



November 2022

NSW Government Consultation on major Building law reforms proposed for NSW

David Glinatsis

INTRODUCTION

After implementing the *Design and Building Practitioners Act 2020* which focuses on class 2 residential apartment buildings; the NSW Government has proposed additional reforms to improve the quality of other types of residential buildings.

The proposed reforms include the release by NSW Government has of three Bill as part of the 2020-25 Construction NSW transformation strategy aimed at restoring public confidence and creating a customer facing building and construction sector by 2025.

The reforms proposed are grouped into the following broad topics of change:

- Making home building fairer and easier
- Improving the supply and use of safe building products;

- Regulating pre-fabricated and manufacture homes;
- Strengthening building compliance and enforcement
- Simplifying the licensing system, improving the supervision of work and the quality of owner builder work;
- Up skilling the building and construction industry
- Securing prompt and fair payment for building work.

GOVERNMENT CONSULTATION

The NSW Government is seeking industry and community input and consultation on the proposed changes.

According to the NSW Fair Trading Commissioner Natasha Mann¹:

“The feedback here will refine proposals to improve building regulatory standards across the State that have been co registered through our on going engagement with key industry and community stakeholders..

A second consultation will propose comprehensive reforms to the NSW building regulatory framework including enhanced consumer protections and changes to strata.

We want those who work in the industry and members of the community to help us improve rules around the design, construction, certification and ongoing safety of NSW buildings..’

The Consultation is open until Friday 25 November 2022.

THE BILLS

The Bills comprise of the following:

- the Building Bill 2022 incorporate and build on the Home Building Act 1989 to regulate all building work in NSW (yes, both residential and commercial), including licensing and the approval process for building work;
- the Building and Construction Legislation Amendment Bill 2022, and the Building and Construction Legislation Amendment Regulation 2022 is proposed to amend various existing Acts, with the aim of strengthening the legislation supporting the building and construction industry in NSW; and
- the Building Compliance Enforcement Bill 2022 aims to modernise and consolidate regulatory compliance powers of various NSW Acts relating to the building and construction industry.

THE BUILDING BILL 2022

Key amendments that are proposed in the Building Bill² include:

- (a) the expansion of licensing requirements to cover trades operating in the commercial building sector;

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

BUILDING AND CONSTRUCTION LEGISLATION AMENDMENT BILL 2022

As set out in the Regulatory Impact Statement; the key amendments that are proposed in the Building and Construction Legislation Amendment Bill 2022³ include:

- a) amendments to the ***Building Products (Safety) Act 2017 (BPS Act)*** to impose responsibilities on everyone in the building product supply chain, including designers, manufacturers, importers, suppliers and installers, to ensure building products are compliant and fit for their intended purpose.
- b) **Enhancing rectification of strata buildings** – proposed amendments to the ***Strata Schemes Management Act 2015 (SSM Act)*** and supporting regulations to enhance the operation of the Strata Building Bond and Inspections Scheme (**SBBIS**) by:
- (i) expanding the use of the building bond provided by developers to rectify defects identified in the final inspection report;
 - (ii) Penalising people for falsely representing themselves as building inspectors;
 - (iii) Making the requirements for the appointment of Authorised Professional Associations (APAs) and building inspectors more transparent;
 - (iv) Phasing out the transitional arrangement initially provided for developers to transition into the scheme;
- c) **Improving professional standards and competencies** – proposed amendments to ensure practitioners are suitably competent to operate in the industry and actively seek to maintain, improve and broaden their knowledge, expertise and competence, including:
- (i) Recognising skills assessments from associations operating with a PSS for the registration of certifiers under the ***Building and Development Certifiers Act 2018 (BDC Act)***.
 - (ii) Standardising approaches to CPD across all building and construction-related functions.
 - (iii) Enabling inspectors to impose an order to undertake a training or education course instead of issuing a penalty infringement notice (PIN).
- d) **Ensuring fair and prompt payment** – proposed amendments to ***Building and Construction Industry Security of Payment Act 1999 (SOP Act)*** and supporting regulations to better promote fairness between the parties and strengthen protections for secure and prompt payment, through:
- (i) Requiring payment claims to owner occupiers to attach a Homeowners Notice information to help them understand their obligations in responding to a payment claim and the consequences of not doing so;
 - (ii) Extending protections by requiring retention money to be held in trust for projects with a value threshold of \$10 million;
 - (iii) Strengthening the powers for adjudicators to arrange for the testing of, and engage experts to investigate and report on, relevant matters for the adjudication;
 - (iv) Establishing a right for claimants and respondents to apply for a review of an adjudication determination.
- e) **Robust regulatory intervention** – proposed amendments to strengthen the regulator’s compliance and enforcement powers to proactively respond to risks on construction, including:
- (i) Expanding the scope of certifier powers to require the rectification of defects as an early intervention tool during construction under the ***Environmental Planning and Assessment Act 1979 (EP&A Act)***.
 - (ii) Expanding the scope of the regulator’s powers to require the rectification of defects arising out of noncompliance with the Plumbing Code of Australia (**PCA**) or other relevant specifications or standards under the ***Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020 (RAB Act)***.
 - (iii) Allowing NSW Fair Trading to attempt to resolve disputes, under the ***Home Building Act 1989 (HB Act)***, for strata building work prior to the appointment of a building inspector under the strata building bonds inspection scheme.
 - (iv) Clarifying and making consistent the operation of the privilege of self-incrimination for individuals and corporations in relation to investigations of corporate wrongdoing.

- (v) Imposing a duty on practitioners to take reasonable steps to not form business associations with individuals who have engaged in intentional phoenix activity.
- (vi) Allowing the recovery of reasonable costs and expenses associated with investigating non-compliance.

¹ <https://www.nsw.gov.au/customer-service/media-releases/have-your-say-on-building-reforms>

² NSW Government Regulatory Impact Statement Building Bill 2022 Part 1 – Who can do the work August 2022 page 10

³ Regulatory Impact Statement Building and Construction Legislation Amendment Bill 2022 and Building and Construction Legislation Amendment Regulation 2022 (Amendment Bill RIS) August 2022 at page 17 to 18

⁴ Regulatory Impact Statement Building Compliance and Enforcement Bill 2022 at page 9

BUILDING COMPLIANCE AND ENFORCEMENT BILL 2022

Key amendments that are proposed in the Building Compliance and Enforcement Bill 2022⁴ include:

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

HAVE YOUR SAY:

You can make submissions to the proposals for reform by 25 November 2022.

For more information go to:

<https://www.haveyoursay.nsw.gov.au/reforming-building-laws>

CONTACT US

Please contact us on **(02) 8239 6500** or at **excellence@kreisson.com.au** if you have any queries or need any assistance.

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