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Understanding the proposed 'Building Bill' reforms and their potential impact.

A Guide for Builders, Developers,
and other Professionals

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Introduction

This is a second edition to our publication by the same title¹ in which publication, we explored what seemed to be the impending release and enactment of the then 'building bill'.

The first edition referred to one of our publications entitled *NSW Government Consultation on Major Building Law Reforms proposed for NSW*² in which we discussed some of the key reforms to the impending building laws as were then proposed by the NSW Government. We explained at the time that if passed, these reforms would affect both residential and potentially commercial construction in this state.

In the first edition we reported that the public consultation process in relation to the proposed changes had been concluded and a report on the outcome of that consultation was pending. We also said that, whether all proposed amendments were to be passed by the parliament was at that time unknown.

However, now almost a year later, further updates on the proposed reforms have become available, and we hope that with this second edition eBook (or "Guide"), builders, developers and the controllers of related entities (including the directors of entities engaged in the building process) can come up to speed with the progress the NSW government has made in relation to the proposed and complicated "Bills" and the related changes in the law, including amendments to and consolidation of legislation such as the *Design and Building Practitioners Act 2020* into an overarching set of three bills which are to said to regulate (and overhaul) the industry in NSW.

¹ Kreisson Legal "Understanding the proposed 'Building Bill' proposed reforms and their potential impact.", October 2023, at <https://kreisson.com.au/wp-content/uploads/2023/10/How-the-Design-and-Building-Practitioners-Act-and-the-%E2%80%98Building-Bill-will-impact-you.pdf>.

² David Glinatsis, "NSW Government Consultation on Major Building Law Reforms proposed for NSW" 14 November 2022, at <https://kreisson.com.au/nsw-government-consultation-on-major-building-law-reforms-proposed-for-nsw/>.



Although our focus here is on those who may be engaged in work related to residential buildings (Class 2 buildings) as well as strata buildings, this Guide also attempts to explore proposed provisions which seek to significantly expand the liability of builders, developers, design practitioners, and related entities, as well as other building and construction related professionals (hereinafter, altogether “professionals” or “Professionals”).

In essence the proposed changes will impact upon those who are involved in residential and commercial building work, with “end-to-end” ‘accountability’ forming the overarching theme of the ‘consolidated bills’. As the NSW Department of Customer Service has said, “*the government has implemented significant reforms under Construct NSW, focused on creating clear lines of accountability and significant consequences when practitioners deliver substandard work*”³ and that the very reason why the government is proposing these changes is to ensure that “*all people are held accountable for the supply of safe building products and building work.*”⁴

³ NSW Department of Customer Service, “Regulatory Impact Statement, Part 3”, at https://hdp-au-prod-app-nsw-haveyoursay-files.s3.ap-southeast-2.amazonaws.com/8016/9896/5251/a8b1060561c0062fbd16152ddcfa53b8_RIS_-_Building_Bill_2022_Part_3_Building_compliant_homes.pdf, last visited 5 September 2024, [hereinafter “Third Regulatory Impact Statement”], at p 4.

⁴ *Ibid.*, at p4.

An update (since October 2023)

The introduction of Building Commission NSW (**the Commission**) as a single regulator (with the sole authority to issue licences within a single framework and unitary set of rules (with the exception of Architects, see further below)) is an important part of the coming changes.

Various law reforms including consolidation of existing legislation under a single eventual Building Act with two other pieces of supporting legislation, and the imposition of more stringent requirements on private certifiers and standardisation of trades certification, are also in the offering.

Since the first edition of the Guide, various building legislation changes have been passed by NSW Parliament (passed in November 2023) under the Building Legislation Amendment Bill 2023 (**the 2023 Bill**) which amended legislation such as the *Home Building Act 1989* (**HBA**) as well as others.⁵

⁵ Fair Trading, “Changes to building legislation in NSW”, at <https://www.fairtrading.nsw.gov.au/about-fair-trading/legislation-and-publications/changes-to-building-legislation-in-nsw>, last visited 4 September 2024.

Example changes accompanying the 2023 Bill

Here are some examples of the amendments already made with the 2023 Bill which lay the foundation for the later and more significant changes will accompany 'the Bills' (see further below for the definition):

(a) more significant powers for the regulator to refuse a licence application, cancel a licence or disqualify a person from holding a contractor licence if the person has been involved in the management of a company which has become insolvent in the previous 10 years, and where for instance, the individual concerned has had a history of 'intentional phoenixing' (see e.g. the new section 22(2A) of the HBA);

(b) related to (a) above, introduction of more stringent overseeing powers which include powers to allow for the immediate suspension of certifiers, design practitioners, principal design practitioners, building practitioners or professional engineers, whilst disciplinary action in respect of those persons is being finalised and is on-foot (e.g. see the new section 47A in the *Building and Development Certifiers Act 2018*, or the new section 65A under the *Design and Building Practitioners Act 2020*) (**DBP Act**); and

(c) the introduction of the "Decennial Liability Insurance" (**DLI**) which is an insurance product which covers the common property of strata apartment buildings (Class 2 - residential - buildings under the National Construction Code (**NCC**)) as against defects, for a period of 10 years (see *Strata Scheme Management Act 2015* (**SSMA**), new Division 3AA, 'Decennial Insurance').

However, as implied above, these are disparate changes under the 2023 Bill and according to the NSW government plans, as we pointed out in the first edition of the Guide, these are to be passed in a more 'unified' manner under three consolidated pieces of legislation, or a 'Building Act' schema or scheme.

Proposal format and ongoing consultation

These unified bills currently envisaged by the government include:

- (a) the Building Bill (**the Building Bill**);
- (b) the Building Compliance and Enforcement Bill (**the Enforcement Bill**); and
- (c) the Building Insurance Bill (**the Insurance Bill**),

collectively, “the Bills”.

As of this writing (6 September 2024) the Bills have as yet not been passed into law in this state and still subsist in a proposal format pending consultation stages.

The NSW Government is still actively seeking feedback on the draft legislation, with the aim that the drafts of the Bills will consolidate various building legislation and regulations into a single, streamlined framework.

The overall strategy seems to be a part of broader effort to reform the building and construction industry, addressing issues such as quality, accountability and consumer protection.

The consultations are projected to end sometime in September of 2024, with the aim that the Bills are to be introduced sometime in November of 2024.⁶

The passage of the Bills is projected to take effect in Q1 or Q2 of 2025 along with the related regulations, with the commencement of reforms projected to stagger from 2025 through to 2028.

DLI will be consolidated into the Insurance Bill. For completeness, the Insurance Bill maintains the Home Building Compensation scheme in class 1 and low-rise class 2 buildings (including renovation works), amalgamating what is already there in various legislation.

The scheme continues to apply to work amounting to over \$20,000. Insurance (or DLI) must be obtained prior to commencement of work and prior to any money being taken under the contract, including as to the deposit.

These reforms are said to usher in improvement upon the overall standard of building practices in NSW in order to restore public confidence in the industry.⁷

The Building Bill

The Building Bill, which has been amended from its 2022 draft, within its section 4, refers to this overarching goal:⁸

“4 Objects of Act⁹

“The objects of this Act are to—

“(a) support an integrated building and approvals system to ensure competent persons create safe, compliant and trustworthy buildings, and,

“(b) establish a modern regulatory framework that protects owners, tenants and other businesses, and

“(c) implement end-to-end accountability for building work, and

“(d) enable building regulators and industry participants to adapt to new and emerging trends in construction, and

“(e) enable a competitive, professional and capable construction sector to meet built environment needs[emphasis added].”

Hence the inescapable conclusion is that the Bills are onerous on those who are charged with the “supply [of] safe building products and building work” (i.e. Professionals).¹⁰

⁸ Copies of the revised Bills and related documents such as select Commission’s position papers, may be reviewed at: ⁶ [A good overview of the revised Bills is available; see Building Commission NSW, “Proposed NSW Building Reforms Webinar – Building Commission NSW”, 19 July 2024, at <https://vimeo.com/986952199/2b31d974be>, last visited 4 Sep 2024 \[Hereinafter “The Webinar”\], last visited 4 September 2024 \[Hereinafter in these footnotes, “The Bills”\].](https://www.bca.com.au/news-and-events/news/2024/07/19/proposed-nsw-building-reforms-webinar-building-commission-nsw)

⁹ Ibid, at section 4 of the Building Bill.

¹⁰ Third Regulatory Impact Statement, ”, op. cit., at p4.

A Review from the First Edition

In a previous publication entitled “*Major Changes to the NSW Building Industry*”¹¹ we outlined how various developments over a period of time had brought about legislative changes in favour of the consumer in NSW, particularly with respect to building defects and defective building products.

We traced these changes to their founding and to the two very important pieces of legislation, namely the Design & Building Practitioners Act 2020 (or as we have defined it above the ‘DBP Act’) and the *Residential Apartment Buildings (Compliance & Enforcement Powers) Act 2020* (the ‘RAB Act) (collectively “**the Laws**”).

We also canvassed the more recent proposed NSW reforms in this area including the release by the NSW Government of three new Bills as part of “Construction NSW’s” “transformation strategy aimed at restoring public confidence and creating a customer facing building and construction sector”.¹²

¹¹ See at https://kreisson.com.au/wp-content/uploads/2021/02/KREISSON_-_Design-Building-Practitioners-1-2.pdf.

¹² See “NSW Government Consultation on Major Building Law Reforms proposed for NSW”, at <https://kreisson.com.au/nsw-government-consultation-on-major-building-law-reforms-proposed-for-nsw/>.

Some of the foreshadowed amendments



The new proposed regime has been an ambitious one.

Among other things, these initiatives aim to make the building process “fairer”, “safer”, more regulated, and compliant, simplifying the licensing system (for example for builders and other contractors) at the same time as attempting an “[u]p- skilling [of] the building and construction industry” whilst securing “prompt and fair payment for building work”.¹³

Before the enactment of any reforms the NSW government has (repeatedly) given the NSW public the opportunity of providing feedback and consultation.¹⁴

That consultation process opened on 25 November 2022 and according to the NSW Department of Customer Service, that process was supposed to have concluded¹⁵ with a report on the outcome of the consultation by the Government primed to have been released last year. However, as earlier mentioned, the process is still ongoing.

For completeness, we are not aware of any consultative comments or submissions to the NSW government being made publicly available by the government, except for the material made public by individual organisations and entities.¹⁶

¹³ Ibid.

¹⁴ The Webinar, Op. cit.

¹⁵ Ibid.

¹⁶ E.g. see the comments by the Law Society of NSW in response to some questions here:

[https://www.lawsociety.com.au/sites/default/files/2022-](https://www.lawsociety.com.au/sites/default/files/2022-11/Letter%20to%20Department%20of%20Customer%20Service%20%E2%80%93%20Draft%20Building%20Compliance%20and%20Enforcement%20Bill%202022%3B%20Draft%20Building%20and%20Construction%20Legislation%20Amendment%20Bill%20and%20Regulation%202022%20-%202023%20November%202022.pdf)

[11/Letter%20to%20Department%20of%20Customer%20Service%20%E2%80%93%20Draft%20Building%20Compliance%20and%20Enforcement%20Bill%202022%3B%20Draft%20Building%20and%20Construction%20Legislation%20Amendment%20Bill%20and%20Regulation%202022%20-%202023%20November%202022.pdf](https://www.lawsociety.com.au/sites/default/files/2022-11/Letter%20to%20Department%20of%20Customer%20Service%20%E2%80%93%20Draft%20Building%20Compliance%20and%20Enforcement%20Bill%202022%3B%20Draft%20Building%20and%20Construction%20Legislation%20Amendment%20Bill%20and%20Regulation%202022%20-%202023%20November%202022.pdf), last visited 11 October 2023.

Former ‘feasibility surveys’ and the progress of the proposed amendments

The NSW Government did, in August of 2022, publish a series of ‘Regulatory Impact Statements’ which are featured in the Guide’s references, and which shed much light on the amendments and the timings of the Bills’ implementations, and which at this stage seem to ultimately point to 2025.

Consultations have included an assessment of proposed changes as related to consumer protections and as related to “the rules around the design, construction, certification and ongoing safety of NSW buildings”¹⁷ which impact upon various areas, including strata and the related strata building bond and inspections schemes.¹⁸

As well as the amendments made with the aid of the 2023 Bill, from 3 July 2023, the DBP Act was expanded to include class 3 and 9c buildings. This was in addition to class 2 buildings in respect of the construction of new buildings.¹⁹

Forming part of the totality of the changes, one of the most important features of the Laws (DBP Act (supra) and the RAB Act (supra)) was the classification of buildings and structures to which the Laws referred and the steps which professionals were to take to be compliant with the Laws.

¹⁷ “NSW Government Consultation on Major Building Law Reforms proposed for NSW”, op. cit.

¹⁸ The consultations have gone on for a while e.g. see Department of Commerce request for feedback from industry in relation to new licensing proposals See <https://acrassoc.com.au/nsw-news/need-your-comments-by-wednesday-9th-august-2023-re-building-bill-2023/>.

¹⁹ <https://www.fairtrading.nsw.gov.au/news-and-updates/notices/changes-to-regulated-buildings-2023>. Alteration or renovation work for existing class 3 & 9c buildings will come into effect on 1 July 2024.



As we implied, it is – still – not presently very clear when the new NSW government will attempt to implement the reform package. Subject to further reports and decisions from the Government and following the impending closure of the consultation process, herein we will explore some of the more relevant details of the Bills and the accompanying amendments in the event that these proposals all become law.

In essence, this Guide (or at least this second edition) assumes that the proposed reforms will all be implemented.

The Building Bill's all-encompassing 'Building Work'

As far as the Building Bill specifically is concerned, a single definition for "building work" across all NSW is to be adopted.

This leads to various other results, including new certification requirements, duty of care amendments, and the clarification of various obligations etc.

The definition 'building work' will include, for the first time prefabricated building work (there is an emphasis on prefabricated buildings as 'building work' and not simply as 'building products'). The aim is to ensure that the legislation places great emphasis "home building work" so that consumers are protected, with relevant obligations attached to tradespersons engaging in "Home Building Work".

This definition and hence the protection extends to Class 1a, 2, 10 buildings including buildings which contain a class 2 parts. Certification work, prefabricated building work professional engineering work and specialist work are also defined.

Structure and select parts of the Bills



Various legislation (and respective regulations) which are also set to be amended and which are to be packaged within the proposed scheme or regime of changes resulting in the Bills, include:

- the HBA;
- the DBP Act, *Design & Building Practitioners Act 2020*;
- *Architects Act 2003*;
- RAB Act, *Residential Apartment Buildings (Compliance & Enforcement Powers) Act 2020*;
- *Building Products (Safety) Act 2017*;
- *Building and Development Certifiers Act 2018*;
- SSMA, *Strata Schemes Management Act 2015*;
- *Building and Construction Industry Security of Payment Act 1999 (SOP Act)*;
- *Gas and Electricity (Consumer safety) Act 2017*;
- *Plumbing and Drainage Act 2011*; and
- *Environmental Planning and Assessment Act 1979*.

This exercise is in effect one of consolidating existing building laws—the too many building laws in NSW create duplication and complexity.

It is not only the “modernisation” of the laws, but also it is said to provide for scalability, where amending the myriad of laws at any future point, becomes a much simpler exercise.²⁰

For completeness, and significantly, we ought to mention at this juncture that the Bills package is proposed to replace the long-standing HBA.

The Design Building Practitioners Act 2020 (“DBP Act”) and design obligations under the new schema

One of the major aspects of the proposed changes concerns the DBP Act.

Relevantly the Bills refine concepts such as the ‘developer’ allowing owners, or more broadly, the consumers to bring claims as against various Professionals in their respective categories.

For example, ‘developers’-- are entities or people who facilitate, carry out, or cause the carrying out of building work.

Even those who simply facilitate the work in some way – may well find themselves in disputes with consumers such as owners corporations.

This is because the Bills leave little doubt that developers owe warranties and duties as ‘developers’.

This ‘developer’ category of Professionals and related entities are liable to be sued in respect of ‘serious defects’ (rather than ‘major defects’ under the HBA, see further below) as well as for minor defects.

The proposed re-cast of this category takes into account both the Building Code of Australia (“BCA”) and the National Construction Code (“NCC”) standards when assessing performance requirements.

Breaches of these standards may well constitute a ‘serious defect’.

The obligations: more stringent

The changes also bring with them more stringent 'design obligations' (which are integrated within the licensing schema as well; see further below).

With DBP Act Classes 2, 3 and 9c buildings and buildings containing parts with those classes, the registered designer is to follow the 'design declaration process'.

Under the design practitioner guidelines, the 'issued for construction' drawings will need to have a specified level of detail (which detail includes designs, reports, plans and specifications) before a certifier is empowered to issue a building approval.

The process is focused on 'building elements' (see below), including structure, waterproofing, fire safety, building enclosure, vertical transportation provisions and key services.

If there is a variation in relation to the building works, an updated set of declared drawings are to be produced and placed in the 'planning portal' after which filing, the work can commence.

Professionals will need to note that in the case of 'serious defects', there is no longer a need by the owner or the claimant to show that these have caused (or are likely to cause) an inability to inhabit or use the building, or to cause the destruction of the building, or to threaten the collapse of the building.

All the claimant needs to show is that there are aspects of the building or structure, which are non-compliant.

In other words, a 'serious defect' may be proved more easily than a major defect, if the proposed changes are enacted.

As an example of this, a 'major element' in a major defect scenario within the current system is limited to the 'loadbearing' parts of a structure.

That is not the case with 'serious defects' which can include any 'building element' (which definition has been expanded) which are in turn, simply a part of the building structure.

Moreover, it will not be necessary to prove that the performance of the building element is defective, only that the building element does not meet the relevant standards.

See the side-by-side comparison of the current 'major defects' schema and the proposed 'serious defects' definition within the following table:

<p>‘Major defect’ under HBA (s. 18E (4))</p>	<p>‘Serious defect’ under the Building Compliance and Enforcement Bill 2022 [NSW]; Schedule 2; Dictionary</p>
<p>a defect in a <u>major element</u> of a building that is attributable to defective design, defective or faulty workmanship, defective materials, or a failure to comply with the structural performance requirements of the National Construction Code (or any combination of these) <u>and</u> that causes, or is likely to cause:</p> <p>(i) the inability to inhabit or use the building (or part of the building) for its intended purpose; or (ii) the destruction of the building or any part of the building; or (iii) a threat of collapse of the building or any part of the building.</p> <p>or</p> <p>a defect of a kind that is prescribed by the regulations as a major defect.</p> <p>or</p> <p>the use of a building product (within the meaning of the <i>Building Products (Safety) Act 2017</i> (NSW)) in contravention of that Act.</p>	<p>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,</p> <p>or</p> <p>a defect in a building product or building element that—</p> <p>(i) is attributable to defective design, defective or faulty workmanship or defective materials, and (ii) causes or is likely to cause—</p> <p>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,</p> <p>or</p> <p>a defect of a kind that is prescribed by the regulations as a serious defect,</p> <p>or</p> <p>the use of a building product in the building, if—</p> <p>(i) the use is in contravention of the <i>Building Products (Safety) Act 2017</i>, or (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.</p>

Moreover, in relation to major defects, the definition of 'building element' has now been extended as follows (section 95 of the Building Bill):²¹

95 Major defects

(1) A defect in a building element of a building is a major defect if the defect—

95 Major defects

(a) is caused by a failure to comply with 1 or more of the following when work is carried out—

- (i) the governing requirements or performance requirements of the National Construction Code,*
- (ii) applicable standards,*
- (iii) approved plans for the work, and*

(b) has a significant impact on the building.

(2) A defect in a building element of a building, or a building product used in the building, is a major defect if the defect—

(a) is caused by 1 or more of the following—

- (i) defective design,*
- (ii) defective workmanship,*
- (iii) defective materials, and*

(b) has a significant impact on the building.

(3) The use of a building product in the building in contravention of the Building Products (Safety) Act 2017 is a major defect.

(4) In this section— significant impact on a building means the following—

- (a) the inability to inhabit the building or part of the building,*
- (b) the inability to use the building or part of the building for its intended use,*
- (c) the destruction of the building or part of the building,*
- (d) the threat of collapse of the building or part of the building.*

Duty of care

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The Bills cast a very wide net upon those who may be deemed responsible for defects, irrespective of whether the defects are serious ones or minor ones.

Generally, given the way in which the Bills are currently cast, this 'wider net' will provide a more unified statutory duty of care regime for building work in NSW, which duty is owed to both current and future owners.

In effect 'the Bills are structured in such a way as to lead potential claimants toward builders, developers (and others) who are 'deemed' responsible.

For example, the proposed section 6 – 'developer' definition -- of the Enforcement Bill 2024, refers to persons who "arranged for, or facilitated or otherwise caused, **whether directly or indirectly**, the building work to be carried out [emphasis added]".²²

Professionals need to be aware that this 'wider net' effectively includes the proliferation and extension of the duty to take reasonable care to not only discrete parts of the building work, but also effectively to the various stages of the process, including inspection, subdivision, certification, as well as the building process itself, *in toto*.





Again, this will mean that all those involved at each and every stage of the building process, including builders, designers and certifiers, owe a duty of care and may be held liable.

Importantly and as implied already herein, this 'duty of care net', may extend to the suppliers of building products as well as service-providing professionals (**significantly, certifiers will also become liable for economic loss**).

There is also a more stringent regime of control when it comes to non-compliant building products which need to be reported by the Professionals. The builders *themselves* will have reporting requirements (the regulators have many more powers – see further below).

The Building Bill Chapter 6 certifier changes

Chapter 6 of the Building Bill relates to certification and certifiers and introduces amendments which are said to ensure that ‘quality remains’ and ‘poor-quality building works are minimised’.

This part of the Building Bill also attempts to address various issues such as conflicts of interest (for example, conflict of interest penalties have increased).

Related to this, the enforcement mechanism is not just left in the hands of the Commission but is also vested in other regulators, such as councils. This is said to help with the process of developing a strong framework upon which trusted certifier-work can take hold in NSW.

The Government says that one of the ways of achieving the improvement and the efficiency of the system as a whole is through a “staged building approval criteria”,²³ which locks the stages of documentation required for each phase and ensures cost-efficient dealing with documents.

The goal is to ensure that the certifiers know what the standard of design work is set to, before they issue their approvals.

Changes (which are yet to be finalised) may include Critical Stage Inspections (CSIs) constituting ‘stop-go’ inspection stages i.e. where the certifier (sometimes with the aid of ‘specialist practitioners’) is unable to approve inspections until appropriate documentary evidence from the person responsible for carrying out the work is provided.

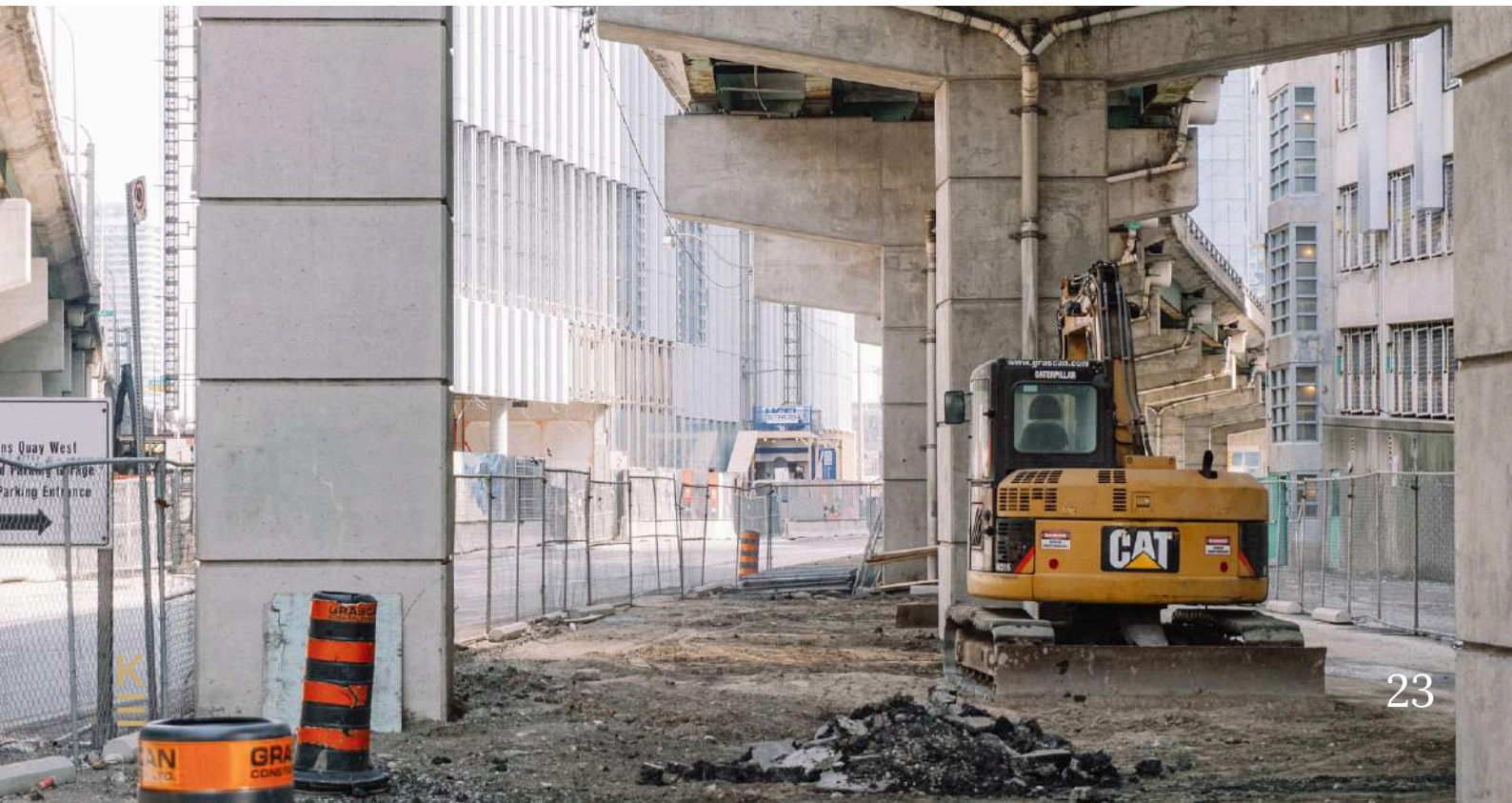
The concern in relation to conflicts of interest relates to considerations such as the issuance of occupation certificates (OC) prior to the actual completion of the work.

This is supposed to be improved by the introduction of staged approvals, and the concurrent restriction of OCs where key elements and essential services remain incomplete.

Minimum frameworks for departures from the BCA are also set to be integrated within the legislative schema to reduce the time and cost of approvals.

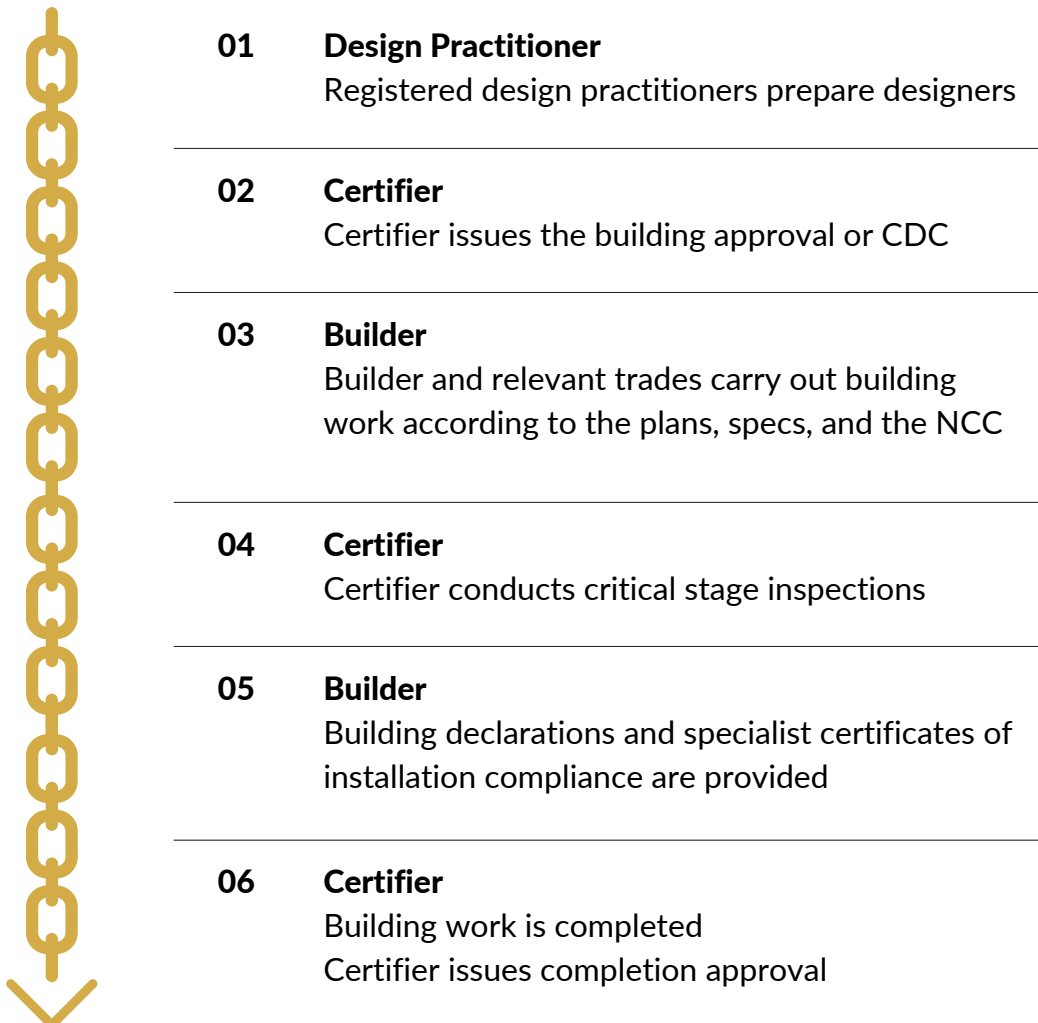
Furthermore, certifiers will now have the power to make enforceable directions which can be supported by tools such as council orders.

The argument by the government is that one of the efficiencies created is the intent that variations are to be streamlined so as to allow certifiers to approve departures from the BCA in a cost-effective manner and without delays. A documented justification allows the certifier to fast-track approvals.



‘Chain of responsibility’

The Bills set out a ‘chain of responsibility’ involving the certifier in various phases of the design and construction process, as the NSW Department of Customer Service’s webinar diagram below illustrates:²⁴



DBP Act and litigation go hand in hand



In relation to the expansion of the definition of the ‘developer’, in past cases the courts have largely resisted the temptation to include certain parties who may not have been previously considered as ‘developers’ However, under the new regime these parties will most likely be included.

For example, in the case *The Owners – Strata Plan 81837 v Multiplex Hurstville Pty Ltd*,²⁵ the NSW Supreme Court had earlier ruled that the Owners could not sue Multiplex because the basis for having added Multiplex as a defendant, was a ‘Development Management Agreement’ with the landowners which provided for exclusive access to the property. The problem, the Court calculated, was that Multiplex was not an ‘owner’ and therefore was not a ‘developer’.

If this case was heard under the proposed Building Bill regime, Multiplex would have likely been captured by the statutory warranties.

At the same time as cases such as Multiplex, this expansion of the duty of care espoused within the Bills and specifically the Building Bill seems to have mimicked some of the ‘less regular’ approaches taken by the NSW Supreme Court.

In *Goodwin Street Developments Pty Ltd atf Jesmond Unit Trust v DSD Builders Pty Ltd (in liq)*,²⁶ Stevenson J held that the statutory duty of care in relation to construction work, extended to any ‘building’²⁷ including commercial buildings (under the Environmental Planning and Assessment Act 1979 (NSW))²⁸.

²⁵ [2018] NSWSC 1488.

²⁶ [2022] NSWSC 624.

²⁷ See also *Roberts v Goodwin Street Developments* [2023] NSWCA 5.

²⁸ We point out that in the case of *The Owners – Strata Plan No 84674 v Pafburn Pty Ltd* [2022] NSWSC 659, even the ‘owner of land’ was to have the requisite duty, even where an owner may not have had effective control over the construction.

One thing is certain: with these kinds of proposed changes, the spectre of more litigation may become more prominent and pronounced.

It is also not a stretch to suppose that professionals will require competent lawyers to help them explore any potential problems which they will need to overcome when faced with significant difficulties in dealing with the pleaded cases against them.²⁹

It bears repeating that with changes this significant, professionals will need to be guided through the maze of the response processes, including through the preparation of their evidence – the evidence of their experts, their ‘Scott Schedules’ and ‘Loulach Schedules’, and lay evidence -- with timely, efficient and accurate advice; advice which aims to provide the Professionals with the full ambit of defences in relation to all their rights, ensuring ultimately that the best defence is put before the courts, and tribunals.

This is of course extremely important, because expert help and effective legal advice is crucial when it comes to dealing with claims which may on first blush, seem ‘impenetrable’ to some Professionals.

As has been held by the Supreme Court of NSW in cases such as *The Owners - Strata Plan No 87060 v Loulach Developments Pty Ltd (No 2)* [2021] NSWSC 106³⁰

*“The DBP Act was enacted to alleviate the need for a party like the Owners Corporation to prove a duty of care owed to it by the Builder. This reform was seen as being needed in light of the [previous rulings to the effect that] builders and engineers did not owe a duty of care to subsequent purchasers of commercial property. **The DBP Act was not intended to provide a shortcut as to the manner by which a breach of such duty might be established** [emphasis added]”*

In other words, the owners or other claimants will need to prove their case and will need to be able to prove it to the requisite standard, and the Supreme Court has held to this standard again and again.³¹

³⁰ Per Stevenson J, at [35-36]

³¹ E.g. see *The University of Sydney v Multiplex Constructions Pty Ltd (No 2)* [2023] NSWSC 1019

Warranties and other consumer protections

Related to all this and particularly as related to the expanded 'litigation net' analogy, there is also a possibility that the warranty periods may be extended from 6 to 10 years for the newly defined 'serious defects' and 2 to 3 years for the minor defects.³² Generally existing statutory warranties are carried through to the Building Bill with some minor changes (for example the term 'successor in title' is simply replaced by the 'owner').

More generally under Chapters 4 (home building work) and 7 (Dispute Resolution) of the Building Bill, provisions are made in relation to the way consumers are to be protected in a variety of ways including for example statutory warranties, duty of care, minimum contracting obligations, dispute resolution mechanisms, enforcement powers, etc.

It needs to be noted that:

- (a) with the exception of duty of care, consumer protections only apply to home building works;
- (b) statutory warranties and requirements as to contracting do not apply to design and certification works;
- (c) home building obligations will be in addition to other obligations such as the Australian Consumer Law (ACL) as already owed to the consumer; and
- (d) relatedly, progress payments are to be arranged in accordance with the provisions of the Building Bill.

Again, given all this, if the reforms proceed in full as they are cast now, it is likely that that litigation will likely proliferate.

An important impact: Professionals



In summary, appearing below are some of the more important impacts of the reforms on Professionals:

- developers will have to deal with more overall liability,³³ added to that will be the potential extension of the 10-year warranty period for the relevant building classes,³⁴ encompassing a more robust bond related scheme;³⁵
- there will be a more significant duty of care placed upon builders, designers, engineers, suppliers, installers, certifiers and building inspectors³⁶ (see below);
- manufacturers of building materials (including those who manufacture pre-fabricated off-site buildings³⁷) may face the prospect of increased liability in respect of the materials which they manufacture and supply;³⁸
- the personal liability of directors and other 'influential' individuals is to increase markedly; for example, the Commission will have powers to 'pierce through the corporate veil' revealing the directors or significant others involved in the construction process;³⁹ and
- importantly, application of the regime will be both to residential as well as non-residential buildings.⁴⁰

³³ E.g. see the proposed section 6 of the draft Building Compliance and Enforcement Bill 2022, in The Bills, op. cit.

³⁴ E.g. see Third Regulatory Impact Statement, op. cit. at p43.

³⁵ E.g. see the amendments already enacted within the 2023 Bill.

³⁶ Second Regulatory Impact Statement, Op. cit., at pp-42-46.

³⁷ Ibid., at pp31-41.

³⁸ Ibid.

³⁹ E.g. see the amendments already enacted within the 2023 Bill (say section 59 of the *Building Products (Safety) Act 2017*).

⁴⁰ Second Regulatory Impact Statement, Op. cit. at p47.

System standardisation

In relation to the duty of care, same is standardised within the Building Bill as between the DBP Act and the *Environmental Planning and Assessment Act 1979*.

The duty is owed to each owner of the land in relation to which the work is carried out, and to each subsequent owner of the land, and it applies to a person who carries out the work or subdivision work (as defined under the Building Bill). **Importantly, it carries for 10 years, after the completion of the work.**

For completeness and as related to the issue of warranties, the completion aspects of the building work have been further clarified. For example, 'practical completion' has been defined further to mean that work has been completed in compliance with the contract, including in compliance with all the plans, specifications, and statutory requirements; or if not carried out under a contract, the work is completed without defects.

Other changes of interest



- The Building Bill of course encompasses many other amendments including **'clarification of variations'** within contracts and clarifications of times as related to payment claims and as related to the variations, are included within the ambit of the Bills.⁴¹
- **Extensive powers under the RAB Act are carried through to the new regime:** Extensive powers are bestowed upon government inspectors allowing them to investigate, monitor and enforce compliance with the building and construction laws in NSW with issues relating to serious defects in residential apartment buildings. The powers also include information-gathering powers and powers of entry which are relied on to carry out the audits and powers related to the issuing of prohibition orders, stop work orders, and building work rectification orders.⁴²
- **Fire safety** requirement consolidation is to take effect, from 'concept design', all the way to day-to-day maintenance, encompassing regular auditing of fire safety⁴³ -- It should be noted at this juncture that there are significant changes to fire safety within the Bills and specifically, the Building Bill. Multiple pieces of legislation which entail multiple registrations needed to carry out fire safety work are condensed into Chapters 6 and 11 of the Building Bill. As a result, a single licence is now available for the performance of work across all the buildings. We note that there are various levels of licensing under the fire safety design practitioner scheme. For example, for detection and alarm systems, fire sprinkler systems, mechanical smoke controls, etc. Specialist licensing will also be required, for example where specific plumbing work on fire safety systems is required). Other changes require the issuance of fire safety schedules with third party assessors working closely with certifiers. In particular in circumstances where there is an interaction between different fire safety systems. A key change is that maintenance of these system can only be carried out by those licensed to install the same systems.

⁴¹ Third Regulatory Impact Statement, Op. cit. at p28.

⁴² E.g. see the amendments already enacted within the 2023 Bill say section 49A of the HBA.

⁴³ Third Regulatory Impact Statement, Op. cit., at p10.

- **Implementing a 'building information system'** which stores all building related certification for ease of access is a crucial element of the Bills.⁴⁴
- **Better protection for payments made under Payment Claims under SOP Act is provided.** It should be noted that payment claims need to carry a notice to owner-occupiers which provides them with information as to their rights. There are consequences for the payment claim if such is not included.⁴⁵
- **Professionals need to be aware that the proposal is to mandate and cause to be reported, the maximum progress payments per home-building stage under the specific Building Bill.**
- **Inspectors (e.g. certifiers) are set to be able to issue rectification notices** to builders and others in the face of defects to avoid delays and later action by the owners of strata plans.⁴⁶
- **Additionally in cases of claim, a strata scheme may be able to access the building bond within 90 days** of the issuance of the defects notice by an inspector, if the defects are not remedied.⁴⁷

⁴⁴ E.g. see The Webinar, Op. cit.

⁴⁵ E.g. see proposed section 90 of the draft Building Bill 2024.

⁴⁶ See The Webinar, Op. cit.

⁴⁷ E.g. see proposed section 100 of the draft Building Bill 2024.

Licensing changes

The **Bills introduce licensing changes** for contractors such as builders and others working within the building industry.

New licensing provisions are said to ensure “competent” people are carrying the building work.

Contractor and Supervisor licences remain, but supervisor rules will likely be further clarified, with obligations of smaller operators being at the forefront.

The end-goal is to ensure the scheme applies to commercial building industry as well, although it should be noted that regulation which “is proposed to apply to the broader building industry, such as licence requirements for carrying out commercial and industrial building work will require a transition to allow industry to prepare for the new requirements” and that transition phase remain undefined at this stage.⁴⁸

Licensing structure

Here is a quick illustrative table as produced by the NSW Department of Customer Service and exhibited in their webinar:⁴⁹

Licensing structure



Licence Types	Carry out work	Supervise work	Contract with consumers
Contractor licence • Individual • Body corporate (with nominee to carry out the work)	Yes	Yes	Yes
Supervisor licence	Yes	Yes	Yes
Tradesperson certificate	Yes	Yes	No
Provisional licence	Yes, under supervision	No	No

As per the table above, builder licenses will be changed so that the current single builder licence is effectively phased out and replaced with a ‘gradation licensing system’ which in turn allows for a progressively advanced licensing scheme (ending in level ‘Builder A’).

⁴⁹ See The Webinar, Op. cit.

New licensing types

As per Chapter 6 of the Building Bill, a wholly new licence for prefabricated building work manufacturers will be introduced where the tradesperson is not interacting with a consumer. Otherwise, one of Builder A, B or C licences will be required. Here is a NSW Department of Customer Service table as presented in the Webinar⁵⁰ which illustrates this gradation or ‘licence level’ system:

Builder licences



- **Builder A – unrestricted**
- **Builder B – medium rise** (up to 6 storeys)
- **Builder C – low rise** (class 1 and 10 buildings)
- **Builder D – renovator / internal fit-outs** (non-structural work, including current kitchen, bathroom and laundry renovation licences)
- **Pre-fab manufacturer** – prefabricated building manufacturer who cannot undertake enabling works onsite or engage directly with consumer

Licence Category	Indicative qualifications	Indicative experience
Builder A	Relevant advanced diploma or tertiary qualification	5 years relevant practical experience
Builder B	Relevant diploma or tertiary qualification	3 years relevant practical experience
Builder C	Relevant Certificate IV or above	2 years relevant practical experience
Renovator	Relevant Certificate III & specified units of competency	1 year relevant practical experience
Pre-fab manufacturer	TBD	TBD

It is noteworthy that prefabrication work has its own licence level Builder E (or “Pre-fab manufacturer”).

The licensing schema includes restrictions on ‘Owner Builder’ permits and the requirement that the work of unlicensed workers be supervised.

For more information see further below under “Other trade licences being proposed”.

Emphasis on waterproofing



It is to be noted that waterproofing (and ducting) will be a new class of specialist work, which will again require licensing.

The proposed change related to the waterproofing licensing is significant. For example, given the claim that defects in waterproofing constitute one of the most prevalent areas of complaint, the requirement will be that irrespective of the value of the work, the tradesperson must have a waterproofing licence, with incidental requirements as to waterproofing carried through to other areas of the building work.



Specialist work and other variations to elements such as training

Additionally, the threshold value of licenses for building works will likely be reduced to \$3000 (from the current \$5000); i.e., a license will be required for all work above \$3000.

Furthermore, work which is considered 'high-risk' and which is not simply 'specialist work' will also require a license irrespective of the cost.

These licensing related changes will also impact upon the ongoing training requirements of licence holders in relation to, for example, continuing professional development (CPD), and competency improvements. This can at times come at the cost of a fine if training which is prescribed, is not undertaken or completed.

Related to all that, there is the spectre of demerit points which will be introduced (in addition to the heftier fines mentioned above) which will accumulate with offences committed by builders and others, and which may impact your licence.⁵¹

⁵¹ For a good treatment of these issues, see The Webinar, Op. cit.

New proposed methods of assessment

An option is currently being considered in relation to competency assessments and examinations. These are to take place before a licence is issued. However, details in this regard remain unclear. For example, will any examinations, assessments or interviews be carried out using the industry bodies or will the Commission be the responsible examining body?

Some of these obligations are to extend to tradespersons having code/s of conduct, and as stated, continuing professional development and practice standard obligations as well as supervisory standards and express requirements to comply with the NCC (as well as ensuring adequate insurance requirements).

Other trade licences being proposed



Other trade licences are also being proposed, including bricklaying, painting, excavating, wall and floor tiling, roof slating, joinery, glazing and similar licences.

We have already mentioned 'Specialist work' (for example, medical gas-fitting, water plumbing, plumbing mechanical services, refrigeration and air conditioning etc.). These will also become a part of the licensing framework.

Design-wise, various design obligations are integrated within the licensing scheme such that the NSW Architects Board for example, will continue to maintain the licensing oversight of the profession. However, the proposal is that building designer and design practitioner registrations are to be absorbed into the building designer (and unrestricted and medium rise) licence schema. Enforcement will be available both to the Board and to the Commission (see further below).

Architects have raised concerns about some of the implications of this, which we will briefly review further below.

Disputes, dispute resolution, and regulator intervention, enforcement

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Dispute resolution improvements as between the residential owners and contractors are there to supposedly ensure that there is more cost efficiency in these processes.

As highlighted above, builders need to be aware that the reforms seek to introduce regulator intervention so that government regulators are able to intervene in construction sites and in relation to constructions more generally.

This new system if implemented will mean that not only certifiers, but also the regulator representatives will have powers to demand defect rectification because of say, noncompliance with various specifications or standards.

The mix of powers encompasses the taking of remedial actions including undertakings [encouraging voluntary undertakings where possible to avoid costly disciplinary actions], injunctive relief and the issuance of orders as to rectification, compliance, enforcement as well as 'stop work' orders.

Some of these powers may seem draconian -- the new regime if enacted will also allow for the recovery by the regulator of "reasonable" costs and expenses as related to investigations. Authorised officers will have more power to conduct investigations and enter premises, as well compelling some of the members of the 'material supply chain' to provide information to other nominated members.

In relation to licensing and the fines mentioned above, breaches in relation to the licensed persons' obligations, now attract increased penalties including:

(a) A maximum penalty of \$330,000 and 12 months imprisonment for unlicensed work;

(b) Maximum penalty of \$33,000 for 'licence lending'; and

Maximum penalty of \$110,000 for breach of a condition of license.

There are also provisions which will prevent "intentional Phoenix activity"⁵² – placing the onus on professionals and registered practitioners to ensure that they do not deal with businesses which have been involved in illegal 'Phoenixing' activity within the industry⁵³ (Under the Enforcement Bill, Directors or 'persons of influence' may also be subject to prosecutions as 'accessories' in order to prevent schemes such as Phoenixing).

As part of the scheme, notifications of non-compliant material to the government will also be a requirement.

In relation to dispute resolution, where the building dispute is not resolved as between the parties, a party must notify the Commission (the 'dispute resolution process' involve the informing of the Commission, to which all matters must go, and which is a key change) and the parties cannot take the matter to the Tribunal without the endorsement of the Commission.

The new process will allow that the warranty limitation period/s be put 'on hold' for up to a maximum of 6 months in order to allow for the dispute resolution procedures including mediation, to take place or to continue if required.

⁵² This is the illegal transfer of below-market value assets to a new company, with the old company deliberately liquidated with the added intention of defeating the interests of creditors (creditors such as the ATO, employees and suppliers).

⁵³ E.g. see Third Regulatory Impact Statement, Op. cit. at p18.

Summary

Finally, we have summarised below some of the salient features of the Bills (which are reflected mainly in the Enforcement Bill) as follows:

- the scheme provides a myriad of responses to misconduct (aimed at 'bad actors' and bad operators).
- there are definition and prescribed enforcement powers, consolidating the enforcement powers under the SOP Act, the Building Bill itself, the Building Insurance Bill and the *Gas and Electricity (Consumer Safety) Act 2017*;
- investment of enforcement powers in various regulators including local councils and Architects Registration Board for example is a prominent feature of the Bills;
- the compliance strategy commences with warnings and undertakings (with the emphasis placed squarely on undertakings). There are also penalties, remedial and prohibition orders and exclusion of persons provisions (an excluded persons register will be activated);
- in relation to enforcement, the 'serious defects' approach within the RAB Act is carried over through to the Enforcement Bill;
- in relation to powers to investigate, warrants will not be required for entry into homes under construction as well as common property of strata buildings;
- information provided by representatives of body corporates is admissible in relation to civil and criminal proceedings and representatives are not precluded from giving information on the basis of self-incrimination;

- in relation to specialist work, on-the-spot remedial orders / directions are included;
- building work rectification orders as well as stop-work orders will also be available. Stop-work orders will be extended across the industry where for example there may be a likelihood of significant harm;
- prohibition orders as to occupation may also be used to prevent occupation;
- in relation to investigation costs, same may be levied at the at-fault party;
- procedural fairness will be applied (in non-emergency and non-stop-work order situations) when orders are intended, with (alleged) at-fault party will be given an opportunity to respond;
- again, privilege against self-incrimination cannot apply;
- disciplinary action is consolidated into a single set of rules and streamlined, with powers such as immediate suspension where there is, for example, again significant harm to public; and
- 'show cause' notices will be issued and depending on the circumstances, and disciplinary action may follow which may then result in the recording of the practitioner's name in the register.

Criticisms

Criticism of the Bills comes mainly from some professional bodies.

The critics believe that the bills (e.g. the unrestricted licensing classification provisions) may blur some of the boundaries between the professions, allowing some professionals to carry out work which should be in the domain of other professionals.

For example, architects believe that some of the provisions may create confusion between the nature of the work undertaken by 'building designers' versus the architects, which may in turn lead to the undermining of the process, the rigorous qualification paths which the architects need to meet in order to practice as professional architects.

Related to this, architects argue that the more generic competency assessments as provided under the Bills may not reflect the comprehensive education and competency assessments that architects receive, risking a reduction in the quality and safety of built outcomes.⁵⁴

⁵⁴ Australian Institute of Architects, "Forum Repeal Architects Act 260824", 26 Aug 2024, at https://www.architecture.com.au/archives/news_media_articles/2024-nsw-building-bill-open-forum-recording-and-transcript, last visited 4 September 2024.

What does all this have to do with me?

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We have already explained how this all relates to builders and developers and Professionals generally, if the reforms become law. However, it bears repeating that the Bills can have a major and perhaps lasting impact on Professionals and on the industry as a whole.

The Building Bill schema is another serious development and those involved in the building and construction industry in NSW ought to take its provisions very seriously because the changes it aims to introduce will likely lead to more litigation-- the potential is there for significant increases in overheads to Professionals such as builders.

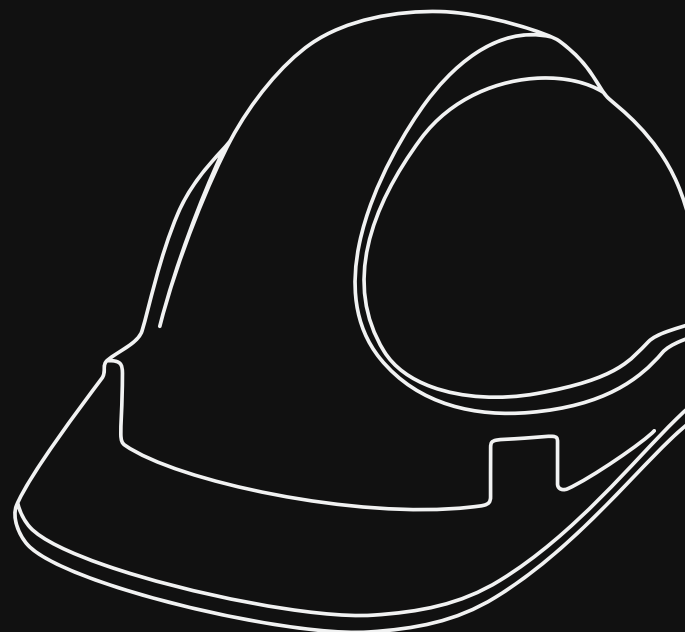
At the risk of repeating this, the Bills will have a massive impact on Professionals, people such as developers, building consultants, and others involved in both residential and non-residential building work. As it is quite clear based upon what we have set out in this brief Guide, obligations are not simply limited to licensed companies, but these extend to directors and 'nominee supervisors'.

This is why it is so important that you obtain good advice in respect of these changes and to obtain it early in order to be able to have control over all the legal implications which the Bills will have for your business and in respect of your livelihood.

The experts at Kreisson are able to help you with cost-effective advice.

Please contact us for an obligation free consultation. Find out more [here](#).

Finally we will likely return with the third edition of the Guide as and when required to keep you up-to-date.



For recent publications by Kreisson on building reforms please see:

- [Expanded reach of the DBPA to “persons” including directors and site supervisors](#)
- [NSW Government consultation on major building law reforms proposed for NSW](#)
- [Potential liability of developers under DBP Act](#)
- [Expert evidence and the *Design and Building Practitioners Act*](#)
- [A Builder’s guide to the *Design and Building Practitioners Act and Regulation Pt. I*](#)
- [A Builder’s guide to the *Design and Building Practitioners Act and Regulation Pt. II*](#)
- [A Builder’s guide to the *Design and Building Practitioners Act and Regulation Pt. III*](#)
- [Update: a busy month for construction regulation in NSW](#)
- [A Builder’s guide to the *Design and Building Practitioners Act and Regulation Pt. IV*](#)
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