

Regulatory Impact Statement

Building Bill 2022

Part 3 - Building compliant homes

August 2022

Published by

Better Regulation Division

NSW Department of Customer Service

www.customerservice.nsw.gov.au

Disclaimer

This publication avoids the use of legal language, with information about the law summarised or expressed in general statements. The information in this document should not be relied upon as a substitute for professional legal advice.

For access to legislation in force, go to the official NSW Government website for online publication of legislation at www.legislation.nsw.gov.au

Copyright Information

© State of New South Wales through NSW Department of Customer Service 2022

You may copy, distribute, display, download and otherwise freely deal with this information provided you attribute NSW Fair Trading as the owner. However, you must obtain permission from NSW Fair Trading if you wish to 1) modify, 2) charge others for access, 3) include in advertising or a product for sale, or 4) obtain profit, from the information. For full details, see NSW Fair Trading's copyright policy at www.fairtrading.nsw.gov.au/copyright or email publications@customerservice.nsw.gov.au

Table of Contents

TABLE OF CONTENTS	3
COMMISSIONER'S MESSAGE	4
GLOSSARY	5
EXECUTIVE SUMMARY	9
CONSULTATION PROCESS	15
Making a submission	15
1. KEY OBJECTIVES OF THE BILL	17
Objective	17
2. HOME BUILDING WORK IN THE BILL	19
Definition of 'Developer'	20
Contracting to do home building work	24
3. WHAT HAPPENS WHEN SOMETHING GOES WRONG?	31
Statutory warranties	31
Dispute Procedures	46
4. HOME BUILDING COMPENSATION SCHEME	53
5. HOW DO WE TRANSITION INDUSTRY INTO A NEW SCHEME?	55
APPENDIX 1 – BUILDING CLASSIFICATIONS	57
APPENDIX 2 – NEW SECTIONS GUIDE	59
APPENDIX 3 – ALTERNATIVE TEXT FOR HOME BUILDING IN NSW: CUSTOMER JOURNEYS	69

Commissioner's Message

I am proud to present this Regulatory Impact Statement (RIS) and proposed Building Bill 2022.

The NSW Government's Construct NSW transformation strategy is working to restore public confidence in the building and construction industry and create a customer-focused sector by 2025. The strategy, and appointment of the NSW Building Commissioner, respond to repeated failures in the design, construction and certification of buildings that had led to substandard building work.

A central theme of Construct NSW is the making of trustworthy buildings – buildings that are fit for purpose, sustainable and measurably less risky. The players who make them must be the most capable. Customers who buy them must be confident to own and occupy them. Further, the financiers and insurers who underwrite policies for constructors and building owners must be confident in the level of assurance.

The government has implemented significant reforms under Construct NSW, focused on creating clear lines of accountability and significant consequences when practitioners deliver substandard work. We have made substantial progress towards achieving these outcomes and are gaining traction with industry professionals who are now firmly part of Construct NSW's vision.

To ensure government, industry and consumers maintain momentum in restoring confidence to the sector, this RIS and the proposed Building Bill 2022 put forward the next phase of reforms. This next phase of Construct NSW will focus on: strengthening consumer protections and enforcement powers; ensuring trade practitioners are suitably skilled to carry out their work; making all persons accountable for the supply of safe building products and building work; and ensuring fair and prompt payment.

Recent incidents have emphasised the devastating impacts that building defects have on building owners and occupants.

The NSW Government is committed to supporting the building and construction sector and providing NSW with a built environment that puts safety and quality first.

I encourage you to take part in this consultation and have your say on the proposed reforms. Your feedback will help us to strengthen building laws in NSW.

Natasha Mann

Commissioner for Fair Trading

Glossary

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

Term	Description
2019 Government Response	NSW Government Response to the <i>Building Confidence Report</i> released on 19 February 2019.
ABCB	Australian Building Codes Board – a Council of Australian Government standards writing body that is responsible for the development of the <i>National Construction Code</i> .
ACL	<i>Australian Consumer Law</i> .
BCA	Building Code of Australia – Volumes One and Two of the National Construction Code.
BDC Act	<i>Building and Development Certifiers Act 2018</i> .
Building Confidence Report	' <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.
Building work	<p><i>Building work</i> means work involved in, or involved in coordinating or supervising work involved in, one or more of the following:</p> <ul style="list-style-type: none"> the construction of a building the making of alterations or additions to a building the repair, maintenance, renovation or protective treatment of a building <p>work prescribed by the regulations.</p> <p>The regulations may exclude work from being building work.</p>
CIE	Centre for International Economics.
Class 2 building or building with a Class 2 part	<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>

Commercial building work	<i>Commercial building work</i> is used to identify buildings and building work that is outside the current focus on the home in the HB Act. It broadly includes Class 3 to 9 buildings under the National Construction Code.
DBP Act	<i>Design and Building Practitioners Act 2020.</i>
EP&A Act	<i>Environmental Planning and Assessment Act 1979.</i>
EP&A Reg	Environmental Planning & Assessment Regulation 2000.
HBA	The <i>Home Building Act 1989.</i>
Home	<p><i>Home</i> means a building designed, constructed or adapted for use as a residence, but does not include the following:</p> <ul style="list-style-type: none"> premises not intended to be used for permanent habitation a hostel or backpackers' accommodation a hospital or nursing home a correctional complex, including a correctional centre hotel or motel accommodation or serviced apartments a registered club or a residence within premises licensed under the <i>Liquor Act 2007</i> a residence associated with, or provided by, a hospital or educational establishment a building or premises excluded by the regulations. <p>In this definition a nursing home has the same meaning as in the <i>Public Health Act 2010.</i></p>
Home building compensation scheme	Insurance under the Home Building Compensation Scheme provides a safety net for homeowners, if a licensed business that worked on their home cannot complete work or honour statutory warranties due to insolvency, death, disappearance, or licence suspension for failing to comply with a court or tribunal order to pay compensation to the homeowner.
Home building work	<i>Home building work</i> is regulated work carried out in, on, or for a home.
NCAT	NSW Civil and Administrative Tribunal.
NCC	<p><i>National Construction Code</i> – is published in three volumes. The Building Code of Australia is Volumes One and Two and the Plumbing Code of Australia is Volume Three.</p> <p>It is a performance-based code containing all performance requirements for the construction of buildings, a set of technical design and construction provisions for buildings. As a performance-based code, it sets the minimum required level for the safety, health, amenity, accessibility and sustainability of certain buildings.</p>
NRF	Draft 'National Registration Framework for Building Practitioners' discussion paper released by the Australian Building Codes Board on 26 June 2020.

OBC	Office of the NSW Building Commissioner sitting within the Department of Customer Service.
OC	Occupation Certificate – authorises the occupation and use of a new building or building section.
Owner-builder work	<p>Owner-builder work means home building work that is one or more of the following:</p> <p>the carrying out of exempt building work prescribed by the regulations</p> <p>the engagement of a licence holder to carry out residential building work</p> <p>the coordination of the supply and installation of a kit home or pre-fabricated buildings, and</p> <p>relating to the erection of a dwelling house or secondary dwelling, but only if:</p> <p>development consent is required to carry out the work, or</p> <p>the work may be carried out as complying development.</p>
Product Safety Act	<i>Building Products (Safety) Act 2017.</i>
PSS	Professional Standards Scheme – a scheme approved by the Professional Standards Council within the meaning of the <i>Professional Standards Act 1994</i> .
RAB Act	<i>Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020.</i>
Regulated work	<p><i>Regulated work</i> includes:</p> <p>building work</p> <p>fire safety work</p> <p>general building design work</p> <p>professional engineering work</p> <p>specialist work</p> <p>other work prescribed by the regulations.</p> <p>Regulated work requires a licence under the Building Bill.</p>
RIS	Regulatory Impact Statement.
RLLC Act	<i>Residential (Land Lease) Communities Act 2013.</i>
Serious defect	<p>Serious defect, in relation to a building, means—</p> <p>(a) a defect in a building element that is attributable to a failure to comply with the governing requirements or the performance requirements of the National Construction Code as in force at the time the building work was carried out, the relevant standards or the relevant approved plans, or</p> <p>(b) a defect in a building product or building element that-</p>

	<p>(i) is attributable to defective design, defective or faulty workmanship or defective materials, and</p> <p>(ii) causes or is likely to cause—</p> <p>(A) the inability to inhabit or use the building, for its intended purpose, or</p> <p>(B) the destruction of the building or any part of the building, or</p> <p>(C) a threat of collapse of the building or any part of the building, or</p> <p>(c) a defect of a kind that is prescribed by the regulations as a serious defect, or</p> <p>(d) the use of a building product in the building, if—</p> <p>(i) the use is in contravention of the <i>Building Products (Safety) Act 2017</i>, or</p> <p>(ii) the product or use does not comply with the requirements of the National Construction Code, or</p> <p>(iii) the product or use does not comply with other standards or requirements prescribed by the regulations for the purposes of this definition.</p>
SIRA	NSW State Insurance Regulatory Authority.
Specialist work	<p>Means the following, whether or not done in connection with building work:</p> <p>electrical wiring work within the meaning of the <i>Gas and Electricity (Consumer Safety) Act 2017</i></p> <p>gasfitting work within the meaning of the <i>Gas and Electricity (Consumer Safety) Act 2017</i></p> <p>mechanical services and medical gas work</p> <p>medical gasfitting work within the meaning of the <i>Gas and Electricity (Consumer Safety) Act 2017</i></p> <p>medical gas technician work within the meaning of the <i>Gas and Electricity (Consumer Safety) Act 2017</i></p> <p>plumbing and drainage work</p> <p>refrigeration work or air-conditioning work prescribed by the regulations</p> <p>waterproofing work</p> <p>work prescribed by the regulations.</p>
The BCE Bill	The Building Compliance and Enforcement Bill.
The Bill	The Building Bill.
The Department	The Department of Customer Service.
The Regulator	NSW Fair Trading / Office of the NSW Building Commissioner.
The Secretary	<i>Secretary</i> means the Secretary of the Department of Customer Service.

Executive summary

Responses to recent building incidents have driven reforms under the Construct NSW transformation strategy to improve transparency, accountability, and the quality of work in the NSW building and construction industry. The reforms have highlighted the costs of substandard work, which are felt by everyday homeowners and building owners who rely upon building practitioners to produce compliant work.

Building failures across all building types increase costs to building owners, other practitioners, financiers, and insurers to remediate defects and are an increased risk to safety for people left with non-compliant building work. These failures tarnish the industry even for those who produce quality work and negatively impact overall confidence in the building and construction industry.

The Department has implemented significant reforms under Construct NSW, focused on creating clear lines of accountability and significant consequences when practitioners deliver substandard work, including the *Design and Building Practitioners Act 2020 (DBP Act)*, and the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020 (RAB Act)*. The focus of these reforms has initially been on residential apartment buildings.

The Building Bill 2022 (**the Bill**) is part of the next stage of Construct NSW and is intended to ensure best practice regulation of all building work, complementing and supporting the broader building framework.

Since August 2021, the Department has held five industry roundtables, two focus groups and two written submission processes to support the development of the Bill. A broad cross-section of building and construction organisations across the industry have been represented. Direct consultation was also held with individual stakeholders outside of the roundtables to deep-dive into their feedback on niche subject matter issues.

The purpose of the Bill is to create end-to-end accountability for building work in NSW. This Bill seeks to consolidate and regulate several key elements of the building and construction industry. These include:

- what building work is intended to be regulated and who should be licensed to perform it
- the approval process for building work
- fire safety requirements for building work, and
- key consumer protections that have been preserved for residential building work.

The Bill also provides an opportunity to extend some of the key features of building regulation in NSW to all building work, including licensing tradespeople, building designers and professional engineers on all buildings.

Key features of the Bill include:

- expanding licensing requirements to cover trades operating in the commercial building sector
- expanding the definition of ‘developer’ to better cover those who should be responsible for contractual and statutory warranty responsibilities, obligations under the home building compensation scheme, and ensuring a definition that is consistent and fit for purpose for commercial developers
- clarify contract processes for residential building work around variations and payment processes. This includes prescribing when payments can be claimed in relation to major work contracts
- restricting the work an unlicensed person can do under the owner-builder permit system
- revising the statutory warranty scheme and the definition of ‘major defect’ for residential building work
- enhancing the dispute resolution model for residential building work to provide a more time and cost-effective way to resolve disputes between licence holders and residential customers
- making it a requirement for all licence holders to supervise the work of unlicensed people in accordance with gazetted practice standards
- bringing all certificates that come after development consent through the planning system into the building system
- consolidating all fire safety requirements for building work, from the design stage, through installation and certification and to maintenance and annual audits, under a single Bill to improve fire safety, and
- introducing a new regulatory scheme for pre-fabricated and manufactured housing.

The Bill aims to reshape consumer and industry interaction with each other and with the Regulator. The customer journey map below illustrates several pathways specialist and industry participants may follow under the proposed reforms. Please refer to [Appendix 3](#) for a text description of the customer journey map.

Home Building in NSW: Customer Journeys



What do I want to do?

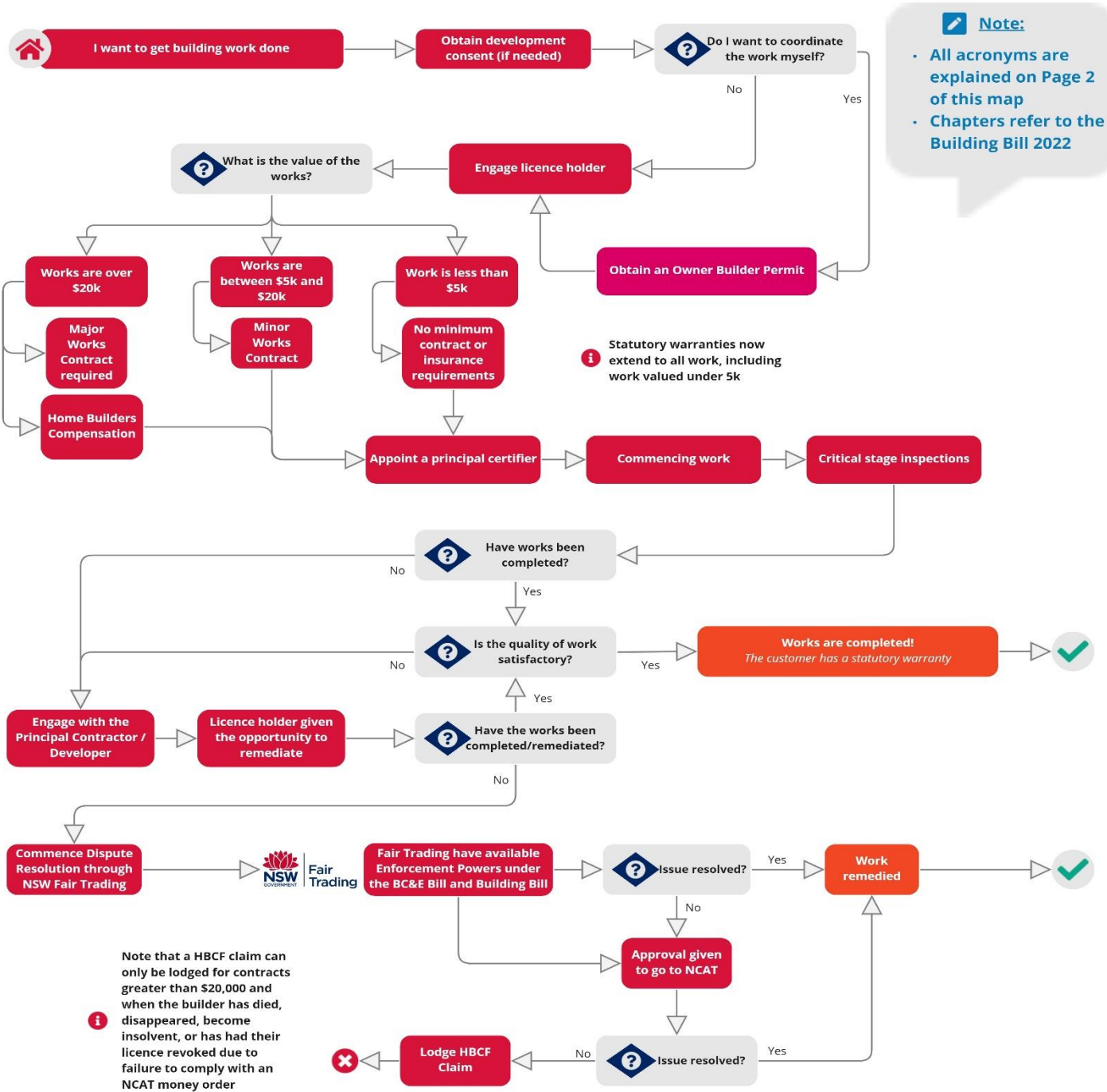


I want to get building work done. I am a customer.

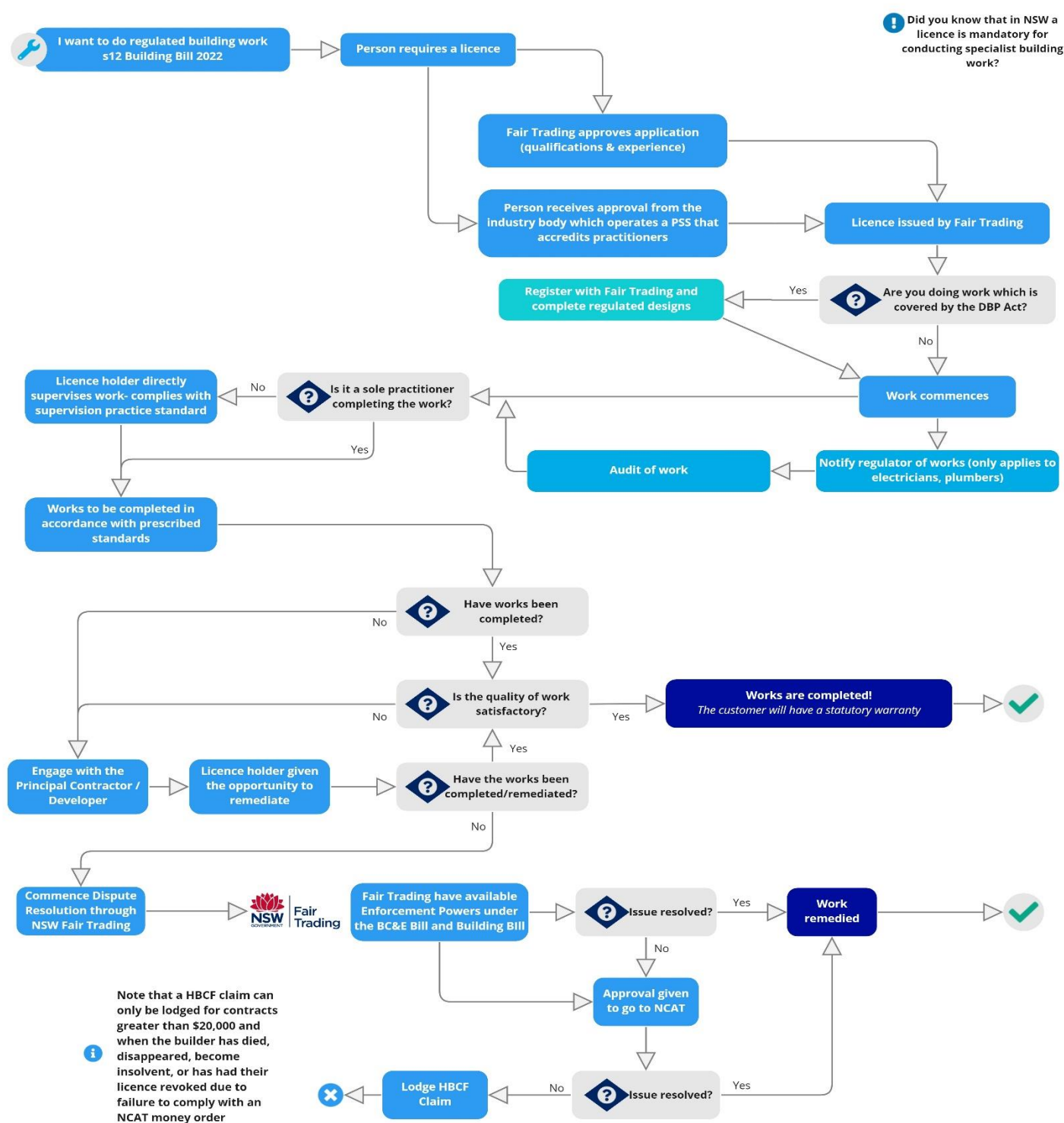


I want to do regulated work.

Residential customer wanting to get building work done



I want to do regulated work



Acronyms & References to other Legislation

- **BCE Bill** - Building Compliance and Enforcement Bill 2022
- **EP&A** - Environmental Protection and Assessment Act 1979
- **CDC** - Complying Development Certificate
- **HBCF** - Home Building Compensation Fund
- **PSS** - Professional Standards Scheme
- **NCAT** - NSW Civil and Administrative Tribunal

- ## Acronyms & References to other Legislation
- **BCE Bill** - Building Compliance and Enforcement Bill 2022
 - **EP&A** - Environmental Protection and Assessment Act 1979
 - **CDC** - Complying Development Certificate
 - **HBCF** - Home Building Compensation Fund
 - **PSS** - Professional Standards Scheme
 - **NCAT** - NSW Civil and Administrative Tribunal

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

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

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

There will be a twelve-week public consultation period on the Bill.

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

The RIS has been divided into 3 parts for ease of access. The following table provides a quick guide to the RIS outlined in order of the Bill:

Chapter in the Bill	Title and Description	Part/Chapter in the RIS
1	Preliminary This Chapter sets out the objects of the Bill, some key definitions, and functions of the Secretary	Key Objectives of the Bill repeated in all parts – Chapter 1
2	Licensing for regulated work This Chapter sets out the proposed licensing and supervision scheme for regulated work and requirements for licence holders.	<ul style="list-style-type: none"> • Review of building licensing Part 1 (pages 21-45) • Specialist occupations Part 1 (pages 46-64)
3	Home Building Work This Chapter includes provisions for contract requirements, statutory warranties, and owner-builder work.	<ul style="list-style-type: none"> • Owner-builder permit scheme Part 1 (pages 73-78) • Home building work in the Bill Part 3 (pages 16-27) • What happens when something goes wrong? Part 3 (pages 28-49)
4	Reviewable decisions and resolving disputes This Chapter sets out the proposed dispute resolution scheme and the powers to issue home building work directions	Dispute procedures Part 3 (pages 43-49)
5	Home building compensation scheme	Home building compensation scheme Part 3 (page 50)

6	Certification of building work, subdivision work and specialist work (EPA Pt 6) This Chapter includes provisions for certification of building work, subdivision work and specialist work (under the Environmental Planning and Assessment Act 1979 (EP&A Act), Part 6 (including the DBP Act and the EP&A Act duty of care))	<ul style="list-style-type: none"> • Quality and build standards Part 2 (pages 16-23) • Building approvals and duty of care Part 2 (pages 36-39)
7	Miscellaneous	N/A.
Sch 1	Terms to be included in certain contracts	Home building work in the Bill Part 3 (pages 21-27)
Sch 2	Savings, transitional and other provisions	How do we transition industry into a new scheme? Part 1 and 3
Sch 3	Dictionary	Throughout
Sch 4	Amendment of Acts and other instruments	N/A.

Consultation process

Making a submission

Interested organisations and individuals are invited to provide a submission on any matter relevant to the Bill, 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 of 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 Bill. 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

Mail to: Policy and Strategy, Better Regulation Division

Locked Bag 2906

LISAROW NSW 2252

The closing date for submissions is 25 November 2022.

We invite you to read this paper and provide comments. You can download the RIS and the Bill from <https://www.nsw.gov.au/have-your-say>. 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 Bill 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 Bill is finalised.

Presentation of Bill in Parliament

After the Minister for Fair Trading has finalised the Bill, it will be presented to, and considered by, the NSW Parliament in 2023.

Once passed by both Houses, the Bill will be forwarded to the Governor for assent and published on the official NSW Government website at www.legislation.nsw.gov.au.

1. Key objectives of the Bill

Objective

People who engage builders, tradespersons, designers and engineers have expectations that those practitioners are competent, their work is safe and compliant, and that building laws exist to support them appropriately when needed.

The purpose of the Bill is to establish a future focused regulatory framework for all building work in NSW while retaining and building on effective regulatory features of the HB Act that have been the cornerstone of the residential construction industry for decades.

The Bill is part of the next stage of Construct NSW and is intended to ensure best practice regulation of building work, complementing and supporting the broader building framework. To achieve this, the Bill outlines the licensing requirements, including who must be licensed, how they are licensed and what it means to be licensed. It includes standards that must be upheld by licence holders, including integrity and building standards.

The Bill also carries over and maintains certain requirements, including contracts, statutory warranties, the home building compensation scheme, what it means to be an owner-builder, and how disputes about home building work can be resolved.

A significant change in the Bill also involves a transfer of building and subdivision certification under the current of Part 6 of the *Environmental Planning and Assessment Act 1979* (**EP&A Act**), signalling a stronger link between compliance, licensing, building standards and better performance and outcomes.

Efficiencies have also been developed where possible, recognising the contribution the *Plumbing and Drainage Act 2011* (**P&D Act**) inspection framework provides to specialist work. The P&D Act is proposed to be repealed and the current framework expanded in the Bill for some additional specialist work.

Finally, as the Bill is proposed to create the overarching framework for compliant and safe buildings in NSW, the duty of care provisions from the DBP Act and EP&A Act have been transferred over and consolidated.

The objects outlined in the Bill to achieve compliant and safe buildings are to:

- ensure competent people use compliant products and processes to create safe, resilient and trustworthy buildings,
- establish a customer-focused regulatory framework that protects owners, tenants and other businesses,
- implement end-to-end accountability for building work in NSW, and

- enable the NSW building regulator and industry participants to adapt to new and emerging trends in construction.

Questions

1. Do the identified objectives support both the industry and regulator to be future focused, responsible and support all people who interact with it to achieve a fair outcome?
2. After reviewing the Bill do you think that it supports these intended objectives?

Relationship to other Bills

This Bill will, subject to public consultation and support, incorporate reforms proposed in the Building and Construction Legislation Amendment Bill 2022 (**Amendment Bill**). The regulatory impacts of the reforms proposed in the Amendment Bill are addressed in a separate Regulatory Impact Statement (**Amendment Bill RIS**) which are not repeated in this RIS. The Building Compliance and Enforcement Bill 2022 (**BCE Bill**) is also an outcome of this review. As outlined in that RIS, the compliance and enforcement powers for all building and construction legislation are proposed to be consolidated in a single Act. Further information about those reforms is included in a separate Regulatory Impact Statement for the BCE Bill (**BCE RIS**).

Key features of Amendment Bill relevant to the Bill include:

- standardise the way that CPD requirements are prescribed to make it easier for CPD units to be carried over between schemes under the DBP Act, *Building and Development Certifiers Act 2018* and licence holders under this Bill.
- Placing a duty on a registered practitioner to take reasonable steps to ensure that persons with whom the registered practitioner enters or maintains a business association are not, or have not been, involved in intentional phoenixing activity in an industry relating to building and construction.

2. Home building work in the Bill

Over the last few decades the *Home Building Act 1989* (**HB Act**) has focused on the capability of practitioners to contract for work by licensing certain kinds of building work. It has also helped to address the risk of defects and information asymmetry by establishing key consumer protections.

Past consumer protections have focused on providing safeguards that give consumers the confidence to understand what work they are commissioning, how it will be done, who it will be done by and what happens if something goes wrong. Protections include minimum contracting standards, mandatory home building cover, statutory warranties over the work and dispute resolution procedures to provide a cost-effective way of resolving disputes.

It is proposed that the consumer protections under the HB Act are brought across to the Bill but are limited to 'home building work', including:

- Contract requirements (part 2, chapter 3 of the Bill)
- Obligations under the home building compensation scheme (chapter 5 of the Bill)
- Statutory warranties (part 3, chapter 3 of the Bill)
- Dispute resolution (chapter 4 of the Bill).

The Department supports protecting consumers by imposing regulatory restrictions on licence holders for home building work. However, there is no current proposal to extend these requirements to more traditional commercial building work, where operators tend to have higher levels of control over the contracting and oversight process.

Limiting consumer protections to home building work will not prevent commercial customers from accessing remedies under the Bill, but the process for resolving those disputes will be in the hands of both parties to negotiate that dispute resolution process.

As part of the review of the HB Act, the definition of 'residential building work' was reviewed and modernised. In the past, the extensive definition of residential building work may have been confusing to some industry participants and consumers, who may be unclear about their rights and responsibilities.

What is home building work?

Clause 49(2) of the Bill proposes that 'home' means a building designed, constructed or adapted for use as a residence other than:

- premises not intended to be used for permanent habitation
- hostel or backpackers' accommodation
- a hospital or nursing home
- a correctional complex, including a correctional centre

- hotel or motel accommodation or serviced apartments
- a registered club or a residence within premises licenced under the *Liquor Act 2007*
- a residence associated with, or provided by, a hospital or educational establishment
- a building or premises excluded by the regulations.

Home building work is ‘regulated work’ (defined in clause 9 of the Bill) on a home.

The proposed definition is intended to capture places where people sleep but to restrict it to places where the end customer is likely to be a residential customer rather than a commercial customer. For example, a residential care facility may have people who live in the facility for the remainder of their life, but it is not a home for the purposes of the Bill because the person who runs the facility is a commercial entity.

Questions

- 3. Do you support excluding the listed premises from home building work?**
- 4. Should any other types of buildings be excluded? If so, why?**
- 5. Do you support restricting consumer protection guarantees to home building work, or should some of them be extended to other kinds of work?**

Definition of ‘Developer’

The current definition

One of the largest groups responsible for consumer protections in construction are developers. These are the people who arrange for another party (usually licensed contractors) to do the residential building work and therefore have a vested interest in the economic reward of selling the property.

The Bill proposes to amend the HB Act definition of developer to ensure that critical consumer protections owed for home building work will be assigned to the right person – ensuring a modern regulatory framework that is reflective of the developer market.

Currently, under the HB Act, a developer is defined as an individual, a partnership or a corporation who owns the land and building work is done on their behalf. A person is identified as a developer when the residential work is done in connection with

- an existing or proposed dwelling in a building or residential development containing 4 or more dwellings, or
- an existing or proposed retirement village or specialist disability housing owned by the same individual or corporation.

While the Department continues to support the intent behind this definition, it proposes to broaden this definition to capture individuals who may avoid being included in these provisions to circumvent their obligations.

What are the planned changes?

The Bill introduces a new definition of 'Developer' that aligns with the proposed definition in the BCE Bill, currently used in the RAB Act.

The new definition of developer will include any person who, in connection to home building work carried out on three or more self-contained dwellings:

- a) contracted or arranged for, or facilitated or otherwise caused, whether directly or indirectly, the building work to be carried out,
- b) if the building work is the erection or construction of a building— is the owner of the land on which the building work is carried out at the time the building work is carried out,
- c) is the principal contractor for the building work within the meaning of the Bill
- d) in relation to building work for a strata scheme— is the developer of the strata scheme under the *Strata Schemes Management Act 2015*.

Broadening the definition creates consistency across different legislation that regulates developer behaviour. By aligning the definition to the current definition in the RAB Act, it allows clear, tested and already understood parameters of who is captured as a developer within the Bill.

What obligations are proposed for developers?

The definition has been broadened to capture more of the industry, while the same contractual, statutory warranty and obligations under the home building compensation scheme to the subsequent owner are maintained.

The Bill proposes mandatory contractual obligations for home building work, with the developer (as the contractor) responsible for these to the contracted party. As the developer is typically the more sophisticated player in a contract agreement, provisions have been introduced to ensure a fair and equal contract is entered into and the homeowner is informed of their rights. Further information regarding mandatory contractual obligations have been further outlined in this chapter.

Clause 74(2) of the Bill outlines that if a contract to carry out home building work is not made with the owner of the land, the person who contracts or arranges for, facilitates or otherwise causes, whether directly or indirectly, the work to be carried out is responsible for providing the statutory warranty. As a developer facilitates building work, they are therefore responsible for statutory warranties to the subsequent owner. This means they are liable for any breaches of a statutory warranty and are responsible for the remediation of defects within the relevant warranty period. Changes to the statutory warranty scheme has been further outlined in chapter 3 of this Part.

A developer needs to ensure that cover under the home building compensation scheme is required for building work done under a major work contract, with the certificate of insurance needed to be supplied by the principal contractor to the developer.

A developer must also not enter a contract of sale with a subsequent owner unless a certificate of insurance is attached. Therefore, it is the developer's obligation to ensure that cover is provided to the new owners.

Developers are not typically able to claim on the home building compensation scheme, and may be pursued by insurers to recover costs in the event that a homeowner makes a claim relating to their developments. Further information about the home building compensation scheme's provisions of the Building Bill can be found in chapter 4 of this Part.

What is the effect of change in the definition?

The current definition of a developer under the HB Act is ambiguous about who is captured and what their obligations are under the legislation. The 'note' under section 3A(1A) of the HB Act implies RAB Act intentions by clarifying that the owner of the land is a developer, even if the work is done on behalf of another person, and that the other person on whose behalf the work is done is also a developer in relation to the work.

While the note implies the policy intent, it does not go far enough to outline who is captured under this definition clearly, and, therefore who holds obligations as a developer.

It is critical that clarity is provided to ensure consumers have rights against appropriate parties and that no party with a commercial interest in a multi-unit development may make a claim towards the home building compensation scheme, which is intended to be reserved for homeowners. The definition must be pitched correctly as developers are not required to hold a licence – assigning obligations will need a clear and easy-to-understand definition to ensure all parties understand who owes what obligation.

The new definition of developer provides clarity around who is captured as a liable party by setting greater parameters around anyone who directly or indirectly caused building work. In broadening the definition, the Bill proposes incorporating all major participants who benefit from the development transaction and, therefore, should be responsible to the subsequent homeowners.

Who could be newly captured by the Bill?

Case Study: The Owners – Strata Plan 81837 v Multiplex Hurstville Pty Ltd [2018] NSWSC 1488

On 22 June 2005 Multiplex Hurstville Pty Ltd, entered into a "Development Management Agreement" (the DMA) with landowners Sydney Land Holdings Pty Ltd (SLH) and a number of other companies. Under the DMA, Multiplex was to select and contract a licensed builder to carry out the project works. After the completion of the building, the Owners Corporation found a number of defects in the building.

The Owners Corporation attempted to claim Statutory Warranties under sections 18C and 18D of the HB Act, against both SLH (as an “owner” and “developer” of the building) and the builder. Those warranties were not honoured as SLH become deregistered and the builder subject to a deed of company arrangement.¹

The Owners Corporation then looked to Multiplex for rectification of the defects. However, the court ruled that under section 3A of the HB Act, that Multiplex was not an “owner” (and thus not a “developer”) of the land, and therefore the Owners Corporation was not entitled to the benefit of the Statutory Warranties against Multiplex on that ground.

Under the new definition of a developer, in this example, the developer, although not the landowner, would be liable for statutory warranties as they arranged and facilitated the building work carried out.

As a result, the Bill will offer greater consumer protections by incorporating major players in the construction process as developers and therefore safeguarding homeowners from defects and financial burden.

In addition to expanding the scope of who a developer is, the Bill also proposes to reduce the number of dwellings excluded from the definition. In doing so, greater assurance can be given to homeowners who are part of 3-dwelling developments to pursue the person who commissioned the work and the principal contractor for breach of statutory warranty. It also allows insurers under the home building compensation scheme to seek recovery of claim costs from such persons under subrogation for these kinds of small-scale developments.

Regulatory impact

During targeted consultation on the HB Act, the majority of industry and consumer stakeholders provided support for adopting a consistent definition of developer that aligned with the RAB Act. A key professional body representing consultants and professionals proposed anti-avoidance provisions should be incorporated into the provisions to capture a greater cohort of people from evading their obligations. By lowering the threshold, the Bill proposes capturing developers who use the current loophole to defer their responsibilities.

The cost of broadening the scope of the obligation will have an impact on developers not currently regulated, as they may face some statutory warranty claims from their customers, particularly in the case where the builder is no longer in business. It may reduce pressure on premiums under the home building compensation scheme to the extent that claim costs may be recovered from additional parties that are deemed to be developers, or to the extent that the change creates incentives for such parties to better manage quality risks on their projects.

¹ The Owners – Strata Plan 81837 v Multiplex Hurstville Pty Ltd [2018] NSWSC 1488
<https://www.caselaw.nsw.gov.au/decision/5bb45de4e4b06629b6c62652>

The purpose of the statutory warranties scheme is to ensure that homeowners are protected against defective or incomplete building work, and if defective or incomplete work is done, the homeowner has the appropriate avenues to pursue remediation for these defects. By widening the HB Act definition and reducing the threshold for when a person is deemed to be a developer, the likelihood of homeowners being able to hold a person to account for warranties is increased.

The policy intent for expanding the definition of developer is to allow for greater coverage within the industry to ensure homeowners who fall outside of the regulatory scheme do not suffer unnecessary burden from people facilitating building work.

Questions

- 6. Do you think the definition of a developer should be broadened to capture more of the industry?**
- 7. How can we ensure that people responsible for building work meet their consumer protection obligations?**
- 8. Should the threshold for developers be lowered to 3-dwelling homes? Why or why not?**
- 9. What other costs or benefits should the Department consider before progressing with a definition of developer?**

Contracting to do home building work

A building contract is a legally binding agreement that details the rights and responsibilities of the parties to building work – the customer seeking to have the building work carried out and the licence holder committing to carry out the building work. Contracts provide clarity on what work will be done, in what timeframe and on payment schedules. They also set out the process for resolving disputes if they arise. Contracts protect both the consumer and builder from improper behaviour.

Under the HB Act, written contracts are required where the value of the building work is above \$5,000. Jobs between \$5,000 and \$20,000 require a small job contract with basic information. Building jobs worth more than \$20,000 must be covered by more extensive written contracts. The requirement to have a written contract is intended as a consumer protection measure to ensure that customers understand what they agree to pay for and how to hold the licence holder accountable.

NSW Fair Trading has produced plain English home building contracts for small and large jobs. These contracts clearly list customers' rights and responsibilities and those of the builder or tradesperson. Customers and licence holders are also free to use their own contract as long as it includes the minimum required terms.²

² NSW Fair Trading, *Contracts*, (2022), <https://www.fairtrading.nsw.gov.au/housing-and-property/building-and-renovating/preparing-to-build-and-renovate/contracts>

A tradesperson must also provide the consumer with a [Consumer Building Guide \(the Guide\)](#) and an information sheet about Certifiers before signing a contract for residential building work with a value of more than \$5,000. The guide outlines:

- what to consider before work starts, including contracts and payments,
- common traps and tricks,
- statutory warranties, and
- how to resolve a dispute with a builder or tradesperson.

The Bill proposes maintaining minimum term requirements for contracts. However, contracts are currently only required for home building work.

Amendments are proposed to the minimum requirements for contracts for home building work to make the process fairer for the customer and the contractor. This includes:

- maintaining contract requirements for home building work, and a threshold of \$5,000 (small form) \$20,000 (major contract) incorporating prescribed terms,
- including mandatory clauses for all contracts – e.g. termination clause, variation power, powers of suspension,
- changing display home requirements to cater for online representations and advertisements of buildings,
- emphasising consumer education and assistance in interpreting contracts,
- providing a process for dealing with variations and what happens when there is non-payment of a contract,
- ensuring that the contractual provisions apply to developers and the suppliers of a kit home or a pre-fabricated building as well as a licence holder, and
- alternatively, mandating a standard contract.

The current requirement of mandatory minimum contract terms was introduced in 2014 in response to customers signing contracts that did not contain critical information, unfair terms, and were ambiguous about the licence holder's responsibilities.³ As these issues have reduced in frequency since the introduction of mandatory minimum contract terms, it is proposed to maintain the requirement for contracts for home building work of more than \$5,000.

Despite the prescriptive nature of contract terms, complaints and disputes are still arising over unfair or unclear contract terms. Complaints made to NSW Fair Trading indicate that not all consumers have understood their rights and responsibilities under the contract. NSW Fair Trading has received 1,776 complaints from 2019 to 2021 related to the rights and responsibilities of

³ *Home Building Amendment Act 2014.*

traders and customers. Approximately 11.1% of these issues relate to cancellations/cooling-off periods or a lack of consumer knowledge about contract responsibilities or when paying a deposit.

Why should information be provided to customers and when?

As part of the review of the HB Act, the customer contracting journey is being reviewed by the NSW Behavioural Insights Unit to understand the reasons why consumers and builders continue run into problems with their contracts. Customer journey mapping and behavioural analysis has been performed, including consideration for the effectiveness of the consumer building guide and the prescriptive standard form contract.

Early indications suggest that NSW Fair Trading can improve the information provided to customers, including both voluntary resources and mandatory documents (e.g. consumer building guide). The timing of information provision has also been identified as a key driver of customer outcomes. Customers should be encouraged to understand necessary information before they are presented with a contract.

The NSW Behavioural Insights Unit has provisionally identified that the average customer is generally unlikely to read their contract in full and in depth before signing. Even if they do read the contract, this does not mean they always evaluate contract terms correctly, which can result in poor and unexpected customer outcomes. Finally, customers are at an inherent disadvantage due to the builder or tradesperson having a better understanding of the critical information, including contract terms. These insights, obtained from the review of the contracting journey, will inform the future response to home building contract issues in NSW.

Preliminary recommendations from the Behavioural Insights team are contained in the figure below.






	1. Bake defaults into system to reduce onus on contracting parties Identify and leverage opportunities to reduce reliance on parties to make active decisions (and the need to navigate complexity) in contracting process (e.g. safety net provisions, automatic insurance enrolment etc).
	2. Promote salience of early engagement and prompt slow thinking Ensure that benefits of best practice contracting are clear and compelling to do. Use proactive measures to prompt engagement at key decision points and use friction strategically to encourage reflection.
	3. Provide decision aids and tools to simplify and facilitate contracting process Make it easy for customers to identify, evaluate and vet contracts by providing decision aids. Make contracting easier by providing accessible tools and templates for customers to use.
	4. Make contract provisions more transparent and easy to understand Simplify contracts to make them easier to read and understand. Increase transparency of key contract provisions to enable customers to understand the implications of how they may be affected.
	5. Elevate role and visibility of Fair Trading as a trusted messenger Position Fair Trading as the accepted home for consumer building guidance- becoming a trusted source of advice and an automatic part of engagement between customers and contractors, to entrench rights and accountability for both parties.

Figure 1: Preliminary recommendations for consumer home building contracts, source: NSW Behavioural Insights Team

Proposed changes to contracts

Progress payments are an important part of the build process, both for the customer and the contractor. Currently, the HB Act prohibits more than 10% deposit of the contract price on any residential building work. The Bill proposes new reforms, including maximum progress payments at key stages of the contractual process as well as a legal requirement to document variations to contracts.

IPART recommended changes to maximum deposits and progress payments in their review of the efficiency and effectiveness of the NSW Home Building Compensation Fund (**HBCF**).⁴ Changes were recommended to minimise a homeowner's out-of-pocket expenses if jobs are not completed, resulting in a HBC claim. As noted in the IPART report, around 40% of HBCF claims in NSW are due to non-completion of work. Compared to other jurisdictions, NSW claims costs are significantly higher because there is no current requirement for progress payments to match the work completed.

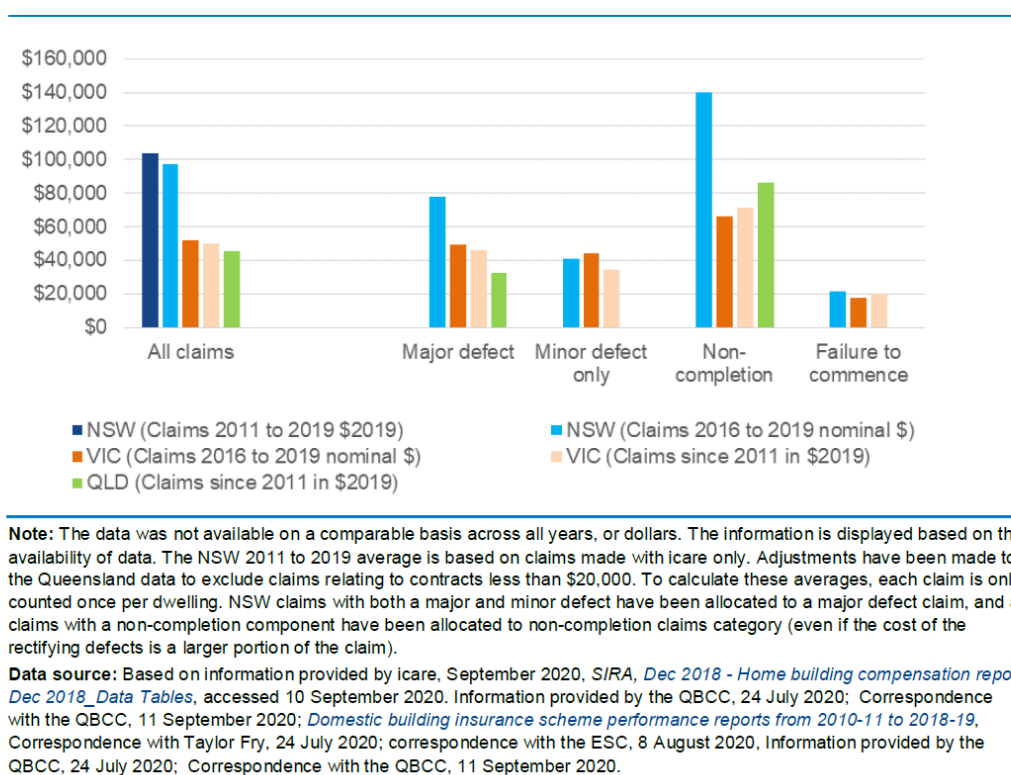


Figure 2: Average claims cost per dwelling - NSW compared to Victoria and Queensland, source IPART 2020

Stakeholder submissions to the IPART review note that typically, payments are made significantly earlier than those in other states. If progress payments can be limited to work completed, non-completion claims are less likely to occur. This would also mean that the homeowner would not be left out of pocket.⁵

⁴ IPART, *Review of the NSW Home Building Compensation Fund*, (November, 2020), recommendations 4 and 5 <https://www.ipart.nsw.gov.au/sites/default/files/documents/final-report-efficiency-and-effectiveness-of-the-nsw-home-building-compensation-fund-december-2020.pdf>

⁵ IPART, *Review of the NSW Home Building Compensation Fund*, (November, 2020), p 42.

The specific changes recommended by IPART have not been adopted, however a contracting arrangement which is both prescriptive and flexible is proposed. It is prescriptive in that certain payments cannot be claimed until certain work is complete. It is flexible in that the situation in which the prescribed payments are applied can change depending on the contract type. For example, prescribed maximum progress payments this means a licence holder must not demand, recover, or retain under a major work contract for a house project more than the prescribed amount at the completion of the following stages:

1. the base stage:

- for a home with a timber floor—the stage when the concrete footings for the floor are poured and the base brickwork is built to floor level, or
- for a home with a timber floor with no base brickwork—the stage when the stumps, piers or columns are completed, or
- for a home with a suspended concrete slab floor—the stage when the concrete footings are poured, or
- for a home with a concrete floor—the stage when the floor is completed, or
- for a home for which the exterior walls and roof are constructed before the floor is constructed—the stage when the concrete footings are poured.

2. the frame stage: when a home's frame is completed.

3. the lock-up stage: when a home's external wall cladding and roof covering is fixed, the flooring is laid and external doors and external windows, whether or not temporary, are fixed.

4. the fixing stage: when all internal cladding, architraves, skirting, doors, built-in shelves, baths, basins, troughs, sinks, cabinets and cupboards of a home are fitted and fixed in position.

Variations

Variation changes involves a requirement to documenting evidence of a variation to a major work contract (a variation document) must:

- be a written document signed by each party to the contract, and
- include a detailed description of the variation, and
- state the reason for the variation, and
- specify the cost of the variation, and
- if the variation will result in a delay affecting the work to which the contract relates — state a reasonable estimate for the period of the delay.

This means that the contractor must give a signed copy of the variation document to each contracted party. The contractor must not start to carry out home building work relating to the variation before the contractor has complied with the provisions.

Why are contractual requirements restricted to residential building work?

Residential contracts remain captured in the regulatory framework due to information asymmetry that exists in the contracting relationship. While business to business contracts remains an area of interest for the NSW Building Commissioner, there is currently no active research. There is a possibility these contracts will be selected as a topic of consideration for the upcoming construction industry doctorate program.

Research to date in business-to-business contracts has however, identified issues with deficient substance in the contract including no stipulation of liquidated damages, minimal or extremely broad provisions for extensions of time, lack of a limitation on the liability of the builder and failure to appropriately populate contract particulars.

What are the regulatory costs and benefits of the changes to home building contracts?

Some industry associations provide a standard contract to members to reduce the administrative burden of creating a contract and obtaining legal advice about clauses and inclusions. There will be a cost to industry associations and any member who currently use these contracts.

For associations, the costs are associated with drawing up new contracts, seeking legal counsel to ensure the effect of the contract is lawful, updating online access portals and advertising costs associated with any changes. These costs are likely to be passed on to members who use the contracts. These members will also absorb the time cost involved in becoming familiar with any changes in the contract so they can explain the contract to their customers. Some may wish to seek legal advice about the changes.

For Government, the same costs will apply as noted above. As NSW Fair Trading supply a standard contract free of charge, there is also no cost recovery possible.

In the face of the changes to minimum terms in major contracts they may not appear significant to some, but they may impact the way some builders conduct their business. For example, the current requirement in section 7 of the HB Act asks that *'there is a sufficient description of the work to which the contract relates'*. The new requirement in clause 55(2) is that there is *'a detailed scope and description of the work to which the contract relates'*.

The new requirement is aimed at reducing disputes over the delivery of the project and so is expected to deliver a net benefit; however, it will require more organisation and active agreement at the outset of the contracting process. To complement this, stronger wording has been included around the provision of plans and specifications with the contract. Currently, the term in section 7 implies that there may not be plans associated with the work. The updated version in section 55

indicates that if an approval is required for the work, then plans and specifications must be attached.

This will not likely be a change for most builders who currently follow best practice. It will benefit customers who may be engaging with less than optimal businesses who do not currently supply these elements with the contract.

In relation to the changes to progress payments, the IPART report notes that there is likely to be a cost to business initially as cashflow is interrupted. The cost of accessing credit to cover the initial projects will be a business impact. This cost will be offset by potentially reduced or stable premiums as the cost to claim unfinished work under the HBC Scheme will be directly impacted. IPART notes that the benefit is also likely to extend to all homeowners, not just those who have an eligible claim under the scheme.⁶

As noted in the graph above, the average cost of a non-completion claim in NSW is \$140,000. Almost half of these costs reflect the cost of completing work that a customer has already paid for and not received. Non-completion claims are capped at 20% of the total contract price in NSW under the HBC scheme, leaving some customers significantly out of pocket even when a claim is paid. Removing the capacity to claim payment for work not completed reduces the likelihood that a customer will be out of pocket.

What other options were considered?

A stronger option considered as part of this reform was to prescribe a standard contract. The benefit of this approach includes a reduced cost for the consumer and industry in producing the same contract and becoming familiar with standard contract terms. This would be likely to lead to a consistent body of case law for future reference. In addition, a standard contract allows the regulator to clearly identify what action needs to be taken as there are consistent provisions and is likely to assist in providing advice and recommendations to industry and consumers.

The disadvantage of this approach is that overly prescriptive contracts can be inflexible in the face of a changing building industry.

Questions

10. Do you agree with the maximum progress payment provisions? If not, why not?

11. Do you agree with the variation requirements? If not, why not?

12. Do you think a standard contract should be prescribed or do the current changes provide enough support to the contracting parties?

⁶ IPART, *Review of the NSW Home Building Compensation Fund*, (November, 2020), p 43.

3. What happens when something goes wrong?

Statutory warranties

What are statutory warranties?

The statutory warranties scheme is a core element of the consumer protection framework in the HB Act. It creates legally enforceable standards for the quality and performance of building work. This consumer protection applies to home building work and relates to the relationship between the licence holder and the consumer. Statutory warranties are implied in all residential building contracts.

What is being proposed?

This RIS sets out a proposal to amend the way the current statutory warranties scheme works. Specifically, this includes an analysis of a proposed change to the definition of ‘major defect’ to ‘serious defect’ as well as changes to the scope, types of warranties, key definitions, and consideration of changes to the time frames for the warranties. Statutory warranties will apply to building work completed on a ‘home’ (see clause 49(2) and chapter 2 above).

These proposed reforms would not take place in a vacuum, instead, they should be considered holistically with the other proposed reforms in the Bill. Much of these reforms are aimed at improving building quality through increased training requirements, transparency, and accountability. This is intended to decrease the reliance on statutory warranties as a consumer protection.

The proposed changes to the statutory warranty scheme include:

- the definition of ‘major defect’ to align with ‘serious defect’ under the RAB Act
- changes to the scope of warranties
- change the definition of ‘residential building work’ to ‘home building work’ (see above in part chapter 2)
- change the definitions of ‘owner’ and ‘completion’
- consideration of extending the time frame for major defect to 10 years and other defects to 3 years.

Changes to the scope of warranties

The HB Act currently provides several statutory warranties for consumer protection against defective residential buildings. These warranties are in the new Bill with some changes.

At clause 75 of the Bill (former section 18B of the HB Act), a warranty includes that:

- (a) work will be done with due care and skill,

- (b) the work will be carried out in accordance with the plans and specifications set out in the contract,
- (c) all materials supplied, whether assembled onsite or offsite will be good and suitable for the purpose for which the materials are used, unless otherwise stated, new, a warranty that the work will be done in accordance with the Act or any other law,
- (d) the work will be done with due diligence and within the time agreed or if no time agreed a reasonable time,
- (e) that the work will result in a home that is reasonably fit for habitation,
- (f) the work and the materials used in carrying out the work will be reasonably fit for the specific purpose or result.

Including pre-fabricated components

Section 18B(1)(a) of the HB Act is a 'warranty that the work will be done with due care and skill and in accordance with the plans and specifications set out in the contract'. As seen above, the current Bill divides the two concepts to create two warranties. This is because work that is done with due care and skill may not always be in accordance with the plans and specifications of the contract. This change is largely maintaining the status quo and is unlikely to have a large regulatory impact.

It is intended that s 18B(1)(c) of the HB Act about materials warranty will be changed to extend to supply and assembly of offsite components. This warranty has been changed and is intended to encapsulate pre-fabricated components. The use of pre-fabricated components is on the rise (see RIS Part 2, Chapter 2). It is intended that the statutory warranty scheme complements these reforms and provides an avenue for recourse if something goes wrong.

Changes to who is responsible and for what?

A further proposed change to the Bill is widening the scope of statutory warranties to include the work completed rather than only the work outlined in the contract. The tests within the HB Act section 18B(1)(e) and (f) have been streamlined with changes to the legal terminology in response to issues identified in the case law. This incorporates consideration of recent cases, including *Oikos Constructions Pty Ltd t/as Lars Fischer Construction v Ostin & Anor* [2020] NSWCA 358 (**Oikos**)⁷. The case of Oikos indicates that the warranty in section 18B(1)(e) cannot extend beyond the expressly agreed scope of works within the contract. The Bill will have the statutory warranty scheme apply more broadly than the specifics of the scope of works in a contract. It is intended to cover the 'work' completed and not solely the contents of the contract.

Builders, developers, tradespeople and owner-builders have obligations under the statutory warranty scheme for the work they conduct and the materials they supply during a construction arrangement.

⁷ *Oikos Constructions Pty Ltd t/as Lars Fischer Construction v Ostin & Anor* [2020] NSWCA 358.
<https://www.caselaw.nsw.gov.au/decision/1768d5c25b3e171ef8c310d9>

The Bill proposes that the person responsible includes:

- the person who enters into a contract with the owner of the land
- if there is no contract, the person who contracts or arranges for, facilitates or otherwise causes, whether directly or indirectly, the work to be carried out is responsible for the work as if the person was a party to a contract under which the work was carried out.

This is not intended to prevent the joint or several liability of the parties. This means that when more than one party makes a promise to complete work, then more than one party may be responsible for the work. It is proposed that the scope of the duties tie to the completion of home building work as opposed to the contents of the contractual agreement. If there is no contract for home building work, then there is a 'deemed contract.' It is intended that statutory warranties can apply:

- if there is no contract
- to include otherwise unlawful oral variations and work outside of the schedule of works of a contract.

This often means the key person responsible for statutory warranties is the builder and, at times, the owner-builder, tradesperson or developer who has contracted or facilitated the work. The other subcontractors responsible may be pursued by the builder/owner-builder or developer to cross-claim and recover money.

The policy intent of the statutory warranties scheme is to ensure that a homeowner is protected against any defective or incomplete building work. Where work is defective or incomplete, the homeowner need only pursue the person or entity with whom the homeowner had a direct contractual or working relationship. In most instances, this party will be the principal contractor.

The statutory warranties scheme does not exempt subcontractors from their responsibility for carrying out work to a proper standard. The scheme provides that subcontractors are also responsible for statutory warranties but that their primary responsibility is to the principal contractor (or the party they are directly in contract with) rather than the homeowner. This means that, even though the principal contractor is fully liable to the homeowner for statutory warranties breaches, they are not prevented from seeking recourse against any subcontractors who carried out the defective or incomplete work.

It will be the responsibility of the principal contractor to ensure that the homeowner has been fully compensated for the faulty work.

Changes to when the scheme applies

In relation to the warranty within s 18(1)(f) of the current HB Act, the test is 'fit for occupation'. It has been raised that the use of the phrase, 'reasonably fit for occupation' is problematic because

of the incredibly broad circumstances in which many people live. In the case of *The Owners Strata Plan 62930 v Kell & Rigby Holdings Pty Ltd* [2010] NSWSC 612 (***Kell & Rigby***)⁸, Ward J viewed the phrase reasonable fit for use as a dwelling' to mean premises that were 'injurious to health.' This is a high bar to set for the purpose of this warranty.

Feedback is sought on whether changing to 'fit for habitation' is more appropriate. The benefit of this approach is that it is likely a lower bar and, more people may benefit from statutory warranties in line with the intention of the scheme in serious circumstances. For instance, the test of 'fit for habitation' is used under section 52 of the *Residential Tenancies Act 2010 (RT Act)*. This has historically not been defined in the RT Act and so the Tribunal has applied the 'reasonable comfort test' to determine what is 'fit for habitation'. For example, in *Marsters v Graham* [2016] NSWCATCD 73⁹ a storm flooded the tenant's apartment. The Tribunal used the test of reasonableness to find that the structure of the roof of the premises should be sufficiently secure and in a state of repair to prevent copious amounts of water from entering the premises.

Despite the test being used in the context of a tenancy dispute, the test relates to the comfort of when a home can be lived in which is the intent of the warranty protection. Feedback is sought on whether the term 'fit for habitation' is a better term or whether it should be further defined in the legislation to give a clearer intent of the meaning of the test. It is understood that changing the definition, will likely impact industry and may impact the home building compensation scheme because it responds to breach of statutory warranty, however the scale of impact is uncertain.

Regulatory costs and benefits of the proposal to amend the statutory warranties scheme

The benefit of changing the scope of the warranties (as above) includes that:

- the supply of offsite materials and pre-fabricated products will have the benefit of the statutory warranty framework
- the warranty will be tied to the work and not the contents of the contract, and
- more people can benefit from the 'fit for habitation' definition.

The cost of these proposals is that the scope of the duty is broadened, which may have an impact on licence holders' responsibilities as well as home building compensation scheme premiums which may be a cost that is ultimately passed on to the consumer.

Questions

13. Do you support the changes to statutory warranty duties? If not, why not?

14. Do you think that fit for habitation is a more appropriate legal test compared to fit for occupation? Do you think fit for habitation should be a defined term?

⁸ *The Owners Strata Plan 62930 v Kell & Rigby Holdings Pty Ltd* [2010] NSWSC 612.

<https://www.caselaw.nsw.gov.au/decision/549ff4523004262463c5dc6e>

⁹ *Marsters v Graham* [2016] NSWCATCD 73. <https://www.caselaw.nsw.gov.au/decision/581ab857e4b058596cba105b>

- 15. Do you agree that linking statutory warranties to home building work, as opposed to having a ‘contract’, achieves a better outcome? If not, why not?**
- 16. Do you agree that the person responsible is the person who enters into a contract with the owner of the land if there is no contract, the person who contracts or arranges for, facilitates or otherwise causes, whether directly or indirectly, the work to be carried out? If not, why not?**

Changes to the definition of ‘owner’

The benefit of the warranties is received by the building owner and any subsequent owner. The proposed Bill is based on the definition of owner in equity and under the DBP Act. The proposed definition of ‘owner’ includes:

- every person who jointly or severally or at law or in equity is entitled to the land for an estate of freehold
- for a lot within a strata scheme, the owner of the lot
- for a development lot or neighbourhood lot within a community scheme, the proprietor in relation to the lot within the meaning of the *Community Land Management Act 2021*
- for land subject to a strata scheme—the owners corporation constituted for the scheme,
- for land subject to a community scheme, precinct scheme or neighbourhood scheme within the meaning of the *Community Land Management Act 2021*—the association for the scheme
- every person who jointly or severally or at law or in equity is entitled to receive, or receives, or if the land were let to a tenant would receive, the rents and profits of the land, whether as beneficial owner, trustee, mortgagee in possession or otherwise
- a homeowner within the meaning of the *Residential (Land Lease) Communities Act 2013*,
- other persons prescribed by the regulations.

Issues have been raised about the current HB Act definition of ‘owner.’ In the case of *The Owners – Strata Plan No 91322 v Trustees of the Roman Catholic Church for the Archdiocese of Sydney*,¹⁰ the holder of a 99-year lease not a “successor in title” under the HB Act and was not able to access the statutory warranty protections.

The benefit of the new definition is to ensure that any owner of the property or land which is within the scope of ‘owner’ is owed the same rights and benefits as the original owner, and that the potential limitations of the ‘successor in title’ terminology are not carried over to the new Act. The cost of this approach is it may broaden the concept of ‘owner’ and who may bring a statutory

¹⁰ *The Owners – Strata Plan No 91322 v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2019] NSWCA 89. <https://www.caselaw.nsw.gov.au/decision/5cc26658e4b02a5a800c0640>

warranty. However, this reflects the intent of the scheme and focuses instead on holding the person carrying out the work responsible for delivering that work compliantly.

The Bill also proposes to include pre-fabricated buildings into statutory warranties. This proposal includes consideration of incorporating the meaning of ‘home’ in the *Residential (Land Lease) Communities Act 2013 (RLLC Act)*.

The definition of ‘home’ in the RLLC Act includes:

- any caravan or other van or other portable device (whether on wheels or not) other than a tent, used for human habitation, or
- a manufactured home as defined in the LGA, or
- any conveyance, structure or thing of a class or description prescribed by the regulations for the purposes of this definition.

Feedback is sought on whether anything needs to be added to the definition of ‘owner’ and whether all or some of the definition of ‘home’ within the RLLC Act should be added to the definition.

Questions

17. Do you agree that the new definition of ‘owner’ is fit for purpose? If not, please provide reasons and/or recommendations for change.

18. Do you agree that a ‘home’ within the *Residential (Land Lease) Communities Act 2013* should be included within the definition of ‘owner’?

19. Do you support including caravans and other moveable dwellings in the definition of home for the purposes of statutory warranties?

Changes to the definition of ‘completion’

Under the proposed Bill, the time period for a statutory warranty starts on completion of the home building work to which it relates. If the home building work is not completed, the warranty period starts on:

- the date on which the contract is terminated, or
- if the contract is not terminated, the date on which the home building work under the contract ceases, or if the contract is not terminated and home building work under the contract did
- not commence—the date on which the contract is made, or
- if there is no contract—the date on which a person last attended the site to carry out home building work.

Slight tweaks have been proposed to the current definition of ‘completion’ to align with Queensland and to remove specific circumstances for owner-builders in relation to completion. Currently,

'completion' under the current HB Act is complex and can be determined at a number of points depending on the scenario.

Under the Bill (clause 51), the definition of completion of building work for new strata schemes has been transferred from the current HB Act. This is the date an occupation certificate is issued that authorises the occupation and use of the whole of the building. Feedback is sought on whether this adequately covers occupation certificates issues on parts of a building.

However, there is also a definition of 'completion' of residential building work which defines completion at a number of points depending on the facts. Completion can be when the work is complete within the meaning of the contract. If there is no contract, or the contract doesn't specify 'completion', the work is regarded as 'complete' when it can be used for its intended purpose and is free of major defects. The earliest of the following events can be used to determine when this occurs:

- the date the builder 'handed over' the project to the owner,
- the date the contractor last carried out work (other than remedying minor defects), or
- the date of the issue of an occupation certificate

Feedback is sought on, whether completion should be re-modelled so that completion is the 'latest' of the above scenarios. The benefit of this approach may be that it is more likely that the work has been completed and it will benefit the consumer by shifting the time for application of the statutory warranty period, to a later date. Accordingly, the protections will start when and to a point in time where the building is likely to be more complete than not. The disadvantage of extending the period in certain scenarios would result in delays, impacting both the consumer and developer.

Questions

- 20. Are the current definitions of completion fit for purpose? If not, why not?**
- 21. Should completion be remodelled to relate to the latest date of certain listed scenarios?**
- 22. Do you think that the definition of completion for new strata buildings should incorporate occupation certificates for a part of a building? Does the current definition reflect this?**
- 23. Do you agree that completion occurs for a 'deemed contract' when the last person on site completed the work before a complaint for a statutory warranty (see clause 50(3) of the Bill)?**

The proposal to align the current definition of major defect with the definition of serious defect – why is the current definition not working?

An important aspect of the scheme's operation is the definition of a major defect and tests of the impact. The definition of major defect is the key definition for determining whether a claim can be made for a statutory warranty and the period in which a claim can be brought to NCAT.

A major defect is defined as a defect in a major element of a building that is due to defective design, workmanship or materials or failure to comply with the National Construction Code structural performance requirements.

A major element of a building means:

- an internal or external load-bearing component of a building that is essential to the stability of the building, or any part of it (including but not limited to foundations and footings, floors, walls, roofs, columns and beams), or
- a fire safety system, or
- the failure of external cladding of a building to comply with the performance requirements of the NCC for fire resistance and fire safety for that building (applies to buildings with a rise in storeys of more than 2)
- waterproofing.

In addition, a major defect also encompasses the use of a building product (within the meaning of the *Building Product (Safety) Act 2017*) in contravention of that Act, capturing any building products that are currently banned in NSW (such as certain types of flammable cladding).

The second element of the test is that it causes, or is likely to cause:

- the inability to inhabit or use the building (or part of the building) for its intended purpose, or
- the destruction of the building or any part of the building, or
- a threat of collapse of the building or any part of the building.

If changes to the definition are not adopted and it is preferred that the current definition is retained and the courts continue to provide guidance on what key terms mean, the cost to industry, community and Government is expected to remain the same. This will promote certainty and maintain status quo.

However, this may be a missed opportunity to resolve any issues or gaps in the statutory warranty scheme. Consultation with industry and consumers suggests that the definition of major element is complex and does not capture significant issues in defective buildings including:

- essential services. For example, questions are raised about whether the HB Act deals with faulty electrical, plumbing or drainage work, or
- external brickwork on a brick veneer, or

- weatherproofing – a critical defect in buildings that compromises individual lots and common property, or
- balustrades/barriers.

Question

24. Are there any other issues with the definition of major defect? If so, please provide reasons to support your response.

Why use the definition of ‘serious defect’?

While the definition of major defects under the HB Act provides the trigger for statutory warranties, the RAB Act sets out a separate definition for ‘serious defect’ which effectively covers the same conduct.

Definition comparison

The RAB Act sets out the enforcement powers of the regulator (currently limited to class 2 buildings), with a focus on proactive enforcement (picking up problems before they are passed onto the customer). A key trigger is whether a ‘serious defect’ exists.

The definition of ‘serious defect’ and ‘major defect’ are similar with some key differences:

- ‘major defect’ is a 2 stage legal test (Firstly, a defect in a major element of a building that is attributable to defective design, workmanship or materials or a failure to comply with the structural performance requirements of the National Construction Code and secondly, that it causes an inability to inhabit or use the building, destruction, or threat of collapse). In comparison, the serious defect definition contains a single legal test with an overall broader application (see below explanation)
- the ‘major defect’ definition applies to the NCC while the ‘serious defect’ definition currently applies only to the BCA (this is proposed to be resolved under Tranche II Bill reference)
- the ‘major defect’ definition incorporates the definition of a ‘major element’ while the ‘serious defect’ definition uses the broader definition of a ‘building element’, leveraging the definition that has been used under the DBP Act to secure upfront design to prevent defects
- the serious defect definition currently incorporates a reference to the relevant Australian Standards or the relevant approved plans (see further explanation below)

Serious defect

While the definition of ‘major defect’ requires both elements of the definition to be satisfied, ‘serious defect’ can be met by one of four mutually exclusive limbs.

A serious defect can be met by:

- a) a defect in a building element that is attributable to a failure to comply with the performance requirements of the Building Code of Australia, the relevant Australian Standards or the relevant approved plans (development consent plans under the EP&A Act or declared designs the DBP Act).
- b) a defect in a building product or building element that is attributable to defective design, defective or faulty workmanship or defective materials AND causes or is likely to cause:
 - i the inability to inhabit or use the building (or part of the building) for its intended purpose, or
 - ii the destruction of the building or any part of the building, or
 - iii a threat of collapse of the building or any part of the building.
- c) a defect of a kind that is prescribed by the regulations as a serious defect
- d) the use of a building product (within the meaning of the *Building Products (Safety) Act 2017*) in contravention of that Act.

While there are some similarities with the definition of major defect (particularly (b)), the definition of serious defect is deliberately broader. This approach is a product of the time that has passed since the major defect definition was introduced under the HB Act, as well as the need for broad, proactive enforcement powers to address substandard building work.

Broadening the definition will also allow more claims to be dealt with by NSW Fair Trading's disputes team rather than relying on using the duty of care provisions under the DBP Act or Chapter 6, Part 8 of the Bill, which would involve potentially costly litigation. While statutory warranties can still end up in court, there is a requirement to seek to resolve the dispute with input from the regulator before it escalates to this point – saving the licence holder and customer time and money.

There are concerns that the first component of the 'serious defect' definition may not have a sufficiently high bar for statutory warranties. The definition of serious defect covers a defect attributable to a failure to comply with performance requirements without additionally having to prove it causes an inability to inhabit/use, destruction of the building, or threat of collapse.

The reference to 'plans' or 'building element' does not contain a qualifier of seriousness which means the test is referring to a 'defect' as opposed to a 'serious defect'. For example, this means that this captures any fire safety system (such as inadequate fire safety plasterboard, fire alarm, stairs balustrade) without needing to be attributed to a building failure. The definition is cast this way to ensure that defects picked up during the design or build phase can be remediated, rather than relying on the defect to eventuate. This provides a more timely and cost-effective point of intervention.

The following case study is a practical example of the differences between the current definitions of 'major defect' and 'serious defect'.

It is useful to note that the definition of 'major defect' in the HB Act is grounded in a history of focusing on detached houses as well as residential apartment buildings for the purposes of statutory warranties and home building compensation claims. In particular, for the construction of new residential apartment buildings, the home building compensation scheme only extends up to three storeys. In contrast, the RAB definition of 'serious defect' is based on a new imperative to address defective multi-storey high rise buildings.

Case Study: comparison of 'major defect' and 'serious defect'

A common source of defects in buildings is waterproofing (11.6% of all defects Griffith Report),¹¹ (23% of building surveyed OBC Strata Report).¹²

The test for 'major defect' under the HB Act is generally an inability to inhabit or use the building. Whereas the 'serious defect' test under RAB can be a defect attributable to failure to comply with the performance requirements of the BCA.

The relevant BCA performance requirement for waterproofing is:

To protect the structure of the building and to maintain the amenity of the occupants, water must be prevented from penetrating—

- a) behind fittings and linings; and*
 - b) into concealed spaces,*
- of sanitary compartments, bathrooms, laundries and the like.*

Scenario:

Mr and Mrs Jones purchased a unit in a residential apartment building. Three years after moving in they noticed mould forming on the bedroom wall, which is adjacent to the bathroom. After some investigation it was found that the waterproofing membrane in the shower was compromised and allowing water into the wall cavity.

The extent of the damage is relatively minor, in that it has at this stage only affected a small part of the plasterboard wall lining. However, to repair the waterproofing membrane requires extensive and costly work to the bathroom.

HB Act – major defect definition

Under the major defect definition Mr and Mrs Jones's waterproofing defect would not meet the threshold of the inability to inhabit or use the building as the issue has been discovered early. If left

¹¹ Nicole Johnston and Sacha Reid, 'An examination of Building Defects in Residential Multi-owned Properties', (June, 2019), <https://www.griffith.edu.au/__data/assets/pdf_file/0022/831217/Examining-Building-Defects-Research-Report-S-Reid-N-Johnston.pdf>.

¹² NSW Government - Construct NSW, 'Research report on serious defects in recently completed strata buildings across New South Wales', (September, 2021), <https://www.nsw.gov.au/sites/default/files/2021-10/Serious_defects_in_residential_apartments_research_report.pdf>.

unchecked the compromised waterproofing membrane would eventually cause more severe damage to the building that will be costly to repair and costly to litigate responsibility.

RAB Act – serious defect definition

Under the serious defect definition Mr and Mrs Jones's waterproofing defect would meet the threshold as it can be established that water from the bathroom is penetrating behind the wall lining, therefore failing to comply with the relevant performance requirement of the BCA.

Regulatory costs and benefits of changing the current definition of 'major defect'

Reframing the definition of major defect will naturally impact the type of claims that can be brought. In the case study above, lowering the threshold for very common defects like waterproofing may lead to an influx of claims. The risk and cost are to the principal contractor, regulator, Tribunal and home building compensation scheme in handling the influx of claims. This also has the impact of reducing government and court resources to handle the more serious defects due to a possible influx of minor claims.

However, there are benefits in maintaining one definition to make it easier for the Government, industry and consumers to understand, particularly where a dispute reaches the courts and requires a clear, consistent understanding of what breach has occurred. During targeted consultation last year on the HB Act, industry and consumer stakeholders provided in-principle support for moving to a single standard as the current scheme could have a defect as both a 'serious' and a 'major' defect. This may lead to two different outcomes on the same issue.

It is important to note that the definition of serious defect has been drafted intentionally broader to allow a larger scope of investigation and enforcement action under the RAB Act. These powers, while also focused on remediation of defects, are specifically targeted to bring more defects into the scheme – giving more defects the benefit of a regulator-driven outcome.

Lowering the threshold will mean more defects will be subject to increased liability over six years instead of two years. This is likely to widen the liability of builders, developers and the home building compensation scheme to some degree. .

The benefit of this approach is that more claims are coming through the Department to access the statutory warranty regime. This increases our oversight of the scale of the problem.

Taking a matter to NCAT for a breach of a statutory warranty is a more straightforward remedy than taking a claim to the Supreme Court for a breach of a duty of care. There will always be a cost to resolving a dispute and accessing the statutory warranty pathway is intended to be quicker and cheaper for the consumer. For example, applying to [NCAT](#) for a claim for more than \$30,000 is \$279. In contrast making an application to the [Supreme Court](#) may cost \$1,169 for an individual or \$3,200 for a corporation. The legal costs between these two forums are also markedly different.

In addition, these reforms are intended to complement building reforms already implemented under the DBP Act. This includes the licensing of design professionals and preventative measures to ensure buildings are built according to their designs in the first place.

Questions

25. Do you think that the current definition for ‘major defect’ as defined in the HB Act should be retained? Why or why not?

26. Do you agree that the definition of ‘serious defect’ should be used instead of ‘major defect’ for statutory warranties? Why or why not?

Alternative proposal – extension of time limit for statutory warranties

An option for statutory warranties is to extend the coverage from six to ten years for major defects and from two to three years for minor defects. The rationale for this proposal is to further protect consumers from defective workmanship by allowing extended access to the regulator and NCAT for dispute resolution. However, the added value created for consumers comes at the cost of increased risk to businesses that will be liable for defective work for a longer period and will likely see higher insurance premiums.

Why change the time limits for warranty claims?

For those consumers who discover defects after the warranty period has expired, they are left to rectify the problem at their own expense or pursue expensive litigation to enforce the decennial duty of care against the person who caused the defect. This can leave consumers dealing with major defects that can include problems around fire safety and structural integrity of the building. . The resulting situation represents a market failure, as buildings are products that are reasonably expected to have a long-life span. However, the cost of poor workmanship is falling on the consumer both in terms of rectification work and the failure of the builder to deliver the promised quality product resulting in market failure.

However, while this is clearly a market failure, the failure is limited as some defects become apparent during the existing warranty periods. are discovered early on. The number of cases between six to ten years is not likely to overwhelmingly burden insurers or the building and construction industry, despite likely higher costs to remediate after a longer coverage period. However, it is pertinent to acknowledge that the actual impact that a change in period will have on insurers may vary from current projections.

What evidence is there that the two-year period for minor defects is not an appropriate period of time for the warranty?

A September 2021 research report prepared by NSW Government and strata community association on serious defects in recently completed strata buildings across New South Wales,

revealed that, “around 25% of defects were resolved in less than 6 months. Also, an equal proportion of responses indicated defects were resolved within 12 to 18 months, and more than 18 months (19% respectively). Together, these findings show that for most owners corporations (38%), defect resolution is generally a protracted process and likely to take 12 months or more.”¹³ It is also reported that this is likely as defects in new buildings are not always immediately apparent.¹⁴

Regulatory costs and benefits of extending the time for statutory warranties

Extending the statutory warranty period will lead to added costs for industry, some of which are likely to be passed on to the consumer. For builders, their costs will increase from rectifying some defects that previously fell outside the warranty period. Alternatively, industry may change the resourcing and methods by which they manage risk to ensure that the end product is not defective so their risk of liability is reduced. Where possible, industry are likely to pass these costs on to consumers.

The added liability may lead to higher average insurance premiums under the home building compensationscheme . These have already experienced significant growth in recent years. The added liability will likely lead to higher HBC scheme premiums which have already experienced significant growth in recent years. For reference, average premiums per certificate of insurance under the HBC Scheme have more than doubled in dollar terms since inception over ten years ago from just under \$1,000 to over \$2,000. These increases are not uniform across all types of building work. For example, there have been larger increases for work on multi-dwelling buildings, whereas insurance premiums for swimming pools have reduced over the same period, reflecting different risk profiles.

It is important to note that individual consumers already bear the burden of costs associated with quality problems in their homes. To the extent there was an increase in premiums, that should reflect the transfer of that existing risk from individual homeowners to the responsible building businesses and the home building compensation scheme.

As the costs of liability must be borne by someone so the decision to be taken is who is best placed to manage the risk.

An extension of statutory warranties will address further costs placed on the community aside from the financial burden placed on consumers. Defects falling outside the statutory warranty period

¹³ NSW Government - Construct NSW, *Improving consumer confidence: Research report on serious defects in recently completed strata buildings across New South Wales*, (September, 2021), <<https://www.nsw.gov.au/building-commissioner/research-on-serious-building-defects-nsw-strata-communities>>, p 31.

¹⁴ NSW Government - Construct NSW, *Improving consumer confidence: Research report on serious defects in recently completed strata buildings across New South Wales*, (September, 2021), <<https://www.nsw.gov.au/building-commissioner/research-on-serious-building-defects-nsw-strata-communities>>, p 31.

create reputational damage for the whole building industry by leaving consumers to bear the cost of poor performance on the part of industry. By extending the coverage period, builders and developers will be responsible for the quality of their work for longer. In time, this added responsibility is likely to lead to higher standards which will flow on to higher levels of trust in the industry.

Extend the application of the *Limitation Act 1969*?

An alternative approach to extending the time frames is a consideration of extending the provisions of the *Limitation Act 1969* Part 3, Division 2 which allows for the extension of time periods for disability, confirmation, mistake or fraud and deceit. It could be argued that these extenuating circumstances should also apply to the statutory warranty scheme. Feedback is sought on whether this would be a fair addition for extenuating circumstances.

Why is the duty of care under DBP not sufficient to address these issues?

The statutory warranties are intended to be a more accessible, cheaper and more consumer-friendly environment to resolve complaints.

The DBP Act strengthens consumer protections by establishing a statutory duty of care. Under these provisions, any person who carries out construction work has a duty to exercise reasonable care to avoid economic loss caused by defects. In certain circumstances, the duty of care applies retrospectively to construction work carried out up to 10 years before the Act commenced. This is consistent with the EP&A Act where a person may take civil action for loss or damage in relation to defective building work or subdivision work within 10 years after the date of completion.

In the case of *The Owners – Strata Plan No 87060 v Loulach Developments Pty Ltd (No 2)* [2021] NSWSC 1068¹⁵, the New South Wales Supreme Court considered the statutory duty of care imposed by section 37 of the DBP Act for the first time. The case highlighted it is not easy to prove a breach of a duty of care. The existence of a defect does not mean a breach of a duty of care. A party making a claim must identify risks the builder was required to manage and the precautions the builder should have taken to manage those risks.

The benefit in using statutory warranties is that the cost of bringing a claim is lower as you are bringing a claim to a Tribunal and not a Court. In addition, a statutory warranty claim is less onerous as those warranties have been implied into every contract.

Questions

27. Do you think that providing six years cover for ‘serious’ defects and two years for ‘other’ defects is fit for purpose?

¹⁵ *The Owners – Strata Plan No 87060 v Loulach Developments Pty Ltd (No 2)* [2021] NSWSC 1068 <https://www.caselaw.nsw.gov.au/decision/5eb9d87fe4b0f66047ed90bf>

28. Do you think that the time frame for ‘serious’ defects should be extended to ten years and three years for ‘other’ defects?

29. Do you think that Part 3, Div 2 of the *Limitation Act 1969* should extend to statutory warranties?

Dispute Procedures

What is the new proposal?

It is necessary to establish a new framework to move the discussion of the Department’s building reform from a reactive mode, responding to reports and crises, to a proactive mode. This section will explain the dispute resolution model proposed under the Bill. The dispute process will apply to building work completed on a ‘home’ (see clause 49(2) and chapter 2 above).

Dispute Resolution Process

We propose that the dispute resolution model follows the following steps.

- 1. Encourage parties to resolve the matter between themselves.**
- 2. Make a complaint to the Department.** The Department can:
 - a) discuss a mutually agreeable outcome,
 - b) intervene with a home building work direction,
 - c) inspect the property and decide if appropriate to issue a compliance notice, accept a written undertaking or issue a building work rectification order, or
 - d) refer the matter to mediation.
- 3. If regulatory tools not appropriate or not complied with – letter to take the matter to the NSW Civil and Administrative Tribunal (NCAT).** This may also be referred for further action due to a contravention of a provision of the Bill (see clause 5). A matter may be fast-tracked for consideration by the NCAT because:
 - the builder is unlicensed or an owner-builder,
 - the time limits for statutory warranties are soon to expire e.g. within 3 months before time limit of 6 years for serious defects or 2 years for other defects,
 - cross claim,
 - debt recovery by a trader,
 - claim by a trader against a sub-contractor for defective work,
 - claims under the home building compensation scheme,
 - if a rectification order has been issued but has not been complied with

4. If a rectification order has been issued but has not been complied an NCAT letter is provided to the consumer with their options to take the matter to NCAT.

5. If there is a breach of the legislation - for example, a failure to comply with a rectification order. It may also follow the NSW Fair Trading compliance matrix:

- no further action from the Department,
- education letter,
- penalty infringement notice (for example if a rectification order not complied with),
- notice to show cause (for example, for a fine, suspension or cancellation of licence),
- written undertaking, or
- prosecution.

The dispute resolution scheme underpinning the statutory warranty scheme provides positive change as it incorporates additional powers to intervene early and resolve a dispute. The Department can encourage the parties to resolve their disputes, issue a home building work direction (detailed below) or use a range of other compliance and enforcement mechanisms being developed under the BCE Bill.

The process maintains the requirement for a complaint being lodged with the Department before taking a matter to NCAT. NSW Fair Trading data showed that in 2021, 427 rectification orders were issued with 228 of those not complied with and, 227 were matters where a rectification order was not needed as the parties agreed on a resolution.

NSW Fair Trading currently provides methods for licence holders and consumers to resolve disputes. This process should reduce costs for businesses as the changes are likely to increase the effectiveness of the regulator in resolving disputes before going to NCAT. A customer cannot take the matter to NCAT or court without first coming to us to undertake early dispute resolution. The proposal seeks to enhance the effectiveness of intervening early and taking a more proactive approach instead of relying on the courts and the home building compensation scheme which are last resort mechanisms.

How is the regulator more effective at resolving disputes than the parties?

A key change for the Bill is that NSW Fair Trading no longer requires a complaint to be lodged to investigate a home. This is appropriate in circumstances where a new home is under construction and a customer may not have access to the site. NSW Fair Trading can use the investigation provisions provided within the BCE Bill to conduct audits in the building industry to identify and investigate non-compliance. The Secretary may also proactively investigate a current or former licence or registration holder, buildings, building products, developers and former developers, the

carrying out of work under a relevant building enforcement legislation, and any other potential breaches of the legislation.

In addition, under the BCE Bill, the Secretary may accept a written undertaking from a person relating to the carrying out of building work, specialist work, professional engineering work or certification work.

In contrast, the alternative is that parties would need to navigate a way of resolving a dispute themselves. This would quite often involve a person taking a matter to court. As indicated above, taking a matter straight to NCAT or the Supreme Court involves filing fee and often expensive legal fee costs.

This provides a fit for purpose compliance framework that provides a service to parties of a dispute in trying to resolve a dispute before the matter is escalated. Further details about the compliance framework are contained in the BCE RIS.

What is a 'home building work direction'?

A 'home building work direction' is issued by NSW Fair Trading to help resolve consumer disputes. It is proposed that NSW Fair Trading will have an additional tool at their disposal. This means that a consumer may apply to the Secretary for a home building work direction. The Secretary may, by written notice, direct the supplier to:

- repair building goods or services
- replace building goods or services
- refund the consumer

This is intended to apply when a person takes money from a consumer and does not provide the promised service. In this case, NSW Fair Trading may issue an order to refund the money as part of the home building work direction. This will require the person to repay the money within a reasonable time period. NSW Fair Trading complaints data reveals that from February 2021 to February 2022, 582 traders took payment without returning to site. This is an average of 48.5 complaints per month. This clearly shows that a power is needed to ensure that people are not taking consumers money without attending the site or providing a service.

The detail of this scheme is intended to be contained in the supporting regulations. It is intended that if a business fails to comply with a direction to refund an amount, the amount can be converted into a judgement debt for enforcement. This is likely to benefit consumers if no service is provided. This may impact builders and tradespeople. However, if a 'service' is provided within a reasonable time it should not have a significant impact. Further consideration will also be given to demerits applying to licence holders who fail to comply with orders.

Case Study: consumer complaint about non-completion of service

NSW Fair Trading received a complaint from a customer regarding non-completion of building services that had been contracted for. The customer stated that they contracted for renovations worth over \$100,000 and paid a deposit of 20% of this value. The legal maximum deposit is 10%. These renovations were financed, at least in part, through a bank loan. The builder never provided a receipt for this deposit. After receiving the deposit, several weeks passed before the trader then requested further payments before beginning work. If paid, the trader would have received over two thirds of the contracted amount before beginning work. At this point the consumer requested evidence of the trader's licence and home builder compensation cover. When the trader failed to comply, the consumer asked for the paid money to be returned which the trader refused to do.

NSW Fair Trading contacted the trader in relation to the customer's concerns and desired outcome and received a response. NSW Fair Trading also provided education relating to the identified breaches. The trader was prepared to provide a partial refund however it was not the amount requested. As the customer was requesting monetary redress, NSW Fair Trading is limited in what regulatory action can be undertaken. NSW Fair Trading cannot force the trader to provide the requested refund. The customer was referred to NCAT.

Questions

30. Do you agree with proposed 'home building work direction' refund power?

31. What other directions would be useful as a home building work direction?

32. What will be the cost to licence holders for the changed requirements? For customers?

The change in approach to the dispute resolution process is intended to improve costs for licence holders. The dispute resolution process is aimed at intervening early and avoiding last resort mechanisms such as relying on statutory warranties and taking a matter to NCAT.

When complaints to NSW Fair Trading fail to result in a settlement for the dispute, either because one party or the other is unhappy with the outcome or part of the order is not complied with, the parties can appeal the issue in the NCAT. While NCAT provides a necessary remedial function and is significantly faster than pursuing action through the justice system, its services can still take a significant amount of time. After having already engaged with NSW Fair Trading, 44% or 805 cases dealing with an issue under \$30,000 waited more than 16 weeks for a ruling while 11% or 104 cases over \$30,000 had to wait more than 18 months for a resolution in the 2020 to 2021 period.¹⁶ By bringing in reforms that address the issues of building quality and builder misconduct before they arise, the undue burden of dispute resolution imposed by lengthy wait times can be reduced.

¹⁶ NCAT, *Annual Report 2020 – 2021*, (2022), p 94.

A joint OBC and Strata Community Association survey investigated how strata associations in NSW dealt with defects and other building issues. The survey found that only 15% of buildings with serious defects reported these to NSW Fair Trading with a wide variety of reasons for not reporting.¹⁷ For instance, strata associations dealing with building defects frequently forgo Fair Trading's remediation services, often to engage directly with the builder but also because they are unaware of their rights or avenues open to them or because of a lack of trust in NSW Fair Trading to deliver outcomes for them.¹⁸ Part of the proposed changes to dispute resolution will be an expansion of capability and capacity within NSW Fair Trading to meet the expected uptick in demand.

When defects are dealt with during the construction phase, significant cost savings can be made. These can be both from avoiding the previously mentioned costs of the dispute resolution process and from the decreased costs for the builder to remediate during construction. A Western Australian Government report found that it was on average 2.5 times cheaper to remediate defects during construction than to carry out remediation work 5 years later.¹⁹ These figures demonstrate the cost savings that quality building work can have for both the consumer and the builder who will pay less for remediation work.

Why is NSW Fair Trading proposing a new compliance matrix for maximum penalties?

Across existing building legislation similar conduct leads to different penalty amounts. For example, under the Bill, the penalty for unlicensed work is proposed as a tier 2 offence of a maximum of \$330,000 for a corporation and \$66,000 for an individual. In addition, a second or subsequent offence is punishable by up to \$110,000 or 12 months imprisonment. In comparison, the penalty for unlicensed engineers under the DBP Act is a maximum penalty of \$165,000 for a corporation and \$55,000 for an individual.

The Bill proposes to standardise penalties based on five levels of offences to ensure like conduct is treated the same, as well as create clear thresholds for other consequences (for e.g. demerit points under the BCE Bill).

Tier 1 is intended to apply to the most serious matters. It is currently applied to Chapter 6 of the Bill as it mirrors the penalties within the EP&A Act and applies to building approval matters which are

¹⁷ NSW Government - Construct NSW, *Improving consumer confidence: Research report on serious defects in recently completed strata buildings across New South Wales*, (September, 2021), <<https://www.nsw.gov.au/building-commissioner/research-on-serious-building-defects-nsw-strata-communities>>, p 47. Contextually, these figures represent delays impacted by COVID-19.

¹⁸ NSW Government - Construct NSW, *Improving consumer confidence: Research report on serious defects in recently completed strata buildings across New South Wales*, (September, 2021), <<https://www.nsw.gov.au/building-commissioner/research-on-serious-building-defects-nsw-strata-communities>> p 33.

¹⁹ Government of Western Australia Department of Mines, Industry Regulation and Safety, *Reforms to the building approval process for single residential buildings in Western Australia* (September, 2019), <<https://www.commerce.wa.gov.au/publications/reforms-building-approval-process-single-residential-buildings-wa-cris>>, p 67.

the building blocks of the regulatory scheme. Tier 2 applies to people who are unlicensed under the Bill as this is a core component of the framework. Tier 3 and 4 allow for a gradual assessment of the seriousness of offences within the Bill. Tier 5 is reserved for minor or administrative matters which may ultimately be resolved in a less serious manner. Please see below table.

Tiers	Corporation	Other (individual)	If ongoing offence
Tier 1	1.1 million penalty units 10,000	\$220,000 penalty units 2,000	\$110,000 - 1,000 (corporation) \$22,000 - 200 (in any other case)
Tier 2	\$330,000 penalty units 3,000	\$66,000 penalty units 600	\$33,000 – 300 (corporation) \$6,600 – 60 (in any other case) If unlicensed - subsequent offence <ul style="list-style-type: none"> • 1,000 (\$110,000) • 12 months imprisonment
Tier 3	\$165,000 penalty units 1,500	\$33,000 penalty units 300	\$16,500 – 150 (corporation) \$3,300 – 30 (in any other case)
Tier 4	\$110,00 penalty units 1,000	\$2,200 penalty units 200	
Tier 5	\$55,000 penalty units 500	\$11,000 penalty units 100	

Table 1: Proposed penalty tiers

Increases to the penalties may have an impact on businesses, specifically small businesses. However, an increase in the maximum penalty will not necessarily result in larger penalties being applied by a court. Courts will not simply double the penalty it would have otherwise applied when the maximum penalty was half as much. The courts may consider several factors including the seriousness of the offence, its prevalence, the deterrence, the capacity of the offender to pay the fine and the weighing up of all factors.

NSW Fair Trading has a range of compliance and enforcement options available to achieve compliance with the law and enhance consumer protection. Upon detection of a breach, compliance officers issue a caution or warning letter to clarify the requirements of the law. They use education programs in preference to immediate prosecution. The next step is to issue a fine or penalty infringement notice where appropriate. The final response is for the matter to be prosecuted in court.

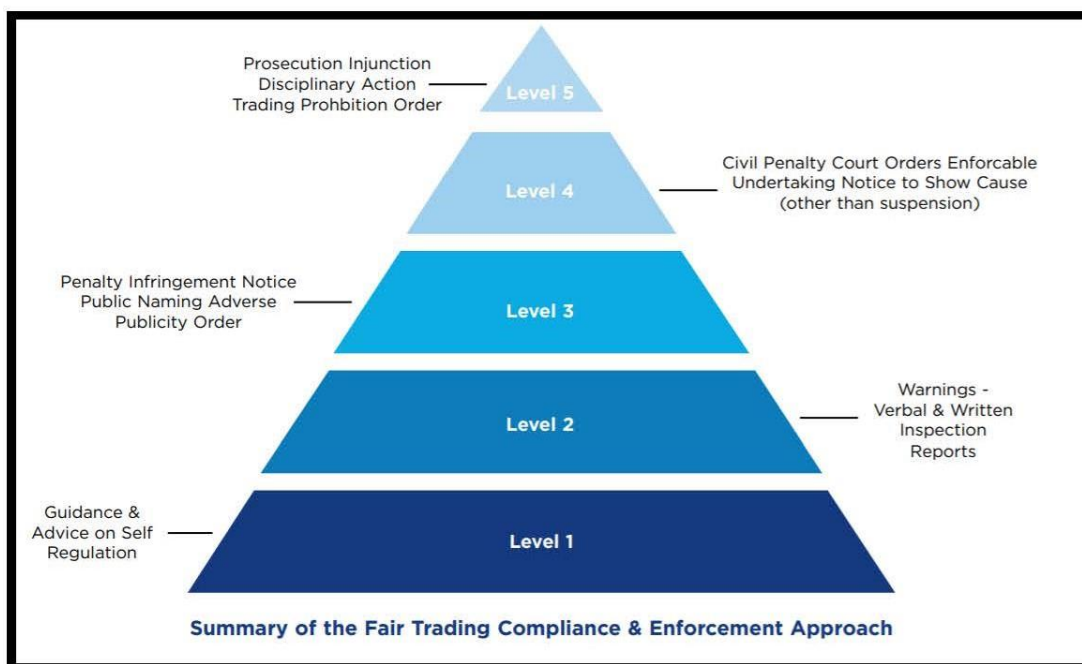


Figure 3: Summary of Fair Trading Compliance and Enforcement approach

Penalties are an important feature of the suite of compliance and enforcement options available to NSW Fair Trading and are relied on as an effective deterrent against non-compliance. In general terms, maximum penalties are used to enforce compliance in situations where it is considered appropriate to take prosecution action against a corporation or individual. The proposed maximum penalty offences in the Bill have been assessed according to the seriousness of the offence, the elements of the offence, and the appropriateness. It is intended that, the penalty notice fine amount will be set in the supporting regulations to ensure a sufficient deterrent from non-compliance with the legislation.

Consideration has also been given to ensuring that the penalties are consistent with existing offences of a similar nature or seriousness in other NSW Fair Trading regulatory schemes. NSW Fair Trading retains the discretion to prosecute serious breaches of requirements under the Act in court. However, NSW Fair Trading will also issue penalty notices where it is appropriate to do so.

Questions

33. Do you agree with the amounts of the five tiers used to apply to the penalties in the Bill? If not, why not?

34. Do you agree with the maximum penalty amounts specified in the Bill? If not, please identify the provision, amount or approach that you disagree with and why?

4. Home building compensation scheme

What is the home building compensation scheme?

Cover under the home building compensation scheme provides a safety net for homeowners, in the case of a licensed business that worked on a home cannot complete work or honour statutory warranties due to insolvency, death, disappearance, or licence suspension for failing to comply with a court or tribunal order to pay compensation to the homeowner. The scheme operates as a product of last resort.

A business that holds a licence under the HB Act (whether as a corporation, partnership or individual) must buy a product under the scheme if contracting for residential building work that exceeds \$20,000 with a developer, homeowner or owner-builder. This includes work such as new homes, new low-rise 'multi-unit' buildings of three storeys or less, or renovations or additions to existing residential buildings of any number of storeys, unless exempt. Scheme products are also required for speculative home building work that exceeds \$20,000.

The NSW Self Insurance Corporation, trading as 'icare HBCF' is currently the sole insurer under the home building compensation scheme. The scheme is regulated by the NSW State Insurance Regulatory Authority (**SIRA**).

The provisions contained in Chapter 5 of the Bill have been re-written to modernise and clarify the language and support changes made in other parts of the Bill.

This is not in itself expected to materially affect the operation of the scheme. However, changes made in other parts of the Bill may affect the risks that the home building compensation scheme must cover, for example, any changes to what statutory warranties the scheme is required to insure and the effectiveness of other mechanisms to address risk of detriment to homeowners.

There may also be some changes to the scope of work for which businesses must buy insurance. This is a consequence of moving from the current 'residential building work' definition in the HB Act to the new 'home building work' definition in the Building Bill, and subject to the regulations.

SIRA is also separately publishing a discussion paper about redesigning the home building compensation scheme in response to findings and recommendations of IPART's 2020 review of the scheme. This may result in other reforms, that may also affect the scheme, and may require other legislative reforms, whether by way of adjustment to the Bill, or via a separate legislative process. Depending on the final mix of reforms adopted as a result of these two processes, there may be an increase or reduction in the scheme's exposure to claims and therefore the amount of insurance premium that must be collected to indemnify those risks.

Question

35. Do you have any comments or feedback about the Bill's provisions for insurance under the home building compensation scheme?

5. How do we transition industry into a new scheme?

The Department acknowledges the impact these changes will have on industry and will continue to support businesses and licence holders in ensuring a seamless transition into the new scheme. The Building Bill proposes a number of transitional arrangements in order to prepare industry with the adequate time needed to implement change.

Transitioning into a new licensing scheme

Many of the impacts on the traditional regulated areas, such as domestic dwelling construction, electrical, and plumbing work are considered to require minimal transition. Current licence holders (both individual and corporate) will be able to continue to complete the work they are permitted to do as part of their licence.

Regulation that is proposed to apply to the broader building industry, such as licence requirements for carrying out commercial and industrial building work will require a transition to allow industry to prepare for the new requirements. Acknowledging the potential impact the proposed licensing scheme will have on the availability of skilled professionals, and to allow industry to upskill, it is anticipated that a two-to-five-year transitional period is appropriate, depending on industry feedback. A staged approach targeting individual licencing will ensure sections of industry are transitioned to minimise the impact on the overall sector.

This transitional period will grant businesses ample opportunity to meet the new requirements without severely impacting their operations in the meantime, minimising the impact of the scheme. The Department will work with industry to help support businesses in meeting the new requirements within the timeframes.

Participation in the construction industry is projected to grow by 66,400 (or 5.8%) by November 2026, with 75% of workers completing Vocational and Education Training through an apprenticeship or traineeship.²⁰ The Department is continually working with RTO providers to incentivise individuals towards a greater uptake in the industry and ensure competency of new licence holders.

Questions

36. How can the Department support the industry transition into the licensing new scheme?

37. Is a period of 2-5 years for transitioning into the new licensing scheme appropriate? If no, why not?

²⁰ National Skills Commission, '2021 Employment projections for the five years to 2026', (2021) <<https://labourmarketinsights.gov.au/industries/industry-details?industryCode=E>>.

38. How can the Department help incentivise individuals to enter the construction industry?

Where it is proposed to include new categories of licences and new licence classes, these requirements will be phased in over time to allow industry to prepare for changes. It is anticipated that the phase-in period will be between two to five years for the expansion into the commercial building space. The major limiting factor is the number of people currently active in the commercial sector that already meet the new criteria for a licence.

Transitioning statutory warranties and consumer protections

It is proposed that the new statutory warranties scheme will apply on commencement of the Bill. The new statutory warranty period provisions should be applied when the contract is entered into by both parties. If there is no contract, then the new scheme applies when a 'deemed contract' is entered into. A deemed contract should be determined when work has been completed or if no work has been completed when consideration has been provided.

Application of the new statutory warranties scheme on commencement along with other consumer protections such as contractual rights and cover under the home building compensation scheme will provide consumers with ample safeguards while industry continues to upskill and transition into the new licensing scheme. This will allow greater consumer protections while minimising regulatory burden on industry.

Feedback on these provisions is welcomed as part of the consultation.

Question

39. Do you think that savings and transitional provisions for statutory warranties should be tied to when the contract or 'deemed contract' was entered into? If not, why not?

Other transitional arrangements

Upon repeal of the HB Act, new provisions relating to pending applications, dispute claims and, reviews will automatically be carried over. This means that individuals will have their applications and claims processed under the Act that is in place at the point of decision. Review of these decisions will also be made based on the point in time the original decision was made and the relevant provisions in place. This will ensure there is consistency between the regulatory scheme applicable and the processes that support the scheme.

Appendix 1 – Building classifications

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). A building may have parts that have different uses. In most cases, each of these parts are classified separately. A building (or part of a building) may also have more than one use and may be assigned more than one classification.

Class 1 - houses. Typically, they are standalone single dwellings of a domestic or residential nature. These buildings can also be horizontally attached to other Class 1 buildings. When attached they are commonly referred to as duplexes, terrace houses, row houses and townhouses. In these situations, they must be separated by a wall that has fire-resisting and sound insulation properties. The Class 1 classification includes two sub-classifications: Class 1a and Class 1b. A Class 1a building is a single dwelling being a detached house; or one of a group of attached dwellings being a town house, row house or the like. A Class 1b building is 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.

Class 2 - apartment buildings. They are typically multi-unit residential buildings where people live above and below each other. The NCC describes the space which would be considered the apartment as a sole-occupancy unit (SOU). 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.

Class 3 - 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. 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. 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.

Class 4 part of a building is a sole dwelling or residence within a building of a non-residential nature. An example of a Class 4 part of a building would be a caretaker’s residence in a storage facility. A Class 4 part can only be located in a Class 5 to 9 building.

Class 5 - office buildings used for professional or commercial purposes. Examples of Class 5 buildings are offices for lawyers, accountants, government agencies and architects.

Class 6 - typically shops, restaurants and cafés. They are a place for the sale of retail goods or the supply of services direct to the public. Some examples are: dining room, bar, shop or kiosk part of a hotel or motel, hairdresser or barber shop, public laundry, market or showroom, funeral parlour, shopping centre.

Class 7 - storage-type buildings. The Class 7 classification has two sub-classifications: Class 7a and Class 7b. Class 7a buildings are car parks. Class 7b buildings are typically warehouses, storage buildings or buildings for the display of goods (or produce) that is for wholesale.

Class 8 - A factory is the most common way to describe a Class 8 building. It is a building in which a process (or handicraft) is carried out for trade, sale, or gain. The building can be used for production, assembling, altering, repairing, finishing, packing, or cleaning of goods or produce. It includes buildings such as a mechanic's workshop. It may also be a building for food processing, such as an abattoir. A laboratory is also a Class 8 building, even though it may be small. This is due to the high fire hazard potential.

Class 9 - buildings of a public nature. The Class 9 classification has three sub-classifications: Class 9a, Class 9b and Class 9c. Class 9a buildings are generally hospitals, referred to in the NCC as health-care buildings. They are buildings in which occupants or patients are undergoing medical treatment and may need physical assistance to evacuate in the case of an emergency. This includes a clinic (or day surgery) where the effects of the treatment administered involve patients becoming unconscious or unable to move. This in turn requires supervised medical care (on the premises) for some time after treatment has been administered. Class 9b buildings are assembly buildings in which people may gather for social, theatrical, political, religious or civil purposes. They include schools, universities, childcare centres, pre-schools, sporting facilities, night clubs, or public transport buildings. 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. An aged care building, where residents are provided with personal care services, is a Class 9c building.

Class 10 - non-habitable buildings or structures. Class 10 includes three sub-classifications: Class 10a, Class 10b and Class 10c. Class 10a buildings are non-habitable buildings including sheds, carports, and private garages. Class 10b is a structure being a fence, mast, antenna, retaining wall, swimming pool, or the like. A Class 10c building is a private bushfire shelter. A private bushfire shelter is a structure associated with, but not attached to, a Class 1a building.

Appendix 2 – New Sections Guide

New and existing provisions

Key: New provision Amended provision No change to provision

Bill reference	Provision in Bill	HB ACT reference	Other Acts reference
Chapter 1	Preliminary		
1	Name of Act	Section 1	
2	Commencement	Section 2	
3	Definitions	Section 3	
4	Objects of Act	NEW	
5	Building work	NEW	RAB Act s 5
6	Close Associate	CI 5 of Sch 1	
7	Functions of Secretary under Act (HB Act, s 106)	Section 106	
Chapter 2	Licensing for regulated work		
Part 1	Preliminary		
8	Definitions	NEW	
9	Work to which this chapter applies	NEW	
10	Professional engineering work (DBP s 31)	NEW	DBP Act s31
11	Specialist work	NEW/ Section 3D	
Part 2	Licensing of persons carrying out regulated work		
Division 1	Preliminary		
12	Regulated work requires a licence	NEW/ Sections 12 to 15 C	
13	Licensing of persons to carry out regulated work	NEW	
14	Grounds for finding that a person is not a suitable person to carry out regulated work	Sections 20, 25	
Division 2	Application for licence		
15	Application for licence	NEW + sections 19, 24	
16	Secretary may obtain information from third parties	Section 35	
17	Grant or refusal of licence	Sections 20, 25	
18	Duration of licence	Section 42	
19	Variation of licence	Section 62	
Division 3	Recognition of eligible persons		
20	Skills recognition by approved professional bodies	NEW	
21	Approval of professional bodies to grant skills recognition	NEW	
Division 4	Conditions of licences		
22	Conditions of licence	Sections 32 (2) (b), 36	
23	Compliance with standards or methodologies	NEW	

24	Conditions may provide that authorisation takes effect later	NEW	
Division 5	Suspension or cancellation of licences		
25	Grounds for suspension or cancellation of licence	Sections 22, 56, 57	
26	Suspension of licence	Section 64	
27	Cancellation of licence	Section 64	
28	Suspension or cancellation may be subject to conditions	NEW	
Division 6	Miscellaneous		
29	Offence of contravening condition	Section 36 (2)	
30	Offence of lending licence	Section 46A	
31	Voluntary surrender or suspension of licence	NEW	
32	Recovery of unpaid fees	Section 67	
33	Licence register	Section 120	
34	Exercise of certain Secretary functions by professional bodies	NEW	
Part 3	Requirements on licence holders		
Division 1	Insurance or other arrangement		
35	Licence holders must be indemnified	Sections 22, 103	
36	Regulations	Section 103	
Division 2	General Requirements		
37	Qualifications, skills and experience	Section 25	
38	Secretary may publish guidelines for supervision of unlicensed employees	Sections 14, 15A, 15B, 15C	
39	Code of conduct	NEW	
40	Licence holder to notify other persons of certain changes	NEW	
41	Licence holder to notify Secretary of certain events	Section 22	
42	Return of licence	Section 44	
Division 3	Additional requirements for licensed corporations		
43	Directors of licensed corporations must ensure regulated work carried out lawfully	NEW	
44	Directors of licensed corporations must report certain conduct	NEW	
45	Licensed corporation must ensure regulated work carried out by individual	NEW	
46	Licensed corporations and partnerships—nominee supervisors	NEW	
47	Duties of licensed corporations and partnerships	NEW	
48	Duties of nominee supervisor	NEW	
Chapter 3	Home building work		
Part 1	Preliminary		
49	Building work to which Chapter applies	NEW	
50	Date of completion of home building work (HB Act s 3B)	Section 3B	
51	Date of completion of new buildings in strata schemes (HB Act s 3C)	Section 3C	
Part 2	Contract Requirements		
Division 1	Preliminary		

52	Definitions	NEW	
53	Application of this part	Sections 6, 92 (4)	
Division 2	Major works contract		
Subdivision 1	Requirements for major work contracts		
54	Application of Division	NEW	
55	Form of major works contracts	Section 7	
56	Variations	NEW	
57	Display homes (cf s 9)	Section 9	
58	Maximum progress payments (cf ss 8 and 8A)	Sections 8, 8A	
Subdivision 2	Rescission and cooling off periods		
59	Application of Subdivision	Sections 6, 7BA (8)	
60	Recission	Section 7BA	
61	Variation or avoidance of cooling-off period	Section 7BA	
62	Person may rescind contract if cooling-off statement not included	Section 7BB	
Division 3	Minor work contracts		
63	Requirements for minor work contracts	Section 7AAA	
Division 4	Other requirements		
64	Terms of home building work contracts	Section 7E	
65	Certain terms and conditions void in home building work contracts	Section 7E	
66	Consumer information (cf s 7AA)	Section 7AA	
67	Copy of contract (cf s 7B)	Section 7B	
68	Arbitration clause prohibited	Section 7C	
69	Interests in land under contract	Section 7D	
70	Enforceability of contracts and other rights	Section 10	
Part 3	Statutory Warranties		
71	Definitions	Cl 1 of Sch 1	
72	Persons having benefit of warranties	NEW	
73	Duties of persons having benefit of statutory warranty (HB Act s 18BA)	Section 18BA	
74	Persons responsible for providing statutory warranties	NEW	
75	Warranties (HB Act s 18B)	Section 18B	
76	Proceedings for breach of statutory warranty (HB Act s 18E)	Section 18E	
77	Commencement of proceedings if building bond lodged (HB ACT s 18E(1A))	Section 18E (1A)	
78	Defences (HB A s 18F)	Section 18F	
79	Warranties may not be excluded	Section 18G	
Part 4	Owner-builder work		
80	Definitions	Cl 1 of Sch 1; Section 29	
81	Applications for owner-builder permits	Section 31	
82	Authority of owner-builder permit	Section 32	
83	Duration of owner-builder permit	NEW	
84	Cancellation of owner-builder permit	NEW	
85	Unlicensed contracting	Section 32AA	
Chapter 4	Reviewable decisions and resolving disputes		
Part 1	Resolving building disputes		

Division 1	Preliminary		
86	Definitions	Section 48A	
87	Meaning of “building claim”	Section 48A	
Division 2	Dealing with building disputes and claims		
88	Notification of disputes	Section 48C	
89	Secretary may determine disputes	NEW+ Sections 48D, 48E	
Division 3	Jurisdiction in relation to building claims		
90	Application for determination of building claim	NEW + Section 48I	
91	Jurisdiction of Tribunal in relation to building claims	Section 48K	
92	Tribunal responsible for resolving building claims	Section 48L	
93	Jurisdiction for actions against refusal of insurance claims	Section 48M	
Division 4	Powers of Tribunal		
94	Determination of building claims	Section 48O	
95	Secretary must be informed of compliance with order	Section 48T	
96	Failure to inform of compliance	Section 48U	
Division 5	Home building work directions		
97	Application of subdivision	NEW	
98	Home building work directions	NEW	
99	Recovery of refund	NEW	
100	Regulations	NEW	
Division 6	Miscellaneous		
101	Requirement to notify Secretary of court order to pay money in relation to building claim	Section 48V	
Part 2	Jurisdiction of Civil and Administrative Tribunal		
Division 1	Administrative reviews		
102	Review by Tribunal	Sections 83A, 83B	
103	Time limits for review of Secretary’s decisions	Section 86	
104	Determination of reviews	Section 85	
Division 2	Unjust contracts		
105	Jurisdiction relating to unjust contracts	Section 89D	
Chapter 5	Insurance		
Part 1	Insurance (HB ACT Part 6)		
Division 1	Preliminary		
106	Definitions	NEW	
107	Mandatory insurance extends to rectification work	Sections 92 (5), 96(4)	
108	Operation of mandatory insurance for owners of land (HB ACT ss 92C, 99(2A) and (2B))	Sections 92C, 99(2A), 99 (2B)	
Division 2	Insurance requirements and premiums		
Subdivision 1	Mandatory insurance		
109	General requirements for mandatory insurance (HB ACT s 102)	Section 102	
110	Insurance periods (HB ACT s 103B)	Section 103B	

111	Limits on claims (HB ACT ss 103BB and 103BC)	Sections 103BB, 103BC	
112	Notification of insurer (HB ACT s 92A)	Section 92A	
113	Insolvency or death in partnership carrying out home building work	NEW + Section 99(1)	
114	Insurance not required for persons carrying out work for contractor (HB ACT s 98)	Section 98	
Subdivision 2 Insurance relating to major work contracts			
115	Work under major work contracts must be insured (HB ACT s 92)	Section 92	
116	Mandatory insurance for work carried out under major work contracts (HB ACT s 99)	Section 99	
Subdivision 3 Insurance relating to speculative work			
117	Definitions	NEW	
118	Speculative work not carried out under a contract must be insured (HB ACT ss 96, 100)	Sections 96, 100	
119	Exemptions from insurance requirements (HB ACT s 97)	Section 97	
Subdivision 4 Developers			
120	Developers not entitled to claim under mandatory insurance	NEW	
121	Obligations of developers (HB ACT s 96A)	Section 96A	
Subdivision 5 Premiums			
122	Premiums (HB ACT s 103BE)	Section 103BE	
123	Filing of premiums (HB ACT s 103BF)	Section 103BF	
124	Rejection of premiums by Authority (HB ACT s 103BG)	Section 103BG	
125	Arbitration after rejection of premium (HB ACT s 103BG(6) and (7))	Sections 103 BG (6), (7)	
Subdivision 6 Miscellaneous			
126	Contracts for sale of land voidable if certificate of insurance not provided	Section 96	
127	Register of insurance and other particulars (HB ACT s 102A)	Section 102A	
128	Part may not be excluded (HB ACT s 103D)	Section 103D	
129	Exemption for work done for public sector agencies (HB ACT s 103E)	Section 103E	
130	Regulations (HB ACT s 103C)	Section 103C	
Division 3 Insurance Guidelines			
131	Insurance Guidelines (HB ACT ss 103EC and 103ED)	Sections 103EC, 103ED	
132	Insurance Guidelines for the determination of premiums (HB ACT s 103BD)	Section 103BD	
133	Regulations relating to Insurance Guidelines (HB ACT s 103EE)	Section 103EE	
Division 4 Home Building Operational Fund			
134	Home Building Operational Fund (HB ACT s 103EF)	Section 103EF	
135	Payment of contributions by licensed insurers (HB ACT s 103EG)	Section 103EG	
Part 2 Insolvent insurers (HB ACT Part 6A)			

Division 1	Preliminary		
136	Interpretation	Section 103F	
137	Insolvent insurers	Section 103G	
138	State indemnity after insolvent insurer dissolved	NEW	
Division 2	State indemnity		
139	State indemnity	Section 103I	
140	Amount of State indemnity if other claim made	Section 103I (3)	
141	State indemnity claim must be made to Authority	Section 103K	
Division 3	Determination of claims		
142	Payment of claims	Section 103L	
143	Assignment of rights	Section 103M	
Division 4	Home Building Insurers' Guarantee Fund		
144	Home Building Insurers Guarantee Fund	Section 103OA	
145	Contributions to Guarantee Fund	Section 103OB	
Division 5	Miscellaneous		
146	Functions of Authority	Sections 103S, 103Z	
147	Authority may enter into agreements and arrangements with liquidator of insolvent insurer	Section 103U	
148	Recovery of amounts under contracts or arrangements for re-insurance or co-insurance or guarantees or indemnities	Section 103V	
149	Liquidator to notify claims administrator of claims	Section 103W	** Rename section
150	Directions for certain documents and information	Sections 103X, 103Y	
151	Authority may take certain legal proceedings	103Z	
152	Review of decisions of Authority	NEW	
Part 3	Alternative indemnity products (HB ACT Part 6B)		
153	Alternative indemnity products	Section 104	
154	Approval of alternative indemnity products	Section 104A	
155	Alternative indemnity product may be used instead of insurance	Section 104B	
156	Regulation of alternative indemnity products	Section 104C	
157	Insolvent providers	Section 104D	
158	Insurance Guidelines relating to alternative indemnity products	Section 104E	
Part 4	Insurers and providers (HB ACT Part 6C)		
Division 1	Licensing of insurers and providers		
Subdivision 1	Preliminary		
159	Definition	NEW	
160	Offence—unlicensed insurers and providers	Section 105A	
161	Self-Insurance Corporation is licensed insurer	Section 105B	
Subdivision 2	Application for licence		
162	Application for insurer's and provider's licence	Sections 105C, 1-5D, 105E	
163	Grant or refusal of licence	Section 105F	

164	Duration of licence	Section 105G	
165	Variation of licence	Section 105H	
166	Assignment of licence	Section 105K	
Subdivision 3	Conditions of insurer's licence and provider's licence		
167	Conditions on licence	Section 105H	
168	Offence of contravening condition	Section 105H (6)	
169	Imposition of civil penalty on or censure of licensed insurers and providers	Section 105M	
Subdivision 4	Suspension or cancellation of licence		
170	Grounds for suspension or cancellation of licence	Section 105N	
171	Suspension of licence	Section 105L	
172	Cancellation of licence	NEW+ Section 105N	
173	Suspension or cancellation may be subject to conditions	NEW	
Subdivision 5	Records and information		
174	Records relating to insurer's and provider's licences	Section 105P	
175	Certificate evidence of certain matters (HB ACT s 105P(2))	Section 105P (2)	
176	Publication of information about licence holders (HB ACT s 105R)	Section 105R	
177	Accounts, returns and other records of licensed insurers and providers	Section 105W	
178	Information and documents to be provided to Authority by licensed insurers and providers	Section 105X	
179	Licensed insurer and licensed provider reports	Section 105Y	
Division 2	Miscellaneous		
180	Application of this division	NEW	
181	Power of Supreme Court to deal with licensed insurers and licensed providers	Section 105Z	
182	Notification to Authority of certain defaults	Section 105ZA	
183	Proceedings for non-compliance	Section 105ZB	
184	Data required to be supplied to Authority by licensed insurers and licensed providers (HB ACT s 121C)	Section 121C	
Chapter 6	Certification of building work, subdivision work and specialist work (EPA Pt 6)		
Part 1	Preliminary		
185	Definitions	NEW	EPA s 6.1
186	Subdivision of land	NEW	EPA s 6.2
Part 2	Certifiers		
187	Functions of certifiers	NEW	EPA s 6.5
188	Directions by principal certifiers	NEW	EPA s 6.31
Part 3	General Requirements		
189	Requirements before building work or subdivision work commences	NEW	EPA s 6.6
190	Requirements before home building work commences (EPA Reg, ss 71 and 150)	NEW	EPA Reg Cl 71, 150

191	Work or activity that requires certificate	NEW	EPA s 6.3
Part 4	Certificates for building work		
192	Construction certificates	NEW	EPA ss 6.4, 6.7
193	Restriction on issue of construction certificate	NEW	EPA s 6.8
194	Occupation certificates	NEW	EPA ss 6.4, 6.9
195	Restrictions on issue of occupation certificates	NEW	EPA s 6.10
196	Effect of occupation certificate on earlier occupation certificates	NEW	EPA s 6.11
197	Owners building manual	NEW	EPA s 6.27
Part 5	Certificates for subdivision work and subdivisions		
198	Subdivision works certificates	NEW	EPA ss 6.4, 6.13
199	Restriction on issue of subdivision works certificate	NEW	EPA s 6.14
200	Subdivision certificates	NEW	EPA s 6.4
201	Restriction on issue of subdivision certificates	NEW	EPA s 6.15
Part 6	Work requiring compliance certificates		
202	Compliance certificates	NEW	EPA ss 6.4, 6.16
203	Persons who may issue compliance certificates	NEW	EPA s 6.17
204	Restriction on issue of compliance certificates	NEW	EPA s 6.18
Part 7	Certificates of compliance for specialist work		
Division 1	Preliminary		
205	Definitions	NEW	
Division 2	Notifiable work		
206	Certain specialist work must be pre-notified to Secretary	NEW	Plumbing and Drainage Act s 9
207	Emergency work does not have to be pre-notified	NEW	Plumbing and Drainage Act s 10
208	Notice of defective installation or system	NEW	Plumbing and Drainage Act s 11
Division 3	Inspection of specialist work		
209	Inspection of specialist work by Secretary	NEW	Plumbing and Drainage Act s 12
210	Responsible person to notify Secretary when work is ready for inspection	NEW	Plumbing and Drainage Act s 13
Division 4	Obligations to supply certificates of compliance and plans		
211	Person to give certificate of compliance after specialist work completed	NEW	Plumbing and Drainage Act s 15
212	Supply of plans	NEW	Plumbing and Drainage Act s 16
Division 5	Miscellaneous		

213	Obligation to prevent threats to public health or safety	NEW	Plumbing and Drainage Act s 17
214	Authorised fittings required for specialist work	NEW	Plumbing and Drainage Act s 8
Part 8	Duty of care		
215	Definitions	NEW	DBP s 36
216	Extension of duty of care	NEW	DBP s 37
217	Limitation on time when action for defective building work or subdivision work may be brought	NEW	
218	Economic loss—owners corporations and associations	NEW	DBP s 38
219	Duty must not be delegated	NEW	DBP s 39
220	No contracting out of Part	NEW	DBP s 40
221	Relationship with other duties of care and law	NEW	DBP s 41
Part 9	Appeals		
222	Appeals against failure or refusal to issue certificate	NEW	EPA s 8.16
223	Deemed refusal for purposes of appeal	NEW	EPA s 8.17
224	Regulations	NEW	
Part 10	Miscellaneous		
225	Crown subdivision, building, demolition and incidental work	NEW	EPA s 6.28
226	Certifiers may be satisfied of certain matters	NEW	EPA s 6.29
227	Assumption of compliance with conditions precedent to the issue of certificates	NEW	EPA s 6.30
228	Regulations	NEW	EPA s 6.33
229	Regulations—general	NEW	EPA s 6.6 (4A)
230	Regulations—smoke alarms in buildings providing sleeping accommodation	NEW	EPA s 6.34
Chapter 7	Miscellaneous		
Part 1	Premises affected by loose-fill asbestos insulation (HB ACT Part 8, Div 1A)		
231	Definitions	Section 119A	
232	Asbestos insulation register	Section 119B	
233	Warning signs	Section 119C	
Part 2	Offences		
234	Disclosure and misuse of information	Section 121	
235	Secrecy of information	Section 121A	
236	Offences by corporations	Section 137	
237	Onus of proof—reasonable excuse	NEW	
238	Penalty notices	Section 138A	
239	Proceedings for offences	Section 139	
Part 3	Miscellaneous		
240	Building Administration Fund	Section 114	
241	Service of documents	Section 123	
242	Exchange of information—Authority	Section 121B	
243	Exchange of information—Secretary	NEW	
244	Delegation	Section 122	
245	Personal Liability	Section 144	
246	Certificate evidence	Section 131	

247	Regulations	Section 140	
248	Review of Act	Section 145	

Appendix 3 – Alternative Text for Home Building in NSW: Customer Journeys

Home Building in NSW: Customer Journeys

Part 1 - Residential customer wanting to get work done

- 1) I want to get work done
- 2) Obtain consent (if needed)
- 3) Do I want to coordinate the work myself? (If yes, go to 3a, if no continue on to 4)
 - a) Obtain an owner builder permit
- 4) Engage licence holder
- 5) What is the value of the works?
 - a) Works are over 20k
 - i) Major works contract required
 - ii) Home Builders Compensation
 - b) Works are between \$5k and \$20k
 - i) Minor works contract
 - c) Work is less than \$5k
 - i) No minimum contract or insurance requirements
- 6) Appoint a principal certifier
- 7) Commence work
- 8) Critical stage inspections
- 9) Have works been completed? (If yes, go to 10, if no, go to 10a)
- 10) Is the quality of work satisfactory? (If no, go to 10a, if yes, works are completed)
 - a) Engage with the principal contractor / developer
 - i) Licence holder given the opportunity to remediate
- 11) Have the works been completed/remediated? (If yes, go back to 10, if no go to 12)
- 12) Commence dispute resolution through NSW Fair Trading
- 13) NSW Fair Trading have available Enforcement Powers under the BC&E Bill and Building Bill
- 14) Issue resolved? (If yes, works are remedied, if no go to 15)
- 15) Approval given to go to NCAT
- 16) Issue resolved? (If yes, works are remedied, if no go to 17)
- 17) Lodge HBCF claim

Part 2 - I want to do regulated work

- 1) I want to do regulated building work s12 Building Bill 2022
- 2) Person requires a licence
 - a) Fair Trading approves application (qualification and experience)
 - b) Person receives approval from the industry body which operates professional standards scheme that accredits practitioners
- 3) Licence issued by Fair Trading
- 4) Are you doing work which is covered by the DBP Act? (If yes, go to 4a, if no, go to 5)
 - a) Register with Fair Trading and complete regulated designs
- 5) Work commences
 - a) Notify regulator of works (only applies to electricians, plumbers)
 - i) Audit of work (for electricians, plumbers)

- 6) Is it a sole practitioner completing the work? (If yes, go to 7, if no go to 6a)
 - a) Licence holder directly supervises work and complies with supervision practice standards
- 7) Works to be completed in accordance with practice standard
- 8) Have works been completed? (If yes, go to 9, if no, go to 9a)
- 9) Is the quality of work satisfactory? (If no, go to 9a, if yes, works are completed)
 - a) Engage with the principal contractor / developer
 - i) Licence holder given the opportunity to remediate
- 10) Have the works been completed/remediated? (If yes, go back to 9, if no go to 11)
- 11) Commence dispute resolution through NSW Fair Trading
- 12) NSW Fair Trading have available Enforcement Powers under the BC&E Bill and Building Bill
- 13) Issue resolved? (If yes, works are remedied, if no go to 14)
- 14) Approval given to go to NCAT
- 15) Issue resolved? (If yes, works are remedied, if no go to 16)
- 16) Lodge HBCF claim