



## BUILDING LEGISLATION AMENDMENT BILL 2023

### STATEMENT OF PUBLIC INTEREST

#### Need: Why is the policy needed based on factual evidence and stakeholder input?

In NSW, the cost of defective building work is estimated to cost up to \$700 million per annum. Defects can be attributable to defective design, defective or faulty workmanship, defective materials, or non-compliance with the Building Code of Australia. A longitudinal study of 346 construction projects in Australia found that over six years, the projects required over 19,600 rework events to address defects. Costs associated with rework of the surveyed projects averaged 39 per cent of the contract value over the period.<sup>1</sup> These issues have translated to real drops in consumer confidence and willingness to invest in NSW housing. A survey of prospective apartment purchasers found that 53% were concerned about defects, with half of these respondents saying they would not purchase an apartment in NSW due to this perception.<sup>2</sup>

The NSW Government has been working to reduce building defects and restore public confidence in the building and construction sector. The *Building Legislation Amendment Bill 2023* has been developed in consultation with industry and with public feedback as a precursor to a consolidated Building Bill. This will continue to drive reform in this sector. The Bill seeks to progress a range of reforms to reduce defective building work, improve customer protection for homeowners, ensure accountability for unsafe building products, and ensure that the regulator has the necessary powers to address non-compliant work and poor behaviour by practitioners.

Schedule 1 of the Bill amends the *Home Building Act 1989* to enable the building regulator to undertake proactive investigation and order rectification of building defects in low-rise residential (Class 1) homes without a complaint being made. For example, a house collapsed in Condell Park in May 2023. A complaint was not received by Fair Trading prior to the collapse. Another building under construction by the same company had been audited and safety concerns were identified at that site. The amendments in the Bill would allow this to be a trigger for an audit of other buildings under construction by the builder to ensure defects were not passed onto the consumers.

The Bill also provides additional powers to the Secretary to discipline practitioners who have intentionally phoenixed and to require persons applying for a licence who have a history of insolvency to demonstrate that they are not a future risk to customers.

Schedule 2 of the Bill amends the *Building Products Safety Act 2017* to impose a range of duties and obligations on persons who form part of a building product supply chain. It also expands requirements in that Act to ban and/or recall the supply of building products that are deemed to be 'non-conforming'. Unsafe building products increase risk to public safety, and present significant costs for consumers and the public. For example, it is estimated that rectifying flammable cladding cost apartment owners in NSW between \$2,500 to \$60,000 per dwelling, supported by \$139 million from the NSW Government. The amendments will create accountability for building products by establishing a 'chain of responsibility' between the manufacturer, supplier and installer.

Schedule 3 amends the *Strata Schemes Management Act 2015* to allow decennial liability insurance (DLI) to be taken up as an alternative to the strata building bond or home building compensation scheme for apartment buildings. Customer protections are necessary in this space as the high cost of rectification in apartment buildings can mean strata committees and individual apartment owners are at risk of bankruptcy where serious defects arise. Studies have found owners corporations spend an average of \$330,000 repairing defects.<sup>3</sup>

<sup>1</sup> Love, et al, The costs of rework: insights from construction and opportunities for learning. *Production Planning & Control*, 2018.

<sup>2</sup> Construct NSW, *The State of Consumer Confidence*, 2022.

<sup>3</sup> Construct NSW and Strata Community Association (NSW), *Improving Consumer Confidence: Research Report on Serious Defects in Recently Completed Strata Buildings Across NSW*, 2021.

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DLI policies have been found to provide comprehensive cover for the repair of defects for future homeowners and are a viable alternative to the strata building bond.

Schedule 4 amends the *Building and Development Certifiers Act 2018* and the *Design and Building Practitioners Act 2020* to duplicate powers from the *Home Building Act 1989*. These powers will enable the building regulator to immediately suspend practitioners registered under those Acts subject to a show cause notice, where the Secretary is satisfied there is, or is likely to be, a serious risk to public safety, consumers or other businesses if the registration holder is allowed to continue work until the disciplinary action is finalised. This is needed to protect public safety.

Schedule 5 makes minor amendments to building legislation to ensure information sharing arrangements continue to be fit for purpose following the establishment of the Building Commission.

**Objectives: What is the policy's objective couched in terms of the public interest?**

The objectives of the amendments are to improve customer protection for homeowners and ensure that the regulator has the necessary powers to address practitioners' poor behaviour and defective building products and serious defects in homes.

There is a clear public interest in ensuring residential apartment buildings are free from serious defects, particularly before they are handed over to the end consumer. Buildings which have serious defects or do not comply with the Building Code of Australia pose a high risk to public health and safety, particularly to the people who reside in, visit, or work in those buildings. It is in the public interest that the regulator has the necessary powers to address unsafe and non-compliant building products and strong disciplinary processes to suspend or remove practitioners performing defective work.

Where serious defects do impact residential apartment buildings, it is in the public interest that owners are able to fix the defects. Customer protections, such as the strata building bond or the home building compensation fund, can be strengthened through the expansion of the DLI policies in the NSW market.

**Options: What alternative policies and mechanisms were considered in advance of the bill?**

Amending the regulatory framework in NSW requires legislative change and cannot be delivered through alternative mechanisms.

Retaining the existing regulatory powers with no changes was considered in the development of the reforms set out in this Bill.

For Schedule 1 this would mean that the building regulator would only have powers to respond to building defects and unsafe work after a complaint has been made, with changes deferred until the Government introduces its proposed Building Act reforms in 2024. However, this would not allow the Government to immediately offer stronger protections by compelling builders to fix defective building work.

For the enforcement and compliance for low-rise residential (class 1) buildings, amendment to the *Residential Apartment Building (Compliance and Enforcement Powers) Act 2020* (RAB Act) was considered. This approach could have been realised through an amendment to the Regulation to expand the ambit of powers under the RAB Act to class 1 buildings. This alternative was moved away from because the *Home Building Act 1989* is the primary regulatory framework for class 1 buildings and the powers under the RAB Act would exceed the needs of the building regulator at this time by imposing unnecessary obligations on class 1 builders, including providing six months notice of the completion of building work.

Options for non-legislative policies were also considered to address defective building work in NSW, such as establishing a Building Commission to expand the capability and capacity of the regulator and education and learning tools for practitioners. These measures are being progressed as complementary policies to the amendments in the Bill.

An alternative for Schedule 2 was to wait for an agreement to be reached for a national framework for building product safety reforms. The Australian Building Codes Board developed the National

Building Product Assurance Framework in 2018 as a model for jurisdictions to use to provide national consistency. However, no agreement has been reached after five years. With the increase in global supply chains, amendments in the Bill will provide immediate improvements to NSW in the oversight of building product safety. The national framework has been considered in the drafting of the Bill.

### **Analysis: What were the pros/cons and benefits/costs of each option considered?**

#### *Schedule 1 – Home Building Act*

Under the current regulatory framework, it is the responsibility of the owner to identify defects in their homes and lodge a complaint with Fair Trading to trigger an investigation. Homeowners without experience in construction can find it difficult to identify serious defects, particularly during the statutory warranty period. Enabling proactive investigation allows experienced building inspectors to identify defects earlier. If these reforms are not progressed, the existing legislation would be retained and the burden on homeowners would remain unchanged.

The Bill provides a much stronger suite of powers to restrict people operating in building and construction where they have been insolvent or have been involved with companies that have become insolvent. Where a builder becomes insolvent, homeowners can be left with defective or incomplete work and no way to fix them. Insolvencies can also mean sub-contractors and suppliers do not get paid for their work.

The Bill will ensure consumers, suppliers and sub-contractors are better protected from persons who illegally phoenix or have a poor corporate history. However, to ensure that people who become legitimately insolvent are not unfairly stopped from working in the industry, they will be able to get a licence if they demonstrate that they are not a future insolvency risk.

#### *Schedule 2 - Building product safety*

Current regulatory controls within the *Building Products Safety Act 2017* are limited to prohibiting the use of building products and have been predominately used to address flammable cladding. Many building products, particularly building materials and specialist trade products, are not captured under the Australian Consumer Law as they are not used for personal, domestic or household use or consumption. The Bill will have an initial financial impact for suppliers, importers or manufacturers of building products as they bring their supply chains into compliance and if they are subject to product recalls or bans. However, the reduction in unsafe and non-conforming building products in the NSW market will reduce the ongoing liability and future litigation against these parties, reducing costs on balance.

The amendments were developed in consideration of the regulation framework established by the Queensland Government in 2017. This framework has evidenced success in identifying non-conforming building products and when necessary, recalling these products. The amendments also support the move towards national consistency in the certification of high-risk building products as recommended in the Building Confidence Report.<sup>4</sup> Failing to progress reform would limit the ability of the building regulator to stop non-conforming building products from being used. This would increase safety risks and rectification costs for homeowners.

#### *Schedule 3 – Decennial liability insurance*

DLI policies have been found internationally to provide highly comprehensive protection for future apartment owners. The amendments in the Bill will support increased choice without reducing the protections available for apartment owners to cover the cost of serious defects. If legislative amendments are not made, developers choosing to obtain DLI policies will be required to hold a strata building bond or a policy under home building compensation scheme. These extra costs will pass to customers, penalising customers for seeking DLI protection for defects.

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<sup>4</sup> Shergold and Weir, *Building Confidence: Improving the effectiveness of compliance and enforcement systems for the building and construction industry across Australia*, February 2018.

#### *Schedule 4 – Immediate suspension of authorisations*

The Bill will enable building, certifier and design practitioner registrations to be temporarily suspended for 60 days after a notice to show cause as to why disciplinary action should not be taken has been issued to a registered practitioner. These are preventative powers aimed to protect the public.

Suspending a practitioner's registration will have a significant impact on them and their livelihood. However, these powers can only be used where the Secretary is satisfied that an individual or corporation:

- has engaged in serious conduct that could result in their registration being cancelled or suspended,
- is likely to continue to engage in this conduct, and
- has engaged in conduct that could cause significant harm or loss to a person or property.

There must be sufficient evidence that the impact of suspension on the practitioner is less than the potential public harm that could result if they were allowed to continue to operate.

#### *Schedule 5 – Information Sharing Arrangements*

If legislative amendments are not made, government agencies will not be able to share information gathered under the *Home Building Act 1989* or *Building and Development Certifiers Act 2018* following the establishment of the Building Commission. This would be detrimental to the delivery of customer service outcomes and the regulation of the building and construction industry in NSW.

#### **Pathway: What are the timetable and steps for the policy's rollout and who will administer it?**

The legislation to be amended by the Building Legislation Amendment Bill 2023 is administered by the Minister for Better Regulation and Fair Trading and Minister for Building.

The amendments to the *Building Products Safety Act 2017* in Schedule 2 will commence on a date to be set by proclamation. It is intended that these reforms will come into force following the preparation of supporting Regulations, to ensure alignment with the reforms to be progressed in 2024 under the proposed Building Bill. The date for proclamation will also be informed by consultation with stakeholders to provide an adequate transitional period for industry.

The remaining amendments in Schedules 1, 3, 4, and 5 will come into effect on the Bill's assent.

#### **Consultation: Were the views of affected stakeholders sought and considered in making the policy?**

In August 2022, the Department of Customer Service publicly consulted on a wide range of building reforms including the reforms proposed in this Bill. Stakeholders were invited to provide comment on a draft Building Bill, Building Compliance and Enforcement Bill, and Building Legislation Amendment Bill, and accompanying regulatory impact statements. The consultation received 1,477 survey submissions and 117 submissions from consumers, tradespeople, and industry associations. There was overwhelming support for the proposed amendments.

Separate public consultation is being carried out through August-October 2023 to capture public and industry feedback on the proposal to support the expansion of decennial liability insurance as an option for apartment buildings and potential amendments to the *Strata Schemes Management Act 2015*. A regulatory impact statement examining the options for optional or mandatory insurance schemes was provided to stakeholders for comment. More than 800 survey submissions were received and are being considered by the Government.

The Government has also been continuously engaging with industry stakeholders about the Government's proposed building reforms. The submissions received from the public and industry feedback were carefully considered by the Government in the development of the amendments in this Bill.