

LGNSW SUBMISSION

More compliant and fire-safe buildings: Draft Regulations for Fire Safety and Building Classes

OCTOBER 2022

Local Government NSW (LGNSW) is the peak body for local government in NSW, representing NSW general purpose councils and related entities. LGNSW facilitates the development of an effective community-based system of local government in the State.



OVERVIEW OF THE LOCAL GOVERNMENT SECTOR



Local government in NSW employs more than **55,000 people**



Local government in NSW looks after more than **\$136 billion of community assets**



Local government in NSW spends more than **\$1.9 billion each year on caring for the environment, including recycling and waste management, stormwater management and preserving and protecting native flora and fauna**



NSW has 450 council-run libraries that attract more than **34.8 million visits each year**



Local government in NSW is responsible for about **90% of the state's roads and bridges**



NSW councils manage an estimated **3.5 million tonnes of waste each year**



NSW councils own and manage more than **600 museums, galleries, theatres and art centres**

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OPENING

As the peak body for local government in NSW, representing NSW general purpose councils and related entities, Local Government NSW (LGNSW) welcomes the opportunity to provide comment to the NSW Department of Customer Service (the Department) on proposed changes to building and fire safety laws currently open for consultation to improve building design, construction and fire safety.

LGNSW has welcomed the Construct NSW building reform agenda driven by the NSW Building Commissioner which has made considerable progress since 2019. This current phase of reforms is an important next step in the Construct NSW program to address decades-long issues with accountability and liability in the building and construction sector.

LGNSW consulted with councils to help inform the content of this submission. For detailed technical comments on the proposed provisions the Department should refer to individual council submissions.

This submission was endorsed by the LGNSW Board in December 2022.

BACKGROUND

LGNSW understands that the [consultation](#) which closes on 7 October includes the following two proposed Regulations (each supported by a Regulatory Impact Statement (RIS))¹:

1. The **Environmental Planning and Assessment (Development Certification and Fire Safety) Amendment (Fire Safety) Regulation 2022** (or ‘Fire Safety Regulation 2022’).

This seeks to improve compliance with requirements for design, certification and maintenance of fire safety measures by:

- increasing oversight of performance-based design solutions through enhanced involvement of Fire and Rescue NSW
- establishing a new category of independent certifier to assess and verify the performance of installed fire safety measures before buildings can be occupied
- mandating improved documentation of fire safety measures which is relied on for certification, inspection and maintenance
- mandating standards for the maintenance of fire safety measures.

2. The **Building Legislation Amendment (Building Classes) Regulation 2022**

This will expand the application of existing Acts² to Class 3 and 9c buildings. Key features include:

- new requirements for developers, designers and builders for Class 3 and 9c buildings to ensure building work is compliant with the Building Code of Australia, including:
 - expanding the registration scheme for designers and builders who must declare their work is compliant with relevant standards to class 3 and 9c buildings;
 - requiring developers to provide notice to the Regulator before the completion of building 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;
- expanding the registration scheme for professional engineers carrying out professional engineering work on these buildings.

¹ [RIS - Fire Safety Regulation 2022](#) and [RIS - Building Legislation Amendment \(Building Classes\) Regulation 2022](#)

² The *Design and Building Practitioners Act 2020* (DBP Act) and the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (RAB Act)

GENERAL COMMENTS

Local government plays a key role in the planning and building approval system. While the focus of the draft Regulations is chiefly on the activities of designers and practitioners in the building and fire safety industry, the reforms also have various implications for local government. This is because of councils' role as a consent authority, their inspection and enforcement powers (together with private certifiers) in regulating fire safety issues and more broadly the advice and assistance they provide to residents and developers when assisting them to undertake developments. In short, councils are the first port of call for many in the community when things are seen to go wrong with building and construction.

Council compliance and regulatory responsibilities

Councils are under unprecedented financial pressures due to a range of factors and face mounting expectations in performing their regulatory building, development and certification duties.

The diminishing availability of highly qualified expert professional building surveyors, registered certifiers and fire safety practitioners within local government is a major challenge for councils. Further to this, funding and resourcing an ever-expanding inventory of compliance and regulatory work³ remains challenging for councils, with limited appropriate mechanisms to keep up.

These difficulties are compounded by:

- The absence of sufficient financial means and lack of control over councils' ability to raise revenue;
- The challenges around attracting and retaining staff and the shortages and availability of skilled and trained professionals, especially in remote regional locations; and
- the considerable variation in councils' structures, circumstances and resources across the state, with the consequence that for matters such as fire safety regulation the approaches and capabilities of councils will vary greatly. (This was acknowledged in the NSW Government's *Industry report on reforms to improve fire safety in completed buildings*⁴).

³ Recent examples include: enforcing compliance with the DBP Act and remediation of flammable cladding; regulating exempt and complying development in the planning system; and concerns that [Project Intervene](#) and other common strata building remedial rectification work under the DBP Act will require councils to be involved with issuing orders and other enforcement activities.

⁴ <https://www.nsw.gov.au/building-commissioner/building-and-construction-resources/research-on-fire-safety-reforms#toc-download-the-report>

While the local government sector has welcomed the work of the NSW Building Commissioner and the team at the NSW Department of Customer Service to properly regulate and reform the poor building practices of the past, LGNSW is concerned that aspects of the reforms will place additional responsibilities and further costs on councils without due consideration of the impacts. This is particularly concerning where councils may no longer have in-house expertise or they face challenges to attract and retain suitably qualified and skilled officers. The reforms need to be accompanied by mechanisms to enable councils to properly and fairly recover the costs of the enforcement activities that are being expected of them to support the government's reform program.

Building information certificates

Requests for Building Information Certificates (BICs) are on the rise and becoming increasingly problematic for councils⁵. The purpose of many of these certificates is to indicate that no orders will be issued by a council relating to existing works. But councils are receiving increasing numbers of these applications from developers, builders and owners to seek to 'regularise' unauthorised building work. An application for a BIC in these circumstances absolves the Registered Certifier of their responsibility, adds to council workloads and often places councils in a precarious position. The use of a BIC in this way is effectively placing an expectation on councils to provide tacit endorsement for works that may not comply with prescribed laws, placing the liability on council rather than on those responsible for the works. Further, the inability for councils to be able to charge fees to cover the time and resources spent in issuing BICs is contributing to councils' existing financial sustainability concerns.

It is also not uncommon for the particular unauthorised works to involve fire safety measures, which have, in effect, bypassed the usual prescribed building certification and/or inspection processes. If for example a BIC application relates to a Class 2 building and involves the need for revised building plans, fire engineering, structural engineering reports etc, the BIC process sits outside the design compliance declaration process under the DPB Act.

BICs are not an appropriate mechanism for authorising non-compliant building work and must not become a proxy to circumvent the construction certificate (CC) or complying development certificate (CDC) processes or the DBP Act and its regulations and any other legislation. A concern of local government is that without resolution, the increasing complexities and number of BICs will perpetuate poor practice and undermine the current reforms to building industry practices. The current proposals to expand declared designs to Class 3 and 9c buildings will only compound this issue.

⁵ Historically, the use of BICs was related to buyers and sellers of property seeking clarification from councils that the property in question contained no unauthorised works that warranted the issue of any Orders. Councils have seen a dramatic decline in these types of BIC applications from approximately 50 to 60 % of all BIC applications in past years to now representing only 10 to 15 % of applications.

LGNSW has been advocating for a commitment from the NSW Government to review the BIC framework to reduce the misuse of these certificates to ‘approve’ unauthorised works and to establish a fee structure that provides for full-cost recovery by councils when issuing these certificates. The matter remains to be addressed.

Compliance and enforcement funding – State and local

The local government sector has been pleased to see the NSW Government commit much-needed resources after decades of neglect to properly audit and enforce building activities in the Class 2 construction sector. The Government’s levy on Class 2 buildings, introduced in 2021, provides a source of funding to offset these compliance costs.

With similar regulatory responsibilities, local government fully understands and appreciates the costs and resources associated with compliance and enforcement. However, while the NSW Government now has its own levy on developers to support the oversight of its compliance work, similar provisions have not been afforded to local government.

The current reforms propose to expand this levy to Classes 3 and 9c buildings, noting that the levy will be:

- used to recover the future cost of the regulatory oversight of the industry, including compliance, licensing, intelligence and education; and
- paid by those who will profit from the building works to ensure increased standards of design and building work.⁶

As discussed earlier in this submission, the scope of local government’s enforcement responsibilities is being continually broadened with no commensurate financing mechanisms to support it. Councils need a mechanism to enable them to properly and fairly recover the costs of their compliance activities, in the same way that the NSW Government has justified the introduction of its compliance levy. This is a matter of significant concern to the local government sector, particularly in light of councils’ current severe fiscal constraints. LGNSW and councils have made representations to NSW Government Ministers and departments on this issue, but the matter remains to be addressed.

The proposed building reforms and Regulation provide an opportunity to address this disparity, by introducing a provision that would allow councils to charge a compliance levy on development applications (DAs) or construction certificates (CCs). This would assist councils to fund and resource compliance with development consents, construction certificates and complying development certificates.

⁶ RIS - Building Legislation Amendment (Building Classes) Regulation 2022, pp 47-67

01



Recommendation: That the NSW Government work with LGNSW and councils to consider mechanisms that could be introduced to help offset the cost to local government of its expanding compliance and enforcement responsibilities to support the State government's building and planning reforms.

02



Recommendation: That the NSW Government commit to reviewing the framework and provisions for Building Information Certificates to:

- reduce their misuse and ensure alignment with other building legislation; and
- establish a fee structure that provides for full-cost recovery by councils in issuing these certificates.

SPECIFIC COMMENTS

Fire safety regulation

Fire safety is one of a broad range of compliance and enforcement responsibilities that councils have with respect to development and building work. As discussed above this list is growing, without the requisite funding mechanisms to support these activities.

As a general principle, any legislative change that puts a mandatory imposition on councils to undertake regulatory functions would only be supported by LGNSW where funding is provided to cover all costs and in circumstances where it is practicably possible to source staff to resource the function.

If councils are required to be responsible for assessing and making changes to fire safety schedules for certificates issued by Registered Certifiers this would involve council specialists needing to review the construction certificate documentation, fire safety reports and undertake inspections, to determine whether proposed changes to the fire safety schedule are acceptable. This places a significant liability on councils, particularly if they do not have the specialist staff to undertake these assessments.

Within this context, some brief comments from a local government perspective on the four areas of reform/focus are offered below.

Reform area	LGNSW Comment
Fire safety design: increasing the independent review of non-standard designs (i.e. performance solutions) by broadening Fire and Rescue NSW (FRNSW) call-in powers.	Supported. FRNSW must be adequately resourced to effectively manage the proposed notification and consultation processes in a timely manner.
Certification of fire safety measures: creating an independent accredited practitioner role - establishing a new category of independent certifiers to assess and verify the performance of installed fire safety measures before buildings can be occupied.	LGNSW supports the proposals to improve measures in this area. This aligns with the following 2019 Annual LGNSW Conference resolution: <i>That Local Government NSW lobbies the NSW Government to increase the qualifications for competent fire practitioners and include continual development and training requirements.</i>
Maintenance: mandating an independent standard for the	The RIS notes (p 26) there could be some enforcement costs on councils associated with enforcing AS 1851

<p>frequency, method and documentation of testing fire safety measures.</p>	<p>(i.e. for any site visits and consequent actions that included inspection of AS1851 records on site). The addition of new regulatory responsibilities such as this must be matched with appropriate funding and resourcing mechanisms for councils and also consider other impacts such as the availability of in-house expertise.</p> <p>The capacity of the industry to service the increased testing regime also needs to be considered.</p>
<p>Certification, maintenance and any subsequent building works: ensuring that Fire Safety Schedules are correct and list all the approved fire safety measures for the building and their required performance standard.</p> <p>The reforms would allow certifiers or councils to amend incorrect schedules in specific circumstances and would also enable the NSW Government to mandate a standard schedule format. The proposed reforms to Fire Safety Schedules may have administrative costs for some councils (RIS p 24).</p>	<p>The implementation of fire safety schedules, fire safety certificates and fire safety statements present numerous issues and challenges for councils.</p> <p>Councils consistently maintain that Registered Certifiers need to be accountable for their certification work, including the accuracy of the fire safety schedule and any matters that arise in the development. Councils should not have to ‘step-in’ and review and rectify errors, omissions or flaws in these certification processes. The appointed Registered Certifier should be responsible for the rectification of any changes to be made to the fire safety schedule, up until the issue of the Occupation Certificate.</p> <p>LGNSW does not object to the provisions which enable a building owner (or their authorised agent) to request a change to the fire safety schedule for specified reasons, after the issue of an occupation certificate. However, it is critical that these provisions (or the <i>Local Government Act 1993</i>) include an explicit provision which allows the council to charge a full cost-recovery application and assessment fee for all such requests.</p> <p>In cases where an application for a Building Information Certificate for unauthorised work encompasses fire safety measures, subject to the provision of adequate documentation and certification, there needs to be a mechanism to include any relevant fire safety measures associated with the unauthorised work, into the fire safety schedule. The draft provisions should be amended to enable councils to make changes to or create a fire safety schedule (which also triggers the annual fire safety provisions) as a result of the issue of a Building Information Certificate.</p>

Building Legislation Amendment (Building Classes) Regulation

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

To date, the NSW Government's building reform has focused on high-rise residential (Class 2) construction. The system of improved registration and accountability that has been in place for Class 2 buildings under the *Design and Building Practitioners Act 2021* (DPB Act) has been a welcome and positive first step towards restoring public trust in the building and construction sector.

LGNSW has previously made representations⁷ for these provisions to be extended to other building classes, noting the many concerns from councils about unauthorised work and poor quality of building and regulation in relation to the following building types:

- Class 1a (single detached dwellings and town house, row houses or the like)
- Class 1b (smaller boarding houses)
- Class 3 (which includes boarding houses, guest houses, hostels/backpacker accommodation).
- Class 9 (i.e. 'public' buildings which include health-care, child-care, education and public-assembly facilities).

Buildings in Classes 6, 7 and 8 are also considered by some councils to be of sufficient importance. In particular some local government areas are experiencing an increased number of complaints from Fire and Rescue NSW about factory and warehouse buildings and report that the poor quality (or non-existent) documentation, particularly around alternative solutions, is challenging when carrying out fire safety audits. While these buildings do not normally pose the same level of risk to occupants, they open a weak point in the overall leadership of a process to improve standards across the board, and can be very costly to fix when they go wrong).

LGNSW supports the proposed changes to expand existing legislation to apply to Class 3 and Class 9c buildings. We also welcome the NSW Government's commitment (noted in the RIS, p 27) to eventually extend these reforms to additional building classes.

In addition, LGNSW recommends considering the inclusion of Class 1b buildings⁸ in this current phase of the DBP Act expansion. The RIS has noted that Class 1b buildings have not been included on the basis that "the reforms under the proposed Building Bill are likely to deliver the necessary benefits for this building class" and that "these buildings are typically

⁷ [LGNSW Submission on Design and Building Practitioners Regulation 2020 – January 2021](#)

⁸ RIS, p 28: "A Class 1b building - a boarding house, guest house or hostel that has a floor area less than 300 m2, 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."

less complex than Classes 2, 3 and 9c and are already subject to upfront design, rather than staged design and construct”⁹.

LGNSW questions these conclusions. Based on councils’ experiences with Class 1a and 1b buildings, the sector has consistently raised concerns that existing building regulation issues are being exacerbated with the State Government’s ongoing expansion of complying development, which provides for certifiers to approve increasingly complex forms of development.



03

Recommendation: That Class 1b buildings be considered for inclusion along with Classes 3 and 9c in the expanded application of the DBP Act.

⁹ RIS - Building Legislation Amendment (Building Classes) Regulation 2022, p 28

CONCLUSION

Councils are being expected to undertake additional regulatory activities to support the requirements and implementation of the DBP Act and the RAB Act, in addition to rectification orders and other enforcement work they have been required to do since 2017 for buildings with flammable cladding. With the continued expansion of various government legislation, building reforms and planning policies this list is growing. This latest expansion in the remit of the state's building regulation, while welcomed by the local government sector, is potentially adding further to councils' workload, without commensurate funding mechanisms.

Local government has a keen interest to see the new regulatory framework continue to deliver well-built, safe and compliant buildings that protect the public interest and rebuild trust. It is important that close consultation with local government is maintained so that the issues raised in this submission, particularly those relating to cost recovery of councils' compliance activities and the misuse of building information certificates, can be addressed.

For further information in relation to this submission, please contact Jane Partridge, Strategy Manager, Planning on 02 9242 4093 or jane.partridge@lgsw.org.au.

SUMMARY OF RECOMMENDATIONS

Recommendation 1

That the NSW Government work with LGNSW and councils to consider mechanisms that could be introduced to help offset the cost to local government of its expanding compliance and enforcement responsibilities to support the State government's building and planning reforms.

Recommendation 2

That the NSW Government commit to reviewing the framework and provisions for Building Information Certificates to:

- reduce their misuse and ensure alignment with other building legislation; and
- establish a fee structure that provides for full-cost recovery by councils in issuing these certificates.

Recommendation 3

That Class 1b buildings be considered for inclusion along with Classes 3 and 9c in the expanded application of the DBP Act.