

# Regulatory Impact Statement

Building Legislation Amendment (Building Classes)  
Regulation 2022

August 2022



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## Commissioner's Message

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I am proud to present this Regulatory Impact Statement and proposed Building Legislation Amendment (Building Classes) Regulation 2022 (**Amendment Regulation**).

The NSW Government's Construct NSW reform agenda is transforming the NSW building and construction sector to put quality and the customer at its centre. A central theme of Construct NSW is the making of a 'trustworthy building' – buildings that can be relied upon to provide the occupants with safety and amenity. The players who make them must be the most capable. Customers who buy them must be confident to own and occupy them.

The Government has already commenced significant reforms to hold developers, builders and designers accountable for their work with the initial focus on multi-unit, multi-storey residential buildings.

The *Design and Building Practitioners Act 2020 (DBP Act)* ensures that certain designs need to be declared for compliance with the Building Code of Australia (**BCA**) and other relevant standards before building work can start, and declared designs need to be lodged on the NSW Planning Portal. Builders must then construct according to those designs.

The *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020 (RAB Act)* provides a suite of comprehensive investigation, rectification and enforcement powers and establishes a mandatory developer notification scheme for building work.

Together, these changes have been made to ensure that buildings are safe and secure, that the industry is more customer-focused, and that better data is captured throughout the building life cycle.

The proposed reforms in this Amendment Regulation are part of the next phase of the Construct NSW reform agenda and will see the expansion of these Acts to other building classes where customers reside.

Recent building incidents have emphasised the devastating impacts that building defects have on property owners and occupants. The Department of Customer Service (**Department**) is committed to supporting the building and construction sector and providing NSW with a built environment that puts safety and quality at the top of the list.

I encourage you to take part in this consultation process and have your say on the proposed reforms in this Amendment Regulation that will assist in strengthening NSW building laws.

**Natasha Mann**

**Commissioner for Fair Trading**

## Glossary

The following is a list of terms and acronyms used in this document.

Term	Description
<b>2019 Government Response</b>	The NSW Government Response to the <b><i>Building Confidence Report (BCR)</i></b> commissioned by the national Building Ministers' Forum.
<b>Amendment Regulation</b>	Building Legislation Amendment (Building Classes) Regulation 2022.
<b>BCA</b>	Building Code of Australia – contained within the <b><i>National Construction Code (NCC)</i></b> and provides the minimum necessary requirements for safety, health, amenity and sustainability in the design and construction of new buildings (and new building work in existing buildings).
<b>BCE Bill</b>	Building Compliance and Enforcement Bill 2022, currently being consulted on, which proposes to replace the RAB Act and consolidate the compliance and enforcement power of the Department. Please see the BCE Bill RIS for further information on these reforms.
<b>Building Bill</b>	Building Bill 2020, currently being consulted on which proposes to replace the HB Act and the <i>Plumbing and Drainage Act 2011</i> as well as transfer and consolidate the duty of care provisions from the DBP Act and the EP&A Act. See the Building Bill RIS's for more information on these proposed reforms.
<b>Building Confidence Report (BCR)</b>	' <i>Building Confidence: Improving the effectiveness of compliance and enforcement systems for the building and construction industry across Australia</i> ' report by Professor Peter Shergold AC and Ms Bronwyn Weir, commissioned by the Building Ministers' Forum in 2017.
<b>CC</b>	Construction Certificate – confirms that the construction plans and development specifications are consistent with the development consent, and comply with the Building Code and any other council requirements.

<p><b>Class 2 building</b></p>	<p>Class 2 buildings are apartment buildings. They are typically multi-unit residential buildings where people live above and below each other. Class 2 buildings may also be single storey attached dwellings where there is a common space below. For example, two dwellings above a common basement or carpark.</p> <p>A building with a Class 2 part is a building of multiple classifications that has a Class 2 as well as another class, making it a “mixed class” (for example, a Class 2 with a Class 5 which are office buildings used for professional or commercial purposes or a Class 6, which are typically shops, restaurants and cafés).</p>
<p><b>Class 3 building</b></p>	<p>Class 3 applies to residential buildings other than Class 1 or Class 2 buildings, or a Class 4 part of a building. Class 3 buildings are a common place of long term or transient living for a number of unrelated people.</p> <p>Examples include a boarding house, guest house, hostel or backpackers (that are larger than the limits for a Class 1b building). Class 3 buildings could also include dormitory style accommodation, or workers’ quarters for shearers or fruit pickers.</p> <p>Class 3 buildings may also be “care-type” facilities (such as accommodation buildings for children, the elderly, or people with a disability) which are not Class 9 buildings.</p> <p>Class 3 includes residential care buildings and the residential parts of hotels, motels, schools, or jails.</p>
<p><b>Class 9c building</b></p>	<p>Class 9c buildings are residential care buildings that may contain residents who have various care level needs. They are a place of residence where 10% or more of persons who reside there need physical assistance in conducting their daily activities and to evacuate the building during an emergency.</p> <p>An aged care building, where residents are provided with personal care services, is a Class 9c building.</p>
<p><b>Construct NSW</b></p>	<p>A strategy led by the <b>Office of the Building Commissioner (OBC)</b> which focuses on six areas of industry reform: regulation, ratings, education, contracts, digital tools, and data and research. It aims to provide industry and</p>

	regulatory transformation needed to restore consumer confidence in residential apartment buildings.
<b>DBP Act</b>	<i>Design and Building Practitioners Act 2020.</i>
<b>DBP Regulation</b>	Design and Building Practitioners Regulation 2021.
<b>EP&amp;A Act</b>	<i>Environmental Planning and Assessment Act 1979.</i>
<b>EP&amp;A Regulation</b>	Environmental Planning and Assessment Regulation 2021.
<b>FTE</b>	Full time equivalent – is a unit that indicates the workload of an employed person in a way that makes workloads or class loads comparable across various contexts.
<b>HB Act</b>	<i>Home Building Act 1989.</i>
<b>LMS</b>	The Construct NSW Learning Management System. The <b>Office of the Building Commissioner (OBC)</b> have partnered with TAFE NSW to proactively address skills and learning gaps in the construction sector by creating, sponsoring and approving training courses.
<b>NCAT</b>	NSW Civil and Administrative Tribunal.
<b>NCC</b>	National Construction Code – a performance-based code containing all performance requirements for the construction of buildings.
<b>NSW Planning Portal</b>	The digital portal where documents such as regulated designs and compliance declarations will be lodged.
<b>OBC</b>	Office of the NSW Building Commissioner sitting within the Department of Customer Service.
<b>OC</b>	Occupation Certificate – authorises the occupation and use of a new building or part of building or a change of building use for an existing building.

<b>OC Audits</b>	<b>Occupation Certificate (OC)</b> audits. An OC audit involves a review of designs and documents (including contracts) for building work as well as a physical onsite inspection(s). OC audits are a process designed to reduce the risk of poorly constructed buildings being delivered to the consumer.
<b>RAB Act</b>	<i>Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020.</i>
<b>RIS</b>	Regulatory Impact Statement.
<b>Secretary</b>	Secretary of the Department of Customer Service.
<b>The Department</b>	The Department of Customer Service.
<b>The regulator</b>	NSW Fair Trading/Office of the NSW Building Commissioner.

## Executive summary

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The proposed Amendment Regulation will amend existing legislation to strengthen the laws supporting the building and construction industry.

These reforms are a part of the NSW Government's reform agenda to restore confidence in the NSW construction sector and improve the effectiveness of compliance and enforcement systems for the building and construction industry in NSW.

Key proposals featured in the Amendment Regulation include:

- new requirements for developers, designers and builders for Class 3 and 9c buildings to ensure building work is compliant with the BCA, including:
  - expanding the registration scheme for design practitioners, principal design practitioners and building practitioners who are required to declare their work to Class 3 and 9c buildings;
  - requiring developers to provide notice before the completion of work for these buildings;
  - requiring developers to pay the building work levy for these buildings;
  - expanding the robust compliance and enforcement powers to intervene, and stop, building work for these buildings; and
- expanding the registration scheme for professional engineers carrying out professional engineering work for these buildings.

This Regulatory Impact Statement (**RIS**) has been prepared as part of the making of the Amendment Regulation to:

- identify and assess direct and indirect costs and benefits, to ensure that the Amendment Regulation are necessary, appropriate and proportionate to risk,
- demonstrate that the Amendment Regulation, when compared to alternative options, provide the greatest net benefit or the least net cost to the community, and
- demonstrate that any regulatory burden or impact on government, industry or the community is justified.

The RIS sets out the rationale and objectives of the Amendment Regulation and the various options for achieving the objectives. It also provides a discussion on important aspects of the Amendment Regulation and seeks feedback from stakeholders and the community. This RIS should be read in conjunction with the Amendment Regulation.

There will be a six-week public consultation period on the Amendment Regulation.

Submissions are invited on any of the matters raised in the discussion in the RIS or anything else contained in the Amendment Regulation. All submissions will be considered and evaluated, and any necessary changes will be made to address the issues identified before the Amendment Regulation are finalised. The process for submitting comments is explained in the following section.

## Consultation process

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### Making a submission

Interested organisations and individuals are invited to provide a submission on any matter relevant to the Amendment Regulation, whether or not it is addressed in this RIS. You may wish to comment on only one or two matters of particular interest, or all the issues raised.

To assist you in making a submission, an optional online survey is available on the Have Your Say website at <https://www.nsw.gov.au/have-your-say>.

However, this survey is not compulsory, and submissions can be in any written format.

An electronic form has been developed to assist you in making a submission on the RIS and the Amendment Regulation. The electronic form is available on the Have Your Say website and is the Department's preferred method of receiving submissions. Alternatively, you can email your submission to the address below. The Department requests that any documents provided to us are produced in an 'accessible' format. Accessibility is about making documents more easily available to those members of the public who have some form of impairment (visual, physical, cognitive).

More information on how you can make your submission accessible is contained at <http://webaim.org/techniques/word/>.

Please forward submissions by:

Email to: [HBAreview@customerservice.nsw.gov.au](mailto:HBAreview@customerservice.nsw.gov.au)

Mail to: Policy and Strategy, Better Regulation Division

Locked Bag 2906

LISAROW NSW 2252

**The closing date for submissions is 07 October 2022.**

We invite you to read this paper and provide comments. You can download a copy of the RIS and the Amendment Regulation from the Have Your Say website. Printed copies can be requested from NSW Fair Trading by phone on 13 32 20.

### **Important note: release of submissions**

All submissions will be made publicly available. If you do not want your personal details or any part of your submission published, please indicate this clearly in your submission together with reasons. Automatically generated confidentiality statements in emails are not sufficient. You should also be aware that, even if you state that you do not wish certain information to be published, there may be circumstances where the Government is required by law to release that information (for example, in accordance with the requirements of the *Government Information (Public Access) Act 2009*). It is also a statutory requirement that all submissions are provided to the Legislation Review Committee of Parliament.

### **Identified stakeholders**

The RIS has been provided directly to some stakeholder organisations.

### **Evaluation of submissions**

All submissions will be considered and assessed. The Amendment Regulation will be amended, if necessary, to address issues identified in the consultation process. If further information is required, targeted consultation will be held before the Amendment Regulation is finalised.

### **Finalising the Regulation**

After reviewing comments, the Minister for Fair Trading will forward the final regulation to the Governor. After the Governor, with the advice of the Executive Council, approves the regulation it will be published on the official NSW Government website at [www.legislation.nsw.gov.au](http://www.legislation.nsw.gov.au).

# Objective and rationale of the Amendment Regulation

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## Need for government action

Modern buildings are no longer just four walls and a roof. Construction is complex, integrated and evolving. Future home and building owners deserve to know they are buying a quality design and expert construction that is protected by strong building laws. Occupiers of these buildings should feel confident that the buildings are safe and compliant.

Recent building incidents have emphasised the need for reforms to improve transparency, accountability and the quality of work in the NSW building and construction industry. In NSW, examples such as Imperial Towers complex in Parramatta in July 2021 and Skyview apartments in Castle Hill in June 2021 have captured the public's attention.

NSW Fair Trading issued prohibition orders for these developments requiring serious defects be rectified before an Occupation Certificate (OC) would be issued. Serious defects found in the Imperial Towers included waterproofing issues, non-compliant structural steel junctions in the basement, and inadequate fire safety systems that heightened the risk of fire spreading throughout the complex.<sup>1</sup> Fair Trading inspectors found structural issues with the Skyview apartments, preventing residents from occupying their new apartments.<sup>2</sup>

However, the costs of substandard work are not only felt in these high-profile instances, but also by everyday homeowners and building owners who rely upon building practitioners to produce compliant work. Building failures result in costs to homeowners in remedying defects and an increased risk to safety for people living with non-compliant building work. These failures tarnish the industry, negatively impacting compliant traders who produce quality work and negatively impacting consumer confidence.

Practitioners working in the building and construction industry should be suitably competent to carry out the work. They should also actively seek to maintain, improve and broaden their knowledge, expertise and competence.

A major driver of the reforms introduced by the DBP Act and RAB Act is the aim to reshape the culture of the building and development sector and squeeze out poor performance and improve

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<sup>1</sup> Prohibition Order – 9 Hassell Street Parramatta  
[https://www.fairtrading.nsw.gov.au/\\_data/assets/pdf\\_file/0015/1003821/Hassall\\_Developments\\_Pty\\_Ltd\\_9\\_Hassall\\_St\\_Parramatta\\_Prohibition\\_Order.pdf](https://www.fairtrading.nsw.gov.au/_data/assets/pdf_file/0015/1003821/Hassall_Developments_Pty_Ltd_9_Hassall_St_Parramatta_Prohibition_Order.pdf)

<sup>2</sup> Prohibition Order – 299-309 Old Northern Road, Castle Hill  
[https://www.fairtrading.nsw.gov.au/\\_data/assets/pdf\\_file/0009/992421/FINAL\\_PO\\_JKN\\_Hills\\_Pty\\_Ltd.pdf](https://www.fairtrading.nsw.gov.au/_data/assets/pdf_file/0009/992421/FINAL_PO_JKN_Hills_Pty_Ltd.pdf)

building quality. These reforms are still working their way through the system, and it will be some years before their impact can be fully assessed.

This Amendment Regulation will extend the operation of existing statutory regimes introduced by the DBP Act and the RAB Act to ensure that those responsible for key aspects of the design, building and engineering of these buildings are held accountable for their work. The Amendment Regulation is a necessary component of the building and construction industry framework in NSW to ensure buildings in NSW are safe and trustworthy.

## **Objective of government intervention**

The objects of the Amendment Regulation are to:

- ensure quality builds and designs and reducing the likelihood of defective buildings being passed onto consumers
- ensure building practitioners are suitably competent to carry out work and lift their capabilities
- ensure proactive compliance powers are available to the regulator to remedy defective work

## Discussion and assessment of options

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Submissions are welcome on any aspect of the Amendment Regulation or any other relevant issue, whether or not raised in this RIS. However, the following discussion points provide greater context for provisions in the Amendment Regulation and explore some regulatory options, costs and benefits for these provisions.

This RIS will discuss the proposed amendments to expand the application of the DBP Act and the RAB Act to Class 3 and 9c buildings which will require:

- a. Registered practitioners to declare that certain designs comply with the BCA and other relevant standards before building work can start, and building work is constructed in accordance with compliant designs and in compliance with the BCA.
- b. Professional engineers to carry out or directly supervise professional engineering work.
- c. Developers to give notice of the date they plan to apply for an OC to allow time for a review of the building developing, including a possible Occupation Certificate audit (**OC audit**), to identify any serious defects before the building is completed and buyers settle their contracts.
- d. Developers to pay the building work levy to fund the reform agenda to restore faith in the industry.

## Other building reforms

The Department is consulting on other building reforms as part of the next stage of Construct NSW initiatives. The proposed Building Bill 2022 (**Building Bill**) will provide the framework for the licensing of building and construction trades and the regulation of building work including contracting, insurances and warranties.

The Building Bill will replace the HB Act replace the *Plumbing and Drainage Act 2011* and transfer and consolidate the duty of care provisions from the DBP Act and the EP&A Act.

This change has been driven by stakeholder concerns that the current framework for residential building work has not kept up with the industry it is supposed to be overseeing. For this reason, the framework will be expanded to commercial work and pre-fabricated homes.

The proposed Building Compliance and Enforcement Bill 2022 (**BCE Bill**) will replace the RAB Act and will consolidate the compliance and enforcement power of the Department to ensure a consistent and uniform approach.

It is expected that the Building Bill and the BCE Bill will not commence until 2024. Relevant changes proposed in the Amendment Bill and Amendment Regulation will be made to the existing legislation and commence operation before they are incorporated as part of the new Building and BCE Acts.

# Ensuring quality designs and builds

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## The landscape of building reform

The NSW Government's recent reforms to the oversight of the NSW building and construction industry address shortcomings that have left too many homeowners dealing with serious defects. The RAB Act and the DBP Act are critical components of the NSW Government's comprehensive six-part reform agenda to lift standards and accountability across the industry.

The reforms currently apply to Class 2 buildings, which are typically multi-unit residential buildings, as well as mixed-use buildings that have residential apartments within the building. The Government prioritised applying the reforms to Class 2 buildings to address the recurrence of serious defects arising in residential apartment buildings.

The reforms offer protections to apartment owners for defective work. Purchasers of apartments are particularly vulnerable as they generally have little involvement in the construction process until after it has been completed. Therefore, substandard practices were able to flourish as those who come to own the apartments have little to no control over the building works.

### ***DBP Act***

On 1 July 2021, the Government introduced changes to the residential building industry to restore consumer confidence and make sure that apartments being built are trustworthy. These changes deliver on the reforms committed to by the 2019 Government Response to the BCR commissioned by the national Building Ministers' Forum and authored by Professor Peter Shergold AC and Ms Bronwyn Weir.

The BCR found that the accountabilities of different parties were unclear and there were insufficient controls on the accuracy of documentation. It identified that, particularly for Design Practitioners, there was a systemic failure to expressly require documentation to show compliance with the BCA.

The DBP Act requires practitioners who have control over the preparation of key designs or the carrying out of building work for residential apartment buildings to be registered. Those practitioners must make declarations that the work they are responsible for complies with the BCA and other important matters. It ensures that compliance with the BCA is a paramount consideration in the design and building phases and that accountability remains with the practitioners who have control over the work.

The DBP Act and supporting regulation requires the building practitioner to lodge designs for critical building elements before commencing building work. Design practitioners must declare that the designs they prepare for the critical parts of the building comply with the BCA, with building practitioners required to build in accordance with those designs.

The DBP Act also requires the registration of professional engineers who carry out professional engineering work including engineering services, that requires, or is based on, the application of engineering principles and data to a design or a construction, production, operation or maintenance activity relating to engineering. Currently engineers are only registered to carry out engineering work for the purposes of designing or constructing a Class 2 building or a building that contains a Class 2 part.

To ensure that industry is meeting the obligations, the reforms are complemented by strong compliance and enforcement action, such as those under the RAB Act, to address the behaviour of those who are not meeting the required standards and to promote behavioural change in the industry.

A major part of the Government's reform agenda is proactive compliance. The Department is focussed on risk-based regulation and is enhancing strategies to utilise data collected across a variety of building activities to channel resources towards the riskier practitioners.

Each of the reforms include measures designed to flag risky conduct along with the development of algorithms across collated data that attaches to practitioners as they move through various registration, certification and planning systems.

Under the DBP Act, this risk-based approach to regulation will lead to audits of declared plans throughout the construction process. In addition, it will inform decisions about where to conduct audits under the RAB Act based on factors including the type of development, type of declared plans, use of certain products and construction methods, and the track record of practitioners involved in the development.

### ***RAB Act***

Like the DBP Act, the RAB Act currently applies to Class 2 residential apartment buildings and those with a Class 2 part. The legislation provides the building regulator with a suite of comprehensive powers against non-compliant developers to address serious defects in residential apartment buildings, including the power to order the rectification of work or prohibit the issue of an OC until defective building work is remediated. It complements the DBP legislation and the

Construct NSW agenda by ensuring that where standards are not met, those responsible for the building work are responsible for remediating the defects.

Under the RAB Act, a developer who has building work that is approaching completion is required to give notice of the date they plan to apply for an OC. This notice is called an Expected Completion Notice or ECN.

The ECN must be given at least six months before the application for an OC is made or within 30 days of building work commencing for building work expected to be completed in less than six months.

The notice puts the regulator's audit team on notice so that the Department's authorised officers can conduct a site audit to identify any serious defects before the building is completed and buyers settle their contracts. Approximately 20% of developments are to be subjected to an OC audit every year.

The RAB Act was amended in July 2021 to include a power to allow the regulator to impose a levy on developers for building work. From July 2022, the levy can be imposed for each ECN. The levy is intended as a cost recovery mechanism for the important reforms being implemented by the regulator to restore consumer confidence in the building industry.

The Government committed to expanding the RAB and DBP legislation to further building classes, ensuring more buildings are designed and built by competent practitioners who are accountable for their work and there are strong powers available for those who do not meet the required standards.

In keeping with the Government's focus on multi-unit residential accommodation, the proposal in the Amendment Regulation is to expand the RAB and DBP Acts to Class 3 and 9c buildings next, which includes hotels, motels, hostels, backpackers, gaols (Class 3) and care facilities such as aged care facilities (Class 9c).

## Expanding the DBP Act to Classes 3 and 9c

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The Department proposes to expand the DBP Act to other complex buildings where people reside or are accommodated, with Classes 3 and 9c next on the agenda.

- **Class 3** buildings are residential buildings other than a Class 1 or 2 building, for the accommodation of unrelated people, including boarding houses, guest houses, hostels, backpackers or hotels (typically capable of housing 12 people or more). Class 3 buildings could also include dormitory style accommodation, or workers' quarters for shearers or fruit pickers, and may also be "care-type" facilities (such as accommodation buildings for children, the elderly, or people with a disability) which are not class 9 buildings.
- **Class 9c** are residential care buildings. They are a place of residence where 10% or more of persons who live there need physical assistance in conducting their daily activities and to evacuate the building during an emergency. An aged care building, where residents are provided with personal care services, is a Class 9c building.

As with Class 2 buildings under the DBP Act, the intention is to capture the entire building if there is a Class 3 or 9c part in the building. The rationale for this is simple: there is no point in raising the standards of only a part of the building.

The DBP legislation establishes two registration schemes:

1. Design Practitioners, Principal Design Practitioners and Building Practitioners to provide compliance declarations (**Compliance Declaration Scheme**) and
2. Professional Engineers to perform professional engineering (**Professional Engineers Scheme**).

The following sections will provide an overview of the two schemes and explain the impact of expanding them to Class 3 and 9c buildings under the proposal.

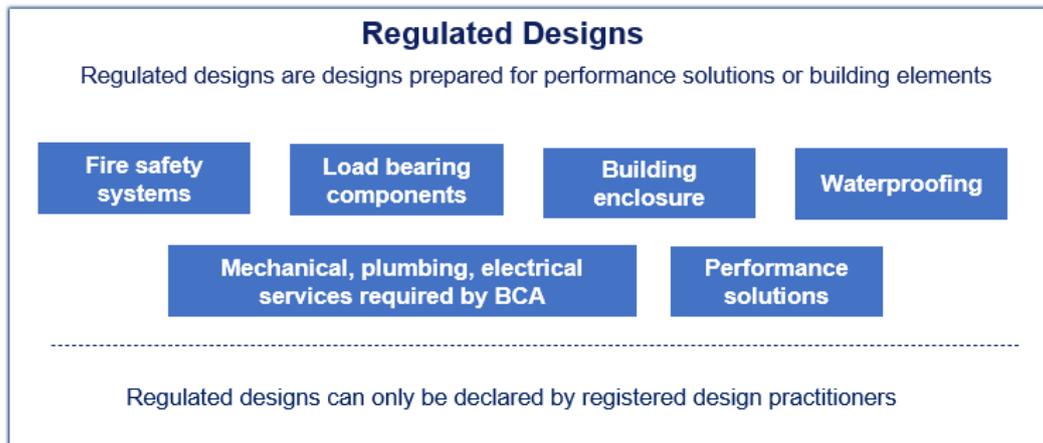
### Compliance Declaration Scheme

The Compliance Declaration Scheme requires registered design practitioners and registered building practitioners to make declarations that the work they are responsible for complies with the BCA.

### Regulated designs

Under the Compliance Declaration Scheme, the obligations for Design Practitioners to provide compliance declarations only apply for 'regulated designs'. A 'regulated design' is a design, including a plan, specification or a report detailing a design that is prepared for a building element,

or for a performance solution, for building work. This will be maintained under the proposed expansion as detailed below.



Designs for building elements are important as they are more likely to have a greater impact on the safety and proper construction of a building. They are also the components where major defects have been recorded in residential and mixed class buildings.

A performance solution is one of two pathways of achieving compliance with the BCA. While the bespoke nature of a performance solution enables flexibility and innovation, it also requires careful and detailed assessment so that the building solution can meet the performance requirements of the BCA. Extending the operation of the reforms to designs for performance solutions ensures they are properly documented and are a reliable method of compliance.

### **Design Practitioner: role and responsibilities**

Design practitioners' obligations centre around regulated designs, meaning these critical elements of the building must be designed by practitioners who have gained registration by demonstrating they have the qualification, skills, knowledge and experience in their area of expertise. Those designs, before they can be provided for use for building work, must be declared, with the registered design practitioner providing a Design Compliance Declaration that the design they have prepared, supervised or coordinated, complies with the BCA.

The design practitioner is also required to integrate their design with other designs and relevant building work. This means the design practitioner will need to actively consult and work with design practitioners from other disciplines to factor in all relevant considerations in developing their design. For example, a modern façade system may include architectural, structural and mechanical elements. The respective designers would therefore collaborate in the development of the façade system. Each design practitioner would make a Design Compliance Declaration for their work and note on the declaration that they have integrated the design with the relevant designs of

the other specialist designers. The integration requirement is critical to ensure that designs are not prepared in siloes and that building design is holistic.

Without these aspects being fulfilled, resulting in a Design Compliance Declaration that states that the design is BCA compliant and integrates relevant design and building work, the building practitioner risks committing an offence if they rely upon the design for building work.

The building practitioner cannot commence building work without the declared regulated designs, which must be lodged by the building practitioner on the NSW Planning Portal before work commences. Likewise, if there is a variation to a building element or performance solution, the variation needs to be designed and declared by a registered design practitioner. The building practitioner must upload the varied design and declaration within a day of the work commencing or else building work will need to stop.

The lodgement on the NSW Planning Portal makes the designs available to the regulator for audit. This means that the regulator can check that practitioners are complying with their obligations and can audit the designs to ensure that they comply with the BCA. The design audits also allow the regulator to determine areas where there are failings of individual practitioners or systemic failures of a particular class.

The DBP Act provides the regulator with proactive powers to issue a stop work order if a design audit determines non-compliant work could result in significant harm or loss. There are also powers to mandate education, accept undertakings, issue warnings, issue penalty notices, prosecute offences, apply to the Court for an order to remedy or restrain breaches and powers to conduct investigations. There are also disciplinary powers available for use against individual practitioners, including cancellation of registration.

Each design is stamped with the details of the design practitioner who prepared the design and is catalogued within the NSW Planning Portal against that practitioner. If there are shortcomings detected in a practitioner's designs, the regulator can call up other designs prepared by the practitioner. The scheme utilises data to ensure that defects are detected early and can be prevented. Expanding the reforms to further building classes will mean that there will be a greater amount of data to detect practitioners not meeting the required standards and also ensuring that practitioners who do not meet the standard are not working on other buildings.

Design audits carried out by the Department's DBP audit team up to May 2022 found that in 8 out of 15 occasions, the registered design practitioner had failed to appropriately integrate relevant designs. Four audits also detected non-compliance with the BCA and compliance with old versions of the BCA. The proactive detection of these issues at the design phase means they can be

remedied by those responsible before the works are completed. Early detection of non-compliant design means non-compliant building services, waterproofing, drainage and fire systems, which by their nature would otherwise be latent defects, can be fixed rather than risking future loss or damage. It also reduces the likelihood that the responsible practitioner will repeat the mistake on another project.

These requirements benefit property owners and complements the DBP Act's duty of care provisions, which provide that any person who carries out construction work has a duty to exercise reasonable care to avoid economic loss caused by defects in or related to a building for which the work is done and arising from the construction work.

This duty is owed to each owner of the land in relation to which the construction work is done and to each subsequent owner. This duty extends beyond registered practitioners and is owed by anyone who carries out building work, prepares designs for building work, manufactures or supplies a building product used for building work, and includes anyone who supervises, coordinates, project manages or has substantive control over such work.

The regulated designs requirements benchmark design standards to community expectations. The reforms require practitioners to operate in a way which ought to be standard practice but, unfortunately, has become best practice for some due to project cost cutting. The DBP legislation mean designs that relate to critical elements of the building cannot be treated as guidance by the builder but must be followed. The reforms require buildings to be built in accordance with designs that are compliant and integrated to reduce building defects.

For property owners, it creates a documentary chain of accountability that assists both the regulator and owners in determining responsibility for defects. Additionally, it provides property owners with an accurate set of designs for their building, which is invaluable for future works and ongoing maintenance.

## **Building work**

To be a regulated design, the design must be for 'building work'. This means that early concept designs, shop drawings or early drafts are not 'regulated designs' as these designs are not intended to be relied upon for building work. The DBP Act sets out that building work means work involved in:

- the construction of a building
- the making of alterations or additions to a building
- the repair, renovation or protective treatment of a building.

The Design and Building Practitioners Regulation 2021 (**DBP Regulation**) includes the class of building that the above relate to. The DBP Regulation currently specifies Class 2 buildings and buildings with a Class 2 part. To expand to the additional building classes, the Amendment Regulation will prescribe Classes 3 and 9c.

The definition of 'building work' also affects the responsibilities of a building practitioner under the Act. For example, a building practitioner must take all reasonable steps to ensure that building work complies with the requirements of the BCA. This obligation is for *all* building work, not only the building work that requires a regulated design, i.e. building work for a building element or performance solution.

### **Building practitioner: role and responsibilities**

The DBP legislation requires the building practitioner, who is the principal contractor, to be registered. Before the building practitioner can begin building work, the building practitioner must have designs and declarations for the key building elements and lodge them on the NSW Planning Portal, where they can be audited by the Department's inspectors. This requirement has been designed to promote compliance with the Act, change the behaviour amongst Building Practitioners and assist in detecting non-compliance of building works that are subject to an audit.

The building practitioner must build in accordance with the designs, and if variations are required for a building element or performance solution, the building practitioner needs the variation to be designed and declared by a registered design practitioner. This means building work relating to the regulated design may need to stop so that the varied design can be prepared and declared before the work is carried out.

There are likely to be costs associated with re-engaging the designer to make variations and potentially slowing down building work while the Design Practitioner works on the variation. It is expected that such costs will likely be passed onto the client in the short term. However, as behaviours change and industry adapts to the reforms, it is hoped that these reforms result in better quality and detailed designs at the start of a project. This should reduce the need for, and volume of, variations during construction and may ultimately results in efficiencies which will serve to minimise costs, including the costs of delays.

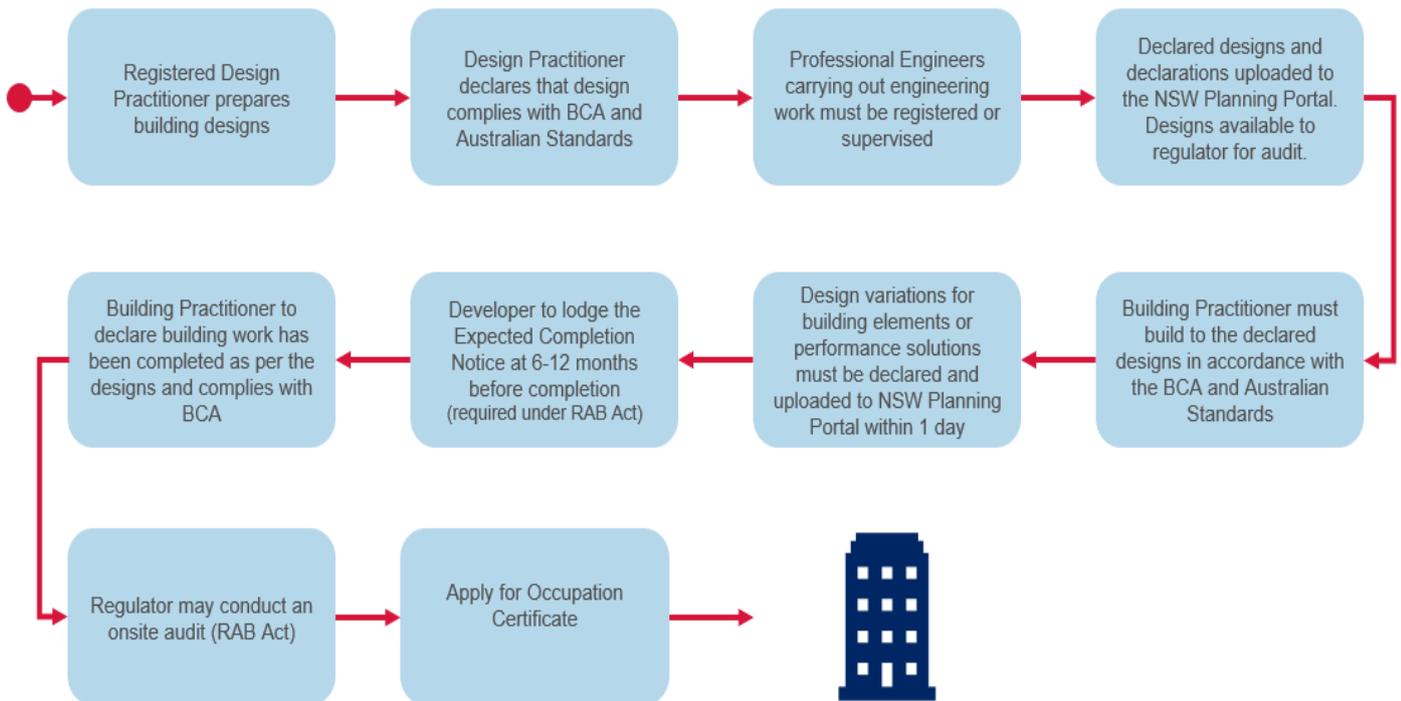
Before the application for the OC, the building practitioner must make a declaration that covers whether the building work was built in accordance with the designs from the registered design practitioners and, whether all the building work (including building work that is not a building element or performance solution) is compliant with the BCA.

The Building Practitioner must also lodge critical documentation on the NSW Planning Portal. This ensures that variation statements and other documentation is in order prior to the OC being issued and assists with certifier obligations and auditing by the regulator.

The reforms focus on upfront design, integration and compliance with the BCA through design to build with key compliance checkpoints.

These requirements that currently apply to Class 2 buildings will be expanded and apply to Class 3 and 9c buildings. This means that building and design practitioners working on these projects will need to be registered and comply with the Compliance Declaration Scheme. Practitioners would also need to hold insurance in the future. It is expected that additional financial burden would be placed on businesses running these projects and projects may experience delays as a result of variations.

The Department considers expanding the reforms introduced for design and building practitioners, to other buildings is necessary to restore consumer confidence in the industry, which it is expected to motivate consumer demand once faith is renewed.



*Expanding the reforms to new buildings, and repair and renovation*

As foreshadowed in the Second Reading Speech when the DBP Bill was in Parliament<sup>3</sup>, the DBP legislation was intended to eventually apply to the construction of new buildings as well as repairs, renovation and remediation of existing buildings across a broad range of building types in NSW. Class 2 buildings emerged as a priority for reform and now the Department aims to ensure that standards of design and building work are raised across all building classes.

If the reforms were limited to a lone building class, it would risk poor practitioners avoiding working on that building class to evade detection. This could push poor practitioners to concentrate their work in other building classes. It is rare for practitioners to strictly work in a single class of building. Therefore, those practitioners who are responsible for the poor work detected in Class 2 buildings are also likely to be working in other building classes. The intention is to raise the standard of all building work to ensure practitioners who are responsible for poor work are no longer able to get away with it in any building class. This relies on the reforms being expanded to all building types.

The expansion into Classes 3 and 9c will introduce a broad range of building types to the reforms. As the DBP Act applies to the entire building where there is a Class 3 or 9c part within that building, it will mean other building classes will be subject to the reforms if they are in a mixed class building.

In the period January 2021-22, 67 CCs were issued for Class 3 buildings via the NSW Planning Portal, of which 46 buildings were in the Metropolitan area and 21 buildings were in Regional NSW. Similarly, the number of applications for Class 9c buildings issued was 15, of which 6 buildings were in the Metropolitan area and 9 buildings in Regional NSW.

There are approximately 6,000 Class 3 buildings in NSW, of which approximately 4,000 are for shared accommodation facilities (such as boarding houses, hostel for homeless, refuges, boarding schools, staff quarters, retreats and lodges, prison or corrective institution for adults, residential colleges/ hall of residency and others) and 2,000 are for residential care-type facilities (such as psychiatric hospital or institution, hostel for the disabled, other welfare institutions, NDIS specialist disability accommodation-group home and others). Around 3,100 buildings are in the Metropolitan area and 2,900 are in Regional NSW.

There are approximately 1,000 Class 9c buildings in NSW. Around 600 buildings are in the Metropolitan area and 400 in Regional NSW. The data has been obtained from research utilising

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<sup>3</sup> Second Reading speech for DBP Bill, 23 October 2019

<https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#docid/HANSARD-1323879322-108381>

government departmental lists on boarding house registers, statistics such as Aged Care Service List and online research of accommodation providers.

ABS projections show that by 2041 between 828,300 and 868,300 people are projected to live in non-private dwellings (**NPDs**), up from 490,800 in 2016. This is an increase of between 69% and 77% – far exceeding the projected population increase of 40%. Around one third (between 200,800 and 282,200) of all people projected to be living in NPDs in 2041 are aged 85 years and over, up from 123,800 in 2016. The large majority of elderly people living in NPDs in 2016 were in aged care facilities or retirement homes. Another quarter (between 169,100 and 242,200) are projected to be younger people aged 15–29 in 2041, up from 129,400 in 2016.

In 2016, most people aged 18–24 living in NPDs were in university accommodation. Between 1996 and 2016 people who usually lived in NPDs (such as boarding schools, aged care facilities, prisons and workers' accommodation) increased from 1.8% to 2.0% of Australia's population. The aged care facility population had the largest increase of any non-private dwelling type.<sup>4</sup>

NPDs are establishments which provide a communal and often transient type of accommodation. The ABS classification does not correlate with NCC building classes. NPDs are classified according to their function and include hotels, motels, guest houses, prisons, religious and charitable institutions, military establishments, hospitals and other communal dwellings. Where this type of accommodation includes self-contained units (as provided by hotels, motels, homes for the elderly and guest houses), the units are enumerated as part of the NPD. Complexes such as retirement villages, which have a combination of self-contained units, hostel and/or nursing home accommodation, are enumerated as NPDs.

Like Class 2 buildings, Class 3 buildings include a diverse scale of buildings in terms of size and complexity. The expansion to Class 3 will capture smaller existing buildings, such as motels in small towns, and small-scale mixed class buildings such as a rural pub with accommodation or a motel that shares the building with a restaurant and hairdresser. It will include high-rise hotels that have floors of retail or office space or Class 9b entertainment/recreation venues, such as gyms or theatres. The larger Class 3 buildings in metropolitan locations may also have complex infrastructure components, such as skywalks or bridges that will also be captured by the DBP Act.

Developers and owners of larger Class 3 buildings, such as high-rise hotels, may have stronger awareness and understanding of the DBP Act through connected ventures or interests in Class 2

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<sup>4</sup> Data sourced from the Australian Bureau of Statistics (ABS), *Household and Family Projections, Australia 'Type of non-private dwelling'* in which people were counted on Census night for the 2016-2041 projections. <https://www.abs.gov.au/statistics/people/population/household-and-family-projections-australia/latest-release>

buildings already subject to the reforms. Some Class 3 parts of a building will already have been subject to the reforms from being in a mixed-use building that has a Class 2 component.

Smaller Class 3 building owners, such as proprietors of small hotels, motels and backpacker buildings in rural and regional areas may have a low awareness of the DBP legislation. Despite education and awareness campaigns, some owners may first learn of the reforms after it commences.

When the DBP Act reforms commenced for Class 2 buildings, those requiring work for repairs, renovation or remediation work on smaller existing buildings appeared to be less acquainted with the reforms and found it more difficult to understand the obligations. Research conducted shortly before the DBP Act commenced in 2021 revealed that 5% of designers and 20% of builders were unaware of the changes in the DBP Act and 34% of practitioners sampled knew very little of the reforms.<sup>5</sup>

For this reason, it is proposed to stage the expansion to Class 3 buildings by first expanding the reforms to new Class 3 buildings, in which the application of the reforms is more straightforward and are already subject to processes through the planning system that will allow for a relatively seamless introduction to the new requirements. Along with the new builds, the reforms will also apply to building work involving the repair, renovation, maintenance, alteration or protective treatment of a Class 3 building other than low or medium rise buildings.

It is proposed that repair, renovation and maintenance of low and medium rise buildings will commence 6 months later, allowing slightly more time for owners of smaller class 3 buildings to develop an understanding and awareness of the reforms.

Delaying the reforms applying to repair and renovation work of smaller class 3 buildings is intended to ensure that smaller proprietors, especially in regional areas, have additional time to prepare for the obligations.

The new restricted Design Practitioner – Architectural and Building Practitioner classes for medium and low-rise buildings were introduced in March this year. This will enable practitioners who work on a mix of buildings, including smaller Class 2, 3 or 9 to become registered, to the particular benefit of practitioners in regional areas. Extending the reforms to additional building classes incentivises registration for practitioners in regional areas, ensuring supply of registered practitioners isn't concentrated in metropolitan areas. After this phase of expansion, it is intended

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<sup>5</sup> NSW Government and Western Sydney University, *Industry Report on Digitalisation of Design and Construction of Class 2 Buildings in New South Wales*, June 2021, <https://researchdirect.westernsydney.edu.au/islandora/object/uws:60727>,

to continue expanding the reforms to other building classes, including commercial buildings, meaning that commercially, practitioners in regional areas will need to be registered to provide declarations for regulated designs and building work across a range of building types.

It is not proposed to split the commencement of building work on a Class 9c building, with the DBP Act proposed to commence on 3 April 2023 for building work on new or existing buildings.

### **Expansion to Class 1b considered**

The Department considered expanding the DBP legislation to Class 1b buildings during this phase. A Class 1b building is a boarding house, guest house or hostel that has a floor area less than 300 m<sup>2</sup>, and ordinarily has less than 12 people living in it. It can also be four or more single dwellings located on one allotment which are used for short-term holiday accommodation, such as cabins in caravan parks, tourist parks, farm stay, holiday resorts and similar tourist accommodation.

The class was initially considered due to similarities in the nature of the housing to Class 3 buildings, although noting the requirements under the BCA for Class 1b are far less stringent than for Class 3. This is due to the smaller size of the building and the lower number of occupants representing a reduced risk in terms of fire or other emergency situations.

Class 1b has not been included in the next phase of the DBP Act expansion as the reforms under the proposed Building Bill are likely to deliver the necessary benefits for this building class. For example, the proposals requiring registration for engineering work and building designers and the expansion of specialist trade registrations, such as waterproofing. Regulating more design and building work for Class 1 buildings, coupled with strengthened consumer protections, dispute resolution, enforcement and compliance processes is considered an appropriate measure to achieve improvements in this building class. Improvements to clarifying the role of the certifier will also result in improvements for this class, noting the regulatory role of the certifier for building work.

Another reason for not expanding to Class 1b was that these buildings are typically less complex than Classes 2, 3 and 9c and are already subject to upfront design, rather than staged design and construct. The suite of reforms proposed in the Building Bill that will apply to Class 1, including Class 1b buildings are considered more appropriate to deliver improvements amongst this class. Please refer to the Building Bill RIS for further information on these reforms.

The proposal has therefore been limited to expand the DBP legislation to Classes 3 and 9c in the next phase.

Proposed timetable for expansion to Classes 3 and 9c

Building Class	Timeframe
Class 2	1 July 2021 <b>(Stage 1)</b>
New Class 3 and repair/renovations for larger Class 3 (repair/renovation for low/med rise not captured)	3 April 2023 <b>(Stage 2)</b>
Class 9c	3 April 2023 <b>(Stage 2)</b>
Repair/renovation med/low rise Class 3	2 October 2023 <b>(Stage 3)</b>

**Questions**

1. Do you support the expansion of the DBP obligations to Class 3 and 9c buildings? If not, why?
  2. Is the proposed timetable for commencement of the reforms suitable? If no, what should change?
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## Building work exemptions

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[Clause 13](#) of the DBP Regulation excludes certain work as 'building work' for the purposes of the Compliance Declaration Scheme. This means obligations such as requirements for registered design and building practitioners, regulated designs and declarations do not attach to the work. However, the exemptions do not apply to the professional engineer registration scheme so engineers will still need to be registered to carry out professional engineering work.

Exemptions are for minor work, such as exempt development and work where it may cause an unnecessary burden to require regulated designs and declarations by registered practitioners (e.g., for the maintenance of building services and fire safety systems).

The DBP Regulation also excludes work that is specifically exempt from complying with the BCA under the EP&A Act or where complying with the current BCA may be difficult or prohibitive, such as Development Control Orders (unrelated to cladding) as they may be issued for work on older buildings.

After commencement, further exemptions were included, such as exemptions relating to:

- waterproofing for a sole occupancy unit where the work is also exempt development
- in the case of a mixed-use building, the non-structural aspects of a fit-out of a Class 5 or 6 (office or retail) space, provided it is subject to its own development consent.

The waterproofing exemption was included as the work was considered relatively low risk and it would have posed an undue burden requiring a registered design practitioner to prepare and declare the designs for the waterproofing aspect and a registered building practitioner to carry out the building work for work that is otherwise exempt development.

The exemption for fit outs was included as those who work predominantly in commercial buildings may not have the necessary licences and experience to gain registration under the DBP Act and it was considered there were sufficient controls in the building approvals process to monitor the work and structural components remain part of the declaration scheme. The intention is to review this exemption once the reforms are expanded to commercial classes.

Consideration is currently being given to an exemption for 9b parts in similar terms to the current exemption allowed for the fit-out of Class 5 and 6 parts. This would allow the fit-out of the non-structural aspects of a Class 9b part of a building such as a childcare or gymnasium, provided it is subject to its own development consent.

## Exempt Building Work

exempt development (not waterproofing)	waterproofing (bathroom, kitchen, laundry or toilet alterations) which is exempt development and for a single dwelling	work ordered under the Local Government Act or a development control order (not cladding)	work exempted from compliance with BCA (EP&A cl 164B, 187 or 188)	maintaining fire safety system (not replacing entire system or structural component)
maintaining component of mechanical, plumbing or electrical service	work not requiring HBA licence (less than \$5,000)	work under the HomeBuilder Grant scheme	electrical or plumbing performance solution not involving building element (only for regulated design)	fit-out class 5 or 6 (own development consent and not structural)

In expanding the application of the DBP Act to Classes 3 and 9c, it is proposed that the existing exemptions apply to these new classes of building. The Amendment Regulation does not propose further exemptions for the new classes.

However, it is acknowledged that whereas Class 2 buildings are usually owned by different owners as part of strata arrangements, a Class 3 or 9c building may have the same long-term owner who owns the entire building. This may mean a different policy approach is warranted for certain work. For example, waterproofing in bathrooms is important because if not properly done, it can have impacts on dwellings below. In a Class 3 building where the entire building is under the same ownership, it may be preferred to upgrade the bathrooms on an entire floor at once. An owner of a commercial building has a vested interest that the waterproofing is done properly so as not to impact floors below that they also own.

Previously, owners of Class 2 apartments who bought off-the-plan or post-construction were vulnerable to building defects partly because of having little or no control over the initial building work. Owners of apartments were also vulnerable to potential impacts on other parts of the building caused by repair and renovation work on another apartment or communal area. Therefore, repair and renovation work on an existing Class 3 or 9c building, where the entire building has the same owner, may pose less risk as the proprietor will want to ensure the work does not adversely impact other parts of the building.

However, best intentions may not always amount to safeguards, and a proprietor may need the controls within the DBP Act to ensure that the work meets the desired standard. One of the main reasons why this work has not been exempted is that even where the building is owned by a single owner, excluding this work does not offer safeguards or documentary evidence to successive owners and those who have interests (timeshares etc). Another important factor is that the legislation is not intended only for the benefit of owners but is also for the benefit of occupants, noting that people inhabiting these buildings may be particularly vulnerable.

## Questions

3. What exemptions, if any, do you think should be introduced for building work on Class 3 or 9c buildings? Why?
  4. Are there particular exemptions that should apply to certain types of buildings within these classes? For example, allowing waterproofing work for multiple units in a boarding house without being subject to the DBP Act. Why?
  5. The requirements will also apply to the non-Class 3 and 9c parts of a mixed-use building. Are there exemptions needed specifically for these parts? Why?
  6. Should any of the existing exemptions not apply to Class 3 or class 9c building work? Why?
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## Design Practitioner classes

The DBP Regulation provides the criteria that must be met before a person is eligible for registration as a Design Practitioner and Building Practitioner. The registration fee for a Design Practitioner – Architectural or Engineering class is \$405 for 1 year, \$911 for 3 years and \$1519 for 5 years.

For a Design Practitioner in the other classes, the registration fee is \$440 for 1 year, \$990 for 3 years and \$1519 for 5 years. If a Design Practitioner applies for two or more classes of registration in relation to the same type of practitioner, in the same application, the fee payable is the fee for the class with the highest fee amount. If the Design Practitioner applies for two different classes (such as a Professional Engineer and a Design Practitioner) then both fees will apply.

Currently, there are 19 individual classes of registration for Design Practitioners, and a class for a Body Corporate to be registered as a Design Practitioner. The current classes of Design Practitioner under the DBP Act are:

### Design Practitioner Classes

Architectural	Architectural (medium rise)	Architectural (low rise) – coming soon	Building Design (medium rise)	Building Design (low rise)	Civil Engineering
Drainage	Drainage (restricted)	Electrical Engineering	Façade	Fire Safety Engineering	Fire Systems (detection and alarm systems)
Fire Systems (fire sprinkler)	Fire Systems (fire hydrant and fire hose reel)	Fire Systems (mechanical smoke control)	Geotechnical Engineering	Mechanical Engineering	Structural Engineering
		Vertical Transportation	Registered Body Corporate		

Registered Body Corporate Design Practitioners need an employee who is registered in the relevant class of Design Practitioner to which the design relates to make declarations for designs on behalf of the body corporate.

As of 31 March 2022, there are 3,863 design practitioner class registrations with NSW Fair Trading. Recent amendments to the DBP Regulation allowing Design Practitioners in the architectural classes to become registered to work on medium rise buildings by recognising

experience across additional classes is likely to see registrations increase in the architectural class.

It is proposed that those currently registered to work on Class 2 buildings will also be able to work on Classes 3 and 9c buildings once the reforms are expanded. Although Class 9c buildings will at times have more complex requirements, particularly in terms of fire safety requirements, the Department considers commercial arrangements are likely to resolve this as those who are engaged for such work will likely need to demonstrate competency for the work.

Building Designers are currently restricted to work on medium and low-rise buildings for Class 2 work under the DBP registration. This is consistent with limitations imposed under the State Environmental Planning Policy 65 (**SEPP 65**). SEPP 65 does not apply to Class 3 or 9c buildings. Therefore, upon the expansion to Classes 3 and 9c, an unrestricted class of building designer may be necessary, in which the restrictions consistent with SEPP 65 will only apply to Class 2 design work. It is proposed that the current knowledge, skills and experience are adequate, however, the qualification for the unrestricted class is proposed to be a master's degree in architecture or equivalent.

Practitioners who need to be registered to work in Class 3 and 9c may already be registered to work on Class 2 and mixed-use buildings. The DBP Regulation offered temporary pathways for registration for certain practitioner classes to enable applicants who didn't satisfy the registration criteria. These temporary pathways have now closed but the DBP Regulation could provide that for a limited time, once the legislation expands to Classes 3 and 9c, these temporary pathways are reopened, such as allowing competency assessments for practitioners who don't hold particular qualifications.

## Questions

- 7. Should practitioners registered under existing classes in DBP for Class 2 work be automatically eligible to work on Class 3 and 9c buildings?**
  - 8. Are further practitioners required for Class 3 and 9c buildings? Why?**
  - 9. Will further practitioner classes be required to cover work on a building part that might be mixed with a Class 3 or 9c building? Why?**
  - 10. Should there be an unrestricted class of building designer? Why or why not?**
  - 11. Should the temporary pathways for registration ('grandfathering provisions') and competency assessments that were available when the legislation first applied to Class 2 be reopened for the expansion to Classes 3 and 9c? Why?**
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## Building Practitioner classes

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The Act requires the Building Practitioner to have designs and declarations to do the building work where it is for a building elements or performance solutions. However, not all builders working on a project need to be registered as a Building Practitioner under the DBP legislation. Only the principal contractor who is contracted to do or arrange the building work needs to be the Building Practitioner. Whoever is contracted to do the building work is the Building Practitioner and must be registered. Therefore, developers may be Building Practitioners.

As it is the contract that determines who the Building Practitioner is, Body Corporates can also be Building Practitioners. The Body Corporate currently requires a contractor licence under the HB Act. A Body Corporate must nominate an individual registered as a Building Practitioner to make declarations on behalf of the Body.

The following classes of Building Practitioner are:

- Body Corporate nominee
- Body Corporate nominee (medium rise)
- Body Corporate nominee (low rise)
- General
- General (medium rise)
- General (low rise)

The registration fee for a Building Practitioner is \$405 for 1 year, \$911 for 3 years and \$1,519 for 5 years and for a Building Practitioner – Body Corporate is \$1,366 for 1 year, \$3,074 for 3 years and \$5,122 for 5 years.

Feedback is sought on whether practitioners who are already registered under DBP for Class 2 work should be automatically eligible to work on Classes 3 and 9c and whether this should be the case for all practitioners, or Design Practitioners or Building Practitioners. For those who consider they should not be eligible, feedback is sought on what should be required of those practitioners to become eligible.

### Questions

**12. Are further practitioner classes required for Class 3 and 9c buildings? Why?**

**13. Will further practitioner classes be required to cover work on a building part that might be mixed with a Class 3 or 9c building? Why?**

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## Qualifications

Current eligibility requirements for registration as a Building Practitioner are linked to licences under the HB Act, such as a contractor licence for body corporates, and either a supervisor certificate for general building work or endorsed contractor licence for general building work for individuals.

As building practitioners engaged in Class 3 and 9c work may not carry out building work that requires them to be registered under the HB Act (as Class 3 and 9c work is excluded from the definition of 'dwelling' under Schedule 1, clause 3(3) of the HB Act), the DBP Act will need to set the qualifications for practitioners without reliance on HB Act licences.

The eligibility criteria for Building Practitioners would therefore require qualifications to be prescribed in the DBP Regulation. An option would be to mirror the qualifications needed for registration as a general builder under the HB Act. This information is included in more detail in **Appendix 1** but generally requires:

- a Certificate IV in Building and Construction or Building Project Support, including mandatory units and either a carpentry or bricklayer licence or qualification or Diploma of Building and Construction; or
- a degree in building, construction, construction management, construction project management, construction economics, applied science (building), or quantity surveying from an Australian university which requires the applicant to undertake the equivalent of four years' full-time study and a mandatory work placement.

Similarly, for practitioners who do not have the Qualified Supervisor Certificate, as they do not require that qualification under the HB Act, but wish to be registered for work on Class 3 or 9c or the mixed-use elements of a building captured by DBP, the DBP Regulation may prescribe as an alternative eligibility criteria where a Qualified Supervisor Certificate is currently required, that an applicant can demonstrate two years' experience supervising and coordinating general building work, not just work of a particular trade. This experience of a supervisory nature will be in addition to the current experience requirements, where a practitioner needs to demonstrate five years' recent and relevant experience carrying out or coordinating building work, generally in building Classes 2, 3 and 9c.

Practitioners who do not hold a Contractor licence under the HB Act may be required to submit to additional probity checks.

## **CPD**

CPD obligations under the DBP legislation are set at three hours per year as the focus is on quality over quantity. It was also in recognition that most practitioners have existing CPD obligations under other registrations or professional associations.

Feedback is sought as to whether Building Practitioners who are registered through this pathway, where they do not have an existing HB Act licence and the CPD obligations that come with that, should be required to do additional CPD.

## **Questions**

- 14. Are the existing qualifications appropriate for registration as a Building Practitioner for Class 3 and 9c work?**
  - 15. As Building Practitioners registered for DBP won't also have licences under HB Act, should these practitioners be subject to additional CPD or other requirements?**
  - 16. Should there be additional qualifications required for this work?**
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## Professional Engineers Scheme

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As outlined in the beginning of the Chapter, the DBP Act sets up to two registration schemes. The above content covers the expansion of the Design Compliance Scheme. The proposed reform also includes the expansion of the Professional Engineering Scheme, discussed below.

The Department is committed to enhancing public trust in the building and construction industry by continuing to register Professional Engineers.

The importance of the registration of engineers is highlighted in the following case studies:

### *Case study: A House with No Piers*<sup>6</sup>

*A construction of a home in regional NSW in 2009 resulted in the owners commencing three and a half years of legal proceedings in NCAT.*

*The weight of expert evidence found that the footing design prepared by the design engineer was inadequate. Further, the design was for a slab and piers and the piers were not constructed by the builder.*

*The Council officer failed to identify that the footings were not constructed in accordance with the approved design when conducting mandatory inspections.*

*The owners made complaints about the design engineer and the builder's expert engineer to their professional industry association. Both complaints were dismissed demonstrating a lack of willingness by the industry association to hold their members to account for what the weight of evidence showed was incompetent and unprofessional conduct by the engineers. The legal case was poorly managed by the owners' legal team and the absence of piers was not put before NCAT. Due to this, NCAT found that the builder had constructed the footings in accordance with the design. The owners were ordered to pay the builder's costs. In total, their own and the builder's legal and expert witness costs were \$301,000.*

*The NSW Building Commissioner inspected the site in mid-2020. He observed the excavated footings and the absence of piers under the slab. The NSW Building Commissioner commissioned a report and further investigation by NSW Fair Trading into the conduct of the builder and certifier to understand in detail what occurred in this matter, and how to prevent these outcomes for consumers.*

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<sup>6</sup> NSW Government, *The House with no Piers: A review of the issues relating to alleged defects in the construction of a home and the related complaints and dispute process*, September 2021, <https://www.nsw.gov.au/sites/default/files/2021-02/the-house-with-no-piers.pdf>

### Case study: Opal Towers, Sydney Olympic Park

*The Opal Tower is a high-rise residential building located in Sydney Olympic Park. It has 36 storeys above ground and three basement levels below ground. Construction was completed in 2018 and occupation of 392 residential apartments commenced.*

*On Christmas Eve 2018, residents of the Opal Tower reported loud noises, including a loud “bang”, reportedly of internal origin, and presumably associated with the structure of the building. Early investigations of the source of these loud noises identified cracks in a load-bearing panel on Level 10 of the building, forming one of the exterior walls at the base of one of the inset slots. Later investigations revealed further cracking of the hob beam supporting the cracked load-bearing panel. Subsequent investigations also identified other cracked concrete structural members at Level 4 of the building, again at the base of an inset slot feature.*

*To prevent future occurrences of such cases, experts engaged by the NSW Department of Planning and Environment to investigate the likely causes of cracking recommended the creation of a registry of engineers. The experts recommended “registered engineers should have a high level of competency including recognised qualifications benchmarked to international education standards, minimum level of professional practice and currency of continuing technical professional development. Certifications and approvals associated with the design and construction of a building should only be undertaken by a registered engineer in their specialist area of expertise.”<sup>7</sup>*

When designing the existing engineering registration framework the Government’s first priority was to introduce the reforms to the residential construction sector with an initial focus on multi-storey residential apartments and related mixed-use developments. This was to address the significant failures in building standards which occurred prior to 2021 such as the Mascot Tower and Opal Tower incidents.

### **Reasons for the proposed expansion of the registration framework**

The appropriate regulation of engineers provides greater consumer confidence in the construction end result, increased standards, and ensures professionals are competent. Through effective regulation and enforcement, the Government can better ensure the quality and safety of buildings.

The registration of engineers ensures engineers in NSW:

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<sup>7</sup> Unisearch Expert Opinion Services, *Opal Tower Investigation Final Report: Independent Advice to NSW Minister for Planning and Housing*, February 2019, page 15.  
<https://www.planning.nsw.gov.au/-/media/Files/DPE/Reports/opal-tower-investigation-final-report-2018-02-22.pdf>,

- meet qualifications, knowledge, skills and experience requirements set by the Government for registration class(es) they are seeking registration in
- meet ongoing compliance with a Code of Practice
- meet ongoing insurance requirements
- meet ongoing requirements for CPD.

The proposal for the licensing of engineers to apply across all building work moves NSW closer to national uniformity with Queensland and Victoria. Registration for engineers in Queensland has been in place for more than 90 years, when in 1930 the then Queensland Government passed the original *Professional Engineers Act*, creating the Board of Professional Engineers Queensland and bringing in the registered professional engineer of Queensland system.

The main objects of the [Professional Engineers Act 2002 \(QLD\)](#) are:

- to protect the public by ensuring professional engineering services are provided by a registered professional engineer in a professional and competent way
- to maintain public confidence in the standard of services provided by registered professional engineers
- to uphold the standards of practice of registered professional engineers.

The benefits of registration of professional engineers in Queensland has prompted many other States and Territories to implement their own engineer registration framework. Mandatory registration for engineers is being phased in Victoria under the [Professional Engineers Registration Act 2019](#) (VIC). On 1 December 2021, mandatory registration for fire safety engineers commenced. This will be followed by civil and structural engineers on 1 October 2022, electrical engineers on 1 June 2023 and mechanical engineers on 1 December 2023.

Other jurisdictions are also in the process of considering establishing professional engineer registration systems. This includes Western Australia, who is proposing to require engineers to be registered to carry out building engineering work and the ACT where the introduction of an engineer registration scheme was an election commitment by the ACT Government as part of the 2020 election.

The Department acknowledges that registration will impose regulatory burdens on engineers in NSW who have not been required to be registered previously. The costs involved for individuals include licensing fees, costs associated with satisfying CPD requirements and costs associated with maintaining appropriate levels of professional insurance. However, the Department is satisfied that the benefits of registration far outweigh the costs associated with defective building work.

Recent prominent examples of building failures arising out of problematic engineering practices include Opal Tower, as highlighted above, and Catalyst Apartments in Darwin, May 2019.<sup>8</sup>

The fact that self-regulation of the engineering profession is not sufficient is evidenced by the presence of building defects which result in significant costs to be remedied. These defects also create risks to people living and working in affected buildings. As reported in the Western Australian Consultation RIS, problems associated with engineering work have been reported to include:

- information asymmetry to evaluate the qualifications and competencies of engineers
- potentially significant negative effects on health and safety, and environmental and economic costs, of poor engineering decisions and/or practices.<sup>9</sup>

The appropriate regulation of engineers will provide greater consumer confidence in the end construction result, reduce the incidence of building defects, increase standards and ensure professionals are competent. Registration of engineers has the following benefits:

- allows the setting of benchmarks by ensuring that those performing professional engineering work have the required competencies and experience to be carrying out the work
- ensures professional engineers are required to maintain an appropriate level of performance and continually develop their skills and knowledge
- ensures there are consequences for professional engineers who fail to meet minimum standards of conduct.

### **Proposed expansion of Professional Engineering Scheme under the Building Bill**

The Government's intention has been to roll out the registration scheme for professional engineers working on all kinds of buildings in NSW to ensure the Government has effective and fit-for-purpose reforms that ensure consumer safety. The licensing of engineers is no longer intended to be restricted to Class 2 buildings or buildings with a Class 2 part, rather it would apply to buildings classified 1-10c including single dwellings, hospitals, factories, storage buildings, and shops. The regulation of engineers will provide greater consumer confidence in the end construction result, increase standards and ensure professionals are competent.

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<sup>8</sup> Jano Gibson, ABC News, *200 homeowners caught up in Darwin's non-compliant building probe*, May 2019, <https://www.abc.net.au/news/2019-05-01/buildings-failing-creditation-darwin-200-affected-infrastructure/11062348>

<sup>9</sup> Government of Western Australia Department of Mines, Industry Regulation and Safety, *Consultation Regulatory Impact Statement Registration of Building Engineers in WA*, July 2020, page 11 [https://www.commerce.wa.gov.au/sites/default/files/atoms/files/cris\\_engineers\\_registration\\_9\\_july\\_2020.pdf](https://www.commerce.wa.gov.au/sites/default/files/atoms/files/cris_engineers_registration_9_july_2020.pdf)

It is proposed as a longer-term strategy, to relocate the professional engineering licensing scheme into the proposed Building Act, as a more appropriate home for the scheme with other mandatory occupational licences.

The proposal will require those doing professional engineering work for either residential or commercial building work to be registered unless they are doing the work under direct supervision. The rationale is that the DBP legislation will be limited to registrations of practitioners for the purposes of making declarations, not their substantive occupational licence/registration. Currently, to be registered as a Design Practitioner – Architectural or a Building Practitioner, a person must first be registered as an architect under the *Architects Act 2003* or hold a general building licence under the HB Act.

Likewise, a Design Practitioner in an engineering class in the future will need to be registered as a Professional Engineer, but that registration will be required under the proposed Building Act. Please see the Building Bill Volume 1 RIS for further discussion on this.

### **Proposed expansion under the Amendment Regulation**

Consistent with the scope of the reforms indicated earlier in the RIS, the Amendment Regulation, the subject of this RIS, proposes to only register engineers carrying out engineering work for the purposes of designing or constructing a Class 2, 3 or 9c building or a building that contains a Class 2, 3 or 9c part. This will ensure that engineers involved in the scope of work covered by the Compliance Declaration Scheme are appropriately registered for carrying out the work.

Consistent with how it applies to Class 2 buildings, the Professional Engineers Scheme will also be expanded so that a person must not carry out professional engineering work in a prescribed area of engineering unless the person is a registered Professional Engineer and the person's registration authorises them to carry out the work, unless under the direct supervision of a registered Professional Engineer.

### **Professional engineering work**

The DBP Act (s 31(1)) sets out that professional engineering work means engineering work, including engineering services, that requires, or is based on, the application of engineering principles and data to a design or a construction, production, operation or maintenance activity relating to engineering. The DBP Act excludes engineering work if the work is only provided in accordance with a document that states the procedure or criteria for carrying out the work, and the work does not require the application of advanced scientifically based calculations.

## **Prescribed areas of engineering**

The following areas of engineering are included in the DBP Act and Regulation. It is not intended to add any further areas of engineering as those included for Class 2 building work:

1. structural engineering
2. civil engineering
3. mechanical engineering
4. fire safety engineering
5. electrical engineering
6. geotechnical.

## **Classes of registration**

The following classes of engineer are available for registration:

1. Professional Engineer – Civil Engineering
2. Professional Engineer – Electrical Engineering
3. Professional Engineer – Fire Safety Engineering
4. Professional Engineer – Geotechnical Engineering
5. Professional Engineer – Mechanical Engineering
6. Professional Engineer – Structural Engineering.

It is not intended to add any further classes of registration for the expansion to Classes 3 and 9c on the basis that the current classes have proved adequate for Class 2.

Registration as a Professional Engineer will be necessary to carry out professional engineering work on a Class 3 or 9c building. Registration as a Professional Engineer is \$592 for 1 year, \$1,332 for three years and \$2,219 for five years (on current fees).

In addition to this, registration as a Professional Engineer requires practitioners to hold adequate professional indemnity insurance and complete CPD each year. The CPD depends on whether the practitioner is registered directly with NSW Fair Trading or whether they are first recognised through a professional body approved by NSW Fair Trading, which sets the CPD for the practitioners they recognise. The CPD requirements for registered professional engineers set by NSW Fair Trading requires completion of at least 50 hours of approved relevant education and training each CPD year.

The requirement to be registered, along with obligations relating to insurance and CPD will impose additional costs upon practitioners who do professional engineering work. However, these impacts

are justified by the need for regulation of professional engineering work to ensure practitioners delivering engineering work are held to certain standards and action can be taken against those who do not meet the required standards, including the power to prevent them from practising. The Professional Engineering Scheme under the DBP legislation is limited to requiring registration of Professional Engineers for classes of buildings that are also covered by DBP. However, it is recognised that there is a need to regulate engineering work more broadly than the work covered by the DBP Act and Regulations.

In the short-term, the impacts upon Professional Engineers in regional areas may be more acute if the need to become registered is not balanced out by a significant amount of work in Classes 2, 3 or 9c or their mixed-use buildings. This has potential to mean that practitioners in more remote areas may find the costs associated with registration overly burdensome and outweigh the benefits of becoming registered. However, the planned expansion of the requirement for registration for professional engineering work for additional building classes, including free-standing residential (Class 1), offices (Class 5) and retail (Class 6) in the future, will mean it will be a commercial necessity for most practitioners to become registered and the requirement is extended across all building types.

## Questions

- 17. Do you support the expansion of the Professional Engineering Scheme to Classes 3 and 9c? Why or why not?**
  - 18. It is proposed for the expansion to occur in April 2023. Do you support this timeframe? If not, why?**
  - 19. For the first year of the Professional Engineering Scheme, practitioners who did not meet the qualification requirements could become registered for Class 2 buildings if they successfully completed a competency assessment and had 10 years relevant experience in the previous 15 years. Should this alternate registration pathway be reopened when the scheme is expanded to those working on Class 3 and 9c buildings? Why?**
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## Expanding the RAB Act to Classes 3 and 9c

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Expanding the RAB Act to Classes 3 and 9c will expand all of the powers under the RAB Act for the benefit of these building classes. It will simultaneously expand the obligations on developers to provide notice before the completion of work and pay the building work levy. It is proposed to expand the RAB Act to these additional building classes on **3 April 2023**.

The expansion of the RAB Act will mean the robust compliance and enforcement powers to intervene, and stop, building work contained in the RAB Act can be used for Class 3 and 9c buildings. The RAB Act includes powers to:

- prohibit the issue of an occupation certificate in certain circumstances, including where the Secretary is satisfied a serious defect exists or where insufficient notice was given under the Act
- issue a stop work order if the Secretary is of the opinion that the building is, or is likely to be, carried out in a manner that could result in significant harm or loss or significant damage to the property
- issue a building work rectification order requiring a developer to eliminate or minimise a serious defect
- do anything necessary or convenient to give effect to the terms of a building work rectification order where a developer fails to comply, including carrying out works or destroying all or part of a building
- issue a developer with a compliance cost notice requiring the developer to pay reasonable costs and expenses incurred by the Secretary in connection with a building work rectification order.

The RAB Act also includes powers to:

- direct persons to hand over information and records, or answer questions, for an authorised purpose
- enter premises
- make necessary examinations, enquiries, measurements and tests
- seize items and demolish building work where necessary because of a serious defect or offence against the Act.

This means those buildings may be subjected to Occupation Certificate audits, and disciplinary action may be taken against those responsible for the project. Eventually, the intention is to expand the RAB Act powers more broadly as part of the BCE Bill. This proposal and the impacts are discussed further in the BCE Bill RIS, which is also subject to consultation at this time.

## A levy to maintain momentum restoring confidence in the industry

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Consumer confidence in the sector is directly related to the level of impairment in constructed buildings. The subsequent maintenance also has a direct, ongoing impact. Ensuring consumer and investment confidence in buildings, with an initial focus on multi-unit residential, is the centrepiece of the Government's Construct NSW strategy.

Critical to the ongoing success of the sustainability of these reforms is the Government's work to transform the NSW building regulator into a modern regulator.

The Government has made significant inroads during a short period since implementing the Construct NSW six pillar strategy. The strategy is the Government's roadmap to improving the building and construction industry through modern regulatory tools. The strategy is holistic, providing consumers with information and stronger protections as well as enhancing industry controls in the form of strengthening contracts and upskilling practitioners.

These proactive measures are working to restore confidence in the building and construction industry. The Government has invested considerable resources, including standing up new NSW Fair Trading inspector teams to target poor building work in Class 2 buildings, upgrades to the NSW Planning Portal and new capability development programs for industry practitioners. The Government has also taken decisive action to restore trust in an industry, that after a series of serious failings, had lost consumer confidence. However, it is clear there is still more work to do.

While the Government has stood up a modern regulator and committed significant resources to empowering industry to develop market-based regulation, it is critical that industry now make a significant contribution to the ongoing regulation to ensure the behavioural changes secured by the reforms are sustainable.

To ensure a sustainable funding approach to the oversight of the sector, the Government has imposed a levy on Class 2 buildings to ensure industry contributes to the cost of its oversight. The levy will provide a source of funding to offset costs of the Department in continuing to deliver the robust level of compliance and enforcement activities required to restore confidence to the sector.

The (**RAB Regulation**) has been amended to introduce the mechanism for the new levy payable by developers on building work regulated by the RAB and DBP Acts. It currently only applies to buildings with a Class 2 part. However, the proposed draft amendments to the RAB Regulation, will expand the levy, along with the other powers to buildings with a Class 3 or 9c part.

The levy will be used to recover the future cost of the regulatory oversight of the industry, including compliance, licensing, intelligence and education by:

- enhancing the NSW Planning Portal to consolidate declared design documents (i.e. allowing for the lodgement of all designs ahead of construction through a single system)
- maintaining internal capability to audit plans of certain buildings (selected through a risk-based matrix approach) to ensure they are compliant with the BCA (preventing defects before they occur)
- having dedicated compliance teams to inspect selected sites to ensure that buildings are constructed in accordance with those designs
- maintaining processes developed by the Building Commissioner to work with developers and practitioners to rectify work that falls short of required standards, including the development and oversight of BWROs and enforceable undertakings
- having dedicated licensing teams for practitioners under the DBP Act
- maintaining a digital learning platform including approving and developing training to test and upskill practitioners' knowledge.

The levy will be paid by those who will profit from the building works to ensure increased standards of design and building work—restoring confidence in the industry. The RAB Levy Regulation has been designed to recover costs from developments that are more resource intensive from a regulatory perspective, for example, OC audits. An OC audit involves a review of designs and documents (including contracts) for building work as well as physical onsite inspections. OC audits are designed to reduce the risk of poorly constructed buildings being delivered to the consumer. For staged developments, there might be multiple OCs which could be subject to multiple OC audits.

Over time, the levy will provide full cost recovery for the activities under the RAB and DBP Acts. Cost recovery involves the recuperation of the costs of government-provided or funded services or activities that provide private benefits to individuals, entities or groups, or reflect the costs their actions impose.

The levy is consistent with the principles governing cost recovery which ensures the fair and efficient use of public resources. This aligns with governmental cost recovery principles, such as those published by the Australian and Victorian governments<sup>10</sup>.

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<sup>10</sup> *Australian Government Cost Recovery Guidelines (RMG 304)* <https://www.finance.gov.au/publications/resource-management-guides/australian-government-cost-recovery-guidelines-rmg-304> and Victorian Government, *Cost Recovery Guidelines January 2013*, [https://www.dtf.vic.gov.au/sites/default/files/2018-01/Cost-Recovery-Guidelines-Jan2013\\_0.pdf](https://www.dtf.vic.gov.au/sites/default/files/2018-01/Cost-Recovery-Guidelines-Jan2013_0.pdf)

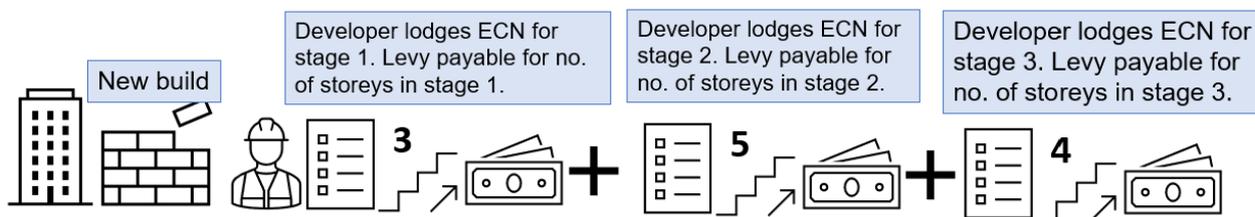
To support the expanded focus of the NSW building regulator on Class 3 and 9c buildings under the DBP Act and RAB Act, it is proposed that a levy be paid by certain developers and owners of Class 3 and 9c buildings. The following sections detail the justification, costs and application of the proposed levy expansion.

### What building work will be subject to the levy

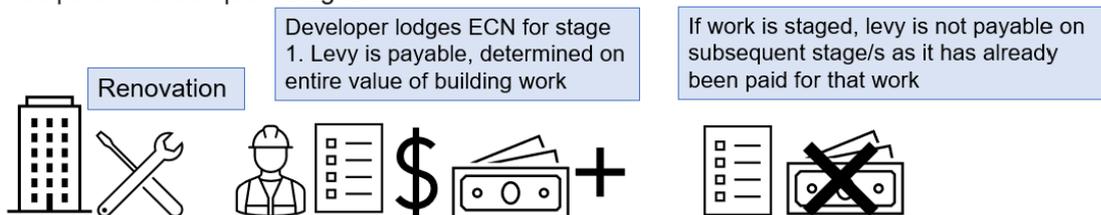
As the levy is to support the activities under the RAB and DBP Acts, the RAB Regulation only imposes the levy only in relation to building work for which a registered Building Practitioner is required to provide a building compliance declaration.

#### Building work subject to RAB levy

For new buildings or additions of storeys, the developer will be required to pay the levy on each stage of construction, triggered by the number of storeys at each stage.



For renovations and repairs, the developer will be required to pay the levy on the first expected completion notice, determined on the value of the works. If the works are staged, the levy will not need to be paid on subsequent stages.



## **A staged affair: imposing the levy on staged construction**

The levy is payable on each stage of work where an ECN is required. Therefore, where construction is staged, multiple levies may be payable.

For new buildings or buildings involving the addition of storeys, the levy may be charged multiple times on a single development, depending on how the building work is staged. The trigger for the Secretary to impose the levy is the developer providing an ECN. Therefore, if the building work is subject to staged construction and a developer provides six ECNs, the development may be subject to six levies.

The reason the levy has been structured this way is to reflect the resources expended in staged construction, particularly towards carrying out the audits prior to the application of an OC. The rates of the levy are scaled within ranges, so that as the number of storeys for each ECN increase, so too does the levy. This reflects that the greater number of storeys in each stage generally requires a more resource intensive response in terms of auditing designs and building work.

From a practical perspective, connecting the levy to mechanisms within the NSW Planning Portal provides clear checks and measures against the metrics the levy is calculated on. For ease, the levy has been attached to existing processes, leveraging the ECN so as not to fetter the developers staging or timing of the project and to clearly identify who is responsible for payment of the levy given the broad definition of developer means that a building project could involve multiple developers.

The levy is payable by the developer who provides the ECN within the NSW Planning Portal. Providing the ECN will trigger a notice from the Secretary that the levy will need to be paid. The levy will need to be paid within 14 days of the notice being issued.

Attaching the levy to the ECN simplifies the process for the developer by connecting the levy to an existing process, allowing the information to be stored in a central repository and requiring payment before the OC audit is carried out. The timing also gives the Secretary avenues of recourse given the failure to pay the levy is a ground for prohibiting the issue of an OC or registering a strata plan.

Under the RAB Act, a developer is:

- the person who contracted, arranged or facilitated building work to be carried out
- the owner of the land on which a building or part of a building is erected or constructed (who was the owner when the building work was being carried out)
- the principal contractor for the building work within the meaning of the [EP&A Act](#)

- the developer for building work for a strata scheme within the meaning of the [SSM Act](#).

The Department considered only imposing the levy once on each development. This would have been achieved by calculating the rate of the levy on the number of new storeys in the entire development for new buildings and building involving additional storeys, rather than imposing the levy at each stage of development. However, imposing the levy at each stage was preferred as it more closely aligned with the resources required by the Department. For example, a multi-tower development or united building is more resource intensive and a staged levy captures the levy as that work is carried out. Staging allows the Department to measure the resources expended in carrying out the reforms against the levy amount and adjust accordingly. If adjustments are necessary, there is more agility in connecting it to stages and is more equitable, for example, if a levy rate is reduced after a developer had already paid the greater amount for the entire project.

The NSW Planning Portal does not differentiate between a staged OC or Final OC, so if the levy was imposed on the entire development, this approach would have required the full levy amount to be payable on the first ECN. A more favourable approach for developers is to stage the levy payment rather than requiring all the funds upfront, giving developers the opportunity to recoup costs incrementally as stages are completed. This also means that if some works are not carried out, for example, if a hotel that has multiple towers and an entertainment precinct approved, does not build all the components as per the building approval, the levy will only be paid on the aspects that are actually built.

The Department also considered other ways of having industry contribute to the costs of the reforms, such as increasing licensing fees. However, it was considered more equitable to target the work to which the reforms apply so that those directly benefitting from the reforms contributed to the costs. The levy also allows the money to be recouped at the time the work is completed and can be built into each project.

Connecting the levy to a key driver that determines the required Departmental resources allows the Department to scale resourcing up and down according to need.

### **Type of building work determines rate of levy**

There are two categories of building work that determine the rate of levy that may be imposed by the Secretary:

- building work resulting in new buildings or the addition of storeys to an existing building
- repair, renovation or protective treatment.

The rate of the levy is charged on a sliding scale with larger projects, determined by the number of storeys being constructed at each stage, paying a greater amount. The sliding scale reflects the increased workload for auditing and compliance activity based on the number of storeys, which usually results in an increase in the number, type and complexity of plans required.

<b>New building/addition of storeys</b>	<b>Levy rate</b>
<b>1–3 storeys</b> if the building/additional storeys has a gross floor area that is less than 6,000 square metres	\$7,000
<b>1–3 storeys</b> if the building/additional storeys has a gross floor area equal to or greater than 6,000 square metres	\$8,400
<b>4–8 storeys</b>	\$8,400
<b>9–19 storeys</b>	\$11,100
<b>20–30 storeys</b>	\$15,500
<b>31 storeys +</b>	\$20,000

For building work involving the repair, renovation or protective treatment of a building, the levy is calculated on the overall value of the work.

<b>Repair, renovation or protective treatment</b>	<b>Levy rate</b>
<b>\$50,000 - \$500,000</b>	\$700
<b>\$500,000.01 - \$1,000,000</b>	\$1,300
<b>\$1,000,000.01 - \$5,000,000</b>	\$2,000
<b>\$5,000,000.01 - \$10,000,000</b>	\$2,700
<b>\$10,000,000.01 +</b>	\$4,000

Only repair, renovation or restoration work that requires an OC will be subject to the levy. Therefore, if remedial work is subject to an exemption under the DBP Act (for example, it is exempt development) it does not require a building practitioner to provide a building compliance declaration. Further, the levy will only be imposed on building work for renovation, repair or protective treatment work valued at or over \$150,000. The reason for this is not to unduly burden those undertaking minor works.

The levy on repair, renovation or restoration work is imposed at lower rates, as the Department does not want the levy to deter building owners from undertaking necessary repair or renovation work.

The levy calculations are based on an initial base cost calculated on the cost of the DBP and RAB audit teams and assumes 20% of all buildings will be audited by the RAB team and 80% of all designs lodged in the NSW Planning Portal will be audited. The costs are then scaled up depending on the number of storeys involved to reflect the increase in resources to audit additional storeys and designs. Costs towards investigation have also been attributed to 10% based on the extra resources involved in further investigation where defects are detected.

The audit teams have already been established and are currently operational for Class 2 and mixed-use Class 2 buildings. The expansion of the levy to Classes 3 and 9c will increase the workload of the audit teams and therefore, the proposal is to apply the levy to those buildings generating the work.

The levy has been designed so that it will not be a full cost recovery model for some years, with the intention to review the levy prior to that point. Expanding the DBP and RAB Acts to further building classes is intended to speed up the process of behavioural changes across industry as more work and practitioners are subject to the reforms, normalising the new practices. Over time, as the objectives of the reforms are realised, efforts of the regulator may not need to increase at the same trajectory as the anticipated increase in building work, meaning the levy rates may be able to be reduced despite work increasing. This will mean a lower levy rate can be imposed on a greater number of projects.

## Questions

**20. Do you think industry should contribute to the cost of the Construct NSW reforms?**

**Why or why not?**

**21. Are the ranges for the graduation of rates appropriate for Class 3 and 9c? Why or why not?**

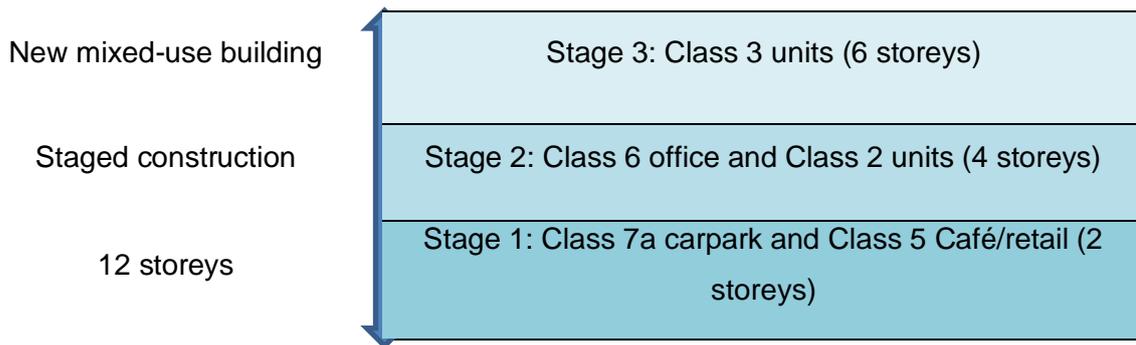
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## Applying the levy to building work

The levy will need to be paid by the developer who provides the ECN.

For staged construction, where different developers have provided ECNs, the developer who has provided a particular notice will be responsible for paying the levy attached to the building work for the respective notice they provided.

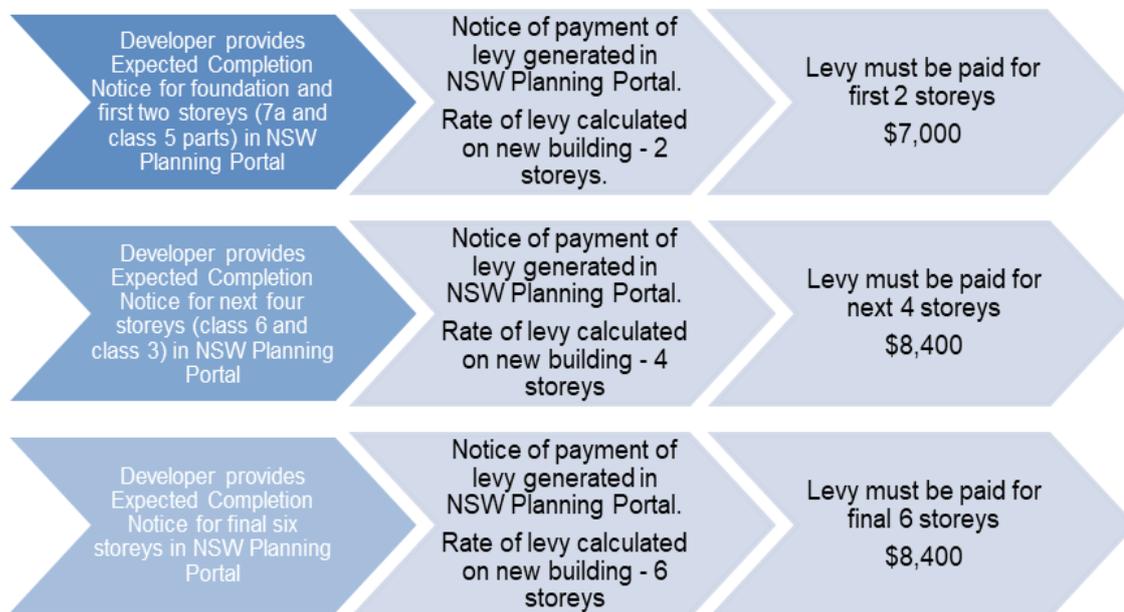
The following scenario demonstrates how the levy will be applied to a mixed-use Class 3 building. For a new building that has 12 storeys and is staged across three ECNs, the levy may be imposed three times. Each time, the levy will be calculated on the number of storeys under each notice.



If the mixed-use Class 3 building was staged as follows, the following levy would be payable under the 2022/23 unit amounts:

Stage 1:	Foundations, 7a carpark & Class 5 retail floors	2 storeys	\$7,000
Stage 2:	Class 6 office and Class 2 units	4 storeys	\$8,400
Stage 3:	Class 3 units	6 storeys	\$8,400
		<b>TOTAL</b>	<b>\$23,800</b>

Using the example set out in the above scenario, the following levies would be payable.



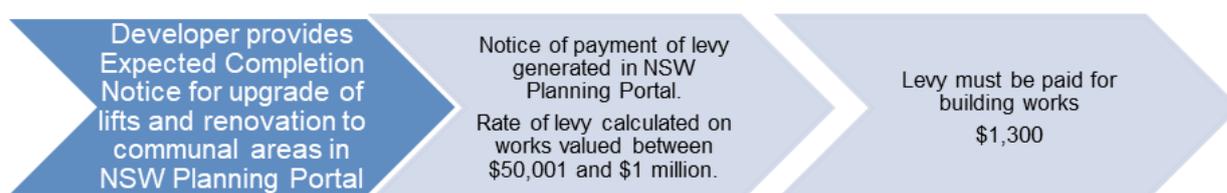
The same development could be staged as follows and accordingly, have the following levies imposed, using the 2022/23 unit amounts:

Stage 1:	Foundations, 7a carpark, Class 5 retail, Class 6 office floors	4 storeys	\$8,400
Stage 2:	Class 3 units	8 storeys	\$8,400
		<b>TOTAL</b>	<b>\$16,800</b>

The levy also applies to existing buildings. If additional storeys are being added, the levy is calculated on the number of additional storeys in each ECN.

For an existing building that is undergoing renovation or repair work, the levy is determined on the total value of those works. The following scenario will demonstrate how the levy is applied in these circumstances.

An existing residential care building (Class 9c) is to be renovated to upgrade the lifts and upgrade communal bathrooms on the ground floor and in the pool/gymnasium at a cost of \$890,000 for the works. The rate of the levy is determined on the overall value of the works and will be payable on the first ECN.



Renovation/repair work	Value of work to upgrade lifts and renovate bathroom and communal recreational areas \$890,000	Levy amount	\$1,300
		<b>TOTAL</b>	<b>\$1,300</b>

### What Class 3 and Class 9c building work would not be subject to the levy

The levy will not be imposed for building work that is subject to an exemption under section 13 of the DBP Act. Some examples of work that is exempted under the DBP Act is: work carried out as exempt development; work that is exempted from a provision under the BCA under the EP&A Regulation; and work involving the maintenance of a component of a mechanical, plumbing, electrical or fire safety system.

In addition, the RAB Regulation includes further exemptions to the levy, such as:

- building work for the purposes of repairing, rectifying or replacing external cladding
- where the building to which the building work relates has or will result in, fewer than 5 units

- building work for the renovation/remediation/repair work valued under \$150,000
- building work by or on behalf of the NSW Land and Housing Corporation
- building work for which a rate of levy is not prescribed by the proposed regulation.

The levy will not be imposed for cladding remediation as the Department does not want to add to the cost or disincentivise such work from being carried out. Likewise, the levy is only payable if the building that the levy relates has, or will have, as a result of the building work, at least five residential units. This means that small-scale developments such as small workers accommodation would not be subject to the levy.

Building work by or on behalf of the NSW Land and Housing Corporation is exempt from the levy, as much of this work relates to social or community housing. As the levy attaches to an ECN, Crown development will be exempt from the requirement to pay the levy provided such work does not require an OC under the EP&A Act.

The Secretary also has the power to waive the levy in particular circumstances, discussed below.

## Questions

**22. Do you support the levy attaching to each ECN? Why or why not?**

**23. Are the existing exemptions appropriate for Class 3 and 9c building work? Why or why not?**

## Levy indexation

The levy is a fee unit so it will be indexed each year. However, where the levy is imposed on the value of works for renovation work etc, the value of those works will not be a unit that will be indexed, as it is preferable to keep these amounts as a rounded amount and review their adequacy periodically.

For ease of reference, the levy amounts are fee units but the value ranges of the building work that determine the levy rate have not been included as units and therefore will not be scaled up as CPI increases. Therefore, the building work value ranges will be reviewed periodically for adequacy.

If the work involves a levy rate from more than one category, for example, the addition of storeys as well as renovation work to the existing building, only one rate is applicable, being the rate that is the greater.

By modelling the levy in terms of the staging, it aligns with the resourcing required and also gives developers control over the number of levies they pay by the way construction is staged. The levy will eventually equate to a full cost recovery basis.

## Impact on developers, successive owners and customers

While developers will be liable for the payment of the proposed levy, it is likely that the cost of the levy will be passed on to purchasers in the end cost or, where the units are retained, will be recouped in accommodation charges. For commercial developments the levy may mean a slight increase to the upfront costs. However, it is expected that the application of the RAB Act and DBP Acts to the work will prevent unexpected costs associated with defects. The front-end compliance model will benefit commercial owners by allowing for inspections to occur before a building has been completed. It will also mean there is a documented chain of responsibility for the building work which makes it easier to hold subcontractors accountable.

Developers will have control over the staging of building work that attracts a levy. If a nine-storey new development, consisting of 80 units,<sup>11</sup> is staged so it is subject to two ECNs and incurs a levy for the foundation and first three storeys (\$7,000) and a second levy for the remaining five storeys (\$8,400), bringing total cost of levies to \$15,400, this would equate to \$192.50 per unit. This additional cost would not take long to recoup in accommodation charges. The cost of such a development could easily be above \$10 million and therefore, levies of \$15,400 are not substantial and would likely represent less than 0.15% of the overall cost.

The Department considers this upfront cost is a small cost to pay for the surety it brings in ensuring that the designs and building work are compliant with the BCA. Pursuing claims for defective work after the event can be expensive, time consuming and, without the documentary evidence requirements established under the DBP Act, can make it a difficult task for claimants to establish fault and apportion liability.

The Department considers the additional upfront cost to the developer is a significant saving overall when compared to the potential remediation costs of defective building work, the financial and emotional costs of pursuing remediation, the potential litigation and the ongoing increased financing and insurance costs the owner would otherwise be subject to.

As the levy only applies to building work that is captured by the DBP Act, the proposed staging of the expansion of the DBP Act for Class 3 will also apply to the levy. Although the RAB Act will generally apply to all Class 3 work from 3 April 2023, as it is proposed that the DBP Act will not apply to repair and renovation type work for small and medium rise Class 3 buildings until October 2023, the levy will not be payable for this work if it is completed by October 2023.

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<sup>11</sup> Assuming the building has a two storey 7a carpark and the remaining 7 storeys contain residential units. Using the average of 11.4 units per storey and rounding up to 80 units (applying calculations for Sydney from Table A2: Apartment Completions in Jenner, K., & Tulip, P. "The Apartment Shortage", Reserve Bank of Australia, <https://www.rba.gov.au/publications/rdp/2020/pdf/rdp2020-04.pdf>).

Developers in the Class 3 space may not all be sophisticated in building and construction practices. One-off developers, such as a family building a motel, are likely to benefit from the regulatory controls that the reforms bring.

The reforms are also intended to provide confidence to building insurers and future purchasers that the building was built under robust controls as to its compliance with the BCA.

### **Waiver, reduction, postponement or refund of levy**

To ensure there is a pathway for the levy not to be imposed or reduced in warranted circumstances, the RAB Levy Regulation includes a power to waive, reduce, postpone or refund a levy. The Secretary can initiate this unilaterally or on application. The grounds to waive, postpone, reduce or refund the levy include:

- financial hardship if the person is an individual
- building work for a charitable purpose
- levy paid in error
- where special circumstances exist.

The financial hardship ground is limited to an individual on the basis that it would be difficult to test financial hardship for a body corporate without the application of forensic accounting methods.

### **Questions**

#### **24. Are further grounds for the waiver, reduction, postponement or refund of levy needed? If so, what are they?**

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### **Basis for recovering the key costs of the reforms**

The DBP Act responds to the systemic failures of industry to deliver trustworthy buildings. While an alternative to the proposed levy is for Government to continue to pay for all costs associated with the reforms, the community reasonably expects that industry should bear the cost of the reforms which are required to eradicate the risks that industry practices have created.

Through the levy, the costs of the reforms are being passed onto developers as developers are at the top of the contracting chain and have control of the overall project costs. This position in the hierarchy and project control also puts developers in the crucial position of being able to ensure the reforms are successful by requiring those they engage meet the standards expected of the Government.

Developers directly benefit from the reforms as good practices and improved standards restore faith in the market, reduce build costs, delays in construction and remediation and litigation costs. All these benefits serve to improve consumer confidence driving overall value of builds. Developers are also in the position of being able to pass on the cost of the levy to the purchaser or end user of the property.

Other revenue raising measures were considered, such as increasing licensing fees. However, the Department has preferred a levy on developers for the following reasons:

- Developers, being in a position of control, are in a stronger position to affect changes on their projects. Noting that regulatory efforts will be reduced once industry standards are raised, the levy imposes a motivation for developers to prioritise rapid improvement.
- Developers will benefit from increased standards by increased market profits.
- Developers can pass on the cost of the levy to purchasers and end users of the property, who will in turn benefit from better built and safer buildings.
- The cost of the levy, once passed on to purchasers, will be a relatively minor increase in the purchase price but should result in much better built apartments.
- Raising revenue by imposing the costs on individual practitioners, such as increased licensing fees does not account for individual circumstances or capacity to pay. Individuals are likely to find it harder to recover the cost in a competitive market, with developers able to defray costs across entire projects.
- Imposing the cost on individuals could result in individuals trying to do more work faster, rather than better, counter to the objective of the reforms.
- The DBP Act only requires certain practitioners to be registered (e.g., only the principal building practitioner not all builders) and therefore would not spread the costs evenly over practitioners.
- It is harder to adjust licensing fees that are imposed on a 1, 3 and 5-year basis to generate the revenue that is required. A levy is more agile as it generates the revenue at the time the resources are needed.
- Increasing licensing fees could deter competent practitioners from working in this part of the industry and create supply issues.

It is the Department's position that the building and construction industry needs to be accountable for the prevalence of substandard building work. While the Government is prepared to step in and fix the problems, it does not consider that the industry should be reformed at public cost.

The levy is paid into the Home Building Administration Fund under the HB Act. The Fund is currently administered by the Secretary and is used to meet the costs of operating the building disputes resolution service and to meet the costs of administering the HB Act and any other Acts prescribed by regulation. The RAB and DBP Acts have been added as Acts that the fund can be used towards.

### **The need for a levy**

The Government has already invested significant funds to implement Construct NSW programs designed to restore consumer faith in the industry, including:

- \$4.2 million on NSW Planning Portal enhancements for RAB and DBP
- \$4 million on establishing an online licensing system for DBP
- \$1.77 million on Departmental teams to oversee implementation of the DBP and RAB Act reforms
- \$4.75 million for RAB audit team (annual recurring cost)
- \$1.42 million for DBP audit team (annual recurring cost)
- \$0.5 million for intelligence data analysis (annual recurring cost).

These costs have been outlaid and applied to set up frameworks for practitioners to be able to register and fulfill their lodgement obligations under the RAB and DBP legislation. The outlays have also set up teams and structures for the regulator to undertake the necessary proactive compliance activities to ensure standards are met. The expansion to Classes 3 and 9c will generate additional work but will simply involve enhancements and scaling up the existing framework. It is likely that when the reforms first extend into Classes 3 and 9c, resources will be scaled up in the short term to provide early guidance to practitioners and ensure a strong regulatory presence in the new classes. The resourcing costs of expanding to Classes 3 and 9c for the audit and intelligence functions are estimated to be \$670,000.

Departmental costs will also increase in other areas, such as legal, compliance, licensing, as the number of audits that are conducted increase, the number of referrals for investigation, disciplinary action, and prosecution will also increase. The regulator is committed to supporting the frontline compliance activities with adequately resourced and highly skilled investigators, ensuring the directorates work together to meet the demand and can scale up and down as required.

## Costs associated with RAB Act audits

The importance of the activities carried out under the RAB Act and in particular the OC audits can be demonstrated through its current application to Class 2 buildings. Purchasers of apartments generally have little involvement in the construction process until after it has been completed. Therefore, with subsequent building owners not being able to oversee building works, substandard practices have been able to flourish.

A recent study of strata schemes completed in the Sydney, Parramatta and Canterbury-Bankstown Local Government Areas between 2008 and 2017, found evidence of defects in 26% of the 635 schemes in the sample. However, as the research was based on available data attainable through means such as Tribunal proceedings and insurance claims, the researchers considered the actual number of defects is significantly higher, with lower numbers being attributed to poor documentation and reporting. Where more robust documentation was available, evidence of defects was found in more than half (51%) of the schemes, with more than a quarter (28%) having three or more types of defects.<sup>12</sup>

The most prevalent defects found related to water issues, conservatively estimated to be present in 42% of schemes with more robust data.<sup>13</sup> This aligns with data gained from more than 120 OC audits carried out by the Department, which found repeated serious defects in residential apartment buildings:

- 46% of buildings have a serious defect related to building services
- 43% of buildings have a serious defect related to fire safety
- Over 39% of buildings have a serious defect related to waterproofing.

The RAB Act includes information-gathering powers and powers of entry which are relied on to carry out the audit. Importantly, the RAB Act contains powers to issue a prohibition order, stop work order, or BWROs if serious defects are found. Since 1 September 2020, NSW Fair Trading has carried out 156 OC audits, identified 668 serious defects, issued 20 prohibition orders, 28 BWROs and 12 stop work orders and 1 enforceable undertaking under the RAB Act.

The cost outlay of the regulator is justified by the results of the OC audits. The above case study demonstrates how the proactive work of the Department's RAB audit team detecting latent defects prior to the properties being handed over to purchasers served to save subsequent homeowners

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<sup>12</sup> UNSW Sydney, *Cracks in the Compact City: Tackling defects in multi-unit strata housing: Final Project Report* by Dr Laura Crommelin, et al, October 2021, [https://www.uts.edu.au/sites/default/files/2021-10/Defects%20final%20report\\_for%20publication.pdf](https://www.uts.edu.au/sites/default/files/2021-10/Defects%20final%20report_for%20publication.pdf)

<sup>13</sup> Ibid

prohibitive remediation works. This saving is in addition to the potential litigation costs and the emotional toll that new homeowners endure when having to deal with defects. The audits are instrumental in ensuring that defects are detected and remediated by those who are responsible, sparing unsuspecting purchasers the associated costs and anguish.

The resource intensity and expenditure of OC audits are significant. The cost of an audit will vary depending on the size and complexity of the building and the quality of the building work subject to the audit, however, audits can amount to \$25,000, with further costs being incurred depending on any compliance and/or enforcement activity resulting from the audit.

The fully established audit team under the RAB Act has an initial annual cost of **\$4,754,187**. The team establishment is based on an estimated 500 buildings being subject to the RAB Act in the 2022/23 financial year, with approximately 20% of those buildings being subject to an audit. The number of buildings within the scope of the RAB Act is expected to increase to 1,000 in the 2023/24 financial year and to 1,600 in the 2024/25 financial year. If efforts are to be maintained over that period, the costs associated with delivering would need to increase.

Expanding the RAB Act to Classes 3 and 9c will expand the levy to those classes. This is necessary to meet additional resourcing demands. It is predicted that the initial expansion to Classes 3 and 9c will require an increase in resourcing of 10% to the current team, being at a cost of \$475,000. The 10% expansion is less than the increase in workload, however, it is anticipated that efficiencies will be made to streamline processes.

The funds realised under the levy will allow the RAB audit team to be scaled up and down in response to industry need. This may lead to levy obligations on developers of certain buildings having their levy obligations increased or decreased over time.

Building on current figures of Class 3 and 9c works captured in the NSW Planning Portal, it is estimated that 80 buildings will be captured by the extended DBP scheme in FY24, 110 in FY25, and it is projected that another 40 buildings will be captured by the scheme in each subsequent year. This growth is based on economic growth and the time it will take for all buildings to be captured by the schemes' commencement date. Like the Class 2 sector, the presence of serious defects in the Class 3 and Class 9c sectors are estimated to be 3.5% of the sector value.

A 2.5% reduction in defects in the Class 2 sector equates to \$70k per annum over 10 years. Hence, it is estimated that a 2.5% reduction in defects in the Classes 3 and 9c sector (over a 10-year period) equates to \$17,500 per annum in benefits in the first year, reaching \$87,500 per annum by year 5.

The objective of the reform agenda is for compliance and enforcement activity to plateau once the reforms have resulted in a change of behaviour within the industry, however, this must be balanced against the forecast of workloads increasing as the reforms expand to additional building classes and building activity increases.

There are early indications that the efforts of the RAB audit team are already having promising impacts, as evidence of the incidence of defects observed in research undertaken by the City Futures Research Centre was compared to data collated by NSW Fair Trading from the first 12 months of the OC audit program, the comparison showed a 29% reduction in the incidence of waterproofing defects, potentially signalling improvements in the industry's performance since the audit program was established.<sup>14</sup>

### **Costs associated with DBP Act audits**

The BCR found that the accountabilities of different parties were unclear and there were insufficient controls on the accuracy of documentation. It identified that, particularly for design practitioners, there was a systemic failure to expressly require documentation to show compliance with the BCA.

The DBP Act introduced controls to ensure that designs are prepared by competent practitioners who are accountable for ensuring that their designs comply with the BCA and other standards.

The Department's DBP audit team is responsible for auditing the regulated designs and declarations lodged in accordance with the DBP Act. The audits ensure that designs are prepared for all building elements and performance solutions, the designs are prepared by registered design practitioners and the designs comply with the BCA, relevant standards and legislative requirements such as integration with other designs and building work. The Department's DBP audit team ensures designs were lodged prior to building work commencing and, in conjunction with the RAB audit team, check whether the building work was built in accordance with the designs.

The Department's DBP audit team will report on design shortcomings and that information will be used to target compliance activities and educate industry. As practitioners develop a data footprint through their interactions with the NSW Planning Portal and the respective audit teams, the Department will monitor trends and behaviours to focus regulatory resources by applying a risk matrix to detect non-compliant practices earlier.

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<sup>14</sup> Ibid.

The Department has a range of powers including stop work orders to ensure that where non-compliant designs are detected, building work can be stopped if necessary.

The DBP audit team complements the RAB audit team to ensure that developments are audited from the design to building process and all practitioners are held accountable for their work.

The DBP audit team has an initial annual cost of **\$1,426,441** based on the current scope of the DBP Act, which applies to Class 2 buildings and mixed used buildings with a Class 2 part. The levy calculations for the DBP Act include a base cost to include a recovery of the costs associated with establishing the specialist team and then increases depending on the number of storeys, as this typically signifies an increase in the number of designs that need to be audited.

The cost of the DBP audit team is expected to increase by 10% with the initial expansion to Classes 3 and 9c building classes, being \$142,000. The levy contributions from Classes 3 and 9c will therefore assist with the additional resourcing required.

The current cumulative annual cost of the Department's compliance teams for the RAB and DBP Acts are **\$6.18 million**. The expansion of these teams alone for the additional work once the reforms are expanded to Classes 3 and 9c is expected to be \$618,000 to begin with. As the teams and processes are already established for the Class 2 building work, there will be efficiencies each time the reforms are expanded to additional building classes.

## **Other costs to Government**

### **A licensing scheme for competent practitioners**

The DBP Act sets criteria for practitioners who prepare and declare designs for the critical aspects of the building work and carry out building and professional engineering work under the Act. Setting high standards for the qualifications, experience, skills and knowledge for registration in the scheme means competent practitioners are in control of the design and build of residential apartment buildings and importantly, are accountable for their work.

There is currently a DBP licensing team that supports the registration assessment and processes under the DBP Act. The team establishment and cost, calculated on the maximum grade for each range, is \$2.34 million.

The majority of these costs will be offset by licence fees paid by registered practitioners. However, additional costs, including the involvement of licensing teams in compliance responses, will be recovered under the levy.

When DBP and RAB are expanded to Classes 3 and 9c, the licensing team will be scaled up for a short time to respond to increased registrations for the new classes.

### **Intelligence and analytics – the art of knowing where to look**

The success of the RAB Act lies in the targeting of developments and practitioners for audits on a risk-based matrix. Intelligence and analytics are applied to data from a range of sources to identify developments that are higher risk. As data is built up, the analytics can be further refined, allowing departmental resources to be applied strategically where they are more likely to yield results.

The annual cost of the intelligence and analytics staff for RAB related projects is currently **\$521,480** and **\$2,085,923** over the four-year period. It is expected the expansion to Classes 3 and 9c will require a 10% increase in resources, being \$52,000 per annum. The 10% expansion is less than the increase in workload, however, it is anticipated that efficiencies will be made to streamline processes.

As more data is built up in the DBP audits, which commenced in October 2021, it is expected that the DBP scheme will have similar costs. The outlay in terms of intelligence is justified as it ensures that resources are used efficiently and effectively.

#### *Case study: Sydney Inner West residential apartment building*

*As part of an audit at a residential apartment building in the inner west, NSW Fair Trading inspectors identified that the plumber had failed to notify NSW Fair Trading of plumbing work being carried out, failed to pay the appropriate fees and book audit inspections as required.*

*NSW Fair Trading then obtained a list of other jobs completed by the plumber from the last 18 months. From the list it was identified that there were another 27 instances of the plumber carrying out work on large Class 2 Buildings where the regulator had not been notified of the work, fees paid or inspections booked resulting in additional investigation.*

*The data generated from the initial audit under the RAB Act was then leveraged to identify further risky behaviour by this licence holder, resulting in finding further issues that could be resolved using RAB Act powers, as well as preventing the plumber from committing further breaches.*

### **Focus on education – competent and skilled practitioners**

One of the main tenets of the reforms is the need for practitioners to have the knowledge and competency to do their work well. The Department, in partnership with TAFE NSW, is proactively addressing skills and learning gaps in the building and construction industry by creating,

sponsoring and approving training courses through the Construct NSW Learning Management System (**LMS**).

Over the past 18 months the Government has delivered 18 courses through the LMS, which currently has 28,000 enrolments, with 24 courses to be hosted on the LMS by the end of 2022.

The levy provides the funding to allow the Department to work with industry to identify areas where additional education is needed. The Department can then mandate participation in the courses under the CPD requirements for practitioners registered under the DBP Act or order training as a disciplinary measure.

The course development cost varies depending on the type of course required. A two-hour course with approximately eight modules ranges in cost from \$19,500 - \$42,000.

Although course costs may be recovered by charging a fee for the module, the levy will allow more upfront investment in modules that are essential to lifting the quality of building work in NSW, such as the 'Waterproofing Design Principles' course, or courses that support the operation of the RAB and DBP Acts, such as the 'The NSW Planning Portal' and 'The value of Australian Standards'. This approach benefits both individual practitioners and the industry at large.

The BCR noted the need for improved understanding and knowledge of the NCC to improve compliance. The OC audits have revealed repeated defects in building services, fire safety and waterproofing that suggest there is a particular lack of knowledge in these disciplines. The Government has stepped up to provide training where it is clear industry has failed to properly educate practitioners and where developers are accepting substandard work.

#### Case study: Waterproofing

*Audits under the RAB Act have found that of the 73 audits undertaken in the first year of the RAB Act's operation that around 40% of buildings had a serious defect relating to waterproofing. This was reinforced by the number of complaints made to NSW Fair Trading on waterproofing.*

*These defects occur due to a lack of competency (in design and installation), lack of understanding of the requisite standard, apathy and cost-cutting. Regardless of the root cause of the defect, it is the end customer who bears the cost of waterproofing not being up to scratch.*

*The DBP Act and RAB Act provide an immediate response by requiring upfront design to address waterproofing throughout a project. However, engagement with industry has made clear that there remains a significant gap between the expected standard of work and industry's capacity to meet it.*

*To respond to this gap, the OBC has rolled out a dedicated module on waterproofing, leveraging expertise in industry to explain how to prevent water leaks and leaking in buildings.*

## **The value of imposing a levy – estimated revenue**

As developers control the staging of the work that is used to calculate the applicable rate of levy, this will mean the funds raised by the levy will depend on how building work is staged.

Projections are based on approximately 80 new buildings being within the scope of the Class 3 and 9c work, in the 2023/24 financial year, being the first full year that the levy will be operational. This figure is based on numbers within the NSW Planning Portal over the 2021-22 period, with inflation to reflect the impacts of Covid-19 shutdowns and allowing for an increase in work two years later.

The expected revenue to be generated from the levy in the forward years is as follows:

	<b>FY22/23</b>	<b>FY23/24</b>	<b>FY24/25</b>	<b>FY25/26</b>
<b>Classes 3 &amp; 9c</b>	\$92,685	\$798,900	\$1,420,200	\$2,239,500

The estimates are based on the Class 3 and 9c building work accounting for 15% of the estimated revenue of the Class 2 buildings. This figure is based on assumptions that the combined proportion of new Class 3 and 9c buildings account for approximately 20% of that of Class 2 and noting that mixed use buildings having both Class 2 and 3 should not be double counted.

The Department has committed to review the levy periodically, with the first review likely to occur within the first 18 months. It is anticipated that the levy rates and scales will be adjusted as further building classes are captured by the reforms.

The revenue raised for Classes 3 and 9c departmental costs are also likely to increase as building work increases and more building classes are brought into the reforms. The projected figures have not accounted for the increased resource intensity when further buildings are subject to the reforms, as departmental costs will not necessarily increase pro-rata with the increase in buildings. The amount by which resources will need to be scaled up will also depend on the speed that behavioural changes can be realised. The intention is to review the levy after approximately 18 months against the drivers that require resources to be ramped up.

## **Questions**

**25. Is there a preferred cost recovery method for the reforms for Class 3 and 9c buildings rather than the levy? Is so, what?**

## APPENDIX 1 – Building qualifications (Class 3 and Class 9c)

Qualifications to register as **Builder (general)**

You must meet one of the two qualification criteria below:

1. VET qualifications and units of competencies:

- CPC40120 (current) Certificate IV in Building and Construction, or
- CPC40320 (current) Certificate IV in Building Project Support, or
- CPC40110 / BCG40106 / CPC40108 Certificate IV in Building and Construction (Building), or
- CPC40208 / BCG40206 Certificate IV in Building and Construction (Contract Administration), or
- BCG40306 / CPC40308 Certificate IV in Building and Construction (Estimating), or
- BCG40506 / CPC40508 Certificate IV in Building and Construction (Site Management),

**and** including all the following units:

- CPCCBC4001 (current) Apply building codes and standards to the construction process for Class 1 and 10 buildings, and CPCCBC4053 (current) Apply building codes and standards to the construction process for Class 2 to 9 Type C buildings, or
- BCGBC4001A / CPCCBC4001A Apply building codes and standards to the construction process for low rise building projects, and
- CPCCBC4002 (current) Manage work health and safety in the building and construction workplace, or
- BCGBC4002A / CPCCBC4002A Manage occupational health and safety in the building and construction workplace, and
- CPCCBC4003 (current) Select, prepare and administer a construction contract, or BCGBC4003A / CPCCBC4003A Select and prepare a construction contract, and
- CPCCBC4004 (current) / BCGBC4004A / CPCCBC4004A Identify and produce estimated costs for building and construction projects, and
- CPCCBC4005(current) / BCGBC4005A / CPCCBC4005A Produce labour and material schedules for ordering, and
- CPCCBC4006 (current) / BCGBC4006A / CPCCBC4006A or CPCCBC4006B Select, procure and store construction materials for low rise projects, and

- CPCCBC4007 (current) / CGBC4007A / CPCCBC4007A Plan building or construction work, and
- CPCCBC4008 (current) Supervise site communication and administration processes for building and construction projects, or
- BCGBC4008A / CPCCBC4008A / CPCCBC4008B Conduct on-site supervision of the building and construction project, and
- CPCCBC4009 (current) / BCGBC4009A / CPCCBC4009A / CPCCBC4009B Apply legal requirements to building and construction projects, and
- CPCCBC4010 (current) Apply structural principles to residential and commercial constructions, or
- BCGBC4010A / CPCCBC4010A / CPCCBC4010B Apply structural principles to residential low-rise constructions, and BCGBC4011A or CPCCBC4011A or CPCCBC4011B Apply structural principles to commercial low-rise constructions
- BSBESB407 (current) Manage finances for new business ventures, or
- BSBSMB421 / BSBSBM406 / BSBSMB406A Manage small business finances, and
- CPCCBC4012 (current) / CPCCBC4012B / BCGBC4012A / CPCCBC4012A Read and interpret plans and specifications, and
- CPCCBC4018 (current) / BCGBC4018A / CPCCBC4018A Apply site surveys and set out procedures to building and construction projects, and
- CPCCBC4024 (current) / BCGBC4024A / CPCCBC4024A Resolve business disputes

**Plus** any of the following:

- a current carpentry or bricklaying contractor licence or qualified supervisor certificate, or an approved qualification that would allow the issue of such a licence (for details of approved qualifications, see [Carpentry](#) or [Bricklaying](#)), or
- Diploma of Building and Construction (Building) - CPC50220 (current) / BCG50206 / CPC50208, or
- Diploma of Building and Construction (Building) CPC50210, and including the following units:
  - CPCCBC5004 (current) / CPCCBC5004A Supervise and apply quality standards to the selection of building and construction materials, and
  - CPCCBC5005 (current) / CPCCBC5005A Select and manage building and construction contractors, and

- CPCCCBC5007 (current) / CPCCCBC5007A or CPCCCBC5007B Administer the legal obligations of a building and construction contract, and
- CPCCCBC5009 (current) / CPCCCBC5009A Identify services layout and connection methods in medium rise construction projects
- Bachelor of Housing from an Australian university or a degree in civil engineering, structural engineering, architecture, housing, construction, construction management, construction project management, construction economics, applied science (building) or quantity surveying from an Australian university.

**OR**

2. A degree in building, construction, construction management, construction project management, construction economics, applied science (building), or quantity surveying from an Australian university which requires the applicant to undertake the equivalent of four years' full-time study and a mandatory work placement.

A “degree” excludes an associate degree or an honorary degree.