

Building Commission NSW Position Paper on Regulation of Prefabricated Buildings

Draft Building Bill 2024

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About this paper

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

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Glossary

The following is a list of terms and acronyms used in this document.

Term	Description
ABCB	Australian Building Codes Board – a Council of Australian Government standards writing body that is responsible for the development of the <i>National Construction Code</i> (NCC).
ACL	<i>Australian Consumer Law</i> .
BCA	Building Code of Australia – Volumes One and Two of the <i>National Construction Code</i> (NCC).
Building Work	Defined in the <i>Environmental Planning and Assessment Act 1979</i> as “any physical activity involved in the erection of a building”.
DBP Act	<i>Design and Building Practitioners Act 2020</i> .
EP&A Act	<i>Environmental Planning and Assessment Act 1979</i> .
EP&A Reg	Environmental Planning & Assessment Regulation 2000.
HB Act	<i>Home Building Act 1989</i> .
HBC scheme	Insurance under the Home Building Compensation scheme provides a safety net for homeowners, if a licensed contractor cannot complete work or honour statutory warranties due to insolvency, death, disappearance, or licence suspension for failing to comply with an order to pay compensation to the homeowner.
LEP	Local Environmental Plan, which is a legal document that provides controls and guidelines for development in an area.
LG Act	<i>Local Government Act 1993</i> .
NCAT	NSW Civil and Administrative Tribunal.
NCC	<p>The <i>National Construction Code</i> is published in three volumes. The Building Code of Australia is Volumes One and Two and the Plumbing Code of Australia is Volume Three.</p> <p>The NCC is a performance-based code containing all performance requirements for the construction of buildings, a set of technical design and construction provisions for buildings. As a performance-based code, it sets the minimum required level for the safety, health, amenity, accessibility and sustainability of certain buildings.</p>

Term	Description
NRF	Draft 'National Registration Framework for Building Practitioners' discussion paper released by the Australian Building Codes Board (ABCB) on 26 June 2020.
OC	Occupation Certificate – authorises the occupation and use of a new building.
Owner-builder work	<p>Owner-builder work means home building work that is one or more of the following:</p> <ul style="list-style-type: none"> the carrying out of exempt building work prescribed by the regulations the engagement of a licence holder to carry out residential building work the coordination of the supply and installation of a kit home or prefabricated buildings, and relating to the erection of a dwelling house or secondary dwelling, but only if: development consent is required to carry out the work, or the work may be carried out as complying development.
Product Safety Act	<i>Building Products (Safety) Act 2017.</i>
RAB Act	<i>Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020.</i>
RLLC Act	<i>Residential (Land Lease) Communities Act 2013.</i>
SIRA	NSW State Insurance Regulatory Authority.
Specialist work	<p>Means the following, whether or not done in connection with building work:</p> <ul style="list-style-type: none"> electrical wiring work within the meaning of the <i>Gas and Electricity (Consumer Safety) Act 2017</i> gasfitting work within the meaning of the <i>Gas and Electricity (Consumer Safety) Act 2017</i> mechanical services and medical gas work medical gasfitting work within the meaning of the <i>Gas and Electricity (Consumer Safety) Act 2017</i> medical gas technician work within the meaning of the <i>Gas and Electricity (Consumer Safety) Act 2017</i> plumbing and drainage work refrigeration work or air-conditioning work prescribed by the regulations waterproofing work (under the proposed Building Bill)

Term	Description
	<ul style="list-style-type: none"> work prescribed by clause 14 of the Home Building Regulation 2014
The BCE Bill	The proposed Building Compliance and Enforcement Bill 2024.
The Bill	The proposed Building Bill 2024.
The Secretary	<i>Secretary</i> means the Secretary of the NSW Department of Customer Service.

1. Executive Summary

The NSW Government has committed to restoring confidence in the NSW construction industry through comprehensive reform to the regulatory oversight of building work in NSW. These reforms are centred around improving transparency, accountability, and the quality of work in the NSW building and construction industry. These commitments, and industry and community support for change, have highlighted the costs of substandard, non-compliant and unsafe work, which are felt by homeowners and building owners who rely upon industry practitioners to produce compliant work.

As part of these reforms, Building Commission NSW is proposing a new regulatory framework for prefabricated and manufactured buildings to improve building quality in the sector and provide better protection for homeowners and building owners.

Prefabricated buildings and components can offer innovative, timely and environmentally conscious solutions to the building and construction industry and have a role to play in rebuilding communities in the wake of disaster. The proposals for strengthened regulatory oversight of prefabricated building work demonstrates the NSW Government's position to support innovation in this space to make the regulatory framework future ready to ensure that all buildings that people live and work in are compliant, safe and resilient. This process will seek to set minimum standards across the industry to create consistent built environment outcomes and a competitive offsite construction industry.

These reforms are proposed to be included in the broader building reform package that the NSW Government is considering in its proposed Building Bill. The development of the proposed Building Bill has been informed by ongoing consultation on draft legislation over the past few years. The draft Building Bill (**the Bill**) will cover the key elements detailed in this paper, including:

- regulating prefabricated building work by redefining it as building work,
- licensing of practitioners to ensure that work is undertaken by competent, qualified and experienced people,
- appropriate certification for prefabricated building work through a chain of responsibility that operates from design through to installation, and
- implementing key consumer protections for prefabricated home building work.

Building Commission NSW has previously consulted key stakeholders on the proposed regulatory reform for prefabricated building work to ensure the reforms will deliver contemporary and best practice regulation that lifts building standards in NSW. The targeted consultation with key stakeholders confirmed there was general support for the proposed framework detailed in this paper.

The purpose of this paper is to clearly articulate a final proposed regulatory framework following the previous consultation, and to present a complete end-to-end process across planning, building and local government regulatory frameworks.

The drafting set out in this paper may change subject to further consultation as part of the broader consideration of the Bill.

While this paper will seek to define the ambit of responsibilities for delivery of compliant and trustworthy buildings constructed offsite, it must be considered within the broader regulatory landscape that prefabrication operates in. This includes broader discussions on the financial viability of prefabricated building manufacturers, prefabrication in a global supply chain and leveraging expertise from modern methods of construction to the delivery of safe and resilient homes and buildings. The framework detailed in this paper will feed into the broader work of the NSW Government Modern Methods of Construction Taskforce and the review of prefabricated building work by the Australian Building Codes Board (**ABCB**).

2. Introduction

Prefabricated building work is the construction of a building, or part of a building, at a place other than its final location, usually within a factory. Prefabricated buildings can be referred to by other names such as modern methods of construction, offsite fabrication, offsite construction, modular buildings or offsite manufacturing. This paper treats these terms holistically under the concept of prefabricated building work.

Prefabricated building work can deliver innovative and affordable housing in an efficient and timely way. However, current building regulation has focused on onsite construction, which has left offsite construction treated as a building product and not subject to the same requirements as onsite building work. The proposed reforms in the Bill will establish a more comprehensive regulatory framework for this sector without compromising the efficiency and innovation of prefabricated construction.

Spectrum of prefabricated building work

While this paper proposes a bespoke regulatory framework for prefabricated building work, it is critical that the proposed regulatory framework regulates building work and does not inadvertently capture other types of manufacturing that can be appropriately regulated under other schemes such as the *Building Product (Safety) Act 2017*. This recognises that the offsite manufacturing industry delivers a spectrum of work for the construction industry and that regulatory obligations should follow risk.

Offsite manufactured work comes in three main types:

- Linear components – manufactured components intended for onsite assembly, e.g. steel beams.
- Panelised components – multiple components assembled offsite to allow for ease of transportation and then erection onsite, e.g. structural wall systems.
- Modular components – pre-assembled three-dimensional components intended to operate as manufactured with limited to no onsite construction required, e.g. bathroom pods, modular apartments or completed homes.¹

Nature and size of the industry

While there has been much focus recently on the potential for prefabricated building work to contribute to housing delivery in Australia, there is limited data on the scale of industry use of modern methods of construction. This is complicated by a lack of consistent definitions and processes to track the scale and impact of modern methods of construction use.

The Australian prefabricated building market size is currently estimated at AUD 15.77 billion². In comparison, internationally, prefabrication has a much larger market share in countries such as

¹ Emad Gad et al, Swinburne University of Technology, 'Regulatory barriers associated with prefabricated and modular construction: Final Report' (Report, October 2022) <<https://hia.com.au/our-industry/prefab-and-modular-construction>>.

² Modor Intelligence, Australia Prefabricated Buildings Market Size (2024-2029), < [Australia Prefabricated Buildings Market Size \(mordorintelligence.com\)](https://mordorintelligence.com)>

Sweden (accounting for 84%), the Netherlands (20%) and Japan (15%). Currently, the prefabrication industry is mainly driven by the demand for low- to mid-rise residential buildings, project homes, and public housing. However, the Australian prefabricated market is forecast to reach an estimated AUD 20.05 billion by 2029, at a compounded annual growth rate of 4.93% during the next 5 years (2024-2029)³. The industry has expressed that this growing demand is due to increased awareness about using prefabricated buildings as an alternative to traditional homes due to the environmental and time benefits to consumers. This view, however, is reflective of industry's aspiration, and often does not represent the breadth of operators in the industry that range from sophisticated manufacturing operations to a single practitioner constructing buildings offsite.

While the size of the industry is small in comparison to traditional building construction, the span of the industry is vast, varying from the common modular construction of classrooms and demountable offices to shipping container homes and tiny homes to award winning multi-storey houses.⁴ Therefore, there is a complexity in the scale of differences between different forms of prefabricated buildings and their construction methods – making regulation critical to ensure consistent performance outcomes regardless of location or method of construction.

Research has identified that the use of prefabricated components in buildings has increased and that defects in prefabricated components are often more expensive to fix when compared to typical construction methods.⁵ This is because prefabricated components are delivered as a completed unit and require significant changes to the integrity of the component to remediate defects that may be more straightforward with onsite construction. For example, audits of NSW apartment buildings constructed with bathroom pods found non-compliant plumbing fixtures, non-compliant waterproofing and unsafe electrical wiring. These defects needed to be remediated at a cost to the developer and builder and were caused not only by substandard design and building work but also a lack of thought by the onsite designers and builders on how to integrate these offsite constructed components into the building.

Despite the potential for offsite construction, insolvencies continue to be an issue for this part of the sector – reflecting similar trends in onsite construction. With offsite manufacturers required to invest in expensive manufacturing processes and equipment, coupled with complexity in how financing is secured from customers, offsite manufacturers face acute headwinds in scaling up resilient and sustainable businesses. While lessons can be learned from international markets, Australia will be able to build a stronger and bigger prefabricated construction sector by responding to the needs of Australian customers and building sector partners.

Building standards

A critical component in the delivery of prefabricated building work is ensuring that it complies with relevant standards. The proposed approach contemplated in this paper seeks to ensure that offsite manufactured buildings and components of buildings meet the governing and performance requirements prescribed in the National Construction Code (NCC). While a seemingly obvious proposition, that the end user will benefit from the protections of performance set out in the NCC

³ Ibid.

⁴ BuildGreenNH '26 Types of Prefab Homes', (April 2022), <<https://buildgreennh.com/types-of-prefab-homes/>>.

⁵ Callum Stutchbury Parrotte, Hong Xian Li and Linda Tivendale, 'Defect Occurrence and Management in Prefabricated Commercial Construction in Australia', (Report, March 2020), <<https://dro.deakin.edu.au/view/DU:30145573>>

regardless of where the building is constructed, the current regulatory framework does not consistently achieve this outcome.

Work has commenced both in Australia and internationally to explore opportunities for designing appropriate building standards that allow offsite constructed buildings to perform to the same standards as onsite constructed buildings without losing the innovative and efficient processes of prefabrication. Swinburne University's 2022 report into the sector identified the lack of accommodation in the NCC to offsite construction is a key impediment to its uptake.⁶ The lack of translatable standards for this work has compelled the increased use of performance solutions, which make standardising designs and building work, a key benefit of offsite construction, more challenging.

In Australia, Standards Australia and the ABCB have already started work on understanding how to ensure that prefabricated buildings can access the benefits of offsite construction while still ensuring end users can access a fit for purpose product. This work will build on the work of the International Codes Council, which is promoting a suite of standards that could be used to encourage the broader uptake of offsite manufacturing in NSW without compromising the quality of building work.

While this paper does not seek to set these standards, Building Commission NSW will continue to work with the ABCB, other regulators and industry to create a pathway to setting new standards for prefabricated building work that complements the regulatory approach set out below.

⁶ Swinburne University of Technology, 'Regulatory barriers associated with prefabricated and modular construction' (Report, October 2022) <<https://hia.com.au/our-industry/prefab-and-modular-construction>>.

3. Current regulatory landscape

Planning

While offsite manufactured buildings and components of buildings are used in the same way as onsite constructed buildings, the *Environmental Planning and Assessment Act 1979 (EP&A Act)* currently provides that a ‘building’ does not include a manufactured home, moveable dwelling or associated structure within the meaning of the *Local Government Act 1993 (LG Act)*.⁷

The LG Act defines ‘manufactured home’ as a self-contained dwelling (that is, a dwelling that includes at least one kitchen, bathroom, bedroom and living area and that also includes toilet and laundry facilities), being a dwelling:

- a) that comprises one or more major sections, and
- b) that is not a motor vehicle, trailer or other registrable vehicle within the meaning of the *Road Transport Act 2013*,

and includes any associated structures that form part of the dwelling.⁸

Section 68 of the LG Act sets out activities that require local council approval, regardless of whether consent under the EP&A Act is required. Part A of section 68 provides that this includes “Install a manufactured home, moveable dwelling or associated structure on land.” Local councils are required to apply the mandatory conditions set out in the Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2021 (**LG Regulation**) and as the local consent authority they have the discretion to interpret and apply the LG Act and Regulation and EP&A Act. However, by excluding manufactured homes from the definition of ‘building’ the EP&A Act creates ambiguity in ‘development’ related approval pathway for this type of construction.

The lack of clarity leaves room for multiple interpretations and creates inconsistent pathways for the installation of manufactured homes including the use of other local controls such as a Development Control Plan, Local Approvals Policy or Local Environment Plans (LEP) etc. The exclusion also means that the following don’t apply to manufactured homes:

- complying development pathways
- construction certificates and inspections as part of the principal certifier function
- occupation certificates

While the installation of prefabricated homes or associated structures requires approval under section 68 of the LG Act (if it is outside of a caravan park or manufactured home estate), once the approval process is complete, there is no current regulatory regime to ensure a prefabricated installed home is compliant and free from defects. Therefore, the result of the current regulatory approach is that this building work is not subject to the same requirements for design and building certification as building work done on site.

⁷ *Environmental Planning and Assessment Act 1979*, Section 1.4.

⁸ *Local Government Act 1993*, Dictionary.

The LG Act also creates some confusion as to what constitutes a manufactured home, with anecdotal evidence indicating that some manufactured homes installed on residential land lease communities and manufactured home estates are being constructed onsite without the required certification due to the lack of clarity on what a building is.

By carving prefabricated building work out of the definition of a “building” and the broader EP&A Act framework, prefabricated home approvals face inconsistent approval pathways based on each local government area (**LGA**). While it is appropriate that local councils have powers to ensure that localised impacts are considered in determining how housing and buildings are delivered in their LGA, inconsistent requirements create difficulties for homeowners and prefabricated building work suppliers to deliver consistent outcomes. Prefabricated building work allows for consistent quality of work but can be frustrated by non-standardised planning rules depending on which local council is considering the application. Planning Circular 21-0169⁹ and standards prescribed in the LG Regulations provides some guidance on standards that moveable dwellings should be built to. However, application of the standards becomes challenging as the industry has evolved and found innovative ways such as registering prefabricated homes as trailers to evade application of these regulations.

Design

As prefabricated building work does not require development consent, there is currently limited requirements for a designer, engineer or architect to prepare plans for the delivery of prefabricated buildings. The *Design and Building Practitioners Act 2020 (DBP Act)* imposes comprehensive obligations on key design and building practitioners involved in the design and construction of class 2, 3 and 9c buildings and buildings with a class 2, 3 or 9c part, including requirements for practitioners involved in the design of core building elements of the regulated building to be registered.¹⁰

A design practitioner is required to produce a design compliance declaration which affirms that the designs comply with requirements under the Building Code of Australia (**BCA**). A building practitioner must follow the designs as declared by the design practitioner and must produce a building compliance declaration that affirms that the building practitioner has built in accordance with the declared designs and the BCA.

The LG Regulation requires all manufactured homes and associated structures to be signed off as structurally sound by a practising structural engineer,¹¹ and meet minimum design, construction and installation requirements prescribed under Division 4. However, these requirements can be carried out by unlicensed people and do not require certification other than the self-certification of the structural components signed off by the structural engineer.

⁹ NSW Government, ‘Approval to install relocatable and flat-pack homes outside a caravan park or manufactured home estate’ (Planning Circular, 2 December 2021), <<https://www.planning.nsw.gov.au/sites/default/files/2023-03/planning-circular-ps-21-016-approval-install-relocatable-flatpack-homes-caravan-park-manufactured-home-estate.pdf>>.

¹⁰ Building elements are structure, fire safety systems, waterproofing, building enclosure and building services.

¹¹ Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2021, clause 51.

Without a licensing obligation across all parts of the design of the building there is a risk that the end user will have a non-compliant or unsafe building. Despite an obligation under the Australian Consumer Law (**ACL**), the person carrying out the design work may not be aware of what is required to achieve compliance with the BCA, may not understand the performance requirements of the products that are used in the building and may deliver prefabricated building work that is not fit for purpose. This is not the case with all prefabricated building operators, with many employing experienced and competent designers and engineers. However, the lack of consistency is creating risks. While this issue is a risk more broadly across the industry, and is a focus of reforms across the sector, the lack of consistent designer competency requirements may compromise the quality of prefabricated building work.

Project financing and insurance

The *Home Building Act 1989* (**HB Act**) requires that a person carrying out residential building work (i.e. in the HB Act work that is “residential building work” on a class 1 (low-rise residential, such as homes and townhouses) or class 2 building) must enter into a written contract for any work over \$5,000, and for work over \$20,000 secure coverage for the building work under the Home Building Compensation scheme (**HBC scheme**). Where a person enters into a contract for residential building work, the trader cannot require the homeowner to pay a deposit under the HBC scheme until coverage is taken out and can only require a maximum deposit of 10% of the agreed contract value.

These protections do not apply to prefabricated building work as it is not treated as residential building work for the purposes of the HB Act. This means that a homeowner procuring prefabricated building work is not required to enter a mandatory contract prescribed under the HB Act, does not need to have HBC coverage over the work and can be required to pay a deposit above 10% of the agreed contract value. This becomes more confusing for customers who may have a separate contract for the footings, and other installation components, which would be covered under the HB Act and at which point a contract and minimum deposit requirements do apply.

Feedback from prefabricated builders has also raised concerns about consumers’ ability to fund prefabricated construction, with many mortgage providers refusing to issue construction loans for prefabricated building work. While this issue requires further consideration, a key impediment is the ownership of the product, the capacity for the work to be completed where an insolvency event occurs and the lack of oversight of this sector by planning, building and insurance regulators.

Manufacture

National Construction Code

Swinburne University of Technology in partnership with the Housing Industry Association released a report into opportunities to resolve regulatory barriers impeding the uptake of prefabricated construction. In addition to the regulatory barriers that this paper seeks to address below, the paper identified concerns with the prescriptive requirements of the NCC. Where prefabricated building work is required to comply with the NCC, this creates complexity where the deemed to satisfy or performance requirements prescribed in the NCC do not fit cleanly with innovative building designs and build processes contemplated in offsite construction. This is further complicated by critical parts of the manufacturing process that will impact the quality of the completed building not being included in the NCC, including:

- loads to be considered for transportation (temporary loads);

- minimum rigidity requirements of components during lifting and transportation; and
- connection and integration requirements between components offsite and onsite, and with the rest of the building work.¹²

At the March 2024 Building Ministers' Meeting, the ABCB was tasked with exploring pathways to the broader adoption of prefabricated building work, including possible changes to the NCC.¹³

Specialist work

While there are legitimate questions about reform to the NCC (not the subject of this paper), even where prefabricated building work is not treated as building work, any specialist work done on the prefabricated building or building component must be carried out by a licensed person.

In NSW, specialist work must be carried out by a licensed person regardless of the value or location of the work. This includes electrical work, plumbing, draining and gas fitting work and air conditioning work.¹⁴ Where prefabricated building work includes specialist work, this work must be carried out by an authorised person in accordance with the relevant NCC requirements and prescribed standards. For certain work, including plumbing and electrical work, a certificate of compliance must also be provided by the licensed person and lodged with Building Commission NSW.¹⁵

However, some work that is carried out offsite is not currently treated as specialist work and continues to be classified as a product. WaterMark is a mandatory national certification scheme for certain plumbing products and works to ensure that products used in plumbing systems are compliant and fit for purpose. As WaterMark operates as a point of installation scheme, installers must ensure they are using compliant products. This, however, requires that installers have line of sight into the products that are being used, which is challenging when the systems are constructed offsite.

With prefabricated plumbing systems arriving on site treated as products, plumbing work is currently limited to the work the installer themselves carry out not the system as a whole. It becomes more complex as the plumber is not required to commission the system before completing the plumbing certificate of compliance. This can result in a licensed plumber being onsite to connect the installation but not requiring a licensed plumber to do the work where it is carried out outside of NSW. Noting that the systems are intended to operate in the same way, and that end users rely on the work operating to prescribed standards, there is a risk that the current regulatory approach is producing inconsistent results.

Building product safety

Prefabricated building work must also ensure that all building products used in the offsite manufactured work are compliant and used in a conforming way. The *Building Product (Safety) Act*

¹² Emad Gad et al, Swinburne University of Technology, 'Regulatory barriers associated with prefabricated and modular construction: Final Report' (Report, October 2022) <<https://hia.com.au/our-industry/prefab-and-modular-construction>>.

¹³ Australian Government, 'Building Ministers' Meeting: Communiqué March 2024' (Webpage, 22 March 2024), <<https://www.industry.gov.au/news/building-ministers-meeting-communique-march-2024>>.

¹⁴ Section 3D, *Home Building Act 1989*.

¹⁵ Clause 37 Gas and Electricity (Consumer Safety) Regulation, Part 2, *Plumbing and Drainage Act 2018*.

2017 (**Product Safety Act**) imposes obligations on people using building products that seek to ensure building product use complies with the NCC. In October 2023, the NSW Government introduced amending legislation to propose a chain of responsibility for the manufacture, supply and use of building products.¹⁶ These duties will impose an obligation on every person of the building product supply chain to ensure that the product complies with the NCC, and the next person in the chain has sufficient information to verify the product complies with the NCC and how to use it in a conforming way. Where prefabricated building work is treated as a building product, these laws apply to the work carried out by the prefabricated building manufacturer and supplier.

Transport and installation

There is no regulatory oversight of the transportation of prefabricated building work from manufacturing facility to site.

However, where the prefabricated building work requires onsite building work to be carried out, such as the construction of a slab, or footings for the prefabricated building to sit on, this must be carried in accordance with obligations under the HB Act, including licensing of key practitioners for residential building work, and any planning and certification requirements prescribed under the EP&A Act.

The connection of the prefabricated building work to utilities on site will also need to be carried out by licensed and authorised practitioners.

Post-completion

The HB Act provides that building work covered by the Act is subject to mandatory statutory warranties that are owed by the trader to the homeowner (and subsequent owners). These warranties are:

- the work will be performed with due care and skill;
- the work will be in accordance with any plans and specifications set out in the contract;
- all materials supplied will be suitable for the purpose for which they are to be used;
- materials will be new, unless otherwise specified;
- the work will be done in accordance with and will comply with, the HB Act or any other law;
- the work will be done with due diligence and within the time stated in the contract, or otherwise in a reasonable time;
- the work will result in a dwelling that is reasonably fit to live in, if the work includes:
 - construction of a dwelling;
 - making of alterations or additions to a dwelling;
 - repairing, renovation, decoration or protective treatment of a dwelling and any materials used in doing the work will be reasonably fit for the specified purpose or result that the owner has advised the contractor, while indicating that the owner relies on the contractor's skill and judgment.

¹⁶ *Building Legislation Amendment Act 2024*.

For major defects, these warranties apply for six years following completion of the building work.¹⁷ For all other defects, the warranty period is two years.

While homeowners of buildings constructed onsite can access comprehensive consumer protections, prefabricated building work is currently not treated as building work and does not offer the consumer protections under the HB Act. Instead, homeowners can seek to make a claim under the ACL, which is administered by NSW Fair Trading.

Under the ACL, all products come with automatic consumer guarantees that the product or service that are purchased will work and do what the consumer asked for. Products must be safe, lasting, with no faults; look acceptable; and do all the things someone would normally expect them to do. Where a business fails to meet any of these guarantees the consumer has the right to repair, replacement or refund; cancel the service (not practical when the product is onsite) or a reimbursement for damages and loss.

While the ACL does provide certain protections, there is no current building assurance for consumers purchasing prefabricated or manufactured homes. There are no requirements for manufacturers to hold a licence to do this building work, to hold insurance or abide by minimum contractual obligations even though the end result – a home – is the same.

¹⁷ Major defect is defined under the *Home Building Act 1989*, section 18E.

4. Whole of government approach

In September 2023, the NSW Government announced it would commit \$224 million to its Essential Housing Package. The package is focused on delivering more social and affordable housing across NSW. Amongst other commitments, the Essential Housing Package committed \$10 million for the Modular Housing Trial to deliver faster quality social housing. The commitment from the NSW Government recognises that offsite construction will play an important role in the delivery of affordable and trustworthy homes to meet NSW's housing needs.

Critical to realising this, NSW Government agencies are working together to develop a whole of government strategy to support the uptake of offsite construction methodologies while ensuring that offsite building work is compliant, safe and trustworthy. This will include:

1. resolving planning constraints to create consistent rules across NSW to support prefabricated building work;
2. ensuring that offsite manufactured building work is compliant and fit for purpose; and
3. working across Government to design buildings that meet the needs of NSW residents and utilise prefabricated building work where it enhances project delivery.

Resolving planning constraints

There are currently two separate approval processes that apply to the use of manufactured homes outside caravan parks and manufactured home estates. That is, development consent is required for the use of land if required by the EP&A Act and LG Act approval is required for the installation of the moveable dwelling.

Although conventionally constructed dwellings are also generally subject to a two-stage approval process (development consent and construction certificate approval) or a combined complying development approval, the process for manufactured homes is more complex as it sits across two separate pieces of legislation. This has led to variability in how the provisions are interpreted and applied across different local government areas. In addition to adding time and cost to individual developments, the complexity and uncertainty of the current process is a barrier to innovation and growth in the manufactured homes industry.

Numerous councils, particularly those in regional areas, have raised concerns with the current section 68 approval pathway. Councils advised that they did not consider they had the right powers to ensure that buildings constructed offsite and erected in their local government areas were compliant and safe. A particular concern revolved around the lack of clarity of the approval process and the lack of obligation for approvals under the LG Act to be provided by a council certifier.

Certifiers play an essential role in ensuring that designers and builders are producing buildings that are safe and fit for purpose. Certifiers provide independent oversight of the construction process from design through to completion – providing a crucial check in the delivery of homes and other buildings across NSW. Certifiers have a well-established and defined role for onsite construction which includes overseeing the integration of prefabricated components into onsite constructed buildings. However, if the entire building is constructed offsite there is no defined role for certifiers.

To unblock these planning bottlenecks and provide confidence in the quality of work by activating a clear role for certifiers, it is proposed that manufactured buildings will be treated as 'building work'

(detailed below) to ensure that this type of building work is treated consistently with onsite construction – removing inconsistencies between local government areas and providing certainty for those seeking development consent. This definition will carry across the planning and building regulatory frameworks to ensure a consistent regulatory approach from initial planning consent through to occupation.

In addition to this proposed change, work has commenced to consider how manufactured homes could be included under complying development to ensure this combined planning and building approval pathway applies to offsite constructed buildings. Including manufactured homes in the definition of ‘building work’, and removing the current carve out for manufactured homes (other than moveable dwellings), will allow more homeowners to opt into building their home through modern methods of construction.

The Department of Planning, Housing and Infrastructure recently exhibited proposed amendments to the LG Regulation and the feedback is currently under consideration. This work will align the planning framework to support the reforms proposed under the Building Bill to ensure that a consistent development consent/approval pathway for development is created regardless of whether the construction occurs onsite or offsite. Ensuring prefabricated building work is compliant and fit for purpose.

The NSW Government is committed to ensuring that manufactured homes comply with the NCC and building sustainability requirements that apply to onsite constructed dwellings. In addition to providing consistency with other forms of construction, this approach will ensure that consumers can have confidence in the quality of their home regardless of where it is constructed.

This paper details the proposed regulatory approach to ensure that competent practitioners are delivering compliant buildings.

The proposed approach is intended to ensure prefabricated buildings are compliant and fit for purpose, while supporting innovation and efficient delivery of housing by collaborating with industry to expand offsite building sector’s capacity to meet growing demand for prefabricated building work. This whole of government conversation will be supported by industry’s feedback on the proposed regulatory framework for the offsite construction sector.

Delivering the homes NSW needs as effectively as possible

While the prefabricated construction sector currently only makes up a small proportion of the overall delivery of housing in Australia, there is a unique opportunity to leverage innovative and efficient construction processes from the sector to meet NSW’s housing needs. To support this, in November 2023, the NSW Government established a Modern Methods of Construction Taskforce to bring together industry experts and representatives of users of buildings to drive, shape and demonstrate the use and potential for offsite manufacturing across a number of NSW Government development projects, especially housing.

The Taskforce supports whole of government work to understand how prefabricated building work can contribute to the delivery of housing stock and other critical infrastructure that NSW demands.

In addition to the work of the Taskforce, Building Commission NSW will be working with industry to build capacity and capability to meet NSW’s housing needs, including the uplift of design, construction and project oversight capability to deliver medium and high-rise residential properties to meet housing demand. If prefabricated building work is to be a key contributor to NSW’s housing strategy, there needs to be industry transformation – traditional builders understand how to use

prefabrication and prefabricated building work manufacturers constructing fit for purpose housing (not just what is easy to build offsite). This process will address the relative digital immaturity of the market that is hindering the timely and efficient delivery of housing,¹⁸ in addition to work around delivery design and process libraries to standardise core components of housing delivery to expedite getting compliant, safe and trustworthy homes to market.

¹⁸ NSW Government, 'Digitalisation of Construction' (Report, 2021) <<https://www.nsw.gov.au/building-commissioner/how-digital-ready-construction-industry>>.

5. Proposed legislative framework

The proposed legislative framework for offsite construction replicates features of the design and construction process under the DBP Act and the New Zealand BuiltReady scheme, which seek to create clear accountabilities for key practitioners to ensure that building work complies with the NCC and there is an auditable record of the inputs and processes involved in the design and construction of the building. It does this by:

1. Capturing prefabricated building work within the definition of building work.
2. Establishing a bespoke consent process.
3. Introducing standardised licensing for those designing and constructing prefabricated buildings.
4. Creating a fit for purpose certification process for prefabricated building work.
5. Ensuring there is a chain of responsibility from design through to installation.

The rationale for mirroring the DBP Act requirements is based primarily on recognition that the DBP Act uses sound methods to raise the standards of building work without placing an undue burden on the design and construction, or certification process. The implementation of the DBP Act (complemented by expanded enforcement powers for Building Commission NSW) has already started to reduce the frequency of defects class 2 building owners are inheriting post occupation.¹⁹

Entrenching similar practices within the regulatory framework for the prefabricated industry will mean that the two regulatory schemes will work together, creating consistency in standards and reducing regulatory burden when prefabricated construction is subject to obligations under the DBP Act.

A summary of the proposed legislative framework is at Appendix A.

Redefining prefabricated work as ‘building work’

Developing a definition for building work that captures prefabricated buildings

Prefabricated construction is currently regulated inconsistently. This is in part due to various definitions of what constitutes prefabricated building work and a lack of clarity over which legislative framework it sits within. This has led to components of prefabricated building work being captured by the HB Act, EP&A Act, Product Safety Act and the LG Act. This inconsistency can compromise the effectiveness of the market by making compliance difficult and variable based on where the work is being carried out.

The proposed Building Bill is intended to remove duplication and inconsistencies across the planning and building systems by amalgamating and streamlining legislated obligations for people and businesses working in the construction industry. It is proposed to apply this approach to prefabricated building work by pulling all obligations into a single regulatory framework. The first

¹⁹ NSW Government, ‘Research on serious building defects in NSW strata communities’ (Report, 5 December 2023) <<https://www.nsw.gov.au/housing-and-construction/building-commission/building-and-construction-resources/research-on-serious-building-defects-nsw-strata-communities>>.

step is to define what is prefabricated building work, with a particular focus on differentiating this work from genuine building product manufacturing.

Building Commission NSW has considered industry submissions from previous consultations and proposes to include a new definition of ‘*prefabricated building work*’ in the Building Bill. The proposed definition captures the construction in a factory or other offsite facility of a volumetric, contained building, or self-contained room that will form part of a building that is not designed and manufactured for onsite visual inspection and certification.

It is not intended to include moveable dwellings such as caravans or genuine building products manufactured offsite that are used as part of onsite construction. These offsite manufactured components, such as timber or steel trusses and frames, can be visually inspected onsite by licensed practitioners and certifiers.



Figure 1 - Proposed definition of prefabricated building work

The proposal will result in prefabricated homes (or parts of a home that are prefabricated building work such as extensions of complete rooms) being included as building work under planning rules and the Bill, as well as within the definition of “home building work” where the work is carried out on, or the creation of, residential buildings.

Where prefabricated building work falls within the new definition, the work will be treated consistently with onsite construction work under both the EP&A Act and the Bill. For certain types of work, this will include securing development consent under the planning system before prefabricated building work can be installed on site.

Proposed definitions

Building Bill 2024 (Draft)

Building work

- (1) In this Act, building work means the following —
 - (a) work, including specialist work, involved in the —
 - (i) erection of a new building, or
 - (ii) alteration of an existing building, including demolition incidental to the alteration,
 - (b) subdivision work,
 - (c) general building design work,

- (d) prefabricated building work,
 - (e) professional engineering work,
 - (f) certification work,
 - (g) work (fire safety work) involved in the design, installation, commissioning or maintenance of a fire safety system within the meaning of the Building Code of Australia.
 - (h) the preparation of designs for work referred to in paragraphs (a)–(b),
 - (i) supervising, directing, coordinating, managing or having substantive control over work referred to in paragraph (a)–(h),
 - (j) other work prescribed by the regulations.
- (2) The regulations may exclude work from being building work.

Prefabricated building work

- (1) In this Act, prefabricated building work means the following —
- (a) manufacturing a prefabricated building away from the site at which it will be erected,
 - (b) erecting a prefabricated building at a site,
 - (c) other work prescribed by the regulations.
- (2) The regulations may exclude work from being prefabricated building work.

Prefabricated buildings

- (1) In this Act, a prefabricated building means the following if it is manufactured away from the site at which it is to be erected —
- (a) a substantially complete building, room or pod, but not —
 - (i) a moveable dwelling, or
 - (ii) anything prescribed by the regulations,
- Example — a bathroom pod.
- (b) a building component that —
 - (i) is modular, and
 - (ii) will become a building element when properly installed, and
 - (iii) cannot be inspected without destructive testing or opening when installed on the site,
 - (c) anything prescribed by the regulations.

Note — A manufactured home is a prefabricated building.

- (2) The Secretary may issue guidelines to assist in deciding whether something is a prefabricated building or not.

- (3) The guidelines are issued by publication in the Gazette.
- (4) A court must consider the guidelines when making a decision about whether something is a prefabricated building or not.
- (5) In this section —

pod means a part of a room comprising at least a wall, ceiling, floor and fittings appropriate for the intended function of the completed room.

- (1) **Building element** is intended to align with the existing definition of building element under the DBP Act:

Building elements

- (1) In this Act, **building element** means any of the following —
 - (a) the fire safety systems for a building within the meaning of the Building Code of Australia,
 - (b) waterproofing,
 - (c) an internal or external load-bearing component of a building that is essential to the stability of the building, or a part of it, including — (i) in-ground components and other foundations and footings, (ii) floors, (iii) walls, (iv) roofs, (v) columns, (vi) beams.
 - (d) a component of a building that is part of the building enclosure,
 - (e) the aspects of the following for the building that are required to achieve compliance with the Building Code of Australia —
 - (i) mechanical, plumbing and electrical services,
 - (ii) vertical transportation products,
 - (f) other things prescribed by the regulations for the purposes of this section.
- (2) The regulations may exclude things from being building elements for the purposes of this Act.
- (3) In this section —

building enclosure means the parts of the building that physically separates the interior environment of the building from the exterior environment, including —

 - (a) roof systems,
 - (b) walls, including walls below the level of the ground,
 - (c) windows and doors.

Moveable dwelling is proposed to be defined as:

moveable dwelling means a tent, or a caravan or other van or other portable device, whether or not on wheels, used for human habitation and includes a conveyance, structure or thing prescribed by the regulations.

Proposed guideline

During consultations, stakeholders expressed concerns about tiny home manufacturers who purchase a registerable trailer frame and then construct an oversize tiny home on the trailers. There

are other models in the market that open up into extendable/demountable homes that go on to support additional rooms/structures on footings once onsite.

Noting the complexity of defining a part of the sector that has embraced innovation and seeks to bring fresh thinking to the construction of buildings, it is proposed that the legislative definition will be complemented by a power for the Secretary to issue guidelines on what is regulated by the Building Bill and EP&A Act, and what work continues to be regulated under other pieces of legislation. This will provide further clarity on the different types of prefabricated dwellings that should be treated as buildings, while preserving streamlined approval pathways for genuine caravans.

The UK Government has published “Modern Methods of Construction working group: developing a definition framework”, which details seven categories of offsite prefabrication.²⁰ A similar piece of work was contemplated in the Swinburne University of Technology’s (on behalf of the Housing Industry Association and Advanced Manufacturing Growth Centre’s Prefab Innovation Hub) Final Report into prefabricated building work ‘Regulatory barriers associated with prefabricated and modular construction’,²¹ which proposed a simplified typology to define the ambit of regulation:

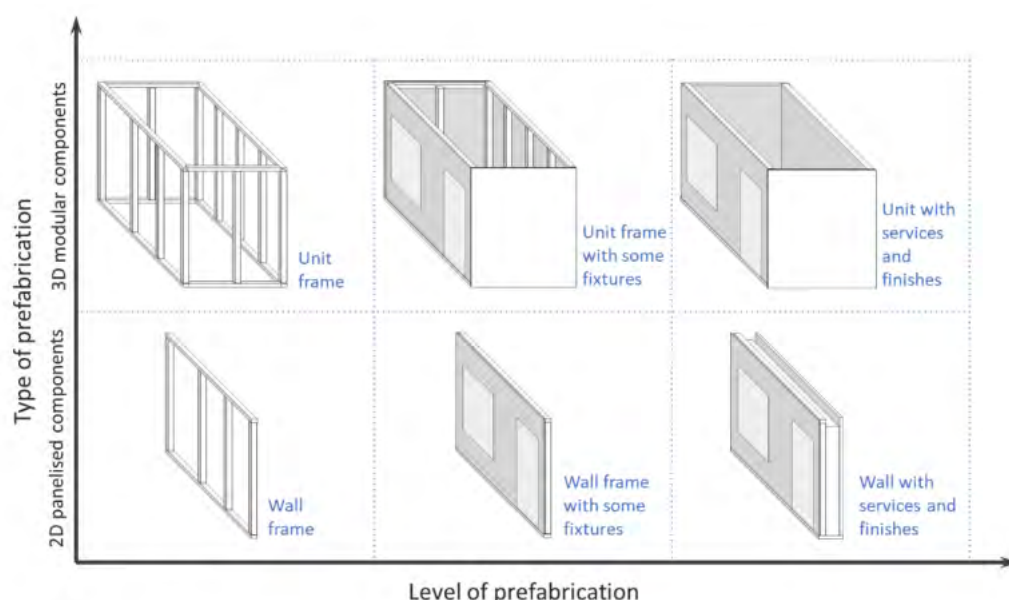


Figure 2 - Regulatory barriers associated with prefabricated and modular construction

The proposed guideline would complement the statutory language, providing concrete examples of where regulatory obligations start and finish and how to meet them. This approach would allow more prescription and real-world context that may be challenging to provide in statutory language.

Where there is ambiguity over whether work is captured under the definition of building work, amendments will be made to the proposed Building Bill or supporting regulations, with the guidelines intended to provide context to legislation without overreaching the ambit of regulation.

²⁰ UK Government, ‘Independent report: Modern Methods of Construction working group: developing a definition framework’ (Report, March 2019) <<https://www.gov.uk/government/publications/modern-methods-of-construction-working-group-developing-a-definition-framework>>.

²¹ Swinburne University of Technology, ‘Regulatory barriers associated with prefabricated and modular construction’ (Report, October 2022) <<https://hia.com.au/our-industry/prefab-and-modular-construction>>.

Kit homes

It is proposed to clarify planning rules to make clear that a kit home installed onsite must follow the same development consent process as other types of building works. However, it is not proposed to otherwise change the way kit homes are regulated at this time where the kit home delivered to site fits within the definition of a building product rather than building work.

Kit homes are designed to be fabricated offsite and delivered onsite in components that can be put together by a licensed builder or a homeowner working under an owner builder permit. Kit homes rely on the manufacturer designing a building made up of volumetric components that can be put together piece by piece by the homeowner following a detailed guide. Kit homes can make it easier for homeowners to build their own homes relying on standardised designs.

Where a kit home is delivered onsite in volumetric components that can be visually inspected before construction it will continue to be treated as a building product. Where components are delivered onsite in a form that encases all the finishes within a module that cannot be inspected onsite it will be treated as building work and subject to certification requirements being proposed for offsite construction (details below). This will not inhibit the carrying out of work onsite by the relevant owner builder or builder but will require the manufacturer to meet the requirements for offsite construction detailed in this paper.

It is proposed to define **kit home** as a set of building components that, when offered for sale, is represented as sufficient for the construction of a home, garage, carport or other structure prescribed by the regulations, according to a plan or instructions provided by the supplier of the set, but does not include the following:

- (a) a set of components for the construction of a moveable dwelling, other than a registrable vehicle, within the meaning of the Road Transport Act 2013,
- (b) a set of components for the construction of a home, structure or improvement prescribed by the regulations.

Consent process

In previous consultations on the proposed regulatory framework for prefabricated building work, feedback was sought on the impact of treating prefabricated building work consistently with onsite construction for the purpose of planning consent. This proposed approach would ensure that the existing rules that determine the relevant consent pathways for onsite construction would apply to offsite construction – allowing the planning system to consider the use of the land agnostic to where the building work is carried out. Feedback provided by industry, local councils and end users of prefabricated buildings endorsed providing this clarity to how consent authorities would treat this work, noting the concerns around lack of clarity and consistency in current processes under the LG Act.

With the proposed amendment to the definition of “building” and “building work” making clear that prefabricated buildings are captured under the EP&A Act, a person seeking to construct, install or erect a prefabricated building would require development consent under the EP&A Act and would not be subject to the existing installation approval process under section 68 of the LG Act. Where a person seeks development consent to construct, install or erect a prefabricated building on their land, the following process will apply, consistent with existing requirements to secure consent for onsite constructed buildings:

1. Determine the relevant consent pathway related to the proposed use of the building.
2. Prepare designs detailing the nature of the building work, including the set out, and how it will integrate into the property. Where a building utilises standardised designs (detailed below in certification), the consent authority is to expedite consideration of the application, with review focused on the integration of the building into the relevant site.
3. Prepare any further supporting documentation required by the relevant consent authority in determining an application for development consent, including the building's compliance with bushfire, flood and BASIX obligations and other relevant planning controls.
4. Consent authority determines application, with a certifier subsequently responsible for authorising the construction documentation, including any complying development or construction certificates, and ensuring that work complies with the NCC and any development consent requirements.

Creating a licensing requirement for prefabricated design and construction

Currently prefabricated work, other than specialist licence work, is not subject to the same licensing or planning requirements as onsite construction. While many operators employ competent and licensed staff, there is not a consistent obligation to hold a licence issued by a building regulator.

As part of the development of the Building Bill, Building Commission NSW is currently consulting on changes to the existing licensing scheme, which requires people carrying out residential building work and specialist work to be licensed. Further obligations apply to designers and engineers working on apartment buildings (class 2 buildings), certain shared accommodation (class 3 buildings) and residential care facilities (class 9c buildings), as well as registration requirements for architects under the *Architects Act 2003*.

With the proposed approach to regulating prefabricated building work seeking to align regulatory obligations more closely with onsite construction, it is proposed that key design and building practitioners undertaking work on prefabricated buildings be licensed.

Designers and engineers

The Building Bill reforms propose extending licensing requirements to key building designers and engineers, in addition to existing requirements for architects to be registered. Under these reforms, it is proposed to extend licensing requirements to designers undertaking work on prefabricated buildings.

Where a practitioner is undertaking design work or engineering work that falls within the definition of building work they will need to be licensed or working under the supervision of a licensed person, regardless of whether this work is carried out for onsite or offsite constructed buildings. Eligibility requirements are subject to ongoing consultation, but licences classes would define the scope of work a licensed person is authorised based on their competency. For example, the following design classes are currently being considered:

Class	Class
Architect	Fire systems designer (hydraulic)
Building designer (low rise)	Fire systems designer (mechanical)
Building designer (medium rise)	Fire safety engineer
Building designer (unrestricted)	Interior designer

Class	Class
Civil engineer	Mechanical engineer
Electrical engineer	Structural engineer
Fire systems designer (electrical)	

Previous consultation endorsed the requirement for designers and engineers working on prefabricated buildings (as distinct from products) to be licensed and meet minimum competency requirements. However, concerns were raised about the current capabilities of designers to understand the nuanced design requirements for offsite construction, such as how to design a building that complies with minimum performance requirements of the BCA and is able to be transported to site without compromising that compliance. Losing the specialised knowledge that has been built up in the prefabricated construction sector would compromise not only the quality of work being constructed offsite but could also unduly hinder the growth of the sector.

Where a licensing requirement is imposed on the design of building work, the proposed eligibility pathways will provide appropriate flexibility to recognise the breadth of training and experience that a person could evidence to show they are competent to do the work. Building Commission NSW will also work with industry to produce focused continuing professional development modules and micro-credentials on design and engineering processes for prefabrication. These units will seek to lift the capability of all designers and engineers to undertake prefabricated design and/or better understand how to integrate prefabricated work into onsite constructed buildings.

Introducing licensing requirements for the design of prefabricated buildings will lift the standards of design work, creating consistent built environment outcomes across onsite and offsite constructed buildings and enable designers to develop new skills to support the broader uptake of offsite manufactured buildings.

Manufacturing and installation process

It is proposed to introduce an overarching building licence for the manufacture of building work carried out offsite to align with onsite building licensing requirements. All prefabricated building work companies would be required to hold a licence, as well as have an individual practitioner who is authorised to hold a building licence as their nominee. This new licensing requirement will complement existing licensing requirements for specialist work.²²

Undertaking building work onsite or offsite requires specialised skills to ensure that the final building meets performance requirements of the NCC and is otherwise compliant, safe and trustworthy. Licensing requirements set a clear capability benchmark that ensures that only competent people can oversight building work.

A building licence would allow the manufacturer to competently carry out offsite construction to ensure that it complies with the designs prepared by registered designers and engineers and the NCC.

While the manufacturer and specialist trade practitioners would need to be licensed, other trades working under the manufacturer's licence would not be required to be separately licensed. For

²² All specialist work must be carried out by a licensed practitioner. Specialist work is air conditioning and refrigeration, electrical, disconnection and reconnection of fixed electrical equipment, mechanical services and medical gas, plumbing, draining and gasfitting work. The Building Act reforms propose extending specialist work to include waterproofing.

example, where the manufacturer is building a prefabricated home the builder and electrician must be licensed but the carpenter and/or joinery practitioner, dry plasterer or metal fabricator employed by the manufacturer would not need to be individually licensed where they are supervised by the builder. The differentiated licensing approach between onsite and offsite construction recognises the higher level of control a manufacturer has on trade work due to the assembly line approach to construction in a singular and controlled building environment, in contrast to onsite construction where licence holders operate across multiple sites concurrently.

Further to the construction of the building offsite, consideration must be given to how the building is to be installed onsite, including site preparation and services connection. This work is currently treated as residential building work, such as footing and slab building work, which requires a building licence for the coordination of the work and a relevant trade licence to complete work (e.g., concreting or piling). It is proposed that this work continues to require a building licence or other prescribed type of licence.

Two models were previously presented for comment on how to licence the construction of prefabricated buildings and install them onto the relevant site:

Option A

A single builder licence that allows a builder to undertake building work onsite or offsite, with eligibility requirements not differentiating between onsite or offsite builders.

Licence class		Scope of Work	Practical experience requirements
Builder A	Unrestricted	Building work on any class of building	5 years relevant practical experience in the work authorised by the licence
Builder B	Medium-rise	Building work on any class of building up to 6 storeys ²³	3 years relevant practical experience in the work authorised by the licence
Builder C	Low-rise	Building work on Class 1 and Class 10 buildings	2 years relevant practical experience in the work authorised by the licence
Builder D	Internal fit-outs	Non-structural building work and fit-outs on any class of building	1 year relevant practical experience in work authorised by the licence

Option B

A dedicated prefabricated builder licence, with different eligibility requirements to other builder licences, but preventing the prefabricated builder from undertaking building work onsite to install the prefabricated building.

²³ Proposal has been changed from 3 to 6 storeys following consultations

Licence class		Scope of Work	Practical experience requirements
Builder A	Unrestricted	Building work on any class of building	5 years relevant practical experience in the work authorised by the licence
Builder B	Medium-rise	Building work on any class of building up to 6 storeys	3 years relevant practical experience in the work authorised by the licence
Builder C	Low-rise	Building work on Class 1 and Class 10 buildings	2 years relevant practical experience in the work authorised by the licence
Builder D	Internal fit-outs	Non-structural building work and fit-outs on any class of building	1 year relevant practical experience in work authorised by the licence
Builder E	Prefabricated builder	Building work on buildings and components of buildings constructed offsite. No onsite building work authorised.	TBD

Option A was presented as the preferred option as it would create a consistent framework for overseeing building work that aligned with other changes proposed in this paper, i.e., treating onsite and offsite construction consistently. There was majority support for Option A, noting it would make it easier for consumers and industry to produce prefabricated buildings and install them onsite.

However, several submissions identified that only adopting Option A could lead to a loss of capability in the sector, with some prefabricated builders producing high quality buildings and components of buildings but not meeting the proposed eligibility standards contemplated under the new licensing model. These submissions preferred parts of Option B as it would provide a way for existing providers to transition, over time, into other builder licences where they are competent to do so without having to stop working in the interim. Option B would also encourage some builders to continue to specialise without needing to secure higher classes of licence, such as a bathroom pod manufacturer not requiring a Builder A licence to supply bathrooms for a 10 storey apartment building.

Subject to finalisation of the broader builder licence classes, it is proposed that a person manufacturing a prefabricated building or component of a building can opt to secure either a:

- Builder A – C²⁴ licence that authorises them to construct the prefabricated building work offsite and install the building onsite (including any enabling work required), with the relevant builder licence class determining the class of building work that can be carried out, or

²⁴ Noting that the scope of work proposal for Builder B licence has been changed and current proposal will allow building work on any class of building up to 6 storeys.

- Builder E licence that authorises them only to construct the prefabricated building work offsite and transport the building work to site. All installation and enabling work onsite would be required to be carried out by a separate builder who must hold a Builder A – C licence.

Where a prefabricated builder opts to hold only a Builder E licence, they will be prohibited from contracting with any person other than a person who holds a Builder A – C licence. This will ensure that the prefabricated manufacturer does not undertake installation work (outside the scope of their licence).

Relationship between licensing requirement in NSW and other jurisdictions

Building Commission NSW has considered the impact of mutual recognition (**MR**) and automatic mutual recognition (**AMR**), as well as the cross-jurisdictional nature of prefabricated building work. The supply of buildings from outside of NSW creates challenges for regulatory oversight of prefabricated buildings entering NSW. While Building Commission NSW is proposing licensing rules that impact NSW operators, it is critical that this does not impose a competitive disadvantage on NSW operators against other Australian or overseas operators.

In addition to the proposed certification rules set out below, where prefabricated building work is carried out outside of NSW, an Australian licensed builder working within the scope of their licence must meet the compliance declaration requirements for prefabricated building work. Where no licensed builder carries out the work, the manufacturer will need to engage an Australian licensed builder to oversight the work and declare that the work complies with the NCC before the work can be installed on an NSW building site.

6. Introducing a certification scheme for offsite construction

Onsite construction is captured under development approval obligations under the EP&A Act, including the requirement for certification of building work. This certification process varies based on the type of building work being carried out but requires an independent certifier to assess designs for the building work before construction, approve the carrying out of the building work, inspect building work at critical stages throughout construction and certify at the end of the construction that the work complies with the development consent and the BCA.

This process works effectively by delineating roles and responsibilities in the construction of buildings and invests responsibility in a third party to certify that the work is compliant with planning and building approvals. Certifiers have been provided this role to ensure that building owners and the public have confidence in the quality and compliance of the building work. However, as this certification approach relies on certifiers being onsite to visually inspect the building work to verify it accords with the relevant designs, building approval, development consent and BCA, it does not readily translate to an offsite manufacturing environment.

Efficiencies in the manufacturing process

A critical part of the value offered by prefabricated building work is the standardised forms of manufacturing in a controlled offsite environment. While processes vary between manufacturers and types of building work, prefabricated building work relies on the efficient manufacturing process delivering quality products. Offsite manufacturing benefits from standardisation of components, with designers able to repurpose components of designs for future work.

Underpinning this process is that prefabricated buildings will be constructed in a controlled factory environment or assembly line format with work progressing to the next stage as soon as it is ready. As with other manufacturing processes, this can include producing multiple products of the same type concurrently, for example undertaking the waterproofing of multiple bathrooms pods at the same time or completing electrical wiring work on multiple prefabricated classrooms before progressing their construction to the next stage.

These types of manufacturing processes offer opportunities for increased quality control as the process does not vary as significantly as onsite construction. While onsite construction will often have multiple trades working on a room or building at the same time, offsite construction can streamline the manufacturing process by getting single trades to do all their work before the next trade comes in. Offsite construction has lower rates of defects due to this efficient construction process and due to reduced risks of the next trade involved in the construction process compromising otherwise compliant work, such as penetrating fire rated walls to retrofit in services or compromising waterproofing membranes by working in the space before the membrane has set.²⁵

²⁵ Callum Stutchbury Parrotte, Hong Xian Li and Linda Tivendale, 'Defect Occurrence and Management in Prefabricated Commercial Construction in Australia', (March, 2020), <<https://dro.deakin.edu.au/view/DU:30145573>>.

These assembly line approaches to construction, however, make it challenging for certifiers to certify work in the same way as onsite construction. While onsite construction has critical stage inspections that require a certifier to inspect building work onsite and the work's compliance with development consent and building standards at each stage of construction, offsite construction currently has no form of certification.

Certification models

Certification not only provides an assurance process to ensure that the work delivered complies with the BCA; it creates a clear line of accountability to the people designing and carrying out the building work. During consultation three models were explored for certification: self-certification, third party certification and aligning offsite certification with onsite certification requirements.

Self-certification

Self-certification relies on the practitioner taking responsibility for declaring that their work complies with the NCC and relevant prescribed standards. Self-declaration is based off ensuring that the practitioner declaring compliance is sufficiently competent to do so, there are opportunities for this declaration to be tested independently when required and that there are consequences for providing false or misleading declarations. Self-declaration is used in NSW under the DBP Act and for plumbing and electrical work.

Third party certification

Third party certification involves an independent, accredited body certifying that the manufacturing process of a product is compliant with relevant standards and that the final product produced under that manufacturing process is compliant. Third party certification relies on approving the systems that produce the product rather than testing each individual product. Third party certification has been adopted in New Zealand for prefabricated buildings under their BuiltReady program, which utilises CodeMark to allow third party certified manufacturers to issue certificates for the design and manufacture of the building work that is accepted by consent authorities as 'deemed to comply' with the relevant building standards.²⁶

Alignment

With the proposal to capture prefabricated building work under the definition of building work, prefabricated building work would be subject to the same certification requirements as onsite building work. This would require changes to the construction process to ensure that certifiers can fulfill their obligations to oversight the carrying out of work and ensure it complies with the NCC.

Proposed certification approach

Submissions noted broad support for either self or third-party certification, noting it would allow the most straightforward transition from the existing way of working to the new scheme. Those in favour of self-certification noted the stronger controls available to the construction process for offsite construction, as well as more ready availability of standardised evidence collection (such as

²⁶ New Zealand Government, 'BuiltReady modular component manufacturing scheme launched' (Website, 7 September 2022) <<https://www.building.govt.nz/about-building-performance/all-news-and-updates/builtready-offsite-manufacturing-scheme-launched/>>.

photographs and structured audits). Third party certification was supported by those who considered the New Zealand model could be scalable to Australia, but with a focus on annualised inspections to maintain accreditation.

While there was support for both models, certifiers and representatives of local councils, as well as think tanks working on a future state for prefabricated building work, noted that these models could create poorer outcomes. These submissions noted that while self-certification is used under the DBP Act and for certain specialist trades, this does not remove the need for the work to be oversighted by a certifier. The certifier is still required to sign off on designs, undertake critical stage inspections and must be satisfied the work complies with the BCA before occupation.

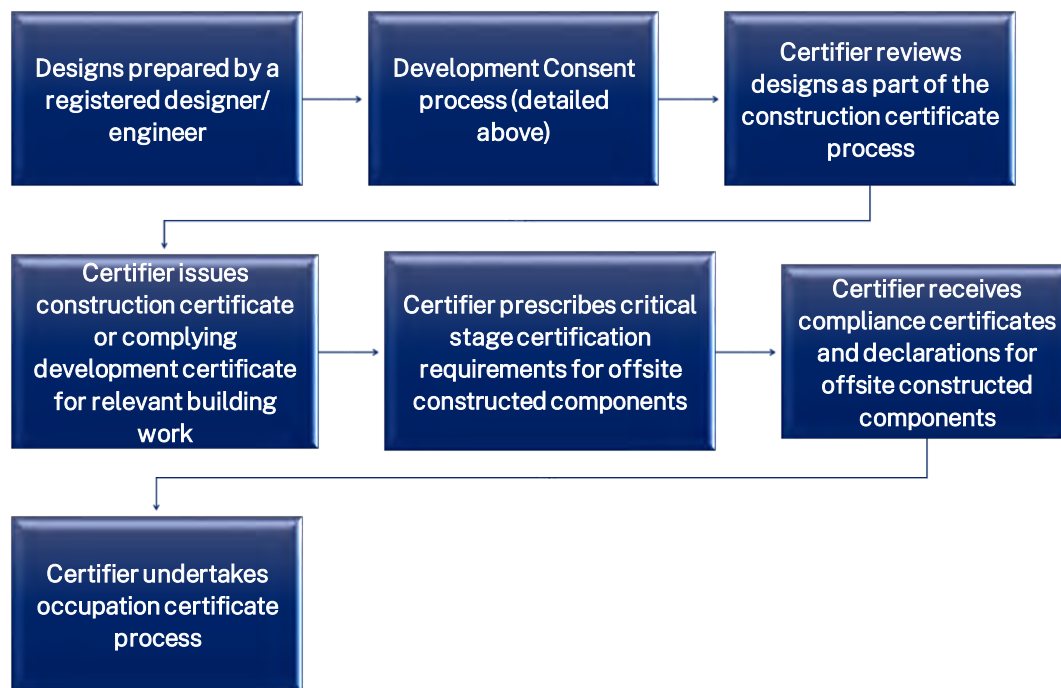
Noting the critical role of the certifier in ensuring compliance with planning and building approvals, the proposed self-certification and third-party certification (where the process is signed off but not the product itself), would make the process for installing and occupying the building more complex. It was submitted that “a certifier is not allowed to authorise occupation unless and until a construction declaration has been issued however the building surveyor must ensure that they satisfy themselves of the suitability of the building for occupation independent of any declaration.”²⁷

While self-certification and third-party certification should remain part of the process, they currently are not fit for purpose for ensuring the integrity of whole buildings or significant parts of buildings. It is hoped that over time a third-party certification capacity could be built up in Australia, not only for prefabricated building work but more broadly for a range of critical building products. Currently, the capacity is not sufficient to use this as the key check on the quality of building work. A certifier must be involved if the process from consent to occupation is to operate as consistently as possible with onsite construction.

However, simply replicating onsite building work certification processes (i.e. inspections of building work at critical stages) will not work for offsite construction. Requiring a certifier to visually check key stages of the construction process will slow down construction and is not practical where the offsite construction is occurring in one place and the certifier is based in another. It would require multiple certifiers oversighting a single project (an inefficient allocation of resources) and would not work for interjurisdictional work.

To ensure that the benefits of prefabricated building work are realised under the new regulatory framework, without compromising the oversight functions of the certifier to ensure that the building can be occupied safely, it is proposed that the following certification approach is introduced for certification work:

²⁷ Australian Institute of Building Surveyors, Submission to November Discussion Paper.



Details of each stage are set out below:

Design of prefabricated building work

Under the DBP Act registered design practitioners are responsible for preparing designs for building elements and declaring that the designs comply with the BCA and any prescribed standards. These declared designs are provided to the building practitioner prior to commencing building work. The building practitioner must complete a building compliance declaration at the completion of the project that they have built in accordance with the declared designs and the BCA.

This upfront design requirement ensures that if a builder builds in accordance with those designs the building will be compliant with the performance requirements under the BCA. To fulfill this obligation, design practitioners must provide full details of how the building work will meet the relevant performance requirements before building work commences.

For offsite construction, it is proposed to require a design compliance declaration by a registered designer or engineer for work that falls within the scope of their registration that declares that the designs comply with the BCA. The design compliance declaration would:

- declare that the design meets the governing and performance requirements of the BCA;
- where the design relates to a fire safety system or is captured by the DBP Act, additional design compliance declaration requirements have been met; and
- the designs account for compliance at the point of manufacture and how the ongoing compliance of the building work will be maintained through transportation and installation onsite.

Where designs are produced by a practitioner outside of NSW, a design compliance declaration is still required. To meet this requirement, a manufacturer may:

- contract with a NSW registered designer who can coordinate the design work with designers in other jurisdictions before making a declaration; or

- use a design compliance declaration declared by a designer that is licensed in their own jurisdiction to do design work on the relevant type of building that is to be manufactured (e.g., if they are restricted to low-rise work, they cannot sign off on designs for high-rise buildings).

A copy of the completed design compliance declaration must be uploaded to the NSW Planning Portal before an application to commence building work is submitted.

Following the consent process, the certifier will review the designs for the prefabricated building work to determine whether to issue a complying development certificate or construction certificate for the prefabricated building work (either as a standalone certificate or as part of a certificate covering work constructed offsite and work constructed onsite). To ensure that the efficiencies of standardised designs are leveraged under the new process, it is proposed that where:

- Designs for the prefabricated building work uses standardised designs that have been previously assessed by a certifier, only onsite installation design (i.e., how the prefabricated building work will integrate into the site and meet minimum performance requirements particular to that site) needs to be assessed;
- building work is using original designs, all designs need to be assessed by a certifier;
- designs are prepared out of NSW, they will need to be assessed by a certifier as if they are original designs.

This process is intended to encourage the use of regularised designs (i.e., consistent ceiling heights, window locations, building set outs) for a streamlined approval process, while preserving the role of the certifier as a critical checkpoint to ensure that the proposed building design complies with the planning approvals and BCA. For example, while a standardised single storey house may benefit from expedited consideration of the room sizes, electrical and plumbing work design and window placements, there may be additional design requirements for the site, such as additional wind-rating requirements or bush-fire protection requirements, that need to be considered before building work can commence.

Requiring the approval of prefabricated building work by a certifier through the existing complying development and construction certificate process will also make it more straightforward for the broader uptake of prefabricated building components in onsite constructed buildings. Under current rules, there is a lack of clarity of how to integrate offsite constructed components into onsite constructed buildings, with these components often erring on the side of caution and going through the onsite construction building approval process. This ensures that the building components are compliant in their own right as well as when they are installed in the building. However, creating a bespoke process that recognises the standardisation available from offsite construction will seek to expedite approval of these components, and instead focus certifier approval on the integration of the component to produce a compliant, safe and trustworthy building.

To ensure that designers, builders, consumers and certifiers are aware of how this process will operate, prescriptive guidance will be provided on what constitutes regularised designs and what needs to be signed off. This will be contained in a guideline that becomes enforceable on all licence holders to ensure that the responsibility for meeting the proposed design and certification requirements sits not just with the certifier, but all licensed parties involved.

Under the DBP scheme, where a building practitioner seeks a variation to a building element in a declared design,²⁸ including product substitution, this must be signed off by a registered designer. It is proposed this requirement will also apply to offsite manufactured buildings. While this will slow down construction time, it is not expected to be a frequently used process for offsite manufactured buildings which benefit from consistent construction processes to maximise efficiency and reduce costs. This type of process benefits from minimal variations from standardised processes. However, where a variation is required to a building element, a registered designer must sign off this change.

Construction of prefabricated work

Once a licensed manufacturer has received a design compliance declaration for the relevant building work and the relevant construction approval from a NSW registered certifier or local council, they can commence construction. In addition to following the designs prepared by the registered designer, the builder has an ongoing obligation to build in accordance with the NCC.

For onsite construction, a certifier will undertake onsite inspections of the relevant building work at critical stages of the project to ensure that the work complies with the construction approval and development consent. As noted above, however, simply requiring the certifier to undertake inspections as they do for onsite construction is not practical or risk-based and would create unnecessary delays in the delivering of prefabricated building work. The proposed model for certification of offsite constructed building work seeks to address this by:

- introducing mandatory inspection requirements that will be set out in a practice standard to ensure consistency across the sector;
- requiring the certifier to prescribe the mandatory inspection requirements associated with the prefabricated building work for which the certifier has issued a CDC or CC;
- mandatory inspections for offsite constructed building work may be enabled through remote inspection techniques, including photographs, videos, third-party certification and remote walk throughs of more complex components of the building work;
- all records of the remote inspections will be provided to the certifier, who will then confirm that they are satisfied with the work as carried out through the NSW Planning Portal.

The proposed approach recognises that it is not appropriate to require the certifier overseeing the project to attend the manufacturing facility at all stages, but that a self-declaration process alone may not provide the certifier with sufficient evidence to determine at the end of the process that the building is fit for occupation. The remote inspection regime is scalable not only for NSW manufactured buildings but also those constructed outside of NSW, as it allows the NSW certifier to oversee the project regardless of the location of the building work.

These obligations will be imposed on a licensed builder, with the prefabricated building work manufacturer required to hold a NSW licence or an authority in another Australian jurisdiction to carry out building work. Where the building work is carried out overseas, a NSW licensed builder must be appointed to facilitate the mandatory inspection requirements and will be held accountable throughout the build process for meeting these minimum requirements.

²⁸ Building elements are structure, fire safety systems, waterproofing, building enclosure and building services.

When the prefabricated building work is complete and ready for transportation, the manufacturer is required to produce a building compliance declaration that declares:

- the building work has complied with the declared designs, and, if variations have occurred, all variations and product substitutions related to a building element have been signed off by a registered designer;
- the building work complies with the NCC; and
- all specialist work has been carried out by specialist work licence holders and any specialist work compliance declarations have been attached to the building compliance declaration (in addition to any other submission requirements imposed on specialist work licence holders).

Where a prefabricated building work compliance declaration has been made it is required to be uploaded into the NSW Planning Portal and a certifier can rely on the declaration (and remote inspection documentation) as evidence that the prefabricated building work complies with the BCA.

Where prefabricated building work is constructed outside of NSW, a manufacturer may:

- contract with a NSW licensed builder who can carry out the building work in that jurisdiction (subject to local approvals);
- use a licensed builder from another Australian jurisdiction to oversight work that they are authorised to do in that jurisdiction, who will produce a prefabricated building work compliance declaration prior to transportation; or
- for overseas manufactured building work, commission a NSW licensed builder, authorised third party certifier (currently no pathway) or independent registered NSW certifier to inspect the building work either at point of manufacturer or arrival in NSW to certify that the building or building component accords with the declared designs and otherwise complies with the BCA.

Specialist trade work

Where a person is carrying out specialist trade work in NSW they must hold a licence to do that work. Specialist trade work includes:

- electrical;
- plumbing;
- gasfitting;
- mechanical services - refrigeration and air conditioning; and
- mechanical services – plumbing.

This work requires a licence regardless of where the work is being carried out, or the value of the work, due to the significant risks to the person carrying out the work and the end user if the work is not carried out compliantly.

Following completion of electrical or plumbing work, a licensed practitioner must produce a certificate of compliance that certifies the work complies with prescribed standards. The lodgement of these certificates triggers a notification to Building Commission NSW, which may result in an inspection of the work.

Specialist trade work requirements will continue to apply on offsite constructed buildings as they do for onsite construction. Under the proposed scheme, the person carrying out the specialist trade

work will have the benefit of more comprehensive designs to inform their work, and will be required to complete their existing installation, testing and commissioning requirements before producing their certificate of compliance. This would apply to the work carried out offsite and the onsite enabling work.

However, as noted above, the current WaterMark scheme creates complexity to this process, as it treats plumbing and drainage work that is carried out in another jurisdiction and installed in NSW as a product not building work. Maintaining this distinction, where certain parts of prefabricated building work continue to be treated as building products (i.e., by treating plumbing work carried out in other jurisdictions as simply the sum of its parts rather than an installation), could undermine the benefits of the proposed scheme. While the conformity assessment bodies oversighting this work have significant expertise in assessing the compliance of the products used in an installation, there is a concern that there is insufficient capacity to check the work itself to ensure the installation works as intended.

Under the proposed scheme, a NSW licensed plumber would be required to take responsibility for the entire plumbing system, not just signing off on its connection within the building or to the mains. Where the work has been signed off by a licensed plumber in another jurisdiction, the NSW licensed plumber could rely on this. Where no licensed plumber has signed off on the work, the NSW licensed plumber would step in as an inspector of the work. Feedback from plumbing industry representatives indicate this could provide a way to address concerns with the quality of work coming into NSW but would require investment in the competency of licensed plumbers to ensure they understand how to do a compliant inspection.

This approach would benefit from the remote inspection regime proposed above, and would allow a NSW licensed plumber to indicate to the prefabricated builder what evidence they would require to sign off on the work when it is delivered in NSW. There will be a learning curve for some plumbers who will not see this as their responsibility, but the end result will be a single licensed plumber taking accountability for the entire system rather than discreet components of the system.

Installation

Prefabricated buildings or components of buildings will arrive on site with a compliance declaration for design work and building work (and any specialist trade work) and an installation guide prepared by the manufacturer. At this point the manufacturer can either carry out enabling building work to facilitate the use of the prefabricated building on site (if they hold a Builder A – C licence) or deliver the building or component of building to site for a licensed builder to install on site (if they hold a Builder E licence).

The development's certifier will be responsible for certifying that the building as completed and installed complies with the development consent, building approval and the BCA. The certifier can rely on the design and building compliance declarations and documentation produced through remote inspections as evidence of the offsite manufactured work's compliance but must undertake onsite inspections of enabling works, including footings and slabs and any compliance certificates for specialist work to connect the building to services. No changes to allow remote inspections of these onsite works is proposed.

During consultation, some representatives of manufactured home estate operators indicated concerns with the requirement for certifiers to undertake an occupation certificate process rather than retaining the existing approval process under the LG Regulation. These submissions noted that involving a full occupation certificate process would slow down delivery without adding to the

existing controls in place. Before finalising the proposed approach, Building Commission NSW tested these views to ensure that the proposed occupation certificate process for prefabricated building work would not create undue regulatory burden.

Feedback from local councils, manufactured home suppliers and Building Commission NSW's inspectors noted that the existing process, where a sign off from a structural engineer is required and approval can be authorised by a local council employee (not required to be a certifier) has produced poorer build quality outcomes due to:

- the increasing shift over the past few years in caravan parks and manufactured home estates to onsite construction where the planning approval is for offsite construction but some, if not most, of the construction is carried out on site;
- offsite constructed work installed onsite has not been compliant with NCC requirements; and
- offsite constructed work has not been installed correctly, with enabling works not compliant with NCC requirements.

Noting that Building Commission NSW and local council inspections have identified consistent issues with the existing LG Regulation process's ability to produce compliant buildings, the new certification process will align with existing controls for onsite construction. Where the building work is carried out on a manufactured home estate, the local council or certifier oversighting the development can only allow the work to be treated as prefabricated building work where they receive a compliance declaration from a licensed manufacturer. If this certificate is not provided, including details of what work has been constructed offsite, the normal certification rules apply to that building work.

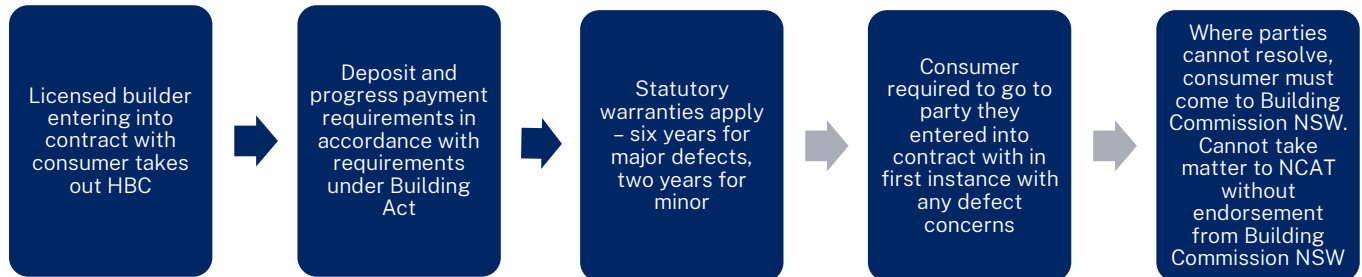
Planning system transition

The Building Bill enabling legislation is proposed to be introduced into Parliament in 2024, with commencement of changes proposed to start from the end of 2025.

The proposed changes detailed in this paper provide a clear line of accountability for the delivery of compliant building work for future building owners and addresses gaps in the current planning and building rules. From 2025, planning and building rules will be location agnostic to where building work is carried out and will instead focus on the impact and performance of the building when it is installed onsite.

However, proposed changes to licensing obligations will be staged to allow industry more time to transition to the new rules. Licensing obligations for residential prefabricated building work will commence when the Building Bill comes into force. This approach replicates proposals for onsite building work licensing.

7. Consumer Protection



Prefabricated building work captured under ‘home building work’

Where building work, including prefabricated building work, is being carried out in a ‘home’, it will be subject to mandatory consumer protection requirements. This change will ensure greater oversight of consumer and manufacturing protections, certification, and quality of these methods of construction. Where the work is captured under ‘home building work’ the relevant consumer protections, such as statutory warranties and dispute resolution, also attach to these homes irrespective of the construction method.

It is proposed that the definition of **home** will mean a relevant building designed, constructed or adapted for use as a residence, other than a precluded residence, and includes the following –

(a) a building, other than a precluded associated structure –

- (i) associated with the residence, and
- (ii) used in conjunction with the residence,

(b) a building element associated with the residence,

(c) a structure supporting –

- (i) the residence, or
- (ii) a building or building element referred to in paragraph (a) or (b).

Home building work regulates the relationship between a consumer and a licence holder to ensure that the power imbalance between the two is effectively controlled. This ensures that the consumer has the benefits of additional protections due to the power and information asymmetry between the two parties. The protections detailed in this section will apply to all consumers, regardless of whether they have paid for onsite or offsite constructed building work.

However, it is not proposed to extend these consumer protections to two contracting commercial entities, including where the building is intended to be used as something other than a home. This will ensure that the proposed consumer protection measures are proportionate and targeted at the risks, rather than creating unnecessary regulatory burden. Accordingly, it is also proposed to clarify that the following types of residences will be excluded from the definition of home:

- a moveable dwelling,
- a class 3 or class 9 building,
- a class 5 or class 6 building if the building is part of a class 2 building,
- a prefabricated building owned by the operator of a community on land that is a community within the meaning of the *Residential (Land Lease) Communities Act 2013*,
- boarding premises within the meaning of the *Boarding Houses Act 2012*,
- a guest house, hostel, backpackers' accommodation or other premises not intended to be used for permanent habitation,
- residence within premises licensed under the *Liquor Act 2007*,
- a residence associated with, or provided by —
a hospital, or
an educational establishment,
- specialist disability accommodation within the meaning of the *National Disability Insurance Scheme (Specialist Disability Accommodation) Rules 2020* of the Commonwealth,
- a building or premises excluded by the regulations.

Contracts

Under the Bill, written contracts are proposed to be required where the value of the building work is above \$5,000. Under the reforms, the parties that enter the contract for prefabricated building work will be the homeowner and a prefabricated building work manufacturer that holds a Builder A – C licence. A manufacturer with a Builder E licence will be prohibited from entering into a contract with a consumer and can only contract with a Builder A – C licence holder.

Jobs between \$5,000 and \$20,000 require a minor works contract with basic information. Building jobs worth more than \$20,000 must be covered by more extensive written contracts. The requirement to have a written contract is intended as a consumer protection measure to ensure that customers understand what they agree to pay for and how to hold the practitioner accountable.

Plain English home building contracts for minor and major works have been produced by Building Commission NSW, which clearly list customers' rights and responsibilities and those of the builder or tradesperson. Customers and licence holders will continue to be free to use their own contract provided it includes the minimum required terms prescribed in the Bill and supporting regulations.

Before signing a contract for residential building work valued at more than \$5,000, a practitioner must also provide the consumer with a Consumer Building Guide and an information sheet about certifiers. The Guide outlines information about:

- what to consider before work starts, including contracts and payments;
- common traps and tricks;
- statutory warranties; and
- how to resolve a dispute with a builder or tradesperson.

Where the consumer or builder needs to vary the contract, a written variation to the contract must be approved by both parties. This requirement will not apply to a Builder E licence holder seeking a

variation to a contract with a Builder A – C as they are not directly negotiating with a consumer. Further details on this process are set out in the *Building Bill 2024: Consumer protections for home building work April 2024* paper.

Deposits and progress payments

Feedback from industry consultation sessions indicate that a key impediment to the uptake of prefabricated buildings by consumers relates to progress payment requirements (with manufacturers requiring higher upfront payments than onsite construction) and limited availability of construction loans by mortgage providers as prefabricated building work is currently treated as a product.

Establishing a comprehensive framework that integrates prefabricated building work more effectively into the NSW construction landscape will legitimise the role that prefabrication has to housing delivery in NSW. It will ensure that regulation, and the protections it offers, is agnostic to where the building work is carried out. While not a complete solution to broader financing issues, it is intended these controls will encourage financiers to be more comfortable with underwriting prefabricated building work. This conversation will be progressed more broadly by the Government's Modern Methods of Construction Taskforce, but with the following legislative measures proposed to support consumers and prefabricated builders to appropriately finance projects:

- a consumer will enter into a single contract for the building work, with the relevant Builder A – C responsible for oversighting the delivery of the building work;
- a builder cannot require a deposit until they have taken out Home Building Compensation (HBC) coverage (detailed below);
- once a contract is signed and insurance taken out, a Builder A – C may require a deposit of up to 10% for the building work;
- progress payment stages proposed under the Building Bill will provide for the higher upfront costs of prefabricated building work.

Home building compensation scheme

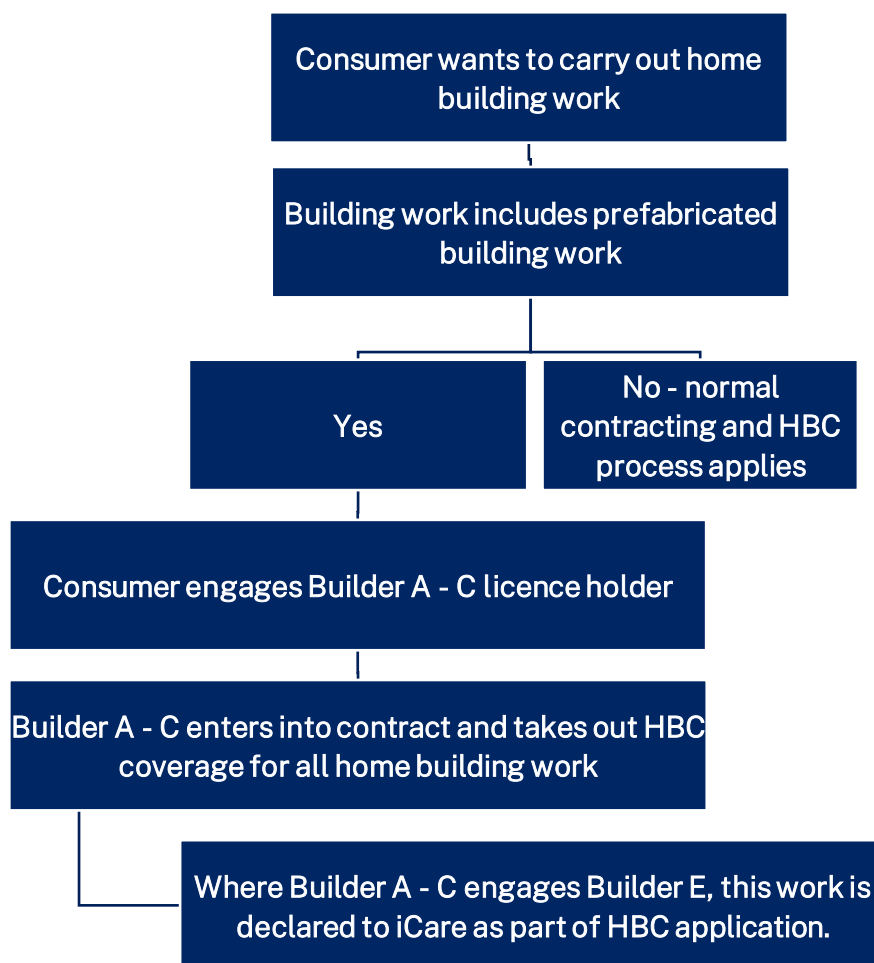
Prefabricated building work that falls within the definition of '*home building work*' will be subject to an obligation to take out HBC coverage before building work commences and before any deposits are taken for the building work. HBC helps homeowners if their builder is unable to complete building work or fix defects because of insolvency, death, disappearance, or licence suspension. The coverage extends to provide a protection for the homeowner if the builder or contractor is unable to complete the work or honour a statutory warranty.

Coverage for up to \$340,000 must be taken out before work is started or any money is paid for any residential home or renovation project where the:

- work is contracted with a homeowner, owner-builder or developer;
- contract price or market cost of labour and materials is over \$20,000, including GST; and the
- project is not exempt from insurance.

With the ability to contract with a consumer to carry out building work, including prefabricated building work, proposed to be limited to Builder A – C licence holders, HBC coverage will only be issued to an eligible Builder A – C licence holder approved by iCare.

Where a Builder E licence holder is undertaking prefabricated building work on a home, HBC coverage will not be captured under their contract with a Builder A – C licence holder. Instead, the Builder A – C licence holder must ensure that their contract with the consumer captures the work they will carry out themselves, as well as the work carried out by the Builder E licence holder. This approach will treat the Builder E licence holder similarly to other subcontractors.



Where a consumer seeks to make a claim under the HBC policy, this will be subject to the contracting builder's status, with the Builder A – C licence holder expected to institute appropriate indemnity arrangements with the Builder E licence holder.

Statutory warranties

The statutory warranties scheme is a core element of the consumer protection framework proposed under the Building Bill reforms. The proposed statutory warranties will establish legally enforceable standards for the quality and performance of building work that are implied into all contracts for home building work, including where a contract is required but has unlawfully not been entered into.

Changes are proposed to the broader statutory warranty scheme that will be instituted as part of the consolidation of existing building legislation into the new Building Bill, including addressing definitional issues and making clear that certain work is covered by statutory warranties. Further detail is set out in *Building Bill 2024: Consumer protections for home building work April 2024* paper.

For the purposes of prefabricated building work, it is proposed to apply the statutory warranty requirements that apply to home building work to prefabricated building work carried out on a home. The statutory warranties will be owed by the person who enters into the contract.

In previous consultations, Building Commission NSW tested how statutory warranties should apply to prefabricated building work that is relocated. One of the benefits of prefabricated building work is that it is designed for manufacture and assembly (noting the benefits of efficient delivery of

building work to site) and often disassembly. This can allow buildings to be moved from site to site with only enabling works specific to that site required to be undertaken before the building can be used again. However, this creates complexity when considering the statutory warranties, a manufacturer holds to a building owner when that building is not only transported and installed to site A, but is then uninstalled, transported and installed at site B.

It is intended that statutory warranties will be available to owners of prefabricated homes for the respective two or six year period (with six years applying for major/serious defects under the statutory warranty scheme) as long as the prefabricated home remains at the location it was originally installed.

In the event that the prefabricated home is relocated within the two or six year warranty period (noting the different warranty periods for major and minor defects), and the contract between the Builder A – C licence holder and the consumer does not specify that the performance of the prefabricated building work includes that it has been designed for manufacture and assembly and disassembly, the relocation will serve to end the original warranty. The break in the chain of causation by relocating the prefabricated home would make it difficult to tie the original manufacturer or installer to any defects that might materialise after relocation, unless the original manufacturer has represented to the consumer that the prefabricated building work can be relocated. This approach would also apply to volumetric modular components within a relocated prefabricated home e.g. bathroom pods.

However, where the Builder A – C who enters into the contract with the consumer provides that the building work can be relocated, the statutory warranties continue to apply throughout the warranty period.

Disputes

One of the key elements of the Government’s reform agenda is to ensure that there is a fit-for-purpose complaints handling and dispute resolution process for home building work.

While the broader reforms aim to uplift building quality and reduce building defects placing downward pressure on the need for dispute resolution, the nature of the building industry is such that disputes will inevitably still occur between parties. This is due to several factors, including home building work being an expensive and complex process, and the number of different people involved in a building project.

Disputes are further exacerbated by the power imbalance between the builder and the customer. That is, consumers are at an immediate disadvantage in their level of knowledge of the building process and regulatory requirements and generally hold limited influence in resolving disputes.

A cost-effective and efficient dispute resolution process by Building Commission NSW is a critical part of the regulatory framework and has significant benefits for consumers, industry and government. Building Commission NSW has set ambitious goals to reduce the number of building matters heard by the NSW Civil and Administrative Tribunal, which will require a comprehensive re-think into how disputes are managed.

The proposed reforms to uplift the way Building Commission NSW handles disputes will apply to prefabricated building work on a home – keeping these matters out of the Tribunal and courts.

8. A chain of responsibility from design to installation

The proposed certification framework seeks to embed assurance processes at every stage of the design, construction and delivery of offsite manufactured building work. Despite the proposal seeking to provide bespoke certification rules for offsite manufacturing, rather than strictly applying the same rules that apply to onsite construction, the mandated outcome for onsite and offsite constructed buildings will be the same – compliant, safe and trustworthy buildings.



The creation of a design and building work declaration process will invest significant responsibility on the registered designer and licensed manufacturer. The certification process will streamline the involvement of the certifier and leverage the benefits of standardised construction methods to give the certifier the level of information they need to make an informed decision on approving construction work to commence and certifying the work before occupation.

There are risks with this approach, including that it incentivises builders to make declarations regardless of whether their work complies with the NCC and risks that they do not comply with the remote inspection documentation process prescribed by the certifier, which could reduce the ability of the certifier to test the claims being made by the builder without expensive destructive testing. Where the certifier does not feel confident in the compliance of the building work, they may seek assistance from Building Commission NSW, which is empowered to undertake destructive testing and require the production of relevant documents. This approach should be used sparingly as the proposed framework relies on industry take accountability for their work from conception to delivery.

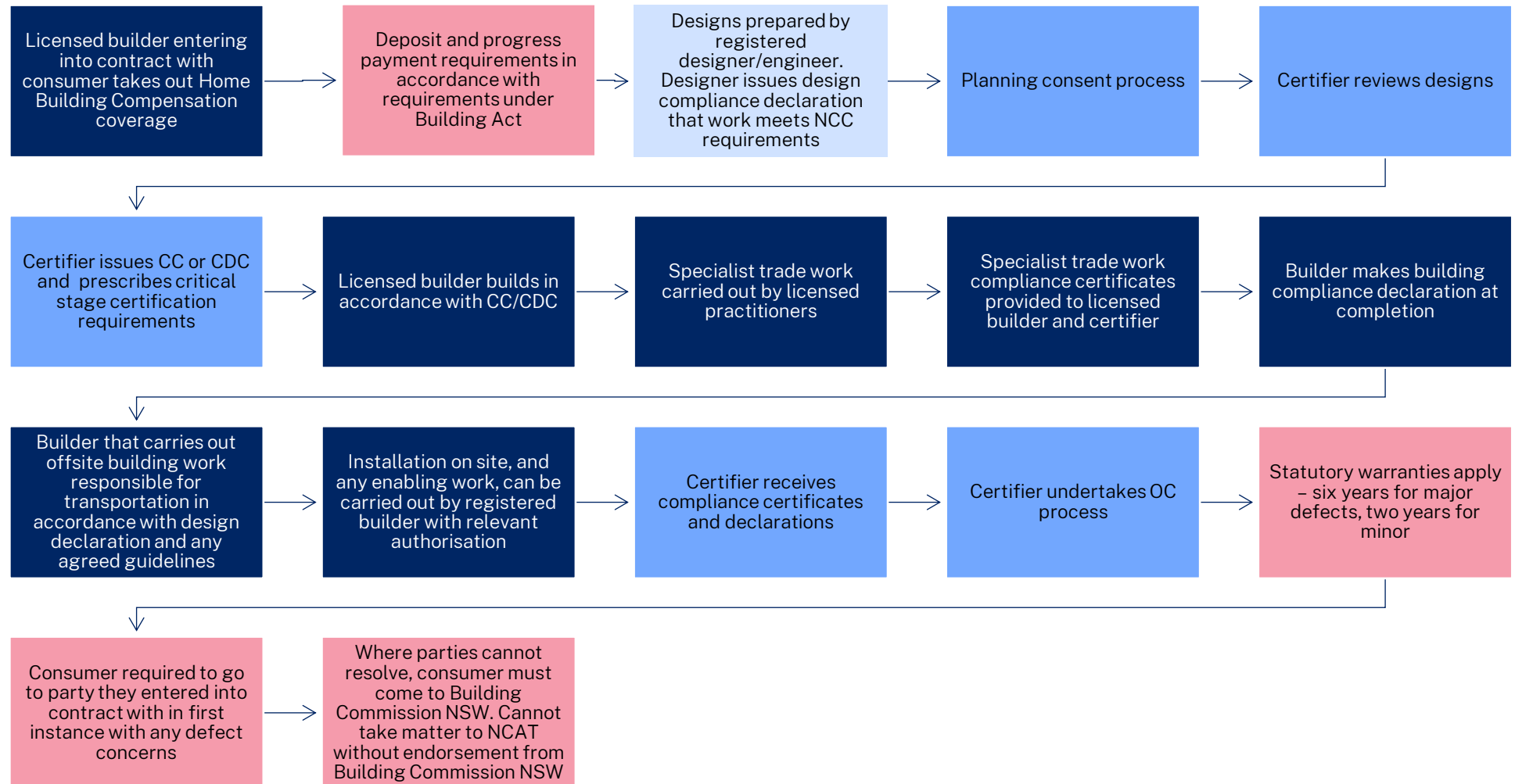
To maximise this, and empower future building owners, it is proposed that a chain of responsibility is introduced for the design, manufacture and installation of prefabricated buildings. In previous consultations on prefabricated building work regulation the concept of introducing a chain of responsibility was supported by the majority of stakeholders.

This chain of responsibility ensures that each person in the supply chain owes a duty to other parties in the chain and the eventual owner/user of the building to ensure that their work is compliant. This obligation already applies under the duty of care requirement under the DBP Act and has been recently introduced for building products. These obligations will be carried forward in the Bill.

If non-compliance is detected by a party in the chain of responsibility, they can take action themselves under their contractual arrangements or seek the support of Building Commission NSW, who will now have a clear record of who has done what on the relevant building. Building Commission NSW will be empowered to take decisive action, including ordering rectification works,

suspending licences and imposing significant penalties for non-compliant work. The chain of responsibility will also ensure that where the breaches occur in other jurisdictions that NSW based operators are not unduly punished where they have acted in accordance with their obligations.

Appendix A – Proposed prefab process



■ Build ■ Design ■ Certification ■ Consumer protection

Appendix B – Comparator between example types of prefabricated building work under proposed scheme

	Windows	Panellised wall	Bathroom pod	A prefabricated building
Planning system obligations	Windows not captured separately. Planning process determined by building they are installed in.	Walls not captured separately. Planning process determined by building they are installed in.	Bathroom pods not captured separately. Planning process determined by building they are installed in.	Offsite manufactured buildings subject to same planning rules as onsite manufactured buildings.
Licensing obligations	None.	None.	All building work carried out in construction of pod requires licence, including plumbing, electrical and waterproofing work. Manufacturer to hold building licence.	All building work carried out in construction of the prefabricated building offsite requires licence, including electrical work. Manufacturer to hold building licence.
Design process	Regulated under <i>Building Product Safety Act 2017</i>	Regulated under <i>Building Product Safety Act 2017</i>	Designed by a registered designer or engineer. Designs declared as compliant with NCC.	Designed by a registered designer or engineer. Designs declared as compliant with NCC.
Manufacture process	Regulated under <i>Building Product Safety Act 2017</i>	Regulated under <i>Building Product Safety Act 2017</i>	Manufacturer must hold building licence. Specialist trade work carried out by licensed specialist trades who produce compliance certificates for their work. Manufacturer produces building compliance declaration.	Manufacturer must hold building licence. Specialist trade work carried out by licensed specialist trades who produce compliance certificates for their work. Manufacturer produces building compliance declaration.
Installation process	A glazing work licence is required for any work over \$5,000 on a residential building.	Installation of panellised wall system onsite must be carried out by a licensed tradesperson, such as a builder or carpenter, authorised to construct and/or install walls.	Manufacturer produces installation guide that is provided to builder authorised to undertake building work onsite.	Manufacturer produces installation guide that is provided to builder authorised to undertake building work onsite.

	Windows	Panellised wall	Bathroom pod	A prefabricated building
Certification process	Certified as part of the rest of the building.	Visually inspected and certified by certifier onsite.	Certifier can rely on design and compliance declarations and documentation provided through prescribed remote inspection regime as evidence that pod complies with NCC. Certifier certifies pod is installed correctly.	Certifier can rely on design and compliance declarations and documentation provided through prescribed remote inspection regime as evidence that pod complies with NCC. Certifier certifies classroom enabling works (e.g. footings) are compliant and that the completed installation complies with development consent and NCC.
Consumer protection obligations	Australian Consumer Law and any relevant statutory warranties and Home Building Compensation coverage relevant to broader building work.	Statutory warranties and Home Building Compensation coverage relevant to broader building work.	Where bathroom pod is installed into a residential building, statutory warranties apply to work. Bathroom pods will be covered by Home Building Compensation/ Strata Building Bond/ decennial liability insurance coverage.	Statutory warranties and Home Building Compensation coverage relevant to broader building work.

