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Building Commission NSW
Department of Customer Service

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RE: Building Bill 2024 – Consumer protections for home building work

We thank Building Commission NSW for the opportunity to provide feedback on the Consultation Paper, *Consumer protections for home building work.*

As you know, our members include the nation's major investors, owners, managers, developers, designers and builders of property of all asset classes. They create landmark projects, environments, and communities where people can live, work, shop, and play. The property industry shapes the future of our cities and has a deep long-term interest in seeing them prosper as productive, sustainable, and safe places.

The Property Council have been actively engaged in the building reform work underway in NSW, providing our feedback to the initial Building Bill consultation in 2022 as well as the numerous rounds of consultation across all aspects of the building regulatory landscape.

The Property Council are supportive of policy reform that restores consumer confidence in the construction industry and commend the NSW Government on their achievements to date in progressing reforms to ensure the integrity and quality of the built product.

As outlined in the Consultation Paper the need for greater consumer protections is well documented. Regulation should provide adequate consumer protection weighed against any undue impacts to the building and construction sector, particularly during this period of operating uncertainty and the need to rapidly increase the scale of housing supply.

We have provided a detailed response to the consultation questions in the attached answer sheet.

Once again, we thank the Building Commission NSW for the opportunity to provide our response. If you have any questions about this submission, please contact NSW Policy Advisor, Nikki Allen at nallen@propertycouncil.com.au.

Yours sincerely

Katie Stevenson
NSW Executive Director
Property Council of Australia

Licensing framework changes		
Q1.	Do you support maintaining the status quo regarding the current licence types?	Yes, we support maintaining the status quo regarding the current licence types and did not see the previously proposed changes as bringing benefit customers or builders. The current system already provides some level of differentiation between licence types that may promote consumers to think about the qualifications of the potential contractors they are planning to use.
Q2.	Are there other ways to improve the current licence types? Please provide examples.	We request that the new Building Bill makes it clear that a developer does not need to be licensed (assuming that the developer engages a licensed builder to undertake works). The building licensing regime would benefit from an awareness campaign to empower the public to make informed decisions when dealing with various licence holders. As cited in the Consultation Paper, information asymmetry has led to some of the current consumer protection issues and is an area where the NSW Government can take a proactive role to correct. We also see a gap in the requirements to obtain a licence and think this could be more stringent to test competency. For example, acquiring a residential contractor's licence only requires a Construction Degree, two years of residential project experience, and the endorsement of an existing licence holder.
Consumer protections scope		
Q3.	Are there any considerations that should be made in limiting the scope for consumer protection to building work carried out on a home?	Consumer protection against substandard workmanship should be expanded to include small business and commercial enterprises that may lack the resources and expertise to undertake refurbishments for small shops, offices, cafes, etc, without the fear of being taken advantage of. We propose this extension of consumer protections is limited to commercial enterprises of a certain value, similar to the "consumer" test under the ACL. Consumer protection should be limited to the original work by the builder such that if the consumer has engaged third party trades to undertake work, those alleged defects should not be able to form the subject of a complaint to the Regulator.

		In addition, we suggest that the Building Bill makes it clear that in the definition of 'building work', physical work is not intended to cover design work and other consultancy type of work (unless it involves managing, co ordinating or facilitating the physical work).
Q4.	What are the impacts of providing consumer protections for pre-fabricated building work? Are there any considerations that should be made?	Pre-fabricated buildings manufactured in a controlled environment generally have better quality control compared to those built on-site. Accordingly, the industry should be able to support consumer protection being extended to include pre-fabricated buildings. Additionally, there is an element of on-site work involved with pre-fabricated construction, which should already be covered by the current protections. A concern which may arise is that protections may be provided to the consumer in circumstances where the builder is not responsible for the pre-fabricated building work itself and has no recourse to an overseas supplier. While the current proposal excludes prefabricated homes in the definition of 'residential building work', questions remain concerning the applicability to elements such as bathroom pods. This includes who is liable for the fabrication of the pod and when does the 'clock' start ticking for such elements. It is expected for the industry to continue innovating and expanding on pre-fabricated/pre-assembled elements (e.g. window panels, wall panels, CLT steel structures), however these issues must be considered when drafting the Building Bill. Further, consideration of the delivery of the pre-fabricated building is recommended as this often falls between the responsibilities of parties and there is a high risk for damage to occur. From the consumer/customer perspective, there should not be any differences in functionality between a pre-fabricated home, or part thereof, and an in-situ home. The same expectation should remain for the use of licensed individuals and consumer protections on pre-fabricated elements.
Q5.	In relation to the definition of 'home' should any other types of residence be included or excluded?	Any building or structure on a residential property should be covered including a garage, shed, etc. Further, any residential property including a guesthouse or Short-Term Rental Accommodation (e.g. AirBnB) should be covered, so long at the structure is to be used for residential purposes and the counter party is a "consumer" rather than a commercial business.

		The Consultation Paper states that the regime is not intended to capture homes where the owner of the building is a 'commercial entity'. We assume this means that build-to-rent is excluded but recommend that the exclusion also applies to not-for-profit organisations (as well as commercial entities), for example those that own and manage social and affordable housing. Land lease housing should also be excluded in the absence of clear evidence that the land lease industry is experiencing the same issues as the home building industry .The Building Bill should not seek to apply to land lease housing other than to the "specialist work" components the Home Building Act currently captured. Given land lease is an affordable housing option, and institutional capital is now flowing into this sector, the government can expect that it will increase in prevalence as part of a housing continuum and assist in bringing diverse housing supply to the market.
Contract requirements		
Existing HB Act protections, Case for change, Current proposal		
Q6.	Do you support maintaining the monetary threshold for when a minor works contract is needed for home building work at $5,000? Why/why not?	Yes. Below this monetary threshold, a great deal of work not requiring a contract would be captured and the process would become too cumbersome.
Q7.	What effect will maintaining the contract requirement threshold of $5,000 have on contracting to do home building work in the industry?	We suggest that business-to-business contracts are excluded from the contract requirements. Noting the Consultation Paper states on p. 25 that a developer is exempt from the requirements when they contract with a builder, we would like to see this clearly stated in the Building Bill.
Maximum deposits		
Q8.	Do you support maintaining the 10% maximum deposit threshold? Why/why not?	We do not support deposits. Contractors should be financially secure enough to carry the load until the first scheduled interim payment. Contractors should also have the capacity to start the project given most suppliers/subcontractors are on 30-day accounts. We do not agree with payments being made up front as a deposit as there is no protection for the customer in the event of the contractor not attending site or going into liquidation. A $500k project would leave the customer exposed to the amount of $50k.

Contract variations		
Q9.	Do you support the requirement for a written variation document with the required components outlined in the paper? Why/why not?	We understand the importance of variations being documented to ensure both parties are clear on what is required. This includes the order of cost and implication to the delivery program. The minimum prescribed information to be included in provider-to-consumer contracts increases traceability and transparency for both parties. However, we note that with greater formalised documentation, homeowners may consider that they are capable of project managing a large build when they should be employing an experienced and competent consultant to look after their interests. We agree with the Consultation Paper's suggestion that the written variation document should not apply to contracts between developers and builders as it is inconsistent with existing variation processes.
Q10.	Do you support the minimum requirements for variation documents? Are there any additional requirements that should be added?	Minimum requirements should highlight the implication to the consumer of instructing a change in additional cost and or time. The variation document for the consumer should indicate any changes to scope, price, date for completion, security amounts, insurance amounts and caps on liability (if any). However, consumers and builders should retain flexibility to consider variations on a case-by-case basis.
Progress payments		
Q11.	Does the hybrid model for progress payments address the concerns about flexibility with the prescribed stages?	The proposal of set stages for progress payments may not be workable for builders. The complex nature of a project build means that different stages will take different programme times and could leave the builder to work for long periods without any interim payment. Interim Progress Payments should be made on work completed (even if only partially complete i.e. reinforcing installed before a concrete pour would not require a structural element to be finished before a payment was made) and should be linked to a programme. A programme of works should be mandatory and having payments tied to works completed (partial or fully) as per the programme will provide greater protection to both the consumer and contractor. In the case that interim payments are required, stipulating the payment upfront can ensure both the provider and consumer can manage their cash flow.

		For provider-to-consumer contracts, a flexible progress payment schedule is recommended as it can be tailored to the size and nature of each project. Further, business-to-business contracts should be excluded from this requirement as the parties should have the ability to make their own commercial arrangements.
Q12.	If we adopted the hybrid model, do you have any other concerns we should consider?	A concern is the proposal of set stages for progress payments, as it may leave the builder working long periods without any interim payment. This includes instances where work is completed or partially completed. The *Building and Construction Industry Security of Payment Act 1999* (NSW) (SOP Act) was amended in 2021 to expand its operation to residential building work. The Regulator should consider how the prescribed progress payment stages fit with the entitlement to monthly payment claims for work completed to date in the SOP Act. We query if the Regulator has received feedback on the application of the SOP Act to residential building works and if it has been beneficial to consumers. We recommend that the hybrid model should not apply to arrangements between developers and builders, who have sophisticated and negotiated payment arrangements.
Q13.	Would you support moving away from the hybrid model and allowing all builders to prescribe their own progress payment stages on condition that the payments are tied to the value of the work completed? If so, why?	See comments above. However, it could work if stages can be defined having regard to project complexity and size and if they can be clearly defined rather than being based on program duration. There should be a maximum frequency e.g. one claim per month.
Q14.	Do you have any concerns about allowing builders to prescribe their own progress payment stages? Why/why not?	Yes. A payment should be made when work is completed rather than arising on a pre-determined date. Further, builders tend to front load their payment schedules which results in the cost to complete exceeding the remaining contract value.
Preliminary Service Agreements, New proposal		
Q15.	Are there any other types of work that you consider to be within the scope of work for a PSA?	There is a risk in exhaustively listing types of work that are included, consider a broader definition such as 'any work that facilitates construction activities but is not in itself a construction activity'.

Q16.	Do you consider that linking PSAs to subsequent contracts for residential building work is an effective way of discouraging improper use of PSAs? If not, what other measure do you consider will be effective?	We do not believe that PSAs should be linked to any subsequent contracts for residential building work. If a broader definition is used, as suggested above, then PSAs are separated from construction activities and the contracts surrounding them. A customer may have some PSA work carried out by a contractor and then no longer wish to appoint that contractor to do the work.
Q17.	Are there any other issues relating to contracts that you would like to raise?	Further information for customers would be advantageous as PSAs are often brought to the table by the contractor, which can have the effect that the contract is used for the benefit of the contractor. We also recommend that the restriction on the use of PSAs should not apply to arrangements between developers and builders, who have sophisticated and negotiated pre-construction contracts such as Early Contractor Involvement (ECI) processes. Introducing statutory limitations on the use of these processes could cause uncertainty and undermine common contractual processes on development projects. In addition, we suggest the phrase PSA is not used as it could be confused with the commonly used term PSA (Professional Services Agreement) that is often used to describe a consultancy agreement (for example with an architect or engineer).
Statutory Warranties		
Q18.	Does the inclusion of 'incidental work' provide appropriate consumer protections? What types of work do you think 'incidental work' would cover?	Yes. If the incidental work was unforeseen but is paid for by a variation to the contract, then it should form part of the Statutory Warranty. Incidental work would include items such as preparation of a surface before finishes are installed or making good to items that facilitate the works but not expressly noted in the contract and likely to be unforeseen. Any work that is to be considered to be 'incidental' must be work performed by the builder who is subject to the statutory warranty and not be contractor work. Any 'incidental' work where the reasonable market cost of labour and materials is <$5k and involves defect rectification after the date of completion should not enliven a fresh limitation period, but still be considered under the original statutory limitation period for the whole of project.

		Certain 'incidental' work should be excluded from any fresh statutory warranty, regardless of market cost, including that currently set out in Clause 2 of Schedule 1 of the *Home Building Act 1989* (NSW) (HB Act) which is excluded from consideration as 'residential building work'.
Q19.	Do you support the hybrid definition for 'major' defect? Why/why not?	We support the broadening of the definition of 'owner' in the legislation for the purpose of the statutory warranty framework to avoid the issues with 'successor in title' terminology. This also aligns with the *Design and Building Practitioners Act 2020* (DBP Act) We agree with introducing clarification for compliance with the National Construction Code (NCC) in force. However, the wording should be revised to comply with NCC at the of Construction Certificate (CC) application for the entrance floor (in accordance with the Environmental *Planning and Assessment Regulation 2021* (EP&A Reg)). We recommend that a definition is included for "relevant standards" and "approved plans" in the major defect test. We also recommend for an issue to satisfy the test that it must have failed to comply with all three elements, being: • the governing requirements or the performance requirements of the NCC as in force at the time the relevant building work was carried out; • the relevant standards; • the relevant approved plans. We do not support the introduction of the new hybrid definition for 'major defect' in its current form for the following reasons: **Higher volume of complex claims:** the deliberate broadening and lack of clarity in the definition will give rise to more claims by consumers and disputes between consumers and builders and with greater complexity being made given the additional time that consumers now have to make a claim in relation to: • a broader number of issues that could be a considered as a 'major defect' (in particular, given the change from the very distinct and defined elements of a building included in a "major element" in the HB Act); and • issues claimed by consumers to be defect but which may actually be because of a lack of servicing and maintenance, giving rise to competing arguments.

		Difficulties in distinguishing a "major defect" vs "defect": the new proposal does not include enough specificity as to what is required to prove the vital second clause of the "major defect" (causing or likely causing inhabitability, destruction or collapse), and consequently leaves the definition of a "major defect" wide open for interpretation. We consider that there needs to an opinion provided by an engineer or design practitioner who is registered under the D&BP Act to establishing that any one of the events have occurred there is an imminent threat of occurring: • an ability to inhabit or use the building or any part of the building, for its intended purpose • the destruction of the building or any part of the building; or • a threat of collapse of the building or any part of the building. A standard of more than a "mere possibility" of these events occurring is not a sufficiently high enough bar to establish a "major defect". **Destruction test limited to load bearing building elements:** the current proposal states "the destruction of the building or any part of the building" can be one of the prerequisites to satisfying the second clause of the "major defect" test. We suggest that the "destruction of any part" test sets too low a bar for issues to be classified as "major defect" and that consumers concerns are adequately covered by the other failures within that second clause (being inhabitability or threat of collapse). For example, a plaster board wall may need to be removed to rectify an issue adjacent or behind the plaster board wall such as caulking to a window. This removal could potentially fall within the "destruction of part of a building" but should not be categorised as a "major defect". We propose that the "destruction test" should be limited to circumstances where a load bearing part of a building is impacted rather than the current proposal which has a much broader application. **Building maintenance:** We suggest that as part of any statutory warranty claim for a "major defect" that consumers must also have a positive obligation to demonstrate that they have properly maintained the building in accordance with operation and maintenance (O&M) manuals and that the issue has arisen despite proper maintenance and appropriate treatment of the building elements (i.e. demonstrating that it is a defect caused by the builder). **Prolongation of claims:** it has the potential of prolonging exposure for builders for a larger pool of issues who are already under financial and resource strain, with no material benefit for consumers. The current definition already provides consumers with protection for those types

		of defects which would have a significant impact on their ability to live in their home and for all other defects a two-year window to make a claim. Prolonging claims could also have unintended consequences, for example with regards to insurance premiums, builder insolvencies, lagging costs for owners who have engaged experts and lawyers. All these factors create cost pressures and impact affordability.
Q20.	Do you support the definition of 'practical completion' that will apply to statutory warranties? If not, why?	A change in the definition of Practical Completion will create greater uncertainty, greater risk and give rise to more dispute between consumers and builders. With the change there will be a requirement for all clauses of the test to be satisfied in order to achieve Practical Completion, with each being an opportunity for a dispute as to if it occurred and the date it occurred on. The uncertainty of a date then pushes the warranty periods out beyond the intended period. For example, an OC may have been granted but yet clause (a) may not be satisfied as there may be minor defects that need to be remedied. The other alternative, if the definition is to refer to the later of events, is to simplify the definition by combining clauses (a) and (b) and deleting clause (d) or amending the definition such that all the other tests must be achieved in order for OC to be issued. This means that the final determination of the date of 'practical completion' is by a party that is independent of the owner and the builder.
Q21.	Are there any other issues relating to statutory warranties that you would like to raise?	• With regards to the section under '*Who is liable will be clarified*' both developer and builder should be held responsible to additional parties by way of a Collateral Warranty. We suggest that if multiple parties are subject to the statutory warranty this is addressed in the legislation making it clear as to who the warranties apply to and how to apportion liability if there are multiple defendants. • Confirmation that design is not included in the scope of the statutory warranties. • Confirmation that the statutory warranties are limited to residential building work and will not be implied (under a single Building Act) to apply to non-building work, i.e. commercial building work or built-to-rent projects. • Any new Building Act should recognise and mandate obligations of owners and building managers to undertake recommended and regular maintenance and ensure compliance with O&M manuals (which is often a cause or contributing factor to

		defects). Failure to comply with maintenance obligations should be recognised in any new Building Act in the context of determining whether there has been a breach of statutory warranties.
Dispute Resolution		
Q22.	Are there any matters that you think should be dealt with directly by NCAT and not be triaged through the Regulator?	• NCAT should deal with 'building claims' as defined by the legislation and the Regulator deal with 'building disputes'. • Consideration should be given to the ability for consumers or builders to apply directly to NCAT for particularly complex or technical matters, high value matters or where the Regulator does not have the power to make certain orders. • Any decision by the Regulator not to refer a matter to NCAT should be reviewable. • Similar to Domestic Building Dispute Resolution Victoria (DBDRV) and the current limitation for bringing claims, any claims before the regulator must be brought within 10 years of completion of the home building work. • The government should also consider the exclusions from the DBDRV, such as work not currently considered 'residential building work'. • There should be a fixed time within which the Regulator must resolve a building dispute, after which it must automatically be referred to NCAT. Timings should be broadly in line with the SOP Act to provide consistency across the industry, which already provides quick turnaround times to resolving disputes via adjudications. • The government should clarify the dollar thresholds for bringing claims before the Regulator and NCAT, respectively. The Building Bill 2022 as drafted provides that NCAT only has jurisdiction for claims up to $500,000, whilst the Consultation Paper suggests that if the value is above $500,000 a person can bring the claim before the NCAT without the Tribunal's approval (see p. 60 of the Consultation Paper). • We would also like to pose the following questions: ○ The Consultation Paper suggests that matters are referred to the regulator where both parties agree to do so. Under the proposal, is that condition obsolete? Or is this potential for a case going straight to NCAT?

Q23.	What would be the impacts of the statutory warranty 'pause' to allow the time to deal with building disputes where the warranty expires within 6 months?	We support a 'pause' of a statutory warranty so long as the pause only applies to those particular disputes that have been formally raised within six months of expiry of the limitation period and the subject of discussions and the 'pause' does not give rise to any additional rights or extend the limitation period for any other claims. However, there should be a time limit within which the Regulator must determine the application (e.g. six months) so that (1) consumers have the certainty of an outcome and (2) builders are not left with the uncertainty of a statutory warranty period that has been 'paused' where the alleged defect may worsen over time, for which the builder is not responsible. We query how this will work with the introduction of decennial liability insurance (DLI). We understand from the Roundtable that as a pre-condition to claiming on the DLI policy, the consumer must first go through the Regulator's dispute resolution process. Please clarify how this works. For example, if a dispute is resolved by a developer paying damages to the consumer or by the parties agreeing settlement terms, then presumably the consumer cannot 'double dip' by claiming on the DLI policy as well. A 'pause' on the warranty period (subject to the length of that pause) is likely to be a welcome change as it gives parties time to attempt to resolve disputes before proceeding with formal litigation which may reduce the amount of building disputes in NCAT.
Q24.	Are there any other issues relating to dispute resolution you would like to raise?	The Regulator will need to be sufficiently resourced to ensure that disputes are resolved promptly, particularly if the consumer is not permitted to have any further recourse until the Regulator has allowed the consumer to proceed to NCAT. Consider whether there should be a right to proceed to NCAT if the Regulator does not make a decision on the referral within a certain period. There are concerns that some consumers will abuse the free dispute resolution service by filing applications or complaints without proper basis or make multiple complaints in order to draw matters out with the builder. There needs to be a filtering process in place to prevent this occurring. As above, the concern is that if mutual agreement to Regulator dispute resolution is not necessary contractor's may be caught up in this process frequently and as the data in the paper suggests, some complaints are by neighbours and the like.

		From a consumer protection perspective, we see potential to use the Regulator's digital portal to support the dispute resolution process, with mandatory data collected by the Regulator making it easier to access information. This has been a barrier to efficient dispute handlings in the past. Any dispute handling by the Regulator must be conducted by qualified and experienced legal professionals. This is to ensure the dispute process is respected which is not always the case with the current adjudication process under the SOP Act.
Duty of Care		
Q25.	What do we need to consider to give effect to providing a single duty of care framework in the Building Bill?	We support the consolidation of the different obligations in the DBP Act and the *Environmental Planning and Assessment Act 1979* (EP&A Act) under the Building Bill. When drafting the Building Bill please bear in mind that the 10 year long stop provision in the EP&A Act: • does not create a 'duty of care' (it rather acts as a limitation period); • applies more broadly than just claims under s.37 of the DBP Act (for example, claims for breach of contract); • is a *longstop* date, it does not *extend* the limitation period (rather it cuts the limitation period short). Following the decision in Goodwin, the application of the duty of care is very broad and extends well beyond residential building work to any "structure" (e.g. a bridge). This has caused potentially unintended consequences in the commercial and civil infrastructure sector. This means, for example, that a contractor would have uncapped liability to the state in respect of infrastructure works, which is inconsistent with Infrastructure NSW's Commercial Principles for Infrastructure Projects (see link). When amending the duty of care, we propose it should be limited to residential building work (or at least to 'buildings' in the traditional sense), not including other structures such as bridges and elevated roads. The duty of care provision in the Building Bill should not extend the duty beyond the current drafting in the DBP Act.