



November 2023

CHANGES TO CLASS 3 AND 9(C) INTRODUCED BY NSW GOVERNMENT IN JULY OF 2023 REGARDING REGULATED BUILDINGS

INTRODUCTION

Two laws were introduced in 2020 by the NSW Government¹ which had a significant impact upon the building and construction industry in NSW.

These were:

1. the *Design and Building Practitioners Act 2020* (DBP Act) in which compliance related 'duty of care' requirements were featured prominently in respect of various parties including builders and developers (i.e. obligations were introduced in respect of building and design practitioners) most of which came into force on 1 July 2021, and
2. the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (RAB Act) which in effect empowered the NSW Building Commissioner

to take enforcement related actions in relation to the same practitioners, such as to ensure that the works were compliant with the standards-- in particular the Building Code of Australia. (BCA)

These laws relate to defective works and claims which consumers could pursue as against the practitioners and the residential building and construction professionals (DBP Act), as the well as to the grant of powers for the NSW Building Commissioner and authorised officers taking of action against defective building work.

One of the most important features of these laws was the classification of buildings and structures to which they referred.

Initially, these laws only applied to class 2 residential apartment buildings. However, from 3 July 2023, these laws also applied to class 3 and 9c buildings.

These laws are meant to 'intertwine' to ensure that the classification regime of the DBP Act, is to be enforced through the RAB Act.

In this short article we examine the classification relevant to these laws and briefly outline the steps which professionals need to take to be compliant.²

BUILDING CLASSIFICATION

Buildings are classified in a particular way as set out under the 'National Construction Code' (NCC).

As stated by the the Australian Building Codes Board:³

[NCC] sets out the minimum technical requirements for new buildings (and new building work in existing buildings) in Australia. In doing so, it groups buildings by their use. These groups are assigned a classification which is then how buildings are referred to throughout the NCC[.] Building classifications are labelled 'Class 1' through to 'Class 10'. Some classifications also have sub-classifications, referred to by a letter after the number (e.g. Class 1a).

Class 1 buildings are generally houses.

Class 2 buildings are generally apartment buildings and multi-unit residential buildings but can also include single storey buildings with sub-building areas, such as common carparks.

Class 3 buildings can include boarding houses, guest houses, hostels for backpackers, dormitory style accommodation, or 'care-type' buildings such as accommodation buildings for the elderly.

Related to these 'care type' buildings, are '**Class 9c**' buildings which include:

*"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. An aged care building, where residents are provided with personal care services, is a Class 9c building."*⁴

As from 3 July 2023 DBP Act and RAB Act will now encompass the above building classes as detailed above. The laws apply specifically to the time of construction certificate (see further below).

DBP Act

Additionally, from 1 July 2024, existing class 3 and 9c buildings will also be subject to the alteration-and-renovation-works provisions of these laws.

There are of course consequences for practitioners resulting from all these changes.

Impact on Practitioners

One of the main issues which arises with these changes is the 'time and cost' problem for practitioners, where for example, regulated designs are required to be certified by properly qualified practitioners. (see further below in respect of 'qualifications', and the definition of a 'design practitioner').

Design practitioners who are engaged in preparing designs and completing design compliance declarations, need to register under the laws. A design practitioner is simply a person who is responsible for preparing regulated designs and declaring that the designs comply with the BCA and other relevant standards (as defined under section 3 of the DBP Act).

In turn “regulated designs” are designs which relate to a building element or the development of a performance solution on a regulated building (which as we have explained herein, constitute class 2, 3 or 9c buildings). The designs are called “regulated” because these are regulated under the DBP Act (see section 5 of the DBP Act).

Design practitioners who must be registered are those who either:

1. are charged with generating regulated designs in respect of class 2, 3, or 9c buildings or buildings which include a class 2, 3, or 9c part() , and, who also declare that the designs are in compliance with the BCA, or
2. co-ordinate and lodge designs by other design practitioners as related to the same organisation (or ‘principal design practitioners’).

You will need to contact your respective professional association such as Engineers Australia for details. Full details of registrations and who will qualify are available at Fair Trading NSW link: [Licensing and Qualifications](#)

Some practitioners cannot meet the qualification and experience requirements immediately and so a transitional period is allowed for them to attempt and fulfill the requirements by 2024. The period expires on 31 December 2023. These provisions are available for professional engineers and design practitioners (for both low rise and medium rise building design).

As part of the registration process, design practitioners are required to have completed two required modules which constitute the course **“Navigating the Design and Building Practitioners (DBP) legislation”** and **“The value of Australian Standards”**. Of course the design practitioner needs to have the requisite qualification (e.g. engineering or architectural degrees), as well as the requisite skills, experience and knowledge to be meet registration requirements (Police check and age requirements also need to be met).

The New South Wales Court of Appeal has recently confirmed that building practitioners owe a statutory duty of care under the DBP Act for all building work, not just works undertaken in respect of Class 2 buildings. (Goodwin Street Development judgment, or “Judgment”).⁵

The prima facie effect of the amendments subject of this article seems to be that these extend the requirement of regulated designs to two other classes in addition to class 2, However the duty of care applies to all classes, and the Judgment makes it quite clear that under the DBP Act itself, the duty of care requirements extend to all classes and not just those regulated classes 2, 3 and 9c.

KEY TAKEAWAYS: BUILDING PROJECTS

Given the foregoing, all practitioners need to be aware of the following.

- If building works for the additional clauses commenced prior to 3 July 2023, (i.e. the construction certificate was issued prior to 3 July 2023), DBP Act obligations will not apply and so the design and building compliance declarations need not be lodged, (notwithstanding, designs already used will still need to be uploaded to the NSW Planning Portal).
- The corollary is that any building work commenced after 3 July 2023 (under any complying development certification or construction certification dated prior or after 3 July 2023) will need to be in compliance.

Importantly, as Fair Trading NSW says where the designs for building works which are to be commenced after 3 July 2023: *“have been prepared before 3 July 2023 by a practitioner who is not eligible for registration, those designs will need to be reviewed by a registered design practitioner who is able to provide a Certificate for designs prepared before 3 July 2023. The Certificate allows the building practitioner to use the design for building work as though it was a regulated design.”*⁶

Consequence of a failure to register or, contravention of the laws, or failure to meet any conditions of registration can be severe including hefty fines (for example up to a \$66,000 for a corporation in respect of a contravention of a condition -- see section 56 of the DBP Act) or suspension and even cancellation of the registration.

Accordingly, it is extremely important that proper registration steps are undertaken by the appropriate personnel in your organisation and at the appropriate time in light of the dates furnished above so that compliance is achieved.

Generally, the sooner, the better, especially as we near the end of 2023.

REFERENCES

1. NSW Fair Trading, “Changes to regulated buildings 2023”, at <https://www.fairtrading.nsw.gov.au/news-and-updates/notices/changes-to-regulated-buildings-2023>
2. the term “professionals” or “Professionals” refers to, inter alia, builders, developers, design practitioners, and related entities, as well as other building and construction related professionals.
3. Australian Building Codes Board, “Understanding the NCC Building Classifications”, at <https://www.abcb.gov.au/sites/default/files/resources/2022/UTNCC-Building-classifications.PDF>, last visited 10 October 23
4. Australian Building Codes Board, “Understanding the NCC Building Classifications”, at <https://www.abcb.gov.au/sites/default/files/resources/2022/UTNCC-Building-classifications.PDF>, last visited 10 October 23
5. See *Roberts v Goodwin Street Developments* [2023] NSWCA 5
6. NSW Fair Trading, Op. Cit.

CONTACT US

For further information, please do not hesitate to contact **Kreisson** on **(02) 8239 6500**.

This communication is sent by Kreisson Legal Pty Limited (ACN 113 986 824). This article contains general information only and is not a substitute for considered legal, accounting or business advice. It does not take into account your particular circumstances, objectives, appetite for risk or financial situation. We are not tax or BAS agents or specialist tax advisers. You should not rely on this article without seeking detailed advice from discipline experts. The contents are copyright and should not be reproduced, re-published, adapted or used without the author's permission