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Building Commission NSW
Department of Customer Service

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RE: Proposed building reforms in NSW

The Property Council of Australia welcomes the opportunity to provide feedback on the Draft Building Bill 2024, associated Bills and consultation papers.

As Australia's peak representative of the property and construction industry, our members include the nation's major investors, owners, managers, developers, designers and builders of property of all asset classes. 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.

We acknowledge these once-in-a-generation reforms are the culmination of numerous rounds of consultation by the NSW Government and Building Commission NSW over the past five years. Following collective advocacy with other industry organisations, we were pleased that the consultation period for these reforms were extended to provide our members with more time to review and respond to the proposed changes.

The Property Council broadly supports the intent of these reforms to reduce red tape and restore consumer confidence in the building and construction sector. Consolidating ten Acts that regulate the building and construction industry is a necessary step in removing the burden of compliance administration, unnecessary duplication and overlapping regulations. However, this needs to be carefully balanced against risks of creating further complexity and confusion within the industry and undermining the architectural profession.

We are concerned about the proposed timeline to introduce these reforms, which was signposted at the NSW Building Reforms Industry Reference Group meeting earlier this week. Rushing the consideration of how different legislative instruments will interact with each other will not deliver the outcomes the government is after. There is also a real risk that critical elements could be mistakenly adopted or omitted without proper consideration, such as the potential ramifications of an appeal currently before the High Court of Australia on how key terms proposed in the draft Building Bill may be interpreted. An arbitrary deadline should not be the key driver of a truncated policy development process.

The Property Council's comments and recommendations are summarised below in order of priority, with further details on specific aspects of the draft Bills and consultation papers provided in the attachment in order of how they appear in the materials provided:

1. There are several discrepancies between fundamental terms used throughout the proposed legislation. In their current form, key terms such as 'building work' and 'carry out work' are ambiguous and need to be clearly defined to provide greater certainty to industry.

2. We support the intent of establishing a new regime for building approvals; however, several aspects of the current drafting of the Bill are unclear or do not clearly reflect the intent outlined in the consultation papers or the proposed building approvals framework.
3. The definition of 'developer' in the *Building Compliance and Enforcement Bill 2024* (BCE Bill) can be interpreted broadly and risks capturing unintended professions.
4. We support the proposed staging of reforms to change licensing obligations, with the initial focus being on residential building work. Grandfathering of existing licence classes needs to be considered as part of the transition to the new licensing framework.
5. We are concerned that the draft BCE Bill significantly expands Building Commission NSW's enforcement powers and does not provide a transparent framework around the appointment of the Building Commissioner and their roles and responsibilities.
6. The duty of care provision in the proposed Building Bill should not extend the duty beyond the current drafting in the *Design and Building Practitioners Act 2020* (DBP Act).
7. Provide further clarification of decennial liability insurance (DLI) requirements, including a mandated waiver of subrogation and consistent coverage of building elements. DLI should not be incentivised before there are multiple competitive providers in the market.
8. Regulating manufactured homes as 'prefabricated building work' under the Building Bill has the potential to undermine the existing approval pathway for manufactured home estates. The existing approval pathway should be retained.
9. The proposed Building Bill should prescribe how liability is apportioned between separate providers of statutory warranties.
10. We do not support the imposition of an additional developer levy and want clarity that the levy proposed under the BCE Bill will act in the same way as the existing developer levy under the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (NSW) (RAB Act).
11. We broadly support a dispute resolution process whereby claims are brought to Building Commission NSW.

We recognise that much of the detail about key elements of the proposed reforms will be prescribed in the regulations that will be developed once the Bill is passed. However, we are not able to support the proposed legislation without in-depth consultation on the draft regulations. Industry needs to be provided with the assurance that the implications of the proposed reforms are carefully balanced against the aims of the legislation.

Given the extensive nature of the changes, industry should also be provided an opportunity to review and comment on any proposed savings and transitional provisions and that a staged commencement of any reforms is considered. This will ensure that industry is given appropriate lead times to implement changing requirements.

The Property Council thank Building Commission NSW for the opportunity to provide a submission to this consultation. If you have any questions about this submission, please contact NSW Policy Manager, Emma Thompson at ethompson@propertycouncil.com.au or by phone on 0458 294 817.

Yours sincerely

Katie Stevenson
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Property Council of Australia

DRAFT BUILDING BILL 2024, ASSOCIATED BILLS AND CONSULTATION PAPERS - PROPERTY COUNCIL RECOMMENDATIONS

Draft Building Bill 2024

1. Due to the case of *Pafburn Pty Limited & Anor v. The Owners - Strata Plan No 84674* (*Pafburn*) which is currently before the High Court of Australia, we are concerned that the phrase 'carry out', which is used throughout the Bill, may have an unintended meaning.

   For example, clause 21(1) provides that 'a person must not carry out licensed work' unless licensed. We understand that the phrase is intended to capture the person who performs the work themselves (e.g., a contractor); and not intended to capture the person who contracts to deliver the work and therefore procures the contractor to perform the work (i.e. the developer).

   Depending on the High Court's decision in *Pafburn*, the phrase may be given the latter meaning, such that a developer will need to be licensed if it contracts with another party to deliver licensed work. This would have broad-reaching and unintended consequences throughout the Bill.

   If the meaning of 'carry out' is not limited as per the recommended definition below, there is a risk that a broad range of contracts, such as development agreements and project delivery agreements, could inadvertently fall into the definition of 'home building work contract'. This concern is not remedied by the application of clause 66(2).

   Recommendations: We propose the following definition of 'carry out' for the Department's consideration in drafting the revised Bill.

   In this Act, a person is taken to carry out licensed work, home building work or building work if that person is physically carrying out licensed work, home building work or building work themselves, and in the case of a body corporate:

   - *a body corporate is taken to carry out licensed work, home building work or building work if the body corporate's employees are physically carrying out the licensed work, home building work or building work; and*
   - *a body corporate is not taken to carry out licensed work, home building work or building work merely because the body corporate has contracted to procure that work from a third party who will physically carry out the work.*

     Note- For example:
   - where a landowner engages a developer to deliver building work, and the developer engages a licensed contractor to carry out that building work, the developer is not taken to be carrying out the building work; or
   - where a landowner engages a head contractor to deliver building work, and the head contractor engages licensed subcontractors to carry out part of that building work, the head contractor is not taken to be carrying out the subcontracted building work.

2. The term 'building work' is used in several ways throughout the Bill and one of them relates to the requirement for a building approval. The proposed definition is much broader than the current requirements under the *Environmental Planning and Assessment Act 1979* (NSW) (EP&A Act) for a construction certificate.

   A building approval should not be required for preparation of designs and engineering work; nor should it be required for non-physical activities involved in the erection of a building. It is also confusing to require a building approval for subdivision work, which also

falls under the 'building work' definition, when most subdivision works do not typically involve the erection of buildings.

Recommendations:

- The definition of 'building work' should be amended so that it does not capture non-physical activities involved in the erection of a building such as design preparations, engineering work and the supply of materials.
- 'Subdivision work' should be excluded from the definition of 'building work' and be separately defined in the Bill. We note that a definition was included in the proposed building approvals framework and want to clarify that it is the same as the one included in the exposure draft Bill from September 2022.

3. We acknowledge that the Bill aims to consolidates several instruments and reduce red tape and duplication. However, some of the proposed changes run the risk of causing confusion and increased discrepancy amongst various pieces of legislation. Industry is already grappling with conflicting requirements and some of the new terms proposed by the draft Building Bill are unlikely to provide much-needed clarity.

   Examples of inconsistency in terminology and definitions include, but are not limited to:
   - 'regulated design' (Draft Building Bill) vs 'regulated design' (DBP Act) vs 'construction issued regulated design' (Design and Building Practitioners Regulation 2021 (DBP Regulation)
   - 'design compliance declarations' are defined slightly differently within all instruments
   - 'licensed design practitioner' (Draft Building Bill) vs 'registered design practitioner' (D&BP Act)
   - 'professional engineer' (Draft Building Bill) vs 'registered professional engineer' (DBP Act)
   - 'licensed individual' / 'license holder' (Draft Building Bill) vs 'registered building practitioner' (DBP Act)
   - 'building approval' (Building Bill) vs 'construction certificate' (Building and Development Certifiers Regulation 2020 and DBP Regulation) vs 'building certificate' (DBP Act).

   Several definitions throughout the Bill require clarification or amendment. Specific recommendations to amend or clarify proposed definitions are outlined below.

   Recommendations:

   - New or amended terms need to be clearly and consistently defined across legislative instruments to avoid confusion, complexity and risk of misinterpretation by industry and the public.
   - The requirements for 'approved form', as defined in Schedule 4, should be clearly outlined and not contradict other instruments.
   - The definition of 'home building work' should be amended to:
     - clarify that off-the-plan sales contracts are not home building work contracts,
     - expressly exclude prefabricated building work for Land Lease communities, regardless of their ownership, and
     - include a category of home building work or establish a monetary threshold for works that are small enough to allow homeowners to undertake minor works.
   - The definition of 'home' should exclude student accommodation and serviced apartment buildings to align with the exclusions proposed in the *Consumer*

protections for home building work position paper. These buildings are not traditional dwellings and are owned by institutional investors, rather than private owners.
- Clause (12)(1)(a)(iii) should be amended to include the same limitations included in paragraphs (i) and (ii). We assume this was unintended as part of the drafting process.
- The definition of 'relevant building' should be amended to clarify what parts of a building are taken to 'service' a class 2 part by expressly listing the parts of the building. If this proposal is not accepted, the Department should provide some examples immediately underneath the definition to assist with interpreting how the definition is intended to work.
- The definition of 'owner-builder work' should cover family members or where a home is currently not inhabited by the owner, but it is intended to be their principal place of residence. Owner-builder work should also be allowed for an investment property of an investment property owned by a close associate.
- 'Building element' is defined twice in the Building Bill – at sections 9 and 112 – and used throughout. To avoid confusion, we suggest that in Chapter 6 the defined term is 'relevant building element'.
- Given its focus on the conduct of certifiers, body corporates and local councils, we recommend renaming Chapter 10 to "Requirements of approval authorities" to align with the *Building and Development Certifiers Act 2018* (NSW) (BDC Act).

4. We broadly support the intent of establishing a regime for building approvals under the Building Bill. However, in its current form, some aspects of Chapter 6 are unclear or do not meet the intent outlined in the position paper.

   In addition, this chapter does not address how works that are undertaken before a building approval is issued are rectified. A clear process is required to allow for a benchmark for compliance and fire safety to be established for the building to enable maintenance and future building work to be undertaken, and to enable property to be settled on when being sold.

   We propose the following recommendations to provide clarity on uncertain terms and processes, or to retain protections under existing legislation.

   Recommendations:

   - The basis for rejecting an application for a building approval under clause 117 should be clearly identified.
   - Existing rights under the EP&A Act should be retained for building approval applications (e.g., refusal or deemed refusal appeal rights or third-party rights to challenge the issue of a building approval).
   - Clause 119 should be reworded to clearly outline when this applies to staged building approvals.
   - Clause 121(4) should be either amended or include specific examples to identify scenarios where the impacts of other stages of development do not need to be considered.
   - The regulations should offer guidance on what 'consistency' means in the context of clause 122 to meet the intent of the position paper, which provides that development consents deal with planning impacts and not constructability issues.
   - The treatment of unauthorised building works needs to be addressed in more detail in the Building Bill.
   - More detail is required about how the variation process outlined in clause 125 is proposed to operate. There is an opportunity to clearly state the basis for which variations can be obtained and ensure the legislation addresses new or updated code requirements.

- Clause 134 should be amended to make it clear that a certifier should not issue a fire safety certificate, as this should be issued by a licensed professional.

5. Further clarification is needed about the proposed interactions between the EP&A Act and the Building Bill, particularly in relation to exempt, complying and Crown development. It is unclear from the current drafting of the Bill whether these development types are excluded from the requirement to obtain a building approval, although the intent is set out in the proposed building approvals framework. It is also unclear whether building requirements for complying and Crown development will be amalgamated into the proposed Building Bill. This, along with proposed changes to well-known terminology (e.g., moving from 'construction certificate' to 'building approval'), runs the risk of causing confusion for industry and the community.

   As prefaced above, competing definitions and terms need to be resolved to avoid confusion within the industry and ensure that the right people with the right qualifications and experience are performing required functions. In particular, the Property Council does not support mandating that certifiers, as an approval authority, assess any DBP Act requirements at the construction certificate stage. Certifiers are not equipped or trained to assess the requirements of regulated designs and therefore should only be bound by the BDC Act and Regulation to assess construction certificates under the EP&A Act and Regulation.

   Recommendations:

   - Clarify whether building approvals are required for exempt, complying and Crown development as there is a potential risk of overlap between the EP&A Act and the proposed Building Bill.
   - For exempt development, clarify whether it will be:
     - subject to the home building contract requirements in Chapter 4. The Property Council broadly supports this if it meets the monetary thresholds for consumer protection purposes, and
     - considered as licensed work under the proposed legislation.
   - If complying development requires a building approval, clause 122 should also refer to any complying development certificate that is in force, in the same way that development consents are referenced.

6. The Property Council supports the proposed definition of 'professional engineering work' to capture the range of specialist services required in the development of a building. We propose some minor amendments to what is classified as 'engineering' in the definition to better reflect some of the skill sets and procurement methods employed in these industry specialisations.

   For example, fire safety engineering is typically understood by the industry to be undertaken by fire engineers and relates to the preparation of fire performance solutions. There is a preference for fire services engineering and fire safety engineering to be treated separately because they require different study, experience and have different competencies.

   Recommendations:

   - Vertical transport engineering, environmentally sustainable design (ESD) engineering and acoustic engineering should be included in the definition of 'engineering'.
   - Fire services engineering should be included in the definition of 'engineering' or included in the definition of 'fire safety engineering'.

- Façade engineering needs to be captured in the definition of 'engineering', either as a standalone discipline or a sub-set of structural engineering.

7. Subject to our comments above regarding *Pafburn*, we support the requirement in Chapter 3 that allows a person with an appropriate licence to carry out work, as opposed to the current requirement not to enter a contract without an appropriate licence. However, the existing wording around 'licensed work' causes concern for developers entering contracts for home building work (e.g., project development agreements) where they were not intending to carry out the work but there was ambiguity as to whether a licence was required to be held by the developer.

   It is understood that the regulations will prescribe requirements for licences to authorise the carrying out of certain types of work. We request to be consulted on the development of the regulations to ensure that any new licensing regime either aligns with or appropriately transitions from existing licensing frameworks.

   Recommendations:

   - Clause 31 should be amended to be clearer about whether it is intended to remove the assessment of competency from the relevant government department, and if the regulations will cover all licence classes.

8. The Property Council generally supports the introduction of more detailed requirements for contracts for 'home building work'. The current drafting of some elements of this part of the Bill do not reflect the practical realities of home building and may run the risk of creating uncertainty for the industry.

   For example, clause 67(b) provides that persons who agree under a contract to 'ensure home building work is carried out' are deemed to be contractors. That means, for example, a developer under a project delivery agreement would be deemed a contractor, meaning they would need to be licenced. We understand this is not the intention of the Bill; however, we note this concern is not remedied by the provisions in clause 66(2).

   Additionally, clause 77 restricts progress payments to no more than the value of the work 'completed' at the time payment is required, which generally aligns with current industry practices. However, in clause 104(1), 'complete' is taken to mean final completion of the entire building work. This does not reflect the Department's intention for clause 77 as set out in the *Consumer protections for home building work* position paper. The current wording also does not reflect that progress payments are often made for construction material not yet incorporated in the building work. There may be instances where payment for items to be ordered but not completed may need to be covered (at least partially) by the owner, such as large orders for windows. We believe the intent of the clause is correct, but the wording is too restrictive for instances which have been agreed in advance.

   Recommendations:

   - Amend clause 67 of the draft Building bill to ensure that developers do not need to be licensed.
   - We propose an amended clause 77 for the Department's consideration in drafting the revised Bill:

*If a major work contract provides for progress payments, the required progress payments must not ~~be more than the value of the work completed~~ **claim payment for work not yet carried out or materials not yet supplied** at the time the payment is required to be made.*

- Business-to-business contracts should be excluded from the requirement for progress payments under clause 77 as the parties should have the ability to make and manage their own commercial arrangements.
- The regulations should identify what needs to be included in the checklist referenced in clause 90(4)(e).
- We propose an amended clause 92(2) for the Department's consideration in drafting the revised Bill:

  *A provision in a **home building work** contract or other **similar** agreement is void to the extent that it may be reasonably construed as an attempt to create an estate or interest in land.*

- The wording of clause 93 should be expanded to protect owners against works being carried out by a non-compliant person who is engaged by a third party (e.g., a subcontractor).

9. We are concerned about the lack of definition in the Bill around 'applicable standards' and 'approved plans' in relation to major defects. This creates uncertainty in the objective test that a builder must meet and requirements that may be introduced after the commencement of works (i.e., work that was compliant at the time it was undertaken is not compliant and gives rise to a defect post-completion).

   We also understand that while 'design work' is not intended to be captured by the proposed Building Bill and Regulation for 'home building work', the definition of 'major defect' specifically calls out defects to include defective design. Further clarity or consistency in terminology should be adopted for the purpose of this definition.

   Additionally, the definition of National Construction Code (NCC) within the Dictionary is confusing and appears to enable the regulations to prescribe the relevant version of the NCC and allows to extend further requirements (unknown at the time of design works and building works for 2- and 6-year defect claims).

   It is also not appropriate for any consultant (who is not required to be registered under the DBP Act) making claims that a defect is 'significant' and will cause, or is likely to cause, threat of collapse, destruction of the building or inability to inhabit. There must be a real threat of damage or destruction and inhabitability.

   Recommendations:

   - Greater clarity is required around 'applicable standards' and 'approved plans' in relation to major defects.
   - Defects claimed as 'major defects' under the Building Bill must be accompanied by a report from a registered design practitioner (under the DBP Act) confirming that the impact is 'significant' and that the defect will, or will in the future, cause a failure (even if at the time there is no evidence of such defect).

10. We are concerned that the 'warranty provider' definition departs from the position in the *Home Building Act 1989* (NSW) and does not make sense in all circumstances. The table below summarises our position on the elements of this definition.

Responsible person	Comments
The person who enters a contract for the work with the owner of the land	We assume this is intended to capture the person who carries out home building work (i.e., the builder), and on small projects that will be the case. However, on large projects, this could be a developer, meaning that the developer (rather than the builder) owes the statutory warranties, and the builder does not owe any statutory warranties. Presumably, this is not the intention of the section and should be clarified. From a developer's point of view, the statutory warranties should be owed by the builder who contracts to deliver the work.
If a person did not enter a contract with the owner for the work – the person who contracts or arranges for, facilitates or otherwise causes, whether directly or indirectly, the work to be carried out	This wording, from the RAB Act, has long been open to uncertainty for industry participants. It is extremely broad and could cover lenders, government funding bodies and developers, in circumstances where the builder itself does not provide equivalent warranties. The significant expansion of the entities that owe statutory warranties could result in industry participants reconsidering their role in housing development.
A person who carries out the work under a subcontract	Supported. This is consistent with the current provisions of the *Home Building Act 1989* (NSW).

Recommendations:

- The Bill should make it clearer that the holder of a construction licence who carries out the home building work should owe the statutory warranties.
- As the statutory warranties are owed by multiple parties as prescribed by clause 98, the new Building Bill should prescribe how liability is apportioned between the separate warranty providers.

11. We broadly support the options included in clause 104 for determining the completion of home building work to trigger the statutory warranty period. These options address concerns raised that completion would rely on the issuance of an occupation certificate. However, a change to the definition of 'practically complete' may cause greater uncertainty and risk and give rise to more disputes between consumers and builders.

    However, the current drafting does not account for staged completion of a single or multiple buildings. For example, where there are multiple connected towers (e.g. residential and commercial), the common podium level would be the first part of the building that is 'complete' and be able to have an occupation certificate issued, followed by separate approvals/certificates issued for subsequent components as they are finalised.

    We also note that clause 104(1)(c)(i) provides that home building work will be complete if an application has been made for the completion approval, and it has not been issued within

six months. This does not contemplate circumstances where it has not been issued for good reason, like the work being non-compliant or a prohibition order being issued.

With the proposed change to the definition of 'practically complete' in clause 104(4), there will be a requirement for all limbs of the test to be satisfied 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 occupation certificate may have been granted, yet limb (a) may not be satisfied as there may be minor defects that need to be remedied.

Recommendations:

- The regulations should be clear to allow for completions to be staged if there are multiple stages in a development and must ensure that associated statutory warranties aligns with the corresponding stages.
- The Property Council suggests that the definition of 'practically complete' is amended as follows:

  '...(a) is practically complete in compliance with the contract, including...'

- Alternatively, the definition of 'practically complete' in clause 104 can be amended by combining limbs (a) and (b) and deleting limb (d) or amending the definition such that all other limbs must be achieved for the occupation certificate to be issued.

12. The Property Council broadly supports the proposed improvements to the regulation of prefabricated building work, which will encourage growth in this underutilised construction method.

    While well intentioned, regulating manufactured homes as 'prefabricated building work' under the Building Bill has the potential to undermine the existing approval pathway for manufactured home estates (MHEs) under section 68 of the *Local Government Act 1993* (NSW) (LG Act) if not carefully managed. While the Property Council broadly supports improvements to the certification process for prefabricated building work, it is unclear whether this process is intended to run in parallel with or replace the existing certification regime for manufactured homes in the Local Government (MHE) Regulation.

    We welcome the proposed regime that allows a manufacturer to provide a building declaration from a licensed person for a prefabricated building and allows the on-site builder to rely on that declaration. However, the draft provisions mean that a locally registered person must provide the declaration on behalf of the manufacturer, and a person supplying the prefabricated building must be licensed in NSW. It would be impractical for a NSW licensed builder to individually sign off and take on the professional liability for a prefabricated building component manufactured in a factory domestically or internationally.

    The technology for manufacture and certification of prefabricated buildings is developing, and we consider that to meet NSW's housing needs, a streamlined process for certification of overseas manufactured prefabricated homes, which ensures the quality of those homes, will be important. We note clause 148 provides future flexibility regarding regulations governing prefabricated buildings built outside NSW and request that industry is consulted on these.

Recommendations:

- Retain the existing approval pathway under the LG Act for manufactured home installation.
- Provide further clarification to industry to better understand the implications of any planned regulatory change on the manufactured homes and movable dwellings.
- That industry is consulted on the development of the regulations governing prefabricated buildings outside NSW.

13. The Property Council broadly supports a dispute resolution process whereby claims are brought to Building Commission NSW. Sufficient resourcing with the required capacity and capability will be needed to assess the potential volume of claims brought forward.

    Given the jurisdictional limits of the NSW Civil and Administrative Tribunal to hear claims up to a value of $500,000, it is unclear how claims exceeding this amount are intended to be addressed in the proposed regime in Chapter 7 of the Building Bill.

    Recommendations:

    - Assessments by Building Commission NSW must be against the definition of 'major defect' under the Building Bill and not against the definition of 'serious defect' under the RAB Act.

14. The current drafting of Chapter 11 is unclear as to whether the provisions relating to the inspection of specialist work will mirror the existing Fair Trading inspection requirements for plumbing, drainage and gas. It is also unclear what will be required in terms of inspections for electrical installations, as current electrical installations only need a certificate of compliance for electrical work filed after works are complete.

    In its current form, clause 223 does not specify which works this would apply to. If all specialist work is required to be inspected, there is a risk that this will place increased pressure on Building Commission resources to undertake inspections in a timely manner. The Property Council recommends including a monetary threshold for specialist works to be inspected, so that minor works (e.g., installing a single light switch) do not clog the system.

    Recommendations:

    - The regulations should be consistent with or not duplicate any existing requirements for specialist works.
    - The regulations should also include a monetary threshold for specialist work that needs to be notified and/or inspected, to ensure that inspections are not required for prescribed minor works.

15. We support the consolidation of obligations under the DBP Act and the EP&A Act under the Building Bill. When finalising the Building Bill, 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 section 37 of the DBP Act (for example, claims for breach of contract), and

- is a long-stop date, it does not extend the limitation period (rather, it cuts the limitation period short).

Any proposed changes to the duty of care need to provide certainty for builders and owners and enable builders to be able to understand their risk exposure (and therefore be able to take on further work in the industry) while still giving owners a significant period of time to make a claim.

Following the NSW Court of Appeal decision in *Roberts v Goodwin Street Developments Pty Ltd*, 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.

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. In its current drafting, if a developer engages a head contractor, and that head contractor engages a consultant to undertake design work, the head contractor owes a duty of care in respect of the work performed by the consultant (in addition to the consultant itself owing the duty of care). This means that the head contractor is deemed to be 'carrying out' the work, even if they themselves are not actually performing that work. This is contrary to the use of the phase 'carries out' in other parts of the Building Bill.

Recommendations:

- The duty of care provision in the Building Bill should not extend the duty beyond the current drafting in the DBP Act and should only apply to residential building work (or, in the alternative, the duty should only apply to 'buildings' in the traditional sense (i.e., not 'structures' more broadly).
- Amend the Building Bill to clarify that a case cannot be brought more than 10 years after the date of completion of the building work and where the building work is completed in stages (and subject to staged occupational approval) that it is 10 years from the issuance of each staged occupation approval.

Draft Building Compliance and Enforcement Bill 2024

1. The Property Council is concerned that the proposed definition of 'developer' in clause 6 is too broad and may encompass individuals that are not intended to be included by the definition. The use of words 'arranged for, or facilitated' and 'directly or indirectly', are particularly broad and may capture:
   - Financiers,
   - Company directors,
   - Holding companies,
   - Government agencies who enter into development agreements and project delivery agreements, or
   - Development managers who co-ordinate and control building work.

Recommendations:

- Propose that the definition of 'developer' in the BCE Bill is the same as the definition under section 4 of the RAB Act.

2. The Property Council views the powers under clause 9(2) that suspend the 10-year limitation on the Building Commission's enforcement powers if an investigation is commenced as a significant extension of their powers. The 10-year limitation period is necessary to provide industry certainty as to their liability under the BCE Bill. It is also not clear what constitutes an 'investigation' - could it merely be an employee of the Commission opening a file?

   If the 10-year period is extended, then the limitation period under clause 233 of the Building Bill must also be extended, to enable a developer to make the appropriate contractual claims against its contractors.

   The Property Council would like certainty that Division 2 does not allow the Secretary to impose an additional levy, rather the existing RAB Act levy migrates to the proposed Building Bill.

   The Dictionary states 'authority' will be defined in clause 20, however it is not. We are concerned that this may cause misinterpretation. We understand the intent is for council to be responsible for development consent compliance and the Secretary for Building Approval (BA). However, without definition, the authority could include council officers enforcing the Building Bill, noting a BA is treated as part of a development consent.

   The drafting of clause 58 provides greater powers than those under existing legislation existing powers. We understand under this drafting, compliance orders can now be given for class 3 and 9c buildings (in addition to class 1 and 2) and can be issued to a broader range of people including developers. The same comment applies to clause 64.

   Recommendations:

   - Reinstate a hard 10-year limitation on the Building Commission's enforcement powers, to align with the original intent under the RAB Act. Alternatively, we request that:
     - what constitutes an investigation is defined, and includes notice being given to the developer, and
     - if an 'investigation' is commenced, the 10-year period is extended by a fixed period (e.g., 6 months).
   - Confirm no additional developer levy will be imposed.
   - Amend clause 20 to include a definition of 'authority', consistent with the Dictionary.

3. Under clause 69, a building work rectification order (BWRO) can be given to a developer or 'another person responsible for the building work'. The current drafting of this clause is very broad and could potentially mean that a BWRO could be given to a subcontractor, consultant, certifier or tenant. Given the already broad definition of 'developer', we are concerned about any other classes of person who may be intended to be captured by this provision.

   We are also concerned about the potential risk of developers getting a BWRO to rectify minor defects beyond the 2-year statutory warranty period. To resolve this issue, we recommend removing clause 71(4) or amending it to make it clear that developers are liable for rectifying defects within the prescribed warranty period. The provisions of clause 59(4) should also align with this recommendation for compliance orders.

Recommendations:

- The Bill should more clearly specify who a BWRO can be issued to.
- The Bill should be amended to specify that a BWRO or a compliance order should only be issued to rectify minor defects if the order is issued within the prescribed statutory warranty period for minor defects.

4. Under clause 156, the Building Commissioner, not the Secretary of the Department, has the powers under this Act. Further, the Building Commissioner is not subject to the control and direction of the Secretary. This is a departure from the current arrangements, whereby the Secretary has powers under the RAB Act and can delegate those powers.

   The proposed approach appears to be like how the 24-Hour Economy Commissioner is appointed; however, the *24-Hour Economy Commissioner Act 2023*(NSW) goes into more detail about the functions and powers of that Commissioner. As a result, we are concerned that there is no framework around the appointment of the Building Commissioner and the manner in which they must perform the role.

   Recommendations:

   - Provide greater transparency around the appointment of the Building Commissioner and the manner in which they must perform the role.

<u>Draft Building Insurance Bill 2024</u>

1. Any policy of decennial liability insurance (DLI) should require that the terms of the policy include a waiver of subrogation. Without the waiver, if the insurer pays out an insurance claim, it will be able to sue the builders and other parties in the contracting chain on behalf of the owners. This defeats a core element of DLI policies, which is to provide finality for consumers, builders and developers in respect of building claims.

   We understand the NSW Government intends for DLI to become the default consumer protection mechanism for class two buildings in the medium-long term. Part 5 of the bill outlines further details of how DLI will operate, providing foundational regulation to support the growth of the DLI market.

   It is important that the NSW Government only seeks to incentivise uptake of this insurance product when there are multiple, competitive providers and when the product provides the correct coverage in line with consumer expectations.

   In 2023, the Property Council responded to the Regulatory Impact Statement (RIS) outlining the proposed model and requirements of mandated DLI in NSW. Our two key concerns regarding market maturity and consistency of coverage remain salient.

   At the time of this consultation, the only DLI product in the market did not meet the coverage requirements outlined in the RIS, and we called for the Building Commission to work closely with new providers to ensure these critical building elements in common property are covered in future DLI products.

   Overseas DLI markets demonstrate that the price of premiums increases significantly with the additional coverage of certain building elements. If the local DLI product follows the same model, it will be crucial that price modelling has considered how providers will process these additional elements in the premium.

Recommendations:

- Decennial insurance policy should have the requirement to have a waiver of subrogation.
- Make sure there is an established and competitive DLI market before policy is enacted to incentivise uptake.
- Make sure DLI products provide consistent levels of coverage in line with consumer expectations.

2. Under the Home Building Regulation 2014, Home Building Insurance (HBI) is not required for multi-storey buildings. We propose that this is made clear here or in the regulations to provide clarity and certainty to industry.

   We propose that this insurance should not be required for rectification work to multi-storey buildings. In other words, if HBI was not required when the building was newly constructed, it should not be required for rectification work to that building. The builders who work on multi-storey buildings may not have that insurance as a matter of course, and the requirement to obtain it delays the commencement of rectification works.

   As a minimum, if a Decennial Liability Insurance (DLI) policy is in place, or a strata bond is still in place, then HBI should not be required for rectification works to multi-storey buildings.

   Recommendations:

   - Ensure new buildings above three storeys remain exempt from requiring Home Building Insurance.
   - HBI should not be required for rectification work of a building that did not require this type of insurance when newly constructed.
   - If the above cannot be realised, at a minimum a multi-storey building with a DLI or strata building bond in place should not be required to take out HBI.

Draft Building (Licensing) Regulation 2024

The Property Council supports the staged reforms Building Commission will undertake to change licensing obligations for industry. It is sensible to focus on residential building work before the expansion into other classes as outlined in the consultation video. Industry will require further consultation as this expands into other building classes.

We support retaining the licensing obligation for residential building work above the $5,000 threshold. We are also supportive of the integration and expansion of the licensing of building designers and see the distinction between classes to be sufficient.

We support the addition of waterproofing as a class of specialist work and welcome the consideration of licensing exclusion for incidental waterproofing work that will be outlined in later consultation. We would like to propose a new class of specialist work for roof drainage and stormwater drainage, separate to roof plumbing specialist work. This is separate to the work defined as plumbing and drainage in the *Plumbing and Drainage Act 2011*(NSW).

Grandfathering of licence classes needs to be considered as part of the transition protocol, especially between licence classes B and C. Industry experience and tenure should be considered for those wishing to move from class C to class B, as well as the fact that a license was not previously required. Many licence holders under the current scheme have either the experience or knowledge and understanding of many of the classes not covered under the proposed class C licence and on paper it appears the proposed changes would exclude them from a class B licence.

Despite this knowledge and experience, the framework as proposed for qualification of the revised licence classes may adversely affect business and industry veterans from operating in areas that previous licence classes covered, or for which they were not required. The impact of the proposed changes could create a shortage of qualified, or lead to an exodus of, practitioners from these licence classes who either feel they cannot meet the requirements for that class of licence or find the process of re applying or upgrading too tiresome.

Further, we look forward to participating in further consultation for the additional license classes:

- Engineering technologists and associates
- BCA consultants
- Pre-purchase and defect inspectors
- Landscape architects

Recommendations:

- That industry is involved in future consultation on the revised licensing framework to outline opportunities to support mobility and capability uplift in the sector.
- To support license holders to understand their obligations and standards used to complete work, we recommend improving the accessibility of the standards to make them both free and easily downloadable in PDF format.
- The regulations should include something about preparation of performance solution reports referenced in clause 119(2) of the Building Bill to ensure the licenced professionals carrying out the work are also the ones preparing the reports.
- Propose a new class of specialist work for roof drainage and stormwater drainage, separate to roof plumbing specialist work.
- Ensure appropriate transition provisions for existing license holders.