



ENGINEERS
AUSTRALIA

NSW Reforming Building Laws

Engineers Australia Submission

Nov 2022



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1. Introduction

1.1 Purpose of this document

Engineers Australia supports the efforts of the New South Wales Government to reform the building industry in NSW and to implement the recommendations of the Building Confidence Report.

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

Engineers Australia does not support moving the registration of professional engineers in NSW to a Building Bill. Engineers Australia strongly advocates for a stand-alone Professional Engineers Act. A separate, specific Act for engineers, would be consistent with the proposed NSW registration approach for Architects, that utilises the nationally consistent *Architects Act 2003*. It would also be consistent to the approach used in Queensland and Victoria to register engineers. Moving the registration of engineers to the Building Bill would result in NSW further deviating from approaches in other jurisdictions and would undermine the aim of national consistency to effect agreed mutual recognition ambitions and potentially make it unattractive for engineers to practice in NSW. This is not in the interests of the NSW community or professional engineers resident and working in the State.

Engineers Australia recognises that some specific provisions should apply to professional engineers working in the building sectors and that these provisions may be included in the Building Bill, Building Construction Legislation Amendment and Building Compliance and Enforcement Bill. Some of these provisions relating to insurance are already applied through the *Design and Building Practitioners Act* and place unreasonable burdens on individual engineers that may prevent engineering businesses from providing services in NSW. The NSW Reforming Building Laws proposals will perpetuate and extend these burdens, with the likely outcome that the reforms will not provide the intended protections.

There are new provisions in the Building and Construction Legislation Amendment that introduce unreasonable burden for the individual engineer in relation to non-conforming building products and intentional phoenix activity. This document outlines these concerns together with specific feedback on aspects of the Building Bill and the Building and Construction Legislation amendment.

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. Key recommendations

The building law reforms extend beyond the engineering services and Engineers Australia have only sought to provide recommendations and feedback that relate to engineering. The feedback has been prepared considering how registration is being implemented in other jurisdictions and consultation with our members.

The key areas of concern, and related recommendations are highlighted below.

Registration of Engineers

Engineers Australia does not support the registration of professional engineers being incorporated within the Building Bill. It is **recommended that the NSW Government develops a stand-alone Professional Engineers Act** that extends beyond the building sector and has greater consistency with similar Acts in Queensland and Victoria.

Further details are contained in the Engineers Australia's *Registration of Engineers in NSW* submission

Insurance requirements to do engineering work

Engineers Australia reinforces its concern regarding insurance requirements in the *Design and Building Practitioners Act 2020*. The NSW Reforming Building Laws proposals will perpetuate and extend these requirements. It is **recommended that clear guidance is provided to professional engineers on their obligations under the existing Act and Building Bill**.

Further details are contained in the Engineers Australia's *The issue with insurance requirements for engineers* submission

Burdens placed on individuals

Engineers Australia is concerned that the NSW Reforming Building Laws proposals increase burdens on individual engineers, in areas where they are not best placed to manage, control or minimise the impact of risk. It is **recommended that NSW Government re-evaluate who is best placed to deal with risks in Buildings**. Some of the proposals in the NSW Reforming Building Laws related to insurance requirements and obligations with respect to non-conforming products and intentional phoenix activity ask engineers to act outside their area of expertise and beyond areas which they have significant influence over.

Non-conforming Building Products

Engineers Australia **recommends that the transition period for non-conforming building product provisions be increased**, to allow the industry time to adjust. It also recommends that **reporting requirements for non-conforming building products be limited** to matters that are relevant or of specific concern.

Intentional Phoenix Activity

Engineers Australia supports the principle that the whole industry should work together to disrupt companies that engage in intentional phoenix activity. This could include an anonymous tip-off facility as a practical solution to getting industry involved in identifying and disrupting those engaged in intentional phoenix activity, however it is **recommended that addressing these actors should be restricted to the Department of Fair Trading, ASIC and the ATO** as they are best-placed to investigate these matters.

3. Burdens Placed on Individual Engineers

The Queensland *Professional Engineer Act 2002* and Victorian *Professional Engineers Registration Act 2019* register individuals with the required professional engineering skills and competencies. In NSW the *Design and Building Practitioners Act*, including Part 3, provides for the registration of “persons”, defined in the Interpretation Act to include an individual, a corporation and a body corporate or politic. Regulation 31 of the Design and Building Practitioners Regulation provides that the Secretary must refuse to register a body corporate as a registered professional engineer. This may leave it open to the Secretary to register a corporation as opposed to a body corporate or politic, but in practice the Secretary is only registering individuals at the moment.

The NSW Reforming Building Laws are intended to expand registration coverage to corporations and businesses and the proposed Building Bill provides for the registration of “persons”. There is no indication that this will be limited by regulation to individuals in the case of professional engineers.

There are sound grounds to differentiate between individuals registered on the basis of individual training, skills and competency and businesses registered on the basis of organisational and financial capacity to trade. Nevertheless, the nationally consistent scheme for registration of professional engineers is limited to individuals. This does not prevent NSW from introducing separate registration of engineering businesses in other legislation such as the proposed Building Bill.

Engineers Australia recommends that legislation should allocate each risk to the entity most capable of managing that risk and the NSW Reforming Building Laws should clearly and appropriately allocate obligations to the individual or the business as appropriate.

The majority of professional engineers work as officers or employees of a separate business. Very few operate businesses as sole traders. The existing provisions for professional engineers in the *Design and Building Practitioners Act*, the Design and Building Practitioners Regulations and in draft subsidiary legislation such as the proposed Engineering Practice Standard blur the distinction between individual and business.

Whilst every team member is responsible to identify and communicate risk, successful risk management requires specific people within the business accepting responsibility for and working together to assess, manage and monitor risk. In a single director or sole practitioner business, a single person may be accountable for ensuring that risk is managed appropriately, along with all other management responsibilities. In a larger consultancy, there may be multiple personnel who have direct responsibility or oversight of activities to manage risks.

Due to the breadth and complexity contained in modern buildings, it is unreasonable for each individual building practitioner to be trained in managing the risk for all aspects of a building.

The proposed reforms in the Building Bill and Building Construction Legislation Amendment place unreasonable expectations and obligations on licensed parties who are not best placed to manage, control or minimise the impact of the risk. This is particularly present in the proposals around:

- The Insurance Requirements to do Licensed Work (Building Bill)
- Non-Conforming Building Products (Building and Construction Regulation Amendment Schedule 1)
- Detecting Intentional Phoenix Activity (Building and Construction Regulation Amendment Schedule 10)

3.1 Insurance requirements to do engineering work

The Building Bill contains provisions that each individual registered engineer must assess and record the risks of that engineer’s work and the adequacy of any professional indemnity insurance (PII) policy that covers the individual’s work. If the individual engineer cannot form an opinion that work about 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*.

In July 2022 Engineers Australia, Consult Australia and the Insurance Council of Australia raised serious concerns with the Minister for Fair Trading about the insurance requirements for engineers in the Design and Building Practitioners Act 2022. Engineers Australia has prepared a separate submission on the insurance requirements of services provided by design professionals, particularly engineers, proposed in the new Building Bill 2022. The

submission seeks to clarify the reasons why we do 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.

Further details are contained in the Engineers Australia's *The issue with insurance requirements for engineers* submission

3.2 Non-conforming Building Products

Under the current building regulatory framework significant parts of the building product supply chain do not hold the same levels of accountability for their work as others. Engineers often rely on information or representations from suppliers, manufacturers or importers about the suitability of building products to ensure they are used for the intended purpose.

Engineers Australia supports the proposed persons being included in the chain of responsibility but only to the extent that each person can reasonably influence the conformance of any particular product or the way that it will be incorporated into a building.

Responsibility needs to rest with the party that can exercise the greatest control over the relevant risks, and in terms of products, that is primarily the product manufacturer. It is noted that product manufacturers are usually well-versed in manufacturing compliance responsibilities, but rarely as familiar with application compliance (such as in construction). It may be therefore difficult for a manufacturer to explain the compliant use considerations.

It is noted that most consulting engineers are engineers who are trained in a specific field, such as structural engineering. For example, in façade engineering, the engineer's expertise is in structural and weatherproofing design of wall and floor systems. They have no training or experience in any other aspect of façade design (i.e., life safety issues such as combustibility) that are traditionally the expertise of others (i.e., Fire Engineers and BCA Consultants). It is important that the responsibility of designers is appropriately attributed to the correct designer.

Ultimately a designer or builder should be able to rely on the representations made by material designers and suppliers with respect to the compliance and suitability of a product or material being supplied by them.

3.3 Intentional Phoenix Activity

Intentional phoenix activity is damaging to the building and construction industry. Engineers Australia supports the principle that the whole industry should work together to disrupt companies that engage in intentional phoenix activity, however, it should not fall on building practitioners to police the operation of these persons. Whilst an ethical practitioner should take steps to avoid involvement with these persons and report them to the appropriate authorities, the duty should fall the Department of Fair Trading, ASIC and the ATO who are best placed to investigate these matters.

Individual professional engineers are not trained in business auditing or interpretation of financial statements and may struggle to make the assessments of what constitutes reasonable steps to avoid business association required under Schedule 10 of the Building Construction Legislation Amendment. This obligation will deter many from doing building engineering work for their employer or move to employers who do not serve the building sector, in order to avoid the risk of disciplinary action.

4. Further Comments

4.1 Non-conforming Building Products

Engineers Australia supports companies that manufacture or supply building products (including importers) being held accountable for non-conforming building products, especially where the use of the product is known (such as cladding materials and structural components). Ultimately it is the manufacturer/supplier of the building product who gains a financial benefit from the sale of the product, and it is often the manufacturer who has invested considerable capital in the required research to justify the compliance of their product. They should therefore be responsible for undertaking the required investigations and testing to ensure it is fit for the purpose for which it is intended to be sold.

4.1.1 Additions to the Chain of Responsibility

Engineers Australia believes that the following parties should be added to the chain of responsibility:

- The consumer.

Misuse of a product by a consumer should not be the responsibility of the supply chain, as long as the consumer was supplied with adequate information to explain what was supplied and how they should use it.

- The certifier.

Reliance on a fraudulent certificate should be prevented, with some basic checks. The role shouldn't be the sole responsibility of the certifier though, with other parts of the chain able to validate appropriate use of a product with suitable documentary evidence. A certifier should be required to sight as-built records and testing/commissioning records before building occupancy is approved. If a certifier cannot reasonably interpret the validity of these records, they should be able to transfer responsibility to a suitable expert.

4.1.2 Comments on Duties Imposed

Providing information to others in the chain about a building product (clause 8F)

Information relevant to giving effect to the design, transfer of the product, should be limited to the intended use of the product, perhaps with a clear warning that unintended use requires further assessment by others in the chain.

Engineers Australia members are concerned that the volumes of materials involved simply makes this impractical, and in many cases would be unnecessary. The result would be a huge burden of work, slowing down an already stretched industry. Support for this requirement is conditional providing the requirement is narrowed only to matters that are relevant or of specific concern.

Builders and installers to provide information to the owner about the building products they use (clause 8F(4))

As above, given the sheer volume of materials involved in the construction of a building, it would be impractical to provide information for ALL building products, and is not necessary for most. Support for this requirement is conditional providing the requirement is narrowed only to matters that are relevant or of specific concern.

Notifying the Secretary when becoming aware of non-compliance or safety risk of a building products (clause 8H)

As mentioned above (Burdens placed on individual engineers), each person should take responsibility for anything within their control and then take reasonable action to comply, however, writing to the Secretary on every occasion (regardless of the level of risk) is unreasonable. Support for this requirement is conditional providing the requirement is narrowed only to matters that are relevant or of specific concern.

Comply with any safety notices for warnings, bans or recalls (Part 3)

The method of notification to those in the chain of responsibility requires further consideration. The industry will not be checking an internet page for publications on a sufficiently regular basis for this to be effective. The Secretary should be required to take all reasonable steps to identify building product stakeholders and to then contact them.

Subscription to a mailing list of notifications might be a manageable first step, but this notification expectation needs further consideration.

4.1.3 Timeline for Reform

The timeline for the proposed reforms is not long enough for industry to adjust to the new requirements. The question of how long it will take for industry to be ready is predominately a question for material manufacturers and suppliers. The vast majority of products and materials currently do not have the information required under the amendments, let alone endorsements from CodeMark or other certification schemes that are likely to be required to give designers and installers the confidence to specify/use materials and products.

Reforms requiring the testing of certain building products for compliance with the latest AS 1530 when the grandfathering clauses closed in the NCC have resulted in many challenges for parts of the industry that were not sufficiently informed or prepared. There should be no excuse for such lack of awareness or preparedness, but this has led to supply chain problems. Many construction materials are obtained overseas/interstate. The question over whether manufacturers/suppliers will be sufficiently motivated to provide the required information to a relatively small market is a significant one. This could leave huge gaps in the supply chain. The absence of information for a single component (a significantly high risk considering the number of materials used in construction) will have large knock-on effects.

Where an existing process is required to change, Engineers Australia recommends considering transitional strategies such as the way engineering registration was handled in NSW. It is recommended that the transitional strategy considers that designers and installers will bear the initial brunt of passing the amendments. NSW government must avoid a situation where practitioners are forced into the impossible decision of delaying projects or specifying or using materials/products for which information is not available.

4.2 Intentional Phoenix Activity

Guidance around how to identify those who have been involved in intentional phoenix activity would be welcomed by industry. However, depending on what is contained in this guidance, it may be outside the expertise or capacity of a building practitioner to determine if a company they are intending to work with complies. This guidance must be comprehensive and practical enough to accommodate all building practitioners, from those working in large corporations to sole operators. Consideration must be given to the resources available to each of these different types of building practitioners and what is reasonably practical for them to do to determine whether or not they are engaging with party that undertakes intentional phoenix activity.

As mentioned, most professional engineers work as officers or employees of a business. Very few operate businesses as sole traders. An ethical practitioner may be placed in a position where they suspect their company is engaging with another company which is engaged in intentional phoenix activity but is unable to convince others within their company. The result being that this ethical practitioner is forced to decide whether they should stay remain in the company and risk disciplinary action or choose to leave the company. All of this based on assessment which they are not trained to do.

Even for engineering businesses, the steps outlined in the Regulatory Impact Statement may be difficult for some building practitioners to follow as there is no legal requirement for a party engaging in intentional phoenix activity to provide the pertinent information and documents to an ethical building practitioner. Due to the nature of building contracting, an ethical business may be forced to associate with a phoenixing offender through their contract with a developer or others. This ethical business may ask for this information to check whether their associates are engaged in intentional phoenix activity but not be provided this information as there is no legal compulsion to do so. This will result in a similar situation to the ethical practitioner mentioned above.

Proposing that there should be disciplinary action on those who may be willing to report phoenixing offenders, but who may not have the expertise to detect these offenders, is likely to encourage good and ethical practitioners out of the industry. A failure to comply should certainly not be treated as an offence and Engineers Australia does not support any mandatory reporting requirement. It is too onerous on both individual practitioners and businesses to investigate details of something they weren't involved in, are not expert in assessing and then possibly managing ongoing correspondence with the Secretary.

Engineers Australia suggests that an anonymous tip-off facility would be a more practical solution to getting industry involved in identifying and disrupting those engaged in intentional phoenix activity.

4.3 Training as a response to a breach

Engineers Australia believes that education and training notices may be more effective than monetary penalties for the lower non-compliant behaviour. It seen as an important form of disciplinary action as it can be used as an early intervention measure to respond to initial or less-serious breaches by a practitioner.

For less serious breaches, severe disciplinary action will not address and rectify examples of poor practice. Rather than only relying on cancellation or disqualification of licences, EA believes that it is important that other disciplinary action mechanisms are available to be used throughout the enforcement process.

Construct NSW has established a digital platform containing high-quality, approved educational modules that are already being used by the industry to satisfy CPD. Engineers Australia is happy to continue assisting the NSW government in the synthesis of these courses.

The national (Qld/Vic) legislation already provides for training (an order requiring the registered professional engineer to successfully complete a specified course of training within a specified period). NSW's proposal for training as a response to a breach is welcomed by EA and is in line with the national model.

5. Conclusion

Engineers Australia supports the efforts of the NSW Government to reform the building industry in NSW, however some of the proposals in the NSW Reforming Building Laws package undermine the nationally consistent approach to the registration of engineers and place unreasonable burdens and obligations on individual engineers.

Engineers Australia recommends:

1. NSW Government develops a stand-alone Professional Engineers Act
2. NSW Government provides clear guidance to professional engineers on their insurance obligations under the existing Act and Building Bill
3. NSW Government re-evaluates who is best placed to deal with risks in Buildings
4. Increasing the transition period for non-conforming building product provisions
5. Restricting reporting requirements for non-conforming building products to matters that are relevant or of specific concern
6. NSW Government provide an anonymous tip-off facility as a more practical solution to getting industry involved in identifying and disrupting those engaged in intentional phoenix activity.

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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Appendix A Responses to Questions

Building Bill Part 1 Who can do the work

Review of Building Licensing

ENGINEERS

What classes of engineers should be registered?

All engineers should be registered. For further details refer to Engineers Australia's Submission "Registration of Engineers in NSW"

Do you support all engineers being registered or only those working on certain kinds of building work?

All engineers should be registered. For further details refer to Engineers Australia's Submission "Registration of Engineers in NSW"

What other ways should engineers be regulated (for example practise standards, codes of conduct, mandatory inspection regimes)?

Refer to Engineers Australia's Submission "Registration of Engineers in NSW"

Do you support moving the engineering registration scheme from the DBP Act to the Bill?

No, for further details refer to Engineers Australia's Submission "Registration of Engineers in NSW"

FIRE SAFETY

28. Do you support combining existing licensing and registration requirements for fire safety practitioners into a single framework or should the schemes be kept separate?

Engineers Australia advocates that Fire Safety Engineers be registered under a stand-alone professional engineers registration act. For further details refer to Engineers Australia's Submission "Registration of Engineers in NSW"

WHY ARE WE KEEPING OTHER BUILDING PROFESSIONALS SEPARATE

38. Do you support registering and oversight of these practitioners under separate pieces of legislation, or should they be brought into a whole of industry Bill?

Yes, however engineers should also be included with these practitioners. For further details refer to Engineers Australia's Submission "Registration of Engineers in NSW"

39. If they are kept separate, what measures should be introduced to ensure consistent obligations apply to all involved in building work in NSW?

Refer to Engineers Australia's Submission "Registration of Engineers in NSW"

40. If they are not kept separate, and incorporated into the Bill, what parts of the Bill should change to make this transition effective and consistent with the broader intent of the reform?

These practitioners should be kept separate. For further details refer to Engineers Australia's Submission "Registration of Engineers in NSW"

HOW ARE WE UTILISING THE NRF / CO REGULATION

41. Do you support allowing professional bodies to play a role in accrediting practitioners?

Yes, for further details refer to Engineers Australia's Submission "Registration of Engineers in NSW"

42. What are the risks of this model?

Refer to Engineers Australia's Submission "Registration of Engineers in NSW"

43. What other functions do you consider appropriate to give these bodies when they are operating as a co-regulator with Government?

Refer to Engineers Australia's Submission "Registration of Engineers in NSW"

Building Bill Part 2 What work can be regulated

Building Approvals

18. Do you support the duty of care provisions under the DBP Act and EPA Act being consolidated in the Bill?

Please refer above and Engineers Australia's Submission "The issue with insurance requirements for engineers"

19. How do you feel the duty of care provisions in the DBP Act have been working since they commenced on 10 June 2020? Do you consider any changes should be made to make them more effective?

There must be changes made to these provisions for engineers. Please refer above Section 3 and Engineers Australia's Submission "The issue with insurance requirements for engineers"

Building Construction Legislation Amendment

Schedule 2 Amendment of Strata Schemes Management Act 2015 No 50

Engineers Australia notes that it has been listed as authorised professional association.

Ensuring building products are safe and suitable

1. Do you support the persons included in the chain of responsibility (clause 8B) being held accountable for non-conforming building products or for non-compliant use of the product? If not, why?

Yes, please refer section 3.2 and 4.1 above.

2. Are there any other persons that should be added to the chain of responsibility and therefore be held accountable for non-conforming or non-compliant building products? If yes, who and why?

Yes, please refer section 4.1.1 above.

3. Do you support the following duties being imposed on persons in the chain of responsibility? If not, why?

Yes, please refer section 3.2 and 4.1 above.

4. Focusing on the duty to provide information about building products, are there any challenges associated with persons in the chain of responsibility satisfying this duty?

Yes, please refer section 3.2 and 4.1 above.

5. Do you support the following additional powers for the Secretary to manage non-conforming or non-compliant building products? If not, why?

Yes, please refer section 3.2 and 4.1 above.

6. The maximum penalty for breaching a building product use or supply ban or a building product recall will be;

- \$220,000 or 2 years imprisonment, or both and \$44,000 each day the offence continues; or
- for a body corporate, \$1,100,000 and \$110,000 each day the offence continues.

Do you support this maximum penalty? If not, what do you think the penalty should be?

No comment.

7. The reforms for building products will commence 12 months from passing through Parliament and receiving formal assent. Does this timeframe allow enough time for industry to prepare for the new requirements? If not, what timeframe do you propose and why?

No, please refer section 4.1.3 above.

Improving professional standards and competencies

CONTINUING PROFESSIONAL DEVELOPMENT

23. Do you support the standardisation of CPD across the building and construction industry? Why or why not?

For comments on CPD requirements for engineers, refer to Engineers Australia's Submission "Registration of Engineers in NSW"

24. Do you support extending CPD requirements to include specialist practitioners? Why or why not?

For comments on CPD requirements for engineers, refer to Engineers Australia's Submission "Registration of Engineers in NSW"

25. How many hours of CPD do you think the average practitioner should be required to do per year? Why?

For comments on CPD requirements for engineers, refer to Engineers Australia's Submission "Registration of Engineers in NSW"

26. Should it be up to industry or the regulator to determine the CPD requirements for individual practitioner types? Please explain your answer.

For comments on CPD requirements for engineers, refer to Engineers Australia's Submission "Registration of Engineers in NSW"

TRAINING AS A RESPONSE TO A BREACH

28. Do you agree that education and training notices may be more effective than monetary penalties to fix non-compliant conduct and encourage permanent behaviour change? Why or why not?

Yes, please refer section 4.3 above.

29. Do you have any concerns about introducing education and training notices as a form of early intervention disciplinary action? If yes, please explain what any challenges may be.

Yes, please refer section 4.3 above.

30. Do you agree that there should be a bigger focus on early intervention disciplinary action to proactively address non-compliance in the industry? Why or why not?

Yes, please refer section 4.3 above.

PROMOTING ACCOUNTABILITY TO DETER INTENTIONAL PHOENIX ACTIVITY

50. Do you support the proposal to place a duty on a registered practitioner to take reasonable steps to ensure that persons they deal with aren't involved in intentional phoenix activity? Why or why not?

No, please refer section 3.3 and 4.2 above.

52. Do you support that a failure to comply with the duty is addressed through disciplinary action rather than being an offence? Why or why not?

Yes, please refer section 3.3 and 4.2 above.

53. Would you support a mandatory reporting requirement if a person reasonably suspected that a director of a company has, will or is engaging in intentional phoenix activity?

No, please refer section 3.3 and 4.2 above.



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