

The next phase of building reform in NSW begins

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Authors: **Robert Finnigan** (Partner), **Chris Knight** (Special Counsel)

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At a glance

- In January 2020, the NSW Government announced its legislative strategy to restore public confidence in the building sector by 2025.
- The next phase has now commenced with the introduction of four proposed changes to the legislative framework.
- The proposed bills and regulations are open for public consultation and will be introduced to NSW Parliament in 2023.
- The proposed reforms, if enacted, will bring further significant change to the NSW building industry, and ultimately provide greater transparency and certainty for insurers.

Proposed new legislation to be introduced into NSW Parliament in 2023

In January 2020, the NSW Government announced its legislative strategy to restore public confidence in the building sector by 2025.

The first phase of that strategy focussed on the ‘compliance crisis’ in the high-rise residential sector. The next phase has now commenced with the introduction of four proposed changes to the legislative framework:

- Building Bill 2022
- Building Compliance and Enforcement Bill 2022
- Building and Construction Legislation Amendment Bill 2022
- Building and Construction Legislation Amendment Regulation 2022

The proposed bills and regulations are open for public consultation until 25 November 2022 and will be introduced to NSW Parliament in 2023.

The proposed reforms, if enacted, will bring further significant change to the NSW building industry. In this article, we discuss the proposed changes that are likely to be of most interest to insurers.

Building Bill 2022

The most significant proposed reform is the Building Bill, which will replace the *Home Building Act 1989* (NSW) (HB Act). While the Building Bill contains a number of substantial changes, insurers are likely to be most interested in two key changes.

The first is the expansion of the new statutory duty of care (currently in section 37 of the *Design and Building Practitioners Act 2020* (DBP Act)) to include ‘inspection’ and ‘certification’ of building work. In other words, the Building Bill proposes to impose the new statutory duty on certifiers.

The other significant proposed change is to swap the current definition of ‘major defect’ under the HB Act for the broader definition of ‘serious defect’ in the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (NSW) (RAB Act).

The definition of ‘major defect’ is (and will continue to be) key for determining whether a claim can be made for breach of the HB Act statutory warranties and the time period in which claims can be made.

In short, a ‘major defect’ is a defect in a major building element caused by defective design, workmanship or materials, or failure to comply with the National Construction Code (NCC) that results in an inability to inhabit or use the building. A ‘serious defect’ can be established simply by demonstrating that there is a defect in a building element caused by a failure to comply with the Building Code of Australia (BCA), Australian Standards or the approved plans. Changing the definition of ‘major defect’ to ‘serious defect’ will mean that more defects will be caught by the legislation, and the time to bring defect claims will increase from two to six years. This change is likely to widen the liability of builders, developers and other participants performing building work.

The proposed alternative to changing the definition of ‘major defect’ is to extend the time periods to bring a claim for breach of the HB Act statutory warranties for ‘minor defect’ claims from two to three years, and ‘major defect’ claims from six to ten years, or amending the *Limitation Act 1969* (NSW) to allow extensions of time to bring HB Act statutory warranty claims.

The Building Bill will retain the HB Act statutory warranties, but expand the definition of ‘developer’ to align it with the definition in the RAB Act, and the definition of ‘owner’ to pick up 99-year lease strata schemes.

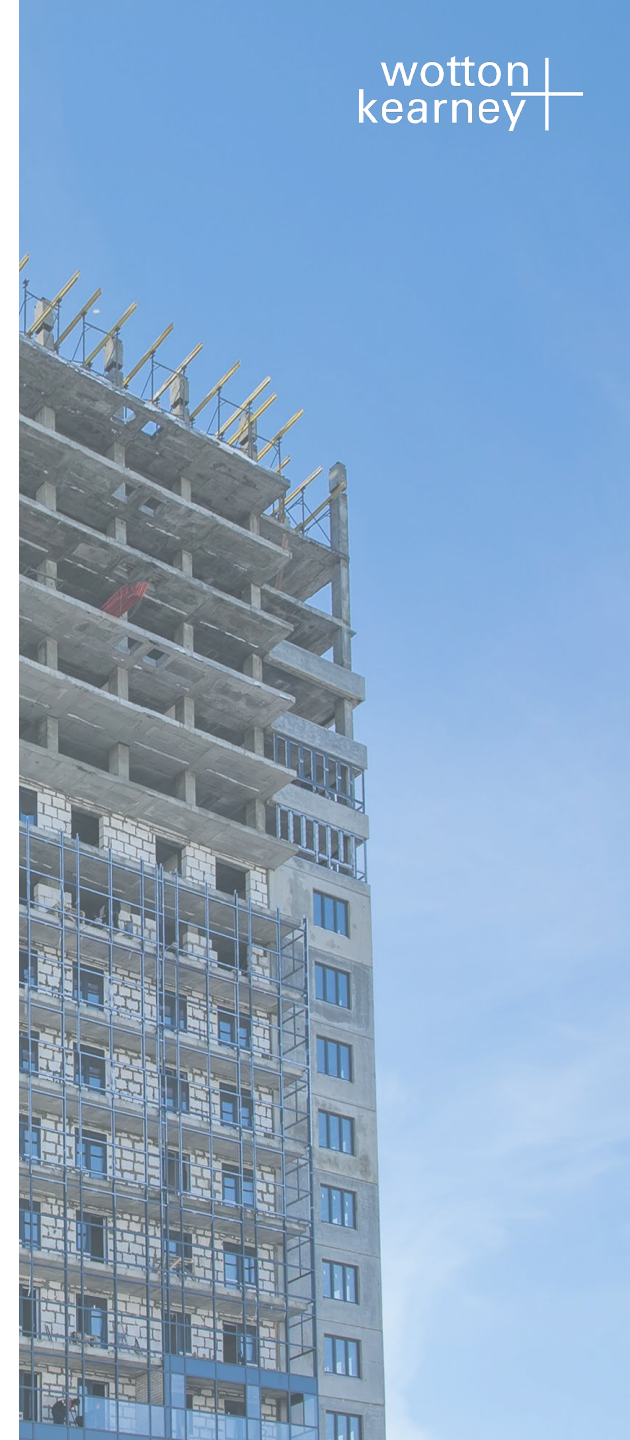
Regulations to underpin the Building Bill are expected to be developed through a consultation process during 2022 – 2023, and enacted at the same time as the Bill.

Some provisions within the Building Bill 2022 will have an extended commencement period. For example, provisions regarding a new licensing scheme will come into effect over a period of two to five years.

Building and Compliance Enforcement Bill 2022 (BCE Bill)

The BCE Bill will replace the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (NSW) (RAB Act). The new Act is intended to include the powers given to the NSW Building Commissioner (Commissioner) under the RAB Act to deal with non-compliant developers and ‘serious defects’ in buildings. The Commissioner’s powers to order the rectification of building work will be expanded to all classes of building (not just Class 2 residential buildings) where a ‘serious defect’ may exist, as well as the power to prohibit the issuing of occupation certificates.

The BCE Bill gives teeth to the reforms by including compliance and enforcement powers which can be deployed against building professionals. It provides wide powers to enforce various Acts and Regulations, which are referred to collectively as ‘building enforcement legislation.’



Key parts of the BCE Bill of interest to insurers include:

- imposing the requirement to give an ‘Expected Completion Notice’ at least six months before an application for an occupation certificate is made to any ‘notifiable building’ (as opposed to just Class 2 buildings). This includes any Class 2 building and any building where building work requires a building compliance declaration under the DBP Act (soon to include Class 3 (larger shared accommodation) and Class 9c (aged care buildings)) – this means a wider range of buildings will be subject to audits by the Commissioner
- expanding the Commissioner’s power to issue stop work orders
- allowing the Commissioner to issue building work rectification orders on any class of building (as opposed to just Class 2 buildings under the RAB Act), and
- powers to “pierce the corporate veil” to ensure company directors and other ‘persons of influence’ can be held personally liable if the entity commits an offence. This also introduces ‘executive liability offences’ that would make a director liable for failure to comply with undertakings, stop work or rectification orders.

Building and Compliance Enforcement Bill 2022 (BCE Bill)

The Amendment Bill will amend existing Acts. The key parts of the Amendment Bill are its focus on:

- ensuring building products are safe and suitable – this includes proposed amendments to the *Building Products (Safety) Act 2017* (BPS Act) to impose responsibilities on everyone in the building product supply chain (the ‘chain of responsibility’), including designers, manufacturers, importers, suppliers and installers, to ensure building products are compliant and fit for their intended purpose
- enhancing protections for Owners’ Corporations by allowing building inspectors to note defects identified in final inspections, and allowing Owners’ Corporations to access a developer’s building bond if defects are not rectified within 90 days (previously, a building inspector could not record defects identified in final inspections if they were not identified in interim inspections, and developers had no obligation to rectify those defects before the 2% building bond was returned)

- expanding certifiers’ powers to issue ‘written direction notices’ in circumstances where a ‘serious defect’ (as defined by the RAB Act) is identified – this will impose more responsibility on certifiers to resolve defects at an earlier stage of construction
- enabling the Commissioner to issue building works rectification orders for non-compliant building products, and
- placing a new duty on registered practitioners to take ‘reasonable steps’ to ensure people they contract with are not, or have not been, involved in intentional phoenixing activity in the building industry – what constitutes ‘reasonable steps’ will be provided in a guidance document to be issued by the Department.

Conclusion

The New South Wales building industry is now moving at speed into a highly regulated phase, which will see greater transparency and certainty, and eventually result in a much better risk profile for insurers. The NSW Government’s initial reform strategy was to focus on the high-rise residential sector as this was where the most pressing problems had coalesced. The next legislative steps will see a consolidation of the building reforms and an expansion beyond the residential sector. The reforms are intended to create end-to-end accountability for NSW building professionals. While the proposed legislation is intended to improve the regulatory framework and enhance compliance, the ultimate objective is to ensure that only safe, compliant and resilient buildings are constructed in NSW.

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Australian offices

Adelaide

Hub Adelaide, 89 Pirie Street
Adelaide, SA 5000
T: +61 8 8473 8000

Brisbane

Level 23, 111 Eagle Street
Brisbane, QLD 4000
T: +61 7 3236 8700

Canberra

Suite 4.01, 17 Moore Street
Canberra, ACT 2601
T: +61 2 5114 2300

Melbourne

Level 15, 600 Bourke Street
Melbourne, VIC 3000
T: +61 3 9604 7900

Melbourne – Health

Level 36, Central Tower
360 Elizabeth Street, Melbourne, VIC 3000
T: +61 3 9604 7900

Perth

Level 49, 108 St Georges Terrace
Perth, WA 6000
T: +61 8 9222 6900

Sydney

Level 26, 85 Castlereagh Street
Sydney, NSW 2000
T: +61 2 8273 9900

New Zealand offices

Auckland

Level 18, Crombie Lockwood Tower
191 Queen Street, Auckland 1010
T: +64 9 377 1854

Wellington

Level 13, Harbour Tower
2 Hunter Street, Wellington 6011
T: +64 4 499 5589

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Need to know more?

For more information, contact our authors,
Construction + Infrastructure specialists.



Robert Finnigan

Partner, Sydney
T: +61 2 8273 9850
robert.finnigan
@wottonkearney.com.au



Chris Knight

Special Counsel, Sydney
T: +61 2 8273 9932
chris.knight
@wottonkearney.com.au

Get in touch with our specialists

Construction PI
Australia

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