



## BUILDING AND OTHER FAIR TRADING LEGISLATION AMENDMENT BILL 2022

### STATEMENT OF PUBLIC INTEREST

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

The NSW Government has been working to implement the Construct NSW transformation strategy to restore public confidence in the building and construction sector and create a customer-facing sector by 2025. The strategy responds to repeated failures in the design, construction and certification of buildings that has led to substandard building work.

The amendments in the Bill are informed by nearly two years of operation of the *Residential Apartment Building (Compliance and Enforcement Powers) Act 2022 (RAB Act)* and the changes respond to anomalies in the current framework that have been identified through the building regulator's proactive enforcement regime throughout this time. The amendments clarify the original intent of the legislative scheme to not limit the regulator's powers in resolving serious defects. Other complementary amendments increase penalties against non-compliant developers, enhance information that can be made publicly available, and facilitate better data and information sharing to assist with data-led regulatory activities.

The Bill also introduces an Australian first decennial liability insurance product as an alternative to the strata building bond under the *Strata Schemes Management Act 2015 (SSM Act)*. This is a measure of the successes realised under the Construct NSW building reforms. The reforms have started to reduce risks in the residential apartment building market to the extent that insurers are offering ten-year warranties over NSW apartment buildings to provide consumers stronger protections than ever before.

The proposed amendment to the SSM Act is consistent with advice provided to the NSW Government by the Decennial Liability Insurance Ministerial Advisory Panel, which is comprised of industry experts across insurance, finance, development and building owner representatives, as well as consultation undertaken by that Panel with broader industry stakeholders.

The Bill seeks to implement recommendations from the 2019 Statutory Review (**the Review**) of the *Explosives Act 2003 (Explosives Act)*. The Review was required under section 38 of the Explosives Act, which provides that the Minister must review the Act after five years from the date of commencement of the last major amendments, in 2013. Following consultation with key industry stakeholders, the Review found that the Act's objectives remained valid, and that its terms remain appropriate and effective for securing those objectives, subject to minor amendments – two of which this Bill will implement. The expansion of regulation-making powers under the Explosives Act will facilitate the upcoming remake of the Explosives Regulation 2013.

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

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 an increased risk to public health and safety, particularly for those people who reside in, visit, or work in those buildings.

Serious defects can also adversely impact emergency services, such as fire brigades, who rely upon the correct operation of fire safety systems to carry out fire-fighting operations. Where these systems do not work as required this can endanger the safety of first responders and

increase the risk of fire spread to other buildings. The objective of the building amendments is to ensure the building regulator has the necessary powers to address serious defects in residential apartment buildings.

The regulation of explosives ensures that the community is protected from the unsafe and/or illegal use of explosives and explosive precursors. By maintaining appropriate deterrence of such behaviour through adequate penalties, and clarifying inspector powers, the amendments will ensure that any breach of the regulatory regime is effectively responded to. The amendments postpone the scheduled repeal of the Explosives Regulation 2013 until 1 September 2024. This postponement, combined with the clarification of regulation-making powers will allow for a more thorough and comprehensive remake to occur.

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

The building amendments seek to address anomalies in the current legislation that are impacting the proper execution of powers in line with the original legislative intent. While maintaining the existing powers was considered, doing so would have an adverse impact on the ability of the building regulator to address serious defects in residential apartment buildings. Consideration was given to retaining differing requirements for developers who seek to resolve matters by a voluntary undertaking. The benefits of including the same development consent concessions for undertakings as building work rectification orders and similar requirements for making these actions publicly available was considered to result in a benefit.

The amendments to the explosives legislation were developed following the public consultation on the Review. During this time, stakeholders were presented with the opportunity to provide feedback on policies and mechanisms to improve the legislative framework. As a result, the amendments have been developed to reflect stakeholder feedback and desired outcomes.

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

A Construct NSW research report identified that the cost of rectifying defects in strata buildings is typically passed to end consumers, with an average cost of rectifying defects being around \$300,000 per apartment.<sup>1</sup> Implementing the proposed amendments will enable more effective early intervention by the building regulator representing cost savings to end consumers.

The amendments may result in some increased initial expenses for developers, such as through commissioning expert reports. However, it is considered that the overall cost will be neutral or result in a cost saving through early intervention. Expert reports are expected to result in an overall benefit as orders will be able to be targeted to the specific cause of the serious defect.

The information sharing provisions will enable the building regulator to work more effectively with other regulators and promote data-driven and targeted regulatory activities. The amendment to provide certain information to Australian universities to carry out research will expand the body of knowledge, inform future policy and education gaps and assist the building regulator exercise functions under the RAB Act.

The insurance amendments to the SSM Act are cost neutral and provide an alternative option for developers to the strata bond. The insurance product will provide enhanced consumer protections compared with the strata bond and is expected to result in significant benefits for consumers. The full costs and benefits on the implementation of the insurance product will be addressed in a separate regulatory impact statement.

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<sup>1</sup> 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/buildingcommissioner/research-on-serious-building-defects-nsw-strata-communities> > p 8

The implementation of recommendations of the Review will streamline investigations and ensure that the Explosives Act retains its deterrent value.

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

If the amendments are passed by both Houses of Parliament, they will come into effect once assented and be administered by the Minister for Fair Trading.

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

The building proposals are machinery in nature and consultation was undertaken with relevant clusters. The Department has also been engaging in continuous consultation with industry stakeholders through the Construct NSW reforms. Key industry stakeholders were advised of the intent of the changes in the proposed building reforms, with no concerns raised by industry on these. The insurance amendments have been co-developed with industry through a dedicated panel and have broad industry support.

For the amendments to the Explosives Act, the Department conducted a public consultation as part of the Review, in which stakeholders were asked to respond to a Discussion Paper that set out the framework of the Act and included questions to guide feedback.

The Discussion Paper was available online via SafeWork NSW's website and the Have Your Say website, and submissions were accepted through an online form, by post and by e-mail from 19 July to 16 August 2019. Key industry stakeholders were also invited to an industry forum, facilitated by the Department of Customer Service, SafeWork NSW and the NSW Resources Regulator.

NSW Government agencies involved in administering and enforcing the Act – SafeWork NSW, the NSW Resources Regulator, and NSW Police – were consulted in developing the Discussion Paper and throughout the Review.

The submissions and feedback from the stakeholder forum were carefully considered by the Review, along with input from the regulatory authorities under the Act.