeking third party review when required? If no, who do you think should be held responsible?

A: Yes, the developer should be responsible for engagement of third-party engineers undertaking reviews.

Any independent third-party review should not lessen the initial engineer’s responsibility for the design.

Q13: Do you support the use of the 'building complexity' definition in the NCC as a baseline to identify high-risk or complex buildings? Why or why not?

A: Yes. It is practical to use this well-established and understood definition as the baseline for this identification.

Q14: How could we better define what 'high-risk' work is to complement the use of 'building complexity' as a measure to ensure independent third-party review is proportionate to the risk of the work?

A: High-risk is difficult to define. We support using the existing definition of 'building complexity' in the NCC.

Q15: Do you think performance solutions should be subject to independent third-party reviews? Why or why not?

A: No. A risk-based approach should be taken, where only a performance solution in respect of a high-risk element of fire and life safety should require independent third-party review.

Q16: This proposal is currently limited to introducing mandatory third-party review of engineering designs. Do you think there is a need for expert review of other types of design work?

A: No. This will unnecessarily add cost, which will be passed on to consumers. A more effective and efficient way to address issues of quality is to upskill industry in other areas of design.

Q17: Do you support the proposed obligations for Professional Engineers when undertaking independent third-party review, as set out in the draft Practice Standard?

A: Yes.

Q18: What additional obligations or guidance could be created for other practitioners to ensure that the work of a Professional Engineer undertaking independent third-party review enhances the compliance, safety and resilience of the relevant building (for example, changes to the Certifier Practice Standard)?

A: In addition to the proposed obligations for professional engineers undertaking independent third-party reviews, there should be a minimum scope of what the review should cover.

Carrying out On-Site Inspections

Q19: Do you support the introduction of a positive obligation on Professional Engineers to carry out on-site inspections? Why or why not?

A: We do support the introduction of a positive obligation, noting that professional engineers are not the arbiters of quality of works being undertaken on site, and site inspections by professional engineers should not be a substitute for ordinary QA.

Contractors undertaking works must maintain responsibility for the quality of works performed to avoid a situation where builders/trade contractors rely on professional engineers undertaking site inspections at the expense of their own QA.

As the Design and Building Practitioners Act vests the responsibility for construction with the building practitioner, the draft standard's reference to scope of inspections and making declarations in relation to the inspected building work potentially creates ambiguity about the legal responsibility of the engineer for the building work.

Rather than a minimum number of site inspections, it would be more practical for Hold Points to be included in the documentation for the inspection of critical elements (e.g. transfer beam post-tensioning and reinforcement, waterproofing works etc.) as a minimum site inspection requirement.

In addition, the standard should clarify whether virtual inspections are acceptable, following their widespread use during the Covid pandemic.

Q20: The proposed Practice Standard allows that a Professional Engineer is permitted to use their experience and expertise to determine sufficient inspections for a project. Do you support this approach?

A: No. There should be industry guidance for consistency and frequency, based on key hold points to manage risk or stages, rather than setting a minimum number of inspections. Industry guidance will help to avoid engineers over-inspecting or under-inspecting.

Q21: What guidance would support Professional Engineers to make informed decisions regarding the number of inspections for a project?

A: As above, we recommend providing guidance on hold points and/or what needs to be inspected as the best approach.

The Property Council can provide guidance to the Building and Construction Policy Team on appropriate hold points for various engineering disciplines to inform this approach.

Q22: If the proposed Practice Standard were to include mandatory inspection schedules for Professional Engineers instead, would you support this approach? If yes, what criteria would you suggest for when an inspection should take place?

A: Yes, as above. Professional bodies such as Engineers Australia and Chartered Institute of Building Services Engineers would be best placed to provide guidance on inspection criteria.

Additional Obligations for Specific Registrations and Specific Engineering Work

Q23: Are there any further obligations that should be introduced for specific classes of Professional Engineer? If so, what are they and why? Please be specific on what further obligations you consider necessary, the desired outcome sought and your views on how it could be prescribed.

A: No comment.

Q24: Are there any further obligations that should be introduced for engineering work on specific building parts? If so, what are they and why? Please be specific on what further obligations you consider necessary, the desired outcome sought and your views on how it could be prescribed.

A: No comment.

Q25: Should any of the proposed additional obligations set out in Chapter 8 of the proposed Practice Standard that should be removed? If so, what are they and why?

A: Professional bodies should be consulted on this point. We are generally supportive.