



Building and Construction Policy
Policy and Strategy,
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Dear Building Law Reform Team

Thank you for the opportunity to provide feedback on the development of the Building Bill and discussion paper regarding the enhancement to consumer protections for home building work (“the Discussion Paper”). The NSW Small Business Commissioner (“the Commission”) is an independent statutory office of the NSW Government. It provides strategic advice, advocacy, and affordable dispute resolution services across NSW.

The Commission acknowledges the need for appropriate regulation to ensure trust and capability in the construction sector, protect consumers, reduce serious defects or substandard work as well as remove risky participants from the market.

The Commission has engaged in previous consultations relating to the reform proposals and welcomes the opportunity to continue its engagement. Previous matters raised by the Commission include the need to properly assess the impact of proposed reforms and potential second-round effects which impact the supply and affordability of housing. The Commission has previously noted that additional costs may potentially lead to increased building costs being passed on to end consumers or have wider industry impacts. These considerations should remain front of mind when developing and assessing policy options and encourage more detailed assessment across all facets of the proposed amendments.

The Commission also notes there are contemporary challenges facing the construction sector and indeed more broadly in the context of housing supply and housing affordability. Feedback to the Commission has indicated that excessive regulation is increasing the cost of doing business, forcing small businesses to exit the industry. This sentiment is supported by the ASIC Insolvency statistics indicating construction industry insolvencies in NSW are up 56 per cent year on the previous year.¹ It is important to consider any reform agenda relating to the construction sector within this broader context.

Broadening and changing key definitions

The Discussion paper identifies several definitions that will be expanded or modified, which will have a direct impact on statutory warranties. It is proposed that the definition of:

- ‘*Home building work*’ be amended to include work that is necessary and incidental to do the work agreed to be done
- ‘*Major defect*’ will be reframed to capture ‘building elements’ (rather than ‘major elements’)

¹ Year on year figures refer to Apr-24 compared to Apr-23. Data to 21 April 2024. ASIC (2024) ‘[Insolvency statistics \(current\)](#)’ Insolvency statistics, Australian Security and Investment Commission (ASIC), accessed 7 May 2024.

- ‘*Practical completion*’ will be changed to clarify that the statutory warranty period will commence from latest of the prescribed events (rather than the earliest)
- ‘*Owner*’ will be broadened for the purposes of the statutory warranty framework.

The expansion of these definitions will broaden the work and coverage of statutory warranties. As noted in the Part 3 Regulatory Impact Statement (RIS), lowering the definition threshold will mean more defects will be subject to increased liability.² This will likely widen the liability of builders, developers, and the home compensation scheme to some degree.

Neither the Part 3 RIS nor Discussion paper has elaborated on the extent to which these additional liabilities or costs will be borne by construction businesses or home compensation scheme premiums. More detailed economic analysis should be undertaken to properly understand the impacts of these regulatory changes, especially for those small businesses in the industry who are unable to absorb these costs as effectively as larger entities. While the costs and benefits of changes of this nature may be difficult to quantify, further regulatory impact assessment should clarify, based on the available evidence, whether the benefits are likely to exceed costs.

Contract variations and progress payments

The Discussion Paper reaffirms the proposal for the documented contract variations with potential modifications. The Part 3 RIS³ previously noted the costs for this new requirement would primarily be incurred by industry associations drawing up new contracts, seeking legal advice to ensure the effect is lawful, updating online access portals, in addition to associated advertising costs. Having to document variations, even for straightforward constructions, may impose delays. Excessive delays for small business operators may equate to postponement of approvals or commencement of work, that ultimately delays completion and payment for work.

While the Discussion Paper indicates some modifications will be considered to address these concerns, it does not describe or explain what those are or how they could operate. The Commission would welcome further opportunities for stakeholders to provide feedback on these approaches, noting there is potential for additional complexity and ambiguity if certain contract variations are subject to new requirements while others are not. The Commission also notes cost escalations due to unforeseen factors are a common occurrence in a construction sector, and there should remain sufficient flexibility for contractual arrangements to protect construction businesses’ legitimate interests.

The Regulator has also revised their position on progress payments. As opposed to the rigid position that progress payments must be made at the four prescribed stages, builders wishing to deviate from these can customise the progress payment schedule in the contract to stages that are suitable for their building project. Whether the builder chooses to adopt the prescribed four stages or their own alternate schedule, progress payments are required to reflect the value of the work that has been completed. In the event the builder decides to ‘contract out’ of the prescribed stages, the builder will be obliged to provide the consumer with a ‘*written disclaimer*’ that clearly articulates the basis for the alternate progress payment stages and informing consumers that agreeing to the payment schedule may affect entitlements under the Home Building Compensation scheme (“HBC scheme”).

The Discussion Paper tends to focus on the likely experience of the majority of the industry and sector, noting “*industry already has the capability to adopt and align with the proposed reforms*”. However, there is a need to focus on areas where this may not be the case, and ensuring the proposed reforms are fit

² Better Regulation Division (DCS) (August 2022), ‘[Regulatory Impact Statement - Building Bill 2022: Part 3 Building compliant homes](#)’ p. 42, Have your Say, accessed 29 April 2024.

³ Better Regulation Division (DCS) (August 2022), ‘[Regulatory Impact Statement - Building Bill 2022: Part 3 Building compliant homes](#)’ p. 29, Have your Say, accessed 29 April 2024.

for purpose and capable of addressing circumstances that are atypical or where there may be unintended consequences.

Requiring all progress payments to be linked to work completed may have impacts which should be better understood before proceeding. The Commission notes there are different reasons why an alternative payment schedule may be appropriate for a given project. In some cases this could include ensuring sufficient financial resources are available at different stages of the project. Linking all progress payments to work completed (rather than allowing builders to prescribe their own stages and the corresponding payments), may have potential consequences for some projects.

Impacts on prefabricated and manufactured works

A change to the definition of home building work is proposed so that prefabricated buildings and large components (kitchen, bathroom, or modular pods) are captured and carry the same requirements as traditional builds. As a consequence, prefabricated home buildings will be subjected to the statutory warranties and minimum contract requirements (e.g. contract variation and progress payments).

It is noted that smaller businesses within this industry generally find it challenging to manage the financial risk associated with the cash flow of a more traditional builder. As a result, the majority request payment upfront prior to delivery. The staged payment method adopted for on-site construction will be difficult to adopt for off-site construction. The proposed progress payment policy has the potential to cause considerable disruption to these existing business models.⁴

The Discussion Paper acknowledges that changes to the regulations for prefabrication will make supplying this building method in NSW more difficult due to likely increases in the cost of manufacturing. As these materials will be encapsulated in the duty of care obligations and statutory warranties, this will have an impact on the sourcing of quality materials and importation of buildings. In this sector there are financial challenges, particularly in obtaining bank guarantees, together with high insurance premiums.⁵ Currently large companies are better able to manage the financial risk associated with these constructions, such as short-term risk related to cash flow, and long-term risk of something going wrong and needing insurance cover.⁶

There has been limited assessment of these impacts on this sector of the construction industry in either the RISs or Discussion Paper, other than acknowledgement there will be an increase in costs. The use of these materials is on the rise and the NSW Government is exploring the use of modular housing to deliver additional social housing.⁷ Furthermore, the Australian Federal Government is exploring ways to reduce red tape within the prefabricated and modular construction industry to enable expansion and growth in the industry to address the shortfall in Australia's housing supply.⁸ With these developments occurring across different levels of government it is imperative that detailed assessment on the impacts of what is proposed is undertaken to ensure that the policy agendas do not conflict. The Commission recommends that these assessments ensure adequate participation of small businesses to ensure their unique needs and challenges are taken into consideration.

⁴ Swinburne University of Technology (2022) [‘Regulatory barriers associated with prefabricated and modular construction’](#) pp. 36-38, Pre-fab and modular construction, HIA, accessed 9 May 2024

⁵ Ibid.

⁶ Ibid.

⁷ NSW Government (2023), [‘Exploring modular housing to deliver more social homes sooner’](#) [website], accessed 10 May 2024

⁸ Australian Government (2024), [‘Building ministers progress on modular housing and new National Construction Code’](#) [website], accessed 10 May 2024

Dispute resolution

Caution should be exercised when considering reforms to the dispute resolution process. When an agency exercises both regulatory compliance and dispute resolution powers, there is the potential for the perception that impartiality, trust, and confidentiality may be compromised. A licence holder in a dispute might regard an agency-bias in favour of the consumer if it is also responsible for enforcing the regulatory obligations that are in dispute. Implicit bias undermines trust in the fairness of the process, with impacts to participation, settlement rates and overall efficacy of the conciliation process.

Transparency, clear procedures, and adequate independence of functions is essential for an alternative dispute resolution system to be perceived as fair, neutral and accessible for justice for both parties involved in a claim.

Robust cost benefit analysis and impact assessment

Many of the proposed reforms outlined in the Discussion Paper will likely impose additional obligations on businesses both in regulatory compliance and financial costs. Given the likely impact of the proposed reforms on the industry, it is crucial to provide more detailed information on the specific requirements proposed so that businesses and other stakeholders can be more meaningfully consulted to inform the proposed reforms.

The Commission previously raised concerns about the quality of impact assessment and options analysis contained in the previous RISs relating to proposed changes. The Commission maintains new requirements and standards should only be introduced where there is significant likelihood that these will lead to improved outcomes in building standards. Much of the justification for the reforms are framed in terms of benefits to consumers, providing greater protections from defects and substandard work. However, there is not always a clear articulation or assessment of how proposals will deliver benefits or estimates as to the magnitude of any costs or benefits.

The Discussion Paper serves as a preliminary step to obtain more detailed feedback, however future policy development processes could better align with accepted best practice by following the steps outlined by the NSW Government's Better Regulation Principles, including Principles 1-3 which emphasise the need to clearly define the problem, make clear the objective of government action and consider the costs and benefits of a range of options.

Thank you for the opportunity to make a submission. If you require further information, please contact my Executive Officer Megan Bennett, at either megan.bennett@smallbusiness.nsw.gov.au or (02) 9372 8767.

Yours sincerely

Chris Lamont
Commissioner
NSW Small Business Commission

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