Building Commission NSW Position Paper

Consumer protections for home building work

Draft Building Bill 2024

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About this paper

This paper provides an indication of policy positions proposed by Building Commission NSW as part of broader proposed building reforms. Proposed policy positions are being circulated for industry and community stakeholder feedback during consultation on the proposed building reforms. This paper does not reflect final Government positions or decisions.

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Introduction

As part of the NSW Government's commitment to introduce a whole of sector Building Bill, the Building Commission is seeking to provide consumers with effective safeguards to give them the confidence to understand what work they are commissioning, how it will be done, who it will be done by and what happens if something goes wrong.

For many people building a home is the single biggest investment of their lives. When things go wrong, the resulting financial and mental toll placed on consumers can be devastating. In addition, consumers are often at a significant disadvantage in the building process, having a less sophisticated technical understanding of the process, a high level of information asymmetry, and suffering from a negotiating power imbalance.

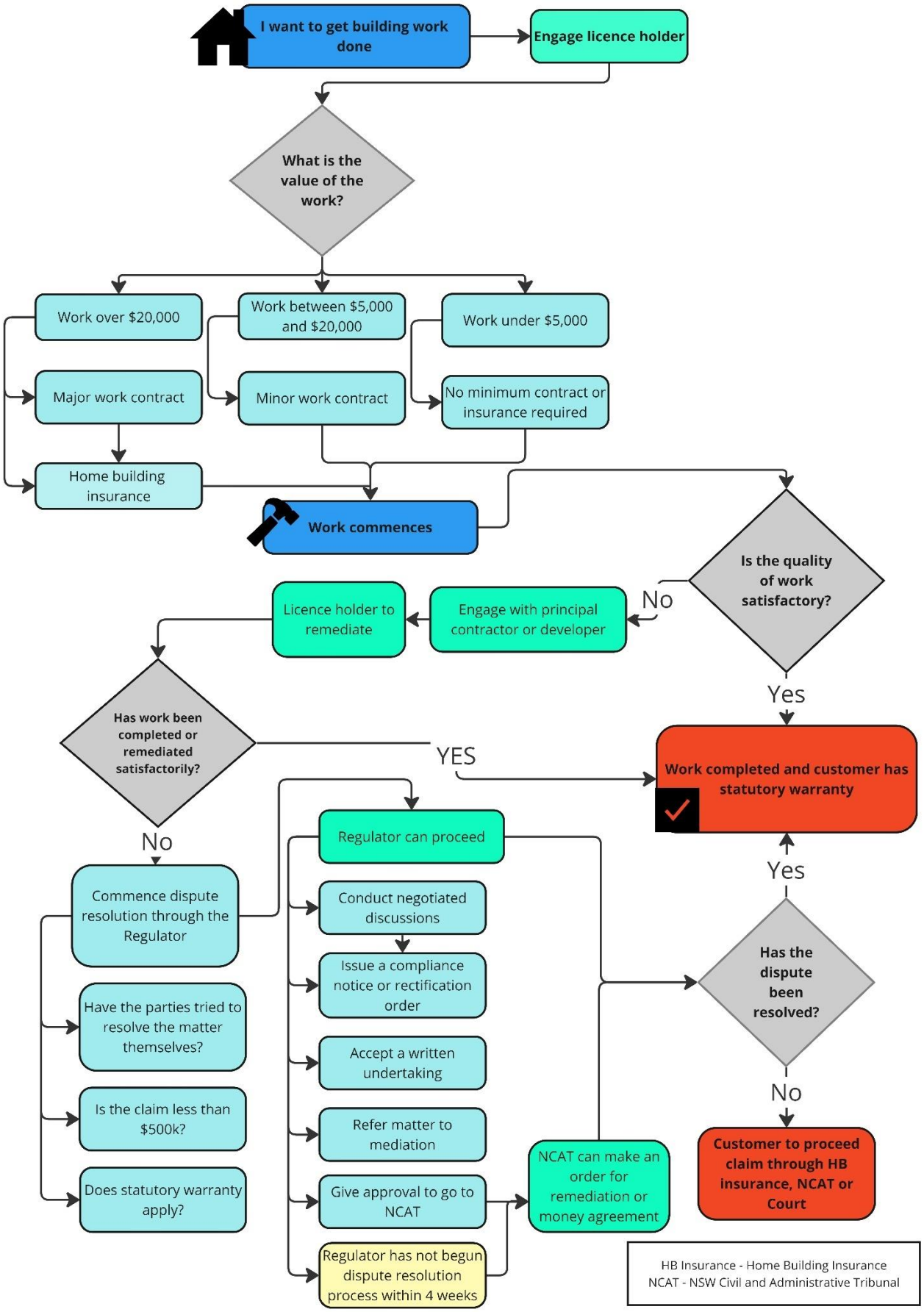
The consumer protection features detailed in this paper aim to ensure consumers are empowered to make informed decisions, that the rights and obligations of the consumer and builder are clear, and that these rights and obligations are enforceable.

The Building Commission has conducted extensive consultation on proposed building reforms since August 2021 with a series of concept papers released to stakeholders. In 2022, a draft Building Bill and draft Building Compliance and Enforcement Bill and supporting Regulatory Impact Statements were released. This was followed by numerous roundtables held in 2023 with industry and community to gather feedback on the proposals.

The latest consultation for the proposed consumer protection reforms was the release of the Consumer Protection Discussion Paper in April 2024. The paper, issued to more than 250 stakeholders, sought feedback on the scope of consumer protections, contracting requirements, statutory warranties and dispute resolution processes. This was followed by an industry roundtable held in May 2024 with 79 attendees to further discuss the reforms and hear industry views. A total of 28 submissions were received. This paper contains a summary of the feedback received, how that feedback has been addressed and the rationale that has shaped the provisions in the draft Building Bill 2024 which is supported by a draft Building Compliance and Enforcement Bill 2024 and a draft Building Insurance Bill 2024.

This paper provides an indication of policy positions proposed by Building Commission NSW as part of broader proposed building reforms. Proposed policy positions are being circulated for industry and community stakeholder feedback during consultation on the proposed building reforms. This paper does not reflect final Government positions or decisions.

The following customer journey map provides a visual representation of the proposed consumer protection framework.


I want to get building work done
Engage licence holder
What is the value of the work?
Work over $20,000
Work between $5,000 and $20,000
Work under $5,000
Major work contract
Minor work contract
No minimum contract or insurance required
Home building insurance
Work commences
Is the quality of work satisfactory?
No
Engage with principal contractor or developer
Licence holder to remediate
Has work been completed or remediated satisfactorily?
YES
Yes
Work completed and customer has statutory warranty
No
Commence dispute resolution through the Regulator
Regulator can proceed
Conduct negotiated discussions
Issue a compliance notice or rectification order
Accept a written undertaking
Refer matter to mediation
Give approval to go to NCAT
Regulator has not begun dispute resolution process within 4 weeks
Have the parties tried to resolve the matter themselves?
Is the claim less than $500k?
Does statutory warranty apply?
Has the dispute been resolved?
Yes
No
NCAT can make an order for remediation or money agreement
Customer to proceed claim through HB insurance, NCAT or Court
HB Insurance - Home Building Insurance
NCAT - NSW Civil and Administrative Tribunal

Consumer protections scope

Overview

Over the last few decades, the *Home Building Act 1989* (**HB Act**) has established key consumer protections focused on providing safeguards to consumers when engaging with builders, developers or trades when carrying out 'residential building work'.

These consumer protections currently include minimum contracting standards, mandatory home building insurance cover, statutory warranties over the work and dispute resolution procedures to provide a cost-effective way of resolving disputes.

Residential building work currently captures any work (including coordinating or supervising work) involved in the construction or alteration[1] of a dwelling. A dwelling is a building or portion of a building used as a residence. This also includes any specialist,[2] roof plumbing, and other services work done in connected with a dwelling. [3]

Initial Proposal

The Consumer Protection Discussion Paper proposed a new term of 'home building work' to define the scope of building work covered by consumer protections. These protections include contract requirements, statutory warranties and dispute resolution services.

While replacing the HB Act term of 'residential building work', the new term would continue to limit the scope of consumer protections to building work on homes. However, a key change proposed was to extend the scope of cover to homes which are prefabricated.

The definition of home building work was proposed to capture:

> *the building work, specialist work or prefabricated building work, carried out or intended to be carried out in relation to a home.*

Each of the terms underlined above were separately defined as explained below.

Building work

Building work captured the physical work involved in building a new home, as well as the physical work involved in altering an existing home (including incidental demolition work). Contracting for this physical

[1] Extends to additions to a dwelling, and the repairing, renovation, decoration or protective treatment of a dwelling.
[2] Means plumbing and drainage work, mechanical services, gasfitting, electrical wiring work and refrigeration or air-conditioning work.
[3] Includes work concerned in installing in a dwelling any fixture or fixed apparatus that is designed for the heating or cooling of water, food or the atmosphere or for air ventilation or the filtration of water in a swimming pool or spa.

work, as well as having control over the work (managing, coordinating, or facilitating it or having the intention to do so) was also captured.

Specialist work

Specialist work captured plumbing and drainage work, waterproofing work, refrigeration work or air-conditioning work, electrical wiring work, gasfitting work, mechanical services work, medical gasfitting work and medical gas technician work.

Prefabricated building work

Prefabricated building work captured a prefabricated building constructed in whole or as separate components away from the site at which it will be installed. This could be a substantially complete building, room or pod but would not capture a moveable dwelling such as a caravan.

As a consequence of this work being included as home building work, it was proposed that authorised people that contract with a consumer to construct prefabricated home buildings would be subject to the statutory warranties and minimum contract requirements, as well as the Home Building Compensation Scheme (**HBC Scheme**).[4]

Home

Home captured buildings designed, constructed or adapted for use as a residence, extending to any associated buildings, building elements or structures supporting or used in conjunction with the residence.

To ensure the consumer protections were appropriately limited to homeowners, the following types of residences were proposed to be excluded from the definition of home:

- a guest house, boarding house, hostel or backpackers' accommodation;
- a moveable dwelling;
- class 9 buildings (hospitals, assembly buildings and residential care buildings);
- class 5 or 6 parts in a class 2 building (offices, shops, and restaurants);
- a residence within premises licensed under the *Liquor Act 2007*;
- a residence associated with/provided by a hospital or educational establishment; and
- specialist disability accommodation.

[4] Insurance under the HBC scheme provides a safety net for homeowners, if a licensed builder or tradesperson cannot complete work or honour statutory warranties due to insolvency, death, disappearance, or licence suspension for failing to comply with a court or tribunal order to pay compensation to the homeowner.

Stakeholder feedback

Stakeholders broadly supported the scope of home building work covered by consumer protections but suggested that the definition could be streamlined by referring to National Construction Code (**NCC**) classes of buildings rather than listing individual building types.

Stakeholders were supportive of the proposed expansion to prefabricated building work. Stakeholders recognised that prefabricated building work on a home comes with the same risks and financial outlay as homes constructed onsite, making the proposed expansion of the consumer protection framework reasonable and justified.

Some stakeholders were concerned that the definitions of building work and specialist work didn't clearly capture fire safety work and therefore didn't provide a robust consumer protection framework. Conversely, some stakeholders were concerned the definition of building work inappropriately extended the scope of the consumer protections to capture design work.

Feedback received suggested that social or affordable housing, lendlease housing, boarding housing and disability accommodation should no longer be exempted and afforded consumer protections. Mixed support was also received on whether consumer protections should apply to build to rent buildings.

Mixed feedback was also received on the status of residential properties used for commercial purposes, such as short term holiday rentals (homes rented out for 3 months or less). Some stakeholders thought these types of buildings should be exempted, due to the commercial nature of holiday letting. However, other stakeholders considered these buildings should be afforded consumer protections, with most owners likely to be unsophisticated in relation to building work and worthy of protection.

Final position

The draft Building Bill maintains the proposed new definition of 'home building work' to define the scope of building work covered by consumer protections. However, taking into account feedback received, minor changes have been made to the definition.

The definition of home building work is contained in clause 13 of the draft Building Bill and captures the following work on a home:

a) work, including specialist work, involved in the—

   i. erection of a new building, or

   ii. alteration of an existing building, including demolition incidental to the alteration,

b) prefabricated building work,

c) supervising, directing, coordinating, managing or having substantive control over work referred to in paragraphs (a) and (b),

d) other work prescribed by the regulations.

Although the scope of the definition is intended to capture the same types of work as previously proposed, it is intended that removing the reference to 'physical' work will signal the broad nature of the work intended to be captured, removing any doubt about fire safety work. Fire safety work in relation to the electrical and plumbing components of fire systems is also captured by specialist work.

Further, to clarify the concerns raised by stakeholders, the definition of home building work does not include design work. While the definition of 'building work', under clause 10 of the draft Building Bill, provides an extended list of work that includes design work, that definition does not apply to Chapter 4. Consumer protections are intended to apply to the end product that the consumer receives. Consistent with the current state of play, excluding design work from the consumer protection framework has no meaningful impact on the protections in place for consumers.

Some minor amendments have been proposed to the definition of specialist work (clause 19). These include removing refrigeration work and air-conditioning work. Refrigeration and air conditioning work is now included within the definition of mechanical services work. Further, electrical wiring work is now referred to as electrical work.

Prefabricated building work is proposed to capture manufacturing a prefabricated building away from the site at which it will be erected or erecting a prefabricated building at a site.

Definition of 'home'

Responding to stakeholder feedback, the definition of home found at clause 13 of the draft Building Bill has been streamlined by referring to the following classes of buildings:

- class 1a buildings which are residential buildings including detached dwellings or attached houses like a town house;
- class 2 buildings which are apartment buildings or buildings where the dwellings are above and below each other; and
- class 10 buildings which are non-habitable buildings such as sheds, carports, etc.

Despite the inclusion of class 10 buildings, the following structures will not be captured, regardless of their association with a residence: a jetty, slipway, boat ramp, pontoon, or farm building (including a farm shed).

Although feedback suggested that social or affordable housing, lendlease housing, boarding houses and disability accommodation should be captured in the scope for consumer protections, these will continue to be exempt.

Further, class 1a and class 2 buildings will be captured regardless of their use as short term rental accommodation. Properties that are built as a class 1a or class 2, and are consequently used for short term accommodation, can also be used in the future as long term residences. For this reason, these buildings will be captured regardless of arrangements for their use.

The definition of home is intended to capture residential properties such as apartments, houses and townhouses but restrict it to places where the end customer is likely to be a residential customer rather than a commercial customer. Homeowners are given the benefit of consumer protections because they are at an inherent disadvantage due to the builder or tradesperson having a better understanding of construction and how to manage the risks of the building process. Consumer protections will apply to home building work and relates to the relationship between the licence holder and the consumer.

Build to rent is a large scale, purpose built rental housing that is held in single ownership. Build to rent are generally funded by large scale institutional investors and are professionally managed. As these homes are built by a commercial entity, under the proposed draft Building Bill, build to rent will be excluded from the consumer protection framework.

Contract requirements

A building contract is a legally binding agreement that details the rights and responsibilities of both parties when home building work is being carried out. Contracts provide clarity on what work will be done, materials, timeframes and payments.

Currently, under the HB Act, a written contract is required where the value of the residential building work is above $5,000. Where the work is between $5,000 and $20,000 a small job contract is required. If the building work is more than $20,000 a more detailed contract must be entered into. The requirement to have a written contract protects consumers by ensuring they understand what they have agreed to pay for and how to hold the practitioner accountable.

The HB Act prescribes a maximum 10% deposit for residential building work and imposes substantial penalties for non-compliance. Currently, there are no prescribed percentage requirements for progress payment stages and payments are not linked to the value of the work that has been completed.

General requirements

Initial Proposal

The Consumer Protection Discussion Paper proposed minimal changes to the general contracting requirements, including:

- maintaining the current thresholds for written contracts (no contract for work under $5,000, a minor work contract for work between $5,000 and $20,000, and a major work contract for work over $20,000);
- retaining the existing requirement for a person to be licensed to enter into a contract to do building work for a consumer (retaining two separate licence types to cover contracting to do home building work and carrying out the home building work);
- adopting the existing minimum requirements for contracts but with minor amendments to clarify obligations; and
- maintaining the 10% maximum deposit limitation.

Stakeholder feedback

The majority of stakeholders supported maintaining the monetary threshold for requiring a contract for home building work as striking the right balance of protecting consumers without unnecessarily burdening industry.

Some stakeholders suggested that the threshold should be increased due to the cost of construction work that has exceeded the rate of inflation. The increased cost of construction would mean that work previously not captured by the contract requirements would now be captured which in turn leads to greater administrative burden on the industry.

Stakeholders making the case for lowering the threshold argued that as much work as possible should be captured by the consumer protections. These stakeholders asserted that consumers often find it difficult to have defective work remediated and without a clear contract, these difficulties are only exacerbated.

Stakeholders also largely supported retaining the 10% maximum deposit for home building work. Stakeholders agreed that the current deposit limit reflects the need to protect consumers while maintaining adequate cash flow for the industry.

Some stakeholders argued that no deposits should be allowed. They suggested that the industry should be required to bear the cost of the initial works before the first progress payment is paid. The reasoning behind this approach is to allocate risk to the party best able to control it.

Several industry stakeholders proposed increasing the threshold or allowing it to be waived when agreed by both parties. These stakeholders identified the need for industry to have adequate cash flow to fund continued works. It was further argued that industry should not be required to float the project funds before a progress payment can be made.

Final position

The draft Building Bill maintains the existing monetary thresholds for major work contracts ($20,000) and minor work contracts ($5,000) and no contract (below $5,000). These threshold amounts are proposed to be prescribed in the Regulations under powers provided in clause 65 of the draft Building Bill (definitions of major work amount and minor work amount). After analysing the feedback it was felt that this position is a reasonable compromise between industry and consumer needs.

Maintaining a threshold where no contract is required is also supported by several reviews of the licensing system, which explored the costs and benefits of the monetary thresholds. They found that excluding ‘minor work’ (work below a threshold) from licensing requirements provided a net benefit by removing regulatory compliance costs on work for which protections would rarely be needed.

Based on the supportive feedback received, the draft Building Bill will also maintain the threshold for the maximum deposit at 10%. This amount will be prescribed in the Regulations under clause 88 of the draft Building Bill. This position is a reasonable balance between the rights of consumers to limit their exposure to potential loss and the rights of industry to ensure adequate cash flow to fund continued building work.

Progress payments

Progress payments are an important part of the build process, both for the consumer and the contractor. Currently, the HB Act requires progress payments to be of a specified amount or percentage payable following completion of a specified stage of the work, with the work that comprises that stage described in clear and plain language. However, the Act does not prescribe any percentage requirements for progress payment stages and progress payments are not required to be linked to the value of the work that has been completed.

The ability for builders to prescribe their own stages and the corresponding payments creates challenges for consumers who do not have a sophisticated understanding of building stages and appropriate payment schedules. It puts consumers at risk of being left out of pocket in the event the builder does not complete the building work.

Initial Proposal

The Consumer Protection Discussion Paper proposed a hybrid model for progress payments. This was to have a fixed stage approach but also enable a contractor to have their own alternative progress payment structure.

The structured fixed stages would define progress payments at various construction stages of the base, frame, lock-up, and fixing stage. It was anticipated that maximum amounts for each of these stages, as a percentage of the total contract price would be prescribed.

The alternative option was that the contractor could deviate from the prescribed progress payment stages and customise the progress payment schedule in the contract to reflect the stages that are suitable for their building project.

Should the alternative progress payment structure be used to 'contract out' of the prescribed stages, the builder would be obligated to provide the consumer with a written disclaimer that clearly articulates the basis for the alternate progress payment stages and that this may impact the consumers entitlements under the HBC scheme. A standard disclaimer could be produced by the Building Commission.

In addition, it was proposed that payments would be anchored to the building work that had been undertaken, i.e. linking payments to the completion of work, meaning a payment claim can only be made once the stage is complete.

The progress payment reform was aimed to both minimise risks that consumers face from non-completion by builders and lessen pressures on the insurance industry.

Stakeholder feedback

Stakeholder feedback for fixed payment stages was mixed. An issue raised by many stakeholders was the lack of correlation between the progress payment stages and the reality of a build project. The proportion of costs related to each stage was highly dependent on the project.

Despite the mixed response for fixed payment stages, the requirement for progress payments to be linked to the value of work done was largely supported. Stakeholder submissions varied with some stating that linking progress payments to the value of the work done was largely standard practice in the industry, and others asserting that the proposal was a reasonable protection for consumers.

Final position

The Building Commission recognises that defining the progress stages will require builders to be clear about the specific work that they are completing. This is particularly relevant as the proposed reforms intend to capture prefabricated building work as home building work. After considering feedback it was decided that the proposal for prescribed progress payment stages would not proceed.

However, clause 77 of the draft Building Bill gives effect to the proposal that progress payments must be linked to the value of work completed at the time the payment is required for major works contracts. This change will align with current practices and recognises that 'completed' means the discrete task or deliverable, rather than delivery or completion of the project as a whole.

To ensure the protection of consumers, a maximum penalty for breach of this requirement will be $110,000 for a corporation or $22,000 for an individual.

Contract variations

Schedule 2 of the HB Act requires contracts for residential building work to specify that any agreement to vary the contract must be in writing signed by, or on behalf of, each party to the contract.

Initial Proposal

The Consumer Protection Discussion Paper proposed maintaining the existing requirement for a written variation document. The variation document would provide details of the changes for a major work contract and include various details such as a written description of the work, the reason for the variation, the specific cost and whether the variation would result in a delay. The document would then be signed by both parties and a signed copy of the variation provided to each contracted party. Unless urgent work was required, the contractor would not be able to carry out any home building work relating to the variation before the written variation document was completed.

Stakeholder feedback

Stakeholders have previously provided feedback that, despite the current HB Act requirements to have variations agreed to in writing, variations are still commonly agreed verbally or scope of work changes are made without written documentation showing agreement to that change.

Stakeholders showed general support for the proposal for a variation document with specific requirements as to what would be in that document. However, some stakeholders were concerned about the proposed requirement for the price of the variation to be listed up front. Their concerns were that variation work could not always be easily priced before the work was done.

Stakeholders were also concerned about overregulation of the home building sector. These stakeholders argued that the requirements to have a written document signed and including a scope of works for the variation would place an undue burden on industry.

Final position

While the Building Commission recognises the dynamic nature of building work, it is considered necessary for variations to be documented to provide valuable protection for both consumers and builders. Variations that are recorded in writing and authorised by the contracting parties mitigate risks of builders charging consumers without them being fully informed. Noting the experiences of traders over the past few years, documenting this process will also provide protections for traders in dealing with consumers.

Clause 75 of the draft Building Bill will require a written variation document for a major work contract to be prepared by the contractor and:

- be a written document authorised by each party to the contract; and
- include a detailed description of the variation; and
- state the reason for the variation; and
- specify the cost of the variation or a reasonable estimate of the cost; and
- if the variation will result in a delay affecting the work to which the contract relates—state a reasonable estimate for the period of the delay.

The document will not be required to be in a particular template or form, but a copy must be given to each of the contracting party.

Changes were made in response to feedback concerning the difficulty of listing an accurate price for variation work. A contractor is now required to list the price or a *reasonable estimate* of the price.

Taking into consideration the feedback received about signing contracts, the requirements have been changed to enable the variation document to be authorised by both parties. This change will enable authorisation to occur electronically.

A written variation must be in place before any home building work relating to the variation is carried out. This will apply unless the work is urgently required because of a hazard to the health or safety of a person or the public, or damage to property unless urgent work was required. It is accepted that there may be some work, such as emergency work, where price cannot be determined until further work is done. The regulations will make allowances for these by allowing subsequent determination of price in specific circumstances and where it is agreed upon by both parties.

It will be penalty offence for work to be carried out without a variation document in place with a maximum penalty of $55,000 for a corporation or $11,000 for an individual.

Preliminary Service Agreements

A Preliminary Service Agreement (**PSA)** refers to an agreement entered into for services provided to consumers before, but separate to, residential building work. This includes a wide scope of work or services that are typically done in preparation for a subsequent contract for the building work.

Initial Proposal

The Consumer Protection Discussion Paper proposed to introduce a definition of PSA in the draft Building Bill to clarify the scope of work that can be included in these types of agreements. It was further proposed to introduce a clear prohibition on linking PSAs to home building work contracts.

Where builders link a PSA to a contract for home building work, the contracts would be deemed to be one contract for home building work and the full sum of the contracts will be taken into account for the purpose of a deposit, progress payments and home building insurance coverage.

Stakeholder feedback

Stakeholders provided mixed feedback regarding the proposal to define a PSA in the draft Building Bill. A range of issues were raised by stakeholders opposed to the proposal, with primary concerns being overregulation and overreach by the Building Commission and the difficulty in creating an exhaustive list of work that should be included in the definition. Despite the issues with the proposal that were identified, stakeholders were supportive of addressing the problem of home building work being included in PSAs.

Stakeholders further provided mixed support to the proposal of linking a PSA that included home building work to future home building work contracts. The main concern raised was the regulatory overreach into an

area that should be left up to consumers and builders to negotiate. However, this feedback was offered in the context of a proposal to define and regulate PSAs within the legislation.

Finally, stakeholder feedback indicates that that there appears to be industry misunderstanding about the operation of statutory warranties in relation to work covered by PSAs. Stakeholders advised that the Building Commission should reach out to industry on this issue to clarify misunderstandings.

Final position

The proposal to introduce a definition of PSA in the draft Building Bill will not proceed and instead rely on the definition of home building work to ensure that, where a PSA does include home building work, the contract will have the benefit of the required consumer protections. Any PSA that does involve home building work must have HBC Scheme insurance.

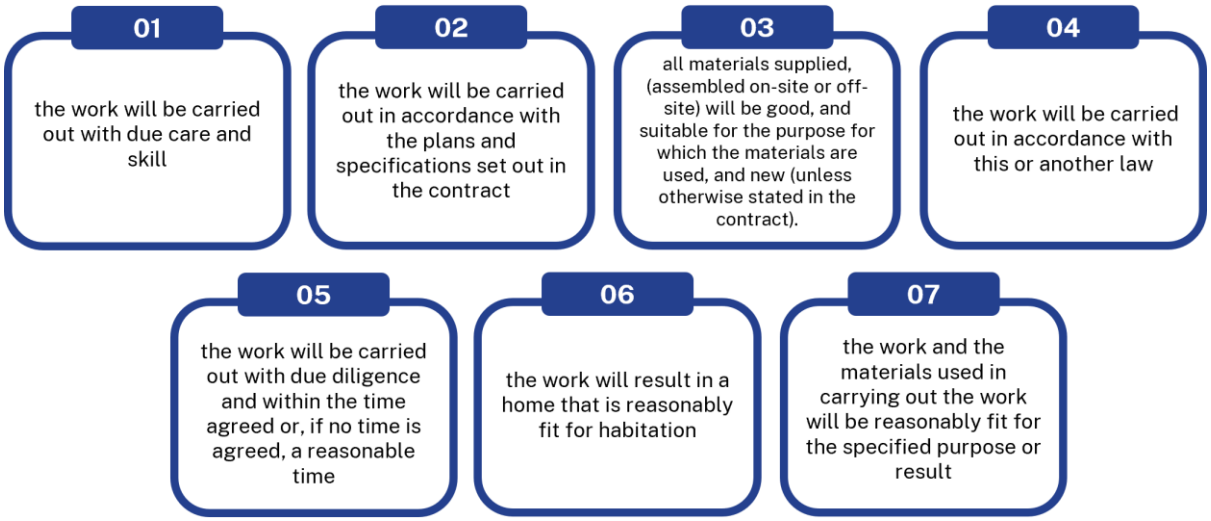
Where builders link a PSA to a contract for home building work, clause 69(2) of the draft Building Bill will deem the contracts to be one contract for home building work and the full sum of the contracts will be taken into account for the purpose of a deposit, progress payments and HBC Scheme coverage.

Further, where a PSA includes home building work but not does not meet the legislative requirements for a home building work contract, the contractor will be subject to penalties for the breach.

The Building Commission has also noted stakeholder feedback on the need for a greater focus on education for industry about the proper use of PSAs.

Statutory Warranties

Statutory warranties provide an essential guarantee for consumers by creating legally enforceable standards for the quality and performance of residential building work. Currently, the HB Act implies the following warranties into all residential building contracts:



Under the HB Act, the contract forms the basis of the statutory warranty and is the source for determining liability. The contract outlines the scope of work the trader will be doing and to which the liability of the statutory warranty attaches to.

Builders, developers, tradespeople and owner-builders have obligations under the statutory warranty scheme for the work they conduct and materials they supply during the course of a construction arrangement.

A breach of warranty can be claimed by the owner or subsequent owners within two years for any defect or six years for a major defect. A major defect is where the defect relates to a major element and threatens the use of the building for its intended purpose.

Initial proposal

In the Consumer Protection Discussion Paper, certain aspects of statutory warranties were proposed to have minor changes or remain unchanged from current practices. As we have previously consulted on these changes, the paper did not seek further feedback from stakeholders.

Final proposal

The existing statutory warranty time periods of 6 years (major defects) and 2 years (other defects) will be maintained, subject to the inclusion of a statutory pause for dispute claims where a breach becomes

apparent within the last 6 months of the warranty period. This proposal is discussed further in this paper under the dispute resolution section.

A minor change to the definition of 'home building work' has been made to broaden the scope of statutory warranties by capturing '*supervising, directing, coordinating, facilitating or managing the carrying out of any work*.'

This change is designed to ensure that developers have the same level of responsibility for the statutory warranties as the builder, providing the homeowner the greatest chance of recovering any losses from defective or incomplete work. This approach aligns with the courts' interpretation of who has primary obligations under the statutory warranty scheme and will create greater assurance that developers are captured.

Further, the current limitations of the 'successor in title' terminology will not be carried over with a new definition of 'owner' aligning with the definition used in the *Design and Building Practitioners Act 2020* (**DBP Act**). This is designed to ensure that any owner of the property or land which is within the scope of 'owner' is owed the same rights and benefits as the original owner. The new definition of 'owner' is designed to reflect the broader intention behind the scheme in holding the person carrying out the work responsible for delivering that work compliantly.

The Building Commission expects that the change to who is owed a statutory warranty will overcome the narrow interpretation of 'successor in title' without drastically changing the test.

Incidental work

Given the dynamic nature of the building industry, the scope of building work can evolve over the period of construction. This means there are instances where building work that is not expressly contained in the contract may be done during construction. However, there is currently a narrow reading of the contract, creating instances where work which should have been covered is left unprotected, without the benefit of the statutory warranty.

Initial Proposal

The Consumer Protection Discussion Paper proposed that the definition of 'home building work' would be amended to include work that is necessary and incidental to do the work agreed to be done. This broader definition would cover work that is implicit within the scope of the contract and emerges during the course of the build. It was only intended to capture work associated with the 'doing' of the work and not be expanded to include design work.

Stakeholder feedback

The majority of stakeholders supported broadening the coverage of work incidental to the contracted work. Their view was that there was value in including the work that was required to be done regardless of whether that work is explicitly mentioned in the contract scope.

This feedback is in line with the Building Commission approach to align the statutory warranty protection with the reality of doing home building work. Further, stakeholders reiterated the impracticality of including every detail of work in the scope of work for a contract.

However, some stakeholders raised concerns about unintentionally expanding the scope of protection and so increasing the liability of builders. Stakeholders wished to see greater detail on what is meant by incidental work to ensure it does not have unintended consequences.

Final position

Following the positive stakeholder feedback, the Building Commission will be adopting the proposal for broadening the scope of statutory warranties by including incidental work. The draft Building Bill, clause 96, will require that the warranties apply to—

> (a) the home building work specified in the contract under which the work is carried out (the ***contracted work***), and
>
> (b) work carried out in relation to the contracted work if the work is—
>
> > (i) necessary to carry out of the contracted work, or
> >
> > (ii) incidental to the contracted work.

This will mean that the statutory warranty will remain to be derived from the agreement to do work (i.e. the contract), however the scope of the work protected will not be limited by the express terms of the contract. Rather, the contract will form the guaranteed scope of the work but will not be exhaustive, with incidental and necessary work also allowed to be covered if there is a sufficient link.

This will ensure there is a relevant and adequate relationship between the work and the builder; addressing feedback about the disconnection of a builder's liability from any rational relationship to the contractually agreed scope of works.

The benefit of adopting this proposal is that the courts will be equipped with a definition that is sufficiently broad to cover work that is necessary and incidental despite not being expressly stated in the contract, offering stronger protections for consumers that reflect the nature of the industry.

Major defect definition

Currently, under the HB Act, the definition of major defect is the key definition for determining whether a claim can be made for a statutory warranty and the period in which a claim can be brought. A defect is considered a major defect if it is in a major element of a building and if it causes an inability to inhabit or use the building, destruction, or threat of collapse. Both limbs of the legal test contained in the definition must be satisfied.

Initial proposal

The Consumer Protection Discussion Paper proposed providing a new definition for defects subject to the 6-year statutory warranty period to overcome the challenges associated with the 'major defect' definition and to ensure statutory warranties are providing sufficient coverage and protection for consumers.

The new definition was proposed to be a hybrid leveraging the utility of the 'serious defect' definition in the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (**RAB Act**) while maintaining aspects of the existing major defect definition.

The proposal included bringing across the broader list of building elements from the current definition of serious defect and incorporating that into the major defect definition. It was expected that this would capture more defective building work and work that might currently fall outside the definition of major element and therefore major defect.

Retaining the high threshold second limb test from the existing major defect definition was intended to ensure that while more types of defects will fall within the ambit of the scheme, a sufficiently high bar is maintained to avoid unwarranted claims being made.

Stakeholder feedback

Feedback received on the proposal was mixed. Some stakeholders believed the proposed definition would provide greater consumer protection and clarity as to when that protection was available. Others felt the definition was too broad leading to increased liability on industry. It was also considered that there was a lack of specificity in the definition leading to difficulties in interpreting it.

Many stakeholders held the view that both the current and proposed definitions lacked clarity. It was suggested that only the relevant parts of the NCC should be referenced rather referring to NCC in general to provide clarity to industry. Other stakeholders stated that the definition creates uncertainty by using language that requires subjective interpretation – 'causes or is likely to cause' and 'inability to use for its intended purpose'.

Final position

After considering the feedback received from stakeholders, the hybrid definition for major defect proposed in the Consumer Protection Discussion paper will not proceed. Clause 95 of the draft Building Bill will largely align with the existing definition in the HB Act but will refer to a 'building element', instead of a 'major element'.

The definition of building element (contained in clause 9 of the draft Building Bill) replicates the existing definition in the RAB Act, representing the broadly accepted industry position of the key elements of a building. The broader scope of building elements from the current definition of major element will ensure statutory warranties are providing sufficient coverage and protection for consumers. While more defects will fall within the ambit of protection, the retention of the high threshold second limb test will continue to appropriately limit claims.

The Building Commission acknowledges the concerns of industry around the resulting impact of the changes on contractor liability. However, consistently with the intent of the recent DBP and RAB Act reforms, the Building Commission considers that it is only appropriate that liability should rest with the party best able to control the risks; being the person with control of the work and how it is carried out.

Definition of practical completion

Currently, under the HB Act, the time period for a statutory warranty starts on completion of the residential building work to which it relates. This is complex and dependant on different scenarios.

Currently, the warranty period begins on either:

If the work is INCOMPLETE:	If the work is COMPLETE:
a. Date contract is terminated; **OR** b. Date work ceased (contract not terminated; **OR** c. Date of contract (contract not terminated and work not commenced).	a. Date work is complete (per contract); **OR** b. **Date of practical completion** (contract silent).

Practical completion is defined as work complete except for any omissions or defects that do not prevent work from being used for the intended purpose, and can be determined by the earliest of one of these scenarios:

- the date on which the builder 'handed over' the work to the owner;
- the date on which the contractor last carried out work (other than remedying minor defects);

- the date the occupation certificate (**OC**)[5] is issued for the work; or
- 18 months after the owner-builder permit was issued (if applicable).

Initial proposal

The Consumer Protection Discussion Paper proposed amendments to the definition of practical completion with the aim for the clock for statutory warranties to only start when the work is closest to completion as possible, ensuing consumers have the benefit of the entirety of the warranty period.

Key changes proposed included removing the owner-builder permit trigger and adding a new trigger to include the day the work is completed in compliance with the contract including all plans and specifications for the work and all statutory requirements applying to the work.

Additionally, to ensure consumers are afforded adequate protections, it was proposed that completion (where the contract has not specified a date) will be the latest of the events, as opposed to the earliest.

Stakeholder feedback

Feedback on this proposal was mixed with some stakeholders supportive because of the expanded consumer protections resulting from the changes and others concerned about the adverse impact of expanding the builder's liability and whether the practical completion definition would allow for the statutory warranty period to trigger.

Some stakeholders were concerned that the 'latest' approach triggering the start of the statutory warranty period would have the effect of extending the period of liability, placing greater liability on the builder as a result.

Some stakeholders had concern about the practicalities of some of the events. These stakeholders were concerned that the issue of an OC, the event most likely to come last, is outside the control of the builder. In addition, several stakeholders were concerned that the requirement for the work to be completed defect free might mean that practical completion never occurs. In this scenario, stakeholders were concerned that because practical completion never occurs, statutory warranties are never made available to the consumer.

Other stakeholders supported the proposal due to the greater protection it affords consumers. Specifically, stakeholders believed it would ensure that statutory warranties would only trigger under this proposal when the work is likely to be more completed than not.

[5] The OC is issued by the Principal Certifier (local council or private certifier) authorising the occupation and use of a new building or change of building use for an existing building.

Final position

The draft Building Bill largely adopts the intent of the initial proposal with minor changes made to address concerns raised by stakeholders.

For work that is incomplete, clause 100(5) of the draft Building Bill provides that the warranty period begins on either:

- the date on which the contract is terminated; or
- the date on which the work ceased (if the contract is not terminated); or
- the date on which the contract is made (if the contract is not terminated and work did not commence); or
- the date on which a licence holder last attended the site to do work (if there is no contract).

For work that is completed, clause 100(4) of the draft Building Bill provides that the warranty period beings on the date the work is completed as determined under clause 104.

Clause 104 provides for the framework for determining completion based on the following 3 scenarios:

1. work constructing a new building in a strata scheme;
2. work carried out under a contract that provides for a completion date;
3. all other work (i.e. no contract or contract doesn't provide for a completion date).

In scenario 1, work will be complete when an occupation approval is issued authorising occupation and use of the building. The draft Building Bill also maintains the existing ability to provide another event for completion through the regulations.

In scenario 2, work will be complete on the date the work is complete in accordance with the contract.

In scenario 3, work will be complete when:

- where completion approval[6] is required – the date the completion approval has been issued or where an approval has not been issued within 6 months after an application for one, the date of the application, or
- where completion approval is not required:
    - the work is practically complete (completed in compliance with the contract or where there is no contact, completed without defects or omissions affecting use); **and**

[6] Completion of work approval means an approval, under proposed Chapter 6 of the draft Building Bill – providing for approvals relating to building work, to certify that work included in the building approval has been completed in accordance with the building approval.

- the date the licence holder last attended the site to carry out work (unless to remedy a defect not affecting practical completion).

Key changes from the initial proposal in response to stakeholder feedback include:

- enabling practical completion to occur despite the occurrence of minor defects or omissions that do not affect the intended use of the building. This will address the concerns over the statutory warranties not being triggered for work that is not defect free.
- providing three options for determining the completion of home building work to trigger the statutory warranty period. This will address concerns that completion would be reliant on the issuance of an OC. This continues to be relevant for the first scenario for the construction of a new building in a strata scheme. This is an appropriate trigger for the commencement of the statutory warranty as the consumer can be assured that the work has been actually completed and the building is fit for occupation.
- Scenario 3 provides for the completion to be linked to the 'completion approval' which is a broader concept recognising OC and other methods of certifying completion. If the completion approval is not required, then it will be when the work is practically complete and when the licence holder last attends the site to carry out work. This will address stakeholders concerns that practical completion may never occur or be realised to trigger the statutory warranty period.

Dispute Resolution

A cost-effective and efficient dispute resolution process by the Building Commission is a critical part of the regulatory framework and has significant benefits for consumers, industry and government.

Currently, the HB Act provides a mechanism for resolving building related disputes about residential building work and specialist work. The voluntary cost-free service provided by the Building Commission facilitates discussions between parties to resolve the matter or inspect building work and issue orders for rectification where necessary. Both parties need to agree to the attempt at resolution.

Where the dispute is beyond the jurisdiction of the Building Commission or cannot be resolved through this process, matters are either closed or referred to the NSW Civil and Administrative Tribunal (**NCAT**) or a court of competent jurisdiction. Parties can also go directly to NCAT to have the dispute dealt with, without going through dispute resolution with the Regulator.

Future dispute resolution process

Initial Proposals

The Consumer Protection Discussion Paper proposed the Building Commission assisting in resolving more building disputes to reduce the number of matters going directly to NCAT. This was in recognition that the Building Commission is well suited to deal with issues around defective, incomplete or non-compliant building work. While NCAT is an effective mediator and adjudicator, there are significant benefits for both parties if matters can be resolved by the Building Commission in the first instance. Early intervention and avoiding last resort mechanisms such as relying on statutory warranties or taking a matter to NCAT or having to make a claim under the HBC Scheme will have significant benefits for consumers, industry and government.

It was proposed that a building dispute would need to be lodged with the Building Commission in the first instance. The Building Commission would have sufficient powers to investigate the matter and take appropriate actions, such as issuing a compliance notice, accepting a written undertaking or issuing a building work rectification order. If the matter was inappropriate for the Building Commission to investigate or any of the regulatory tools were not followed, the Building Commission would issue a letter to the applicant allowing them to take the matter to NCAT.

Stakeholder feedback

The majority of feedback received raised concerns with the implementation of the proposal, i.e. would the Building Commission have sufficient resources and appropriately skilled staff to manage the increase in

volume of disputes being lodged with the Commission. Stakeholders were concerned about the potential for a bottleneck of disputes resulting in extensive delays and poorer outcomes.

To moderate these concerns, some stakeholders suggested that the draft Building Bill should impose a time limit for the Building Commission to deal with the dispute or provide for a deemed referral process if the dispute is not actioned after a certain period (automatically allowing the applicant to proceed with their application to NCAT). Further suggestions included imposing time limits for lodging claims and allowing the NCAT to review matters not accepted as a building dispute by the Building Commission.

The Consumer Protection Discussion Paper proposed that formal mediation could be a future initiative after further consideration of resourcing, staff capability and timeframes to ensure the service could be offered through skilled professionals. One stakeholder suggested allowing for external mediation services to be used as part of the Building Commission's dispute resolution process. They argued that professional mediation services are commonplace and can provide experts to address disputes lodged with the Commission.

Final position

The draft Building Bill will continue to require certain matters to be dealt with by the Building Commission in the first instance. This distinction is provided in the draft Building Bill, with building disputes defined in clause 156 (being those matters that the Building Commission is responsible for) and building claims defined in clause 161 (being those matters that NCAT is responsible for).

A building dispute can be lodged for disputes relating to one or more of the following:

- the supply of goods, including the substitution of inferior goods;
- the standard and quality of home building work, including compliance with the NCC and contract requirements for quality;
- compliance with the terms of the contract (including a term for time periods for completing the work);
- the payment of a specified sum of money or relief from the payment of a specified sum.

Disputes can be lodged by either the owner of the home (including the owners corporation) or the person involved in carrying out the work. However, disputes between a licence holder and a developer, or two licence holders will not be dealt with by the Building Commission.

The Building Commission will have a number of tools available to deal with the dispute, including:

- taking action under the proposed Building Compliance and Enforcement Bill;
- refer the dispute for conciliation;

- refer the dispute for mediation, or
- give approval to the person to apply to NCAT.

A new general power is proposed under the draft Building Compliance and Enforcement Bill to enable an authorised officer to issue a compliance order to a person if a dispute has been raised with the Building Commission. Compliance orders will replace the existing rectification orders under the HB Act. The order will require a contractor to remediate building work and have it brought into conformity with the required standards. A compliance order will apply for all defects, but where a defect meets the threshold of a serious defect, it will be dealt with under the powers for building work rectification orders.

Conciliation will involve the Building Commission attempting to bring the parties to a settlement acceptable to all of them. While not proposed to be established initially, powers to facilitate procedures for formal mediation will allow this service to be implemented in the future.

The draft Building Bill will commence on proclamation which is anticipated to be late 2025 or early 2026. This will provide time for the Building Commission to ensure they have sufficient resources and skills to be able to manage the influx of building disputes.

In response to the feedback received about delays, clause 159(3) provides that if the Building Commission has not taken any action within 4 weeks after accepting a building dispute, it will be taken that the party has received approval to proceed to NCAT.

To address the feedback about time limits being imposed on lodging building disputes, a power to prescribe time limits in the Regulation has been captured in the draft Building Bill (clause 157(2)(a)). While it is not proposed to impose a time limit initially, the power is available if required in future.

Statutory warranty 'pause'

It is understood that parties often file claims with NCAT directly to preserve their statutory warranties. This is particularly true if a dispute arises close to the expiry period. If a dispute is lodged with the Building Commission close to the expiry of the statutory warranty, current practice sees them referred to NCAT to preserve the rights of the parties.

Initial proposal

The Consumer Protection Discussion Paper proposed introducing a 'pause' on statutory warranties to provide the time to give due consideration to investigate disputes and arrive at a suitable outcome. It was proposed that when a building dispute is lodged within 6 months of the warranty expiring, the warranty period in which a claim can be made would be put on hold for up to a further 6 months.

Stakeholder feedback

Stakeholders were largely supportive of this proposal as it aligned with the intention of the warranty period. That is, that a six-year warranty period should allow for the beneficiary of a statutory warranty to receive that benefit regardless of when in that period they raise the issue. However, a concern was raised that the 'pause' had the potential to adversely impact professional indemnity insurance by extending the timeframe for liability. This was contrary to other feedback that suggested 6 months was not a sufficient time period for the claim to be realised.

In addition, a number of stakeholders wanted to ensure that the proposal did not have the effect of allowing a person to make an additional claim for a matter arising within the 'pause' period.

Final Position

Clause 100 of the draft Building Bill gives effect to providing a 'pause' on statutory warranties, enabling the Regulations to prescribe the time period of the extension. It is proposed the Regulations will prescribe a period of 6 months from the date the statutory warranty period ends. The pause will allow the Building Commission to investigate disputes properly and arrive at a suitable outcome without impeding time pressures.

In response to stakeholder feedback, the draft Building Bill expressly prevents additional claims being made on the statutory warranty during the extension period provided by the pause (clause 100(2)(a)). Additionally, no further extensions can be made to the warranty period once the extension period has begun (clause 100(2)(b)). These changes are in line with the intention of the pause which was to give the consumer the 6-year period (for major defects) in which to make a claim and not to extend the warranty period.

The statutory warranty pause will help improve the take up of the dispute resolution service offered by the Building Commission and give confidence to parties that their rights are preserved throughout the process – reducing the need to rush to NCAT to secure an outcome for their dispute.

The pause on statutory warranties only preserves the right of a party to seek legal recourse in the event that the Commission's dispute resolution process is unsuccessful or if the parties wish to seek damages arising out of a breach. As it only applies for a matter identified within the 6-year period, it does not serve to extend the statutory warranty period, and therefore should not have any unwarranted impacts on PII premiums (there is no expansion of individual liability as the practitioner will continue to only be liable for matters arising within the 6 year period). This is a consistent approach with the HBC Scheme under the draft Building Insurance Bill, where a claim can be made after the insurance period if the loss becomes apparent in the last 6 months of the insurance period.

Duty of Care

Purchasers of new buildings rely upon the diligence of building practitioners and statutory protections to have confidence in the quality of development. However, for various reasons, owners can face significant difficulties determining and pursuing liability for defects that arise after occupation.

There are a number of existing obligations and options for the rectification of building defects and recovery of the costs of rectification. These are varied and depend on both the type of defect and the length of time which has passed after the discovery of the defect.

Consumers have common law rights to pursue a claim in negligence in circumstances where a builder, engineer, architect or certifier has breached a duty of care by not satisfying the standard of care expected of a reasonable person in their position and they suffer economic loss (i.e. reduced property value or rectification costs). However, in NSW, consumers are also afforded strengthened protections through a statutory duty of care in the DBP Act.

Under the DBP Act, any person who carries out construction work has a duty to exercise reasonable care to avoid economic loss caused by defects:

a) in or related to a building for which the work is done; and

b) arising from the construction work.

The duty is owed to future owners of the land and cannot be delegated or contracted out of.

The *Environmental Planning and Assessment Act 1979* (**EP&A Act**) also contains provisions relevant to civil actions for defective building work. It currently operates to limit the period within which a civil claim may be commenced for loss or damage arising out of or in connection with defective building work to 10 years from completion. The statutory duty of care in the DBP Act is subject to this limitation period.

Initial proposal

The Consumer Protection Discussion Paper proposed that the draft Building Bill would provide for a single framework for provisions relevant to civil action for defective building work, consolidating the existing provisions in the DBP and EP&A Acts. It was proposed that no substantive changes would be made to the legislative provisions apart from necessary changes to integrate them.

No changes were proposed to the *Limitation Act 1969* with that Act continuing to dictate the time within which a claim must be brought for damages arising from a breach of duty.

Stakeholder feedback

Stakeholder feedback mostly supported the proposed consolidation of the provisions from the DBP and EP&A Acts. The main concern raised by stakeholders was whether the consolidation would inadvertently broaden or narrow the existing scope of the statutory duty of care, specifically in relation to any alignment of definitions.

Stakeholders raised a number of issues that should be taken into consideration when consolidating the duty of care including how the duty of care interacts with the *Civil Liability Act 2002* and clarifying who is liable for what, and when. Stakeholders felt that the consolidation provided an opportunity to express more clearly what the duty of care entails and how it functions.

Stakeholders also expressed the need to see the proposed drafting to provide more substantial comments.

Final position

The draft Building Bill, in Part 2 of Chapter 12, sets out the proposed consolidated framework. Careful consideration has been given to the drafting to avoid unintended consequences arising from transferring and aligning definitions. During the drafting process, stakeholder feedback and learnings from recent case law has been applied to clarify the intended operation of the duty. For example, clarifying the scope of work and type of buildings to which the duty applies.

The statutory duty of care in the draft Building Bill is tied to the carrying out of building work (defined in clause 10) which should mirror the existing definition of construction work in the DBP Act. While the manufacture or supply of building products is not captured in this definition, clause 232(2) extends the operation of the statutory duty of care to those who carry out that work, mirroring the status quo.

Clause 237 clarifies the application of the Civil Liability and Limitation Acts and clause 233 adopts the EP&A 10-year limitation period, which has broad application to any civil action for loss or damage for defective building work (representing the status quo) as well as application to the statutory duty of care.

The operation of existing section 6.21 of the EP&A Act is adopted in clause 233(4) ensuring that the 10-year limitation period does not limit rights to recover damages for death or personal injury arising out of defective building work.

The Building Commission's intention is that the duty of care in the draft Building Bill operates in the same fashion as it currently does in the DBP Act.