Regulatory Impact Statement

Building Compliance and Enforcement Bill 2022

August 2022

NSW GOVERNMENT

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Commissioner's Message

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

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

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

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

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

Recent building incidents have emphasised the devastating impacts that building defects have on building 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 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	NSW Government Response to the Building Confidence Report released on 19 February 2019
ABCB	Australian Building Codes Board – an Australian Government standards writing body that is responsible for the development of the *National Construction Code*
Amendment Bill RIS	The Regulatory Impact Statement for the *Building and Construction Legislation Amendment Bill 2022* and *Building and Construction Legislation Amendment Regulation 2022* also being consulted on.
Authorised officers	*authorised officers* include employees of the Department of Customer Service, council investigation officers and other people prescribed by regulation. The NSW Building Commissioner and members of the NSW police force are automatically prescribed authorised officers for the Bill. Additional people can be authorised officers for matters relating the *Building Products Safety Act* 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.
BCA	Building Code of Australia – Volumes One and Two of the National Construction Code
BCE Bill	The Building Compliance and Enforcement Bill 2022
Building Commissioner	*Building Commissioner* is to be employed under the *Government Sector Employment Act 2013*
Building Confidence Report	'*Building Confidence: Improving the effectiveness of compliance and enforcement systems for the building and construction industry across Australia*' report by Professor Peter Shergold AC and Ms Bronwyn Weir, commissioned by the Building Ministers' Forum in 2017.
Building enforcement legislation	*building enforcement legislation* means the following Acts and the regulations and other instruments made under the Acts: • the *Building Compliance and Enforcement Act 2022* (subject to enactment) • the *Building Act 2022* (subject to enactment) • the *Building and Construction Industry Security of Payment Act 1999* • the *Building and Development Certifiers Act 2018* • the *Building Products (Safety) Act 2017* • the *Design and Building Practitioners Act 2020* • the *Gas and Electricity (Consumer Safety) Act 2017*

Building work	Building work means an activity involved in— (a) the construction of a new building or structure, or a change to an existing building or structure, or (b) coordinating or supervising work specified in paragraph (a). *building* includes part of a building *structure* includes part of a structure
BWRO	*Building work rectification orders* - under the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* - are powers that are specifically targeted at defective and unsafe building work that could cause significant physical and financial harms to consumers and other practitioners.
Compliance Certificate	A Compliance Certificate confirms that the completed building work complies with council, development and regulatory requirements
Class 2 building or building with a Class 2 part	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. 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).
DBP Act	*Design and Building Practitioners Act 2020*
Demerit points scheme	Demerit points scheme means the scheme in Part 7 of the Building Compliance and Enforcement Bill
Developer	For this Act, a *developer*, in relation to building work, means any of the following persons, but does not include a person excluded from this definition by the regulations— (a) the person who contracted or arranged for, or facilitated or otherwise caused, whether directly or indirectly, the building work to be carried out, (b) if the building work is the erection or construction of a building—the owner of the land on which the building work is carried out at the time the building work is carried out, (c) the principal contractor for the building work within the meaning of the *Building Act 2022*, Chapter 6, (d) in relation to building work for a strata scheme—the developer of the strata scheme under the *Strata Schemes Management Act 2015*, (e) another person prescribed by the regulations for the purposes of this definition.
EP&A Act	*Environmental Planning and Assessment Act 1979*
HB Act	*Home Building Act 1989*

Intentional phoenix activity	a person is involved in intentional phoenix activity if the person is a director of a body corporate (the first body corporate) and is directly or indirectly involved in— (a) 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, and (b) establishing the registration, control or management of another body corporate (the second body corporate) with the intention that the second body corporate will— (i) continue business activities similar to the business activities of the first body corporate and using assets of the first body corporate, and (ii) 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 paragraph (a). (c) close associate has the same meaning as in the *Building Act 2022*.
Licence holder	*Licence holder* includes licence holders, former licence holders and people who have influence or control over an entity licence
NCAT	NSW Civil and Administrative Tribunal
NCC	National Construction Code – is published in three volumes. The Building Code of Australia is Volumes One and Two and the Plumbing Code of Australia is Volume Three It is a set of technical design and construction provisions for buildings. As a performance-based code, it sets the minimum required level for the safety, health, amenity, accessibility and sustainability of certain buildings
Notifiable building	A “notifiable building” means— (a) a Class 2 building under the National Construction Code, and (b) a building for which the building work requires a building compliance declaration under the *Design and Building Practitioners Act 2020*. It includes a building containing a part that is classified as a Class 2 building
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
PCA	*Plumbing Code of Australia* – Volume Three of the National Construction Code
P&D Act	*Plumbing and Drainage Act 2011*
RAB Act	*Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020*

Responsible person	For Part 4, Division 5, Plumbing and drainage work direction a *responsible person* for plumbing and drainage work the subject of a certificate of compliance is a person who— (a) holds a licence under the *Building Act 2022*, authorising the person to do specialist work that is plumbing and drainage work, and (b) gives the Secretary the certificate of compliance in relation to the plumbing and drainage work that the person is authorised to do or to supervise, in accordance with the *Building Act 2022*. For Part 5, Rectification of serious defects and resolving disputes a *responsible person* in relation to building work, means— (a) the developer for the building work, (b) another person responsible for the building work
RIS	Regulatory Impact Statement
Serious defect	Serious defect, in relation to a building, means— (a) a defect in a building element that is attributable to a failure to comply with the governing requirements or the performance requirements of the National Construction Code as in force at the time the building work was carried out, the relevant standards or the relevant approved plans, or (b) a defect in a building product or building element that- (i) is attributable to defective design, defective or faulty workmanship or defective materials, and (ii) causes or is likely to cause— (A) the inability to inhabit or use the building, for its intended purpose, or (B) the destruction of the building or any part of the building, or (C) a threat of collapse of the building or any part of the building, or (c) a defect of a kind that is prescribed by the regulations as a serious defect, or (d) the use of a building product in the building, if— (i) the use is in contravention of the *Building Products (Safety) Act 2017*, or (ii) the product or use does not comply with the requirements of the National Construction Code, or (iii) the product or use does not comply with other standards or requirements prescribed by the regulations for the purposes of this definition
The Department	The Department of Customer Service
The Regulator	NSW Fair Trading/Office of the NSW Building Commissioner
The Secretary	*Secretary* means the Secretary of the Department of Customer Service

Executive summary

The proposed Building Compliance and Enforcement Bill 2022 (**BCE Bill**) will modernise and consolidate the regulatory compliance and enforcement powers of various NSW Acts relating to the building and construction industry.

The BCE Bill will standardise NSW Fair Trading's general investigative powers to enable authorised officers to effectively carry out inspections and audits. It will also include specific powers as required, such as the security of payments for subcontractors and the obligations of owners corporations to maintain common property.

The BCE Bill will replace the *Residential Apartment Building (Compliance and Enforcement Powers) Act 2020* (**RAB Act**), carrying across the existing powers held by the NSW Building Commissioner to deal with non-compliant developers and serious defects in buildings. The power to order the rectification of building work will be expanded to all classes of building where a serious defect may exist, as will the power for the Secretary to prohibit the issuing of an occupation certificate (**OC**) where there are non-compliant and serious defects in buildings.

The BCE Bill is part of the Construct NSW reform agenda to improve the quality of construction and provide enhanced protections for consumers by targeting non-compliance activities.

The powers in the BCE Bill will provide the flexibility to enable a proactive regulatory approach to targeting areas based on risk and improved allocation of resources. Applying a holistic approach for building matters and focussing compliance efforts on the poor performing industry players will ensure the best outcome for customers and industry alike.

Key proposals featured in the BCE Bill include:

- consolidating and strengthening the powers for authorised officers to investigate, gather information and enter premises
- providing remedial action including undertakings, injunctive powers and issuing orders to seek compliance, stop work as well as rectify building work
- establishing a consistent disciplinary action process across all licence holders
- introducing a demerit points scheme to deter licence holders from committing offences and provide sanctions for repeat offenders
- increasing penalty offences for serious matters
- expanding the application of the developer notification scheme and complementary prohibition order powers to more classes of buildings.

The BCE Bill is part of a suite of complementary building reforms aimed at improving the regulatory framework for the building and construction industry, increasing confidence in the building industry, and improving consumer protections.

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

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

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

The RIS follows the structure of the BCE Bill as follows:

Part 1 – Preliminary

Part 2 – Completion of notifiable building work

Part 3 – Investigations

Part 4 – Remedial actions

Part 5 – Rectification of serious defects and resolving disputes

Part 6 – Disciplinary action

Part 7 – Demerit points scheme

Part 8 – Offences and proceedings

Part 9 – Miscellaneous

There will be a twelve-week public consultation period on the BCE Bill and this RIS.

Submissions are invited on any of the themes raised in the RIS or anything else contained in the BCE Bill. All submissions will be considered and evaluated, and any necessary changes will be made to address the issues identified before the BCE Bill is finalised. The process for submitting feedback or 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 Bill, whether or not it is addressed in this RIS. You may wish to comment on only one or two matters of particular interest, or all of the issues raised.

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

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

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

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

Please forward submissions by:

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

Mail to: Policy and Strategy, Better Regulation Division

Locked Bag 2906

LISAROW NSW 2252

The closing date for submissions is 25 November 2022.

We invite you to read this paper and provide comments. You can download the RIS and the Bill from https://www.nsw.gov.au/have-your-say. Printed copies can be requested from NSW Fair Trading by phone on 13 32 20.

Important note: release of submissions

All submissions will be made publicly available. If you do not want your personal details or any part of your submission published, please indicate this clearly in your submission together with reasons. Automatically generated confidentiality statements in emails are not sufficient. You should also be aware that, even if you state that you do not wish certain information to be published, there may be

circumstances where the Government is required by law to release that information (for example, in accordance with the requirements of the *Government Information (Public Access) Act 2009*). It is also a statutory requirement that all submissions are provided to the Legislation Review Committee of Parliament.

Identified stakeholders

The RIS has been provided directly to some stakeholder organisations.

Evaluation of submissions

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

Presentation of Bill in Parliament

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

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

Objective and rationale of the BCE Bill

Need for Government action

The Department of Customer Service (**the Department**), through NSW Fair Trading is committed to ensuring NSW has a safe and high-quality built environment, designed and built by competent practitioners. Where building work does not meet expected standards, the Department's priority is for customers to be protected and for those responsible to be held to account. The Department has undertaken a review of the regulatory landscape to identify areas for improvement and expand those measures proven to be a success.

In 2017 Building Ministers across Australia commissioned independent experts to assess compliance and enforcement systems for the building and construction industry across Australia. This resulted in the *Building Confidence: Improving the effectiveness of compliance and enforcement systems for the building and construction industry across Australia* report (**Building Confidence Report**) by Professor Peter Shergold and Ms Bronwyn Weir.[1] The report included 24 recommendations to improve and effectively implement building regulation.

The report recommended regulators be given a broad suite of powers to monitor buildings and building work so they can take strong compliance and enforcement action. The Government took early action to implement this recommendation, setting the benchmark for proactive compliance powers with critical reforms. These included the appointment of Mr David Chandler OAM as the NSW Building Commissioner, and a suite of legislative reforms to empower the regulator to take swift and decisive action through the *Design and Building Practitioners Act 2020* (**DBP Act**) and *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (**RAB Act**).

These reforms initially targeted residential apartment buildings with a strong focus on compliant upfront design and assurance that buildings have been built following the approved designs. These obligations also establish a clear legislative duty of care that is owed to the end customer with respect to defective building work. The reforms enable proactive audits to be undertaken and defects to be detected and resolved before the building work is completed, reducing the risk that the end customer is left with defective building work.

While recent reforms have focused on targeting problematic behaviours that lead to unsafe and defective work in residential apartment buildings, the Department's review has identified that previous reforms to regulatory frameworks for the building and construction sector that the

[1] Peter Shergold and Bronwyn Weir, *Building Confidence Improving the effectiveness of compliance and enforcement systems for the building and construction industry across Australia* (February 2018) <https://www.industry.gov.au/sites/default/files/July%202018/document/pdf/building_ministers_forum_expert_assessment_-_building_confidence.pdf>.

Department administers has resulted in fragmented and disparate compliance and enforcement powers. Despite the intended outcomes of these powers aligning (competent people doing compliant and safe work with appropriate products) there is inconsistency between legislation on the powers available to the regulator to enforce obligations under the different Acts.

The different pieces of building legislation that govern areas of the industry set out the enforcement powers available to the regulator to enforce obligations under each respective Act. For example, the *Home Building Act* (**HB Act**) gives powers to enforce the obligations under the HB Act but only for conduct that is captured by the HB Act. The RAB Act provides broad enforcement powers but is limited to residential apartment buildings where development consent is required (for example, not covering serious defects that may exist in other buildings such as single dwellings and commercial buildings).

This approach, of carefully prescribing the enforcement powers under each Act is wholly appropriate. It ensures that the powers of the regulator are carefully prescribed to meet the obligations set out in the Act. It ensures that regulatory intervention is targeted and proportionate to the risk that is being regulated by the Act – a balancing act intended to not overburden regulated individuals, consumers or even the regulator itself.

However, the construction industry is an end-to-end process, with the work of one individual contributing to another. This issue is exacerbated when the conduct of an individual is regulated by multiple pieces of legislation simultaneously. For example, an electrical engineer doing fire safety work could be regulated under the HB Act, the RAB Act, the DBP Act, the *Gas and Electricity (Consumer Safety) Act 2017* and the *Environmental Planning and Assessment Act 1979.* Despite the work being the same across the different Acts, the power to enforce the required conduct is different.

While the current RAB Act approach has seen a significant uplift in industry behaviour, the full potential to effect change across the building and construction industry is not being realised because of inconsistent powers. For example, a building work rectification order (**BRWO**) can be proactively issued to rectify a structural defect in a residential apartment building, the same order powers cannot be used to rectify a structural defect for a single dwelling. The different trigger points for defects, varied definitions of who a developer is, and different penalties for non-compliance with orders is creating a barrier to effective regulatory compliance and can create confusion and complexity for regulated parties.

Looking to other industries, single enforcement powers Acts have achieved similar success. For example, the *Gaming and Liquor Administration Act 2007* sets out the powers of the Independent Liquor and Gaming Authority (ILGA) over multiple pieces of legislation due to the risks and regulated entities being consistent across captured legislation. This allows a change to one piece of legislation to modernise the regulatory approach across all legislation.

The BCE Bill leverages the success of reforms to date to provide a suite of supporting powers to improve the effectiveness of compliance and enforcement systems and forms part of the broader Construct NSW reform agenda to respond to non-compliant and defective building work. Included in the reform agenda is the proposal to create a new Building Act (Building Bill) to cover all building work providing a fit-for-purpose regulatory powers framework to ensure the effective oversight of all building work in NSW.

The objective of government intervention

A critical element of a regulatory compliance and enforcement system is proportionate and appropriate powers to uphold the integrity of the system. The BCE Bill seeks to provide a modern and proportionate compliance and enforcement framework by expanding the RAB Act to cover all building work in NSW. It will provide the Secretary with a consolidated, effective suite of compliance and enforcement tools, that can proactively respond to issues but also gives a remedy for legacy misconduct.

The objects of the BCE Bill are:

- to provide a single legislative framework for the regulation of building compliance and enforcement
- to promote public confidence in the building and construction sector
- to promote public confidence in the building regulator
- to promote fair and transparent decision-making in relation to the building and construction sector.

A modern compliance and enforcement framework was established through the recently enacted RAB Act. The RAB powers have provided the regulator with tools to intervene before defective building work is handed over to the customer. This has led to opportunities for the regulator to work with practitioners to prevent and respond to defects proactively, rather than waiting for a complaint to be made. Until now, the RAB Act has focused on residential apartment buildings and given the effectiveness of the RAB powers, that Act has been used as the framework for the BCE Bill, which expands the powers more broadly across the building and construction sector.

Overall, better compliance and enforcement in the building industry will yield higher net benefits for the community, more than offsetting the associated cost impacts to the industry and regulator. A particular benefit is the expected improved fairness and level playing field for small business. This will be achieved by reducing the risk of businesses having to complete against each other that cut corners and costs by not complying with regulatory requirements.

Outline of the BCE Bill

Part 1 of the BCE Bill introduces the concept of ‘building enforcement legislation’ that identifies all the building related legislation where the compliance and enforcement powers may be used. This

Part also includes the objects of the BCE Bill and key definitions for the effective application of the powers.

Part 2 retains the current notification requirements for high-risk building classes introduced with the RAB Act, with these expanded to other classes of building. This notification scheme is the requirement for developers to advise the Secretary of their intention to make an application for an occupation certificate. Flowing from the notification scheme are the powers of the Secretary to prohibit the issuing of an occupation certificate for a building or preventing the registering of a strata plan. This part includes powers for the Secretary to impose a levy on developers to fund compliance and enforcement activities.

Part 3 of the BCE Bill will consolidate and standardise regulatory compliance and enforcement powers where appropriate, while retaining nuanced powers required for specific regulatory matters. At its core will be a standard set of investigative powers for authorised officers to enable the investigation, monitoring, and enforcement of building legislation.

Part 4 includes a suite of remedial actions to ensure compliance with regulatory requirements is achieved including undertakings, compliance notices and stop-work orders.

Part 5 retains the building work rectification orders introduced under the RAB Act for serious building work issues, with these being expanded to all classes of building where there is a serious defect.

Part 6 of the BCE Bill consolidates the disciplinary action processes across the range of building enforcement legislation. These powers relate to the conduct of licence holders across the building legislation, as well as former licence holders and directors or other people who have influence over corporate licence holders.

Part 7 introduces a demerit points scheme to strengthen the ability to sanction repeat offenders. This scheme is proposed to be non-discretionary where demerits points are incurred for prescribed offences and mandatory remedial actions imposed upon accumulation of demerit points.

Part 8 of the BCE will include comprehensive enforcement powers to penalise and prosecute for breaches and contraventions of the building legislation. Greater powers and penalties have also been included for directors of corporations where they are involved in an offence or have failed to take reasonable steps to prevent a contravention from occurring.

Part 9 of the BCE Bill contains provisions which are important for the operation of the scheme but do not neatly fall within the ambit of the previous parts of the BCE Bill.

How does the BCE Bill interact with other legislation?

The BCE Bill interacts with multiple pieces of legislation. The majority of these are referred to as the ‘building enforcement legislation’. The compliance and enforcement powers from the building

enforcement legislation will be removed from those Acts and consolidated in the BCE Bill. For example, licensing requirements for building work will be contained in the Building Bill, along with obligations that licence holders must follow, the BCE Bill then sets out compliance and enforcement powers for licence holders. The BCE Bill interacts with the building enforcement legislation by enabling complementary compliance and enforcement action.

The BCE Bill also allows the application of nuanced powers across other pieces of legislation such as powers to enforce the statutory obligations to maintain common and association property in strata and community schemes.

The BCE Bill will, subject to public consultation and support, incorporate reforms proposed in the Building and Construction Legislation Amendment Bill 2022 (Amendment Bill). Also included in this reform package is consultation seeking views on the Building Bill that is proposed to replace the HB Act. The regulatory impacts of the reforms proposed in the Amendment Bill and the Building Bill are addressed in separate Regulatory Impact Statements and are not repeated here.

Key features of the Amendment Bill, relevant to the BCE Bill include:

- introducing new duties on people in the building supply chain and additional Secretary powers around the supply of building products in the *Building Product (Safety) Act 2017*
- make amendments to the *Environmental Planning and Assessment Act 1979* (**EP&A Act**) to create clearer responsibilities for certifiers that will reduce the need to use powers under the RAB Act
- create a cost-recovery mechanism for compliance and investigation work related to building work.

Consistency with Government objectives

The Department has been working with industry and the community under the Construct NSW reform agenda consistently since 2018. These reforms are a once-in-a-generation program focused on establishing new benchmarks of excellence and restoring confidence in the residential construction industry.

The Government has now delivered reforms focused on holding developers, designers, builders, and engineers accountable for their work, as well as oversight of design and building work in NSW. The Department is also undertaking a comprehensive review of the HB Act with the result being the proposed Building Bill.

With these principles at the forefront, a key outcome arising from the reforms was the need for a comprehensive set of building compliance and enforcement powers to ensure that new obligations on practitioners and safeguards for consumers and other practitioners can be appropriately enforced.

The current regulatory framework often includes limitations on exercising powers until after harm has already occurred, a dispute has been raised, or the building work has been completed. The BCE Bill will achieve the Construct NSW objectives by enabling a holistic, proportionate and proactive regulatory approach for all building matters.

Stakeholder feedback has sometimes been critical of the limits to the regulatory approach taken by the building regulator resulting in strong support being shown for greater and more consistent regulatory powers as now proposed in the BCE Bill. Some of the issues that have been raised by stakeholders are concerns with the limitations to proactively achieve compliance, limited powers to holistically investigate, audit and inspect work under construction, and inefficient powers to effectively sanction poor industry players. If powers are granted to respond to misconduct then the regulator needs to use those powers.

A key concept of the BCE Bill is the complementary nature of the compliance and enforcement powers to the building enforcement legislation, with regulatory impact being assessed cumulatively. For example, while the BCE Bill broadens the scope of rectification order powers (potentially adding cost to the person responsible for work under the order), these costs are expected to be offset by the regulatory framework ensuring compliant work is done by competent people during the design and construction process. Over time, this will reduce costs of construction for all parties, and more than offset the upfront additional costs to comply with the powers in the BCE Bill and obligations under other building legislation.

The Department has put considerable effort into capturing new and useful data. This data informs where regulatory powers should be targeted by understanding when and where issues are occurring in the industry. The data also allows for the use of a risk-based methodology in identifying those matters of particular risk that justify greater regulatory intervention. This allows the regulator to resolve the most critical issues first (which may include the use of stronger enforcement powers such as building work rectification orders) while relying on other approaches for the less serious breaches (including education, undertakings and warnings).

A key finding from the analysis of the captured data is the significant benefits that can be realised by adopting a proactive regulatory approach. Recognising the benefits of early intervention for building related matters including preventing defect costs being inherited by future owners.

> *Case Study: south Sydney intervention*
>
> *A 2020 intervention in a development just south of Sydney CBD saw occupation stopped until the developer and builder repaired waterproofing in 380 bathrooms across 241 apartments at an estimated cost of $5.7 million (total build cost of $120 million). If allowed to proceed to occupation, the strata owners would have potentially been asked to readdress the defects in two to six years' time at their own expense, estimated at $13.3 million. The value of impairment in this case would have been 11.08%, not*

including an additional $1.5 million addressing other defects found by the Building Commissioner.

Compliance and enforcement approach

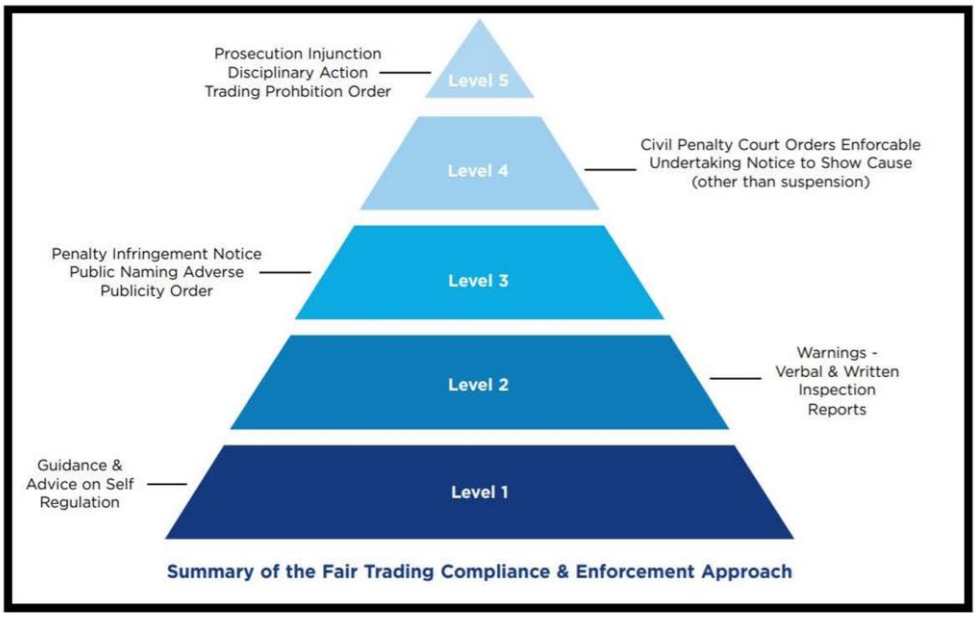

Figure 1 – Summary of NSW Fair Trading compliance and enforcement approach

The compliance and enforcement approach taken by the Department is focused on a proportionate response to the level of detriment and to the seriousness of the breach. More serious offences warrant more serious enforcement action, as shown in **Figure 1**. However, the overriding consideration in taking enforcement action will always be the public interest.

The BCE Bill includes a broad suite of a compliance and enforcement tools to allow a proportionate response dependent on the circumstances. In general compliance and enforcement powers are used to:

- change the behaviour of people
- eliminate financial gain and benefit from non-compliant activity
- deter future non-compliance.

A review of enforcement regimes in the United Kingdom (the Macrory review)[2] found that regulatory regimes were ineffective where there was an over-reliance on criminal prosecution, a lack of flexibility and a lack of appropriate compliance and enforcement tools. The suite of different compliance tools in the BCE Bill and the escalating approach to applying the tools is intended to

[2] Richard Macrory, *Regulatory justice: making sanctions effective* (November 2006) <https://www.regulation.org.uk/library/2006_macrory_report.pdf>.

support a modern regulatory approach and provide the necessary flexibility to protect the needs of consumers.

The compliance journey map below illustrates how the compliance and enforcement tools in the BCE Bill can be applied by the Department when dealing with a customer complaint, as well as the options to seek a review or appeal externally. Please refer to Appendix 2 for the text version of the compliance journey.

Question

1. **Do you support the concept of a single suite of compliance and enforcement powers for the building and construction industry? Why or why not?**


Building Compliance and Enforcement Bill – Compliance Journey
Note: 'Part' refers to a part in both the Regulatory Impact Statement and the Bill.
Customer makes a complaint
Authorised officer can investigate the complaint
If it is related to building work, authorised officer can issue:
Seek an injunction from a court (Part 4)
Issue a stop work order (Part 4)
Fair Trading will seek to put an immediate stop to works where there is a risk to property or person.
A compliance notice to rectify the work (Part 4)
A building work rectification order (BWRO) to rectify the work if it is a serious defect (Part 5)
Accept a written undertaking (Part 5)
A person may seek a review of the notice at NCAT (Part 9)
A person may appeal the order at L & E Court (Part 5)
The Secretary may carry out the work (Part 5)
The Secretary may carry out the work where the builder is unable or refuses to comply with a BWRO.
Is the matter resolved?
Yes
Matter resolved
No
Penalties will range from $55,000 to $1.1 million for corporations and $1,100 to $220,000 for individuals.
Penalties for failing to comply with orders
Person may be prosecuted (Part 8)
Issued a PIN (Part 8)
Disciplinary action against licence holder (Part 6)
A person can seek to appeal a prosecution
A PIN can be challenged in court
A person may seek a review in NCAT of the decision
The offence may incur demerit points (Part 7)
Disciplinary action or the accrual of sufficient demerit points can result in licence cancellation
Matter resolved

Part 1 – Preliminary

Part 1 contains key matters of relevance to the operation and application of the BCE Bill. Importantly, clause 3 of the BCE Bill outlines the proposed objects as:

- to provide a single legislative framework for the regulation of building compliance and enforcement
- to promote public confidence in the building and construction sector
- to promote public confidence in the administration and regulation of the building and construction sector
- to promote fair and transparent decision-making in relation to the building and construction sector.

The primary purpose of the BCE Bill is to provide consistent and streamlined compliance and enforcement powers that are equally distributed across the building and construction industry.

Clauses 5-7 of the BCE Bill provides three overarching concepts that are integral to the operation and application of the compliance and enforcement powers established under the BCE Bill.

In clause 5 of the BCE Bill, the scope of the compliance and enforcement powers will apply to various Acts and regulations which are referred to as 'building enforcement legislation'. The building enforcement legislation includes:

- the *Building Compliance and Enforcement Act 2022* (subject to enactment)
- the *Building Act 2022* (subject to enactment)
- the *Building Construction Industry Security of Payment Act 1999*
- the *Building and Development Certifiers Act 2018*
- the *Building Products (Safety) Act 2017*
- the *Design and Building Practitioners Act 2020*
- the *Gas and Electricity (Consumer Safety) Act 2017*

This means that, wherever the term 'building enforcement legislation' is used in the BCE Bill it is taken to include all the Acts and associated regulations listed above. For example, under clause 40, an authorised officer will have power to seize a thing from premises where they believe the thing is in connection with an offence against any of the Acts above. This enables the holistic application of investigation and enforcement powers across the building and construction industry.

Clause 6 provides the meaning of 'developer' for the purposes of the BCE Bill. Developers are a critical part of the building and construction industry. Having compliance and enforcement powers apply to developers is essential to underpinning the regulatory framework.

A developer relates to building work (defined in clause 7 and explained below) and includes:

- the person who contracted or arranged for, or facilitated or otherwise caused, whether directly or indirectly, the building work to be carried out
- if the building is the erection or construction of a building – the owner of the land on which the building work is carried out at the time the building work is carried out
- the principal contractor for the building work
- for building work for a strata scheme – the developer of the strata scheme.

This definition remains unchanged and is carried over from the RAB Act. Developers have obligations and responsibilities throughout the BCE Bill, including notification requirements and levies (Part 2), remedial actions, such as undertakings and compliance notices (Part 4) and building work rectification orders (Part 5). The Building Bill also relies on the definition in clause 6 with modifications to support the use of developers in the context of home building. Further discussion about the definitions of 'developer' can be found in Part 3 of the Building Bill RIS.

Clause 7 provides the meaning of 'building work' for the purposes of the BCE Bill. The definition is deliberately broad to ensure effective regulatory powers for building work. Building work is an activity involved in the construction of a new building or structure, or a change to an existing building or structure, or coordinating or supervising that work.

The definition is different to the current definition in the RAB Act. It also differs from the two definitions in the Building Bill. The Building Bill main definition (in clause 5) is used to outline what work requires a licence. Chapter 6 of the Building Bill contains a definition of 'building work' which has been carried over from the *Environmental Planning and Assessment Act 1979* (**EP&A Act**) as it relates to the application of the certification system.

The definition in the BCE Bill and the Building Bill are mostly alike with only slight differences. The intent of the definition in the BCE Bill is to provide an overarching definition of the scope of work that may be the subject of compliance and enforcement action. Views are sought on the scope of what the definition captures and if the differences across the Acts may be problematic.

Questions

2. **Do you think the definition of developer captures the characteristics of those who participate in the market?**
3. **Do you think that the definition of building work should be aligned across the Building Bill and the BCE Bill? If so, which is the preferred definition and why?**

Part 2 – Completion of notifiable building work

Existing requirements for notice of intended completion of building work

On 1 September 2020, the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (**RAB Act**) established a scheme for developers to notify the Secretary of the intended completion of building work. It is the first of its kind in Australia. The scheme enables the Secretary to have early awareness and oversight of the developer and the building work. This allows the Secretary to be able to actively monitor and regulate the performance of building work, assisting in the early detection and rectification of serious building defects.

Specifically, the scheme requires developers to notify the Secretary of the date they intend to apply for an occupation certificate (**OC**) for building work. The notice is called an Expected Completion Notice (**ECN**). The ECN is lodged in the NSW Planning Portal through the Building Work Commencement Date Capture and Intent to Seek Occupation Certificate (ITSOC) online process. Visit the NSW Planning Portal for more information about this process.

The ECN must be given at least six months, but no more than 12 months before an application for an OC is made. However, some building work may be completed in less than six months, such as staged developments. It at the commencement of building work for a new building, the developer expects to apply for an OC in less than six months, the developer must give an ECN within 30 days of building work commencing.

The scheme provides for subsequent notices to be given where circumstances change and the date for an application for an OC is brought forward or pushed back.

After an ECN is lodged, the project is reviewed and may be selected for an OC audit. The OC audit will be carried out by inspectors from the Department.

The OC audit involves a review of designs and documents (including contracts) for building work as well as onsite inspections. The focus during an inspection is on the key building elements of structure, waterproofing, fire rating systems, building services and external enclosures. Download a sample OC audit report for more information about the OC audit process and elements that can be inspected by NSW Fair Trading during an audit.

A prohibition order, stop work order or building work rectification order can be made if inspectors find any serious defects arising out of the OC audit. There are also serious consequences if an ECN is not provided, including fines and a prohibition order that delays the OC being issued.

The ECN scheme currently only applies to Class 2 buildings or buildings with a Class 2 part. This is consistent with the Government's initial focus on addressing issues in multistorey and multi-unit residential buildings as a priority.

Prohibition orders

A key feature of the ECN scheme in the RAB Act is the Secretary's power to prohibit the issuing of an OC for a building as well as the registration of a strata plan for a strata scheme. As noted earlier, failure to provide an ECN or provide it in the required timelines can result in the Secretary issuing a prohibition order. An order can also be issued if circumstances change and a revised completion date hasn't been notified to the Secretary. Further, the Secretary has powers to issue a prohibition order in other circumstances, including where:

- the Secretary is satisfied that a serious defect in the building exists
- a rectification bond given as part of an undertaking has not been provided to the Secretary
- a strata defect building bond has not been given to the Secretary (under the *Strata Schemes Management Act 2015*)
- a developer has failed to comply with a direction of an authorised officer to give information or records, or answer questions.

The prohibition order is a tool that empowers the Secretary to take immediate compliance action to prevent developers passing on defects and associated costs to consumers. This is a significant consumer protection as both prohibitions effectively prevent the settlement of contracts and subsequent transfer to consumers. An OC allows purchasers to occupy their units and to complete their purchase with the developer. Following this time, the developer can complete all sales and take their profits. Meanwhile, the registration of a strata plan brings the owners corporation into existence, which commences the initial period. Strata lots can be allocated and the developer can then sell them off the plan.

By preventing the issuing of an OC or preventing the registration of a strata plan, the building regulator can signal to the developer that they must resolve any non-compliance or face never having the building sold or occupied. This is a powerful incentive for ensuring developers take responsibility and ownership of rectifying defects. Without these powers, the burden of the defects unreasonably falls to building owners who are left to try and assert rights to get the defects rectified.

Proposed expansion of the ECN scheme and prohibition orders

Clause 9 of the BCE Bill expands the ECN requirements to any 'notifiable building'. These buildings include Class 2 buildings and any building where the building work requires a building compliance declaration under the DBP Act.

This means that the application of the ECN scheme is tied to the application of the DBP compliance declaration scheme. As the DBP Act expands to new classes of building in the future, the ECN scheme is automatically expanded to those classes.

Currently, the DBP Act applies to Class 2 buildings, but feedback is being sought on expanding the operation of the DBP Act to Class 3 (larger shared accommodation buildings) and 9c buildings (aged care buildings). The aim is to ensure the benefit of the reforms in preventing substandard and non-compliant design and building work are extended to other buildings where people reside or accommodate vulnerable occupants. More information on this reform and the analysis of its costs and benefits can be found in the Amendment Bill RIS.

Regulatory benefits and costs of the proposed expansion

Many defects (through non-compliance with the National Construction Code (**NCC**)) are likely to occur as a result of attempts to minimise construction costs.[3] Defective building work has multifaceted costs to a range of parties, including the end customer (building owner), builders, developers, building insurers and future purchasers. These costs include, but are not limited to potential remediation costs, the financial and emotional costs of pursuing remediation, legal and litigation costs and ongoing financing and insurance costs.

For customers, building failures result in significant costs to end customer (building owner) in remedying defects and an increased risk to safety for people living with non-compliant building work. These failures negatively impact compliant traders who produce quality work, and negatively impact consumer confidence in the building and construction industry. Defective building work also collectively diminishes the public's confidence that buildings in NSW are built under robust controls and in compliance with the NCC.

The impact of defective building work is widespread. Recent research of strata buildings that were completed in the last six years identified the following:

- 39% of strata apartment buildings have a serious building defect in the common property.
- The most serious defects were related to waterproofing (23%), followed by fire safety systems (14%), structure (9%) and key services (5%).
- The average cost of remediation borne by owners corporations was around $300,000 per affected building (including rectification work, legal expenses and other professional services.

[3] 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>, p 86.

- The estimated accumulated value of impaired assets in Class 2 residential buildings, due to serious defects may exceed $3.9 billion.[4]

The research report also noted that very few owners corporations reported being able to recover their costs spent on resolving defects. The time taken to resolve defects also varied greatly across the sample, with around 38% of buildings taking over 12 months and 25% taking less than six months.[5]

As noted earlier, the ECN Scheme enables the Secretary to have early awareness and oversight of developers and building work for developments by having data on when they are nearing completion. The notification process seeks to address the issue of building defects in completed buildings being undetected, by allowing earlier regulatory intervention while the buildings are still under construction.

The ECN scheme is used by the building regulator to inform a proactive compliance audit program. This audit program has seen significant improvement in finding and resolving serious defects in buildings under construction. The early intervention has meant the cost of remediating the defect are borne by the developer, rather than being passed on to the consumer.

The Class 2 building audit program has highlighted the continuing need for regulatory intervention and the prevalence of serious defects in buildings. Of the 49 completed OC audits since the commencement of the RAB Act on 1 September 2020 to April 2022:

- 10% of buildings have a serious defect related to essential services
- 20% of buildings have a serious defect related to fire safety
- over 39% of buildings have a serious defect related to waterproofing.

  Case study: eastern Sydney apartment building

  An Occupation Certificate Audit was carried out on a 13 storey Sydney apartment building that discovered numerous defects in the common areas of the building. Multiple serious defects, as defined under the Residential Apartment Building Act (2020) were discovered which included:

  - fire safety systems
  - waterproofing
  - defective building enclosure
  - various structural issues.

  In addition, multiple potentially serious defects and low risk defects were discovered.

  Total rectification cost is estimated to be almost $3 million for this building or over $30,000 per apartment. Without this audit, some or all of these defects may have gone undetected for the length

[4] NSW Government - Construct NSW, *Improving consumer confidence – Research report on serious defects in recently completed strata buildings across New South Wales* (September, 2021) <https://www.nsw.gov.au/building-commissioner/research-on-serious-building-defects-nsw-strata-communities>, p 6, 8.
[5] *Ibid.*

of the warranty period or lifetime of the developer. If that had happened, then the end customer would have been required to pay these rectification costs. Furthermore, without the OC audit, the occupants would have been living in an unsafe building with deficient fire safety systems.

To ensure that these costs were not passed on to the end customers and that occupants of the building were safe, Fair Trading issued a prohibition order that prevents the issuing of an occupation certificate or the registration of a strata plan until the identified defects in the order have been addressed.

The expansion of the ECN scheme to the additional classes will have an administrative cost impact for developers responsible for those developments. The impacts to business are time related, including needing to build the notification process into project timelines to ensure that notification happens within the required timeframes to avoid OC delays.

However, it is important to acknowledge that the ECN notice requirements are digitised, making it as easy as possible for developers to satisfy their obligations. The Government has spent $4.2 million on enhancements to the NSW Planning Portal to help developers fulfil their lodgement obligations under the DBP and RAB Acts. Including aligning the process with existing planning and strata obligations, reducing the lodgement and reporting burden.

Where defects are identified during an OC audit, this will obviously have an impact for developers. Impacts include cost escalation arising from any delays in receiving an OC as well as additional construction costs associated with rectifying defects. However, these defect costs are not additional costs arising from the reform and therefore cannot be considered an unreasonable regulatory burden for industry.

The ECN scheme, combined with prohibition orders, ensures that these defect costs are incurred by the parties responsible for causing them, creating huge cost savings for consumers and industry. Industry also benefits from earlier regulatory intervention where required, resulting in cost savings by avoiding or rectifying defects earlier, as well as being able to manage risks better.

Evidence suggests that remediation costs are estimated to be lower than those borne by owners corporations as the defects will be addressed and rectified earlier in the building cycle (for example, prior to completion). Analysis carried out by the Western Australian Government showed that rectifying defects in dwellings during construction compared to five years later is on average 2.5 times more than if rectified during construction.[6]

It is estimated that the costs to industry will be further reduced due to embedding of the design process under DBP. This process ensures a critical check and balance between compliant designs being prepared and an assurance that the builder has built to those designs. The maturing of this regulatory scheme is expected to see a significant reduction in building defects. The greater

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

regulatory oversight will also create a more level playing field for industry by targeting practitioners who may have previously cut costs by carrying out non-compliant work.

The benefits to building owners and occupiers will be a reduction in building defects and a reduction in defect-related costs being passed to them. This is through stronger oversight by the regulator and increased upfront obligations placed on practitioners to produce compliant work. Consistent feedback has pointed towards a significant shift in industry mentality because of the initial regulator-led audit program and a return in public confidence in the quality of buildings. The continuation and expansion of these requirements is anticipated to result in continuing benefit to the broader community through increased building confidence.

Many small businesses will also benefit from securing better quality building work through the added oversight provided under the BCE Bill and the other Construct NSW reforms. For example, many Class 3 buildings are owned and operated by small and medium businesses, who will benefit from surety over the quality of building work (through upfront design, more checks throughout the process and registered practitioners) and confidence that, if defects do occur there are regulator powers available to remediate them.

More information on the expansion of these requirements and the analysis of its costs and benefits can be found in the Amendment Bill RIS.

Question

4. **Do you support the expansion of the ECN scheme, in-line with the expansion of DBP obligations to Class 3 and 9c buildings? If not, why not?**

Building levy

The RAB Act was amended in July 2021 to include a power for the regulator to impose a levy on developers for building work. The BCE Bill retains the existing power unchanged at clause 11.

From July 2022, the levy can be imposed for each ECN for certain building work. The levy is intended as a cost recovery mechanism to support the important reforms being implemented by the regulator to ensure safe, trustworthy buildings and to restore consumer confidence in the building industry.

The levy will be used to recover the future cost of the regulation of the industry, including compliance, licensing, intelligence and education by:

- enhancing the NSW Planning Portal to consolidate declared design documents (for example, allowing for the lodgement of all designs ahead of construction through a single system)

- maintaining internal capability to audit plans of certain buildings (selected through a risk-based matrix approach) to ensure they are compliant with the BCA (preventing defects before they occur)
- having dedicated compliance teams to inspect selected sites to ensure that buildings are constructed in accordance with those designs
- maintaining processes developed by the Building Commissioner to work with developers and practitioners to rectify work that falls short of required standards, including the development and oversight of building work rectification orders and enforceable undertakings
- having dedicated licensing teams for practitioners under the DBP Act
- maintaining a digital learning platform, including approving and developing training to test and upskill practitioners' knowledge.

A key feature is that the levy will be paid by those who will profit from the building works to ensure increased standards of design and building work—restoring confidence in the industry, rather than being funded by the taxpayer.

The levy is consistent with the principles governing cost recovery which ensures the fair and efficient use of public resources. This aligns with governmental cost recovery principles, such as those published by the Australian and Victorian governments.[7]

It is proposed to include a provision in the BCE Bill that the Independent Pricing and Regulatory Tribunal (**IPART**) review and report on the building levy rates every three years or less. This is to ensure an independent review of the impacts of the levy on industry can be considered when setting the levy rates in the Regulation.

The levy is proposed to be expanded in line with the proposed DBP scheme expansion. More information on this reform and the analysis of its costs and benefits can be found in the Amendment Bill RIS. Future expansions of the levy will be subject to separate regulatory impact analysis to ensure costs imposed on businesses and the community are proportionate, targeted and justified.

Question

5. **Do you think having the levy rates reviewed by IPART provides a safeguard that the regulator has independent advice accounting for the impact on industry? Why or why not?**

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[7] *Australian Government Cost Recovery Guidelines (RMG 304)* <https://www.finance.gov.au/publications/resource-management-guides/australian-government-cost-recovery-guidelines-rmg-304> and Victorian Government, *Cost Recovery Guidelines* (January, 2013) <https://www.dtf.vic.gov.au/sites/default/files/2018-01/Cost-Recovery-Guidelines-Jan2013_0.pdf>.

Part 3 – Compliance and enforcement powers

Part 3 of the BCE Bill establishes the investigation powers for authorised offers for the building enforcement legislation. It is the 'standard suite' of powers that permits the investigation, monitoring and compliance of requirements imposed under these Acts.

It is essential for the effectiveness of the regulatory framework that, where obligations are imposed on people there are appropriate enforcement powers for the regulator to enforce the behaviours being regulated. Without powers to enforce the expected standards, the benefits of the broader reform agenda are unlikely to achieve the desired social and economic outcomes, including restoring confidence to the NSW building and construction industry.

Part 3 is largely modelled on the RAB Act, building on the powers where they have been drawn from other Acts, such as the *Building and Development Certifiers Act 2018* and the *Plumbing and Drainage Act 2011* (**P&D Act**). The BCE Bill includes standard powers for general compliance and enforcement as well as standalone powers, where appropriate.

The proposed compliance and investigative powers align with recommendation 6 of the Building Confidence Report, which provides *"that each jurisdiction give regulators a broad suite of powers to monitor buildings and building work so that, as necessary, they can take strong compliance and enforcement action".*

Investigative powers

To enable the use of compliance and enforcement powers the regulator needs to have corresponding powers to determine if regulatory requirements have been met. Clauses 19–20 establish the capacity in with authorised officers can act. Clause 19 allows an authorised officer to investigate and obtain information to determine compliance with requirements under the building enforcement legislation.

There are also powers to investigate buildings and building work, such as determining whether building work complies with the NCC, investigating whether a building has a serious defect, assessing the compliance of building products, and determining compliance with property maintenance obligations for strata and community schemes.

Special functions have been given under clause 20 to authorised officers appointed by the State Insurance Regulatory Authority (**SIRA**) to obtain information under Chapter 5 of the Building Bill.

Extraterritorial application provisions have been included at clause 21 to maintain the ability of authorised officers to give notices to people outside NSW.

Authorised officers

Division 2 of Part 3 in the BCE Bill creates 'authorised officers' for the purposes of compliance and enforcement activity. The BCE Bill starts out with a baseline of who is automatically an authorised officer and then has the capacity to switch, on or off other people for specific situations as needed. The NSW Building Commissioner and officers of the NSW Police Force are automatically authorised officers under the BCE Bill (see definition of 'authorised officer' in Schedule 2 of the BCE Bill).

Clause 22 also lists people who the Secretary may appoint as authorised officers for the purposes of Part 3 investigations. The regulations can also extend the classes of people that the Secretary could appoint as authorised officers. People such as those noted above who have power under Part 5 of the Building Bill are candidates to be listed under Regulation.

The ability to appoint different people as authorised officers reflects the specific needs of industry and where nuanced powers are appropriate. For example, additional people are authorised officers for matters relating to the *Building Products Safety Act 2017,* 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 (see clause 22(2) of the BCE Bill). The additional authorised officers are required for the process of issuing building product rectification orders and determining fire safety of a building, in relation to building products.

The remaining clauses in Division 2 provide the administrative framework for the authority, such as the identification card and any conditions that can be placed on an authorisation when given.

Information gathering and inspection powers

Powers given to authorised officers enable investigation and enforcement of obligations under the 'building enforcement legislation', including the power to require the production of documents, answer questions, audit work and records and to enter premises to inspect building work. Authorised officers can only exercise powers for the functions prescribed in the BCE Bill and in circumstances where there is reasonable suspicion of a breach or non-compliance. This is to ensure the use of regulatory powers is appropriate and the rights of the public are preserved.

To reflect the seriousness of investigative powers and the obligation to respond to directions of an authorised officer the current offence for failure to comply with a direction issued by an authorised officer has been maintained from the RAB Act. Clauses 28 and 48 prescribe a maximum penalty of 10,000 penalty units ($1.1 million) for a corporation, with a penalty of 1,000 penalty units ($110,000) for each day the offence continues and 2,000 penalty units ($220,000) for an individual with a daily penalty of 200 penalty units ($22,000).

Given the increase in scope of buildings captured in the BCE Bill, compared to the existing RAB Act, a second-tier penalty based on building classification has been included for clauses 28 and 48. The second tier applies a lower penalty in circumstances where the direction does not relate to a Class 2-9 building.

A key requirement of authorised officers is the ability to assess the compliance of buildings and building work onsite. The BCE Bill allows authorised officers to enter premises at a reasonable hour of the day, during business hours, or while building work is in progress for the purposes of compliance and enforcement. To preserve the rights of occupiers of dwellings, there are protections that an authorised officer can only enter a residential part of a premises with the permission of the occupier or under the authority of a search warrant.

While on site an authorised officer has power to do anything that is necessary for an authorised purpose, such as examining and inspecting building work, removing samples, seizing things, opening up building work and examining and copying records. These powers are limited by the authorised officer needing to have reasonable belief that the actions are necessary and exercising the powers is justified in all the circumstances.

The BCE Bill includes safeguards such as limiting the powers where required, such as an authorised plumbing inspector only having powers in relation to plumbing and drainage work. The BCE Bill also allows the Secretary to limit or condition authorisations, where appropriate to ensure that powers are only exercised where there is regulatory need.

What are the regulatory impacts?

The use of investigative powers results in cost burdens to the person, entity or business being investigated. These costs are predominantly lost time due to responding to questions, attending a site inspection, or other responsive actions for the investigation. There are also associated administrative costs in compiling and providing documentary evidence as part of an investigation.

It is difficult to reasonably estimate the cost impacts to businesses given the varying nature of investigations, in size and complexity as well as the related hourly cost to a business, which can vastly differ. Depending on the complexity of the matter being investigated this could involve significant lost time.

Investigations are generally used in response to complaints, intelligence or another reasonable belief that there is a contravention of regulatory requirements. These thresholds have the effect of limiting the regulatory burden as use of the investigative powers typically follow from actual events.

Stakeholder feedback during initial consultation has highlighted the need for active investigations by the regulator to instil public confidence, provide safer and quality buildings and improve customer protection. Investigative powers allow the regulator to:

- respond to defective building work by identifying it and issuing directions for its remediation

- remove poor players from industry, increasing confidence in those working in the industry to delivery trustworthy buildings
- increase competitiveness of compliant practitioners.

The impact of investigations on industry is twofold. It creates a cost disincentive to non-compliant players by seeking to eliminate any financial gain or benefit received from non-compliance (this includes punitive costs). This also then results in a benefit to compliant industry practitioners.

Investigations impose cost burdens on the regulator, however these will be offset, in part by the building levy and cost recovery mechanisms proposed in the Amendment Bill, with details outlined in the Amendment Bill RIS.

Audit powers

The BCE Bill makes clear that the Secretary has power to audit any person that holds a licence, or authority under the building enforcement legislation. Auditing is a proactive compliance tool that allows the regulator to identify industry issues and assess whether the regulatory requirements are being followed. Auditing is also a recommendation from the Building Confidence report where it states that "*proactive auditing is imperative to restore public trust".*[8]

Audits are a powerful tool that can proactively identify problematic industry behaviours. These behaviours can be widespread throughout industry either through lack of understanding or a perception of there being no consequences for breaching standards.

By engaging with practitioners and taking the time to understand what has caused the non-compliance, authorised officers auditing work can produce insights to address the behaviours or practices causing that non-compliance. For example, 49 completed audits undertaken since the inception of the RAB Act to April 2022, over 39% of audited buildings had a serious defect related to waterproofing. This correlated with the complaints made to NSW Fair Trading about waterproofing.

These defects occur due to a lack of competency (in the design and installation), lack of understanding of the requisite standard, apathy and cost-cutting. Regardless of the root cause of the defect, it is the end customer who bears the cost of waterproofing not being done correctly.

While the DBP Act provides an immediate response by requiring upfront design to address waterproofing throughout a project, engagement with industry has made it clear that there remains a significant gap between the expected standard of work and industry's capacity to meet it.

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[8] Peter Shergold and Bronwyn Weir, *Building Confidence: Improving the effectiveness of compliance and enforcement systems for the building and construction industry across Australia* (February 2022) <https://www.industry.gov.au/sites/default/files/July%202018/document/pdf/building_ministers_forum_expert_assessment_-_building_confidence.pdf >, p 22.

To respond to this gap, the Government has rolled out a dedicated module on waterproofing, leveraging expertise in industry to explain how to prevent water leaks and leaching in buildings. The Building Bill also proposes to include waterproofing as a specialist category of licence, meaning that a licence is required to perform any work. Further details about this proposed reform are contained in Part 1 of the Building Bill RIS.

What are the regulatory impacts?

An audit has a regulatory burden on businesses and practitioners due to lost time, including preparing for an audit, providing requested information and documents and responding to auditor questions.

However, there are significant benefits to be realised through auditing, including:

- early intervention to respond to defective work, including specific defects and the practices that caused them
- awareness by industry that the regulator is assessing compliance, which encourages practitioners to meet best practice standards
- regulatory cost savings for businesses by identification of poor practices
- addressing issues before they translate into problems affecting or needing to be resolved by the customer
- providing the regulator with the information needed to determine the best way to resolve the breach, rather than jumping straight to prosecution.

Failing to audit can have an adverse impact on industry and customers. It can result in poor industry practice being undetected and these practices becoming widespread. Where these poor practices result in defective work that has a flow-on cost to industry, the end consumer, the legal system and the regulator.

The function of auditing is also a cost burden to the regulator. The primary costs associated with auditing are employee related expenses as carrying out an audit is an inherently time-consuming process that requires suitably skilled auditors.

> *Case Study – Sydney inner west residential apartment building*
>
> *As part of an audit at a residential apartment building in the inner west of Sydney, Fair Trading inspectors identified that the Plumber had failed to notify Fair Trading of plumbing work being carried out, failed to pay the appropriate fees and book audit inspections, as required.*
>
> *Fair Trading then obtained a list of other jobs completed by the Plumber from the last 18 months. From the list it was identified that there were another 27 instances of the Plumber carrying out plumbing work on large class 2 Buildings where the regulator had*

not been notified of the work, fees paid or inspections booked resulting in additional investigation.

The data generated from the initial audit under the RAB Act was then leveraged to identify further risky behaviour by this licence holder, resulting in finding further issues that could be resolved using RAB Act powers, as well as preventing the plumber from committing further breaches.

Question

6. **Do you support the consolidation of enforcement powers across the building enforcement legislation?**

Part 4 – Remedial actions

Part 4 of the BCE Bill establishes several actions that the regulator can take to remedy specific issues arising from investigating non-compliance with building enforcement legislation (apart from the *Building Products (Safety) Act 2017*).

Undertakings

Undertakings are an alternative compliance approach that seek to find constructive compliance solutions. An undertaking is essentially a promise made by a person and agreed to by the Secretary as to what that person will do, or refrain from doing and is enforceable in court. They are voluntarily entered into and provide an efficient and effective approach to remedy contraventions without the need for costly court proceedings or other resource intensive compliance actions.

Currently, the Secretary has power to enter undertakings under the building enforcement legislation. The BCE Bill consolidates and standardises the undertaking provisions to apply a consistent approach across the building and construction industry. The exception is 'building product undertakings', which have been retained from the *Building Products (Safety) Act 2017* and kept separate in the BCE Bill due to their unique nature and application.

The rationale for including undertakings as remedial action is to avoid inefficient compliance actions that are resource and cost intensive to the regulator, the subject person and the legal system, where the same compliance outcome could be achieved through agreement. It is another compliance and enforcement option the regulator may use if appropriate in the circumstances, but one where the person has a voice in whether they wish to give an undertaking.

Under the BCE Bill (clause 53), undertakings will be able to be entered into by:

- the holder of a licence under the proposed Building Bill
- a registered certifier
- a registered practitioner
- a developer
- an owners corporation or an association.

The BCE Bill provides that the Secretary can accept an undertaking given by a person that they will:

- take action to prevent or remedy a contravention of the building enforcement legislation
- take action to carry out maintenance and repair work in relation to a breach of a statutory duty under section 106 of the *Strata Schemes Management Act 2015* or section 109 of the *Community Land Management Act 2021*
- take action to resolve a building dispute

- provide the Secretary with a rectification bond in relation to a serious defect, or potential serious defect in a building.

Undertakings will be enforceable. If a person contravenes an undertaking, it will be an offence and, for licence holders it will be grounds for taking disciplinary action against the person. Contravention of an undertaking will be punishable with a maximum penalty of 1,500 penalty units (currently $165,000) for a corporation and 300 penalty units (currently $55,000) for an individual.

Undertakings have been commonly used as a compliance tool for workplace health and safety (WHS) matters in the construction industry, as well as more recently to deal with defective building work. Research undertaken in the occupational health and safety sector (OHS, now referred to as WHS) found that "…enforceable undertakings can, indeed, significantly improve compliance with OHS statutory standards."[9]

Case Study – Greater Sydney residential apartment building

As part of an occupation certificate audit at a Greater Sydney apartment block, several serious defects were identified in respect of the structural elements of the basement slab. A Prohibition Order was issued to the developer under the RAB Act who prepared a remediation plan and implemented with the aim of rectifying the defects. An independent report was prepared by consultants which recommended a monitoring regime for the next ten years in relation to the defects and rectification works.

The Secretary accepted an Undertaking given by the developer under the RAB Act. The undertaking included:

- *structural guarantees for a period of 20 years with respect to certain parts of the building*
- *engaging an independent engineer to implement and perform a continual monitoring regime for 10 years, to identify any future defects and to support the rectification or remediation of any future defects identified*
- *payment for any rectification or remediation works with respect to future defects*
- *engaging a superintendent to supervise rectification or remediation of any future defects*
- *providing securities to the Secretary for the benefit of the owners corporation in the form of four (4) unconditional bank guarantees or insurance bonds to a total of $11 million dollars, due to expire incrementally across 20 years.*

Following the acceptance of the Undertaking and the provision of agreed securities in accordance with the Undertaking, the prohibition order that had been issued previously was revoked.

[9] Richard Johnstone and Michelle King, Griffith University, *A responsive sanction to promote systematic compliance?: Enforceable undertakings in occupational health and safety regulation,* (2008), <https://research-repository.griffith.edu.au/bitstream/handle/10072/24480/53751_1.pdf?sequence=1 >, p 314.

What are the regulatory impacts?

Undertakings are a compliance tool that achieve a quick and effective remedy to contraventions of regulatory requirements. As undertakings are voluntary (in other words a person or body cannot be compelled to enter into an undertaking) the cost impacts on the party to the undertaking or their business are effectively determined by them in offering an undertaking and those costs are internalised by committing to the undertaking.

Research which looked at undertakings in general found that business costs spent to comply with an undertaking were, on average six-to-eight times the cost of a fine that may have been issued if a prosecution were pursued.[10] This is offset, however by the business costs implementing compliant business practices, which not only lower the risk of any future prosecution but also lower business risk. It is a cost used to rectify and resolve issues rather than a monetary fine.

Undertakings represent a cost benefit to the customer as it is an efficient tool to achieve a compliance outcome, including immediate steps that the infringing party will take to remediate the breach that the customer is dealing with. This efficiency also allows the regulator to allocate resources to higher risk or higher impact issues. These resources would otherwise have been used to pursue less efficient responses to the breach, than being resolved through an undertaking.

Undertakings benefit the broader industry and community by enabling the breaching party to understand what has caused the breach and ensure that these practices are not repeated. Through the publication of undertaking outcomes this information and understanding is also shared with the broader community. Further, the financial benefit of undertakings has also found to be approximately eight times more than the average monetary penalty.

These financial benefits are realised through the value added to the “workplace, industry and the wider community” that these undertakings mandate.[11] This represents significantly more value to the community as resources go into resolving the issue, rather than just extracting a penalty.

Questions

7. **Do you support the expansion of undertakings as a compliance tool? Should undertakings be available for all breaches? Why or why not?**
8. **What limitations do you see in using undertakings that the Department should consider in designing an undertaking power and using it in practice?**

[10] Richard Johnstone and Michelle King, Griffith University, *A responsive sanction to promote systematic compliance?: Enforceable undertakings in occupational health and safety regulation* (2008) <https://research-repository.griffith.edu.au/bitstream/handle/10072/24480/53751_1.pdf?sequence=1 > p 285.
[11] *ibid.*, pp 309–310.

Stop work orders

The BCE Bill includes powers to issue stop work orders, which allows the regulator to order building work to stop being carried out (see clauses 57–62 of the Bill). Currently, the regulator only has powers to issue stop work orders under the RAB and DBP Acts. The BCE Bill will expand these powers to apply across all building enforcement legislation, other than the *Buildings Products (Safety) Act 2017*.

Given the cost impacts of stopping work on a building site, the threshold for use of these powers is necessarily high. The BCE Bill includes two threshold tests for issuing a stop work order, depending on whether or not it relates to building work carried out under the DBP Act.

For work under the DBP Act, a stop work order can be issued if the Secretary is of the opinion that the work is being, or likely to be carried out in contravention of that Act, and the contravention could result in:

- significant harm or loss to the public, occupiers or potential occupiers of a building
- significant damage to property.

The threshold for a stop work order under the DBP Act allows earlier intervention because work is audited at the design phase under the DBP scheme. The threshold does not require the work to be carried out for the stop work order to be issued. This means stop work orders can be used to prevent work being carried out where building in accordance with a design would result in work that poses significant risk to people or property.

Likewise, if other aspects of the DBP Act are contravened, such as the requirement for upfront design for the key building elements, and the threshold of risk of harm or loss is met, a stop work order can be issued as a preventative measure.

For other building work, the BCE Bill provides that a stop work order can be issued in circumstances where the building work is carried out, or likely to be carried out in a way that could result in:

- significant harm or loss to the public, occupiers or potential occupiers of a building
- significant damage to property on the land, or on adjoining land
- significant harms or loss to occupiers of premises on adjoining land.

These powers are exceptional powers that are intended to enable the regulator to swiftly address building matters where there could be significant harm. For example, if a building site has deep excavation that is structurally compromised, a potential collapse could result in significant harm and loss to the potential occupiers, as well as damage to the property and adjoining properties. To

date, eleven stop work orders have been issued and three of these have since been revoked under the DBP and RAB Acts.

As with other powers in the BCE Bill, a stop work order is one compliance option that may be used in conjunction with other tools. It is intended as an intervention power to rapidly respond to matters to prevent immediate harm. Because stop work orders are an intervention tool the underlying contraventions, serious defects or practitioner conduct that led to the issuing of the order would be addressed using other tools.

For example, if a stop work order was issued because the building has a serious defect, a building work rectification order would subsequently be issued to have the work rectified. Or, if a stop work order was issued because there were no declared designs for the building work, the builder carrying out the work would be penalised for contravening the requirements of the DBP Act or have disciplinary action taken against them for their conduct.

As a deterrent to ignoring a stop work order, there are significant continuing penalties for non-compliance. Failing to comply with a stop work order attracts a maximum penalty of 3,000 penalty units (currently $330,000) for a corporation and 300 penalty units (currently $33,000) for each day the offence continues. For an individual, the maximum penalty is 600 penalty units (currently $66,000) and 60 penalty units ($6,600) for each day the offence continues.

What are the regulatory impacts?

There are a range of impacts that come from work stopping onsite, including delayed issuing of OC, contract delay penalty clauses, payment issues and challenges with scheduling of tradespersons. However, the impacts of shutting down a building site are proportionate to the size of the project and are difficult to estimate. For many building sites, stopping work will have a direct cost impact on the developer and builder but also flow on costs to trades and suppliers for the building project. As a simple estimate, for a project with a projected build cost of $20 million which was estimated to take three years to build, each day of stopping work could cost $18,625. For a projected build cost of $80 million with an estimate five year completion time, the daily cost of stopping work would be approximately $43,836.[12]

The impact to industry is mitigated in the BCE Bill by the high threshold tests set for issuing an order. If the threshold for issuing a stop work order has been met, the likely harm caused by not intervening could have potentially significant flow-on costs to end customers and the public, as well as safety risks.

[12] $20,000,000 / (365 x 3) = $18,265, $80,000,000 / (365 x 5) = $43,836

Stop work orders have a benefit to the public and end customers as a harm prevention tool. The public interest in using these powers outweighs the potential regulatory burden of shutting down a building site.

> *Case study: eastern Sydney suburbs apartment building*
>
> *An OC audit of an eastern suburbs Sydney apartment building revealed multiple serious and potentially serious defects. These defects included problems with:*
>
> - *structural elements*
> - *waterproofing*
> - *fire safety*
> - *essential services.*
>
> *A change in builder presented several significant concerns for Fair Trading that resulted in a stop work order being issued. These concerns included:*
>
> - *no current principal certifier for the development*
> - *the new builder did not have a scope of works or technical specifications appropriate for the project*
> - *a lack of a rectification plan for the new building to address defects coming into the project.*
>
> *These issues presented a risk to future occupants of the building in terms of harm to life and/or property. By implementing the order, these potential harms were prevented from affecting members of the public.*

Issuing an order to stop work also represents a longer-term cost saving for developers, allowing time to remediate the problematic design, or building work before that work is carried out further, which has a significant cost of coming back and remediating it at a later date.

Compliance notices

The BCE Bill includes a new general compliance notice power to provide the regulator with a tool to remediate building work and have it brought into conformity with the required standards (see clauses 71-77 of the BCE Bill). The compliance notice will replace the existing rectification order under the HB Act and be expanded to apply more broadly.

The current rectification order provisions under the HB Act, sets out that the regulator, upon being notified of a dispute between a contractor or kit home supplier, has the power to investigate. The inspector can make a rectification order if satisfied that the work is incomplete, defective or where the work or contractor has caused damage to work or structure. Orders can also be made for an incomplete or defective kit home or where the kit home was not supplied.

A limitation and key criticism of the current rectification order is that it is only responsive to building disputes raised under the HB Act. The proposed compliance notice can still be used to respond to disputes, but its application has been broadened so it can be used for contraventions of building enforcement legislation. Compliance notices can also be used for other statutory obligations such community and common property maintenance requirements of an owners corporation or community land association.

The expansion of circumstances of when a compliance notice can be used enables the regulator to proactively respond to defective building work without being dependent on a building dispute first being raised. Compliance notices will apply to more minor defects, with serious defects dealt with under building work rectification orders (addressed in Part 5 of this RIS).

The purpose of a compliance notice is to achieve regulatory compliance, rather than a tool to punish a licence holder. It will be a valuable dispute resolution tool, allowing an independent party, being the regulator, to determine if building work requires rectification. This is an important distinction as the compliance notice is more customer focussed in addressing the cause of concern.

Compliance notices can be issued by an authorised officer to:

- a developer
- a person engaged in the work, or responsible for the work
- an owners corporation or community land association.

Compliance notices may be given where a dispute has been raised about work that is incomplete, defective, or causing damage, where the work is subject of a contract under the proposed *Building Act 2022*. They can also be issued if an authorised officer reasonably believes a person contravened regulatory requirements relating to building work or specialist work, or there has been a breach of statutory duties for the maintenance and repair of property for strata and community schemes.

Compliance notices will apply to building work for a period of, up to three years from completion and can only be issued where the defect is not a “serious defect”. Where a serious defect is present, a building work rectification order must be used. This is to ensure that serious defects are addressed through a consistent process, which reflects the critical nature of these elements.

A contravention for building work includes non-compliance with any of the following:

- the approved plans for the building, which could include the construction certificate or complying development certificate plans or declared designs
- the NCC
- the building work standards prescribed in the building enforcement legislation
- relevant quality standards under the Building Bill.

Over the 2019 to 2021 period, over 1,200 rectification orders have been issued with over half of these complied with in the first instance. Non-compliant cases are referred to NSW Civil and Administrative Tribunal (**NCAT**) for further action.

Compliance notices are deliberately broad to allow for the effective resolution of disputes and efficient remediation of defective work. Notices can require a person to take action or make good damaged work and can specify the standard of work required. A notice can require that the work be carried out by a suitable licenced person and require documentary evidence of compliance.

A compliance notice remains in force until it has been complied with or the matter becomes the subject of a building claim under the proposed Building Bill. Over the 2019 to 2021 period, over 1,200 rectification orders have been issued with over half of these complied with in the first instance. Non-compliant cases are referred to NCAT for further action.

> Case Study – rectification of leaks in ceiling
>
> NSW Fair Trading received a complaint against a contractor after the complainant noticed water entering into the ceiling of their kitchen. Upon inspection by NSW Fair Trading, a Rectification Order was issued, requiring the Contractor to identify and eliminate the source of water entering the ceiling in the kitchen area of the complainant and make good the ceiling after issue of water entry was rectified. The rectification order made reference to the relevant standard under the NCC to ensure that the quality of work complied with the standard.

What are the regulatory impacts?

A person who receives the notice will be required to undertake additional work to comply with the notice, either to do work they have not completed or to remediate a defect. Notices will only be issued where a person has breached a requirement under building legislation, but it represents a cost on the person required to do something under the notice.

However, compliance with a notice will remediate a defect that may otherwise have been the subject of a building dispute, which adds time and costs to the person that is the subject of the notice, the customer and any other businesses relying on the person to do compliant work.

A notice also seeks to only bring work into compliance with the regulatory expectations, that is it is not imposing any standards that are not already required to be met.

A compliance notice will be an administratively reviewable decision through NCAT but failure to comply with a notice will be an offence with a maximum penalty of 1,000 penalty units ($110,000) for a corporation with a penalty of 100 penalty units ($1,100) for each day the offence continues. For an individual the maximum penalty is 200 penalty units ($22,000) and 20 penalty units ($2,200) for each day the offence continues. Failing to comply with a compliance notice is also grounds for taking disciplinary action against a licence holder.

More effective regulatory compliance will represent a cost benefit to the public through reduced instances of defects. Early compliance action will have the benefit of cheaper rectification costs as well as cost savings through matters not progressing though the legal system.

Questions

9. **Do you think the compliance notices should be used for defects other than serious defects?**
10. **Do you support the proactive use of compliance notices, that is not requiring a building dispute first?**

Plumbing and drainage work directions

As part of the review of the HB Act, other acts such as the P&D Act were reviewed. Where there was potential for regulatory frameworks to be subsumed into either of the new Bills, consideration was given to how this might be achieved. In the case of the P&D Act, the functions have been split across both the BCE Bill and the Building Bill.

The direction powers in section 14 of the P&D Act have been transferred into the BCE Bill. These direction powers are discrete from other powers in the BCE Bill as plumbing and drainage inspection functions can be delegated to local councils. The certificate of compliance provisions have been included in the Building Bill and expanded to include other types of specialist work. Overall, however, the direction powers in the BCE Bill remain unchanged from the P&D Act.

How do plumbing and drainage directions work?

The BCE Bill has continued the concept of the 'responsible person' in section 5 of the P&D Act. This concept is important to retain as the licence holder remains responsible for the end product when specialist work is done on their behalf of or under their supervision.

Plumbing and drainage directions are typically issued in response to an inspection carried out prior to the completion of work. This is due to the work notification and certificate of compliance system established under the P&D Act. The BCE Bill plumbing and drainage directions allow an authorised person to direct:

- rectification of defective plumbing work
- rectification of, or replacement of non-compliant plumbing fittings
- disconnection of the water supply or sanitary system from the sewer (where there is a risk to public health)
- work to be uncovered to allow an inspection
- a person to produce documents required under the Building Bill.

A plumbing and drainage direction applies to work that is less than three years old and ceases to have effect if the work becomes the subject of an order from NCAT. Where plumbing and drainage

work is required to be carried out under a direction at completion, it must be certified with a certificate of compliance issued by a suitably licensed person.

It is an offence to fail to comply with a plumbing and drainage direction with a maximum penalty of 1,000 penalty units ($110,000) for a corporation with a maximum of 100 penalty units ($1,100) for each day the offence continues, and for an individual the maximum penalty is 200 penalty units ($22,000) and 20 penalty units ($2,200) for each day the offence continues.

This represents a significant increase in penalty from 100 penalty units and, in the case of a continuing offence a further 50 penalty units for each day the offence continues. The penalty increase reflects the serious impact that defective plumbing and drainage work can have both on human health and the public water and sewerage system.

What are the regulatory impacts?

There may be increased regulatory impacts for those who fail to comply with plumbing and drainage directions. Otherwise, there is no change to the current system of issuing a plumbing and drainage direction. A person issued with a direction is subject to the requirement to carry out work, replace fittings or otherwise incur lost time costs in complying with the direction.

The regulatory impacts are offset by reducing the potential for defective plumbing and drainage work, which can have a detrimental impact on building work and the health of occupiers and the public.

Questions

11. **Should these direction powers be expanded to all specialist work in line with the expansion of compliance certificates in the Building Bill?**
12. **Do you agree with the increased penalty amounts? Why or why not?**

Part 5 – Rectification of serious defects

Building work rectification orders

The BCE Bill maintains the building work rectification order (**BRWO**) powers in the RAB Act and expands them to apply to other classes of buildings. These are significant powers specifically targeted at defective and unsafe building work that could cause severe physical and financial harms to consumers and other practitioners.

BWRO powers were introduced under the RAB Act to address the unacceptably high rates of defects in Class 2 buildings. As such the powers were limited to Class 2 buildings or buildings with a Class 2 part. Unacceptable rates of defects however, are not limited to Class 2 buildings and exist across the building sector.

A report by the Centre for International Economics estimates the annual defect cost nationally at $1.3 billion, with 52% of this attributed to Class 2 buildings. The same report also found that between 41% and 53% of new commercial Class 3 to 9 buildings nationally have a major defect.[13] This correlates with the recent research of strata buildings that were completed in the last 6 years,[14] which found 39% of strata buildings having a serious defect.

Anecdotal information gathered from commercial building inspectors (for specialist trade inspections and work, health, and safety inspections) notes that common themes in commercial buildings are similar to Class 2. These include cracking, essential safety management, weatherproofing, and roof defects.

Building defects in all buildings present a cost to building owners and the people who use them. Poor-quality building also represents a hazard to the public. For example, in 2015, a Class 6 commercial shopping centre ceiling collapsed during a busy holiday period.[15] The same shopping centre experienced another roof incident in 2022.[16]

The high rates and incidences of defects pose an unacceptable risk and cost to consumers, occupiers of buildings and the public. The cost of defects are typically passed on to end customers,

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[13] 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> pp 3-4.
[14] NSW Government – Construct NSW, *Improving Consumer Confidence: Research report on serious defects in recently completed strata buildings across New South Wales* (September 2021) <https://www.nsw.gov.au/building-commissioner/research-on-serious-building-defects-nsw-strata-communities> p 6.
[15] Michael Koziol and Emma Partridge, Sydney Morning Herald, *West Bondi Junction roof collapse* (December 2015) <https://www.smh.com.au/national/nsw/westfield-bondi-junction-roof-collapse-20151216-glp567.html>.
[16] Mark Saunokonoko, Sydney Morning Herald, *Rain-hit Westfield Bondi Junction ceiling collapses onto escalator* (March 2022) <https://www.9news.com.au/national/westfield-bondi-junction-ceiling-collapses-onto-underground-escalator/ebd196cd-1a38-4d30-9347-0a6aa1cfe09c>.

with strata research identifying an average cost of remediation borne by owners corporations was around $300,000 per apartment to resolve serious defects.[17]

BWROs leverage the proposed auditing and inspection powers to allow earlier identification and remediation of defects. By intervening earlier in the design and build process, particularly before a building is completed remediation costs are significantly reduced. This is supported by analysis carried out by the Western Australian Government on rectifying defects in dwellings during construction compared to five-years after completion.[18]

Table 2 - Rectification costs during construction vs five years later

	At Construction	At completion (+5 years)	Rectify cost at construction as % of cost at completion
	$	$	%
Footing inspection	1 360	6 875	23.1
Roof framing inspection	250	6 250	4.0
Completion/final			
Bushfire construction requirement	1 100	1 500	73.3
Plasterboard installation	315	3 700	8.5
Waterproofing	10 400	15 000	69.3

Source: CIE, *Building Confidence Report: A case for intervention,* July 2021, p 87.

The use of BWROs in the Class 2 space has been successful in identifying and resolving serious defects in buildings. Since the commencement of the RAB Act to April 2022, over 120 OC audits have begun with 49 completed. From these audits there have been 22 building work rectification orders, of which seven have been revoked indicating that 15 have yet to carry out the orders. The proposed amendment would leverage the success of this regulatory tool in Class 2 buildings and apply it more broadly to other building classes to respond to serious defects in critical building elements.

[17] NSW Government – Construct NSW, *Improving consumer confidence – Research report on serious defects in recently completed strata buildings across New South Wales* (September 2021) <https://www.nsw.gov.au/building-commissioner/research-on-serious-building-defects-nsw-strata-communities> p 8.
[18] Government of Western Australia Department of Mines, Industry Regulation and Safety, *Reforms to the building approval process for single residential buildings in Western Australia* (September 2019) <https://www.commerce.wa.gov.au/publications/reforms-building-approval-process-single-residential-buildings-wa-cris>, p 67.

The BCE Bill will adopt the current scope of BWRO power currently in the RAB Act but expand it to apply to all building classes. A BWRO can be issued in circumstances where the Secretary has reasonable belief that the building work was or is being carried out in a way that could result in a serious defect or a building has a serious defect.

A serious defect is:

- A defect in a building element that fails to comply with the NCC, a relevant standard (such as an Australian Standard) or the approved plans (the endorsed construction certificate plans and declared designs).
- A defect in a building product or building element that is attributable to defective design, defective or faulty workmanship or defective materials AND causes or is likely to cause
    - the inability to inhabit or use the building for its intended purpose,
    - the destruction of the building (or any part of the building), or
    - the threat of collapse of the building (or any part of the building).
- A defect of a kind that is prescribed by the regulations as a serious defect
- The use of a building product in contravention of the *Building Products (Safety) Act 2017,* or the product or use does not comply with NCC, or the product or use does not comply with other standards or requirements prescribed by the regulations.

The definition of serious defect has been largely retained from the current RAB Act definition. The changes proposed include increasing the scope of application to the whole NCC, rather than the BCA. The definition includes a refence to the governing requirements to capture relevant NCC provisions such as fire testing requirements and making clear that a relevant standard is any referenced NCC document.

The definition also includes an expansion in respect to ‘product or use’ that will further equip and 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, for further information please refer to the Amendment Bill RIS.

The building elements that a serious defect relates to are:

- the fire safety systems for a building
- waterproofing
- internal or external load-bearing component of a building that is essential to the stability of the building
- a component of a building that is part of the building enclosure
- those aspects of the mechanical, plumbing and electrical services for a building that are required to achieve compliance with the NCC.

This expansion of BWRO's will allow the regulator to take compliance action for any serious defect, for example where there is a structural issue with a commercial building.

The range of people that a BWRO may be issued to is deliberately broad to capture developers and all those responsible for the work. A developer is defined in the BCE Bill and relates to:

- the person who contracted, arranged for or facilitated or otherwise caused (whether directly or indirectly) the building work to be carried out
- the owner of the land on which the building work is carried out at the time the building work is carried out
- the principal contractor (being the person responsible for the overall coordination and control of the carrying out of the building work)
- for a strata scheme, the developer of the strata scheme.

To ensure fairness, a person that is subject to a BWRO may appeal to the Land and Environment Court against the order. This allows the circumstances and terms of the order to be heard by an independent arbiter in the court, as a further safeguard to the procedural fairness to be followed in issuing a BWRO.

What are the penalties for non-compliance?

To reflect the serious matters that BWROs are seeking to address there are commensurate penalty provisions. It is an offence to fail to comply with an order and this attracts a maximum penalty of 3,000 penalty units ($330,000) for a corporation with a penalty of 300 penalty units ($33,000) for each day the offence continues. For an individual the maximum penalty is 600 penalty units ($66,000) and 60 penalty units ($6,600) for each day the offence continues.

Where a person fails to comply with a BWRO the BCE Bill gives the Secretary powers to do anything necessary to achieve compliance with an order. This includes the ability to carry out the necessary work and to recover all related expenses and associated costs.

What are the regulatory impacts?

Complying with a BWRO can have significant costs for the person who must comply with the order. While the order aims to avoid the greater costs of dispute resolution, including costly litigation it still represents a cost to practitioners.

The threshold of a 'serious defect' has been used in connection with critical building elements of higher risk that require greater regulatory intervention, such as fire safety systems, waterproofing and structural load bearing components. The definition of building element is consistent across both the current RAB Act and DBP Act (requiring declared designs of these elements).

The regulatory burden on Class 2 buildings will remain the same – as the existing powers under the RAB Act will be carried over into the BCE Bill. While anecdotal evidence suggests that serious defects are trending downward in these buildings, there is not yet enough evidence to justify removing the requirements altogether. Particularly with the BWRO power being a key driver of the reduced number of defects.

For Class 1 residential buildings (for example free standing homes) the threshold of a 'serious defect' is appropriate because defects in the critical elements, while smaller in scale for these buildings, still pose significant cost, risk or harm to consumers. The presence of serious defects in Class 1 buildings is unacceptably high, with the CIE *Building Confidence Report* finding a cost to consumers from defects totalling $714 million a year.[19] Anecdotal evidence indicates these figures may increase following more proactive interventions by the regulator to assess Class 1 building work in the same way it has assessed Class 2 building work.

Greater intervention in the Class 1 sector will impact builders in the same way it has impacted builders in Class 2 buildings. These costs are offset by preventing the serious defects being passed on to end customers. The cost impact will be proportionate for builders as the existing regulatory expectation is that these elements are compliant with the NCC and the order requires elements to be brought to this minimum accepted standard. Complying with an order represents costs that should already have been borne by the developer in meeting requirements under the NCC and any contract with the end owner.

> *Case Study – a House with no piers*[20]
>
> *A construction of a home in regional NSW in 2009 resulted in the owners commencing three-and-a-half years of legal proceedings in the NSW Civil and Administrative Tribunal.*
>
> *The weight of expert evidence found that the footing design prepared by the design engineer was inadequate. Further, the design was for a slab and piers and the piers were not constructed by the builder.*
>
> *The Council officer failed to identify that the footings were not constructed in accordance with the approved design when conducting mandatory inspections.*
>
> *The owners made complaints about the design engineer and the builder's expert engineer to their professional industry association. Both complaints were dismissed demonstrating a lack of willingness by the industry association to hold their members to account for what the weight of evidence showed was incompetent and unprofessional conduct by the engineers. The legal case*

[19] 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> p 130.
[20] NSW Government, *The House with no Piers: A review of the issues relating to alleged defects in the construction of a home and the related complaints and dispute process* (September 2021) <https://www.nsw.gov.au/sites/default/files/2021-02/the-house-with-no-piers.pdf>.

was poorly managed by the owners' legal team and the absence of piers was not put before the Tribunal. Due to this, the Tribunal found that the builder had constructed the footings in accordance with the design. The owners were ordered to pay the builder's costs. In total, their own and the builder's legal and expert witness costs were $301,000.

The NSW Building Commissioner inspected the site in mid-2020. He observed the excavated footings and the absence of piers under the slab. The NSW Building Commissioner commissioned a report and further investigation by NSW Fair Trading into the conduct of the builder and certifier to understand in detail what occurred in this matter and how to prevent these outcomes for consumers.

For commercial construction (where the developer may also be the owner of the property or may produce the property for someone else), the regulatory burden will be the same as other classes of building, with any rectification bringing the building back to the regulatory minimum. The benefits for commercial buildings will be marginal in circumstances where the developer retains ownership of the building, as the responsibility of the defect will rest with them.

Where commercial buildings are handed to different owners, the benefits will be commensurate with the benefits realised from the use of BWROs under RAB Act.

It is appropriate that the regulatory burden largely rests with the developer. If the cost is not borne by the person who has caused the defect at the construction stage, the cost will ultimately get passed on to the end consumer or owner, regulatory authorities and insurers. This would be passed on either through disputes and investigations or following expensive litigation. While many of these cases will benefit from the NSW Fair Trading dispute resolution process for residential building work or NCAT, some will rely on the courts to resolve their dispute.

While NCAT aims to provide a low cost and accessible remedy and can be faster than pursuing action through the court system, its services can still take a significant amount of time. After having already engaged with NSW Fair Trading, 44% or 805 cases dealing with an issue under $30,000 had to wait longer than 16 weeks for a ruling while 11% or 104 cases over $30,000 had to wait more than 18 months for a resolution for the 2020 to 2021 period.[21] By bringing in reforms that address the issues of building quality and builder misconduct before they arise, the undue burden of dispute resolution imposed by lengthy wait times can be reduced.

The nature of serious defects is that they can adversely affect neighbouring properties and public spaces if left unchecked. Early regulatory intervention provides a public benefit by addressing serious defects.

[21] NCAT, *Annual Report 2020–2021* (2022) p 94.

There are significant resource costs associated with issuing a BWRO and to offset these costs the BCE Bill includes a compliance cost recovery mechanism to require the responsible person to pay all reasonable costs and expenses incurred by the regulator.

What alternatives are there?

The alternative option is to continue to limit the scope of BWRO to Class 2 buildings. This would be the status quo approach and would not impose any additional regulatory costs on Government. However, this would likely perpetuate the current trend of serious building defects in buildings other than residential apartment buildings, being mainly resolved through legal means, with the associated costs being incurred by the parties.

There is a particular risk if action is not taken to extend the powers to other classes of building as serious defects are not limited to only residential apartment buildings. While commercial operators can be more sophisticated in managing defects, evidence indicates that commercial work remains subject to high rates of defects.

Commercial building work does not only relate to building work that will be retained by the developer, but represents a broad spectrum of work, including work that will end up being owned and operated by small and medium businesses. Failure to provide strong regulatory powers will allow the power imbalance between these customers and the developer who produces the building to continue.

Questions

13. **Do you support the expansion of building work rectification orders to all classes of buildings?**
14. **What do you think the trigger for issuing an order should be? Should it be limited to serious defect of a building element? Should it be expanded or narrowed?**

Part 6 – Disciplinary action

The BCE Bill seeks to consolidate and modernise the disciplinary action processes applying across legislation. The aim is to provide a consistent process for all licence holders under building legislation, whether they be a builder, trade, registered certifier or design practitioner. This will address an imbalance in variations to disciplinary processes across the licensing schemes, provide consistency in disciplinary decision making and reduce the burden for the NCAT for administrative reviews.

A disciplinary framework is integral to upholding the integrity of licensing schemes. This framework is focussed on the conduct of licence holders and sanctions licence holders for poor conduct. The focus on conduct is an important aspect of the disciplinary process that scrutinises the behaviour of licence holders. It fills the gap between strict statutory requirements for licence holders and the reasonable expectation as to how a licence holder should conduct themselves.

Without a disciplinary process there would be a gap in incentives for licence holders to meet their obligations, with the regulator only having the power to impose conditions or prosecute. It creates an additional deterrent as it may result in a loss of licence removing the ability to make a living from licensed work. This is a significant deterrent that is often more effective than the penalties under building legislation which can be seen as a cost of doing business – licence suspension or cancellation changes this mindset.

A disciplinary process provides the licence holder the opportunity to respond to the claims made against them and have their submissions considered before a decision is made by the Secretary. Decisions made under the disciplinary process are subject to administrative review.

How does it work?

Under the BCE Bill, the disciplinary framework sets out:

- a list of the grounds where disciplinary action can be taken (clause 115 -119)
- a process of issuing a notice for person to show cause why disciplinary action should not be taken (clause 121)
- the making of submissions in response to a show cause notice (clause 121 (4))
- the disciplinary action the Secretary may take where satisfied the grounds for taking disciplinary action have been established (clause 122-124)
- administrative review mechanisms (clause 161).

The grounds for disciplinary action identify the types of action and conduct that may result in some form of sanction. This includes improper conduct, breaching statutory requirements, committing offences, or failing to comply with conditions on a licence or the code of conduct.

The BCE Bill proposes to apply the disciplinary framework to current and former licence holders, defined as a person that has held a licence in the previous five years. The purpose of this is to prevent a person surrendering their licence as a means of avoiding disciplinary action. In certain circumstances it is in the public interest to take disciplinary action against a former licence holder, to ensure the risk of harm to the public can be effectively managed by preventing unsuitable people from working in NSW. It is also important to ensure that former licence holders do not seek an equivalent licence in another jurisdiction on the basis that they have no prior disciplinary history.

The Secretary is also empowered to take immediate disciplinary action if it is in the public interest to do so. This would be applied in circumstances where there is reasonable likelihood of harm continuing if a person was not suspended immediately.

Where a disciplinary action includes a monetary penalty, a licence is automatically suspended until the penalty amount is paid.

Case study – suspension of licence

A licence holder and sole director of a company sought to mislead NSW Fair Trading and was the subject of numerous complaints made against them or their company by customers over the course of more than two years. Fair Trading deployed various disciplinary actions against him during this time. When it was apparent that the licence holder would continue to harm customers and was not responding positively to disciplinary action, Fair Trading suspended their licence.

Customer complaints were about misleading and/or deceptive conduct, incomplete and/or defective work, overcharging, intimidation and receipt of deposits more than the amount prescribed by the Act.

Furthermore, upon investigation it was discovered that the licence holder had provided false or misleading information when lodging applications for licenses with NSW Fair Trading.

Complaints were made during a period just over two years. During this time NSW Fair Trading Disciplinary Action Unit escalated action against the licence holder in the following ways:

- *they were provided with multiple verbal requirements and an education letter from Fair Trading in relation to the requirements of the Act*
- *they were issued with Penalty Infringement Notices (PINS) for various and repeated breaches of the Home Building Act 1989 (NSW), Home Building Regulation 2014 (NSW) and the Plumbing and Drainage Act 2011 (NSW), including the provisions that he had previous counsel for from Fair Trading*
- *whilst being the sole director and controlling mind of the company, he was issued with a number of orders by the NSW Civil and Administrative Tribunal.*

Finally, as further breaches of various acts were committed by the licence holder, Fair Trading made the decision to suspend their licence for 10 months to protect customers from continued harm.

What are the regulatory impacts?

The disciplinary process can impose significant costs to a licence holder. These costs are mainly time related, arising from the investigation process and may include legal costs associated with providing submissions. These costs can be increased if a disciplinary finding is made and a review is sought at NCAT, where target service times for licensing issues is nine months.

More serious penalties such as suspension or cancellation will have a significant cost to the licence holder by restricting the ability to carry out that licensed work. If a licence holder's conduct is such that their licence is suspended or cancelled, there is a clear public benefit in ensuring that they do not cause further harm. There may be, however costs to customers if work stops partway through construction as a result.

The costs to licence holders are offset by the regulatory benefit in sanctioning licence holders for poor conduct. The disciplinary process is the main compliance and enforcement tool available to address the poor conduct of a licence holder (as distinct from a breach of legislation) and is particularly important where roles require discretion and judgment, such as certifiers and design practitioners. The disciplinary process has strong embedded natural justice provision and is only used where there is public interest to do so.

There are costs to the regulator in undertaking investigations and taking disciplinary action. Where matters are reviewed at NCAT there are costs associated with being a party to the hearing. These costs are anticipated to be mitigated through stronger licensing requirements in the proposed Building Bill, which seeks to ensure those that are granted a licence are competent and suitable to hold a licence.

There is clear public benefit in having strong disciplinary powers to ensure the integrity of licensing systems are upheld so the public can have confidence in those people who hold a licence.

What is the alternative?

The cost of not taking disciplinary action or not having a disciplinary process has numerous adverse impacts:

- reinforcing the belief of poor industry operators that poor practices can continue because they are not being sanctioned by the regulator
- a flow on effect to the broader industry where poor practices then get labelled as 'industry practice' despite being contrary to regulatory requirements
- creating an unequal cost for those businesses and licence holders that that seek to comply with the regulatory requirements and the associated compliance costs
- higher levels of defective or poor work and practices which predominantly affects the end consumer
- increased consumer detriment through the continued activity of poor industry players
- loss of community confidence in the industry and licensing regimes
- additional demands on the justice system, where consumers take legal action over poor quality builds.

An alternative option was to amend the disciplinary process to include less administrative steps and enable quicker sanctioning of practitioners. This would offset the issue that arises with the

length of time it can take to take disciplinary action. Where the process isn't efficient means that a practitioner is able to continue to fall short of the expected standard of conduct, potentially exposing customers and other practitioners to risks.

This option was not pursued as these administrative steps provide safeguards and procedural fairness to practitioners. These steps, while potentially increasing the time taken, ensures that decisions (such as to cancel or suspend a person's licence) only occur where there is compelling evidence that has been properly tested.

Part 7 – Demerit points scheme

The BCE Bill proposes to introduce a new demerit points scheme. The scheme will enable a person to accumulate demerit points for breaches of obligations under building legislation. Once certain numbers of points are accumulated, this would trigger remedial or punitive consequences. The proposed demerits scheme seeks to build on current enforcement powers to efficiently and effectively punish poor performers who repeatedly contravene the legislation.

The purpose of the demerit points scheme is to:

- deter licence holders from committing offences under the building legislation
- provide for sanctions against repeated contraventions
- minimise the risk of further offences being committed by licence holders.

The proposed demerits scheme is designed to target those industry participants who repeatedly breach legislative requirements. These poor players can cause significant harm and detriment to consumers. There is a clear public interest to sanction these industry players expediently to prevent further harm.

Demerit points would apply to certain serious offences, where repeated infractions constitute a serious breach of the holder's obligations and represent significant harm to customers and other industry practitioners. It is not intended that administrative or minor breaches attract demerit points where these matters are better dealt with through other compliance and enforcement tools.

As a threshold, the BCE Bill prohibits an offence being prescribed as a demerit point offence where the maximum penalty for the offence is less than 1,000 penalty units ($110,000) for a corporation or 200 penalty units ($22,000) otherwise.

The proposed demerits scheme will apply to licence holders and those who hold a registration or authorisation under 'building enforcement legislation', as well as office holders of those licence holders (including members of a partnership and directors of a corporation). This is to ensure that people who have control of the conduct and activities of an entity that holds a licence can be held accountable and cannot hide behind an entity licence.

Demerit points will apply in circumstances where:

- a court convicts the person of an offence
- the court makes a finding of guilt for the offence but does not record a conviction and determines a demerit point for the offence is still warranted
- a penalty notice amount is paid in relation to an offence (where the offence is a demerit point offence)
- a monetary penalty is imposed as part of a disciplinary action

- a penalty notice enforcement order is made against a person for not paying a penalty notice.

The proposed demerits scheme will not affect a person's right to challenge alleged offences. Where a conviction is overturned on appeal, or a penalty notice or order is revoked or annulled, the demerit points will also be revoked and any remedial action ceases to have effect. The same occurs if a person pays a penalty notice amount, but later elects to have the matter heard at court. Where an appeal is made against a demerit point offence any remedial action is taken to be suspended until the outcome of the appeal.

The proposed demerits scheme will operate as a non-discretionary and automatic system. This means that when a demerit point offence occurs, the demerit points will be automatically incurred. Demerit points will stay in force for three years from the date upon which they were incurred and will automatically expire after this date.

By the same token the imposition of remedial actions will be automatic upon accumulation of demerit points. The remedial actions will have three tiers based on the number of demerit points accumulated in a three-year period. All remedial actions will include:

First tier (10-14 points)	1. mandatory reprimand 2. the requirement to undertake a course or training as the Secretary considers appropriate
Second tier (15-29 points)	1. mandatory reprimand 2. the automatic suspension of a licence for a period of six months
Third tier (30 or more points)	1. mandatory reprimand 2. Cancellation of a licence and disqualification from holding a licence for 12 months

Stakeholders have raised concerns about the suitability of using 'education' as a punitive measure. The licensing scheme usually requires ongoing training and education through continuous professional development (CPD) obligations as a positive element of licensing. While the proposed demerits scheme is primarily intended as a punishment, the first-tier mandatory course or training seeks to allow a person to manage or reduce the risks that contributed to the commission of the offences in the first place.

Any remedial training or education will be additional to continuing professional development obligations. It will also be targeted to the behaviour that led to the offence/s and require sufficient evidence of successful completion. Where a course is not successfully completed in the allocated time, it will result in automatic suspension of a licence until the course is completed or the person can demonstrate limited exceptional circumstances.

It is acknowledged that there may not always be suitable education or courses for a person to undertake, or availability within a reasonable time. The BCE Bill includes discretion for the Secretary to not apply this action in those circumstances.

The second and third tier penalties reflect the seriousness of the offences and clearly indicate that repeat offences will result in the suspension and disqualification of a licence.

The BCE Bill includes the ability for a person to make an application to the Secretary to have demerit points removed. This will only be able to be made 12 months after the demerit points were incurred and the onus of demonstrating why the demerit points should be removed rests with the applicant.

The Secretary can remove demerit points where it has been demonstrated that the applicant has:

- complied with any remedial action
- implemented measures or processes to manage or reduce the risks that led to the demerit points offences
- since the demerit point offences, the applicant has not contravened or breached any legislation.

The Secretary must also be satisfied that removing demerit points is consistent with the purpose of the demerit points scheme.

The relevant appeal and review mechanisms will continue to apply for offences that result in a demerit point, such as choosing to have a penalty notice offence heard in court or seeking an administrative review of a disciplinary decision. This provides ongoing procedural fairness for each relevant offence.

To assist with greater availability of information for the public, the Secretary will create and maintain a demerit points register on the Department's website, highlighting key information relevant to the person and the nature of the offence.

What are the regulatory impacts?

For licence holders who repeatedly breach legislation the demerit points scheme will have cost impacts. For the first tier of remedial action the costs incurred will relate to the cost of the required courses and the time taken in successfully completing the course. This should also result in a benefit to the licence holder though upskilling and preventing future non-compliance, representing a future cost saving.

Higher tier remedial action taken against a licence holder, such as a suspension or cancellation, will have a significant cost to the licence holder by restricting the ability to carry out that licensed work. If the licence holder is part-way through carrying out that work, this may result in delays and costs for end customers associated with finding a new tradie to complete the work.

If a licence holder repeatedly breaches legislation to the extent that their licence is suspended or cancelled through demerit points accumulation, there is a clear public benefit in ensuring that they do not cause further harm. While other powers could be used to suspend or cancel a licence holder, the delays in using these powers can result in further harm being caused by continuing to operate in the interim.

The cost impact to the Department is anticipated to be neutral as any costs associated with administering the scheme are likely to be offset by having a more efficient mechanism to remove poor players from industry. The licensing process in the Building Bill is also likely to result in greater rigour around issuing of licences.

It is anticipated that the number of court-elected penalty notices, appeals and administrative reviews for demerit point offences are expected to increase in the short term. This will impose greater regulatory burden on the licence holder, the Department and the relevant court.

What are the alternatives?

The alternative is to retain the status quo of addressing poor industry behaviour through existing disciplinary and prosecution methods. These methods are resource intensive and incur significant cost. There is clear public interest in having a more efficient mechanism to remove poor players from industry and mitigate any further harm.

Various options for the demerit points scheme were considered and tested through stakeholder consultation, including:

- broadly applying demerit points to all offences
- imposing demerit points as a discretionary administrative decision
- suspension of a licence as the first-tier remedial action
- not having a mechanism to apply to have demerit points removed.

These options have not been included in the proposed scheme because the purpose of the scheme is to sanction poor industry players for repeated significant breaches. This purpose would not be achieved if all offences incurred demerit points. This could have the unintended consequence of a licence holder being suspended for several less serious breaches. This type of repeated conduct is more appropriately addressed through other compliance and enforcement actions.

Other licensing schemes allow the imposing of demerit points as a discretionary decision following the conviction of an offence. This model was not preferred as it creates a high level of uncertainty for licence holders as to whether a demerit point will be imposed, has increased administrative burden for little net benefit and duplicates appeal provisions. The preference is to have a model

with certainty as to the demerit point offence and to have appeal mechanisms clearly linked to the offence, which leads to a demerit point.

Any remedial action is a result of multiple serious breaches and consideration was given to suspension as the first tier. This was not adopted to allow a licence holder a chance to undergo training and education to prevent further contraventions.

Similarly, it was considered appropriate to allow a person to apply to have demerit points removed after a 12-month period, where it can be demonstrated to the Secretary that behavioural change has occurred.

Questions

15. **Do you think the demerit points scheme will act as a sufficient deterrent for industry players who repeatedly contravene legislation?**
16. **Should demerit points apply to non-licence holders?**
17. **Do you support mandatory education or training as the first-tier?**
18. **Do you support a mandatory six-month suspension as the second-tier?**
19. **Do you support a mandatory 12-month disqualification as the third-tier?**
20. **Do you support the ability to seek removal of demerit points after 12 months?**
21. **Do you support the publication of a demerit points register on the Department's website?**

Part 8 – Offences and proceedings

Part 8 of the BCE Bill contains provisions relevant to:

- the procedure for prosecuting offences under all building enforcement legislation
- issuing penalty infringement notices as an alternative to prosecutions
- issuing education and training notices as an alternative to penalty infringement notices
- making directors responsible for corporate offending.

Proceedings

Clause 148 of the BCE Bill outlines relevant matters relating to proceedings for offences, more commonly known as prosecutions. Prosecution for an offence is an important element of the suite of compliance and enforcement options available to Fair Trading under legislation it administers. Prosecutions are necessary to uphold the integrity of the regulatory system and act as deterrent against non-compliance.

Prosecutions are a discretionary action and not every breach of the law will result in a criminal prosecution. Prosecutions are normally reserved for serious breaches of legislation. The dominant consideration in deciding whether to prosecute is the public interest.

The BCE Bill provides that prosecutions for offences under the 'building enforcement legislation' where the offence is in the parent Act (for example under the DBP Act) will be heard in the Local Court (up to a maximum of 1,000 penalty units), or in the summary jurisdiction of the Land and Environment Court. Offences in regulation (for example the DBP Regulation) will be heard in the Local Court only.

The BCE Bill provides that prosecutions must be taken:

- no later than three years after the date on which the offence was committed, or
- with leave of the court, no later than two years after evidence of the offence came to the attention of an authorised officer.

In general terms, maximum penalties are used as a sanction in situations where it is considered appropriate to take prosecution action against a corporation or individual.

By commencing a prosecution, Fair Trading aims to promote a fair marketplace and safeguard consumer rights by deterring further offending conduct. Prosecution in appropriate circumstances sends a message to the community that failure to adhere to legislative requirements safeguarding consumers and traders in Fair Trading's remit will be enforced through the courts. The decision to prosecute is based on the applicable law at the time, the public interest and the careful consideration and application of the Fair Trading Prosecution Guidelines.

Penalties for offences in BCE Bill

A maximum penalty is the most severe penalty a court can impose on a person who has been found guilty of an offence. Maximum penalties are only given for the worst or most serious instances of an offence.

The proposed maximum penalties in the BCE Bill have been determined according to the seriousness of the offence, examining the nature of offending conduct and its resulting harms or impacts. In general, as is consistent across the rest of the statute book, there are higher level penalties that apply to corporations for offences compared to individuals or other bodies.

Further, consideration has been given to ensuring that the penalties are consistent with existing offences of a similar nature or seriousness across the building legislation. The BCE Bill proposes to standardise penalties, as far as possible, based on five levels of offences to ensure like conduct is treated the same and to align with penalties in the proposed Building Bill.

Tier 1 is intended to apply to the most serious matters, such as contravening a building product ban or recall. Tier 2 applies to offences such as failing to comply with a stop work order or building work rectification order. Tier 3 applies to breaching an undertaking, and Tier 4 is failing to comply with a compliance notice or plumbing and drainage direction. Tier 5 is reserved for minor or administrative matters which may ultimately be resolved through an alternative manner (for example, throughs warnings, education or penalty infringement notice). Please see below table which explains the tiered system adopted.

Table 3 – Tiered approach adopted for setting maximum penalties

Tiers	Corporation	Other (i.e. individual)
Tier 1	10,000 penalty units ($1.1 million) If continuing offence: 1,000 penalty units ($110,000)	2,000 penalty units ($220,000) If continuing offence: 200 penalty units ($22,000)
Tier 2	3,000 penalty units ($330,000) If continuing offence: 300 penalty units ($33,000)	600 penalty units ($66,000) If continuing offence: 60 penalty units ($6,600)
Tier 3	1,500 penalty units ($165,000) If continuing offence: 150 penalty units ($16,500)	300 penalty units ($33,000) If continuing offence: 30 penalty units ($3,300)
Tier 4	1,000 penalty units ($110,000)	200 penalty units ($22,000)
Tier 5	500 penalty units ($55,000)	100 penalty units ($11,000)

Penalty notices

A penalty notice (also known as a penalty infringement notice (**PIN**), or on-the-spot fine) is a fixed monetary penalty for committing an offence. Consistent with the RAB Act and all other building enforcement legislation, the BCE Bill enables offences under the BCE Act (once enacted) and any supporting regulations to be prescribed as penalty notice offences. This will mean that Fair Trading can give a penalty notice to a person if there is evidence that they have committed an offence under the BCE Act or regulations.

The types of offences that will be prescribed as penalty notice offences are 'strict liability' offences where, to issue the penalty it only needs to be established that the offence has been committed.

Penalty notices are an important feature of the suite of compliance and enforcement options available to the regulator and are relied on as an efficient and effective deterrent against regulatory non-compliance. In general terms, penalty notices are used as an intermediate enforcement tool in situations where it is not considered appropriate to take prosecution action against a corporation or individual, but a more severe punishment other than a warning is warranted.

While penalty notices will result in lower penalties for breaches of the Act and regulation, they are only issued as a graduated response where appropriate to do so. The regulator retains the discretion to prosecute serious breaches of requirements under the Act in court. The value of penalty notices is generally set at a percentage of the maximum penalty that may be imposed by a court for the offence.

A person issued with a penalty notice may elect to pay the penalty amount in the specified time, seek a review of the penalty, or elect to have the matter heard in court. Penalty notices are fixed penalties for prescribed offences and given their nature, do not consider circumstantial or personal factors. To afford procedural fairness, a person issued with a penalty notice who does not consider they have committed the offence or would like mitigating factors to be taken into consideration, may elect to have the matter heard in court.

What are the regulatory impacts?

The burden of receiving a penalty notice is a proportionate cost as it can only be issued where there is sufficient evidence to demonstrate that the offence has been committed. In circumstances where the evidence has been established, an officer also has discretion to issue a formal caution in lieu of a penalty notice if appropriate in the circumstances. This could consider the person having no previous offences, or the nature of the offence.

Where penalty notices are paid, the obvious impact to an individual or corporation is the associated monetary cost, however it has very little time impact. Where a penalty notice is court elected, this can have more significant time and cost implications as this effectively turns into a prosecution.

Penalty notices reflect a net benefit to the community as they are a quicker and more cost-effective punishment, which allows the regulator to reinforce regulatory requirements. This can provide specific and general deterrence and allows more intensive regulator resources to be used for higher risk matters.

What are the alternatives?

Removing the power to issue penalty notices would remove an intermediate sanctioning tool, which limits the options available to the regulator to determine the most appropriate manner to respond to non-compliance. Without penalty notices, matters would need to be dealt with through less punitive tools, such as warnings or more serious tools such as prosecuting a breach.

Education and training notices

Provisions exist in various pieces of building legislation[22] 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 and clause 149 of the BCE Bill proposes that inspectors be empowered to hand out an education and training notice, instead of issuing a PIN. The notice 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 failing to adhere to declaration obligations under the DBP Act, the offender would be required to complete the 'Navigating the Design and Building Practitioners Legislation' set by the Department.

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. 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

[22] *Home Building Act 1989 s 62, Design and Building Practitioners Act 2020* section 66, and *Building and Development Certifiers Act 2018* section 48.

form of disciplinary action and offenders will be disincentivised from seeking to instead pay the standard PIN.

Executive and corporate liability

Many operators in the building and construction sector are corporations or hold a licence as a body corporate. The licensing schemes allow corporate entities to hold licenses to afford flexibility and appropriate risk management in the preferred business model utilised by licence holders. This allows for legal business structures to be set up with the entity engaging suitably qualified people to carry out the regulated work or activity on behalf of the body corporate.

Directors of corporate licences have positive obligations under the building legislation to ensure that the work or activity authorised to be carried out, meets the legislative requirements, as well as obligations to comply with corporate laws, both in NSW and federally.

Despite these obligations, stakeholder and consumer feedback has indicated problems with the ability of directors to personally avoid punishment where certain offences are committed by a corporation and the director was associated with the commission of the offence or did not take reasonable steps to stop the offence.

In some instances, the company procedures may lead to poor outcomes such as:

- deliberately structuring projects to rush work through, without quality assurances
- not allowing each trade the right amount of time for each stage of completion
- deliberately cutting corners and using non-conforming products.

While the corporation can be prosecuted, having no personal liability can result in a poor outcome for customers and other businesses, as directors are free to continue in industry with no blemish on their record or penalties for their conduct.

The BCE Bill includes powers to ‘pierce the corporate veil’. This is to ensure that directors or other individuals in a position to influence the conduct of the corporation are held personally liable for the actions of the corporation that has committed an offence.

Specifically, clause 156 provides that a director or influential individual may be personally prosecuted for a corporate offence if they:

- aided, abetted or procured the commission of the offence
- induced, whether by threats of promises, the commission of the offence
- conspired with others to effect the commission of the offence
- otherwise were knowingly concerned in, or a party to, the commission of the offence.

These provisions apply to any offence in the ‘building enforcement legislation’ that can be committed by a corporation and apply regardless of whether action is also taken against the

corporation. The maximum penalty that will apply to the director or individual for the offence is the maximum penalty that would apply to an individual for the offence.

In addition, the BCE Bill identifies certain offences as executive liability offences (also known as director liability offences) at clause 157. The proposed executive liability offences are:

- contravening an undertaking, including a building product undertaking (under clauses 53 and 66)
- failing to comply with a stop work order (under clause 58)
- failing to comply with a building work rectification order (under clause 87).

The intention of these provisions is to hold directors or influential individuals liable where they have been recklessly indifferent or fail to take reasonable steps to prevent or stop the offence in relation to the corporation's contravention.

The BCE Bill, at clause 157(7), outlines actions that would constitute 'taking reasonable steps' which essentially reflect good corporate governance and due diligence.

What are the regulatory impacts?

The statutory establishment of the proposed accessorial liability provisions will have no regulatory impact as they merely mirror the application of the common law. Under the common law, accessorial liability generally applies to offences unless expressly or impliedly excluded.

The introduction of executive liability offences will increase the exposure of personal liability for directors and individuals involved in corporate management. However, consistent with the COAG-agreed principles for assessment of directors' liability provisions (the COAG Principles),[23] executive liability in the BCE Bill has been limited to specific offences, instead of being applied across all offences in the BCE Bill.

Each offence was considered on a case-by-case basis to determine its appropriateness for executive liability having regard to its role in the regulatory context. It is considered that there are compelling public policy reasons for applying executive liability to these offences. As highlighted previously in the RIS, the issuing of undertakings, stop work orders and building work rectification orders are critical actions taken by the regulator to prevent significant harm. They are the central elements of the public policy rationale underlying the regulatory regime. A failure to comply with these orders poses significant risk of serious public harm.

There is a regulatory need for a greater emphasis on accountability of directors and influential individuals of corporations to:

[23] In 2008, Council of Australian Governments (COAG) launched the Directors' Liability Reform Project as part of its *National Partnership Agreement to Deliver a Seamless National Economy*. The COAG principles were agreed to be applied consistently across states and territories.

- encourage directors and officers to take a more active role in ensuring compliance
- encourage greater corporate responsibly for legislative compliance by directors and officers putting in place risk management systems
- having a compliance history for directors and officers, which can be taken into consideration with new entity licenses
- as a consumer protection initiative to stop poor corporate practices such as intentional phoenixing activity.

The executive liability offences also limit the maximum penalty to 200 penalty units (currently $22,000). Further, to secure a conviction, the prosecution will bear the legal burden of proving each element of the offence beyond a reasonable doubt. The director or influential individual is presumed innocent (that is, presumed to have taken reasonable steps) unless the prosecution can prove otherwise. This moderates the impact in comparison to other approaches to executive liability which reverse the onus of proof putting the evidential and/or legal onus of proof on the defendant (for example, director/influential individual).

Questions

22. **Do you agree with the amounts of the five tiers used to apply to the penalties in the BCE Bill? If not, why not?**
23. **Do you agree with the maximum penalty amounts specified in the BCE Bill? If not, please identify the provision, amount or approach that you disagree with and why?**
24. **Do you agree that penalty notices are an effective deterrent to regulatory non-compliance? If not, why not?**
25. **Do you think that directors should be liable for any offence that is able to be committed by a corporation? If no, why?**
26. **Should executive liability offences apply to any other offence in the BCE Bill? What evidence do you have to support the seriousness of the offence?**
27. **Are there other 'reasonable steps' that could conceivably be taken to prevent an offence from occurring (cl 157(7))?**
28. **Do you think these measures will promote better corporate compliance? If no, why?**

Part 9 – Miscellaneous

Part 9 of the BCE Bill contains provisions which are important for the operation of the scheme but do not neatly fall within the ambit of the previous parts of the BCE Bill.

Most of these provisions have been retained from the RAB Act, unchanged and are procedural in nature with no regulatory impact:

BCE Bill clause	Effect of the miscellaneous provision
Cl 159	Establishes the role of Building Commissioner
Cl 161	Details provisions relating to administrative reviews that may be undertaken by NCAT, including the circumstances under which NCAT may undertake a review
Cl 162	Outlines the compliance obligations for directions under the BCE Bill that prescribe specific timeframes before which compliance must occur
Cl 163	Prescribes that the Secretary must maintain a publicly available register of all in-force prohibition orders, building work rectification orders, stop work orders and other information prescribed by the Regulations
Cl 164	Empowers the Secretary to delegate any of their functions, other than the power of delegation, to certain people identified in the clause or under the Regulation
Cl 165	Prescribes the circumstances under which a person may disclose or use information obtained in connection with the administration or execution of the BCE Bill
Cl 166	Outlines the circumstances under which the Secretary may enter an information sharing arrangement with a relevant agency for the purposes of sharing or exchanging information relating to prescribed topics held by the secretary or the agency
Cl 167	Prescribes that a person cannot be required to pay more than one monetary penalty out of the same circumstances
Cl 168	Clarifies that the Secretary, an authorised officer or a person acting under either of their directions, is not personally subject to civil liability

	for anything done in good faith and for the purposes of exercising a function under the BCE Bill
Cl 169	Outlines the appropriate methods for the service of documents in various circumstances under the BCE Bill or Regulation
Cl 170	Clarifies that a document relating to certain matters that is signed by the Secretary or by an officer prescribed by the regulations is admissible as evidence in criminal or civil proceedings
Cl 171	Prescribes that the Governor may make regulations for the purposes of giving effect to the provisions under the BCE Bill

Warning notices

Clause 160 of the BCE Bill allows the Secretary to authorise the publication of a warning notice. A warning notice is intended to inform the public of particular risks in dealing with licence holders, former licence holders or other people who may have breached legislation. This ultimately assists the public to make informed decisions when engaging with and entering contracts with operators in the industry. The power has been adopted from the existing power in section 99 of the DBP Act.

To ensure that there are appropriate limitations on the scope of the power, the Secretary will be required to conduct an investigation before publishing. The Secretary must also give the opportunity for the person who is the subject of the notice, to provide representations.

Case study – unlicensed contracting in greater western Sydney

NSW Fair Trading received numerous complaints against an unlicensed contractor who would leave work incomplete or not perform any work after contracting for and accepting payment for the residential building work. In addition, the unlicensed contractor did not refund the consumers money after failing to perform or complete the work.

The NSW Fair Trading Commissioner cautioned consumers by publishing a warning notice against the unlicensed contractor, informing consumers of the various business names the unlicensed contractor traded under in the Greater Western Sydney region. The notice also cautioned consumers that this was the second warning notice against the said unlicensed trader and included a photograph of the concerned unlicensed contractor to prevent further unlicensed contracting.

Appendix 1 – New Sections Guide

New and existing provisions

Key: New provision Amended provision No change to provision Repealed

Acts: BCISP Act *Building and Construction Industry Security of Payment Act 1999*
BDC Act *Building and Developers Certifiers Act 2018*
BPS Act *Building Products (Safety) Act 2017*
DBP Act *Design and Building Practitioners Act 2020*
G&E Act *Gas and Electricity (Consumer Safety) Act 2017*
HB Act *Home Building Act 1989*
P&D Act *Plumbing and Drainage Act 2011*
RAB Act *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020*

Bill reference	Provision in Bill	RAB Act reference	Other Acts Reference
Part 1 Preliminary			
1	Name of Act	NEW	
2	Commencement	NEW	
3	Objects of Act	NEW	
4	Definitions	NEW	
5	Meaning of "building enforcement legislation"	NEW	
6	Meaning of "developer" [cf s 4 RAB]	Section 4	
7	Meaning of "building work"	NEW	
Part 2 Completion of notifiable building work			
Division 1 Preliminary			
8	Definitions	Section 3	
9	Meaning of "notifiable building"	NEW	
10	Application of Part [cf s 6 RAB Act]	Section 6	BDC Act Part 7
11	Levy may be imposed by Secretary [cf s 6A RAB]	Section 6A	
Division 2 Completion of notifiable building work			
12	Notification to Secretary of intended completion of building work [cf s 7 RAB]	Section 7	
13	Notification of change to expected date [cf s 8 RAB]	Section 8	
14	Occupation certificates and strata plan registrations not to occur in certain circumstances [cf s 9 RAB]	Section 9	
15	Notice of making of prohibition order [cf s 9 of RAB]	Section 9	
16	Issue of occupation certificate in contravention of prohibition order [cf s 9 RAB]	Section 9	
17	Appeals against prohibition orders [cf s 10 RAB]	Section 10	
Part 3 Investigations			

Division 1 Preliminary			
18	Definitions	Section 11	BCISPA s 32C BDC Act Part 7 DBP Act Part 7 BPS Act s 3(1) G&E Act s 4(1)(b) P&D Act - 'enforcement officer' substituted by 'authorised officer'
19	Purposes for which functions under Part may be exercised [cf s 72 DBP]		DBP Act s 72
20	Certain functions of other authorised officers appointed by Authority	NEW	
21	Extraterritorial application [cf s 32E BCISPA]		BCISPA s 32E BCISPA s 32D BPS Act s 42 P&D Act s 25
Division 2 Authorised Officers			
22	Appointment of authorised officers [cf s 13 RAB]	Section 13	BCISPA s 32C BPS Act s 74 G&E Act s 61 P&D Act s 23
23	Delegation of functions for plumbing and drainage work [PDA s 21]		P&D Act s 21
24	Term of appointment as authorised officer	NEW	
25	Scope of authority [cf s 14 RAB]	Section 14	BDCA s 88 BPS Act s 76 DBP Act s 74
26	Identification [cf s 15 RAB]	Section 15	P&D Act s 24 BPS Act ss 77, 78 G&E Act s 61
Division 3 Information gathering powers			
27	Exercise in conjunction with other powers [cf s 16 RAB]	Section 16	BCISPA s 32F
28	Power of authorised officers to require information and records [cf s 17 RAB]	Section 17	BCISPA s 32G BPS Act s 44
29	Power of authorised officers to require answers [cf s 18 RAB]	Section 18	BCISPA s 32H BPS Act s 45
30	Self-incriminating evidence—corporations	NEW	
31	Provision relating to requirement to give records or information or answer questions	NEW	
32	Recording of evidence [cf s 19 RAB]	Section 19	BPS Act s 46
33	Power to audit certain persons	NEW	

34	Investigation of councils acting as certifier [cf s 107 BDCA]		BDC Act s 107
35	Process following report into council as certifier [cf s 107 BDCA]		BDC Act s 107
Division 4 Entry to premises			
36	Power of authorised officers to enter premises [cf s 20 RAB]	Section 20	BPS Act s 79 BCISPA s 32I BPS Act ss 47 (1), (2), (3) P&D Act s 29
37	Entry into residential premises only with permission or warrant [cf s 21 RAB]	Section 21	BCISPA s 32J BPS Act s 47(4) P&D Act s 30
38	Search warrants [cf s 22 RAB]	Section 22	BCISPA s 32K BPS Act s 50 P&D Act s 35
39	Provision of assistance to authorised officers [cf s 23 RAB]	Section 23	BCISP s 32L BPS Act ss 48, 51 P&D Act s 34(f)
40	Powers that may be exercised on premises [cf s 24 RAB]	Section 24	BCISPA s 32M BPS Act s 49 P&D Act s 34
41	Entry to premises for certain persons in relation to plumbing and drainage functions	NEW	
42	Inspections and investigations in relation to plumbing and drainage work [s 34 P&D]		P&D Act s 34
Division 5 Miscellaneous			
43	Dealing with seized things	NEW	
44	Power to destroy seized things	NEW	
45	Seizure and forfeiture of building products	NEW	
46	Taking possession of records to be used as evidence [cf s 25 RAB]	Section 25	
47	Obstruction of authorised officers [cf s 26 RAB]	Section 26	BCISPA s 32Q P&D Act s 36
48	Failure to comply with direction [cf s 27 RAB]	Section 27	BCISPA s 32O BPS Act s 54
Division 6 Investigation cost notice			
49	Definition	NEW/ Section 51	
50	Investigation cost notices	NEW/ Section 51	
51	Appeals against investigation cost notices	NEW/ Section 52	
Part 4 Remedial actions			
Division 1 Remedial actions for certain legislation			
52	Definition	NEW	
53	Undertakings [cf s 28 of RAB]	Section 28	
54	Variation or withdrawal of undertaking	NEW	

55	Applying for orders to restrain or remedy contraventions [s 31 RAB]	Section 31	BDC Act s 105 DBP Act s 91 P&D Act s 40
56	Complaints and investigations of licence or registration holders [s 32 RAB]	Section 32	BDC Act s 106 DBP Act s 92
Division 2 Stop work orders			
57	Application of Division	NEW	
58	Stop work orders [cf s 29 RAB]	Section 29	DBP Act s 89
59	Conditions of stop work order	Section 29 (3), (4)	
60	Duration of stop work order	Section 29 (2), (5)	
61	Notice of stop work order	Section 29 (6), (7)	
62	Appeals against stop work orders [s 30 RAB]	Section 30	DBP Act s 90
Division 3 Building product undertakings [Part 5 BPSA]			BDC Act s 104 DBP Act s 88 G&E Act s 60
63	Definition	NEW	
64	Secretary may accept undertakings		BPS Act s 27
65	When building product undertaking takes effect		BPS Act s 28
66	Contravention of building product undertaking		BPS Act s 29
67	Order requiring compliance with building product undertaking		BPS Act s 30
68	Variation or withdrawal of building product undertaking		BPS Act s 31
69	Proceedings for alleged contravention		BPS Act s 32
70	Register of undertakings		BPS Act s 33
Division 4 Compliance notices			
71	Persons who may be given compliance notice	NEW	
72	Authorised officer may give compliance notice	NEW	
73	Elements of compliance notice	NEW	
74	Amendment and revocation of compliance notice	NEW	
75	Revocation of compliance notice	NEW	
76	Offence for failure to comply with compliance notice	NEW	
77	Regulation	NEW	
Division 5 Plumbing and drainage work direction [PDA s 14]			
78	Definitions		
79	Meaning of “responsible person” for Division	NEW	
80	Defective or uninspected plumbing and drainage work		P&D Act ss 14(1), (7)
81	Offence for non-compliance with plumbing and drainage direction		P&D Act ss 14(2), (10)

82	Offence for continuing work before complying with plumbing and drainage direction		P&D Act ss 14(3)
83	Effect of plumbing and drainage direction		P&D Act ss 14(4), (5), (8)
84	Revocation of plumbing and drainage direction	NEW	
85	Relationship to other remedial action	NEW	
Part 5 Rectification of serious defects and resolving disputes			
Division 1 Preliminary			
86	Definitions	NEW	
Division 2 Building work rectification orders			
87	Power to order rectification [cf s 33 and 34 of RAB]	Sections 33, 34	
88	Requirement for consent of Minister	Section 33(8)	
89	Administration of building work rectification orders	Section 33 (3), (5), (6) and 38	
90	Giving and taking effect of orders [cf s 35 of RAB]	Section 35	
91	Reasons for orders to be given [cf s 36 of RAB]	Section 36	
92	Notice to be given to other persons and bodies of order [cf s 37 of RAB]	Section 37	
93	Period for compliance with order [cf s 39 of RAB]	Section 39	
94	Continuing effect of orders [cf s 40 of RAB]	Section 40	
95	Occupier of land may be required to permit developer to carry out work [cf s 41 of RAB]	Section 41	
96	Failure to comply with order—carrying out of work by Secretary [cf s 42 of RAB]	Section 42	
97	Use of building work rectification orders in proceedings [cf s 43 of RAB]	Section 43	
98	Declaration of emergency for building work rectification order	NEW	
Division 3 Natural justice requirements			
99	Notice to be given of proposed order to person who will be subject to order [cf s 44 of RAB]	Section 44	
100	Notice to be given to other persons and bodies of proposed order [cf s 45 and 46 of RAB]	Sections 45, 46	
101	Consideration of representations [cf s 47 of RAB]	Section 47	
102	Procedure after consideration of written representations [cf s 48 of RAB]	Section 48	
Division 4 Appeals			
103	Appeals in relation to orders [cf s 49 of RAB]	Section 49	
104	Effect of appeal on order [cf s 50 of RAB]	Section 50	
Division 5 Compliance cost notices			

105	Circumstances for giving compliance cost notice	Section 51 (1)	
106	Issue of compliance cost notices [cf s 51 of RAB]	Section 51	
107	Appeals concerning compliance cost notices [cf s 52 of RAB]	Section 52	
Division 6 Miscellaneous			
108	Combined orders [cf s 53 RAB]	Section 53	
109	Orders may be given to 2 or more persons [cf s 54 RAB]	Section 54	
110	Notice in respect of building work caused to be carried out by more than 1 responsible person [cf s 55 RAB]	Section 55	
Part 6 Disciplinary Action			
Division 1 Preliminary			
111	Definitions	NEW	
112	Application of Part to former licence holders and others [cf s 50 HBA]		HB Act s 50
113	Meaning of “intentional phoenix activity”	NEW	
114	Duty to take reasonable steps to avoid business association	NEW	
Division 2 Grounds for disciplinary action			
115	Grounds for taking disciplinary action—general	NEW	
116	Grounds for taking disciplinary action—partnerships and corporations	NEW	HB Act s 62
117	Grounds for taking disciplinary action for licence under Building Act [s 56 HBA]		HB Act s 56
118	Grounds for taking disciplinary action—registered practitioners [s 64 DBP]		DBP Act s 64
119	Grounds for taking disciplinary action—registered certifiers [s 45 BDCA]		BDC Act s 45
120	Operation of Division	NEW	
Division 3 Show cause			
121	Notice to show cause [cf s 65 DBP]		BDC Act s 47 DBP ACT s 65
122	Power to suspend licence when show cause notice service [s 61A HBA]		HB Act s 61A
123	Immediate action in the public interest	NEW	
124	Disciplinary action that may be taken by Secretary [cf 48 BDCA]		BDC Act s 48 DBP Act s 66
Division 4 Miscellaneous			
125	Enforcement of monetary penalties and payment of costs [cf s 67 HBA]		HB Act s 67 BDC Act s 50 DBP Act s 69
126	Liability for offences not affected		BDC Act s 51 DBP Act s 7034A
127	Protection if complaint lodged [c s 69 HBA]		HB Act s 69

Part 7 Demerit points scheme			
Division 1 Preliminary			
128	Definitions	NEW	
129	Purpose of Part	NEW	
130	Committing demerit offence	NEW	
131	Effect of appeals against convictions	NEW	
132	Effect of electing to have matter dealt with by court	NEW	
Division 2 Incurring demerit points			
133	Demerit points incurred for demerit offences	NEW	
134	Notice of demerit points incurred	NEW	
Division 3 Demerit points register			
135	Demerit points register	NEW	
136	Secretary may publish details from demerit points register	NEW	
137	When demerit points come into force or expire	NEW	
Division 4 Remedial action for accumulation of demerit points			
138	Remedial action—accumulation of 10–14 demerit points	NEW	
139	Remedial action—accumulation of 15–29 demerit points	NEW	
140	Remedial action—accumulation of 30 or more demerit points	NEW	
141	Notice of remedial action	NEW	
142	Remedial action—course of training or instruction	NEW	
Division 5 Removal and reinstatement of demerit points			
143	Application to remove demerit points	NEW	
144	Deciding application to remove demerit points	NEW	
145	Reinstatement of demerit points	NEW	
Part 8 Offences and proceedings			
Division 1 Preliminary			
146	Application of Part	NEW	
Division 2 Offences			
147	Definition	NEW	
148	Proceedings for offences [cf s 56 RAB]	Section 56	BCISPA s 34A BDC Act s 119 BPS Act s 66 DBP Act s 93 G&E Act ss 67, 68 P&D Act s 42
149	Education and training notices	NEW	
150	Non-compliance with education and training notice	NEW	
151	Continuing offences [cf s 59 RAB]	Section 59	BPS Act s 62 DBP Act s96

			G&E Act s 68A P&D Act s 42A
Division 3 Orders and penalty notice offences			
152	Publicity orders [cf s 56A RAB]	Section 56A	
153	Additional orders [cf s 56B RAB]	Section 56B	
154	Penalty notices [cf s 57 RAB]	Section 57	BCISPA s 34B BDC Act s 118 BPS Act s 65 DBP Act s 94 G&E Act s 66 P&D Act s 41
155	Onus of proof regarding reasonable excuse [cf s 60 RAB]	Section 60	BPS Act s 64 DBP s 97
Division 4 Liability of directors			
156	Liability of directors for offences by corporation—accessory to the commission of offences	NEW	BCISPA s 34C BDC Act s 115 BPS Act s 61 DBP Act s 95 G&E Act s 64
157	Liability of directors for specified offences by corporation—offences attracting executive liability [cf s 34D BCISPA]		BCISPA s 34D
Division 5 Other offences			
158	False and misleading information	NEW	
Part 9 Miscellaneous			
159	Building Commissioner [cf s 61 RAB]	Section 61	
160	Warning notices [cf s 99 DBP]		BDC Act s 103 DBP Act s 99
161	Administrative review by NCAT		BDC Act s 49 DBP Act s 68
162	Continuing effect of directions	NEW	
163	Register of orders [cf s 62 RAB]	Section 62	
164	Delegation [cf s 63 RAB]	Section 63	
165	Disclosure and misuse of information [cf s 64 RAB]	Section 64	
166	Exchange of information [cf s 65 RAB]	Section 65	
167	Multiple monetary penalties not to be imposed	NEW	
168	Personal liability [cf s 66 RAB]	Section 66	
169	Service of documents [cf s 67 RAB]	Section 67	
170	Certificate evidence of certain matters	NEW	
171	Regulations [cf s 68 RAB]	Section 68	
172	Amendment of other Acts and instruments	NEW	
173	Repeal	NEW	

Appendix 2 – Alternative Text for Compliance Journey

Building Compliance and Enforcement Bill – Compliance Journey

1) Customer makes a complaint
2) Authorised officer can investigate the complaint
3) If it is related to building work, authorised officer can:
    a) Seek an injunction
    b) Issue a stop work order
4) Additionally, an authorised officer can issue:
    a) A compliance notice to rectify the work
        i) A person may seek a review of the notice at NCAT
    b) A building work rectification order to rectify the work if it is a serious defect
        i) A person may appeal the order at L & E court
        ii) The secretary may carry out the work
    c) Accept a written undertaking.
5) Is the matter resolved? (If yes, matter resolved, if no, continue to 6)
6) Penalties for failure to comply with orders:
    a) Person may be prosecuted
        i) A person can seek to appeal a prosecution
    b) Issued a PIN
        i) A PIN can be challenged in court
    c) Disciplinary action against licence holder
        i) A person may seek a review in NCAT of the decision
7) The offence/penalties may incur demerit points
8) Disciplinary action or the accrual of sufficient demerit points can result in licence cancellation
9) Matter resolved