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Engineers Australia Submission

Building Legislation Amendment (Building Classes)
Regulation 2022
October 2022



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Introduction

Engineers Australia is the peak member-based professional association for engineers. Established in 1919, Engineers Australia is constituted by Royal Charter to advance the science and practice of engineering for the benefit of the community.

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

Our work is supported by around 100,000 members, including about 25,000 in NSW. Engineers Australia maintains national professional standards, benchmarked against international norms. As Australia's signatory to the International Engineering Alliance, we are responsible for accreditation of higher education engineering programs and assessment of experienced engineers against international independent practice standards. Engineers Australia also manages Australia's largest voluntary register for engineers, the National Engineering Register (NER).

This submission is informed by the feedback and advice on the draft Regulations provided by Engineers Australia's NSW-based members.

Engineers Australia is a positive contributor to the work of the NSW Government to implement the *Design and Building Practitioners Act 2020* (DBPA). Both industry and government want to see increased building confidence in NSW. The expansion of classes of buildings that the DBPA applies to is welcomed, however there are still outstanding issues that must be resolved before expanding the remit of the act to more design practitioners.

Building Legislation Amendment (Building Classes) 2022 Recommendation Summary

Extension from Class 2 to Class 3 and Class 9c is a good interim step towards broader registration requirements for engineers working on all classes of building, however there are still issues outstanding with the DBPA

Engineers Australia supports the expansion of the DBPA to encompass class 3 and class 9c buildings, however there are still issues that are outstanding which must be resolved before expanding the remit of the Act to more design practitioners:

- a. Further clarification is required around the insurance and duty of care obligations of design practitioners, and
- b. Inclusion of the assessment of competence for independent practice against Australian competency standards for all pathways at the point of registration is required.

Extending the proposed timeline for Stage 3 implementation to 12 months after Stage 2.

Engineers Australia proposes that the timeline for Stage 3 be pushed back to 12 months after implementation of Stage 2. The proposed timeline for Stage 2 currently coincides with significant changes to BCA/NCC. Industry needs time to digest the regulatory changes, develop strategies to ensure compliance, implement new working procedures accordingly and most critically, address the lack of eligible building services engineers.

Waterproofing work in class 3 and 9c should not be exempted from the regulations.

Waterproofing in class 3 and 9c buildings should not be exempted from the regulations. Failure of showers and other wet areas has already been exposed as a major issue in the early Occupation Certificate audits by the office of the NSW Building Commissioner. Water and roofing leaks are traditionally expensive to fix and it is often difficult to identify the source of leaks. It is recommended that no exemption be permitted for waterproofing works.

The registration of engineers should be codified under a separate act as in Victoria and Queensland

Engineers Australia re-emphasises that registration of engineers should be under a separate Act and broader than the building industry. This will contribute to nationally consistent registration of all engineers across all industries and lift the standards of practice and trust across the whole profession. There is evidence in various Coroner's reports of how engineers who have not conducted their practice in a proper manner have contributed to deaths. Registration of all engineers across all industry sectors will contribute positively to health and safety of everyone in the community.

Regulatory Impact Statement

Glossary

1. The Glossary identifies the NCC as “the minimum required level for safety, health, amenity accessibility and sustainability of certain buildings...”, however this is incomplete. There are numerous mandatory requirements that are called up by other regulations that are not captured by the Regulation’s limited NCC scope.

Expanding the Design and Builders Practitioners Act 2020 to Classes 3 and 9c

1. Do you support the expansion of the DBP obligations to Class 3 and 9c buildings? If not, why?

The building sector reforms should apply to all classes within the National Construction Code (NCC). This would recognise the importance of public safety and compliance for the entire building sector. Application of the reforms to all NCC classes would also help harmonise the various related laws contained in the Environmental Planning and Assessment Act, Building and Design Certifiers Regulation, and the Design and Building Practitioners Act.

Engineers Australia supports the expansion of DBP obligations from Class 2 to Class 3 and Class 9c. This is seen as an interim step to bring NSW into consistency with most other States in Australia which have adopted similar processes to Queensland and Victoria regarding certification of building permits and occupancy permits in that they apply to all classes of buildings.

Whilst Engineers Australia supports the idea of expansion of DBP obligations to Class 3 and 9c buildings, there are still fundamental issues from the DBPA that must be resolved. As strong supporters of the NSW building reform work, EA understands the importance of consumer protection. However, some provisions and proposals are threatening the viability of engineering businesses in NSW and are counterproductive to the consumer protection outcomes sought by these reforms.

In addition, inclusion of the assessment of competence for independent practice against Australian competency standards for all pathways at the point of registration is required.

These matters are explored further below. It is recommended that NSW address these concerns before expanding the remit of the DBPA.

Insurance to do Engineering Work

The DBPA provisions for registration of engineers apply directly to each individual registered professional engineer and not to businesses such as partnerships or corporations. However professional indemnity insurance (PII) cover is usually taken out by the business and not the individual employee.

Individual professional engineers are not trained in insurance risk assessment or interpretation of insurance policies and may struggle to make the assessments of adequacy of insurance required under Clause 77(2). They may decline to do building engineering work for their employer or move to employers who do not serve the class 2, 3 or 9c building sector, to avoid the risk of prosecution for breach of their obligation to be adequately insured under Section 33.

Recommended Actions

- NSW to provide guidance and training to individual professional engineers on their obligations under Section 33, the assessment of insurance adequacy required under Clause 77, and the records to be kept under Clause 78. Guidance could be included in the proposed Engineering Practice Standard. It is recommended that the proposed Building Bill shifts the obligation for insurance to registered corporations and away from individual employees. This will be further explored in Engineers Australia’s feedback on the NSW Reforming Building Laws.
- NSW to provide detailed written guidance on levels of cover, deductibles, exclusions and policy wordings that meet the requirements of Clause 77(2) and provide it to NSW engineers.

Extension of Duty of Care

Section 37 of the DBPA imposes on engineers a duty of care to avoid economic loss caused by defects. The duty is owed to each owner of the land on which construction work is carried out, and to each subsequent owner of the land, regardless of whether that work was carried out under a contract with the owner or another person.

Section 36 defines construction work to include the preparation of regulated designs and other designs for building work as well as supervising, coordinating, project managing or otherwise having substantive control over the preparation of regulated designs and other designs for building work.

Section 5 of Schedule 1 makes this duty of care and liability for damages retrospective subject only to the limit that if the loss had become apparent before Section 37 came into effect, it must have become apparent no earlier than 10 June 2010.

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

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

The decision in *Goodwin* confirms that the duty of care owed under section 37 of the DBPA applies to individuals carrying out construction work. This has the potential of significantly exposing engineers to claims that rely on the statutory duty, which will result in a commensurate rise in the cost of insurance, and a likely deleterious effect on the availability of insurance products for this. EA members have shown examples of increases in premiums for professional indemnity insurance to cover this additional risk and where insurers have placed exclusions on cover to avoid liability. Such an exemption means the insurance does not meet the requirements of Section 33 and therefore an engineer covered by such insurance must not carry out professional engineering work.

Recommended Actions

- New South Wales to clarify whether its policy intention is for this duty-of-care liability to fall on all individuals who have worked on the design of a building project in the past, or whether its intention is for the liability to fall on the entities that have contracted to do the work.
- New South Wales to work with the insurance industry to develop specific insurance products that cover this duty-of-care liability.

Inclusion of the assessment of competence for independent practice against Australian competency standards for all pathways.

Engineers Australia considers that the minimum requirements for registration as a professional engineer include:

1. A relevant Washington Accord engineering qualification (or equivalent);
2. Five years relevant engineering experience;
3. An assessment of competence against the Australian independent practice competencies (which map to the International Engineering Alliance professional competencies);
4. A demonstrated commitment to ethical practice;
5. A demonstrated commitment to continuing professional development (CPD).

Setting these requirements for competence at the point of registration reduces the likelihood of poor engineering work and the subsequent implications of failures on health and safety, and the costs associated with disciplinary action and rectification.

2. Is the proposed timetable for commencement of the reforms suitable? If no, what should change?

Proposed timetable for expansion to Classes 3 and 9c

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

The proposed timeframes are very tight. The industry needs time to:

- Digest the regulatory changes
- Develop strategies to ensure compliance including availability of insurance
- Implement new working procedures accordingly
- Address the lack of eligible engineers in the building service space

As there is no expansion of the classes of design practitioner that the DBPA applies to, Engineers Australia members working in the areas of class 2 as well as Class 3 and class 9c will be aware of the requirements outlined in the DBPA, however practitioners working in solely class 3 and 9c buildings will need time to adjust.

It is suggested the timeline for Stage 3 be pushed back to 12 months after implementation of Stage 2. The proposed timeline for Stage 2 currently coincides with significant changes to BCA/NCC which the industry will need time to adjust to. The delayed timeline will also help to mitigate the shortage of qualified building practitioners that will come with the expansion of the DBPA.

Building Work Exemptions

3. What exemptions, if any, do you think should be introduced for building work on Class 3 or 9c buildings? Why?

Engineers Australia generally agrees with the proposed exemptions and does not believe that any further exemptions are required.

The argument that a 'single owner' is less likely to risk their asset than would be the case for a Class 2 building has merit only where there is reputational risk e.g., for an aged care owner operator, or a hotel chain. The "small" owner is less likely to be perturbed by such risk and may actively seek to "fly under the radar". Accordingly, it is suggested that exemptions be minimised. This is discussed in question 6 below.

It is suggested that there should be a specific mention of balustrades in the regulated designs for all prescribed classes. The requirements around balustrade works are not clear in the current or proposed regulations and further guidance is required to ensure practitioners in this area are appropriately regulated.

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 DBPA. Why?

Engineers Australia generally agrees with the proposed exemptions and does not believe that any further exemptions are required.

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?

Engineers Australia generally agrees with the proposed exemptions and does not believe that any further exemptions are required.

6. Should any of the existing exemptions not apply to Class 3 or class 9c building work? Why?

Engineers Australia concurs with the paragraph on p31 of the RIS document which sums up the reasons not to allow exemptions for buildings housing vulnerable people.

“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.”

The proposed exclusions are generally agreed, with the following exceptions:

- ‘Renovation’ work that is related to active or passive fire safety systems should not be excluded. In this case, the whole system needs to be recertified to ensure functionality. This is because partial renovation or replacement of a system can affect another system with which it interfaces. For example, a partial renovation of an automatic smoke detection system with stair pressurisation or fire curtain deployment could be compromised if the combined integrated system is not certified. Inappropriate minor building alterations can affect existing fire safety systems. For example, a sprinkler system can be obstructed by a change in walls, ceilings, or by building in fixtures or shelving and racking.
- Waterproofing for sole occupancy units in class 3 and 9c buildings should not be exempted. Failure of showers and other wet areas has already been exposed as a major issue in the early Occupation Certificate audits by the office of the NSW Building Commissioner. It is a very common problem and causes huge frustration for residential apartment owners and tenants. Water and roofing leaks are traditionally expensive to fix and it is often difficult to identify the source of leaks. Many buildings have not had sufficiently detailed information on waterproofing, and have relied on, with mixed success, quality trades construction detailing by traditional practitioners. It is recommended that no exemption be permitted for waterproofing works.

Design Practitioner Classes

7. Should practitioners registered under existing classes in DBP for Class 2 work be automatically eligible to work on Class 3 and 9c buildings?

Practitioners currently registered under existing classes in the DBPA for Class 2 work can be allowed to be registered to work on Class 3 and 9c buildings without any further assessment of qualifications and experience. All registered practitioners are required to comply with the Code of Practice at Schedule 4 of the DBP Regulation. Clause 4 of the Code requires the practitioner to not carry out relevant work that is beyond the practitioner's competence or expertise.

In most States, certifiers and other practitioners tend to specialise [in line with the first two volumes of the NCC] and will self-exclude from undertaking work outside their field of expertise. There is a possibility that a form of CPD could be required which could encourage the appropriate skills transition from Class 2 to Class 3 and 9c.

8. Are further practitioners required for Class 3 and 9c buildings? Why?

Achieving national consistency in how practitioners are regulated should be a goal. Specialist skills utilised in Class 3 and 9c buildings including for example kitchen consultants, acoustic consultants, access consultants, infection control consultants, stage lighting/events AV consultants etc may be required, but these are not necessarily skills which are pertinent to all classes of buildings.

If there is no limit on the types of specialists which registered architects and registered engineers may seek to include as Advisors, then it is unlikely that additional practitioners in these areas would be required.

Three occupational categories of the engineering team

It is noted that the Regulation seeks to regulate work that is typically performed by members of all three occupational categories of the engineering team. That is, professional engineers, engineering technologists, and engineering associates. It is appropriate that professional engineering work is regulated as per the draft Regulation (bearing in mind the other comments in this submission), but there are several instances where the work being controlled by Regulation is and can be performed by engineering technologists or associates.

As such it is recommended that, for each class of engineering design practitioner, that two other grades are created to ensure that engineering technologists and associates have the authority to deliver design services appropriate to their level of expertise. The method for determining the cut-off for each class should not relate to the number of building stories, or complexity of the building as defined by the ABCB. Instead, the demarcation should be measured against the nature of the work performed, e.g., a BCA compliant lighting system to be designed by a lighting designer registered as a design practitioner – electrical technologist/associate.

Without this change, there is a risk that many suitable practitioners will be blocked from providing legitimate services. Similarly, it could result in a misapplication of professional engineers who would be forced to supervise and sign-off on work that could appropriately be managed by those other two grades of engineer.

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?

Engineers Australia does not believe that any further practitioner classes be required to cover work on a building part that might be mixed with a class 3 or 9c building other than what is outlined in the response to question 8.

10. Should there be an unrestricted class of building designer? Why or why not?

The category of “building designer” includes specialist designers (acoustics, interior design, access, energy efficiency, engineering technologists and associates, etc.) as well as general building designers who are not registered as architects. EA can only comment on the categories of specialist engineering service providers, but these design practitioners should not be restricted by size or use of building. The risk of restricting these practitioners is that some may be pushed out of their livelihoods should restrictions come into place. As outlined in the RIS, these practitioners must be appropriately qualified.

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?

The 'competency assessments' which were available when the legislation first applied to Class 2 should be reopened for the expansion to Classes 3 and 9c. This will allow some of those practitioners who do not have the benchmark qualifications and/or experience to be assessed for eligibility to become registered. If competency assessments are not made available, some experienced practitioners will be unable to continue to undertake work for which they are competent, exacerbating any current skills shortages.

Building Practitioner Classes

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

Engineers Australia believes that there are no further practitioner classes required for Class 3 and 9c buildings.

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?

No comment

Qualifications

14. Are the existing qualifications appropriate for registration as a Building Practitioner for Class 3 and 9c work?

No comment

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?

No comment

16. Should there be additional qualifications required for this work?

No comment

Professional Engineers Scheme

17. Do you support the expansion of the Professional Engineering Scheme to Classes 3 and 9c? Why or why not?

Please refer response to Question 1.

18. It is proposed for the expansion to occur in April 2023. Do you support this timeframe? If not, why?

Please refer response to Question 2.

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?

Engineers Australia agrees that the alternate registration pathway should be reopened. See response to question 11.

For a traditional career path, Engineers Australia considers that a relevant Washington Accord engineering qualification (or equivalent), five years relevant engineering experience, demonstration of the Engineers Australia's independent practice competencies (which map to the International Engineering Alliance professional competencies) and a demonstrated commitment to ethical practice and continuing professional development (CPD) are the requirements for independent practice without supervision. Setting this mark also minimises the risk of unrealistic expectations for those applying to be registered.

It is recognised that some people may not take the standard career path, and so some exceptions to the above need to be accommodated while also ensuring that appropriate competency standards and other requirements for independent practice are met.

Exception to the five-year rule

Under Pathway 2, some engineering bodies should be permitted to register engineers with less than five years of experience in *specific, exceptional circumstances*, and only if the engineers are compliant with the requirements for independent practice listed above (with the exception of years of experience).

This situation can arise for mid to late career professionals that complete their studies while within the profession. In such cases, additional credentials such as recognition as a Chartered Professional Engineer, could support their application. Such a person has advanced skills and knowledge and is able to demonstrate attainment of additional competencies to those that apply to the benchmark standard of professionalism proposed in the Regulations.

Chartered status can be awarded, by exception to highly skilled and very competent engineers with less than five years of experience post-graduation. Because of the thorough and bespoke competency assessment, engineers with Chartered status and fewer than five years of experience should be considered to have met the five years of experience requirement.

For example, there are some engineers, including mature aged, who may have attained valuable experience before graduating with their formal engineering qualification. On a case-by-case basis, some amount of the five years requirement could be met by pre-graduation experience. In such cases, it would need to be individually assessed. The usual circumstances for this are for students who do an engineering degree part-time or in blocks of study, integrated with significant work placements and operating under appropriate supervision as an engineer. Pre-graduation experience may also be relevant for people who undergo further education to articulate from engineering associate or technologist to professional engineer. These engineers have demonstrated they have relevant work experience that should be eligible for assessment and inclusion for the requirements of the regulations.

A levy to maintain momentum restoring confidence in the industry

20. Do you think industry should contribute to the cost of the Construct NSW reforms? Why or why not?

Engineers are facing increasing insurance costs and multiple regulation costs which is further exacerbated when practicing across various jurisdictions. Engineers Australia believes that if the developer is responsible for the project and they own the land, then they should bear responsibility for paying the building work levy.

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

The rates may need to be reviewed quite soon, as the enforcement cost and review costs may be higher than the proposed rates, if they are to be levied on a cost-recovery basis. The review process for these costs would need to be outlined to avoid developers being surprised by increasing costs.

Applying the Levy to Building Work

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

Yes - the fees should attach to the value of the work undertaken at the time it is undertaken. Moreover, there needs to be a clear nexus between the levy and the publicised enforcement outcomes.

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

No comment

Levy Indexation

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

No comment

Basis for recovering the key costs for the reforms

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

No comment

Proposed Building Legislation Amendment (Building Classes) Regulation 2022

This section provides feedback on the proposed Regulation.

Section	Comment
[2] Clause 13	Add the word "maintenance" to the clause " the repair, <i>maintenance</i> , renovation or protective treatment of the building"



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