

Regulatory Impact Statement

Building and Construction Legislation Amendment Bill
2022

Building and Construction Legislation Amendment
Regulation 2022

'Amendment Bill RIS'

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Commissioner's Message

I am proud to present this Regulatory Impact Statement and proposed Building and Construction Legislation Amendment Bill 2022 and Building and Construction Legislation Amendment Regulation 2022.

The NSW Government's Construct NSW reform agenda is transforming the NSW building and construction sector to put quality and the customer at its centre. The Government has already commenced significant reforms to hold developers, builders and designers accountable for their work. The next tranche of reforms will focus on enhancing consumer protections, strengthening enforcement powers, ensuring trade practitioners are suitably skilled, reinforcing accountability for the supply of compliant and safe building products and ensuring fair and prompt payment.

A central theme of Construct NSW is the making of a 'trustworthy building' – buildings that can be relied upon to provide the occupants with safety and amenity. The players who make them must be the most capable. Customers who buy them must be confident to own and occupy them.

The proposed reforms in this Bill and Regulation are part of the next phase of the Construct NSW reform agenda. These changes support a more customer-centric building industry through comprehensive use of proactive compliance, using digital solutions and data to inform interactions between government, industry and consumers, and making clear the standard of work that must be met and who is accountable for meeting it.

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

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

Natasha Mann

Commissioner for Fair Trading

Glossary

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

Term	Description
2019 Government Response	The NSW Government Response to the <i>Building Confidence Report (BCR)</i> commissioned by the national Building Ministers' Forum.
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 (NCC)</i> .
ACL	Australian Consumer Law – national law to protect consumers set out in Schedule 2 of the <i>Competition and Consumer Act 2010</i> .
ADI	Authorised Deposit-Taking Institution – means an authorised deposit-taking institution within the meaning of the <i>Banking Act 1959</i> (Commonwealth).
Amendment Bill	The draft Building and Construction Legislation Amendment Bill 2022.
Amendment Regulation	The draft Building and Construction Legislation Amendment Regulation 2022.
ANA	Authorised Nominating Authority – means a person authorised by the Minister under section 28 of the <i>Building and Construction Industry Security of Payment Act 1999</i> to nominate persons to determine adjudication applications.
APA	Authorised Professional Association – bodies which establish and maintain a strata inspector panel for building work of a particular kind under the <i>Strata Schemes Management Act 2015</i> .

<p>Authorised officers</p>	<p>Authorised officers include employees of the Department of Customer Service, council investigation officers and other persons prescribed by regulation that exercise compliance and enforcement functions.</p> <p>Additional people can be authorised officers for matters relating to the <i>Building Products (Safety) Act 2017 (BPS Act)</i> including Government Department employees from the Environmental Protection Authority, Department of Planning and Environment, and Fire and Rescue NSW, as well as a member of permanent fire brigade or an employee of a local council.</p>
<p>BCA</p>	<p>Building Code of Australia – contained within the <i>National Construction Code (NCC)</i> and provides the minimum necessary requirements for safety, health, amenity and sustainability in the design and construction of new buildings (and new building work in existing buildings).</p>
<p>BCE Bill</p>	<p>Building Compliance and Enforcement Bill 2022 – proposed legislation governing compliance and enforcement of the building and construction industry.</p>
<p>BDC Act</p>	<p><i>Building and Development Certifiers Act 2018.</i></p>
<p>BPS Act</p>	<p><i>Building Products (Safety) Act 2017.</i></p>
<p>Building Bill Building Act</p>	<p>Building Bill 2022 – proposed legislation governing building licences which will replace the <i>Home Building Act 1989</i>.</p>
<p>Building Confidence Report (BCR)</p>	<p><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.</p>
<p>BWRO</p>	<p>Building work rectification order – under the <i>Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020 (RAB Act)</i>.</p>

CC	Construction Certificate – confirms that the construction plans and development specifications are consistent with the development consent, and comply with the Building Code and any other council requirements.
Class 2 building	<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>
Close associate	Has the same meaning as clause 5 of Schedule 1 of the Home Building Act 1989 .
CodeMark	The CodeMark Certification Scheme – a voluntary third-party building product certification scheme, administered by the Australian Building Codes Board (ABCB). CodeMark is designed to provide confidence and certainty to regulatory authorities and the market, through the issue of a Certificate of Conformity.
Collins Inquiry	2012 Independent Inquiry into Construction Industry Insolvency in NSW by Mr Collins QC, commissioned by the NSW Government. The Inquiry examined the extent and causes of insolvency in the NSW construction industry and what reforms were needed to minimise the adverse effects of insolvency on subcontractors.
Commonwealth Government Inquiry	An inquiry into the effects of non-conforming building products on the Australian building and construction industry led by the Australian Government Economics Committee in December 2018.

Construct NSW	A strategy led by the Office of the Building Commissioner (OBC) which focuses on six areas of industry reform: regulation, ratings, education, contracts, digital tools, and data and research. It aims to provide industry and regulatory transformation needed to restore consumer confidence in residential apartment buildings.
CPD	Continuing professional development – aims to assist practitioners to gain new skills and knowledge, remain up to date with technical, legislative and regulatory changes and, build upon existing knowledge and skills.
DBP Act DBP Regulation	<i>Design and Building Practitioners Act 2020.</i> Design and Building Practitioners Regulation 2021.
EP&A Act EP&A Regulation	<i>Environmental Planning and Assessment Act 1979.</i> Environmental Planning and Assessment Regulation 2021.
Expected Completion Notices (ECNs)	A developer with building work that is approaching completion must give notice of the date they plan to apply for an Occupation Certificate (OC) . This notice is called an Expected Completion Notice. Notice must be given, under the Residential Apartment Buildings (Compliance and Enforcement) Powers Act 2020 (RAB Act) , between 6 and 12 months before applying for an OC.
Fiocco Report	Report to the Western Australian Minister for Commerce ‘Security of Payment Report in the WA Building and Construction Industry’ written by John Fiocco dated October 2018.
FTE	Full time equivalent – is a unit that indicates the workload of an employed person in a way that makes workloads or class loads comparable across various contexts.
HB Act	<i>Home Building Act 1989.</i>

HoustonKemp Economics Report	Report commissioned by the then Department of Finance, Services and Innovation dated April 2019 prepared by HoustonKemp Economics titled ' <i>Financial impacts of statutory trusts in the building and construction industry</i> '.
LMS	The Construct NSW Learning Management System. The Office of the Building Commissioner (OBC) have partnered with TAFE NSW to proactively address skills and learning gaps in the construction sector by creating, sponsoring and approving training courses.
Murray Report	The Federal Government commissioned the national Review of Security of Payment Laws to identify legislative best practice, examine ways to improve consistency in security of payment legislation and enhance protections to ensure subcontractors get paid on time for work they have done. The report prepared by John Murray AM dated December 2017 was commissioned by the then Minister for Small and Family Business and titled 'Review of Security of Payment Laws: Building Trust and Harmony'.
NCAT	NSW Civil and Administrative Tribunal.
NCBP	Non-conforming building products – building products that claim to be something they are not, do not meet required standards for their intended use, or are marketed or supplied with the intent to deceive those who use them.
NCC	National Construction Code – a performance-based code containing all performance requirements for the construction of buildings.
NSW Planning Portal	The digital portal where documents such as regulated designs and compliance declarations will be lodged.
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 part of building or a change of building use for an existing building.

OC Audits	Occupation Certificate (OC) audits. An OC audit involves a review of designs and documents (including contracts) for building work as well as a physical onsite inspection(s). OC audits are a process designed to reduce the risk of poorly constructed buildings being delivered to the consumer.
PCA	The Plumbing Code of Australia contained within the National Construction Code (NCC) and contains the technical provisions for the design, construction, installation, replacement, repair, alteration and maintenance of: <ul style="list-style-type: none"> • water services • sanitary plumbing and drainage systems • stormwater drainage systems • heating, ventilation and air conditioning systems • on-site wastewater management systems • on-site liquid trade waste management systems.
PIN	Penalty infringement notice – requires a person to pay a sum of money as a result of breaching a law.
RAB Act	<i>Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020.</i>
PSS	Professional Standards Scheme – a scheme approved by the Professional Standards Council within the meaning of the <i>Professional Standards Act 1994</i> .
RIS	Regulatory Impact Statement.
SBBIS	Strata Building Bond and Inspections Scheme. Under the SBBIS, developers of new apartment buildings 4 storeys or higher must pay a building bond to NSW Fair Trading equal to 2% of the total price paid or payable of all contracts for the building.
Secretary	Secretary of the Department of Customer Service.
Security of Payment Guide	Guidance material prepared by the Department of Customer Service to provide an easy-to-read document on key aspects of the Security of Payment legislation.

	https://www.fairtrading.nsw.gov.au/_data/assets/pdf_file/0011/975008/Security-of-Payment-Guide.pdf
SOP Legislation SOP Act SOP Regulation	Collective meaning of <i>Building and Construction Industry Security of Payment Act 1999 (SOP Act)</i> and the Building and Construction Industry Security of Payment Regulation 2020 (SOP Regulation).
SSM Act	<i>Strata Schemes Management Act 2015.</i>
The Department	The Department of Customer Service.
The regulator	NSW Fair Trading/Office of the NSW Building Commissioner.
WaterMark	WaterMark is a product certification scheme. It is a mandatory national scheme for the certification of plumbing and drainage products. It is administered by the Australian Building Codes Board and detailed in the <i>Plumbing Code of Australia (PCA)</i> .
WDN	Written Directions Notice is a compliance tool available to principal certifiers under the <i>Environmental Planning and Assessment Act 1979 (EP&A Act)</i> .

Executive summary

The proposed Building and Construction Legislation Amendment Bill 2022 (**Amendment Bill**) and the Building and Construction Legislation Amendment Regulation 2022 (**Amendment Regulation**) will amend existing legislation to strengthen the laws supporting the building and construction industry.

The Amendment Bill and Regulation are part of the NSW Government's reform agenda to restore confidence in the NSW construction sector and improve the effectiveness of compliance and enforcement systems for the building and construction industry in NSW.

Key proposals featured in the Amendment Bill and Amendment Regulation include:

- introducing new responsibilities on persons in the building product supply chain to ensure they are accountable for safe and suitable building products,
- more protections for property owners by ensuring developers rectify defective building work,
- strengthening the adjudication processes for building work payment claim disputes,
- allowing certifier bodies that operate a Professional Standards Scheme (**PSS**) to play a role in the registration of certifiers,
- creating a cost-recovery mechanism for compliance and investigation work related to building work,
- enabling inspectors to impose orders for training instead of penalties,
- improve professional standards and competencies in the industry through standardising continuing professional development (**CPD**),
- requiring more projects to retain money in trust to provide surety of payment for those carrying out building work.

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

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

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

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

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

Consultation process

Making a submission

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

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

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

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

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

Please forward submissions by:

Email to: HBAreview@customerservice.nsw.gov.au

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 a copy of the RIS, Amendment Bill and Regulation from the Have Your Say website. Printed copies can be requested from NSW Fair Trading by phone on 13 32 20.

Important note: release of submissions

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

Identified stakeholders

The RIS has been provided directly to some stakeholder organisations.

Evaluation of submissions

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

Presentation of Bill in Parliament

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

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

Details about the proposed commencement of each reform is detailed in the RIS.

Objective and rationale of the Bill and Regulation

Need for government action

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

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

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

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

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

The building and construction industry also suffers a high incidence of insolvencies compared to other industries in NSW. While market forces play a part, there are other factors including serious

¹ Prohibition Order – 9 Hassell Street Parramatta
https://www.fairtrading.nsw.gov.au/_data/assets/pdf_file/0015/1003821/Hassall_Developments_Pty_Ltd_9_Hassall_St_Parramatta_Prohibition_Order.pdf

² Prohibition Order – 299-309 Old Northern Road, Castle Hill
https://www.fairtrading.nsw.gov.au/_data/assets/pdf_file/0009/992421/FINAL_PO_JKN_Hills_Pty_Ltd.pdf

imbalances of power in contractual relationships, unconscionable behaviour and unlawful and criminal conduct such as illegal phoenixing.

A major thrust of recent reforms introduced by the *Design and Building Practitioners Act 2020* (**DBP Act**) aims to reshape the culture of the building and development sector and squeeze out poor performance and improve building quality. These reforms are still working their way through the system, and it will be some years before their impact can be fully assessed.

This Amendment Bill will enhance the operation of existing statutory regimes and introduce a number of new requirements, all designed to ensure that all persons involved in building and construction are held accountable for their work. The Amendment Bill is a necessary and detailed component of the building and construction industry framework in NSW.

Objective of government intervention

The objects of the Amendment Bill are to:

- ensure building products used in NSW are safe and suitable for use,
- improve customer protection by enhancing the remedies for the rectification of building defects and enable certifiers to play a more proactive role in managing the remediation of defects,
- ensure quality builds and designs and reducing the likelihood of defective buildings being passed onto consumers,
- better promote fairness between the parties and strengthen protections for secure and prompt payment,
- strengthen compliance and enforcement across building laws and introduce a cost-recovery model where the Secretary needs to engage third party expertise or resources for investigations,
- promote accountability for wrongdoing by corporate entities operating in the building and construction industry, and
- impose a proactive obligation on licence holders to respond appropriately to unethical and/or unlawful conduct such as illegal phoenixing.

Discussion and assessment of options

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

This RIS will discuss the proposed reforms under the following key themes:

1. **Ensuring building products are safe and suitable** – proposed amendments to the ***Building Products (Safety) Act 2017 (BPS Act)*** to impose responsibilities on everyone in the building product supply chain, including designers, manufacturers, importers, suppliers and installers, to ensure building products are compliant and fit for their intended purpose.

2. **Enhancing rectification of strata buildings** – proposed amendments to the ***Strata Schemes Management Act 2015 (SSM Act)*** and supporting regulations to enhance the operation of the Strata Building Bond and Inspections Scheme (**SBBIS**) by:
 - a. Expanding the use of the building bond provided by developers to rectify defects identified in the final inspection report.
 - b. Penalising people for falsely representing themselves as building inspectors.
 - c. Making the requirements for the appointment of Authorised Professional Associations (**APAs**) and building inspectors more transparent.
 - d. Phasing out the transitional arrangement initially provided for developers to transition into the scheme.

3. **Improving professional standards and competencies** – proposed amendments to ensure practitioners are suitably competent to operate in the industry and actively seek to maintain, improve and broaden their knowledge, expertise and competence, including:
 - a. Recognising skills assessments from associations operating with a PSS for the registration of certifiers under the ***Building and Development Certifiers Act 2018 (BDC Act)***.
 - b. Standardising approaches to CPD across all building and construction-related functions.
 - c. Enabling inspectors to impose an order to undertake a training or education course instead of issuing a penalty infringement notice (**PIN**).

- 4. Ensuring fair and prompt payment** – proposed amendments to ***Building and Construction Industry Security of Payment Act 1999 (SOP Act)*** and supporting regulations to better promote fairness between the parties and strengthen protections for secure and prompt payment, through:
- a. Requiring payment claims to owner occupiers to attach a Homeowners Notice information to help them understand their obligations in responding to a payment claim and the consequences of not doing so.
 - b. Extending protections by requiring retention money to be held in trust for projects with a value threshold of \$10 million.
 - c. Strengthening the powers for adjudicators to arrange for the testing of, and engage experts to investigate and report on, relevant matters for the adjudication.
 - d. Establishing a right for claimants and respondents to apply for a review of an adjudication determination.
- 5. Robust regulatory intervention** – proposed amendments to strengthen the regulator’s compliance and enforcement powers to proactively respond to risks on construction, including:
- a. Expanding the scope of certifier powers to require the rectification of defects as an early intervention tool during construction under the ***Environmental Planning and Assessment Act 1979 (EP&A Act)***.
 - b. Expanding the scope of the regulator’s powers to require the rectification of defects arising out of noncompliance with the Plumbing Code of Australia (***PCA***) or other relevant specifications or standards under the ***Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020 (RAB Act)***.
 - c. Allowing NSW Fair Trading to attempt to resolve disputes, under the ***Home Building Act 1989 (HB Act)***, for strata building work prior to the appointment of a building inspector under the strata building bonds inspection scheme.
 - d. Clarifying and making consistent the operation of the privilege of self-incrimination for individuals and corporations in relation to investigations of corporate wrongdoing.
 - e. Imposing a duty on practitioners to take reasonable steps to not form business associations with individuals who have engaged in intentional phoenix activity.
 - f. Allowing the recovery of reasonable costs and expenses associated with investigating non-compliance.

Other building reforms

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

The Building Bill will

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

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

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

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

1. Ensuring building products are safe and suitable

Ref: Amendment Bill, Schedule 1 (Amendments relating to building product safety)

Under the current building regulatory framework significant parts of the building product supply chain do not hold the same levels of accountability for their work as others. Licensed builders that install products at the end of an often complex supply chain are faced with high penalties for non-compliance, while individuals who produce or supply products bear little responsibility. These individuals, therefore, may have reduced incentives to create products that are safe and fit-for-purpose.

Builders and others (such as designers or certifiers) often rely on information or representations from suppliers, manufacturers or importers about the suitability of building products to ensure they are used for the intended purpose. At present, there is insufficient onus and accountability on the manufacturers and suppliers of products about how the products comply with relevant standards and how to use the product in a compliant way. This limits the ability of building regulators to protect the public and makes civil legal action difficult or unviable.

The current lack of information flow creates a significant imbalance in the industry. If the obligations for each party are clear, when something goes wrong, this makes it easier for people to exercise their private rights against the wrongdoer. Ensuring everyone has the information they need to do their role effectively will also flow on to the consumer at the end of the supply chain to ensure products are correctly maintained.

This issue has been highlighted by the implementation of the DBP Act, which introduces a statutory duty of care for building work and requires design compliance declarations for all building elements and performance solutions³ before construction begins on certain building work. The effect is to impose clearer obligations on certain designers who are holding out that if designs are followed, including the use of specific products, that compliance with relevant standards, including the BCA, will be met.

As these practitioners are rarely, if ever, involved in the design, manufacture or testing of these products, they are relying on the declarations of people in the supply chain who are not subject to clear obligations, but who may be imposing significant risk to the practitioner that uses their product.

³ Definition, *Building Code of Australia, Volume 1, Part A2, A **performance solution** is achieved by demonstrating compliance with all relevant Performance Requirements or the solution is at least equivalent to the Deemed-to-Satisfy Provisions.*

The BPS Act currently provides the Secretary with powers to prohibit the use of certain building products. In August 2018, the Secretary issued a building product use ban to prohibit the use of aluminium composite panel with a core greater than 30% polyethylene in any external cladding, wall, insulation facade or rendered finish. The core material can contribute to how easily the cladding burns and its potential to spread fire. The imposition of the ban directly supported the work of the NSW Cladding Taskforce to identify buildings with potentially combustible cladding. The Taskforce audited 185,000 building records and has inspected 4182 building. A total of 391 buildings are under review, assessment or remediation.⁴

Schedule 1 of the Amendment Bill will expand requirements in the BPS Act to also restrict the supply of building products that are deemed to be 'non-conforming' building products (**NCBPs**). This will address a gap in protections offered to practitioners and consumers, as currently there is not a remedy under the Australian Consumer Law (**ACL**) as building products are generally not covered as consumer goods.

The concept of 'non-conforming' (**clause 7A**) refers to building products that:

- fail to meet the National Construction Code (**NCC**), standards or legislation
- do not possess the characteristics they are represented to have by a person in the chain of responsibility, independent of how they are used
- are not suitable or safe in relation to a particular use.

For example, a building product that is labelled or described as being non-combustible, but is combustible is a NCBP. Alternatively, a building product that is combustible, and described as such, but used in a situation where a non-combustible product is required under the NCC, is also a NCBP.

These categories will enable the Department to take steps to prevent the use of unsafe building products and limit the use of otherwise compliant building products in an unsafe way. Building products can be individual items or part of a batch, brand or class.

An example of an NCBP is the 'Infinity' brand electrical cables, which were widely distributed in the marketplace in 2013 but failed to meet mandatory electrical safety standards.

⁴ NSW Cladding Taskforce, <https://www.nsw.gov.au/projects/nsw-cladding-taskforce>.

In 2018 the Commonwealth Government conducted an inquiry into the effects of NCBPs on the Australian building and construction industry (**Commonwealth Government Inquiry**).⁵ The report presented a range of examples of NCBPs, including electrical, lighting, plumbing/water, wood, steel, and vinyl/PVC. Examples from submissions showed that the use of NCBPs is increasing. This was determined by the increase in the number of issues being raised, the number of counterfeit versions of products in the market, imported products that did not comply with Australian Standards, fraudulent documentation with flawed testing and reported conducts overseas. It was not only the safety risk arising from the use of these products causing harm, but in many circumstances the cost of faulty products being passed on to the consumer.

One example provided by the Building Products Innovation Council was the replacement of sub-standard glass, from an overseas supplier, at the 150 Collins St building project in central Melbourne which was estimated to cost \$18 million.⁶ The Australian Glass and Glazing Association noted that the manufacture of safety glass is one of the main areas of potential risk of non-conforming glass products.⁷ Of particular concern is the safety risk for glass processors and installers where glass has not been toughened appropriately and can therefore break more easily when it is handled, thus posing a risk of injury.

Responsibilities for persons in the building product supply chain

The Amendment Bill, **Part 2A**, proposes imposing a range of duties on persons who form part of a building product supply chain, including:

- any person who designs, manufactures, imports or supplies building products
- any person who designs, drafts or writes any plans or specifications for a building or any part of a building and recommends or incorporates the use of building products (for example, architects, building designers and engineers)
- any person who installs or does building work where a building product is used, including those who physically do the work and those who coordinate or supervise the doing of the work.

⁵ Senate Economics Reference Committee, *Non-conforming building products: the need for a coherent and robust regulatory regime*, December 2018,

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Non-conforming45th/Report

⁶ Senate Inquiry into the effects of non-conforming building products on the Australian building and construction industry, Submission No. 83 from Building Products Innovation Council.

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Non-conforming45th/Submissions

⁷ Senate Inquiry into the effects of non-conforming building products on the Australian building and construction industry, Submission No. 24 from Australian Glass and Glazing Association

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Non-conforming45th/Submissions

Directors of companies will be captured in the building product supply chain when involved.

The primary duty of each person in the building product supply chain will be to not design, supply, manufacture or install a NCBP. For example, if a person intends to use a building product for a particular purpose, they must be satisfied that it is suitable for that particular purpose. This could mean that they must satisfy themselves that their product is compliant with each applicable standard called up by the NCC.

Secondly, a person in the building product supply chain must provide certain information to accompany a building product as it passes from them to the next person in the chain. Ideally, this would mean that the information about a product is made available by manufacturers, suppliers or importers, or supplied with the product so that other parties in the chain can attest to the suitability of the product for the intended use.

A person in the building product supply chain will be required to make available certain information about building products (far as practicably possible), including but not limited to:

- the suitability of the building product for its intended use
- how the building product meets the relevant Australian Standards for the intended use or where there are no relevant Australian Standards, appropriate international standards or authoritative industry sources that should be utilised
- any particular circumstances, conditions or restrictions where the building product may be safely used such as only internal areas or not above certain heights
- instructions to explain how the building product is to be installed such as types of fasteners, adhesive or mounting system
- instructions on how the building product must be used to remain compliant with the NCC.

For example, cladding that can only be used below certain heights must have this specified.

An example of information may be the manufacturers' instructions for external cladding or a product statement describing its use. An example of evidence that a product conforms to the NCC would be a CodeMark or WaterMark Certificate of Conformity.

Manufacturers need to be aware of the requirements of compliance and conformance of their products and materials and the evidence required to demonstrate compliance with the NCC, standards and state laws. They must supply the conformance information including any limitations for each product and material they produce. Some products or materials (such as consumer gas and electrical products) have specific requirements to demonstrate safety and suitability before they can be sold.

Importers, wholesalers and suppliers will need to ensure that the products and materials that they give to another person meets industry-specific requirements for safety or performance. They must also be able to supply the conformance information including any limitations for each building product and material.

Architects, building designers, engineers and other specialists involved in the planning and design of buildings must ensure that any products, materials or systems specified or approved for use in their designs are appropriately approved, 'fit for purpose' and meet the performance requirements relevant to their use.

Installers and builders who do the building work are responsible for ensuring that information demonstrating the compliance of purchased and installed materials comply with the certification documents/building approval. This documentation should be kept with the contract documentation and provided to the building owner on completion of the building work.

This will provide transparency around the intended use of a building product and prohibit certain products from being labelled as suitable for a certain use in instances where they are not. Failure to comply with these duties will be an offence. Where someone else in the building product supply chain fails to provide the information, the liabilities of other people in the chain are not diluted. Where a person is not provided with the information, they should seek that information and ensure that the product information is passed onto the next person in the chain to remedy the issue.

It is proposed that the regulations can extend and limit the type of information to be provided, as well as provide for the form or manner in which information must be given (for example, in advertising or packaging for the product).

Finally, consistent with moves for the industry to be invested in remedying issues in the sector, duties will be imposed on persons in the building product supply chain to report to the Secretary the use of a NCBP, and events where the use of these products has had an impact, such as death or serious injury. Failure to report to the Secretary will be an offence, with a penalty to apply for each day the offence continues.

The ability to extend the class of persons included in the building product supply chain by regulations is also proposed to ensure that new participants in the supply chain can be captured over time. This is particularly relevant given the rapid pace of changes in technology and processes in the construction industry. The regulations will also allow exemptions to be made in relation to a person or class of persons which are not captured, or the circumstances in which a person or class of persons will not be captured.

Secretary powers

The current BPS Act enables the Secretary to issue a **building product use ban** to prohibit the use of building products that may pose a safety risk causing death or serious injury to occupants. In addition to prohibiting the use of a building product, the BPS Act enables affected buildings to be identified and for an order to be imposed on the owner to rectify the building by eliminating or minimising the risk.

The Secretary has the power under the BPS Act to require a manufacturer or supplier of a building product to conduct a product assessment if it is believed that the product is unsafe and may authorise an investigation into the use of building products that may be unsafe. Authorised officers have the power to examine or inspect anything, make inquiries or tests, or take and remove samples of a product. Authorised officers will also have the power to direct a person to do or not do something if the authorised officer reasonably believes it is necessary to eliminate or minimise a safety risk posed by a building product. This may be a direction to cease using or supplying a building product, cease using a product in a specific way or a direction to render a building product incapable of use or operation to prevent the use of a building product in a way that poses a safety risk or eliminate or minimise the safety risk.

The objective of the Amendment Bill is to close gaps in legislative coverage for unsafe building products, which are not adequately covered under the existing BPS Act and consumer protection laws. The powers that will be provided to the Secretary will allow prompt and efficient action to be taken to prevent the supply of unsafe building products.

To ensure building products used in building work are safe and fit for purpose, the Amendment Bill proposes giving the Secretary additional powers, including powers to issue warnings about a building product or issue a supply ban or building product recall.

The Secretary will be able to issue a **building product warning notice** about any possible NCBPs, or building products used in a building which may pose a safety risk (**Division 2, Part 3**). The warning notice will be published on the internet to make the public aware of the risks associated with using a particular building product. Persons in the building product supply chain will be required to be aware of published warnings and be cautious or refrain from using or supplying these products.

An example of a warning notice might relate to an engineered wood product which has been identified as having high formaldehyde emissions. Formaldehyde is a known carcinogen, and the National Industrial Chemicals Notification and Assessment Scheme has made recommendations on the maximum emission levels of exposure. The Scheme noted in the Commonwealth

Government Inquiry that "...as it is significantly cheaper to manufacture wood product/board from glues that emit higher levels of formaldehyde, there is an economic driver toward non-conformance of branded emission class. This affects the safety during construction (e.g. cabinetry manufacture where workers are exposed to fresh product for longer periods of time) and occupants of buildings".⁸

Where the Secretary is reasonably satisfied that a building product is non-conforming, the Secretary may issue a **building product supply ban** for a product that is a NCBP subject to prescribed grounds, which include where there is no safe use for the product or where there is a misrepresentation about its suitable use (**Division 3, Part 3**). Contravention of a ban will be an offence with strong penalties designed to align with the existing penalties in the BPS Act and the ACL. This will ensure a consistent approach to product safety in NSW and provide a strong incentive for people to comply or risk facing a large penalty.

An example of a supply ban might relate to particular taps that have been tested and confirmed to have high levels of lead. For example, a kitchen tap sold by Aldi was tested to reveal dangerous levels of lead. The tap was sold to 12,000 households nationally in June 2016 and 2017.⁹ In this instance, further testing undertaken by Aldi revealed the tap to be safe. Should the test results show unacceptable levels of lead then it may have resulted in a building product supply ban.

The Amendment Bill will provide powers to the Secretary to issue a **building product recall notice** about a NCBP (**Division 5, Part 3**). The issue of a compulsory recall will be limited to certain instances where the building product is a NCBP and there is a safety risk arising from a reasonably foreseeable use of the building product in a building. If a compulsory recall is issued, the Secretary can immediately alert the community of safety concerns and enforce the withdrawal of products without delay from the supply chain and the marketplace.

Further, a person in the building product supply chain that identifies a product as non-conforming, forms the view that it may foreseeably be used or misused in a manner likely to result in injury or is subject to a building product supply ban, can issue a notice of voluntary recall to the Secretary.

As a further deterrent for repeat offenders, the Secretary will have the power to apply to the NSW Supreme Court for a **trading prohibition order** in instances where an individual has engaged in

⁸ Senate Economics Reference Committee *Non-conforming building products: the need for a coherent and robust regulatory regime*, 4 December 2018, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Non-conforming45th/Report/Committees/Senate/Economics/Non-conforming45th/Report

⁹ John Rolfe, 'A kitchen tap sold by Aldi has been found to contain dangerous levels of lead', News Corp Australia Network, 16 December 2017 <https://www.news.com.au/finance/business/retail/a-kitchen-tap-sold-by-aldi-has-been-found-to-contain-dangerous-levels-of-lead/news-story/bdba66667e0d15fe0e6a9fa0d7c8506d>

unlawful conduct on more than one occasion and is likely to do so again (**Division 3, Part 6**). This will restrict repeat offenders from engaging in any potentially harmful conduct and incentivise suppliers, manufacturers, distributors or other persons in the building product supply chain to act in an appropriate and accountable manner. In addition, any person who fraudulently provides false or misleading information about a building product with the intention to gain a financial advantage will be guilty of an offence.

The existing parts of the BPS Act relating to the identification and rectification of affected buildings, building product undertakings, search warrants and investigation powers of the Secretary and authorised officers will be extended to cover the new framework of NCBPs.

For example, buildings that have products that are subject to a building product supply ban or a building product recall can be identified and subsequently rectified and the Secretary will have the powers to accept an undertaking to rectify a building to eliminate or minimise a safety risk posed by the building product.

The Secretary has an existing power to request a manufacturer or supplier to conduct a product assessment if the Secretary suspects the use of the building product is unsafe. This will also be expanded to determine if the building product is a NCBP.

The Amendment Bill will expand the powers of the Secretary and authorised officers, to seize building products that are believed to be a safety risk or NCBP.¹⁰ Anything that is seized will be subject to a number of provisions to ensure that it is appropriately dealt with or otherwise forfeited where the return of the thing is not justified (such as if the thing is damaged during testing).

Queensland reforms

In 2017, the *Queensland Building and Construction Commission Act 1991* was amended by the Building and Construction Legislation (Non-conforming Building Products – Chain of Responsibility and Other Matters) Amendment Bill 2017. The amendments introduced responsibilities on building product supply chain participants to ensure building products are safe and fit for the intended use. The Queensland Building and Construction Commission (**QBCC**) was given investigative powers to address instances of NCBPs.

NCBPs are reported through an online complaints system, identified as a result of safety incidents or by competitors. In the last financial year to June 2021, 247 NCBPs were reported, a substantial

¹⁰ Refer to Part 3 Investigations in the Building Compliance and Enforcement Bill 2022.

increase from the 127 reported the previous financial year.¹¹ Between 1 November 2017 and 30 June 2021, a total of 697 complaints and enquiries were received about potential NCBPs with 645 investigations closed. This has resulted in 24 products being determined to be a NCBP and only one recall issued during this time.

The QBCC has been proactive in providing information to the industry with information sessions, social media and web page information and are planning to do education sessions on this topic. QBCC advised that the reporting framework was released with limited fanfare resulting in low reporting numbers. However, with the introduction of specific education programs and initiatives as mentioned above, the program is gaining momentum.

The model used for the Amendment Bill has been developed taking into consideration previous issues identified in developing the original NSW Act and the framework that has been established and operating in Queensland.

National Building Product Assurance Framework

The Building Confidence Report (**BCR**), published in April 2018, made 24 recommendations to address systemic issues in the Australian construction industry. The Australian Building Codes Board (**ABCB**) was tasked by Building Ministers from all States and Territories to work with governments and industry to respond to the recommendations with a focus on national consistency where possible. Building Ministers provided in principle support to review their building regulatory frameworks to address NCBPs.

To address the BCR recommendation to establish a compulsory product certification system for high-risk products, the ABCB has developed the National Building Product Assurance Framework. The framework is supported by the Guide to Australian Building Product Conformity¹² which assists all persons in the building product supply chain in understanding the risks of using substandard products or using them incorrectly.

The framework was developed as a model for jurisdictions to use with a view of providing national consistency. This can only be achieved through legislative reforms. The framework has been considered in the development of the Amendment Bill and consistency provided where possible.

¹¹ QBCC Annual Report 2020-2021, page 15,

<https://www.qbcc.qld.gov.au/sites/default/files/2021-10/publication-qbcc-annual-report-2020-2021.pdf>

¹² ABCB, *A Guide to the Australian Building Product Conformity*, April 2018

https://abcb.gov.au/sites/default/files/resources/2020//A_Guide_to_Australian_building_product_conformity.pdf

Prefabricated buildings

The current building legislation focuses on on-site construction and not construction that is carried out off-site. Prefabricated or manufactured homes have typically been treated as a 'product' rather than the work involved being treated as 'construction work'. This results in limited building assurance for consumers and no requirements on manufacturers to hold a licence for the construction of the building.

The new Building Bill proposes to introduce a regulatory framework for prefabricated or manufactured buildings by capturing prefabricated work as 'building work'. For further explanation on these reforms please refer to Volume 2 of the Building Bill RIS.

These changes will mean that the duties that will be imposed on persons in the supply chain for building products will also apply to the construction of a prefabricated building. For example, the same duties will apply to the builder when using the building material in the construction of the prefabricated home or the concrete slabs used in the construction of a commercial building.

What are the burdens and benefit of the reform?

The NSW Government does not currently have adequate or tailored powers to monitor or restrict the supply of building products that pose a risk to human safety or major defects in buildings and building works. Current regulatory controls do not extend beyond electrical, gas and plumbing products.

Regulators operating under the ACL monitor a broad range of general consumer goods and services, but the scope of the ACL does not adequately cover the diverse range of building products and systems used in modern construction. For example, most building products, particularly building materials and specialist trade products, are not captured by the ACL as they are not used for personal, domestic or household use or consumption.

Further, there is a high incidence of building products in the market that are not compliant with the standards set out in the NCC or relevant Australian Standards, resulting in inferior and sometimes dangerous products being used in the construction of buildings.

An example provided in submissions to the Commonwealth Government Inquiry was of the electrical components in SmartSpace Kit Homes supplied by Bunnings prior to July 2015 which have since been the subject of a product recall for risks posed by failing to comply with required ageing tests of AS/NZS 5000.2. The submission noted the insulation could become prematurely

brittle with age, which could see the insulation breaking and exposing live conductors, resulting in possible electric shock or fires.¹³

The submission to the Inquiry provided by the Australian Steel Institute highlighted observable defects such as substandard welding that needed to be ground out and replaced, laminations in plate that could cause catastrophic failure and substandard corrosion protection affecting the life of an asset. They also identified deliberate fraudulent behaviour with examples such as falsified test certificates, welds made with silicone rubber and then painted, attachment of bolt heads with silicon rather than a through bolt and water filled tube to compensate for underweight steelwork with fraudulent claims that their products meet particular Australian Standards.¹⁴

Some building products that may be compliant, may be used in a non-compliant manner which can result in unacceptable risks to safety.

While the DBP Act poses obligations on some persons in the supply chain, the reforms proposed in the Amendment Bill will expand on these obligations making all persons in the building chain accountable. This will lead to higher building product standards, greater attention given to the intended use of products in the construction industry, more effective regulatory enforcement and ultimately safer buildings.

Enforcement of the new provisions will demonstrate to industry and consumers the seriousness of the risks associated with the use of NCBPs and act as a deterrent to manufacturers and suppliers.

The Amendment Bill will reinforce obligations on individuals in the supply chain, such as requirements for products to comply with the NCC, to ensure that building products are compliant with regulatory standards and are fit for purpose.

The Department recognises that the majority of persons in the supply chain already undertake, and would continue to undertake, due diligence and therefore would not have to make any changes to their business practices to ensure compliance. There may be added burdens placed on persons in the supply chain who will now have a duty to provide certain information or make it available for a building product where this has not been previously required. This is likely to be the case for

¹³ Senate Economic Reference Committee, *Inquiry into the effects of non-conforming building products on the Australian building and construction industry*, Examples of non-conforming building products - Chapter 2 – Parliament of Australia https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Non-conforming45th/Report/c02

¹⁴ Senate Economic Reference Committee, *Inquiry into the effects of non-conforming building products on the Australian building and construction industry*, Submission No. 19 from Australian Steel Institute https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Non-conforming45th/Submissions

persons installing building products being required to provide information to home and building owners.

It is expected that a builder may use the same or similar products for a number of construction projects and would only need to obtain the information in the first instance. It may be provided to the home or building owner as hardcopy instructions or referrals to the manufacturer or supplier website that contains the relevant information. The advantage of providing this to the owner is that the information may contain valuable details for the ongoing maintenance of the building product.

Providing information about a building product will have the added advantage of assisting persons in the building product supply chain in deciding whether the product is suitable for its intended use and ensuring products are safe and fit for purpose. The additional protection provided to home and building owners would outweigh any potential burden of providing information with a building product.

The reforms will help practitioners meet their compliance declaration obligations and duty of care under the DBP Act by putting them in a better position to do compliant work. Although the new duties may increase upfront costs for manufacturers, the benefit will be realised by the people at the end of the building product supply chain (i.e. the consumer) who will inevitably pay the passed-on costs.

There is the potential for a financial impact to suppliers, importers or manufacturers of products that may be the subject of a building product recall or ban. While this may result in initial costs to the respective parties, this may reduce ongoing liability and any future litigation.

Overall, the Amendment Bill will promote the safety of residential, commercial, and industrial buildings by establishing a new framework to ensure that building products available and used in NSW are safe and compliant with relevant laws and regulations, while providing the required powers for the Department to effectively investigate and respond to instances of unsafe product supply and use.

Questions

- 1. Do you support the persons included in the chain of responsibility (clause 8B) being held accountable for non-conforming building products or for non-compliant use of the product? If not, why?**
- 2. Are there any other persons that should be added to the chain of responsibility and therefore be held accountable for non-conforming or non-compliant building products? If yes, who and why?**

3. Do you support the following duties being imposed on persons in the chain of responsibility? If not, why?

- Ensuring conforming products and compliant use of building products (clause 8E)
- Providing information to others in the chain about a building product (clause 8F)
- Builders and installers to provide information to the owner about the building products they use (clause 8F(4))
- Notifying the Secretary when becoming aware of non-compliance or safety risk of a building products (clause 8H)
- Notify the Secretary of a voluntary recall (clause 8J)
- Comply with any safety notices for warnings, bans or recalls (Part 3)
- Provide safety notices or other information to others in the supply chain, if required (clause 15I and 15J)
- Manufacturers or suppliers may be requested to conduct a product assessment of a building product (clause 38)

4. Focusing on the duty to provide information about building products, are there any challenges associated with persons in the chain of responsibility satisfying this duty?

5. Do you support the following additional powers for the Secretary to manage non-conforming or non-compliant building products? If not, why?

- Building product warning (clause 15)
- Building product supply ban (clause 15B)
- Building product recall (clause 15F)

6. The maximum penalty for breaching a building product use or supply ban or a building product recall will be;

- \$220,000 or 2 years imprisonment, or both and \$44,000 each day the offence continues; or
- for a body corporate, \$1,100,000 and \$110,000 each day the offence continues.

Do you support this maximum penalty? If not, what do you think the penalty should be?

7. The reforms for building products will commence 12 months from passing through Parliament and receiving formal assent. Does this timeframe allow enough time for industry to prepare for the new requirements? If not, what timeframe do you propose and why?

2. Enhancing rectification of strata buildings

Ref: Amendment Bill, Schedule 2 (Amendment of Strata Schemes Management Act 2015)

Ref: Amendment Regulation, Schedule 1 (Amendment of Strata Schemes Management Regulation 2016)

A strata scheme is a building or collection of buildings that have been divided into lots, like an apartment building, a row of townhouses, or a business park. When a person buys a lot within the strata scheme, they own the inside of the lot and also share in the ownership of common property with other lot owners. Common property includes areas like fire stairs, entrances, exits, carparks, lifts and air conditioning systems. Any person who owns a lot in a strata scheme automatically becomes a member of the owners corporation.

There are more than 83,000 strata schemes registered in NSW and every year this number grows by more than 1,000.¹⁵ NSW has experienced a strata boom in the last 20 years, with more than 33,000 strata schemes being established since the year 2000.¹⁶

Recent research of strata buildings that were completed in the last 6 years identified that 39% of strata apartment buildings have a serious building defect, with the average cost of remediation borne by owners corporations being over \$330,000 per affected building.¹⁷

Commencing on 1 January 2018, the SBBIS was established under the SSM Act. The SBBIS requires developers to lodge a building bond (2% of the contract price for the building work) with NSW Fair Trading to secure funds to pay for rectifying defective building work. For example, a building with a contract price of \$10 million will require \$200,000 as a building bond.

The SBBIS establishes a regime for mandatory defect inspections and reports on the development by an independent building inspector. Building inspectors under the SBBIS are all private and not run by the regulator. The Secretary approves APAs to establish building inspector panels. It is the role of the APA to ensure building inspectors are suitably qualified and experienced to carry out the inspections. The scheme aims to provide a structured, proactive process to resolve building issues quickly and cost effectively, early in the life of the building.

¹⁵ NSW Government, *Report on the statutory review of the Strata Schemes Development Act 2015 and the Strata Schemes Management Act 2015*,

<https://www.parliament.nsw.gov.au/tp/files/81193/DCS%20-%20Statutory%20Review%20on%20Strata%20Scheme%20Legislation.pdf>, page 15

¹⁶ Statutory Review of the NSW Strata Schemes Law Discussion Paper, November 2020, page 7

<https://www.haveyoursay.nsw.gov.au/strata-statutory-review-2020>

¹⁷ Construct NSW and Strata Community Association (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/sites/default/files/2021-10/Serious_defects_in_residential_apartments_research_report.pdf

The current stages of the SBBIS are:

<p style="text-align: center;">STAGE 1: Bond Lodgement</p> <p>Lodge building bond (2% of contract price) for Secretary approval</p>	<p>Timing: before application for Occupation Certificate</p>
<p style="text-align: center;">STAGE 2: Inspector Appointment</p> <p>Developer appoints building inspector from the panel run by the APA</p>	<p>Timing: within 12 months of completion of building work</p>
<p style="text-align: center;">STAGE 3: Interim Inspection and Report</p> <p>Interim inspection conducted and interim report provided by building inspector</p>	<p>Timing: between 15-18 months of completion of building work</p>
<p style="text-align: center;">STAGE 4: Rectify Defects</p> <p>Builder to rectify defective building work</p>	<p>Timing: between 18-21 months of completion of building work</p>
<p style="text-align: center;">STAGE 5: Final inspection and Report</p> <p>Final inspection conducted and final report provided by the building inspector</p>	<p>Timing: between 21-24 months of completion of building work</p>
<p style="text-align: center;">STAGE 6: Determine Cost of Rectification</p> <p>Parties determine the costs to rectify the defective building work</p>	<p>Timing: after 12 months but before 2 years and 90 days of completion of building work</p>
<p style="text-align: center;">STAGE 7: Paying the Building Bond</p> <p>The Secretary makes payment of an amount secured by the building bond</p>	<p>Timing: later of: after 2 years from completion of building work or within 90 days of final report</p>
<p style="text-align: center;">STAGE 8: Completing the Process</p> <p>Process must be completed</p>	<p>Timing: within 3 years of completion of building work</p>

Ensuring the bond is available for all defects identified by a building inspector

The SBBIS requires a building inspector to conduct an inspection between 15-18 months after construction has been completed. Between 21-24 months the building inspector will return to carry out a final inspection to determine if the defects identified in the first inspection have been rectified. Any outstanding defects are indicated in the final report which is provided to the developer, owners corporation, builder and the Secretary.

Section 201(3) of the SSM Act prohibits a building inspector from including defects in their final report where defective work is identified in the final inspection that was not identified in the interim inspection and report. This approach has been taken to ensure that the developer has time to remediate any defects identified in the interim report without risking their bond not being refunded.

Where a building inspector identifies defective building work at a final inspection that was not evident at the interim inspection, they can only list these as 'observations' in their final report and there are no obligations on the developer to rectify this work before they can get their bond back. Building inspectors have raised concerns about how the current approach is inconsistent with their professional obligations. An owners corporation would need to seek a remedy through alternative legal avenues, including through the NSW Civil and Administrative Tribunal (**NCAT**), to have developers pay for the rectification of defects which appear after the interim inspection and report.

The Amendment Bill (**Schedule 2**) and Amendment Regulation (**Schedule 1**) propose to allow the building inspector to note additional defects in their final inspection. The developer will have an additional 90 days to rectify the defects or be able to apply to the Secretary for additional time for rectification. If the developer does not rectify the defects in 90 days or apply for an extension of time, the owners corporation may have access to the building bond to rectify defects.

Amendments will be made to the regulation to extend the maturity date of the bond to 4 years (currently 3 years) to allow for the bond to be held for an additional period while any defects are being resolved. If the defects identified in the final report are rectified, the developer will be entitled to have the remainder of their building bond returned.

The proposed new stages of the SBBIS will be:

<p>STAGE 1: Bond Lodgement</p> <p>Lodge building bond (2% of contract price) for Secretary approval</p>	<p>Timing: before application for Occupation Certificate</p>
<p>STAGE 2: Inspector Appointment</p> <p>Developer appoints building inspector from the panel run by the APA</p>	<p>Timing: within 12 months of completion of building work</p>
<p>STAGE 3: Interim Inspection and Report</p> <p>Interim inspection conducted and interim report provided by building inspector</p>	<p>Timing: between 15-18 months of completion of building work</p>
<p>STAGE 4: Rectify Defects</p> <p>Builder to rectify defective building work</p>	<p>Timing: between 18-21 months of completion of building work</p>
<p>STAGE 5: Final inspection and Report</p> <p>Final inspection conducted and final report provided by the building inspector</p>	<p>Timing: between 21-24 months of completion of building work</p>
<p>STAGE 6: Rectify Defects</p> <p>Developer to rectify defects or request an extension of time from the Secretary</p>	<p>Timing: within 90 days from receiving the final report</p>
<p>STAGE 7: Determine Cost of Rectification</p> <p>Parties determine the cost to rectify the defective work</p>	<p>Timing: after 2 years from completion of building work or within 120 days of final report</p>
<p>STAGE 8: Paying the Building Bond</p> <p>Secretary makes payment of amount secured by building bond</p>	<p>Timing: after 2 years from completion of building work or within 120 days of final report</p>
<p>STAGE 9: Completing the Process</p> <p>Process must be completed</p>	<p>Timing: within 4 years of completion of building work</p>

Serious defects generally lead to significant financial and emotional stress for homeowners, tenants and strata managers. The purpose of the security bond is to enable defects to be rectified without the need for remedies through litigation. It is also to protect owners against developers or builders that disappear or become insolvent. The Home Building Compensation Fund, under the HB Act, only applies to buildings with three or less storeys which excludes many strata developments. Legal action through NCAT or the courts is only resolving defects in around 3% of buildings¹⁸ with the most common barriers being funding, lack of awareness about rights and responsibilities and disagreement on the approach to be taken by the owners corporation. NCAT receives about 1,200 applications per year related to strata developments with just under half being dismissed or withdrawn.¹⁹

The amendments may place additional burden on developers by making the bond repayment process longer, and potentially more complex. There may be additional costs associated with the final inspection as it will require a more thorough inspection of the whole site and not only focus on the defects identified in the interim report. However, for developments that aren't subject to defects, the current process will remain unchanged with the security bond being released back to the developer where no defects are identified by the building inspector at the initial inspection. For developments that are subject to defects, the developers would otherwise have been liable to rectify the defects, but this would have been likely pursued through the courts, which is arguably a more time consuming and expensive process.

The benefits for owners will be the improvements in the customer experience in seeking remedy for the rectification of defects in a timely manner without the need to pursue through NCAT or the courts. Likewise, owners corporations will be able to have defects rectified in common property that may not have been evident in the interim inspection. Building inspectors will also be able to meet their professional obligations by identifying all defects in the final inspection.

As part of these reforms, an amendment will be made to enhance Fair Trading's dispute resolution process so that there is an effective remedy for owners outside of the bond scheme. The HB Act will be amended to enable disputes in relation to building or specialist work on strata developments to be lodged with Fair Trading before the appointment of a building inspector. This will enable the owner to seek resolution of any building defects much earlier than waiting until the first inspection takes place from 15-18 months post occupation. By resolving any defects earlier, the defects will

¹⁸ Construct NSW and Strata Community Association (NSW), [Improving Consumer Confidence: Research Report on Serious Defects in Recently Completed Strata Buildings Across New South Wales](https://www.nsw.gov.au/sites/default/files/2021-10/Serious_defects_in_residential_apartments_research_report.pdf), September 2021

¹⁹ Statutory Review of the NSW Strata Schemes Law Discussion Paper, November 2020, page 13. <https://www.haveyoursay.nsw.gov.au/strata-statutory-review-2020>

not be identified in the interim report and the developer may have the opportunity to receive a refund of the strata bond.

The Department is also proposing broader changes to the dispute resolution process to support building practitioners and homeowners resolving building disputes in a more time and cost-effective way. For more information on the proposed changes, refer to the Building Bill RIS.

Realising the benefits of SBBIS for consumers buying off the plan

When the SBBIS was established, a transitional arrangement was included to moderate the impact to industry for existing contractual arrangements. Accordingly, compliance with Part 11 of the SSM Act, including the giving of the building bond and the inspection reporting requirements, was not required for building work if:

- the contract for the building work was entered into before commencement of Part 11 (1 January 2018), or
- if there was no contract, the building work commenced before the commencement of the transitional arrangement (1 January 2018).

The provision was intended to allow projects already well progressed and nearing completion to not be subject to the new scheme, particularly in circumstances where the bond amount could not be financed by the developer through existing project financing or passed on as a cost to the end customer. The SBBIS has now been operational for 4 years but there is still a disproportionately high number of developments which are in progress or nearing completion which are not subject to the scheme.

Indicative data obtained from the Expected Completion Notices (**ECNs**) submitted since 1 September 2020 on the NSW Planning Portal indicates that 25% of developers that would be eligible to pay the building bond are being excluded as contracts were entered into prior to 1 January 2018. In 2021, 47% of developments eligible for the SBBIS were not captured as their contracts were entered into prior to 1 January 2018. Already, in 2022, 89% of developments eligible for the SBBIS will not be subject to the scheme for the same reason.

While intended to be a transitional measure, the 1 January 2018 contract cut off has created a situation where the SBBIS is not applying to buildings which are completed more than 4 years after the SBBIS was established. With the transitional arrangement focused on the date contracts were entered into, developers are unreasonably avoiding the building bond requirements on developments where considerable building work has not commenced post the contract date.

The building bond is held as security by the Secretary to cover the cost of any building defects should the developer or builder fail to rectify them. This is to ensure that the developer is held accountable for the cost of any defects identified after construction has been completed. Where the developer does not pay the security bond, owners and owners corporation are required to seek a remedy through NCAT or the courts to rectify defects. This leads to both financial and emotional impacts on all involved. In the case of defects in common property, all owners within the complex may be financial impacted.

To ensure more consumers are benefiting from the protections under the SBBIS for buildings completed now, **Schedule 2** of the Amendment Bill proposes to modify the operation of the transitional arrangement to ensure it is appropriately phased out. Specifically, under the proposal, the developer will not be required to lodge a building bond for building work if:

- the contract for the building work was entered into before commencement of Part 11 (1 January 2018) and a Construction Certificate (CC) is issued before 1 January 2023, or
- if there was no contract, the building work commenced before the commencement of the transitional arrangement (1 January 2018).

If a developer has entered a contract before 1 January 2018 and a CC has not been issued before 1 January 2023, the developer will not be required to lodge the building bond. If the developer signed a contract before 1 January 2018 and a CC (or the first CC for staged construction) is issued after 1 January 2023 then the building bond must be lodged.

The following table provides an overview of the proposed new transitional requirements.

Contract date	Construction	Building Bond required?
Before 1 January 2018	CC issued before 1 January 2023	No
Before 1 January 2018	CC issued after 1 January 2023	Yes
After 1 January 2018	N/A	Yes
No contract	Construction commenced before 1 January 2018	No
No contract	Construction commenced after 1 January 2018	Yes

While maintaining the original transitional arrangement for applicable developments, the proposal imposes a reasonable limitation to ensure developments which have not commenced building work or had significant progress since contracts were entered into will be subject to the SBBIS.

It is considered that the issue of a CC is a useful way to determine a cut off for the transition. A CC must be issued by a council or certifier before any building work or construction begins. The CC is accessible to the regulator in the NSW Planning Portal whereas a contract is a commercially sensitive document. Unless the developer is requested to provide the contract, either voluntarily or with formal powers, the requirements to comply with Part 11 cannot be confirmed. This approach is minimally disruptive or burdensome for developers especially given these requirements have been in place for over three years.

This approach will ensure consumer protection is provided to owners of these developments who are entitled to use the building bond to rectify defects caused by defective building work by the builder engaged by the developer. The changes would mean more customers will be able to access this streamlined way of accessing funds to cover remediation. Consumers purchasing off the plan now should have the benefit of this scheme when construction commences.

Greater transparency and scrutiny of APAs and building inspectors

The competence and conduct of individuals carrying out the function of building inspectors under the SBBIS is critical to its success. Under the SSM Act, an APA is responsible for appointing appropriately qualified persons to a strata inspection panel to carry out the functions of a building inspector. The APA must maintain a publicly available register of these building inspectors.

Currently, the Secretary has approved 11 associations to carry out the functions of an APA under the SSM Act. These associations are private and operate independent of the Government. Any person or body may apply to the Secretary to be recognised as an APA. Each APA is required to comply with guidelines²⁰ outlining the Secretary's expectation and requirements for:

- the APA in establishing and maintaining a strata inspector panel, and
- the qualified persons that may be appointed as building inspectors.

Although clause 45A of the SSM Regulation requires an APA to maintain a register of building inspectors, each association can have their own processes and criteria to determine if a person is qualified to perform building inspections and produce reports for the purposes of the SBBIS. The role of the APA promotes self-governance for the management and administration of the strata inspection panels. This co-regulatory approach provides flexibility for the association to carry out certain functions independently but within certain parameters set by the Secretary.

For the Secretary to effectively play a co-regulatory role and manage APAs, **Schedule 2** of the Amendment Bill contains a framework for determining the suitability of APAs. The framework provides a clear and accountable approach in determining the capability of industry bodies to carry out the functions of an APA. The framework will be similar to other building related legislation which establishes the requirements for co-regulation of bodies such as the BDC Act for the approval of accreditation authorities and the DBP Act for professional engineering bodies.

This will provide the Secretary with the power to determine the suitability of an industry body to exercise the functions of an APA and remove their authority if they no longer satisfy the functions of their role.

The body would be required to have clear processes in place for the assessment of applications including qualifications and experience that building inspectors must meet to be on the strata inspection panel. The body would manage persons on their panel by ensuring conflict of interest

²⁰ Secretary's Process –

https://www.fairtrading.nsw.gov.au/_data/assets/word_doc/0020/370316/SBBIS_strata_inspector_panel_guidelines_Secretary.docx made under clause 45B of the [SSM Regulation](#)

provisions are in place and complaints handling and dispute resolution are appropriately managed. The body would also be required to maintain records of the appointment and any disciplinary action taken against building inspectors.

All the criteria that an industry body must meet to be approved will be transparent and mandated in legislation. The Amendment Bill will require the following:

- the application and approval procedure for APAs, including the reasons for refusal of an APA's application and any applicable fees,
- the requirements for an APA to be eligible for approval and to maintain approval, for example, to act in a fair, impartial and transparent manner and ensuring certain information is made publicly available, such as the application processes for building inspectors who wish to be on a strata inspection panel, the APA's conflict of interest protocols, code of conduct and complaint resolution processes,
- prescribing and making of conditions of approval of an APA, for example, the keeping of records, providing reasonable assistance to the Secretary relating to investigations and audits, and the engagement of an independent auditor to conduct an audit of the APA's exercise of its functions, and
- grounds for the APA's suspension or cancellation of approval.

In addition, the APA will have ongoing requirements such as notifying the Secretary when certain circumstances change such as the APA's inability to comply with obligations, change of contact persons or inability to make information publicly available. The Secretary may also request information from the APA on request such as the number of inspectors on their strata inspection panel, applications rejected, or complaints received.

The list of approved APAs is currently prescribed in clause 44 of the SSM Regulation. Any changes to the list of approved APAs requires amendments to the regulation. The list of APAs will be removed from the regulation to provide flexibility in amending the list of authorised bodies in future. Amendments will be made for the Secretary to be required to publish the approvals of APAs in the NSW Government Gazette.

Currently APAs hold approval indefinitely unless deemed unsuitable by the Secretary and removed from the list prescribed in the regulation. There is no current requirement for the approval to lapse or for APAs to re-apply. This will be amended in the Amendment Bill with the approval now valid for a period of 5 years. The Amendment Bill will provide a period of 1 year from commencement for existing APAs to be deemed as approved. The APA will need to apply for approval before the deemed period expires. There should be no impact on building inspectors as the framework being established will focus on the operations of the APA.

It is proposed that information sharing obligations will be imposed on the APA to disclose to the Secretary any information obtained by the APA in the exercise of its functions under the Act.

To encourage compliance, it is proposed that penalties will apply, where required, for breaches of conditions or requirements or requests.

Imposing severe consequences for falsely representing as a building inspector

NSW Fair Trading has received complaints that individuals have falsely represented themselves to developers and owners' corporations as being a building inspector of a strata inspection panel under the SSM Act. This conduct has extended to:

- individuals who are members of a recognised APA, but have not been appointed by that APA to their strata inspector panel, and
- individuals who are members of associations that are not a recognised APA.

The APA determines the suitability of persons to carry out the function of a building inspector. A person that falsely represents themselves as being a building inspector of an approved APA places significant risks to consumers and the safety of buildings. The person falsely representing themselves as a building inspector has not been deemed as suitably qualified or experienced and may not identify major defects in inspections they conduct.

While the ACL provides remedy for false and misleading representation about goods and services, this is limited to the promotion of supply or use of goods or services or for misleading conduct for services to the public.

Schedule 2 of the Amendment Bill will make it an offence for an individual to falsely represent that they are:

- a member of a strata inspection panel by a recognised APA under the SBBIS, or
- qualified to be appointed as a building inspector under the SBBIS.

A maximum penalty of 300 penalty units will apply to this offence (currently equating to \$33,000). This will streamline actions for this fraudulent behaviour and provide a deterrent for this behaviour.

Enabling NSW Fair Trading to assist in resolving disputes for strata building work

The NSW home building dispute resolution service started in 2003. Where a consumer and trader are unable to resolve their dispute, NSW Fair Trading will attempt to mediate an outcome suitable to all parties concerned. A formal request for NSW Fair Trading to assist in the dispute resolution may be made by the consumer or the trader but both parties need to agree to the attempt at

resolution. If an agreement cannot be reached, a NSW Fair Trading inspector will assess the alleged defective or incomplete work. If it is their opinion that the work is the responsibility of the trader, they may issue a Rectification Order directing the trader to undertake rectification work by a due date.

NSW Fair Trading's dispute resolution service has resolved over 70% of building disputes at the initial mediation or inspection stage with building inspectors assisting in approximately 2,500 disputes each year. This has resulted in over 80% of disputes being resolved without being escalated to the NCAT.

Currently, under the HB Act a limitation exists that prevents a person in a strata development from using the services of the NSW Fair Trading dispute resolution team for building work if any work has not been completed as part of the SBBIS.

Under the SBBIS, the developer of a new apartment building 4 storeys or higher must pay a building bond to fix defects identified in a building inspection. The first inspection under the SBBIS occurs after 15-18 months after the completion of building work. If an owner that resides in a residential apartment, identifies a defect before the 15 months inspection, they are unable to seek the assistance of NSW Fair Trading to attempt to resolve issues where a builder or developer may refuse to rectify defects or comply with a rectification order issued by NSW Fair Trading. Accordingly, the only option available to the owner is to seek recourse through NCAT.

The [NCAT Annual Report 2020-2021](#)²¹ indicated that the standard time from lodgement to the resolution of matters by NCAT for standard strata claims is 16 weeks. While the cost to lodge the application is minimal (\$107-\$214), resolving disputes can be time consuming. Each party is required to pay their own costs and generally people represent themselves. Matters can be resolved by bringing parties together in an informal manner with an agreement reached during conciliation.

Alternatively, a joint meeting between experts engaged by the applicant and respondent can be facilitated by a Tribunal member. Depending on the type of application and nature of the dispute, matters may be listed for a hearing. Decisions made by the Tribunal may also be corrected by an internal appeal process or can be appealed to the NSW District Court, NSW Land and Environment Court or NSW Supreme Court. NCAT does not have the power to award damages but can order payment of compensation.

²¹ NSW Civil & Administrative Tribunal Annual Report 2020-2021
<https://ncat.nsw.gov.au/ncat/publications-and-resources/news-and-announcements/news/2021/ncat-annual-report-2020-2021.html>, Appendix 6 and 8

Schedule 4 of the Amendment Bill will amend the HB Act to enable disputes in relation to building or specialist work on strata developments to be lodged with NSW Fair Trading before the appointment of a building inspector. This means that the owner will be able to use the services of NSW Fair Trading to resolve any disputes about building defects without having to wait until the first inspection takes place from 15-18 months post occupation. By resolving any defects earlier, the defects will not be identified in the interim report and the developer may have the opportunity to receive a refund of the strata bond.

The benefits of providing dispute resolution services by NSW Fair Trading is that the owner is given the choice of resolving the dispute with NSW Fair Trading or proceeding to have the matter heard by NCAT. Dealing with the matter earlier through NSW Fair Trading may reduce the stress on owners and assist in resolving any potential breakdown in the relationship with the builder and support the project moving forward amicably. Timelier dispute resolution will lead to the defective work being rectified earlier which may reduce the severity of the defect and cost of repairs. This will also encourage strata bodies to be more proactive in identifying and responding to building defects.

Questions

- 8. Should the strata building bond paid by developers be extended to cover building defects identified in the final inspection carried out 21-24 months after the building has been completed? If not, why?**
- 9. Should the developer be given an extra 90 days to rectify defects identified in the final inspection or should the rectification costs come directly out of the building bond?**
- 10. Are there any issues with the strata building bond being retained for a longer period while defects are remediated?**
- 11. The reforms for extending the building bond will commence 6 months from passing through Parliament and receiving formal assent. Does this timeframe allow enough time for industry to prepare for the new requirements? If not, what timeframe do you propose and why?**
- 12. Now that the strata building bond scheme has been in place since 2018, do you think it is reasonable to phase out the transitional period so that it applies to more buildings. If not, why?**
- 13. Do you think it is reasonable for developers who commence strata building work after 1 January 2023, regardless of when contracts were entered, to have to comply with the scheme? If not, why?**

- 14. It is proposed that all developers will be required to comply with the scheme if a construction certificate has been issued after 1 January 2023, even if they entered into the contract before 1 January 2018. Is there another way we could achieve the same outcome to ensure that all strata developers are required to pay the security bond?**
 - 15. Do you support the introduction of a formal framework for the approval of APAs to improve their accountability? If not, why?**
 - 16. The Bill will require an APA to have certain critical elements as part of the scheme to establish the strata inspection panel (i.e. appointments process, disciplinary action and complaints handling policy, records keeping and reporting requirements). Are there any other critical elements that an APA should be required to have to manage the appointment of building inspectors?**
 - 17. Do you support that a penalty provision should be prescribed for a person that falsely represents themselves as a building inspection? If no, why?**
 - 18. A maximum of 300 penalty units (\$33,000) will apply to this offence. Is this penalty sufficient? If not, what should it be and why?**
 - 19. Do you think that owners in a strata development should be able to access the NSW Fair Trading dispute resolution service before a building inspector is appointed under the SBBIS? Why or why not?**
-

3. Improving professional standards and competencies

1. Flexible pathways for certifier registration

Ref: Amendment Bill, Schedule 6 (Amendment of Building and Development Certifiers Act 2018)

Currently, the Department is primarily responsible for the assessment of registration applications (including eligibility assessments) of many of the industry's practitioners. The Department is proposing to give practitioners new ways to prove their competency to be registered.

To move to more flexible pathways for registration, the Department proposes to utilise the extensive knowledge and expertise of occupational bodies and professional associations who hold a PSS to undertake assessments of applicants seeking registration as a certifier under the BDC Act.

Schedule 6 of the Amendment Bill provides that the approved body would assess an applicant and consider whether the applicant has the appropriate qualifications, skills, knowledge and experience to hold registration as a certifier under the Act (*competency recognition*). The assessment process used by the body would have been separately approved by the Secretary. If assessed as meeting these requirements, the applicant would be referred to the Department to undertake the final registration process (such as probity checks).

A similar framework is already established in the DBP Act where approved professional bodies can assess the qualifications and eligibility of persons applying to be registered as professional engineers.

This framework would allow a body (with a PSS) to assess those practitioners who have not attained the prescribed minimum qualifications but have extensive demonstrated capability. The body will consider and test the practitioner's skills, experience and knowledge to determine whether they are otherwise suitable to hold registration. Adopting this approach would provide a flexible pathway by allowing the registration of certifiers in a more qualification-neutral approach.

This would help overcome some of the difficulties with the current shortage of certifiers in regional areas who may not have met the qualification requirements currently set but hold the appropriate skills, knowledge and experience.

While the Department has extensive experience in the assessment of licensing applications for certifiers, sharing the ongoing assessment of certifier's capability with bodies operating a PSS would provide a new pathway for applicants without compromising quality.

A PSS binds an occupational association to monitor, enforce and improve the professional standards of its members. This is designed to help protect the people, or consumers, who use their members' services. Professional standards regimes are predominately focused on rewarding good behaviour and continuous improvement in the professional standards of service providers.

Further, these associations are organisations that have been approved by the Professional Standards Council as being able to represent professionals of a particular occupation.

A PSS also caps the civil liability or the amount of damages that can be paid by professionals who belong to a participating association's scheme. These caps are designed to be high enough to cover the vast majority of claims and will only apply to a professional if they can prove they have enough insurance and/or business assets to cover the potential damages awarded by a court. This is how a PSS provides confidence in compensation if a claim succeeds.

Initially, the Department proposes to limit the accreditation process to approved bodies with a PSS and only to undertake the competency recognition aspect of the registration process. However, in future, there is the possibility for approved bodies taking on a further management and co-regulatory role in partnership with the Department.

The Department does not propose to allow bodies that do not operate a PSS to carry out this role. This is because it is imperative for Department to approve bodies who uphold the quality of service, trustworthiness and community expectations which are expected of a body that assesses a practitioner's competency to be a certifier in NSW. Since certifiers are public officials that are required to uphold the public interest, the Department needs to be assured it is only providing approval to bodies that can deliver the competency recognition to the highest standard.

Questions

- 20. Do you support the proposal for approved professional bodies with a PSS to undertake competency assessments to determine whether an applicant has the appropriate qualifications, skills, knowledge and experience to hold registration as a certifier? Why or why not?**
 - 21. What benefits or challenges do you think arise from an approved professional body undertaking competency assessments for registration purposes?**
 - 22. Do you consider that this pathway should be limited to bodies operating a PSS? Why?**
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2. Continuing Professional Development

Ref: Amendment Bill, Schedule 11 (Amendments relating to continuing professional development)

Education and training are a foundational pillar of any profession and a major influencer of the culture, behaviours and outcomes that it exhibits. There is a need for greater focus on education in the building and construction sector to address skills gaps that are preventing future growth in capability and efficiency, and to ensure that the curriculum offerings reflect modern requirements.

There are significant variations in the CPD requirements for different building and construction practitioner types. This is a complicating factor particularly in circumstances where a practitioner may hold several licence or registration types that use different CPD units of measurement or systems.

Inconsistencies in CPD requirements across the industry include:

- the number of hours or points required
- eligibility requirements for CPD courses
- whether CPD is a licence application or renewal requirement, or whether it is a condition of retaining a licence
- who can deliver CPD
- the record keeping requirements that must be maintained for the purposes of audits and spot checks
- exemption rules.

For example, accredited practitioners (fire safety) under the EP&A Regulation and the Environmental Planning and Assessment Regulation (Development Certification and Fire Safety) Regulation 2021 must accrue a minimum of 20 CPD points per year compared to licensed builders who must complete 12 CPD points per year which must relate to prescribed broad learning areas. Building certifiers must complete 25 CPD points per year and building designers 3 hours of CPD. Legislation for other building related professions require architects to complete a minimum of 20 hours of CPD each year and professional engineers a minimum of 50 hours per year.

These inconsistencies have a cost for practitioners who must complete CPD and for practitioners' customers and the industry, which depends on practitioners being competent and well-informed in terms of their professional obligations, technological advances, and industry reforms. It is difficult for practitioners who hold multiple licence or registration types to understand their CPD obligations and the cumulative hours/points required across multiple schemes can be overly burdensome.

Feedback from industry organisations and practitioners during targeted consultation has indicated that the existing CPD framework prioritises the completion of large volumes of CPD rather than prescribing focussed, high-quality CPD on an as-needs basis. This has led to practitioners and employers seeking out CPD courses that are the 'easiest' to complete and the CPD framework being regarded as an inconvenient chore with minimal learning and professional development occurring.

These concerns were recognised in the 2021 Productivity Commission White Paper,²² which recommended the Government reform the mandatory CPD requirements where the costs outweigh the benefits.

Considering these concerns, **Schedule 11** of the Amendment Bill will standardise the way that CPD requirements are prescribed to make it easier for CPD units to be carried over between schemes, to update the standards/amounts of CPD and to allow a whole-of-sector digital solution for recording CPD training. This would provide a user-friendly solution for recording and maintaining completed CPD in a consistent way and provide seamless auditing of CPD requirements.

Changes will be made to the BDC Act, the DBP Act and the HB Act to enable their existing CPD schemes to operate consistently. Despite operating a comparable CPD scheme, it was decided not to include the *Architects Act 2003* in the proposed reforms at this time. This is because the Architects Registration Board provides effective regulation of the existing CPD scheme for architects, so it was determined to be more productive to streamline Fair Trading legislation as a priority. The Department will refocus on the alignment of CPD under the *Architects Act 2003* with Fair Trading legislation once the new Fair Trading CPD framework has been devised.

It is important to note that the proposed CPD framework would still require differing amounts of CPD for different practitioner types – this would be dependent on the individual needs of a trade, based on identified skills gaps or relevant regulatory changes and the overall risk profile of each trade. However, in considering the new CPD obligations for each practitioner type, the Department will prioritise the value of CPD content over the need to undertake a particular amount of CPD.

For instance, the CPD curriculum might include courses aimed to educate about a practitioner's new obligations under building reforms; or where certain defective work is identified more regularly than usual on a building site, a course that addresses those work practices might be mandated.

²² NSW Treasury, *Productivity Commission White Paper 2021*, May 2021, <https://www.productivity.nsw.gov.au/sites/default/files/2021-06/Productivity%20Commission%20White%20Paper%202021.pdf>

This shift from imposing a set amount of CPD should decrease the overall time and cost burden on practitioners and result in higher-quality and more effective learning outcomes than existing CPD regimes achieve.

As part of the standardisation process, it is also proposed to review the practitioner types that are not currently required to undertake CPD, including high-risk 'specialist trades' such as electricians, plumbers and medical gasfitters. Industry feedback indicated that specialist tradespersons, including many who have worked in the industry for upwards of 20 years, have never undertaken any form of skills development or training, even when major industry reforms have been introduced. Consultation will assist in determining whether, and to which practitioner types, the CPD scheme should be expanded.

The intention of the Department's CPD reforms is to shift the focus from imposing a quantitative amount of CPD on practitioners, to redesigning the system to ensure value-add is achieved through maintaining or updating specific important skillsets – particularly where a gap in knowledge or opportunity for improvement has been identified. Coupled with the development of a digital solution to facilitate the CPD platform, the reforms will improve the customer experience for practitioners and offer a tangible benefit within the industry.

Questions

- 23. Do you support the standardisation of CPD across the building and construction industry? Why or why not?**
 - 24. Do you support extending CPD requirements to include specialist practitioners? Why or why not?**
 - 25. How many hours of CPD do you think the average practitioner should be required to do per year? Why?**
 - 26. Should it be up to industry or the regulator to determine the CPD requirements for individual practitioner types? Please explain your answer.**
 - 27. Are there any practitioner types that are not currently required to do CPD to be registered that you think should be required to do CPD? If yes, please give examples of the practitioner types you think should be doing CPD.**
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3. Training as a response to a breach

Ref: Amendment Bill, Schedule 9 (Amendments relating to training or education as alternative to disciplinary action)

Ref: Amendment Regulation, Schedule 4 (Amendments relating to education and training notices)

Provisions exist in various pieces of building legislation (section 62 of the HB Act, section 66 of the DBP Act, and section 48 of the BDC Act) that enable the Secretary to impose a condition on the registration of a practitioner to undertake specified education or training as a form of disciplinary action.

This is an important form of disciplinary action as it can be used as an early intervention measure to respond to initial or less-serious breaches by a practitioner.

Without these options for early intervention, there is a risk that disciplinary action will not address and rectify examples of poor practice and will instead allow these behaviours to become accepted as common practice. Rather than only relying on cancellation or disqualification of licences for serious breaches, it is important that other disciplinary action mechanisms are used as a matter of course throughout the enforcement process.

To provide a more targeted and constructive response to lower-risk offences, **Schedule 9** of the Amendment Bill will propose that inspectors be empowered to hand out an education and training notice instead of issuing a PIN. The notices will require an offender to complete a particular course within a specified period. The courses will be targeted to the skills gap identified by the inspector; for instance, where an inspector is penalising a person for non-compliant waterproofing, the offender would be required to complete a waterproofing course set by the Department.

This approach has already been trialled by NSW Fair Trading and the OBC, with inspectors handing out 'yellow cards' recommending the optional completion of online development modules. There has been a high uptake of these modules, even though they are not mandatory, which has reassured the Department that this model of disciplinary action will be welcomed and lead to discernible improvements in building practices.

Construct NSW has established a digital platform containing high-quality, approved educational modules that are already being used by the industry to satisfy CPD and other learning obligations imposed by membership-based professional bodies and PSS. The Department has worked with peak industry bodies to develop the courses. New modules are regularly being added to the platform to address identified skills gaps and high-risk areas of work.

The effectiveness of education and training notices as a method of lifting standards and reducing preventable defects relies on there being high rates of the notices being both issued and complied with.

An additional PIN has been included in the proposed reforms to address instances of non-compliance with an education and training notice. Failure to comply with an education and training notice will result in the offender being issued with the PIN for the original breach, as well as an additional non-compliance PIN. This is intended to deter offenders from opting not to comply with the notice as they can be issued the equivalent PIN to pay instead.

The cost of completing a course will also be less than the correlating PIN amount, so it is hoped that alongside the developmental benefit of the courses, this will increase the appeal of this form of disciplinary action and offenders will be disincentivised from seeking to instead pay the standard PIN. It is worth noting that other disciplinary action powers (such as rectification orders) will still be available to inspectors alongside education and training notices where appropriate.

In the absence of the reforms, an individual issued with a PIN will have the opportunity to request a review if they believe a mistake has been made or there were special circumstances that led to the offence. The individual would also be able to request to have the matter heard and decided in court. Because the reform does not involve the issuing of a PIN, the Amendment Bill does not provide for these external review avenues. However, a person will have access to internal review pathways directly with the regulator.

The Government considers that the overall benefits associated with the proposed reform justify this arrangement, as the education and training notice will directly address incidences of poor practice and is expected to result in tangible improvements in the standard skills and knowledge within the industry.

Questions

- 28. Do you agree that education and training notices may be more effective than monetary penalties to fix non-compliant conduct and encourage permanent behaviour change? Why or why not?**
- 29. Do you have any concerns about introducing education and training notices as a form of early intervention disciplinary action? If yes, please explain what any challenges may be.**
- 30. Do you agree that there should be a bigger focus on early intervention disciplinary action to proactively address non-compliance in the industry? Why or why not?**

31. Do you think that the proposed additional PIN for non-compliance with an education and training notice will be effective in encouraging offenders to complete the prescribed training (rather than opting to just pay the PIN amount)? If not, please provide any suggestions for how we could better incentivise offenders to complete the prescribed training.

4. Ensuring fair and prompt payment

Ref: Amendment Bill, Schedule 3 (Amendment of Building and Construction Industry Security of Payment Act 1999)

Ref: Amendment Regulation, Schedule 2 (Amendment of Building and Construction Industry Security of Payment Regulation 2020)

This section deals with proposed changes to the *Building and Construction Industry Security of Payment Act 1999* (**SOP Act**) and the *Building and Construction Industry Security of Payment Regulation 2020* (**SOP Regulation**) (**SOP legislation**). These proposed changes are outlined in **Schedule 3** of the Amendment Bill and **Schedule 2** of the Amendment Regulation.

The primary objective of the SOP legislation is to facilitate prompt progress payments²³ down the construction chain: from principal contractors to head contractors, and head contractors to subcontractors.

The aim of the SOP Act is to ensure that any person who carries out construction work²⁴ (or who undertakes to supply related goods and services²⁵) under a construction contract is entitled to receive and can recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services. The SOP Act applies to any construction contract, whether written or oral, or partly written and partly oral, and applies even if the contract is expressed to be governed by the law of a jurisdiction other than NSW.

A person entitled to receive a progress payment is granted a statutory entitlement to such a payment regardless of whether the relevant construction contract makes provision for progress payments.

The existing procedure for recovering a progress payment under the SOP Act involves:

²³ A “progress payment” is defined in section 4 of the SOP Act:
<https://legislation.nsw.gov.au/view/html/inforce/current/act-1999-046#sec.4>

²⁴ “Construction work” is defined under section 5 of the SOP Act:
<https://legislation.nsw.gov.au/view/html/inforce/current/act-1999-046#sec.5>

²⁵ “Related goods and services” is defined in section 6 of the SOP Act:
<https://legislation.nsw.gov.au/view/html/inforce/current/act-1999-046#sec.6>

- the making of a payment claim by the person claiming payment
- the provision of a payment schedule by the person by whom the payment is payable
- the referral of any disputed claim to an adjudicator for determination
- the payment of the progress payment so determined.

Cash flow and fair payment is critical for construction businesses, especially for small and medium enterprises, in maintaining solvency. It enables construction businesses to maintain financial health, meet their financial commitments and demonstrate their ability to manage its operations into the foreseeable future.

Homeowners Notice – information symmetry between homeowners and builders

The SOP Act has recently been extended to apply to residential building contracts between an owner residing or proposing to reside in the premises (principal) and the builder (head contractor).²⁶ Prior to the commencement of these changes, only the contracts between the builder and other individuals to perform the work (subcontractors) were captured.

This change is designed to ensure that builders are not unfairly prevented from utilising the statutory payment mechanisms under the SOP Act to receive prompt payment for their work where they are doing residential building work. These mechanisms include a statutory entitlement to progress payments, adjudication of payment disputes and the ability to suspend construction work until payment is received. This change is in line with the recommendations of the 2017 Review of Security of Payment Laws (**Murray Report**).²⁷

Ensuring builders have an equal right to be paid promptly (regardless of what type of building work they are doing) can alleviate financial pressures for the builder and subsequent cash flow issues affecting subcontractors. It also aims to prevent builders from having to pursue expensive and time-consuming claims for payment in the court system.

With the SOP Act now applying to contracts with homeowners, it is imperative that both parties to the contract are on an equal footing in understanding the procedure for recovering progress payments. Critically, an understanding of the strict timeframes in which to serve and respond to payment claims is essential. There are significant consequences under the SOP Act for failure to

²⁶ The amending legislation was Schedule 2 of the SOP Regulation and the change occurred for owner occupier construction contracts entered into from 1 March 2021.

<https://legislation.nsw.gov.au/view/html/inforce/current/sl-2020-0504#sch.2>.

²⁷ John Murray AM, *Review of Security of Payment Laws*, December 2017,

https://www.ag.gov.au/sites/default/files/2020-03/review_of_security_of_payment_laws_-_final_report_published.pdf.

respond to a payment claim, failure to pay a claimant in accordance with a payment schedule and failure to provide a payment schedule.

The consequences of a homeowner not complying with the payment schedule provisions in the SOP Act may include:

- the builder recovering the unpaid portion of the scheduled amount from the homeowner as a debt due in court,
- the builder commencing adjudication proceedings against the homeowner, or
- the builder serving a notice on the homeowner of the builder's intention to suspend the carrying out of construction work (or to suspend supplying related goods and services) under the construction contract.

This could have flow-on effects for the homeowner including being faced with unfinished construction work, an uninsurable asset, longer periods of interest rate exposure and an increased borrowing risk.

The consequences for the builder include:

- longer periods of time not receiving payment for work or goods and services supplied
- expenses involved with commencing court proceedings
- cash flow issues for the builder and the subcontractors relying on the completion of the contract.

These consequences and flow-on effects can be mitigated by both parties understanding and complying with the provisions in the SOP Act. Currently, construction contracts with a value of more than \$20,000 must contain the Security of Payment Guide²⁸, which is a document available on the NSW Fair Trading website that provides easy-to-read guidance on key aspects of the SOP legislation. This aims to mitigate the risk of homeowners entering into a construction contract not being clear on their rights and obligations under the SOP legislation.

Schedule 3, section 13(2A) of the Amendment Bill and **clause 20B** of the Amendment Regulation proposes to ensure that each and every time that a payment claim is issued by a builder to the homeowner under the SOP Act, it will be accompanied by a Homeowners Notice.

NSW Fair Trading will develop the Homeowners Notice and make it available on its website, so it is easily accessible to, and downloadable by builders. The Homeowners Notice would provide

²⁸ NSW Fair Trading, *Security of Payment Guide*,
https://www.fairtrading.nsw.gov.au/_data/assets/pdf_file/0007/967201/Security-Payment-Guide.pdf

succinct information (less than one A4 page) explaining in plain English why the homeowner is receiving a payment claim, the procedure for responding to the claim, the consequences of not responding and how adjudication works.

The proposed reform implements recommendation 13 of the Murray Report for payment claims served on a homeowner to include information on how to respond to the payment claim, and the time period for the response.

The proposed reform supports the legislative intent of the SOP Act to resolve payment disputes quickly, since better informed homeowners will be more capable of responding to a payment claim in line with the legislative requirements. It is also consistent with the primary aim of the SOP Act to encourage prompt payments from homeowners (principals) to builders (head contractors) and subcontractors, promoting positive cash flow throughout the entire construction chain.

Imposing a new requirement to attach the Homeowners Notice to a payment claim is an increased regulatory burden on head contractors compared with the status quo. Construction businesses have existing systems and processes in place for issuing a payment claim. These systems would need to be updated to meet the proposed requirement.

This proposal will not apply to the entire building and construction sector. This proposal will only apply to payment claims made under owner occupier construction contracts, meaning the construction contracts where the person who engages the head contractor resides or proposes to reside on the premises the construction work is taking place.

Importantly, this proposal does not mandate changes to a head contractor's existing payment claim form. This proposal would not require head contractors to prepare new wording on their payment claims to meet the new legislative requirement. For example, the Department is aware that many head contractors in the industry issue a payment claim in the form of an invoice. This proposal would not require head contractors to use a new payment claim form. Head contractors can continue their current practice, and simply attach the Homeowners Notice to their existing payment claim.

The Homeowners Notice would be freely obtainable on the NSW Fair Trading website, and no further information would need to be inputted by the builder. For these reasons, and the reasons above, the regulatory burden of this proposal has been assessed as minimal.

Another industry concern may be the failure of the builder to attach the Homeowners Notice document which would cause their payment claim to be invalid under the SOP Act. By serving an invalid payment claim, the head contractor is prevented from starting the procedure for recovering

a progress payment under the SOP Act. This would cause a further delay in resolving the payment dispute between the head contractor and homeowner, which may lead the head contractor to experience financial stress and subsequent cash flow issues.

The risk of invalid payment claims can be mitigated by notifying all builders to which this proposal relates of the new requirement. The Department intends to notify builders with a strong educational campaign led by the Department, utilising communication channels through Authorised Nominating Authorities (**ANAs**) and trade associations as well as social media and word of mouth when Department personnel are on site with builders.

An alternative to the proposal is to maintain the status quo. Homeowners will receive the Security of Payment Guide initially with their construction contract. However, maintaining the status quo would mean at the point of receiving the payment claim (which may be months or years after receiving the construction contract) the homeowner would receive limited, and/or inaccurate information from the builder about how to respond to a payment claim.

If the status quo was maintained a payment claim served on a homeowner by a builder under owner occupier construction contracts would only be required to contain the current legislative requirements including:

- identifying the construction work (or related goods and services) to which the progress payment relates
- indicating the amount of the progress payment that the builder claims to be
- stating that it is made under the SOP Act.

Maintaining the status quo would be a missed opportunity to provide homeowners with information at the point at which they receive the payment claim. Homeowners under owner occupier construction contracts would not be better informed than they currently are, and this may lead to delays in the homeowner responding to a payment claim in line with the legislative requirements. Delays in the homeowner responding to a payment claim ultimately delays prompt payment to the builder and could open both homeowners and builders up to the consequences outlined above.

Questions

32. The reforms relating to Security of Payment will commence 6 months from passing through Parliament and receiving formal assent. Does this timeframe allow enough time for industry to prepare for the new requirements? If not, what timeframe do you propose and why?

- 33. It is proposed that when a builder serves a payment claim on a homeowner under the SOP Act, the payment claim must be accompanied by a Homeowners Notice. This proposal is not for all payment claims made in the industry, only payment claims served on a homeowner by a builder. Do you support this proposal? If not, why?**
- 34. The RIS identified potential impacts of the reform and how these have been moderated (i.e. narrowing the application and targeted education and awareness strategy). Are there any other challenges that need to be considered for successful implementation?**
- 35. Do you agree providing homeowners with more information, including the consequences of not responding to a payment claim, would encourage prompt payment by the homeowner to the head contractor? If not, why? Are there any other strategies that could be considered?**
-

Securing greater protection of retention money for more projects

Insolvency in the construction industry has been the subject of consideration, inquiries and reviews for many decades. Historically the industry is known as having a high incidence of insolvency and relatively poor payment practices. The construction industry has consistently been the second highest source of insolvencies in both Australia and NSW over the last 10 years. In NSW, the construction industry has contributed to 20% of all insolvencies.²⁹

A primary cause of the high incidence of insolvency is inadequate cash flow.³⁰ The construction industry is characterised by layered business arrangements that trickle down from the principal contractor to the head contractor, then through to the subcontractors and suppliers.

This means a single entity's insolvency often impacts other parties in the construction chain. The industry structure creates a dependency on upstream businesses to make payments promptly so that subcontracting businesses downstream can be paid, and in turn meet their payment commitments.

The Department hosted a roundtable on 25 March 2022 with members of the construction supply chain including manufacturers, principal contractors, developers, builders and legal and insurance professionals to discuss options to resolve the ongoing risk of insolvency in the industry.

²⁹ ASIC, *Australian Insolvency Statistics*, April 2022, <https://download.asic.gov.au/media/jb2ioyaj/asic-insolvency-statistics-series-1a-published-1-april-2022.pdf>.

³⁰ ASIC, *Insolvency Statistics, 2016-2019*, <https://asic.gov.au/regulatory-resources/find-a-document/statistics/insolvency-statistics/insolvency-statistics-series-3-external-administrator-reports/#3.2>.

The current state of play

In 2015 the SOP Act was amended to require a head contractor to hold a subcontractor's retention money (typically 5-10% of the subcontractor's total payment under a construction contract) in trust. However, this requirement only exists if the head contractor's construction contract with the principal (the main contract) has a value of at least \$20 million (the \$20 million threshold).

The requirement was introduced to prevent head contractors using retention money to help them manage short-term liquidity issues created by payments not coming from other contractors higher in the construction chain.

It is unethical for a head contractor who has received funds, a significant portion of which represents the value of work carried out by its subcontractors, to treat such funds as if it was their own. The notion of free working capital not only undermines the integrity of the industry by encouraging undercapitalised companies to operate in the industry and compete, unfairly, with better capitalised firms.

While the change to the SOP Act in 2015 reflected the start of a positive change in the industry, the amendment to the SOP Act and the \$20 million threshold adopted a lighter touch approach to addressing poor payment practices compared with the recommendations of reviews into insolvencies in the construction industry. For example, the 2012 Inquiry into Construction Industry Insolvency in NSW by Mr Collins QC (**Collins Inquiry**) and subsequent Murray Review which both recommended the establishment of a statutory trust for all parts of the contractual payment chain for all construction projects over \$1 million.

Since 2015, the \$20 million threshold has not changed. While a range of options, including implementing a cascading statutory trust framework and lowering the \$20 million retention money trust account provisions have been considered, NSW has not kept up with significant reforms across security of payment legislation in other States and Territories, which provide greater protections for subcontractors and suppliers.

For example, the Western Australian Government has recently introduced a new legislative model. This model provides that, from 1 February 2023, retention money must be held on trust for the trustee if the construction contract is valued at over \$1 million. From 1 February 2024, the project threshold will be lowered and construction contracts with a value of \$20,000 will be required to hold retention moneys in a retention trust account.

Prior considerations by the Government

In 2018, the Government released a consultation paper³¹ regarding the implementation of a cascading statutory trust framework throughout the entire construction chain. This proposed that all amounts (not just retention money) received by a head contractor or subcontractor (the ‘trustee’) as payment for work completed under a construction contract would be deemed as trust funds for the benefit of its subcontractors, workers and suppliers (the ‘beneficiaries’).

Following the 2018 consultation, a financial analysis of the cascading statutory trust framework by HoustonKemp Economics was commissioned. The HoustonKemp Economics report³² provided in 2019 indicated that while the need for a cascading statutory trust framework was clear to prevent insolvencies in the industry, it would represent a substantial change in business practice and leave prospective trustees less resilient to financial shock such as late or non-payment by principals.

Ultimately, the Government determined that implementing the cascading statutory trust framework was not recommended during the COVID-19 pandemic as it was unclear how the industry would recover when the government stimulus packages ceased.

In 2020, the Government consulted with stakeholders on the proposal to reduce the \$20 million threshold to \$10 million. Feedback received from stakeholders was mixed. Some stakeholders supported the extension of the retention money trust requirement by removing the threshold requirement altogether. Therefore, retention money would be held on trust for all subcontractors no matter the value of the project they were working on.

On the other hand, stakeholders who opposed lowering the threshold amount felt that the proposal would lead to additional administrative burden on a greater portion of the sector.

The proposal

Since the Government’s consultation in 2020, the building and construction industry have been operating in a significantly different landscape because of the COVID-19 pandemic. Australian Bureau of Statistics data released in May 2021 indicate the industry’s earnings before interest, tax, depreciation and amortisation growth were only driven by the increase in government funding for

³¹ Department of Finance, Services & Innovation, *Securing Payments in the Building and Construction Industry – A Proposal for ‘Deemed’ Statutory Trust Consultation Paper*, August 2018: https://www.fairtrading.nsw.gov.au/_data/assets/pdf_file/0009/396522/Deemed-Statutory-Trust-Proposal-Consultation-Paper-August-2018.pdf

³² HoustonKemp Economics, *Financial Impacts of Statutory Trusts in the Building and Construction Industry*, April 2019: https://www.fairtrading.nsw.gov.au/_data/assets/pdf_file/0020/532235/HoustonKemp-Report-Financial-impacts-of-statutory-trusts-16-Jun-19.pdf

operational costs, with \$5.8 billion of the \$6.5 billion in growth coming from JobKeeper, Boosting Cash Flow and other COVID-19 government support payments³³.

All participants in the construction supply chain from manufacturers, principal contractors and subcontractors are dealing with the impacts of financial stress and insolvency. This issue has been the subject of parliamentary attention (e.g. in relation to insolvencies of Privium and Probuild) and stakeholder concerns (including most recently through the Department's review of the HB Act).

For this reason, it is proposed to re-evaluate the Government's proposal presented in 2020. This proposal, at **clause 6** of the Amendment Regulation, would maintain the existing retention money trust account requirements but reduce the \$20 million threshold to \$10 million.

The purpose of this proposal is to capture more construction contracts (and subcontractors) and protect retention money withheld under a construction contract in the event of a head contractor becoming insolvent. Monies held in trust are not available for distribution to general creditors as property of the company or the bankrupt.

Regulatory assessment

Costs associated with establishing and maintaining a retention money trust account are primarily borne by head contractors. These costs include:

- Establishing a trust account with an approved authorised deposit-taking institution (**ADI**) (banks, building societies and credit unions). To fulfil the proposed trust obligation a business that engages subcontractors would need to establish a dedicated standard Australian business transaction bank account for the trust funds. Fees for these accounts are typically \$120 per annum (\$10 per month), which allows the account holder to perform an unlimited number of electronic transactions.
- Record keeping costs if using the services of a bookkeeper/accountant.

The administrative costs associated with establishing and maintaining a retention money trust account include:

- Regular reconciliation of trust accounts so that trust fund cash balances and amounts owed to subcontractors can be known in a timely manner.
- Within 10 business days of opening the account, the head contractor informing the Secretary of the following:

³³ Australian Bureau of Statistics, *Australian Industry 2019-20 financial year*, May 2021, <https://www.abs.gov.au/statistics/industry/industry-overview/australian-industry/latest-release>.

- the name of the approved ADI
- the branch or BSB number of the approved ADI
- the name and number of the account
- the opening balance of the account
- the date the account was opened.
- Within 10 business days after closing a retention money trust account, notifying the Secretary of the closure in writing.
- Keeping certain records related to the retention money trust account. For example, a head contractor must provide the subcontractor concerned with a copy of the ledger at least once every 3 months, or as often as may be agreed in writing by the head contractor and the subcontractor (but at least once every 6 months).

These costs are offset by the removal of the annual reporting requirements in December 2020, which were estimated to cost head contractor businesses up to \$10,000, depending on the complexity of their accounts.

Lowering the \$20 million threshold to \$10 million will require more head contractors to establish trust accounts on behalf of subcontractors they engage. However, since the proposed threshold is retained at \$10 million, this proposal will only affect construction business with construction contracts worth \$10 million or more. These construction businesses typically already engage the services of accountants and legal advisors to carry out this role.

While the Department is aware of the impacts COVID-19 has had on construction businesses that would now be required to keep retention money separately for its projects worth \$10 million and above, the impacts have been equally significant for subcontractors.

This proposal would help to provide greater financial health and security for a large portion of the construction industry in NSW. In June 2019 the NSW Innovation and Productivity Council reported “in NSW there are a vast number of micro and small businesses in construction. This is due to the specialised nature of construction trades, and the fact that they are often contracted by larger companies to work on projects”.³⁴

As of June 2019, 83% of the NSW construction industry is made up of micro businesses (employing 1-4 full time equivalent (**FTE**) employees), 14% of small businesses (5-19 FTE employees) and 3% medium sized businesses (20-109 FTE employees).³⁵ This highlights the

³⁴ NSW Innovation and Productivity Council, *Business Size Report*, June 2019 <https://www.investment.nsw.gov.au/assets/Uploads/files/IPC/Full-Report-Business-Size-Report.pdf>, page 10.

³⁵Ibid.

importance of reforms which provide greater protection for subcontractors who provide specialised construction trade work for the larger companies who contract with the principal contractor.

Questions

- 36. Currently, the SOP legislation requires a head contractor to hold a subcontractor's retention money in trust if the head contractor's construction contract with the principal has a project value of at least \$20 million. It is proposed for the project value threshold to be lowered to \$10 million to capture more construction contracts (and subcontractors) and protect retention money withheld in the event of an insolvency. Do you support lowering the project value threshold for payment of retention money? If not, why?**
 - 37. If you do support lowering the project value threshold, do you support lowering it to \$10 million? If not, what alternative amount do you support. Why?**
 - 38. In the RIS it was noted that the costs associated with establishing and maintaining a retention money trust account are offset by the removal of the annual reporting requirements in December 2020 (which were estimated to cost head contractor businesses up to \$10,000). Are there any other reasons for not lowering the \$20 million threshold?**
-

Adjudication Review Mechanism

The intended procedure for recovering a progress payment under the SOP Act involves the referral of any disputed claim to an adjudicator for determination, and the payment of the progress payment so determined.

The overriding principle of the SOP Act is "pay now, argue later". The SOP Act creates a rapid adjudication procedure to resolve payment disputes and is characterised by its 'rough and ready' approach. There is a difficult balance between upholding the legislature's intention of providing a rapid, informal process for resolving progress payment disputes (thereby maintaining a contractor's cash flow) and preserving a party's right to seek relief from adjudication errors.

Currently, a party can only use judicial review to seek relief from a perceived adjudication error. There may be statutory and/or judicial review options available depending on which State or Territory the dispute occurs. Judicial review means a review by a court of a decision made by a public authority, to ensure the decision is legal, reasonable and fair.

However, Victoria and Western Australia's security of payment laws provide for a right for parties to seek a review of an original adjudication determination ("an adjudication review"). An adjudication review provides an additional opportunity for the original adjudication determination to be reviewed and a new determination issued (without the parties being required to go to court).

While an adjudicator can respond to a determination which contains a clerical mistake, an error arising from an accidental slip or omission, material miscalculation of figures or a material mistake in the description of any person, thing or matter referred to in the determination or a defect of form,³⁶ all other matters require a judicial review by the NSW Supreme Court for a "jurisdictional error".

A jurisdictional error occurs when an adjudicator exceeds the limits of the decision-making authority conferred by the SOP Act in making the adjudication determination. Therefore, even if the adjudicator's determination contains an erroneous or mistaken finding, it will not be considered a jurisdictional error that can be appealed in court.

The reason behind there being limited circumstances to bring an appeal of an adjudication determination in a court is because court proceedings are extremely costly and time-consuming, which frustrates the operation and intention of the statutory scheme.

The proposal

A problem in the current SOP Act arises if the nature of the rapid adjudication process, particularly where it involves disputed payments claims for large amounts, results in adjudication decisions which are perceived to be clearly wrong, as considerable injustice may be inflicted.

An aggrieved claimant may be deprived of receiving payment for the construction work the claimant claimed it had carried out. Similarly, an aggrieved respondent may be required to pay to a claimant an amount the respondent does not consider it is liable for. This may mean that the aggrieved party decides to apply to the courts to have the adjudicator's decision set aside.

The Murray Report found "the long list of successful court cases that have set aside many adjudication decisions have been an unfortunate feature of the current legislative regime and strongly suggests that perhaps a more cost-effective alternative may be worth examining".³⁷

³⁶ SOP Act, section 22(5), <https://legislation.nsw.gov.au/view/html/inforce/current/act-1999-046#sec.22>

³⁷ John Murray AM, *Review of Security of Payment Laws*, December 2017, page 200
https://www.ag.gov.au/sites/default/files/2020-03/review_of_security_of_payment_laws_-_final_report_published.pdf

To address this problem, the Murray Report proposed an adjudication review process that would allow for a merit review of an adjudication determination in limited circumstances. The notion of an adjudication review mechanism is to deter respondents from seeking judicial review as a delaying tactic and to create a safety net that captures erroneous determinations outside of the court system.

The Murray Report Adjudication Review Proposal

The Murray Report recommended the review adjudication procedure should have appropriate restraints to require a dissatisfied party to carefully consider whether it wishes to pursue an adjudication review. The Murray Report recommended adjudication review should only be available in respect to disputes involving larger payment claims.

The Murray Report also recommended adjudication review should be available to both parties. The Murray Report considered that an adjudication review should be available to both the claimant and the respondent because an adjudication decision which is claimed to be wrong can inflict an injustice on either party. The Murray Report proposal considered an appropriate limitation on a party to lodge an adjudication review application was to prescribe a threshold amount as this would limit matters to where the amount in issue was not insignificant.

The Murray Report recommended a party to an adjudication should be entitled to lodge an adjudication review where:

- a) the adjudicated amount is:
 - i equal to or greater than \$100,000 of the scheduled amount; or
 - ii lower than \$100,000 of the claimed amount; or
- b) the adjudicator has rejected the adjudication application.

The “adjudicated amount” means the amount of the progress payment (if any) to be paid by the respondent to the claimant.³⁸ The “scheduled amount” is the amount of the payment (if any) that the respondent proposes to make.³⁹ The “claimed amount” is the amount of the progress payment that the claimant claims to be due. The Murray Report recommended this threshold amount because a shortfall of \$100,000 from the amount claimed, and the scheduled amount is significant for either party.

³⁸ SOP Act, section 22(1)(a), <https://legislation.nsw.gov.au/view/html/inforce/current/act-1999-046#sec.22>

³⁹ SOP Act, section 14(2)(b), <https://legislation.nsw.gov.au/view/html/inforce/current/act-1999-046#sec.14>

- A claimant would be entitled to lodge an adjudication review application in the circumstance where the amount the original adjudicator determined the respondent pay was \$100,000 less than what the claimant sought in their payment claim.
- A respondent would be entitled to lodge an adjudication review application in the circumstance where the amount the original adjudicator determined the respondent pay was equal to or greater than \$100,000 than what the respondent sought to pay in their payment schedule.

The Murray Report also considered the eligibility requirements for a review adjudicator and recommended that the most senior adjudicator available should carry out a review.

The Victorian Adjudication Review Model

Victoria's security of payment legislation contains the longest-standing adjudication review mechanism. Victoria's security of payment legislation provides a limited right for either the claimant or the respondent to apply for an adjudication review.

In Victoria a review application can only be made if preconditions are met. For example, the adjudicated amount (the amount of a progress payment that an adjudicator determines to be payable) must exceed \$100,000.

An adjudication review in Victoria is also limited to whether the original adjudicator had erroneously included in an adjudication determination an 'excluded amount' or excluded an amount because of erroneously determining that amount to be an 'excluded amount'.

An 'excluded amount' is defined under section 10B of the Victorian *Building and Construction Industry Security of Payment Act 2002* as amounts that must not be considered in calculating the amount of a progress payment to which a person is entitled under a construction contract. Examples of excluded amounts are any amount that relates to a variation of the construction contract that is not a claimable variation and any amount claimed for damages for breach of the construction contract.

Victorian Adjudication Activity Statistics for the 2020/21 financial year published by the Victorian Building Authority⁴⁰ indicates for the January/July 2021 period:

- 39% of all adjudicated matters had an adjudication amount of under \$5,000
- 89 of the 107 adjudications in this period had an adjudicated amount of \$99,999 or less

⁴⁰Victorian Building Authority, *Adjudication Activity Statistics, 2020-2021 financial year*, https://www.vba.vic.gov.au/_data/assets/pdf_file/0014/146021/Adjudication-Activity-Statistics-2020-2021.PDF

- 18 of the 107 adjudications in this period had an adjudicated amount of \$100,000 or more
- Just over 15% of all adjudications were eligible to apply for an adjudication review.

This data indicates that the Victorian adjudication review mechanism is very narrow and limits the number of adjudicated matters to be reviewed to a small portion of all adjudicated matters. The Victorian Adjudication Activity Statistics indicate there were no review adjudication applications made in the 2020/21 financial year.

Under the Victorian adjudication review framework there are no differences in the eligibility requirements for an adjudicator and a review adjudicator. A review adjudicator will be appointed by an ANA and the ANA has discretion on which review adjudicator to appoint.

Western Australia's Adjudication Review Model

The new Western Australia *Building and Construction Industry (Security of Payment) Act 2021* received Royal Assent on 25 June 2021. The supporting regulations will come into effect on 1 August 2022.

The Act introduces an adjudication review mechanism in lieu of the previously limited review avenue within the State Administrative Tribunal. In designing its adjudication review mechanism, the Western Australia (WA) Government looked to the Murray Report and findings from the Fiocco Report.⁴¹ The Fiocco Report was commissioned by the WA Government to consider the recommendations of the Murray Report and advise about the extent the WA Government should adopt its recommendations.

While the WA model is not as limited as the Victorian model, the claimant or respondent cannot raise matters that were not previously raised in the original adjudication being reviewed. The monetary threshold limitation is also more restrictive than the Murray Report proposal and the Victorian model.

Under the WA model, a claimant may only apply for a review adjudication if the adjudicated amount is less than the claimed amount and the amount of that difference exceeds \$200,000. A respondent may only apply for a review adjudication if the adjudicated amount is more than the scheduled amount and the amount of that difference exceeds \$200,000.

⁴¹ Commerce WA, *Final Report to the Minister for Commerce Security of Payment Reform in the WA Building and Construction Industry* by John Fiocco, October, 2018
https://www.commerce.wa.gov.au/sites/default/files/atoms/files/final_report_-_security_of_payment_reform_in_the_wa_building_and_construction_industry.pdf.

The WA model prescribes that to be eligible to be registered as a review adjudicator, a person must hold the qualifications, expertise and experience requirements prescribed for adjudicators generally. In addition to this, review adjudicators are required to undertake a Building Commissioner approved course to ensure an understanding of legislative requirements, and the role and functions of an adjudicator/review adjudicator in WA.

The proposed NSW Model

The model proposed by **Schedule 3, Subdivision 2** of the Amendment Bill takes into consideration the proposed model in the Murray Report, the Victorian model and the WA model. It aims to provide a moderate approach to carefully balance the objects of the security of payment laws. That is, to enable cash to flow quickly within the construction industry while creating a safety net that captures erroneous determinations away from the court system.

It is well understood that one of the key risks of the proposal is prolonging the process and slowing down the flow of cash. Limitations have been included in the proposed NSW model to mitigate this risk.

An important feature of the NSW model, located at **clause 26AC** of the Amendment Bill, to assist in maintaining the contractor's cash flow is the requirement for the original respondent to pay the part of the adjudicated amount that is not disputed to the original claimant before making an adjudication review application.

The part of the adjudicated amount that is disputed must be deposited into a trust account established with an authorised deposit-taking institution before making an adjudication review application, and the original respondent is required to give the original claimant written notice of the payment into the trust account, and information identifying the trust account.

Like the models in WA and Victoria, the proposed NSW model includes a monetary threshold to ensure only matters where the amount in issue is significant can be heard by a review adjudicator.

The proposed threshold outlined at **clause 20C** of the Amendment Regulation, is:

- the claimed amount exceeds the adjudicated amount by \$100,000; and
- the adjudicated amount determined by the original adjudicator exceeds the scheduled amount by \$100,000. This proposed threshold amount is in line with the recommendations of the Murray Report.

The *NSW Adjudication Statistics Quarterly Report*⁴² for the July – Sept 2021 period published by NSW Fair Trading indicated:

- 92 adjudication applications received an adjudication determination where the adjudicated amount was under \$99,999.
- Comparatively 24 adjudication determination had an adjudicated amount that was \$100,000 or over.

This data shows approximately 26% of adjudicated matters in the July-Sept 2021 quarter would be eligible for a review of the original determination under the NSW model. Since the monetary threshold is specified by the regulations, there is some flexibility to change the threshold amount if necessary.

While the monetary threshold is similar to the Victorian model, the NSW model does not propose to limit the scope of adjudication review applications to whether the original adjudicator had erroneously included in an adjudication determination an ‘excluded amount’ or excluded an amount because of erroneously determining that amount to be an ‘excluded amount’.

However, an important aspect of the NSW model at, **clauses 26AD and 26AE** of the Amendment Bill, is if a review application contains a submission, the submission must not raise and is void to the extent it purports to raise, an irrelevant matter or a matter that was not, but could have been raised before the original adjudicator.

Effectively, a review adjudication is limited to a rehearing of matters that the original adjudicator considered. The benefit of this for the parties is the matter is seen with fresh eyes by an adjudicator who was not directly or indirectly involved in the original adjudication.

By limiting the review to the rehearing of the matters the original adjudicator considered, this aims to mitigate the risk of prolonging the process and prevents review applicants or respondents from seeking a review of ‘new and improved’ matters as a delaying tactic.

A review adjudicator has the power to confirm the original determination or substitute the original determination with a new determination. In deciding the matter, **clause 26AG** of the Amendment Bill outlines that the review adjudicator must only have consideration of the provisions of the SOP legislation, the provisions of the construction contract from which the original application arose, and the material given to the review adjudicator by the ANA, including a response to the review

⁴² NSW Fair Trading, *NSW Adjudication Statistics Quarterly Report*, July- September 2021
https://www.fairtrading.nsw.gov.au/_data/assets/pdf_file/0009/1031859/Building-and-Construction-Industry-Security-of-Payment-Act-1999-Adjudication-activity-statistics-Q1-July-Sept-2021.pdf.

application from the review respondent, and documents that accompany a review application including:

- the original application and original determination
- the payment claim relating to the original determination
- if the original respondent is the review applicant, the payment schedule given to the original claimant
- submissions received by the original adjudicator
- any other information received by the original adjudicator.

The NSW model provides that if a review applicant or review respondent (the review debtor) fails to pay the whole or part of an amount specified by the review determination, the person to whom the amount is owed (the review creditor) may:

1. Ask the ANA to which the review application was made for a review certificate which may be filed as a judgment for a debt in court, and
2. If the review debtor is the original respondent – give the review debtor written notice of the review creditor’s intention to suspend carrying out construction work, or to suspend supplying related goods and services, under the construction contract under which the original application arose.

Clause 26AF of the Amendment Bill does not dictate any additional eligibility criteria for review adjudicators compared to the existing criteria for adjudicators. However, ANAs who receive adjudication review applications are provided with discretion to select the review adjudicator they consider would be most suitable to be referred a review application.

In determining which review adjudicator may be most suitable it is likely that the ANA would consider the review adjudicators background and experience in the matters raised in the review application. Feedback is sought on whether the Amendment Bill should include specific provisions which dictate additional eligibility criteria for review adjudicators and what these criteria may be.

Questions

- 39. An adjudication review provides an additional opportunity for the original adjudication determination to be reviewed and a new determination issued (without the parties being required to go to court). Do you support the proposal to allow a party to seek a review of an adjudication determination to be heard by another adjudicator? Why or why not?**

40. Do you think there should be any limitation on which matters can be reviewed by another adjudicator (i.e. limited by monetary amount or type of matter)? Why or why not?

41. Do you think there should be different eligibility criteria (i.e., qualifications, experience or additional training) for a review adjudicator? Why or why not?

Adjudicator Powers

Under the SOP Act, a disputed payment claim can be referred to an independent adjudicator for determination. When determining a dispute, the adjudicator is required to consider:

- the provisions of the SOP Act
- the construction contract from which the dispute arose
- the payment claim
- all submissions made by both parties
- the results of any inspection carried out by the adjudicator of any matter to which the claim relates.

In addition, the adjudicator may be required to determine the value of any construction work or related goods and services supplied under the applicable construction contract. After consideration of the above matters, the adjudicator's determination will outline:

- the amount of the progress payment (if any) to be paid by the respondent to the claimant (the adjudicated amount)
- the date on which any such amount became or becomes payable
- the rate of interest payable on any such amount.

Currently, an adjudicator has powers under section 21(4) of the SOP Act,⁴³ for the purposes of any proceedings conducted to determine an adjudication application. These powers include:

- requesting further written submissions from either party,
- setting deadlines for further submissions and comments by the parties,
- calling a conference of the parties, and
- carrying out an inspection of any matter to which the claim relates.

⁴³ Section 21(4) of the SOP Act: <https://legislation.nsw.gov.au/view/html/inforce/current/act-1999-046#sec.21>.

The proposal

Prior to the release of the Amendment Bill the Department consulted with parts of industry on an alternative proposal. This proposal would require adjudicators to visually verify (including using video conferencing) a building site where parties to an adjudication disputed whether work had or had not been completed. Feedback from several stakeholders representing ANAs, adjudicators and subcontractors raised concerns with this proposal including that it would:

- complicate the adjudication process
- prevent efficiency and effectiveness of the aim of the SOP Act
- cause the adjudicator to consider matters outside of the matters in section 22(2) of the SOP Act

Feedback from stakeholders also raised that adjudicators are not necessarily experts in building and determining whether or not work has been completed.

To address these concerns the initial proposal was revised. The revised proposal outlined at **Schedule 3, clause 21** of the Amendment Bill proposes to allow an adjudicator to do the following at their discretion (unless both parties object):

- arrange for the testing of a matter to which the claim relates
- engage an appropriately qualified person to investigate and report on any matter to which the payment claim relates.

To limit the risk of over-complicating the adjudication process and preventing an efficient adjudication process, the proposal was changed from being a mandatory inspection to a voluntary power an adjudicator may use if they consider there are complex issues which need to be investigated. The initial proposal was also revised to ensure only appropriately qualified persons can be engaged to test, investigate and report on a matter the adjudicator has sought information about.

Adjudicators are often determining complex claims involving large sums of money and are required to do this as expeditiously as possible (within 10 business days, or later if both parties agree). In this respect, adjudicators should have tools available to them to provide the best understanding of the dispute.

By providing adjudicators with the ability to arrange for testing or engage an expert to investigate and report on a matter to which the payment claim relates, the adjudicator can receive expert information to inform their adjudication determination.

This proposal may raise a concern that testing and expert investigation and reporting may add to the costs of the adjudication proceedings and the length of time a payment dispute remains unresolved. This is a valid concern as the object of the SOP Act is to ensure disputed payment claims are quickly determined in a cost-effective manner for prompt payment to be made to the entitled party.

However, the powers of adjudicators do not provide an extension of time in which an adjudicator is to determine an adjudication application as specified in section 21 of the SOP Act. Unless the adjudicator is granted further time by the claimant and respondent, the adjudicator must provide a determination within 10 business days after the adjudicator serves the adjudicator's acceptance of the adjudication application on the claimant and respondent.

Case study: The engagement of a qualified person to investigate and report

An adjudicator considers it valuable to engage an appropriately qualified person to investigate and report on a relevant matter. In this matter the context of the dispute is a large and complex construction project. The adjudicator considers the engagement of a quantity surveyor would assist in the estimation of the value of construction costs.

The estimated time for the quantity surveyor to complete their assessment is longer than the 10 business days allocated to adjudicators to determine the payment dispute.

The adjudicator would be required to request further time to determine the dispute pursuant to section 21(3)(b) of the SOP Act.

The Amendment Bill also proposes that the adjudicator be required to seek permission from the claimant and respondent of the engagement of the quantity surveyor to provide a report of the estimation of the value of construction costs.

If the adjudicator did not receive acceptance by the parties to determine the matter outside of the 10 business days and/or if both the claimant and respondent objected to the engagement of the quantity surveyor, the adjudicator would be required to determine the dispute within 10 business days.

Questions

- 42. Currently, an adjudicator has powers to request further submissions, call a conference and carry out inspections. It is proposed to additionally allow an adjudicator to arrange for the testing of a matter and engage an appropriately qualified person to investigate and report on any matter (unless both the parties to the adjudication object). Do you support the additional powers recommended by this proposal? If not, why?**

- 43. Do you think that the benefit of the additional powers, such as a better-informed determination, outweighs any concerns that the proposal may lengthen the time for resolving disputes? If not, why?**
- 44. Does the legislation need to address who is required to pay for any testing or the engagement of an expert to investigate and report on certain matters? Or should this form part of the fees of the adjudicator to be shared by the parties in such proportions determined by the adjudicator?**
-

5. Robust regulatory intervention

Rectifying defects early

Many defects (through non-compliance with the NCC) are likely to occur because of attempts to minimise construction costs.⁴⁴ Defective building work has multifaceted costs to a range of parties including the end customer (homeowner), builders, developers, building insurers and future purchasers. These costs include but are not limited to the potential remediation costs, the financial and emotional costs of pursuing remediation, legal and litigation costs and ongoing financing and insurance costs. Defective building work also collectively diminishes the public's confidence that buildings built in NSW must be built under robust controls and compliance with the building codes.

The impact of defective building work is widespread. For example, in a research report on serious defects in recently completed strata buildings across NSW which was prepared by the OBC and Strata Community Association NSW, it was found that of the 1,400 strata managers who were surveyed for the research, 39% of strata managers reported the strata buildings they managed had experienced serious defects in the common property. The majority of serious defects related to waterproofing, affecting 23% of all buildings surveyed. Other serious defects related to fire safety systems (14%), structure (9%), enclosure (9%), key services (5%) and non-compliant cladding (6%).⁴⁵

The research report indicated that “the incidence of serious defects generally led to significant financial and emotional stress for homeowners, tenants and strata managers”. Further findings of the report included:

- It is estimated that around \$331,829 per building was spent by owners' corporations to resolve serious defects.
- Very few owners corporations were able to recover their costs.
- The time taken to resolve defects varied greatly across the sample, with around 38% of buildings taking over 12 months and 25% taking less than 6 months.⁴⁶

⁴⁴ The Centre for International Economics, *Building Confidence Report: A case for intervention*, July 2021 <https://www.abcb.gov.au/sites/default/files/resources/2021/Building-Confidence-Report-A-Case-for-intervention.pdf>, page 86.

⁴⁵ Strata Community Association NSW and NSW Office of the NSW Building Commissioner, *Research report on serious defects in recently completed strata buildings across New South Wales*, September 2021 https://www.nsw.gov.au/sites/default/files/2021-0/Serious_defects_in_residential_apartments_research_report.pdf, pages 5-8.

⁴⁶ Ibid.

On 1 September 2020, the RAB Act commenced. The RAB Act established a suite of new powers to investigate and rectify building work. The RAB Act grants powers to the OBC and NSW Fair Trading to investigate serious defects in multi-storey residential apartment buildings (Class 2). It allows developers to be issued with various orders if serious defects are discovered in the common property. The compliance powers can be used for up to 10 years after the building is completed.

The powers are intended to allow the Department to investigate, monitor and enforce compliance with the building and construction laws in NSW where an issue arises that relates to a serious defect (relating to the following key building elements: waterproofing, fire safety systems, structure, enclosure, and key services) in a residential apartment building. The powers under the RAB Act include information-gathering powers and powers of entry which are relied on to carry out the audits. Importantly, the RAB Act contains powers to issue prohibition orders, stop work orders, and building work rectification orders (**BWRO**) if serious defects are found.

Since 1 September 2020 to April 2022, there have been 123 full OC audits that have commenced of which 49 have been completed and separately there have been 63 Anywhere/Anytime audits of building work under the RAB Act conducted across NSW involving both NSW Fair Trading and SafeWork NSW inspectors. These audits are informed by extensive data collection and analysis by the Department to ensure that high-risk projects and practitioners are subject to these audits.

These audits have found significant rates of serious defects in residential apartment buildings. For example, of the 49 completed OC audits since the commencement of the Act to April 2022:

- 10% of buildings have a serious defect related to essential services
- 37% of buildings have a serious defect related to fire safety
- over 20% of buildings have a serious defect related to waterproofing.

While engagement between developers, builders, designers and architects and inspectors from NSW Fair Trading have led to positive responses to defects in building work, the RAB Act allows the building regulator to issue orders for the work to be fixed and can prevent the issue of an OC until defects are remedied. From 1 September 2020 to April 2022, NSW Fair Trading has issued:

- 18 prohibition orders
- 22 BWROs
- 11 stop work orders
- 1 enforceable undertaking.

During this period, 20 written direction notices (**WDN**) have also been issued under the EP&A Act, which serve to complement the orders available under the RAB Act as an early intervention remediation mechanism available to certifiers.

The Amendment Bill proposes several reforms to further facilitate early regulatory intervention and timely rectification of defects:

1. Strengthening the role of certifiers in responding to serious defects

Ref: Amendment Bill, Schedule 7 (Amendment of Environmental Planning and Assessment Act 1979)

A WDN is a compliance tool available to principal certifiers under the EP&A Act. A WDN is issued for suspected or likely non-compliance and gives the person responsible for the development an opportunity to remedy the non-compliance before further compliance action might be taken. The aim is for certifiers to act as the point of first response in the compliance and enforcement process.

A BWRO is a compliance tool available to the building regulator under the RAB Act to require a developer to carry out building work or refrain from carrying out such work to eliminate, minimise or remediate a serious defect or potential serious defect. BWROs are issued by Department building inspectors rather than certifiers and are intended to be used in more serious matters that require direct intervention from the regulator, rather than a certifier.

The Government's work to transform the building sector has relied not only on comprehensive powers for the regulator but also buy in from industry players. Many certifiers have become increasingly proactive in calling out substandard design and building work rather than relying on regulator intervention.

However, the requirements for a WDN do not work cleanly with provisions relating to BWROs in the RAB Act as the grounds for a private or council certifier to issue a WDN are more limited than those for a building inspector issuing a BWRO. Under clause 66 of the Environmental Planning and Assessment (Development Certification and Fire Safety) Regulation 2021, a WDN can only be issued for works that are carried out in accordance with the CC or Complying Development Certificate and the conditions of the Development Application. The definition of "serious defects" under the RAB Act, which the issuing of BWROs is tied to, captures a broader range of works, including non-referenced standards in the BCA, and works attributable to defective or faulty workmanship and design.

Schedule 7 of the Amendment Bill will amend the EP&A Act to allow certifiers to issue a WDN where there is a defect that is considered a "serious defect" under the RAB Act. This will broaden the instances where a WDN can be issued and impose more responsibility on the certifier to resolve the defect at an earlier stage during the construction process, which will reduce the reliance on the building regulator to intervene to rectify building defects towards the end of the construction.

It is acknowledged that this change will inevitably increase the scope of work to be carried out by certifiers. This change may be reflected in the fees charged by certifiers, which may ultimately result in increased costs to those who engage their services. However, this reform remains consistent with the intended function of the certifier role as an avenue to achieve prompt rectification of defects. The current overreliance on BWROs to remedy simple defects has resulted in unnecessarily drawn-out and costly rectification processes and is not consistent with the Government's commitment to improving accountability in the industry and increasing consumer protections.

The value of rectifying defects early in construction rather than at completion or years after completion is substantial. The WA Government recently estimated for single residential buildings the benefits in avoided costs due to building problems being rectified early is estimated at up to \$5,600 per build or \$14-27 million per annum for the WA construction industry.⁴⁷

On average, it is 2.5 times cheaper to address defects during the construction process than if rectification is required five years later. These statistics considered the savings from avoided costs and have been estimated based on the indicative costs to rectify common types of non-compliance that occur during the critical stages of construction (based on the audit data from the WA Building Commissioner versus the costs of rectification or remediation of damage five or more years after completion). The savings from avoided costs were calculated by deducting inspection costs, rectification costs, and re-inspection costs from the cost to remediate problems five or more years later.⁴⁸

2. Issuing BWROs for products failing to comply with the NCC (not limited to the BCA)

Ref: Amendment Bill, Schedule 5 (Amendment of Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020)

BWROs are a compliance function contained in the RAB Act. They are an effective tool for the timely rectification of certain defects and are an immensely important consumer protection mechanism.

⁴⁷ Government of Western Australia Department of Mines, Industry Regulation and Safety, *Reforms to the building approval process for single residential buildings in Western Australia Consultation Regulatory Impact Statement*, September 2019, page 44

https://www.commerce.wa.gov.au/sites/default/files/atoms/files/cris_building_approvals_process_residential_0.pdf,

⁴⁸ Ibid.

Case study: south Sydney Development

A development just south of Sydney CBD required rectification to waterproofing in 380 bathrooms across 241 apartments at an estimated cost of \$5.7 million (total build cost of \$120 million). Had this development been allowed to proceed to occupation, the strata likely would have needed to address the defects several years later at their own expense, estimated at \$13.3 million.

Since the introduction of BRWOs under the RAB Act in 2020, BRWOs have contributed to the effective remediation of 23 apartment buildings. However, recent audits have identified gaps in the legislation that have unintentionally limited the ability for BRWOs to be used on some types of work.

In particular, the increasing use of prefabricated products in building work has remained largely unregulated. Pre-fabricated products are modernising the way buildings are assembled and provide attractive savings for consumers in terms of both time and cost. However, given their rapidly increasing prevalence in the industry, it is essential that these new technologies are appropriately regulated.

Pre-fabricated products are often imported from overseas. They include things like modular bathroom pods (building products), sanitary drainage and cold and hot water service pipework. With pre-fabricated products, building parts and even entire buildings being constructed offsite, it is critical that regulation keeps pace with trends and practices in industry. The broader issue of regulating the pre-fabrication industry is dealt with in Volume 2 of the Building Bill RIS.

Audits have found that some prefabricated products do not meet Australian specifications or industry codes. A recent example found that the standalone pipes and taps of imported bathroom pods were compliant with Australian specifications, but the pod itself was not waterproofed when incorporated into the building. For products to be compliant for use in Australia, they must meet the required specifications and standards as an individual product but must also remain compliant when incorporated into the overall build.

This means ensuring the right product is being used in the right environmental circumstances and that factors such as waterproofing and soundproofing standards are met, and the product does not compromise the structural integrity of the whole building or a building element.

Currently, these issues are difficult to address under the RAB Act powers. This is because the trigger for issuing a BRWO is the identification of a “serious defect” resulting from non-compliance with the BCA – however this trigger fails to require compliance with the PCA. Additionally, defective products do not readily fit within the definitions of “building element” or “serious defect” because

there is currently very limited, if any, ability to reference back to achieving compliance with the BCA.

The proposed reform in **Schedule 5** of the Amendment Bill will ensure that the definition of “serious defect” captures failures to comply with performance requirements of the NCC, which includes both the BCA and PCA, as well as any specifications or standards prescribed by regulation. This will enable the Secretary to issue a building works rectification order for products that fail to comply with the performance requirements of any part of the NCC or any specifications or standards not captured in the NCC as appropriate.

These changes will reflect the changing industry, including the increasing use of pre-fabricated building products, by ensuring that compliance orders are available to remedy defective work that uses or incorporates prefabricated products.

Questions

- 45. Do you support the expansion of certifier powers to hand out WDNs where they identify a “serious defect”? Why or why not?**
 - 46. Do you agree that BWROs should be able to be issued where non-compliance with the PCA is identified? Why or why not?**
 - 47. Do you think the expansion of the application of BWROs will improve the way in which prefabricated products are regulated? Why or why not?**
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3. No privilege against self-incrimination for body corporates

Ref: Amendment Bill, Schedule 8 (Amendments relating to corporate self-incrimination)

The common law privilege against self-incrimination prevents an investigator from compelling a person to provide documents or answer questions if those documents or answers may tend, directly or indirectly, to expose the person to a conviction for a crime. Currently, it is intended that only natural persons can claim the privilege. Corporations cannot claim it unless there is a specific application of privilege. This was tested in the High Court of Australia case of the *Environmental Protection Authority vs Caltex Refining Co Pty Ltd* where the authority obtained information to be used as evidence against pollution offences.⁴⁹

⁴⁹ *Environmental Protection Authority vs Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, <http://classic.austlii.edu.au/au/journals/UNSWLawJl/1994/23.pdf>

Under various pieces of NSW Fair Trading legislation, investigators can obtain information from a person which can be used to gather evidence to investigate things such as complaints and possible offences under the Acts.

For example, section 127(6) of the HB Act provides that any information or document obtained from a person that has been compelled to provide that information or document is inadmissible against the person in criminal proceedings (other than proceedings for an offence where information provided by the person is knowingly false or misleading).

Currently, this also extends to corporations as they fit the definition of “persons”. This is impacting on the ability for the Department to collect information (including information critical to remediating defective building work) and hinders prosecutions and disciplinary procedures.

Schedule 8 of the Amendment Bill will clarify that the right against self-incrimination will not apply to corporations under the BDC Act, BPS Act, DBP Act, HB Act, RAB Act, SSM Act and the *Fair Trading Act 1987*. This will bring these Acts in line with the common law and other legislation that regulates the activities of corporate entities, such as the *Protection of the Environment Administration Act 1991* (NSW).

This will enable information received from the corporation or responses provided to questions asked by authorised officers from the Department to be admissible in criminal proceedings. This will promote accountability for wrongdoing by corporate entities operating in the building and construction industry. Individuals acting as a representative of the corporation will also be captured however, it will not apply to individual persons acting in their own right.

Questions

- 48. Do you support that information gathered by the Department should be able to be used as evidence against a corporation? If no, why not?**
 - 49. This reform will also apply to individuals in their capacity as a representative of a corporation such as a director of the company. Should the information collected from the representative be able to be used against the corporation in criminal proceedings? If not, why?**
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4. Promoting accountability to deter intentional phoenix activity

Ref: Amendment Bill, Schedule 10 (Amendments relating to intentional phoenix activity)

There is an important distinction between legitimate insolvency processes and intentional phoenix activity. Insolvency under the Commonwealth *Corporations Act 2001* occurs when a person cannot pay all their debts, as and when they become due and payable. There are several lawful options following insolvency including liquidation, voluntary administration, or receivership. Starting a new company after a failed company is a common and lawful part of the business cycle.

Intentional phoenix activity, however, is characterised by directors intentionally creating a new company to continue the business of an existing company that has been deliberately liquidated to avoid paying outstanding debts, including taxes, creditors, and employee entitlements.

Company directors partaking in intentional phoenix activity usually transfer the assets of an existing company to a new company without paying true or market value, leaving debts with the old company. Once the assets have been transferred, the old company is placed in liquidation. When the liquidator is appointed, there are no assets to sell so creditors cannot be paid.

Anecdotal evidence indicates that intentional phoenix activity is unfortunately prevalent in the building and construction industry. Correspondence and complaints to the Department from homeowners, licence holders and other stakeholders in the industry have raised concerns about the impact this practice has on innocent parties, which was also discussed during stakeholder roundtable discussions organised by the Department held on 23 February 2022 and 25 March 2022.

There are difficulties for the Department in policing this conduct as a state-based agency. This is because the laws, resources and powers needed to regulate intentional phoenix activity are found within Commonwealth agencies including Australian Securities & Investments Commission (**ASIC**) and Australian Taxation Office (**ATO**). For example, ASIC uses strategies including surveillance, relationships with liquidators and enforcement action to deter directors and facilitators from engaging in intentional phoenix activity. In addition, the ATO has an interest in intentional phoenix activity, as sophisticated players may also be seeking to avoid paying tax.

While the Minister and the Department do not have the legislative power to regulate the directors that engage in intentional phoenix activity in NSW, the Department is an active member in the Phoenixing Taskforce led by the ATO. The Phoenixing Taskforce brings federal, state and territory agencies together to combat phoenix activity. The Department contributes to the work of the Phoenixing Taskforce via information sharing and intelligence gathering.

The NSW Government has been invested in addressing the prevalence of insolvency generally in the building and construction industry, primarily through responding to the behaviours that cause insolvency (such as defective design and building work, poor project management and documentation, and a lack of understanding of who the untrustworthy players are) and the SOP Act.

However, the object of the SOP Act is not intended to regulate the activity of company directors. Further, intentional phoenix activity cannot be fully addressed by the SOP Act (particularly without comprehensive changes to other regulatory schemes).

Chapter 2, clause 14 of the proposed Building Bill proposes to prevent a person from carrying out regulated work in the building and construction industry if they are not deemed a “suitable person”.

If the person is an undischarged bankrupt or a close associate, who would not be a fit and proper person to be licensed, exercises a significant influence over the person or the operation and management of the person’s business, the Secretary of the Department may determine the person is not suitable to hold a license. An assessment of whether the person or their business has engaged in intentional phoenix activity would be considered in determining whether a person is a “suitable person”.

As mentioned earlier, there are also specific federal laws which aim to prevent intentional phoenix activity and outline the legal duties of company directors when the company is insolvent or is facing a real risk of insolvency. Director’s duties expand to encompass duties to creditors. For example, directors have a duty to prevent creditor-defeating dispositions. Commonly part of phoenixing activity, a creditor defeating disposition involves the disposition of company property for less than market value or the best price reasonably obtainable, and which prevents that property from being realised for the benefit of creditors in the liquidation of the company⁵⁰.

In addition to the provisions proposed in the Building Bill and existing federal laws targeting the person engaging in intentional phoenix activity, **Schedule 10, Division 6** of this Amendment Bill proposes a duty for persons who enter or maintain a business association with the phoenixing company.

This proposal may seem to place an onus on the “wrong” person (on the contracting party rather than the party that has illegally phoenixed); however, it is imperative that the whole industry works together to disrupt companies that engage in intentional phoenix activity as a regular business

⁵⁰ Section 588FDB of the *Corporations Act 2001* (Cth), <https://www.legislation.gov.au/Series/C2004A00818>.

model. This proposal aims to remove players in the industry that engage in intentional phoenix activity by interrupting their contracting ability.

Anecdotal evidence provided to the Department indicates many in the industry turn a blind eye to colleagues who intentionally phoenix, as it does not impact them directly, or simply because they it benefits their own business. One of the key enablers of directors who continue to engage in intentional phoenix activity are the people in the industry who continue to work with companies where the directors are or have engaged in intentional phoenix activity. This proposal addresses those industry participants who wilfully turn a blind eye.

This proposal also serves to protect businesses who are considering entering into a business association with another business. Effectively it mandates due diligence and aims to prevent good businesses that engage in lawful business practices from falling prey to companies that engage in intentional phoenix activity as a regular business model.

Schedule 10 of the Amendment Bill seeks to amend the BDC Act, DBP Act and the HB Act (to be replaced by the new Building Act) to place 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 phoenix activity in an industry relating to building and construction.

There are difficulties in identifying and detecting intentional phoenix activity as there is no legislative definition for intentional phoenix activity. The media and industry participants can often inadvertently use incorrect terminology which lumps together lawful insolvency practices/disputes in the building and construction industry with intentional phoenix activity. To address this, the Amendment Bill proposes a definition of “intentional phoenix activity”. In the proposed definition the person must be a director of a body corporate (e.g., a company). This is because directors of companies act as the “brain” of the company and are responsible for the company’s actions.

Schedule 10, clause 44A of the Amendment Bill proposes that “intentional phoenix activity” would have two limbs.

1. The first occurs when the director is involved in liquidating or otherwise dealing with the first body corporate with the intention of avoiding the payment of debts of the first body corporate (including taxes, employee entitlements and amounts due to creditors).
2. The second limb is when the director establishes the registration, control or management of another body corporate (the second body corporate) with the intention that the second body corporate will:

- a. continue business activities similar to the business activities of the first body corporate and using assets from the first body corporate, and
- b. be under the control or management of persons who are, or are close associates of, persons who had control or management of the first body corporate before the liquidation or other dealing mentioned in the first limb.

What constitutes “reasonable steps” will be provided for in a guidance document prepared by the Department. It will likely include steps such as before entering a business association asking the director of the company whether they have ever operated under a different business name, checking the NSW Fair Trading licence register⁵¹, ASIC’s Banned and Disqualified search or Equifax’s iCIRT rating tool⁵² to confirm the company’s history. If a business association has already been established, reasonable steps may include making enquiries with the director(s) of the company for example, if the company is requesting payments be made to a new company.

It is proposed that a “business association” would include:

- a contract, arrangement or understanding entered into in a registered practitioner’s capacity as a registered practitioner, and
- a close associate relationship such as a business partner, an employee or agent of the person, or where the person holds or is entitled to exercise, in respect of the other person or the business of the other person, any other relevant financial interest, relevant position or relevant power⁵³.

It is proposed that failure to comply with the requirement to take reasonable steps would be a ground for disciplinary action (rather than an offence). Disciplinary action can provide the Department as the regulator a more customisable remediation approach rather than a punitive approach. If this provision was an offence provision, a failure to comply would provide the Department with fewer options to encourage better compliance. An offence would carry significant fines for the company and the director involved.

Comparatively, examples of the disciplinary action which could be taken by the Department (as the regulator) include:

- the regulator issuing a caution or reprimand to the licence holder,
- issuing a penalty (fine),

⁵¹ Service NSW, Contractor and Tradespersons licences register, <https://www.onegov.nsw.gov.au/publicregister/#/publicregister/search/Trades>.

⁵² iCert from Equifax, star-rating tool to assess building professionals, <https://www.buildrating.com/>

⁵³ *Home Building Act 1989*, Schedule 1, clause 5(1)(a), (b) or (f): <https://legislation.nsw.gov.au/view/whole/html/inforce/current/act-1989-147#sch.1>

- imposing a condition on the licence holder including requiring the holder to undertake a course of training relating to a particular type of business practice (e.g. phoenixing behaviour).

Since the intent of this proposal is to encourage lawful conduct from all industry players, protect good businesses trying to do the right thing, and prevent good businesses from falling prey to businesses that intentionally phoenix, the Department proposes an educative, remedial model to assist with compliance and improve outcomes for all.

Questions

- 50. Do you support the proposal to place a duty on a registered practitioner to take reasonable steps to ensure that persons they deal with aren't involved in intentional phoenix activity? Why or why not?**
- 51. Do you agree with the proposed definition of "intentional phoenix activity"? Why or why not? Please make any suggestions for change.**
- 52. Do you support that a failure to comply with the duty is addressed through disciplinary action rather than being an offence? Why or why not?**
- 53. Would you support a mandatory reporting requirement if a person reasonably suspected that a director of a company has, will or is engaging in intentional phoenix activity?**

5. Recovering costs to maintain a strong regulatory approach and increase accountability

Ref: Amendment Bill, Schedule 12 (Amendments relating to investigation cost recovery)

Schedule 12 of the Amendment Bill proposes that provisions be introduced into the BDC Act, BPS Act, HB Act and the *Gas and Electricity (Consumer Safety) Act 2017* to provide the Secretary of the Department the power to give a written investigation cost notice requiring a person to pay some or all costs associated with an investigation conducted by the Department.

It is proposed this power will be limited to where the following occurs:

- a) an investigation is conducted under the applicable Act
- b) the investigation reasonably requires the Secretary to incur exceptional costs and expenses to determine the existence or extent of a breach of this Act or the regulations
- c) as a result of the investigation, the Secretary is satisfied that a person has breached the applicable Act or the regulations.

The intent of this proposal is to ensure that the Department can secure the services of relevant experts to investigate and respond to misconduct, including bringing in external expertise to provide advice on how to respond and rectify misconduct. The Department understands its role as a regulator and enforcer and does not seek to recover investigation costs that should be reasonably incurred by the Secretary.

This proposal does not seek to recover costs which would ordinarily be incurred in an investigation by the Department. It seeks to recover costs associated with the following scenarios:

- for an investigation of a kind that is not regularly conducted, and where substantial costs or expenses have been incurred in the investigation (**category 1**), and
- for an investigation of a kind that is regularly conducted, and where substantial costs or expenses have been incurred that would not ordinarily be incurred in this sort of investigation (such as costs or expenses incurred by commissioning third party expertise) (**category 2**).

Example – category 1

The Department investigates a company for non-compliance with the standards/product certification requirements under the Gas and Electricity (Consumer Safety) Act 2017. Conducting this type of investigation is not something undertaken regularly by the Department. This investigation requires product testing which involves substantial costs and expenses from using the services of a laboratory to conduct a forensic analysis.

Example – category 2

The Department undertakes an audit of the construction of a Class 2 building. These types of audits are regularly conducted by the Department. The audit finds there is atypical cracking and movement in the building, which may require the evacuation of the residents. The developer disputes the findings of the Department's audit.

Ordinarily where the developer does not agree with the findings of the Department, the Department and developer will agree for the developer to arrange for and pay for their own expert report(s).

In the rare occasion a developer is uncooperative the Department may be required to incur substantial costs of expenses to commission a third-party expert such as a structural engineer expert to examine the audit, the building and provide a recommendation.

The Secretary of the Department could recover an unpaid amount specified in an investigation cost notice as a debt in an applicable court.

This proposal also includes an appeal process whereby a person issued an investigation cost notice may appeal against it in the NSW Land and Environment Court within 30 days after the notice is given to the person.

Questions

54. Do you support the proposal to provide the Secretary with the power to give a written investigation cost notice requiring a person to pay some or all costs associated with an investigation? Why or why not?

55. Do you believe that the limitation to the power for the Secretary to issue an investigation cost notice is sufficient? Why or why not?

56. Is the definition of “exceptional costs and expenses” reasonable?

57. Are the appeal provisions reasonable?
