Discussion Paper

Decennial Liability Insurance Ministerial Advisory Panel
Advice to NSW Government

August 2022

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Chair's foreword

The Hon. Victor Dominello MP
Minister for Customer Service and Digital Government
GPO Box 5341
SYDNEY NSW 2001

Dear Minister,

On behalf of the Decennial Liability Insurance Ministerial Advisory Panel (**the Panel**) I am pleased to present advice to Government on the viability of the introduction of decennial liability insurance in NSW.

In recent years the building and construction industry in NSW has suffered from low consumer confidence in response to repeated high-profile defect cases and ongoing systemic issues. In turn, lenders and insurers have been hesitant to participate in an industry with such significant risks.

The NSW Government's Construct NSW reform agenda is restoring confidence back to the NSW construction industry. Key reforms, including the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (**RAB Act**) and *Design and Building Practitioners Act 2020* (**DBP Act**), have been instrumental in addressing industry and community concerns around the quality of residential apartment buildings by ensuring that competent practitioners are producing compliant, fit for purpose designs, builders are implementing those designs to meet the performance standards of the *Building Code of Australia,* and the regulator has adopted a proactive regulatory posture to respond to practitioners and developments that fall short of these standards.

While the past and ongoing reforms in the shape of the RAB Act, DBP Act, and the ongoing remake of the *Home Building Act 1989*, aim to address the issue of defects and other systemic issues affecting apartment buildings, the work done by the Panel seeks to fill a gap in the insurance market by bringing this crucial product into the industry that will result in significantly better outcomes for consumers.

I am proud to present to you this advice to Government which was the result of extensive collaboration and dedicated work from all panel members. The Panel has exceeded expectations by bringing together this paper in just six months, some 18 months sooner than expected.

While the Panel represents varied and at times competing interests, all members have recognised the need for robust consumer protection and have come to a consensus on a model DLI. I believe our recommendations are all the more robust for the range of input, from community to industry stakeholders, that created it.

If implemented, the proposed DLI product would contribute greatly to protecting consumers of apartment buildings. I recommend that this advice be made publicly available to allow the ongoing transparent and rigorous discussion on this crucial policy development.

The work of the NSW Government has laid the foundations for decennial liability insurance to be a viable consumer remedy for apartment owners in NSW. I look forward to working with you and your team to progress this important reform and to briefing you further on the Panel's advice.

Yours sincerely,

Gary Dransfield
Chair, Decennial Liability Insurance Ministerial Advisory Panel

August 2022

Glossary

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

Term	Description
BAS	A market-led digital product being developed, to enable an assurance rating of trusted buildings.
Building Code of Australia	*Building Code of Australia* – contained within the *National Construction Code* and provides the minimum necessary requirements for safety, health, amenity and sustainability in the design and construction of new buildings (and new building work in existing buildings).
Class 2 Buildings	A building containing two or more sole-occupancy units each being a separate dwelling. These are typically multi-unit, multi-storey residential buildings where people live above and below each other.
Construct NSW	Reforms led by the Office of the Building Commission to establish new benchmarks of excellence, and restore confidence, in the residential construction industry. Built on six pillars that each focus on specific areas of change.
DBP Act	*Design and Building Practitioners Act 2020.*
Developer	Developer is defined under the Residential *Apartment Buildings (Compliance and Enforcement Powers) Act 2020* as: (a) the person who contracted or arranged for, or facilitated or otherwise caused, (whether directly or indirectly) the building work to be carried out, (b) if the building work is the erection or construction of a building or part of a building—the owner of the land on which the building work is carried out at the time the building work is carried out, (c) the principal contractor for the building work within the meaning of the *Environmental Planning and Assessment Act 1979*, (d) in relation to building work for a strata scheme—the developer of the strata scheme within the meaning of the *Strata Schemes Management Act 2015*, (e) any other person prescribed by the regulations [of the RAB Act] for the purposes of this definition.

Term	Description
EP&A Act	*Environmental Planning and Assessment Act 1979.*
HB Act	*Home Building Act 1989.*
HBC	Home Building Compensation scheme.
iCIRT	A rating tool for builders, developers and certifiers going to the integrity of their building work.
National Construction Code	*National Construction Code* – a performance-based code containing all performance requirements for the construction of buildings. The *Building Code of Australia* sits within the NCC.
NSW Planning Portal	The digital portal where documents such as regulated designs and compliance declarations will be lodged.
OBC	The Office of the NSW Building Commissioner sits within the Department of Customer Service.
Occupation certificate	Occupation Certificate, authorising the occupation and use of a new building or building section.
RAB Act	*Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020.*
The Department	The Department of Customer Service.
The Panel	Decennial Liability Insurance Ministerial Advisory Panel.
The Regulator	NSW Fair Trading/Safe Work NSW/Office of the NSW Building Commissioner.
Strata Building Bond Scheme	Introduced under the NSW *Strata Schemes Management Act 2015* (Part 11).
Tribunal	NSW Civil and Administrative Tribunal (NCAT)

Executive Summary

The NSW Government's Construct NSW transformation strategy is working to restore public confidence in the building and construction sector and create a customer-facing sector by 2025. The strategy responds to repeated failures in the design, construction and certification of buildings that had led to substandard building work.

A central theme of Construct NSW is the making of a 'trustworthy building' – buildings that are fit for purpose, resilient and measurably less risky. Customers who buy them must be confident to own and occupy them. Further, the financers and insurers who underwrite policies for constructors and building owners will be confident in the level of assurance.

As part of this strategy, the NSW Government has appointed the Decennial Liability Insurance Ministerial Advisory Panel (**the Panel**) to advise on the introduction of decennial liability insurance (**DLI**) into the NSW market. The specific focus of the Panel is to explore whether, in addition to the Government's proactive reforms to raise industry competency and standards to prevent harms and increase protections, the market can provide an insurance safety net that is currently lacking in the multi-storey high rise sector.

The Panel supports the work of the NSW Government to develop and implement further reforms to its building regulatory framework that build off its successful implementation of the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020)* (**RAB Act**) and *Design and Building Practitioners Act 2020* (**DBP Act**) to ensure compliant work through the design and construction of class 2 buildings and an effective dispute resolution scheme when work is not compliant. This work has set the foundations on which the Panel has identified a clear pathway to a viable DLI product in NSW.

As part of its advice to Government, the Panel has made four findings and three recommendations that could be applied regardless of the Government's approach to DLI, with a particular focus on enhancing the way building disputes are handled, and ensuring Government continues to support risk-based regulation that does not unduly burden business or customers with additional costs.

Further to these general recommendations, the Panel has proposed two potential models for DLI in NSW. The preferred model recommends that NSW repeal the strata building bond scheme under the *Strata Schemes Management Act 2015* and introduce a mandatory DLI scheme after a transition period for all new class 2 buildings and buildings with a class 2 part that offers consumers an insurance product of first resort without placing undue additional costs on developers or consumers. The duration of the transition would depend on the rate at which the market for DLI matures and the rate of uptake of DLI.

To encourage uptake of DLI, the Panel has recommended that the size of the strata bond and the length of time it is required to be held is increased as soon as eligible DLI products enter the NSW market. This

should encourage developers to seek out the most cost-effective option and start to prepare for the mandatory obligation to secure DLI.

Legislative changes are needed to support uptake of DLI, but these changes harmonise with reforms already identified and commenced by Government. They would be guided by the principles of competent practitioners doing compliant work for trustworthy developers. The viability of DLI also relies on the continued work of the regulator and industry to lift the quality of design and building work to deliver buildings that meet performance requirements under the *Building Code of Australia*.

The Panel also proposes that if Government were to support a mandatory DLI scheme, that this only occurs following a transition period where the provision of DLI is voluntary and the market's maturity is evaluated against a set of minimum conditions to ensure that DLI has sufficiently broad coverage to provide a genuine consumer protection without compromising housing availability and cost.

In the alternative, the Panel recommends that the Government amend the strata building bond scheme as the mandatory safety net and to incentivise developers instead to take up DLI in place of and as a more attractive option to the bond scheme.

The Panel has consulted extensively in preparing this report. Before implementing the preferred or alternative model, the Panel recommends that Government should continue to consult with construction industry and building owner representative stakeholders, insurance industry representatives and other key stakeholders to ensure the design of either model delivers effective consumer protection while supporting industry's delivery of class 2 buildings in NSW.

Findings and Recommendations

Panel Findings

1. The Independent Construction Industry Ratings Tool (iCIRT) is a critical tool to improving transparency, accountability and trustworthiness in the NSW construction industry but should remain voluntary.

2. The NSW Government's Construct NSW reform agenda is starting to turn the corner in restoring confidence to the NSW construction sector. This is being achieved through clear accountability requirements for designers, builders, certifiers and developers, improved definition and transparency of who the trustworthy operators are, and a proactive regulator addressing non-compliant design and building work earlier in the construction process.

3. Unless decennial liability insurance is made mandatory after the transition period, it is unclear whether a mature decennial liability insurance market can be created to provide a long-term consumer protection for residential apartment building owners.

4. In a mature market, decennial liability insurance costs will not place an undue burden on project costs, housing supply or housing affordability.

Panel Recommendations

General

1. The NSW Government must maintain its investment in reforms of NSW building laws and the capability of the regulator to ensure insurance is a genuine safety net for consumers against defective work in class 2 buildings.

   This includes the ongoing enforcement of design and building standards under the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* and the *Design and Building Practitioners Act 2020*, and implementing amendments to the building dispute resolution process under the *Home Building Act 1989* that the Government is already progressing to require NSW Fair Trading to mediate all building disputes on residential properties before they can be escalated to a tribunal, court or insurer.

2. A developer/builder should still be required to remediate building defects in the first instance. If the developer/builder fails to reach a solution with the building owner, the insurer will then step in with their DLI product.

   When a building defect is identified, the insurer should be notified even where the matter is subject to NSW Fair Trading's dispute resolution process.

3. The NSW Government should not require build-to-rent class 2 buildings to have a strata building bond or decennial liability insurance where that building is a single-use build-to-rent building or is

a class 2 building that does not include a strata component, and the building will be a build-to-rent building for a period of not less than 10 years.

Preferred model – mandatory DLI on all new class 2 buildings and buildings with a class 2 part (other than eligible build-to-rent properties) to replace strata building bond scheme

4. That the NSW Government replace the strata building bond scheme under the *Strata Schemes Management Act 2015* with a mandatory decennial liability insurance requirement for all developers of new class 2 buildings and buildings with a class 2 part, following a transition period.
5. Developer's mandatory decennial liability insurance requirement is met by securing market-provided insurance cover up to the full construction cost value for serious defects (within the meaning of the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020*) on all building elements (within the meaning of the *Design and Building Practitioners Act 2020*) contained in the common property of a building.
6. To meet the mandatory decennial liability insurance requirement, a policy must be an insurance product of first resort and allow claims by building owners on a strict (no fault) liability.
7. The decennial liability insurance policy should be taken out between DA approval and before the first construction certificate is issued to assist consumer confidence in the pre-sales market, paid at the first occupation certificate, and be in force from the issue of the final occupation certificate.
8. Amendments are made to the *Civil Liability Act 2002* and/or the introduction of legislative provisions into building legislation that would appropriately preserve the insurer's right to subrogation from at fault parties where a claim on a DLI policy is made at the end of the ten year period that would otherwise prevent the insurer making a claim to recover costs from at-fault parties in time.
9. Where a developer/builder secures an eligible decennial liability insurance policy for a new class 2 building or building with a class 2 part, they are:
    a. during the transition period, not required to pay the strata building bond scheme under the *Strata Schemes Management Act 2015*, and
    b. not required to take out coverage under the Home Building Compensation scheme under the *Home Building Act 1989*.
10. The design of the proposed mandatory DLI scheme should include the ability to defer the commencement of the mandatory obligation on developers to secure DLI. This ability to defer would be needed in case the market does not sufficiently mature to support an affordable and accessible DLI product for all trustworthy developers. This mechanism should be based on a clear evaluation matrix set at the commencement of the Transition Period.

11. Government should establish an industry consultative group to support the design of any legislative changes required to implement the preferred model, and to inform industry and community engagement and communication of the rollout of DLI in NSW.

Alternative model – voluntary DLI as alternative to strata building bond

12. The NSW Government supports the development of a viable market for decennial liability insurance by making the current strata building bond scheme a less attractive proposition for developers by increasing the bond to 5% (from the current 2%) and bond duration to six years (from the current two years) during the transition period. The higher cost and extended liability of the bond will ensure that a more effective consumer protection is made available to residential apartment building owners.

13. Where a developer of a new class 2 building secures decennial liability insurance for all building elements, they are not required to take out a strata building bond or coverage under the Home Building Compensation scheme under the *Home Building Act 1989*.

Introduction

The Panel

On 23 October 2021, the then Minister for Better Regulation and Innovation, the Hon. Kevin Anderson MP, appointed the Panel under the *Fair Trading Act 1987* to advise on the introduction of DLI into the Australian market.

The functions of the Panel include:

- Overseeing the undertaking or commissioning of work to include:
    - research on international schemes of DLI including matters of scope, coverage, pricing, claims experience, and regulation (if any) of those schemes;
    - consider the feasibility of a scheme of DLI in NSW including matters of the building class or classes to be in scope of cover and whether a product should be offered on a voluntary basis or mandated;
    - gauge market interest and preparedness of suitable providers to offer cover, and
    - consider the potential need for a framework of regulation or oversight of the offering or provision of DLI in NSW including setting standards or other governance or regulatory requirements and , if warranted, outline the options for such a framework.
- Providing expert input and guidance on all the above.
- Providing a report with options stemming from the project work ("Options Report") to be presented to the Minister for Better Regulation and Innovation[1] for consideration.
- Providing advice to the Minister or Secretary of the Department of Customer Service on any matter referred to it.

The Chair of the Panel is former President of the Insurance Council of Australia Gary Dransfield. In addition to representatives from NSW Government agencies, the Panel is comprised of industry experts:

- Michael Bennett - General Manager, Property & Construction Finance, Commonwealth Bank of Australia
- Albert Chan - Executive Director, Meriton Group
- Michael Corcoran - Co-founder and Executive Director, Solido Development Finance
- Chris Duggan – President, Strata Communities Association (NSW)

[1] Now the Minister for Small Business, Minister for Fair Trading.

- Stefan Hicks – Founding Director, SHC Insurance Brokers,
- Chris Kelly - General Manager, Binah
- Darren Maher - Chief Underwriting Officer, IAG
- Steve Mann – Chief Executive Officer, Urban Development Institute of Australia NSW
- Corey Nugent - Senior Operations Manager, Insurance Council of Australia
- Fabrizio Perilli - Chief Executive Officer, TOGA Development & Construction
- Jessica Rippon - Principal Solicitor, Construction Legal, representing the Owners Corporation Network
- Nicholle Sparkes - General Manager, Frasers Property Australia
- David Tanevski - Managing Director, KWC Capital Partners, and Founding Director, Urban Taskforce.

To support the finalisation of its advice to Government, the Panel released a discussion paper to industry stakeholders for comment. Stakeholders consulted are contained in Appendix A. Submissions received during this process informed this advice.

What is decennial liability insurance?

Decennial liability is a strict liability, statutory guarantee protecting building owners from certain types of defects materialising over a period of ten years, from when construction is completed. In simple terms, it ensures that there is insurance coverage to rectify serious defects in class 2 buildings.

Decennial liability schemes are found in many jurisdictions. Following extensive work before the establishment of the Panel and then in tandem with the work of the Panel, Resilience Insurance now offers a Latent Defects Insurance that mirrors the DLI proposed in this advice. A broader decennial liability insurance scheme in Australia would focus on providing 10 year coverage over critical building elements:

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 but not limited to in-ground and other foundations and footings, floors, walls, roofs, columns and beams),
d. a component of a building that is part of the building enclosure,

e. those aspects of the mechanical, plumbing and electrical services for a building that are required to achieve compliance with the *Building Code of Australia*.[2]

NSW currently imposes a decennial liability on all building work under Part 4 of the *Design and Building Practitioners Act 2020* (**DBP Act**). DLI would indemnify the insured from liability for loss and damage arising from defects to common property building work. This provides a remedy for consumers to claim against, and for practitioners to rely on when required.

Existing insurance coverage

Common insurance policies for construction works generally consist of contract works insurance (covering damage or destruction of works during the construction period), public liability insurance (which does not cover contract works), and professional indemnity insurance (which insures an individual's work where there is a failure to exercise reasonable care). These policies are not of themselves sufficient to protect consumers as many are expressly designed to provide business to business remedies rather than a consumer facing claims scheme. DLI seeks to fill this gap.

The table below outlines the limitations of traditional insurance policies and how DLI could overcome these limitations.

Policy type	Limits of cover	Gaps to be covered by DLI
Professional Indemnity	• contingent on establishing breach of insured's professional duty of care • responds to design errors	• extends beyond negligence and breach of duties • responds to errors in workmanship • liability is strict • liability is joint
Public liability insurance	• does not cover contract works	• covers defects related to contract works on building elements
Contract works insurance	• coverage limited to period during which building works are carried out	• liability arises from date of handover (or issuance of OC) until the end of the decennial period
Domestic building insurance	• only builders are required to hold the policy • contingent on establishing a breach of statutory warranties	• liability extends to anyone contracting with the building owner • liability is absolute throughout the decennial period

[2] Section 6(1), *Design and Building Practitioners Act 2020.*

DLI is only offered by a single provider in Australia. Please refer to the table at Appendix B for a high-level interjurisdictional analysis of DLI overseas.

Construct NSW

The Construct NSW transformation strategy is working to restore public confidence and create a customer-facing building and construction sector by 2025. This strategy, and appointment of the NSW Building Commissioner, responded to repeated failures in the design, construction and certification of buildings that had led to substandard building work.

The Construct NSW program commenced in 2019 with a focus on class 2 building construction. The program has given the opportunity for the building regulator – NSW Fair Trading and Safe Work NSW – to transform its regulatory approach by increasing inspection and enforcement powers, uplifting digital and analytical capability to better understand risk, and strengthening the way it oversees the building sector through proactive engagement with industry and customers.

A central theme of Construct NSW is the making of a 'trustworthy building' – buildings that are fit for purpose, resilient and measurably less risky. The players who make them must be the most capable. Customers who buy them must be confident to own and occupy them. Further, the financers and insurers who underwrite policies for constructors and building owners will be confident in the level of assurance.

To support this work, the NSW Government has introduced reforms to prescribe new obligations on industry practitioners and give the regulator the powers it needs to respond to non-compliant work.

Design and Building Practitioners Act 2020 (**DBP Act**) requires the registration of engineers and key design and building practitioners before they can make compliance declarations that the design and building work complies with the *Building Code of Australia*.

The *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (**the RAB Act**), provides the building regulator with a suite of powers to investigate and rectify building work; allowing Fair Trading inspectors to undertake proactive audits of class 2 building work.

The DBP Act and RAB Act currently only apply to class 2 buildings (residential apartment buildings) and buildings with a class 2 part. Class 2 buildings are typically multi-unit residential buildings where people live above and below each other. Mixed-use buildings, containing a class 2 part, are also captured, with the DBP Act and RAB Act applying to all parts of those buildings, not just the class 2 part. This means that buildings that contain commercial office spaces (class 5) or shops and restaurants (class 6) are subject to requirements around upfront design and work complying with the *Building Code of Australia* if they also contain residential apartments.

The Government has re-vitalised the regulatory framework for certifiers; creating clear standards (including managing conflicts of interest and complying with the Certifier Practise Standards) and increased the regulator's powers.

In addition to the introduction of a new digital strata portal, which will provide a single source of truth for all documents relevant to a strata building, the Government will be imposing clearer duties on strata bodies to maintain their buildings effectively – to ensure that the intended building life can be realised by ongoing care of critical building elements.

The NSW Government's reforms are transforming NSW Fair Trading and Safe Work NSW into modern, cohesive, proactive, data-driven, and risk-based regulators. Fair Trading and Safe Work have shifted from reactive responses to issues in the construction sector to proactively seeking out positive outcomes for our customers (end-users, industry participants and the broader community) through collaborative government responses to issues in the sector, including proactive audits of design work under the DBP Act, of building work under the RAB Act and dispute resolution under the *Home Building Act 1989* (**HB Act)**.

Independent Construction Industry Ratings Tool (iCIRT)

Construct NSW has also enabled the exploration of market-led interventions, such as DLI, to support industry-led efforts to respond to poor industry behaviour, falling quality of work and lost confidence in the sector.

The Independent Construction Industry Ratings Tool (**iCIRT**) is a developer/builder rating tool operated by ratings agency Equifax. Equifax assess an entity against consistent standards to produce a star rating out of five to indicate the entity's relative trustworthiness.[3] The tool uses past performance, governance and financial situation to determine the likelihood of their ability to deliver trustworthy buildings and remediate defects if they occur.

iCIRT responds to concerns around information asymmetry by giving an independent assessment, freely available to consumers, on whether the developer/builder is a trusted player. It allows the consumer to understand the capacity of the entity to deliver the product that has been promised. iCIRT also empowers practitioners to identify players that are likely to produce quality buildings, remain solvent, and pay.

The Panel applauded the work of the Building Commissioner and Equifax to stand up the iCIRT, which will change the way consumers and practitioners assess risk when engaging with developers and builders. Some stakeholders consulted by the Panel raised concerns that if DLI were to be made mandatory, then securing and maintaining an iCIRT rating would also be required.

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[3] 'Build Rating', *iCIRT* <https://www.buildrating.com/>.

Despite sitting outside of the ambit of the Panel's terms of reference, the Panel considers that the iCIRT will be useful for insurers for assessing the trustworthiness of an operator. However, it should continue to be a voluntary process for those developers and builders seeking to be transparent, accountable, and committed to improving the sector. It is hoped that other ratings agencies enter this space to provide competition and innovation to give the market better insights into the trustworthiness of industry players.

Finding 1

The Independent Construction Industry Ratings Tool (iCIRT) is a critical tool to improving transparency, accountability and trustworthiness in the NSW construction industry but should remain voluntary.

The policy objective of DLI

The Panel was tasked with examining the feasibility of a DLI model and consider the conditions that are needed to support a DLI market, to protect customers against major defects when purchasing apartments in Class 2 buildings. This goes to the heart of the Construct NSW strategy to address the industry and regulatory transformation needed to improve consumer confidence in these dwellings.[4]

The key outcome sought is to determine whether DLI is a feasible consumer protection that will provide an effective remedy for building owners dealing with defective building work that will not impose undue financial costs on developers/builders and insurers.

Government intervention to support this market will affect a wide range of stakeholders and the consequences (both intended and unintended) are likely to be complex and dynamic. Stakeholders include current and future buyers of these apartments, insurers, builders and developers.

The guiding principles for the Panel are:

1. The current rates of serious defects in building elements in class 2 buildings must be lowered to attract insurers to the market
2. DLI must be a more effective consumer protection than what is currently available
3. DLI must not place an undue burden on project costs, housing supply or housing affordability

Defective building work remains a problem in class 2 buildings but are preventable

There are approximately 300 new class 2 buildings completed every year in NSW, which is expected to rise to approximately 400 by 2025/26.[5] While many of these buildings are produced by reputable players, there are alarming rates of serious defects in NSW apartment buildings post occupation.

[4] See NSW Customer Service, *Construct NSW Update Report*, February 2021, p 3 for more details (Construct NSW Update Report - February 2021).
[5] DCS forecasts using ABS data.

The Construct NSW reforms are targeting an industry with a low baseline of compliant and quality building work in NSW. Recent research of strata buildings that were completed in the last 6 years identified the following:

- 39% of strata apartment buildings have a serious building defect in the common property
- most serious defects were related to waterproofing (23%), followed by fire safety systems (14%), structure (9%) and key services (5%)
- only 15% of the buildings with serious defects were reported to NSW Fair Trading
- the average cost of remediation borne by owners' corporation was around $300,000 per affected building (including rectification work, legal expenses, and other professional services
- estimated accumulated value of impaired assets in class 2 residential buildings due to serious defects may exceed $3.9bn.[6]

This research correlates with the findings of occupation certificate audits under the RAB Act,[7] which have identified serious defects in 80% of the properties audited, with average cost of remediation of over $42,000 per unit.[8] The graph below shows that there have been serious defects across all five building elements. Essential services, waterproofing, fire safety and structural defects consistently trend ahead of building envelope for defect prevalence.

OC Audits, Monthly Defects

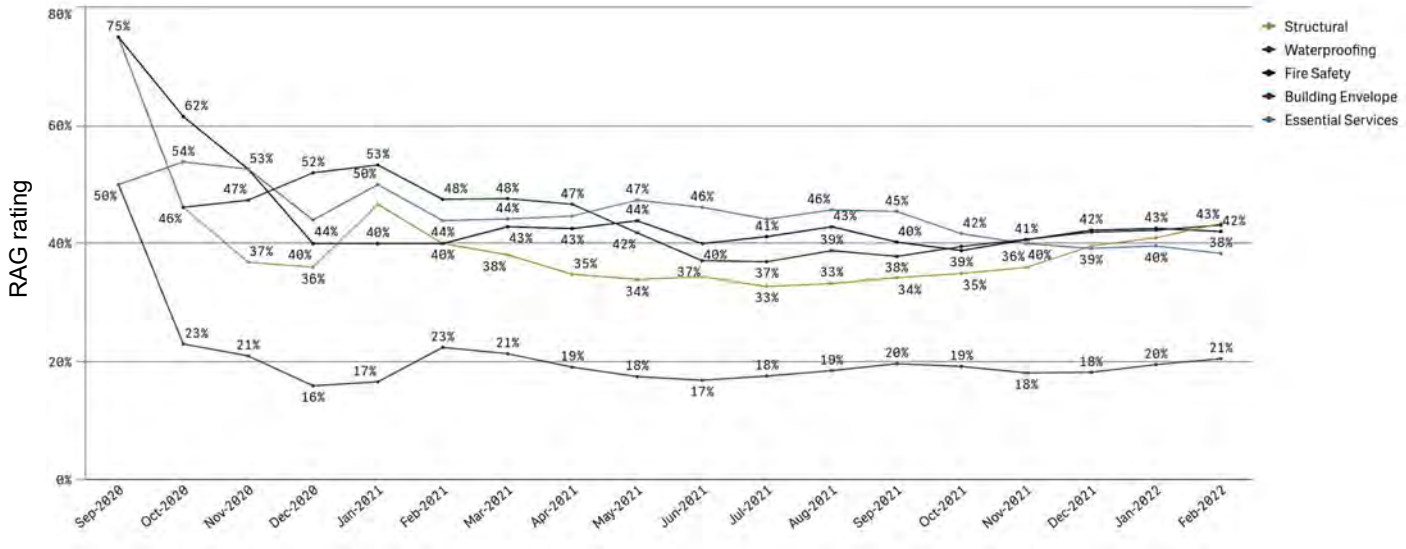

Figure 1: Defects detected during OC audits

[6] NSW Government (2021), *Research report on serious defects in recently completed strata buildings across New South Wales.*
[7] Audits under the RAB Act involve dedicated teams of design and building specialists examining all building work to determine if there are any serious defects in critical building elements.
[8] Quantity Surveyor project preliminary findings into OC Audits conducted by NSW Fair Trading.

The audits have identified 668 serious defects since commencement in September 2020, and in response to these, the Department has accepted one written undertaking and issued:

- 28 Building Work Rectification Orders,
- 20 Prohibition Orders,
- 12 Stop Work Orders,
- three Rectification Orders.

Addressing defects before new owners move in presents a clear cost saving for the customer, who is less likely to experience defects. Defects identified during audits found an average remediation cost of 15% of contract value, with some ranging up to over 30%.[9] This cost is not accounted for at the start of a project (and passed onto the consumer) but comes out of the developer's bottom line after all properties are sold. Further, re-work typically accounts for up to 16% of the time budget on an average construction budget.[10]

Addressing the defect during the design phase is significantly cheaper than during the build phase of a project – a potential cost saving of up to 70% on parts of a build.[11] If this defect was addressed in the design phase the cost to the developer is negligible.

The DBP Act is seeking to address these behaviours by requiring a registered design practitioner (someone with at least five years of experience doing the work they are registered in) to declare that designs for critical building elements (structure, waterproofing, building services, fire safety and building enclosures) comply with the *Building Code of Australia* before any building work commences. This ensures that builders only build when they have designs prepared by competent designers.

To achieve this outcome, building practitioners must lodge all declared designs on the NSW Planning Portal, which allows a single source of truth for project documentation that is auditable by the building regulator. While the DBP Act has only been in effect for 12 months, 30 projects have already had plans audited during the design phase, to complement the 156 projects that have had an occupation certificate audit under the RAB Act.

The Panel considers that, based on the early learnings from these audits, that design practitioners are improving the quality and comprehensiveness of their work, but more effort is required to ensure that all designs comply with the *Building Code of Australia* and integrate all with each other. This will ensure that

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[9] Quantity Surveyor project preliminary findings into OC Audits conducted by NSW Fair Trading.
[10] Procure Technologies, 'How we build: Tracking technology in Asia Pacific Construction 2022', *Procure Technologies* (Livestream, 31 May 2022) <https://www.procore.com/en-au/webinars/how-we-build-now-2022>.
[11] Government of Western Australia Department of Mines, Industry Regulation and Safety, *Reforms to the building approval process for single buildings in Western Australia* (September 2019) <https://www.commerce.wa.gov.au/publications/reforms-building-approval-process-single-residential-buildings-wa-cris>.

the work is compliant in isolation (i.e., individuals' work) and as a united whole (i.e., the project as a whole is fit for purpose).

The DBP Act upfront design requirements are supported by clearer accountability on certifiers to require comprehensive designs before issuing construction certificates and ensure that completed building work complies with the *Building Code of Australia*.

The Panel also agreed that the regulator's efforts to address poor certification work on class 2 buildings is starting to gain traction.

NSW Fair Trading has also created a certifier practise standard, which operates as a condition of licence for all certifiers working on class 2 buildings. The practise standard sets out processes that certifiers must follow to fulfil legislative obligations, including how to properly assess project documentation at the construction certificate application stage and how to undertake critical stage inspections. The Panel considers that the practise standard will empower certifiers to be proactive in oversight building work – delivering compliant buildings.

The Panel considers that it is appropriate for the insurer to be free to decide whether they will organise inspections or rely on those conducted by the certifier, if this does not add undue duplication for the developer or interfere with the statutory functions of a certifier.

Finding 2

The NSW Government's Construct NSW reform agenda is starting to turn the corner in restoring confidence to the NSW construction sector. This is being achieved through clear accountability requirements for designers, builders, certifiers and developers, improved definition and transparency of who the trustworthy operators are, and a proactive regulator addressing non-compliant design and building work earlier in the construction process.

Conditions for a viable DLI are emerging but mandatory DLI likely to be required

The NSW Government's work should be commended and is delivering clear benefits to customers and the industry. However, momentum must be maintained to ensure that insurers are attracted to the market.

If the underlying risks associated with class 2 building work are addressed, including ensuring that competent practitioners are oversighting work, comprehensive designs are prepared before building work commences, designs integrate, compliant and conforming products are used and there are clear records of work done, it is unclear whether the NSW construction industry will be a worthwhile investment for Australian and global insurers.

Lessons learned from other jurisdictions indicate that requiring all developers to secure DLI creates a sufficient pool of premium payers to guard against claims outweighing premiums collected. It also

creates sufficient interest from insurers to the market, rather than relying on a single provider or an uncompetitive duopoly.

If more claims are made than premiums paid, the market will be unprofitable for insurers. This has occurred with professional indemnity insurance for construction practitioners, with insurers dealing with a worsening gross loss ratio of 102% in 2020/21.[12] This would make DLI either unaffordable (with insurers collecting higher premiums to offset pay out rates) or unavailable (with insurers limiting who is offered DLI coverage).

The Panel considered that if the existing strata building bond remains available to developers that it will be used as an alternative to DLI. This will produce a poorer consumer protection outcome due to the limited nature of the bond's ability to remediate serious defects (i.e., rectification cost compensation is capped at the amount remaining on the bond). This issue is considered further in the proposed model.

Finding 3

Unless decennial liability insurance is made mandatory after the transition period, it is unclear whether a mature decennial liability insurance market can be created to provide a long-term consumer protection for residential apartment building owners.

More comprehensive consumer protection is required

While the key consumer protection remains preventing the defect occurring in the first place, there are currently remedies available to class 2 building owners to respond to serious defects.

Statutory warranties

The HB Act provides statutory warranties are implied into all residential building contracts to provide a warranty that the work will be done with due care and skill and in accordance with the plans and specifications set out in the contract. The warranty is owed for the work they conduct and materials they supply during a construction arrangement.

The main person responsible for statutory warranties is the builder and at times the owner-builder or developer who has contracted or facilitated the work. The other tradespeople or subcontractors responsible may be pursued by the builder/owner-builder or developer to cross-claim and recover money.

However, statutory warranties are limited to two years for minor defects and six years for major defects, with fault needing to be proved before remedy under the implied terms can be enlivened. This invariably requires litigation, which imposes prohibitive costs on residents that often need to pay special levies to

[12] Insurance Council of Australia, 'An Insurance industry perspective' (December 2021).

fund proceedings against a developer or builder who may not have sufficient solvency to pay for remediation.

Statutory warranties could be a more effective consumer protection remedy with enhanced dispute resolution capability within NSW Fair Trading, which would allow the regulator to use its enforcement powers to order rectification.

In contrast to the limitations of the statutory warranty scheme, models of DLI only require a defect that is caused by the design and/or construction works to manifest during the decennial period (i.e., fault does not need to be proven to allow remediation costs to be funded by the DLI.

Home Building Compensation

The Home Building Compensation Fund (**HBCF**) scheme offers a safety net to homeowners if their builder is unable to complete building work or fix defects because they have become insolvent, died, disappeared, or had their licence suspended for failing to comply with a money order made by a court or the tribunal in favour of the homeowner.

However, the scheme is limited to new class 1 buildings and new low-rise Class 2 'multi-unit' buildings of three storeys or less, or renovations or additions to existing residential building of any number of storeys, unless exempt. This leaves those buildings higher than three storeys, namely multi-unit high rise buildings, unprotected by the scheme. The withdrawal of insurers from this insurance product and market was largely due to the problems and risks in the class 2 residential apartment market that has become the focus of the Construct NSW reforms.

HBCF scheme is also an insurance product of last resort, requiring a homeowner seeking to claim against the insurance to go through several hurdles before a claim can be determined. With claim amounts also capped, in many cases, the insurance payout will not represent full restitution.

Strata Building Bond Scheme

The strata building bond scheme, introduced under the *Strata Schemes Management Act 2015*, applies to all contracts for residential or part residential works entered into after 1 January 2018, if the development is not covered under the HBCF scheme.

The strata building bond scheme requires developers to lodge a bond of 2% of the contract price of the development with NSW Fair Trading prior to the issue of occupations certificate/s. The bond covers the costs of defect rectification works identified in the interim inspection report carried out by an independent building inspector. The strata building bond is currently held for a period of two years.

There are concerns that the current strata building bond does not operate as an insurance proposition that indemnifies all work but instead provides a finite pool of funding. This pool of funding is typically used to deal with claims of a minor nature (such as defects in individual lots), leaving limited to no funds available to deal with serious defects to building elements. Further, serious defects are often not readily identifiable, let alone those that require rectification of a 'major defect'.

Some stakeholders have also raised concerns that the bond also is a costly and inefficient process for developers to go through when looking to provide surety of the quality of the building.

The existing remedies are not an adequate consumer protection for serious defects

The Panel does not consider that the available remedies alone, or in combination, are currently providing consumers with adequate protection. The remedies have not been effective at remediating the defective building work at a reasonable cost (including time, money and stress costs), and put too much of a focus on proving fault rather than focusing on the speedy remediation of the defects.

DLI will impose a cost on business, but this is justified

Impact on project costs

The DLI product provides a consumer remedy for defects, providing coverage up to 10 years on a no-fault basis that avoids complex and costly litigation (i.e., if a defect is present the DLI will provide coverage rather than having to determine who is responsible). It is proposed that this coverage is limited to the critical building elements in the common property, rather than being a remedy for lot issues.

However, a DLI product is a cost to the developer. Averages from other jurisdictions (with varied industry sizes) indicate a premium of around 2% of construction costs, but this requires full coverage of the industry (mandatory insurance ensures good and bad operators are paying in to spread the risk over a broad pool of payers).[13]

Following consideration of evidence, submissions and research from Australian insurers, the Australian Prudential Regulation Authority, icare, international markets and construction industry stakeholders, the Panel has found that decennial coverage on all building elements for serious defects should be set by the market (rather than mandatory premium rates) and is likely to be up to 2% of total construction costs.

The mandatory French model operates on premiums ranging between 0.8% to 2% of the total costs of works. Similarly, the voluntary model of Latent Defects Insurance in the United Kingdom operates on premiums ranging between 0.7% to1%.

The premiums for a proposed model of DLI in NSW is expected to range between 0.6% to 2% of the contract value, based on the individual circumstances of the developer and the project. The range recognises that less risky developers (a product of past performance, existing processes and the practitioners and products used on a project) will benefit from lower premiums.

While rectification costs are borne by the developer (impacting the developer's profit margin), DLI costs will be passed onto the customer as a cost increase on their unit purchase. For example, an apartment

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[13] Jeanette Barbaro, 'Doing It Overseas: the legal tips and tricks for taking Construction Smarts to foreign jurisdictions' (Conference Paper, SoCLA 2019 National Conference, 1 – 3 August 2019) https://www.scl.org.au/sites/default/files/SOCLA%20National%20Conference%20-%20Call%20for%20Abstracts%202019.pdf.

complex with a contract value of $20m would bear premiums of approximately $200,000 to $400,000 (based on an expected range of 1% to 2%). Accordingly, for an apartment complex of 50 units this would equate to an on cost of $4,000 to $8,000 per unit for 10 years of insurance over the building elements in the common property.

A 2% increase in development costs is a substantial burden on the developer, particularly at a time when the construction industry is already suffering significant cost pressures due to COVID. However, in contrast to additional labour and material costs, any DLI premium costs will be accounted for from the start of the project and can be passed onto the consumer. This would leave the developer at a cost-neutral position.

Further, with remediation costs of serious defects currently estimated to be 15% to 30% of construction costs, securing DLI may be a cost saving for developers (and consumers) in some cases (noting that a developer/builder will still have an obligation to remediate defects. Savings could also be generated by better performing developers accessing lower premiums, with insurers pricing the risk based on the trustworthiness of the player, the design and build process, and the complexity of the build itself.

The Panel considers that the costs of DLI to overall projects are likely to be marginal but encourages Government to track premium costs throughout the Transition Period and beyond to ensure that costs are not becoming prohibitively expensive.

Impact on housing availability

Imposing an obligation to secure DLI in the private market will impact the ability of some developers to secure occupation certificates, with insurers able to undertake an independent assessment of the relative trustworthiness of a developer. However, the involvement of insurers is likely to expedite the market's shift to rewarding trustworthy players, which is at the heart of the NSW Government's Construct NSW reform agenda.

Information asymmetry occurs when buyers have less information than sellers.[14] Building is a skilled profession and consumers have limited understanding of how to deliver compliant building work.[15] For example, a consumer may understand that an apartment building needs to have minimum accessibility standards and can check whether those have been met but is unlikely to have sufficient understanding of whether the structural components of a building comply with the *Building Code of Australia*.

[14] S.Y. Wong et al., 'Improving information gathering and distribution on sustainability features in the Australian residential property market' (2018) 184 *Journal of Cleaner Production* 342.
[15] Amarachukwu Nwadike and Suzanne Wilkinson, *Building Code Amendment Process: A Case Study of New Zealand* (January 2020) 201-9 – 201-11.

For consumers, this limits their ability to confirm building work they have commissioned meets the required standards without commissioning expensive independent verification. This is also an issue for practitioners who rely on their contractors and subcontractors to deliver compliant and integrated work.[16]

Consumers cannot accurately assess the competence of the practitioner or the compliance of the building work, and therefore cannot accurately assess the price they are willing to pay for that work.

They do not know the quality of non-visible products used or the costs over time to come back and fix defective building work (with cost based off financial, time, and stress costs). This information asymmetry may artificially inflate demand (i.e., if they knew the actual cost of the product, they may want less than they are buying).

Practitioners (builders, designers, engineers, trades) also rely on other practitioners to do compliant work to deliver their own work. However, the practitioner may not be aware of how other practitioner's competence, or decisions by the developer, impacts on their work.[17] Ineffective coordination between practitioners is a significant cause of rework and has the potential to affect the practitioner's professional reputation and financial position.

Governments respond to market failure by supporting market players' access to information that may inform their decision to purchase goods and services. In the building sector this is predominately through licensing of key practitioners, instituting independent verification of building work, and creating a legal system to provide a way to resolve disputes.[18]

However, these measures are imperfect as they often respond to the information asymmetry once the damage is done. This damage is not only to the individual consumer left with a defective apartment, but also the broader economy that suffers from an inefficient allocation of resources – labour and material being used to create substandard dwellings at market price that will then need to be rectified. The non-costing of these types of externalities has been identified as reasons why governments need to introduce policies, such as mandatory building standards, to mitigate against these types of market failures.

The Panel does not consider the insurers will seek to act as a second certifier, but they are likely to offer verification of designs, processes, and practitioners throughout the project. Insurers offer an independent, but interested, viewpoint that is focused on ensuring that the delivered product is an insurable building. This interest aligns with the interests of the consumers to have a building that is compliant, safe, and resilient, and would enhance the current iCIRT offering to breakdown customer's information asymmetry.

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[16] W.A.S. Perera, 'An investigation into developing productive construction environments to improve quality performance in Australian building construction' (Ph.D Thesis, University of New South Wales, 2018).
[17] Perera (n14).
[18] See for example *Department of Industry, Science, Energy and Resources* (Web Page, 29 September 2021) <https://www.industry.gov.au/regulations-and-standards/building-and-construction>.

In the current market there are still developers producing these products, relying on the information asymmetry between them and consumers, and relying on either the regulator or certifier not picking up the defective work, or the cost of litigation being prohibitive for future building owners. Under Construct NSW this is changing, and the Panel considers it a justifiable cost that some developers who are currently operating will not be able to secure DLI or will have to change the way they operate before they can secure DLI. This is a market correction that should have occurred already.

The Panel considers that the DBP Act and RAB Act, combined with the iCIRT, will enable developers to identify the fault lines in their existing processes. This will allow them to secure DLI in a mature market, and to quicky work to resolve those issues during the Transition Period.

Impact on housing costs

With the additional upfront 2% cost being passed onto the consumer, there is a risk that DLI will place pressure on housing costs. However, if replacing a strata bond of a similar level, the Panel considers that a DLI product offers significantly more protection for a similar cost to the end consumer.

Rising housing prices in NSW, particularly in metropolitan areas, are placing financial pressure on home buyers, who are having to take on larger mortgages or compromise on size, location, or quality of construction.

The Government's broader efforts are seeking to address this by increasing the supply of class 2 buildings across the State, support new purchasers to secure their first home, and ensuring that better design and building work will lift the quality of apartment buildings. However, DLI would still impose an additional cost on a market already experiencing increased costs.

While an additional cost, the Panel agreed that the additional cost is proportionate to the benefit consumers received and is unlikely to add to overall housing cost concerns. The Panel considered research commissioned by the Office of the Building Commissioner, which found that consumers have a willingness to pay more for decennial coverage of building elements, with 69% of prospective apartment purchasers willing to pay more, with 25% willing to pay up to 5% more on their purchase price.[19]

Further, the Panel also considered the effect that the existing Strata Building Bond Scheme has had on housing costs. Currently, developers are charged a 2% bond for two years to cover costs associated with building defects. When the scheme was introduced, the Government agreed to only apply the scheme to contracts for building work entered into after the scheme commenced. This was to ensure that developers could account for the costs of the bond when setting prices for units. In effect, this has meant that consumers are already absorbing the 2% increase in price, despite developers being eligible for this bond to be returned after two years.

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[19] 'Research on consumer confidence to purchase apartments' *NSW Government* (Web Page, 27 May 2022) <https://www.nsw.gov.au/building-commissioner/research-on-consumer-confidence>.

The Panel agreed that the oncost to consumers for DLI would be justified due to the clear consumer support for paying extra for better coverage, combined with this cost already being borne by consumers for a less effective remedy.

Finding 4

In a mature market, decennial liability insurance costs will not place an undue burden on project costs, housing supply or housing prices.

Conditions required to deliver a viable DLI market

While DLI style products have been offered in the past,[20] viability of DLI waned until recently when Resilience Insurance launched their offering, which has entered the NSW market in recognition of the changing risk profile of the NSW construction sector.

The Panel considers that the conditions that have made the NSW construction industry an unattractive insurance proposition, as far as offering a long-term insurance product over an entire building, are starting to shift as a result of Construct NSW and a desire by industry as a whole to deliver trustworthy buildings. These reforms are starting to "de-risk" the sector, but more work is required to ensure that this change in behaviour and outcome is firmly embedded, and consumers, financiers and insurers have confidence in the trustworthiness and resilience of NSW apartment buildings.

The key outcomes sought from these reforms, and the indicators of a market ready for a DLI product are:

a. assurance that developers and builders are capable;

b. assurance that buildings will be fit for purpose, resilient, and measurably safer;

c. customers who buy them have confidence in their ownership and occupation of them; and

d. financers and insurers who underwrite policies for constructors and building owners are confident in the level of assurance.

The DBP Act and RAB Act, combined with the market-led iCIRT and future rollout of the BAS, provide a strong foundation of confidence in the quality of NSW apartment buildings. These schemes, when operating effectively, will deliver compliant buildings and ensure that NSW offers a viable market for insurers to enter. While not the only way to achieve this outcome, the Panel considers that the elements of the NSW regulatory framework would provide a firm basis for DLI in NSW and offer a model for other jurisdictions to replicate to facilitate DLI extending beyond NSW.

A regulatory framework that secures upfront design and resolution of defects before occupation

Since early 2020, the NSW government has embarked on unprecedented reforms in the building and construction sector aimed at restoring public confidence and ensuring the industry is compliant and competent.

These reforms include the DBP Act which clarified the duty of care provisions and requires registration of principal design and building practitioners and engineers declaring that work complies with the BCA.

[20] Presentation: Panel Meeting 2, APRA, Andrew Gilbert and Grahame Willis, (2022).

In addition, the RAB Act furnished the building regulator with a suite of powers to investigate and rectify building work.

The Government's reforms, including the DBP Act and RAB Act are leading to upfront design and clearer accountability – picking up problems at earlier stages of the design and construction process. Further work is being done to enhance the quality of trade work and the effectiveness of resolving building disputes.

These Acts provide the building regulator a clear line of sight into all design and building work on class 2 buildings, including clarity over who is responsible for delivering what work. Critically, the Acts provide stronger checks and balances for the quality of work on class 2 buildings by:

- registering key design and building practitioners, including engineers;
- requiring all regulated designs (designs for building elements and any performance solution) to be declared by registered design practitioners before a certifier can issue a CC or complying development certificate;
- ensuring that designs integrate – providing a united set of drawings that will comply with the Building Code of Australia;
- the regulator can undertake an audit of the designs as they are lodged onto the ePlanning portal – creating a single source of information on that building – before building work even begins;
- stopping a building practitioner from commencing building work on a building element until they have the declared design from a registered design practitioner;
- mandating that a building practitioner build in accordance with the declared designs – no variations can occur unless it is signed off by a registered design practitioner;
- the regulator is notified 6-12 months from completion and can undertake an audit of building work before an OC is issued. The regulator can issue a building work rectification order, stop work order or prohibition order (which stops the certifier from issuing an occupation certificate) if not satisfied that the building work complies with the Building Code.

The sum of these interventions is that there are clear records of work, work is done to the standard mandated under the *Building Code of Australia*, where there is a defect, it is readily identifiable who caused it, and the regulator has comprehensive enforcement powers to hold that person accountable for rectifying the defect before occupation (i.e., when the proposed DLI product would start). This leaves the consumer, the regulator and the insurer with increased confidence over the quality of the building.

This approach was recommended by the Shergold Weir *Building Confidence* report,[21] but NSW is the only jurisdiction to progress to comprehensive upfront design obligations and mandated assurance processes. Some jurisdictions have started their journey to implement these recommendations, with the Panel encouraging other jurisdictions to adopt the same regulatory posture as the NSW building regulator to secure the same shift in behaviour and quality that has started to occur in NSW.

These reforms complement additional rigour placed on certifiers to adopt a stronger approach to enforcing statutory obligations, including a more interventionist approach to written direction notices to stop work that is not compliant and have that work rectified as soon as it is identified.[22]

For the DLI model, these reforms are increasing the quality of certification work throughout the build process and impose a clear standard of work that the certifier must meet before they can issue the occupation certificate. This will empower more oversight by certifiers, fewer defects through the build process, and more confidence that the completed building is compliant and resilient.

Clear records of work to accurately assess compliance and risk

While strong regulatory frameworks provide increased confidence that the work of designers, engineers, buildings and certifiers will meet industry best practice, a market-led DLI product will rely on enhanced levels of information available to practitioners, consumers and the market. This will allow insurers to more accurately price risk, as well as allow the market to reward trustworthy players and punish untrustworthy players. While some of this will be informed by the insurer's DLI claim experience, a number of initiatives are already offered by government and the market to enhance the quality of records on a building's compliance and resilience.

ePlanning and Strata Portal

The NSW Planning Portal hosts a range of digital planning services, mapping tools and reporting tools; creating an end-to-end chain of project documentation to give a clear picture of the entire building. In addition to ensuring project documentation delivers a compliant building, these reporting obligations assist with ongoing maintenance needs and any future renovation or remediation. All key design and certification documentation will be available in real time and will help to inform insurer's pricing of risk by tracking who has worked on site, what work they have done, and whether the work complies with the *Building Code of Australia*.

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[21] Peter Shergold and Bronwyn Weir, 'Building Confidence: Improving the effectiveness of compliance and enforcement systems for the building and construction industry in Australia' (February 2018) https://www.industry.gov.au/sites/default/files/July%202018/document/pdf/building_ministers_forum_expert_assessment_-_building_confidence.pdf.

[22] A written direction notice is a compliance tool available to principal certifiers under section 6.312 of the *Environmental Planning and Assessment Act 1979.* The notice must be issued in writing where it is suspected that there is or is likely to be non-compliance with aspects of development and gives the person responsible for that aspect of development an opportunity to remedy the non-compliance (including a potential non-compliance) before further compliance action might be taken by a consent authority or the building regulator.

The documents hosted on this system will also inform the creation of future building manuals, which will allow building owners and managers to access the information they need to effectively maintain their building. By giving building owners and managers this information, developers and insurers will have increased confidence in ongoing maintenance that all buildings need to protect the integrity of critical building elements.

The Panel supports the Government's work to implement building manuals across all class 2 buildings and considers it critical to maintaining a building's resilience from defects.

iCIRT

iCIRT is a market-led rating tool for builders and developers that addresses the potential information between industry participants and consumers by allowing providing an independent risk assessment. An iCIRT rating will enable practitioners to understand the relative trustworthiness of the developer/builder they are working for, financiers to accurately price risk when selecting projects to fund and give insurers independent verification of the risk of an operator based on past performance.

Building Assurance Solution

Currently in the pilot stage, the Building Assurance Solution (**BAS**) aims to provide real-time tracking of project inputs and give visibility to third parties of product and process conformity with the *Building Code of Australia* and other prescribed standards. The product will combine data relating to materials used (and their long supply chains) throughout the design and construction process of a building, the construction methods followed, and players involved to calculate the building's risk profile.

By creating this visibility regulators can further shift to a data driven compliance approach, insurers will be better able to distinguish between buildings and accurately price risk (which would support any DLI product), and the market will be driven to improve as trustworthy players are rewarded.

As is the case for iCIRT, the BAS alone does not by itself remove the risk of non-compliant buildings. However, once the BAS has been further tested and developed, it is expected to provide a useful indication of risk when combined with other elements of the NSW regulatory framework.

Buildings are maintained effectively to prevent unnecessary defects emerging

The delivery of competent design and building work will be critical to buildings being compliant, safe, and resilient at the point of occupation. However, responsibility for a building's ongoing resilience also relies on building owners (strata bodies and managers) maintaining their assets in a way that performance standards are not compromised.

The Panel considers that more needs to be done to educate strata bodies on their responsibilities for maintaining their buildings. Poor maintenance of buildings is the result of insufficient designs and maintenance information provided by the developer (to be addressed under the DBP Act and the work to

rollout industry wide building manuals) but also insufficient capability, funding, and action from strata bodies.

Maintenance costs for building assets are recovered from lot owners, who are required to make regular contributions into common pools of funds, such as capital works funds, or pay special levies when expensive treatment is required. While it is hoped that some of these additional costs will be avoided, led by predicted drops in remediation costs due to the DBP Act and RAB Act, there remains a base level of funding required to maintain assets. Under existing approaches, this creates significant variability in the effectiveness of maintenance, with some buildings having committed strata bodies that understand the need to stay on top of maintenance, and others who consider it as an avoidable cost.

The Panel supports the Government's proposed reforms to more clearly define the duty that building owners have to maintain their buildings. The Panel further supports the proposed education material that will be available to strata bodies and managers to lift understanding of what effective maintenance looks like. Building owners must have regular maintenance schedules and contract with trusted, capable operators rather than the cheapest. Money invested during this part of a building's life cycle will not only improve safety and amenity in the short term but extend the life of building elements to make the building itself a more valuable asset.

Strata bodies need to be committed to effective maintenance of their buildings to ensure that unnecessary risks of defects are avoided, as well as early indication that defects caused by non-compliant design or building work are starting to emerge.

An effective dispute resolution process that prioritises remediation

Dispute resolution for building disputes in NSW is regulated under the HB Act, requiring residential building work licence holders to engage with customers and NSW Fair Trading or the NSW Civil and Administrative Tribunal (**NCAT**) to resolve a dispute. While the Panel has not considered how the process operates for class 1 buildings, it does not consider that the current dispute resolution process is providing a fit-for-purpose process to resolve disputes before escalation to NCAT (a jurisdictional cap of $500,000 for building matters) or court.

The NSW Government *Research report on serious defects in recently completed strata buildings across New South Wales* found that only 15% of class 2 buildings with serious defects reported these to NSW Fair Trading with a wide variety of reasons for not reporting.[23] For instance, strata associations dealing with building defects frequently forgo Fair Trading's remediation services, often engaging a lawyer to

[23] NSW Government - Construct NSW, *Improving consumer confidence: Research report on serious defects in recently completed strata buildings across New South Wales,* (September, 2021), https://www.nsw.gov.au/building-commissioner/research-on-serious-building-defects-nsw-strata-communities, p 47.

commence expensive litigation because they are unaware of their rights or avenues open to them, or because of a lack of trust in NSW Fair Trading to deliver outcomes for them.[24]

A viable DLI market will rely on effective dispute resolution at early stages of a dispute to ensure that unnecessary or vexatious claims are not escalated to the insurer (imposing an unnecessary dispute resolution cost on insurers that will be passed on through future premiums). Additionally, it will be a condition of a standard DLI policy for holders of the insurance to report the defect as soon as practical once a major defect manifests. This reactive dispute resolution process is more effective and should complement the proactive risk-based enforcement regime currently delivered under the DBP Act and RAB Act that is focused on resolving a defect during the design and build stage of a project.

Failure to resolve disputes in a timely and cost-effective way also unduly burdens customers and licence holders. Where Fair Trading has not resolved a complaint, or the matter has been commenced in NCAT or a court before Fair Trading is notified of the dispute, customers are subject to longer wait times and, if lawyers have been engaged, additional costs.

While NCAT provides a necessary remedial function and are significantly faster than pursuing action through the court system, its services can still take a significant amount of time. After having already engaged with NSW Fair Trading, 44% or 805 cases dealing with an issue under $30,000 waited more than 16 weeks for a ruling while 11% or 104 cases over $30,000 had to wait more than 18 months for a resolution in the 2020 to 2021 period.[25]

The Panel considered the work of the NSW Government's ongoing review of the HB Act, which is proposing changes to the dispute resolution process. These changes should be accepted and implemented as a priority.

The review of the HB Act has proposed that all residential building dispute matters must come to Fair Trading before they can be escalated to NCAT. This will require customers and contractors to sit down to work through the dispute, with the regulator able to direct remediation using enforcement powers. Matters would only escalate to NCAT where Fair Trading authorises it to by issuing a party a certificate. Matters that go beyond the Fair Trading process will be where there is genuine disagreement, costs are prohibitive (making DLI an appropriate proposition), or the licence holder is no longer around to resolve the defect.

The change in approach to the dispute resolution process is intended to improve costs for licence holders. The dispute resolution process is aimed at intervening early and avoiding last resort mechanisms such as relying on statutory warranties and taking a matter to NCAT.

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[24] NSW Government - Construct NSW, *Improving consumer confidence: Research report on serious defects in recently completed strata buildings across New South Wales,* 2021),<https://www.nsw.gov.au/building-commissioner/research-on-serious-building-defects-nsw-strata-communities> p 33.

[25] NCAT, *Annual Report 2020 – 2021*, (2022), p 94.

Other jurisdictions have adopted a similar approach to resolving disputes, by uplifting the regulator's capability to mediate disputes before tribunals and courts become involved. The Panel considers this a critical feature of a mature industry to ensure that building owners, industry practitioners and insurers are not subject to unnecessary costs.

Recommendation 1

The NSW Government must maintain its investment in reforms of NSW building laws and the capability of the regulator to ensure insurance is a genuine safety net for consumers against defective work in class 2 buildings.

This includes the ongoing enforcement of design and building standards under the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* and the *Design and Building Practitioners Act 2020*, and implementing amendments to the building dispute resolution process under the *Home Building Act 1989* that the Government is already progressing to require NSW Fair Trading to mediate all building disputes on residential properties before they can be escalated to a tribunal, court or insurer.

Where Fair Trading finds that a defect has occurred, the primary response should be to give the developer or builder the opportunity to remediate the defect.

The HB Act currently requires this, which the Panel agreed should be maintained if DLI is introduced in NSW. It is expected that this will control the number of claims under DLI, subsequent payouts, and ultimately the associated premium costs.

In addition, the Panel proposes to include an obligation on the building owner to notify the insurer of the defect as soon as it is identified. While the building owner may continue through the dispute resolution process with Fair Trading, the obligation to notify the insurer will avoid situations where defects might worsen over time.

The Panel notes that in some circumstances there will be an irreconcilable breakdown in relations between the building owner and the developer/builder. In these circumstances, the DLI would be an appropriate remedy of first resort where the building owner has justified lack of confidence in the ability of the builder to remediate the defect.

Recommendation 2

A developer/builder should still be required to remediate building defects in the first instance. If not resolved between the developer/builder and building owner, the insurer to give developer/builder the option to remediate without triggering DLI.

When a building defect is identified, the insurer should be notified even where the matter is subject to NSW Fair Trading's dispute resolution process.

Build-to-rent buildings should be treated separately from build-to-sell buildings

Build-to-rent housing is large-scale, purpose-built rental housing that is held in single ownership and is professionally managed. The developer owns the building and is responsible for remediating any defects to ensure that the value of their asset is not compromised.

In 2020, the NSW Government introduced changes to remove barriers presented by State taxes to the construction of new build-to-rent developments. This included an introduction of a land tax discount for new build-to-rent housing projects until 2040.[26] Subsequent legislative amendments have meant that eligible build-to-rent projects are:

- entitled to receive a 50 percent reduction on land tax, and
- exempted from or entitled to refund of foreign investor duty and land tax surcharges.[27]

To be eligible build-to-rent models, buildings must follow the build-to-rent guidelines as contained in the Treasurer's Guidelines and Revenue Ruling G 014. Amongst other requirements, eligible build-to-rent projects must comprise at least 50 self-contained dwellings used specifically for the purpose of build-to-rent and are made available for use as affordable housing or social housing for a continuous period of 15 years.

Forecasted build-to-rent market

The growth opportunity set for the sector is expected to be underpinned by population growth and number of renters. In Australia, growth is forecast to rebound following the re-opening of borders, post COVID-19. New South Wales and Victoria are entering a period of low supply versus previous peaks.

Analysis of the key build-to-rent participants in Australia suggests the end value of the number of build-to-rent units under construction to be approximately A$9.6 billion, whereas the size of the Australian apartment rental market is A$776 billion, 59% of which is associated to NSW (See Chart 1 and 2).[28]

Nature of build-to-rent properties

Given the potential of build-to-rent developments and diversity of the industry, a single development could include multiple contractual structures, including strata over parts of the building and built-to-rent components in other parts. The result is a complex arrangement of who is responsible for the underlying building elements shared across the building.

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[26] *State Revenue Legislation Amendment (COVID-19 Housing Response) Act 2020.*
[27] Section 104ZJB *Duties Act 1997*; section 5CA *Land Tax Act 1956* and section 9E *Land Tax Management Act 1956.*
[28] Jennifer Johnstone-Kaiser and Callum Yule, Frontier International, 'Australian build-to-rent update' (Report, April 2022) https://www.frontieradvisors.com.au/wp-content/uploads/2022/04/Frontier-international-58-Australian-BTR.pdf..

The Panel considered how DLI would apply to single-use build-to-rent models and multi-use build-to-rent models, in a way that will ensure coverage over strata components of a multi-use without unduly burdening the build-to-rent component of the same development.

Build-to-rent properties do not need the same consumer protections as build-to-sell properties

The Panel affirms that for DLI to be a feasible product it would need to be mandatory for class 2 buildings and buildings with a class 2 part (mixed use buildings), and that the DLI product be made available for other building types through market driven decisions.

The Panel's initial position was that DLI should apply to all class 2 buildings; however, following consultation. The Panel proposes that build-to-rent class 2 (where the entire building is build-to-rent or where a mixed use building does not have a strata component) buildings be exempt from having to secure DLI. The Panel agreed that single-use build-to-rent buildings that do not have a strata component and/or a planning approval permitting strata subdivision, will not require mandatory DLI.

Build-to-rent properties are prohibited from allowing individual lot owners from purchasing a property within the building. This means that the only entity burdened with remediation risks is the developer. While there remains an obligation to protect tenants from defective buildings, the Panel considers that existing obligations under strata and residential tenancy legislation are sufficient to protect the interests of residents.

The Panel has recommended that a class 2 building or building with a class 2 part is a multi-use build-to-rent buildings with a strata component should be subject to mandatory DLI. This is because the building shares the same building elements as the strata component where the strata body would have a right of action against the developer to remediate defects to building elements.

Where the project is not eligible for land and other tax reductions (i.e. does not comply with the Treasurer's Guidelines and Revenue Ruling G 014), the Panel supports requiring DLI be taken out at the same point as other class 2 developments.

The Panel also considered developers that have strata subdivision approval (for potential subdivision in the future and within the decennial period) but have not yet got strata subdivision. The Panel supports these developers should be required to engage an insurer (before proceeding to construction) on a 'fee for service' basis to allow the flexibility for change of use in the future. If this change did occur, the developer would then enter into DLI product with the insurer with the coverage period to still only cover the ten years following occupation.

Recommendation 3

The NSW Government should not require build-to-rent class 2 buildings to have a strata building bond or decennial liability insurance where that building is a single-use build-to-rent building or is a class 2 building that does not include a strata component, and the building will be a build-to-rent building for a period of not less than 10 years.

The Panel's preferred model

The elements of a model

Issue		*Panel's Preferred Model*
	Should DLI be mandatory?	Yes. DLI should be mandatory after a transition period (the Transition Period) with the option to delay the mandate depending on the level of market maturity. During the Transition Period developer must apply for DLI. However, they are free to choose between DLI and a strata building bond. The Panel notes that the cost of the strata bond option should increase in cost and duration over time. The proposed transition period is found on page 64.
	What building work is covered by DLI?	DLI should cover building elements as defined by the DBP Act.
	What building type should DLI cover?	DLI should cover all new class 2 buildings and buildings with a class 2 part (except for eligible build-to-rent properties). Each new class 2 building or building with a class 2 part should have its own DLI policy even in developments with multiple towers.
	Can the insurer exclude elements?	No, elements should not be removed from coverage.
	What should be excluded from DLI?	Non-building elements, issues in individual lots, defects that are not a 'serious defect' within the meaning of the RAB Act.
	What standard of defect is required?	The 'serious defect' definition within the meaning of the RAB Act.
	What is the threshold for liability?	Strict (no fault) liability.

	What is the scope of liability?	Joint and Several.
	What is the trigger for liability?	Upon a defect manifesting.
	When does DLI apply?	An insurance of first resort.
	Who buys and holds DLI insurance?	The developer pays for policy at final occupation certificate stage and policy held by the owner (transferred with title) as the beneficiary.
	Does DLI coverage transfer with change in ownership?	Yes. Automatic transfer from developer to owners and subsequent owners for duration of policy.
	How is remediation addressed?	Building owner should notify insurer of defect as soon as practical. Building owner must work with the developer /builder to remediate in the first instance. If not resolved, insurer to give developer/builder option to remediate without triggering DLI.
	How will a dispute resolution process work?	The Fair Trading dispute resolution process in first instance and only escalated to insurer following the completion of this process.
	What defences are available to the insurer?	Where the damage is not caused by defective design or building work – Force Majeure, Extraneous Cause, Accident. Strata bodies have a duty to maintain and keep property in a state of good and serviceable repair.
	What is the limit on indemnity?	The cost of remediating serious defects up to the full value of the building at the time of construction.
	When is the premium paid?	By the first occupation certificate that allows occupation of a class 2 part of a building (noting that some buildings may have multiple occupation certificates). A deposit for DLI is usually paid before occupation.

	When is the DLI agreement established?	Before construction (between development approval and construction certificate) to allow developers to advertise their conditional DLI before construction in the marketing phase.
	Who should conduct inspections?	The insurer relies on inspections performed by the certifier, with insurer inspections onsite to be negotiated during DLI establishment.
	When does DLI coverage commence?	Issue of final occupation certificate.
	How long does the insurer have to recover from at fault parties?	24 months from the time the claim is commenced, is a sufficient period for the insurer to commence recovery from at fault parties.
	How long does the owner have to claim?	10 years to lodge a claim from the date of issue of the final occupation certificate.
	What is the basis of DLI premiums?	A percentage of the build value (estimated to be <2% of construction costs).
	Can building owner elect to have defect fixed or be paid out?	No. Remediation needs to be organised by the insurer.
	How do we ensure defects claimed for are properly rectified?	Insurer to organise rectification work. Once it is rectified, the insurer will organise inspection.
	How will rectification affect future claims?	The rectified defect remains a part of the policy. Note: building owner has a duty to mitigate its losses, including owner's corporation duty to maintain and keep property in a state of good and serviceable repair.

	How will the strata building bond operate?	Increase over time to 5% strata building bond held for 6 years for those unable to secure DLI coverage. After the Transition Period, repeal strata building bond scheme.
	How will Home Building Compensation coverage work?	For new class 2 buildings, Home Building Compensation coverage will not be required where a DLI product in force. For all other class 2 building work, Home Building Compensation coverage will be required.
	How does DLI work with statutory warranties?	Separate to DLI – liability periods will be different.

Should DLI be mandatory?

Preferred option: DLI should be mandatory after the Transition Period. During the Transition Period developer must apply for DLI but can pay a strata building bond (which should increase in cost and duration over time) if DLI cannot be secured.

Option/s not progressed: DLI should be optional (the developer can either secure DLI or pay strata building bond)

The Panel does not consider that a viable DLI market can be created in NSW without requiring all industry participants to secure the same level of coverage. Mandatory DLI has the benefit of providing consistent consumer protection for all apartment purchasers – providing a genuine safety net if defects emerge.

The mandatory scheme would work in NSW if the underlying risks associated with current building work are rectified including:

- better quality designs,
- building work that complies with those designs,
- higher competency obligations for designers and builders, and
- improved transparency about the relative trustworthiness of industry players.

The Panel agreed that a transitional voluntary scheme that will pave the way for a mandatory proposition is viable in the present market. A mandatory proposition for DLI would mean that every developer in the

market is required to have DLI to operate (for example by prohibiting the issue of an occupation certificate until evidence of a DLI is provided).

International models indicate that a mandatory scheme will lead to a far more cost-effective model. However, it is important to note that in the absence of a mature market with excess pooled liquidity, it may be difficult for all players to secure a cost-effective DLI product. For example, operators not rated under iCIRT or those with properties over a certain value may find it difficult to secure a DLI product immediately or at a reasonable price.

The Panel supports optional DLI during the Transition Period. This will mean that while every developer in the market is required to seek to secure DLI in the first instance, where a developer cannot secure cost-effective insurance coverage the developer can take out a strata building bond during the Transition Period (with the cost and duration of the strata building bond being increased over the transition period). This will provide a legitimate safety net for those unable to secure DLI, while encouraging uptake of DLI. Notably, the Government will be guided by pre-determined indicators of a mature market before closing out the Transition Period (dealt with further below).

The Panel considered what would happen to developers unable to secure DLI after the Transition Period, and the impact this would have on housing supply. With DLI offered by private insurers, the market can restrict the availability of a product to a developer where the market considers the person is too risky or there are broader concerns with the project itself. Under the Panel's preferred model, this could leave some developers unable to commence (if policy is not agreed at start of policy) or finalise (if insurers refuse to issue policy at end of project) a development.

While acknowledging this risk, the Panel does not consider it should impact the imposition of a mandatory DLI product in a mature market. Where insurers are not willing to issue a DLI product, this is usually caused by the developer being too high risk to secure a policy, even with the insurer's ability to set a higher premium to deal with that risk. In these circumstances, it is unclear whether there is a benefit of having these kinds of developers delivering housing supply in the NSW market as they are likely to be poor quality buildings with a high risk of defects.

The impact of the change would be further offset by the Transition Period, which is intended to give industry time to address the underlying risks that would stop them securing DLI. iCIRT (which should remain voluntary) provides a good early indicator of whether a developer, their systems and governance arrangements, are likely to stand up to the scrutiny of a risk assessment by an insurer in the future. Further, with the obligation to apply for DLI, developers will have a keen understanding of what needs to change by the time DLI becomes mandatory.

The Panel does consider that new entrants to the market will be impacted in different ways to the less trustworthy developers, as they will not have a body of work for insurers to compare likely performance for future properties against. However, the Panel considered the broader assessment process for DLI

likely to be undertaken by insurers and is satisfied that new entrants will be able to secure DLI coverage as discussed earlier.

What building work is covered by DLI?

Preferred option:	DLI should cover building elements as defined by the DBP Act.
Option/s not progressed:	All common property
	Major elements (as defined in the HB Act)

The Panel agreed that a proposed DLI model will provide coverage for critical building elements regulated by the DBP Act. The DBP Act defines building element as:

a. the fire safety systems for a building within the meaning of the *Building Code of Australia*,

b. the 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 but not limited to in-ground and other foundations and footings, floors, walls, roofs, columns and beams),

d. a component of a building that is part of the building enclosure,

e. those aspects of the mechanical, plumbing, and electrical services for a building that are required to achieve compliance with the *Building Code of Australia*.

The Panel considered that the most viable DLI product would capture all building elements in the common property due to their ongoing impact on building owners. This impact includes the safe occupation of the building, ongoing maintenance needs, and likelihood of remediation. The Panel made this consideration within the context of statutory warranties providing coverage for all building work and duty of care under the DBP Act lasting for 10 years for building work.

Focusing on building elements also leverages the success of industry and Government to ensure more compliant work through the DBP Act (which requires upfront design and work that complies with those designs) and the RAB Act (which allows the regulator to order remediation for defective work on building elements). These schemes increase confidence in the quality of the building when it is handed over to the building owners and enhances the insurer's ability to accurately assess risk and offer a comprehensive insurance product.

The Panel considered expanding the ambit of cover to other work in the common property, such as fixtures, landscaping and fit-outs. While this work should still be done well, the Panel does not support DLI covering this work as there are insufficient protections to ensure the work is done compliantly, and the impact of this kind of defective work is likely to be minimal. It was considered that there were not

sufficient issues with the current level of coverage and remedies to justify expanding DLI to cover this work.

The Panel also considered the definition of major elements under the HB Act but adopted the building elements definition from the DBP Act as it is more fit for purpose (aligns with the underlying conditions that will make DLI viable – clear obligations on practitioners, a strong regulator and quality documentation throughout the lifecycle of the building).

However, if the Government introduces mandatory DLI to replace the current strata building bond, consumers may lose the ability to secure immediate relief for minor defects (defects that are not related to building elements). This includes minor issues such as cracked tiles, internal doors not closing correctly, incorrect installation of bathroom fittings or chipped walls throughout the building. These issues can currently be remediated by the developer using money set aside under the bond.

Despite removing coverage for minor defects, the Panel considers that consumers will still be better off with a DLI product than a strata building bond as:

- the DLI is an indemnity for the total cost of remediation rather than a finite pool of funds
- DLI focuses on the more complex and critical parts of the building that will impact the safety and amenity of the entire building rather than individual lot owners
- the strata bond provides coverage for two years; DLI for 10 years.

Following engagement with strata body representatives, the Panel considered that DLI, and the ongoing work of the regulator, will encourage developers to resolve minor defects during the statutory warranty period instead of waiting for litigation to resolve the issue. This is because of the more proactive enforcement approach by NSW Fair Trading on minor and serious defects, and the trustworthiness of developers likely to secure DLI.

This will need to be carefully managed to ensure that removing the remedy for minor defects does not inadvertently incentivise litigation, which would add unnecessary time and cost to residents and developer. This will be a particular risk for those building owners coming to the end of the two year statutory warranty period for minor defects. The Panel considers this can be managed if the regulator delivers a dispute resolution process that is fit for purpose – cost effective, timely and proactive to ensure all disputes come to it first and have the best chance of being resolved without litigation.

What building type should DLI cover?

Preferred option: DLI should cover all new class 2 buildings and buildings with a class 2 part (except for eligible build-to-rent properties). Each new class 2 building or building with a class 2 part should have its own DLI policy even in developments with multiple towers.

Option/s not progressed: DLI should cover all new buildings over time.

Certain class 2 building should be exempted from having DLI.

The Panel agreed that the primary focus of Government is to test the viability of a proposed DLI product on class 2 buildings. While the Panel supports the market considering the adoption of DLI across all asset types, it does not provide any advice to Government outside of the adoption of DLI for class 2 buildings as the Government's reforms to date that make DLI viable have focussed on class 2 buildings.

While a significant proportion of class 2 buildings are multi-storey buildings, there are also a variety of low-rise buildings (for example, buildings with only 2 or 3 storeys) which are classified as class 2. As class 2 dwelling units are not independent of each other, they have different requirements that are specially designed to protect the health, safety, and welfare of all occupants. For example, the joining of units by wall, roof, or floor can affect each resident's risks in the event of fire. They therefore require special rules to reduce the effects of heat, smoke, and fire throughout the building.

The Panel proposes that if DLI is feasible it would be made mandatory for new class 2 and buildings with a class 2 part (mixed use buildings), and that the DLI product be made available for other building types through market driven decisions or following re-examination of the issue by Government after the initial rollout in class 2. Class 2 buildings have been subject to significant improvements in regulatory intervention from government and increased awareness of capability gaps in industry that have led to defects. This work puts class 2 in an ideal position to the first mover on DLI coverage in Australia.

There may be concern that the costs of securing a DLI product may be prohibitive for smaller class 2 developments, such as manor houses and granny flats. While the Panel considers this issue will be addressed relatively easily by the market's ability to price risk, it is important this issue is considered further by Government in the implementation of any regulatory changes.

Some stakeholders consulted by the Panel were concerned that DLI may be duplicative of other insurance products available for other building types, traditionally taken out by developers in this space. However, as noted above, DLI seeks to address the limitations of traditional insurance policies, particularly those related to building performance. Further, the Panel recommends that these existing obligations (such as Home Building Compensation coverage and Strata Building Bonds) be replaced with a single DLI obligation.

Build-to-rent adds complexity to any proposal to rollout industry wide obligations to secure DLI as with build-to-rent developers remain the building owners rather than handing ongoing maintenance responsibilities to strata bodies. The Panel considers that where a build-to-rent property does not include a class 2 component subject to strata title, and where that property must be held for not less than 15 years, it should not be subject to a mandatory DLI requirement.

Where a building does contain a build-to-rent that is not subject to the 15 year change of use prohibition under planning and tax requirements, it is appropriate that DLI be a mandatory requirement (after the transition period) when that property's use is changed to strata.

The Panel considers this appropriate as:

- it would ensure the involvement of the insurer as a quality control contributor during the build phase of the project,
- if the developer were to sell the asset, or seek to have a strata scheme registered, during the 10 year period after occupation, insurers were unlikely to offer a DLI product for the remainder of the 10 year period. While the *State Environmental Planning Policy Amendment (Build-to-rent Housing) 2021*[29] indicates that the build-to-rent status of a build-to-rent housing development will last for at least 15 years, it does not prevent developers from selling or changing the use of the development within that time,
- a single development could include multiple contractual structures within a single building, including strata over parts of the building and buildto-rent in another – creating complexity over who is responsible for the underlying building elements shared across the building that could be dealt with more efficiently by having a single insurance obligation on the building. This complexity is resolved where a developer is required to provide coverage from the start of occupation,
- if a DLI was not secured, purchasers would be deprived of a remedy available to other building owners,
- if not made mandatory, it could create a loophole for developers to change building use soon after occupation to avoid purchasing a DLI product.

The Panel has considered that change of use applications during the first 10 years of a building's life could be resolved by requiring DLI to be secured for the period of time between the decennial liability period ending and the final occupation certificate for the original building. With change of use subject to a requirement for a certifier to issue an occupation certificate, this could be used to resolve concerns around enforceability.

The Panel also considered changes of use. Building may not be classified as a class 2 building during construction, then converted to class 2 at a later stage removing the benefits of the DBP Act and RAB Act. While Government has indicated it will extend these schemes out to other National Construction Code classes of building, this may take some time. The Panel recommends further consultation on this issue to ensure that DLI serves as a strong safety net for purchasers in any class 2 building but does not unduly stifle innovation and adaptive use of buildings in NSW.

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[29] Section 41C *State Environmental Planning Policy Amendment (Build-to-rent Housing) 2021.*

Can the insurer exclude elements?

Preferred option: No, elements should not be removed from coverage.

Option/s not progressed: Yes, the insurer should have discretion over what is insured, with the customer to take out a strata building bond to cover the difference between minimum coverage required under the strata building bond and what is covered by the DLI product.

Yes, dependant on rating. Developer to take out strata building bond to cover difference between minimum coverage required under strata building bond scheme and what is covered by a DLI product.

The Panel agreed that if insurers are afforded discretion and exclude certain elements it is expected that developers will be required to take out a strata building bond or another insurance policy to cover that excluded building element.

While some Panel members indicated discretion was vital to enable insurers to adequately assess and price their risk, others were concerned that administering a discretionary scheme with variable insured parts would result in an undesirable sense of uncertainty with respect to coverage.

The Panel agreed that insurers offer a standard policy to reduce confusion and allow consistent risk assessment. It was considered that a standard form policy (possible also aligned with iCIRT ratings) would appropriately assist insurers in determining variable premiums so that they may properly manage their risk. This flexibility in pricing their risk is a balanced compromise for all parties involved.

What should be excluded from DLI?

Preferred option: Non-building elements, issues in individual lots, defects that are not a 'serious defect' within the meaning of the RAB Act.

Option/s not progressed: Insured building work where remediation is below a certain value.

The Panel generally agreed that the proposed DLI model would exclude coverage for building work that does not constitute a building element.

What standard of defect is required?

Preferred option: The 'serious defect' definition within the meaning of the RAB Act.

Option/s not progressed: Develop a new definition aligning 'serious defect' and 'major defect'.

Use the HB Act's definition of 'major defect'.

The Panel's preferred standard of defect required for the activation of DLI is the definition of 'serious defect' as contained in the RAB Act. A serious defect can be met by:

a. a defect in a building element that is attributable to a failure to comply with the performance requirements of the BCA, the relevant Australian Standards or the relevant approved plans (development consent plans under the *Environmental Planning and Assessment Act 1979* (**EP&A Act**) or declared designs the DBP Act).

b. a defect in a building product or building element that is attributable to defective design, defective or faulty workmanship or defective materials AND causes or is likely to cause:

   - the inability to inhabit or use the building (or part of the building) for its intended purpose, or
   - the destruction of the building or any part of the building, or
   - a threat of collapse of the building or any part of the building.

c. a defect of a kind that is prescribed by the regulations as a serious defect

d. the use of a building product (within the meaning of the *Building Products (Safety) Act 2017*) in contravention of that Act.

By limiting DLI coverage to serious defects in building elements, consumers will have access to a remedy to defects in the critical parts of the building without unduly burdening developers and insurers with claims for minor issues. This approach will ensure that the enforcement powers under the RAB Act, which allow rectification to be ordered during and post-construction, would reduce the risk of unnecessary claims being made on DLI policies. Importantly, excluding minor defects keeps the cost of mitigating risk down, benefitting consumers.

A 'major defect' under the HB Act is a defect in a major element of a building that is due to defective design, workmanship or materials, or failure to comply with the NCC structural performance requirements. Adopting this definition (instead of serious defect) would provide synergies with the current statutory warranties scheme and the Home Building Compensation scheme. However, it would not apply to all requirements under the DBP Act that secure upfront and compliant design and building work that delivers those designs. It would provide alternative standards of work, which could create unnecessary complexity.

While the Panel understood the impacts of adopting the broader 'serious defect' definition, adopting 'serious defect' is the Panel's preferred standard. Noting the importance of consistency across regulatory requirements, the Panel recommended that the Government consider aligning the trigger for the proposed DLI product and powers under the RAB Act with the statutory warranties scheme that is currently under review. This advice has been provided to the HB Act review team.

What is the threshold for liability?

Preferred option: Strict (no fault) liability.

Option/s not progressed: Fault based liability.

Liability contingent on damage.

The Panel agreed that the threshold for DLI should be strict liability. Strict liability means that legal responsibility for damages that result from a serious defect to a building element will not be contingent upon the establishment of fault or negligence on the part of the builder and/or developer. Liability will flow from the fact that the defect has caused loss and damage.

DLI is intended to be a customer-centric insurance product – providing an immediate remedy to consumers to ensure that remediation can commence as soon as possible.

The current environment (without DLI) relies on adversarial dispute resolution to determine a party's fault for causing a defect before remediation can commence. This often relies on expensive and lengthy litigation, which favours litigious parties or parties willing to fund long-term proceedings. This process has meant that many building owners are spending significant sums of money to prove liability (a cost also borne by the at-fault party) before any work commences. This not only means living with the defect for longer, but also may increase the cost of remediation.

Relying on proving fault also relies on the party that caused the fault still being around, and solvent at the end of any proceedings. With litigation costs tens or hundreds of thousands of dollars, this is not always a realistic prospect.

Strict liability allows an insurer to move quickly to remediate defects to building elements. This is a clear customer benefit – responding to safety, amenity and cost impacts that customers are currently facing. It also enables the most cost-effective resolution of a defect by fixing the defect at the earliest point in the process, and then working out who caused the problem through a separate process.

If the liability was only established when damage has occurred, this may be too late for a cost-effective remediation to occur. Fixing the problem as soon as the defect becomes apparent will put all parties in a better financial position.

What is the scope of liability for at-fault parties after DLI is paid?

Preferred option: Joint and Several.

Option/s not progressed: Joint or Several liability

The Panel agreed that the scope of liability will be joint and several where the DLI policy has been triggered and the insurer is seeking to recover costs from the at-fault party.

While joint liability refers to the share of liability assigned to two or more parties involved in the building work, several liability refers to a situation where parties involved are liable for their respective contribution to the building work.

In a joint liability scenario if two developers are responsible for defective building work, and one becomes insolvent or cannot be found the other will be liable for the remediation of the entire defective building work. In contrast, a several liability scenario would find the available developer only to be liable for their share of the defective building work.

Accordingly, the combination of joint and several liability makes all parties involved responsible for their respective contribution up to the entire amount, affords the parties flexibility to share liability while allowing the building owner (or where DLI is in place, the insurer) to pursue full recovery from the party with the deepest pockets, if the others cannot pay.

What is the trigger for liability?

Preferred option:	Upon a defect manifesting.
Option/s not progressed:	Once the cause is established. When damage has occurred.

The Panel agreed that the trigger for liability would be upon the manifestation and discovery of a defect. The Panel considered this would allow the parties to get ahead and mitigate exposure.

When does DLI apply?

Preferred option:	Insurance of first resort.
Option/s not progressed:	Applicable if other policies do not respond.

The Panel agreed that DLI should be an insurance of first resort (where the developer/builder fails to remediate the defect). DLI would cover all claims where the owner proves defective work and the claim will be paid when defects are identified as opposed to payment upon a defined event (e.g., a defect identifies and the developer/builder has died, disappeared or become insolvent), as it is with products of last resort. This is expected to ensure timely payouts and good customer outcome.

The Panel noted the concerns around the Home Building Compensation scheme, which operates as an insurance product of last resort, about securing timely remediation of defects. The Panel considered that adopting an insurance product of last resort may put too many obstacles in the way of building owners to secure a timely remedy and would rely on significant work around proving liability before remediation can commence.

DLI is intended to be a simple process for developers, practitioners and building owners. It is proposed that DLI replace Home Building Compensation obligations on new class 2 buildings and the Strata

Building Bond to ensure that there is a single pathway for building owners seeking to remediate defects in building elements. If the proposed DLI product was only triggered upon proof of other policies not providing coverage, it is unclear that the benefits of DLI could be fully realised.

Who buys and holds DLI?

Preferred option: The developer pays for policy at final occupation certificate stage and policy held by the owner (transferred with title) as the beneficiary.

The Panel propose that the DLI product be bought and paid for by the developer. The cost to the developer will likely be incorporated into the build cost, with the entirety of the premium for the DLI product paid before occupation. The resulting DLI policy is expected to pass onto the building owner with transfer of title.

The Panel considered the policy intent of DLI, which is to provide an indemnity for work undertaken by the developer and to ensure that the indemnity is effective for the entire decennial period, in adopting this position. While many developers and builders will be around for the entire decennial period following occupation, the construction industry has high rates of insolvency, an issue seemingly exacerbated during COVID.[30]

By requiring the entire premium to be paid upfront at the occupation certificate stage of a project, it is hoped that DLI not only provides an effective remedy against defects but also insolvency (and illegal phoenixing), which has been an ongoing cause of concern for building owners struggling to recover costs. This will allow building owners to claim on serious defects on building elements throughout the entire 10 year period.

Does DLI coverage transfer with change in ownership?

Preferred option: Yes. Automatic transfer from developer to owners and subsequent owners for duration of policy.

Option/s not progressed: No. DLI does not benefit subsequent owners

Only if assigned by contract.

The Panel agreed that DLI coverage will transfer with title and change of ownership. Accordingly, it will benefit subsequent owners for the duration of the policy's decennial period. This process should be reflected in any changes to conveyancing and strata legislation to ensure the transfer occurs under leasehold and freehold title.

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[30] Insolvency statistics – Series 1A companies entering external administration and controller appointments by industry, ASIC (2022), < https://asic.gov.au/regulatory-resources/find-a-document/statistics/insolvency-statistics/insolvency-statistics-series-1a-companies-entering-external-administration-and-controller-appointments-by-industry/>

How is remediation addressed?

Preferred option: Building owner should work with the developer and builder to remediate in the first instance. If not resolved, insurer to give developer/builder option to remediate without triggering DLI.

Option/s not progressed: As soon as defect manifests, building owner makes claim under DLI and insurer organises remediation and recovers cost from developer/builder.

The Panel has agreed that the developer ought to be provided the opportunity to remediate the defective building work before a building owner can seek to make a claim against the DLI, as is currently required under the HB Act. The Panel agreed that the insurer is to organise remediation with the developer where they become involved in the dispute.

There is a general obligation under the HB Act ensuring the contractor concerned will remediate defective work. The Panel agreed that this obligation should remain unchanged under DLI. It is expected that this will control the number of claims under DLI, subsequent payouts and ultimately the associated premium costs.

In addition, the Panel proposes to include an obligation on the building owner to notify the insurer of the defect as soon as it is identified. While the building owner may continue through the dispute resolution process with Fair Trading, the obligation to notify the insurer will avoid situations where defects might worsen over time.

How will a dispute resolution process work?

Preferred option: The Fair Trading dispute resolution process in first instance and only escalated to insurer following the completion of this process.

Option/s not progressed: Building owners able to come directly to insurer before Fair Trading.

Building owners engage with developer and developer makes claim to insurer.

The Panel noted the ongoing review of the HB Act review is proposing to reframe the current dispute resolution model to reflect a move from a reactive dispute resolution process to one which is more proactive.

The current dispute resolution process under the statutory warranty scheme is activated following the lodgement of a formal complaint to NSW Fair Trading. This allows NSW Fair Trading to encourage the parties to resolve their disputes.

As part of this process, if the building inspector who assesses the defective work cannot get the parties resolve their dispute by consent, the inspector will issue a rectification order (should they form the view

that the work is the responsibility of the developer/builder). If the inspector cannot determine the matter, it is escalated to NCAT.

The proposed remake of the HB Act through the Building Bill provides a range of mechanisms that the Department could use to facilitate proactive dispute resolution processes, particularly enhancing early mediation. These mechanisms are anticipated to intervene earlier in proceedings to avoid burdening the courts and/or reduce the number of insurance claims.

The Panel understand this will prompt parties to refer their disputes to Fair Trading in the first instance. To support this, the Department should prioritise its work to uplift its capacity and resources to facilitate an expected rise in disputes referred to them in the first instance.

A key change being considered by the HB Act review is that Fair Trading no longer requires a complaint to be lodged to investigate. Fair Trading could use its investigation provisions to conduct audits in the building industry to identify and investigate non-compliance. This approach has already been incredibly successful under the RAB Act, with the regulator proactively investigating developers and former developers, residential apartment buildings, the carrying out of building work – including building work carried out by a contractor or sub-contractor – and any potential breaches of the legislation.

The change in approach to the dispute resolution process is intended to improve customer outcomes while keeping costs low, particularly if this results in fewer claims being made on DLI.

The Panel would welcome the speedy implementation of these changes but does note that the Fair Trading dispute resolution process will focus on enforcing statutory warranties, which for building elements will last six years. The remaining period (i.e., year six to ten) will be managed through the dispute resolution process determined under the DLI, with each insurer needing to have a seamless process for building owners to make claims under the policy.

The Panel does not support building owners coming to insurers before Fair Trading as this is likely to lead to unnecessary or vexatious claims, which would impose a significant additional administrative cost on insurers that would have to be offset through premiums.

The Panel supports the ability of building owners to engage with the insurer, but considers the Fair Trading dispute resolution process, particularly when the proposed changes are adopted, an effective way to resolve disputes quickly, and encourage developers and builders to voluntarily remediate.

What defences are available to the insurer?

The Panel is yet to confirm its position in respect to the defences available to insurers.

Preferred option: Where the damage is not caused by defective design or building work – Force Majeure, Extraneous Cause, Accident.

The Panel affirmed that the purpose of the proposed DLI product is not to respond to all problems related to a building but is focused on the design and building work that is defective. Damage or loss that is not causatively linked to the design and building work of the developer is outside the scope and applicability of DLI. Further, strata bodies have a duty to maintain and keep property in a state of good and serviceable repair. If a body corporate is deemed to have been negligent, this could give rise to an insurer withdrawing DLI coverage.

Force Majeure

Force majeure is a common clause in contracts which essentially frees both parties from liability or obligation when an extraordinary, unavoidable event or circumstance beyond the control of the parties, prevents one or both parties from fulfilling their obligations under the contract. Typically, these events include natural causes (fire, storms, floods), governmental or societal actions (war, civil unrest, labour strikes) and infrastructure failures (transportation, energy etc).

Extraneous Cause

Extraneous cause is intended to be a cause unrelated to building work. For example, an earthquake may be an extraneous cause, but if the building is not built in accordance with earthquake requirements, then the earthquake would not be considered the cause. This is the defence used in the French regime.

Accident

Accidental damage is typically defined as damage caused by an unforeseen and unintentional event. For example, a lot owner starts a fire in their apartment which compromises part of the buildings structure, waterproofing and building services. This would need to be remediated by the building owner as but for their actions the building elements would be operating as intended.

Accordingly, events falling under either of the categories above will negate the policy. These events may result in the design and building work no longer be a dominant cause of any associated loss or damage.

What is the limit on indemnity?

Preferred option:	The cost of remediating serious defects up to the full value of the building at the time of construction.
Option/s not progressed:	A percentage of the cost of building.
	No limit – whatever cost of remediation is.

Class 2 buildings vary significantly in their complexity from granny flats to multi-tower developments. This variability also changes the complexity of the build, the number of practitioners involved and the overall construction cost.

The Panel's engagement with industry stakeholder affirmed that this variability in construction cost will be a key challenge in implementing industry wide DLI availability, with smaller developments likely to have more insurer options than larger developments due to the cost risk to insurers. DLI products typically provides coverage for developments under $50 million. Even though reinsurers have capacity to provide reinsurance, larger developments (those worth over $50 million) may find it difficult to obtain an 'off-the-shelf' DLI product to cover higher construction costs. Those developments could either obtain multiple DLI policies or a bespoke DLI product to cover the higher building costs.

The Panel notes that the majority of developments in NSW are under $50 million and that international case studies show that once a thriving DLI market has been established, higher levels of insurance have been more readily available.

Advice from insurers indicated that while the initial products would be based off $50 million construction costs, they do not perceive any limitation in insuring trustworthy developers of >$50 million projects up to the full construction cost value.

However, while the cost of construction is an important determinant, there are likely to be limited circumstances where the cost of remediating a building element would equate to the original construction cost, particularly with the availability of comprehensive designs that enable ready identification of the cause of the defect. Further, insurers are used to providing comprehensive coverage of large scale developments and infrastructure projects. It is expected this value differential will make the process more complex but still achievable.

The Panel proposes that eligible DLI products provide indemnity up to the cost of the full value of the construction costs. If indemnity is limited to total remediation costs, remediation costs could exceed the original construction cost as costs to remediate escalate over the ten year coverage period. On the other hand, a maximum payout could be less than the original construction costs as minor works are excluded from remediation.

The Panel suggests the cost of construction is determined by a valuation by the insurer. If a developer wants to increase this amount, they might consider reinsurance and/or multiple insurance. This will be particularly effective for larger developments that might require multiple contracts of insurance to cover the full value of the construction cost.

When is the premium paid?

Preferred option:	By the first occupation certificate that allows occupation of a class 2 part of a building (noting that some buildings may have multiple occupation certificates). A deposit for DLI is usually paid before occupation.
Option/s not progressed:	At the final occupation certificate
	Over time.

The Panel agreed that the developer will pay the premiums upfront, that is, before the issuance of the first occupation certificate. This will ensure premiums are paid before the transfer of ownership, reducing the risks posed by potential insolvency and/or phoenixing.

The Panel considered again the complexity of class 2 developments, which are often delivered across multiple construction certificates and occupation certificates. This enables developers to manage projects to respond to cost and time constraints, as well as give residents the ability to move in sooner. In circumstances where a building is subject to a single occupation certificate, the premium and commencement date of the DLI is straightforward. However, where multiple occupation certificates are used the situation becomes less clear.

While most buildings with multiple occupation certificates will be completed, there remains a risk of unfinished buildings that are occupied due to people moving in at the first occupation certificate. If this was to occur, there is a potential gap in DLI coverage for those living in the partially completed building.

To respond to this risk, the Panel proposes that the premium for the entire building's DLI is paid before the first occupation certificate. If the work remains unfinished (due to insolvency or other reasons) then the first occupation certificate would ostensibly become the final occupation certificate and provide a definitive point in time when the policy commences for those living in the building. If the work is completed (i.e., work under other occupation certificates are delivering in stages after the initial occupation certificate) the development's decennial liability period does not commence until that final occupation certificate.

Insurers may wish to factor this in when determining premiums, as the benefit in this circumstance predominantly goes to residents covered by the original occupation certificate as they get a longer coverage period. This approach is also likely to reduce the risk of residents seeking to resolve the dispute or remediate the defects through litigation.

In the alternative, the Government may instead wish to require each occupation certificate to be accompanied by a DLI product. This process would provide comprehensive coverage, cap liability at ten years and provide a relatively seamless process for customers. However, there is a risk this adds complexity for developers and insurers to determine what building elements are covered by what DLI product and how. For example, structural components may be covered in the first DLI product but adversely affected by work covered under the second DLI product.

The Panel considers this a viable alternative but remains of the view that the premium for the entire tower should be paid at the first occupation certificate to allow the tower as a whole to be covered by a single DLI product.

The Panel notes the distinction between separate staged completion of one building and staged completion of development which could be multiple buildings on a common podium. In a single building DLI should be offered at completion of building. However, when you have multiple buildings, on

completion of any one building and issuance of an occupation certificate for that building DLI needs to apply to cover the strata of that building. Future buildings will have their own DLI so everyone will have ten years coverage.

When is the DLI agreement established?

Preferred option: Before construction (between DA and CC) to allow developers to advertise their conditional DLI before construction in the marketing phase.

The Panel agreed that a DLI agreement ought to be established before construction (between development consent and the first construction certificate being issued) to allow developers to advertise their conditional DLI before construction in the marketing phase.

It is expected that the time between the DLI agreement being established (between development consent and construction certificate) and the commencement of DLI coverage (on issuance of final OC) will allow the insurer to be involved in the building process up until the point at which the building is complete for occupation.

Having the benefit of more inspections throughout the construction phase (in addition to those conducted by the principal certifier) and generally better insight of the building processes and associated work, will enable the insurer to appropriately manage risk.

The Panel supports insurers being involved in the construction process from an early stage of the project but recommends that the obligation of the insurer's inspectors are to work with the project's certifier rather than adding a separate (and potentially conflicting) certification process.

Who should conduct inspections?

Preferred option: The insurer relies on inspections performed by the certifier, with insurer inspections onsite to be negotiated during DLI establishment.

Option/s not progressed: The insurer supplements the certifier inspection with its own before issuing DLI.

The Panel considered whether the insurer's decision to afford DLI coverage will be informed by an inspection organised by the insurer or whether it will rely on the inspection conducted by the certifier.

The Panel agreed that having established the DLI agreement before the initial construction certificate minimises the likelihood of any differences in opinion between the insurer and certifier. Notwithstanding, the Panel considers insurers should be free to decide whether they will organise inspections or rely on those conducted by the certifier, based on their internal processes and structure but that this should not add undue duplication for the developer nor interfere with the statutory functions of a certifier. Industry practice is for insurers to conduct ongoing inspections at 'time zero' before construction begins, and on

an ongoing basis during construction. This ensures that any quality issues can be raised and addressed well before OC.

It is expected that the cost of these inspections will be absorbed within the premium (and still remain within the expected range of <2% of construction costs).

When does DLI coverage commence?

Preferred option:	Issue of final occupation certificate.
Option/s not progressed:	Practical completion of the building.
	Issuance of final construction certificate.
	Issuance of first occupation certificate

The Panel's recommends that DLI coverage commence at issue of the final occupation certificate.

The Panel considers that a DLI product could only be issued after the insurer has conducted a cumulative assessment of the completed building work, which would occur at the final occupation certificate. Putting a clear trigger point would provide clarity for the developer, marketing of 'off the plan' sales and then for the final building owner.

There is a risk that this approach may present a situation where an 'off the plan' sale purchased with a view that the building is covered by DLI might not be covered because cumulative assessments of the completed building work might indicate the building work is non-compliant. This is expected to undermine the marketing integrity of 'off the plan' sales. The Panel considered the marketing perspective for 'off the plan' sales against the overall policy objective to manage risk presented by the build team.

If an insurer were to refuse to issue a DLI product, despite entering into an agreement for a DLI at the first construction certificate, this would likely only be the result of the work itself being non-compliant as the insurer would not have agreed to the DLI at the start of the project if it was not confident in the trustworthiness of the developer. In this situation, failure to issue the DLI is an added consumer protection that would prevent a developer securing an occupation certificate until they resolve any defects to the satisfaction of the insurer and the certifier.

The Panel did not support using 'practical completion' as the trigger point for the commencement of the DLI due to the lack of clarity of when this occurs, and the variability between projects (making it more difficult to accurately price risk and coverage). Noting the potential for this issue to become subject to litigation, the Panel prefers adopting a standard, readily confirmable point in time that the final occupation certificate offers.

As outlined above, while the Panel supports the premium for the entire DLI to be paid at the first occupation certificate, its preference is for the policy to commence from the final occupation certificate to ensure consistent coverage periods over an entire building's building elements.

How long does the insurer have to recover from at fault parties?

Preferred option: 24 months from the time the claim is commenced, is a sufficient period for the insurer to commence recovery from at fault parties.

The Panel proposes that the Government make changes to civil liability time limits to allow an insurer to make a claim against an at-fault party within 24 months from the time a claim is made by the building owner that would otherwise be outside of the ten year limitation period. The Panel considers this necessary to ensure that consumers have the benefit of an entire ten year DLI period without compromising the ability of insurers to recover their costs.

Notably, this would require changes to existing limitation periods contained in the *Civil Liability Act 2002* and/or the introduction of legislative provisions that would appropriately preserve the insurer's right to subrogation from at fault parties.

Any extension should be narrowly defined to address the particular issues faced with insurers taking action, rather than a broad extension of the existing decennial liability. This should be drafted in consultation with industry.

How long does the owner have to claim?

Preferred option: 10 years to lodge a claim from the date of issue of the final occupation certificate.

Option/s not progressed: 10 years to lodge a claim from the date of issuance of an occupation certificate plus 2 years from discovery of defect.

10 years to lodge a claim from the date of delivery of the work plus 3 years from discovery of defect.

The Panel proposes that a building owner have 10 years to lodge a claim from the commencement of the DLI policy (triggered at the issue of the final occupation certificate).

An important aspect of the proposed model will be provisions of time limitations for a claim to be made by the building owner. This element urged the Panel to consider whether the time allowed to make a claim on the prospective DLI product will be limited to 10 years from an agreed date or extend to a prescribed period beyond discovery of defect. For example, if a defect is discovered on the last day of the 10 year coverage, will there be provision for a period of time allowing the building owner to bring a claim beyond the 10 year mark? If not, might the building owner be pushed to make a premature claim under their DLI policy (rather than utilising other avenues for dispute resolution) to avoid missing out on a remedy towards the back end of the decennial period.

On balance, it was agreed that the building owner needs to bring their claim within 10 years.

In addition, the Panel proposed to include an obligation on the building owner to notify the insurer of the defect as soon as it is identified. The Panel agreed that this obligation may be timed (e.g., an obligation to notify the insurer of the defect within 28 days of it manifesting). Accordingly, the building owner can continue through the increasingly proactive dispute resolution mechanisms with NSW Fair Trading, knowing the insurer is on notice for any claim which might follow in the event that dispute resolution through the NSW Fair Trading processes does not resolve the defect.

What is the basis of DLI premiums?

Preferred option: A percentage of the build value (estimated to be <2%)

Option/s not progressed: Standard set rates determined by industry.

As discussed above, the Panel considers that the premiums should be charged based off the construction costs, which will allow a scalable charging point for insurers to accurately price risk.

Based off consultation to date, it is expected that this approach would contain premiums at around 2% of total construction costs or under (noting that insurers would price the premium based on a technical risk assessment). It is not proposed that this range be legislatively prescribed.

Can building owner elect to have defect fixed or be paid out?

Preferred option: No. Remediation needs to be organised by the insurer.

Option/s not progressed: Yes. The building owner can accept a payout as an alternative to remediation.

The Panel agreed that there must be a positive obligation on the insurer to organise remediation with the developer and builder in the first instance.

While paying out the cost of remediation to the building owner, and allowing them to organise their own rectification, would provide consumer choice, it creates several risks, including:

- that the work will not be done to fix the issue (for example where further work identifies the scale of the problem is larger than expected),
- the new work is not compliant,
- owners corporations cannot decide on how to spend the money allocated, compromising ability to remediate work,
- work is not complaint causing the impacted building element to be carved out from DLI policy (thereby reducing coverage period).

With the insurer organising remediation, failure to secure complete remediation of the building defect will impact the insurer, who will be required to pay further remediation costs until the completion of the DLI

period. The insurer is best placed to manage this process, with the DLI intended to provide assurance over the performance of building elements, rather than only compensating building owners for defects.

How do we ensure defects claimed for are properly rectified?

Preferred option: Insurer to organise rectification work. Once it is rectified, the insurer will organise inspection.

The Panel agreed that the insurer is to organise rectification work. It is expected that once remediation is complete, the insurer will organise an inspection to ensure rectification is compliant. This will ensure that the building element remains covered by the DLI for the remainder of the decennial liability period (with the insurer responsible for confirming work has remediated defect).

How will rectification affect future claims?

Preferred option: The rectified defect remains a part of the policy. An additional DLI product would not be required.

Note: building owner has a duty to mitigate its losses, including owner's corporation duty to maintain and keep property in a state of good and serviceable repair.

Option/s not progressed: Once defect is rectified it is severed from the policy for remainder of cover. Future damage caused by rectification is not covered.

Once rectified, certified inspection (to ensure rectification has not compromised other aspects of building breaking the chain of causation with the original work covered by the policy). Remains a part of the policy.

The Panel agreed that once the developer has completed rectification work, an inspection organised by the insurer will certify the defect has been appropriately rectified, allowing the element to remain a part of the policy.

The Panel noted the building owners' obligation to mitigate its losses and the owner's corporation duty to maintain and keep property in a state of good and serviceable repair, so to avoid situations where unattended minor defects might worsen and compromise the structural integrity of a building over time.

The Panel endorses the proposed Government reforms to strengthen this duty of care owed by building owners to properly maintain building elements, as well as the work to rollout comprehensive building manuals to enable this maintenance to deliver resilient buildings.

How will the strata building bond operate?

Preferred option:	Increase over time to 5% strata building bond held for six years for those unable to secure DLI coverage. After Transition Period, repeal strata building bond scheme.
Option/s not progressed:	Retain 2% strata building bond held for 2 two years. 0.5% (or lower) strata building bond held for two years to cover minor defects plus the requirement to secure DLI coverage. Repeal strata building bond scheme.

The Panel has broadly agreed that if DLI is secured by a developer, a strata building bond should not be required. While the DLI proposition covers any remediation up to an agreed limit on indemnity, the strata building bond only covers a fixed amount (2% of the contract price) for a fixed time (two years), which might not cover all remediation costs.

However, the DLI proposition will only cover serious defects to building elements. Defects other than those that are serious (typically minor defects) are currently protected by the strata building bond. Repealing the strata building bond will remove a protection that is currently available to consumers.

The Panel considered that on balance, a comprehensive DLI policy would be a stronger consumer protection than the current strata building bond as there is quantum of coverage will be significantly higher under a DLI than a bond. DLI will provide longer coverage over key building elements, often more expensive to remediate.

Further, a developer that can secure a DLI product is likely to be a reputable player that will be around to remediate minor defects during the relevant statutory warranty period. Other existing regulatory levers introduced to offset consumer risk (namely, rating tools, upfront designs and clearer lines for accountability discussed earlier), will ensure that those able to secure DLI voluntarily or under compulsion remediate defective work albeit of a minor nature.

The Panel considered that in contrast to the bond, a DLI is a sunk cost for developers. Under the bond scheme, a developer can recover any funds left over from work done to remediate defects in the building. This would enable the developer to be financially better off under a bond scheme, at least initially.

However, as noted above, these costs are already passed onto the consumer, with the developer's risk of not recovering anything from the bond already accounted for in the price paid by the consumer. If the sunk cost approach was adopted by Government, developers would continue to pass on the cost of the bond to consumers, but consumers would be only able to access a seamless remedy for two years and from a finite pool of funds. The Panel considered this a poor consumer protection outcome.

The Panel also considered that the costs of remediation should also be accounted for in determining the value proposition for developers. The DLI product provides an indemnity for the developer, with the insurer recovering the costs from the at-fault party. This process will likely impact future premiums but does afford the developer coverage for the immediate costs of remediation.

The proposal to increase the strata building bond is intended to make DLI more attractive in the Transition Period, as well as provide closer consistency in remedies available to consumers under a DLI and a bond coverage during that period. The Panel considers that the DLI will always be a better consumer outcome, but that steps should be taken to enhance the strata bond scheme until a viable DLI market is established. It considers developers will respond to incentives to choose the most cost effective option.

Regardless of the rate of increase adopted by Government, the Panel considers it critical that the strata bond scheme sunset at the end of the Transition Period as it provides inadequate levels of protection to consumers. Importantly, mandating both a strata bond scheme in addition to a DLI mandate is duplicative and should be avoided as it will result in unnecessarily higher costs for consumers.

The Panel would also support enhancements to the strata bond scheme to enhance its effectiveness over the Transition Period, which should be developed in consultation with industry.

How will Home Building Compensation coverage work?

Preferred option:	For new class 2 buildings, Home Building Compensation coverage will not be required where a DLI product in force. For all other class 2 building work, Home Building Compensation coverage will be required.
Option/s not progressed:	Carve out class 2 buildings currently subject to Home Building Compensation coverage from DLI scheme

Following consultation, the Panel considered stakeholder concerns about how DLI would interact with the existing Home Building Compensation scheme.

Home Building Compensation cover – formerly known as home warranty insurance – offers a remedy to homeowners if their builder cannot complete building work or fix defects because they have become insolvent, died, disappeared or had their licence suspended for failing to comply with a money order made by a court or the tribunal in favour of the homeowner.

Builders/trades/owner occupier permit holders must get Home Building Compensation cover for each home building project over $20,000. The cost of the insurance varies depending on the type of project but generally applies to class 1 buildings and low-rise class 2 ‘multi-unit’ buildings of three storeys or less.

Future owners of a property are covered for the statutory warranty period (six years for major defects in the work and two years for other defects from the date of completion of work). An additional six-month cover applies in cases where the loss becomes apparent in the final six months of the period of insurance. The six-month period starts from the date of the loss becoming apparent.

Premiums under the Home Building Compensation are set by the State Insurance Regulatory Authority, which are set based on the relative risk and complexity of a project.

For class 2 building work, there will be new buildings that are currently required to secure Home Building Compensation coverage to ensure that there is a remedy for building owners where something goes wrong.

However, Home Building Compensation is an insurance product of last resort, in contrast to the proposed DLI which would offer insurance coverage when the defect becomes apparent. Not only is this a more effective consumer protection, but it also reduces the overall costs of remediation by allowing action to be taken to resolve the defect earlier.

The Panel supports DLI applying to all new class 2 buildings, and Home Building Compensation (as well as the strata building bond) requirements no longer applying to these developments. Renovation work on the buildings would still be subject to any Home Building Compensation imposed under the scheme.

As discussed above, an alternative approach would be to carve smaller class 2 developments out of the proposed mandatory DLI scheme. This would leave Home Building Compensation as the primary protection for these properties. The Panel supports all new class 2 buildings being captured by mandatory DLI coverage, with DLI providing a better long-term remedy for consumers dealing with defects in any type of building.

How does DLI work with statutory warranties?

Preferred option: Separate to DLI – liability periods will be different.

Option/s not progressed: Extend statutory time period for warranties to complement DLI.

The Panel understands that Government is currently reviewing the statutory warranties scheme as part of the HB Act review. While this issue is separate from the Panel's area of focus, the Panel notes that the proposed DLI scheme could operate effectively without extending the current statutory warranty period for 'major defects' to ten years. However, this is an issue for Government to consider as part of its broader review of the HB Act.

Recommendation 4

That the NSW Government replace the strata building bond scheme under the *Strata Schemes Management Act 2015* with a mandatory decennial liability insurance requirement for all developers of new class 2 buildings and buildings with a class 2 part, following a transition period.

Recommendation 5

Developer's mandatory decennial liability insurance requirement is met by securing market-provided insurance cover up to the full construction cost value for serious defects (within the meaning of the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020*) on all building elements (within the meaning of the *Design and Building Practitioners Act 2020*) contained in the common property of a building.

Recommendation 6

To meet the mandatory decennial liability insurance requirement, a policy must be an insurance product of first resort and allow claims by building owners on a strict (no fault) liability.

Recommendation 7

The decennial liability insurance policy should be taken out between DA approval and before the first construction certificate is issued to assist consumer confidence in the pre-sales market, and paid at the first occupation certificate, but must be in force from the issue of the final occupation certificate.

Recommendation 8

Amendments are made to the *Civil Liability Act 2002* and/or the introduction of legislative provisions into building legislation that would appropriately preserve the insurer's right to subrogation from at fault parties where a claim on a DLI policy is made at the end of the ten year period that would otherwise prevent the insurer making a claim to recover costs from at-fault parties in time.

Recommendation 9

Where a developer/builder secures an eligible decennial liability insurance policy for a new class 2 building or building with a class 2 part, they are:
a. during the transition period, not required to pay the strata building bond scheme under the *Strata Schemes Management Act 2015*, and
b. not required to take out coverage under the Home Building Compensation scheme under the *Home Building Act 1989.*

Implementation

The Panel considers that implementation of the preferred model should be determined by Government.

The proposed model would require legislative change, broader industry consultation, and a data collection strategy to complement the Panel's recommendations of transitioning from the current opt in model for insurance to a mandatory requirement after the transition period.

Mandatory DLI should be contingent on market maturity

The Panel considers that a viable DLI market in the NSW class 2 market requires Government making securing DLI mandatory for all new class 2 buildings and buildings with a class 2 part. This approach will likely attract sufficient insurers to the market to make DLI an affordable proposition for developers, while providing an effective remedy for building owners dealing with serious defects.

However, if insufficient interest from insurers is drawn to the NSW market, or the underlying risks associated with the sector make securing DLI a prohibitive cost, the costs of DLI become overly burdensome. The Panel considers that the Government should put in place measures to ensure that mandatory DLI is only imposed when the market is sufficiently mature to support all trustworthy developers securing DLI at an affordable cost.

If the Government agrees to prescribe a mandatory DLI proposition following the Transition Period, the Panel proposes that the performance matrix of success measures and indicators of a mature market articulated below would enable the Government to assess whether the market is ready to transition to a mandatory model where all industry participants that are capable of securing DLI can secure DLI. Should this performance matrix indicate the market is unable to ensure this, it is the Panel's advice that there be provision allowing an extended transition period before the mandatory proposition is activated.

Critical indicators are the number of insurers providing cover, the premiums charged, and the success of the regulator's efforts to respond to defective building work. The Panel's advice, based on comparisons with comparable schemes in Australia and globally, indicate that a minimum of two insurers would be sufficient to support a viable market in Australia, with the true determinant of viability for developers and consumers based off the premiums charged when a DLI is secured.

The proposed measures for regulatory effectiveness would address concerns about the long-term viability of the scheme, by making clear that claim rates will be managed by more effective resolution of disputes and defects by the regulator to make the market more efficient in resolving disputes in the long-term.

Indicator	Proposed target
Number of insurers that remain able to offer DLI	2 to 3
Average cost of premiums	Less than 2% (of construction cost)
Average deductible amount payable.	$1,000 (per apartment but capped at $100,000)
Number of developers choosing strata bond over DLI during Transition Period drops.	Year 0 to Year 1 – >10% dwellings covered by DLI Year 1 to Year 2 – 40% dwellings covered by DLI Year 2 to Year 3 – 75% dwellings covered by DLI
Average value of dwellings choosing strata bond over DLI during Transition Period.	By Year 3, 50% of dwelling within each of the below categories choosing DLI instead of strata bond: • Dwellings with construction costs less than <$10m • Dwellings with construction costs between $10m and $20m • Dwellings with construction costs between $20m and $50m For dwellings over $50m, data should be collected on DLI uptake without a fixed target being set. Mixed use dwellings able to secure DLI
Success of the dispute resolution processes	
What percentage of disputes determined by the regulator (during period 6 – 18 months before end of Transition Period), resolved a claim in the statutory warranty period?	50%
Decrease in disputes escalated to tribunals/courts from commencement of reforms to 12 months before mandatory requirement commences will indicate success.	>30%
Number of global insurers that remain able to provide capital for DLI to remain available.	2 to 3
Number of building work rectification orders issued pursuant to the RAB Act that have not been complied with.	<30%

Indicator	Proposed target
Success of Government backed Rating/index tools	
Proportion of apartments in NSW delivered (settled and occupation certificate) 12 months before mandatory requirement commences by iCIRT rated developers.	>70%

The Panel encourages Government to develop an industry monitoring group, with insurance industry representation critical, to track the progress of the scheme towards market maturity. This group should work with Government to finalise the exact targets and timeframes, noting that data will need to be sourced from multiple periods to get an accurate baseline to ensure COVID's impacts on the market does not skew the baseline measure. The group should also be empowered to advise Government on extending the Transition Period if there are low claim rates to allow accurate assessment of the viability of DLI as a consumer remedy.

The group should also assess whether market maturity remains an ongoing proposition (i.e., conditions that support DLI being viable in NSW, including premiums and number of insurers does not change significantly). This further review could happen two years after mandatory DLI commences.

Recommendation 10

The design of the proposed mandatory DLI scheme should include the ability to defer the commencement of the mandatory obligation on developers to secure DLI. This ability to defer would be needed in case the market does not sufficiently mature to support an affordable and accessible DLI product for all trustworthy developers. This mechanism should be based on a clear evaluation matrix set at the commencement of the Transition Period.

Legislative change will require further industry consultation

The Panel's engagement with industry stakeholders indicated an ongoing concern with the current strata building bond scheme. Common issues included its complexity, the way it is paid and expended, and the lack of long-term coverage for building owners.

The Panel's preferred option recommends the repeal of this scheme, and replacement with a mandatory DLI scheme. Industry will need to be involved in the design of this scheme to ensure buy in to the proposed mandatory obligation to secure DLI. Consumer confidence indicates that this is something the market is willing to pay for but with developers wearing the initial cost of the DLI premiums they need to endorse the eventual legislative framework underpinning it.

The Panel recommends that if Government were to adopt the preferred model that the design of the scheme is included in the Government's ongoing consultation on NSW's building laws. This should commence in 2022, with a view to introducing legislative reforms in 2023. This includes:

- upgrades to the ePlanning portal to make securing DLI a seamless addition to existing development process,
- enhancements to the strata building bond scheme to respond to concerns from industry and owner representative stakeholders,
- standardised disclosure documents to inform consumers of a developer's DLI product, and
- ensuring that updates to the building dispute resolution process enhance the effectiveness of the regulator to mediate disputes between parties and creates a mandatory notification process when a defect is identified to put the insurer on notice (even where a DLI claim is not made).

One of the critical elements of these reforms will be the efforts to make the strata bond less attractive to developers to encourage early take up of DLI. The strata building bond provides less protection for consumers than DLI. The bond scheme has been useful to start the conversation about developers ongoing obligation to building owners after occupation, but DLI is a more fit-for-purpose approach to achieve this outcome.

While the ultimate policy design to make DLI the more attractive option for developers during the Transition Period is a matter for Government, the Panel would recommend immediate increases to the size of the bond and the length of time it is held as soon as eligible DLI products enter the NSW market. This will encourage developers to search for a more cost-effective option (particularly with the costs of the product passed onto the end owner of the building) and start to prepare for the mandatory obligation to secure DLI.

Government should also consider including an explicit obligation on developers to seek out DLI at the start of a project (before their first CC) and before they pay the strata building bond. Requiring this to occur before building work commences would give developers the opportunity to compare the two options and understand the benefits of DLI rather than taking the path of least resistance (the bond). It would also give developers a clearer understanding of the changes they will need to make to their design and build process to address risks in the delivery of their projects that will make DLI premiums more affordable.

The Panel considers that transitional arrangements to gradually incentivise uptake of DLI over the strata bond option should be implemented. It proposes a gradual increase in the amount and duration of the strata bond as set out in the table below. The Panel agreed the design should include a 'grace period' from commencement of the scheme to allow DLI products to enter into the market.

Time	Strata building bond amount	Duration of strata bond
Current bond	2.0% of contract value	2 years
Commencement **(Date when first eligible DLI product is offered in NSW)**	2.0% of contract value	2 years
Commencement + 1 year	2.5% of contract value	2 years
Commencement + 2 years	3.0% of contract value	3 years
Commencement + 3 years	4.0% of contract value	4 years
Commencement + 4 years	5.0% of contract value	5 years
Commencement + 4 years until end of Transition Period	5.0% of contract value	6 years

If changes to the bond scheme are progressed, the Panel would support Government consulting on broader enhancements to the scheme. The Panel's consultation indicated ongoing concerns with the bond scheme, particularly the customer experience of developers and strata bodies using the scheme. While the scheme would be replaced under the mandatory DLI model, Government could respond to these concerns to ensure that while the bond scheme is in effect it delivers its intended policy outcomes. This could include ensuring that it works consistently with the statutory warranties scheme under the HB Act (and does not create an incentive to commence unnecessary proceedings) and has adequate timeframes for inspections and rectification.

Industry buy in will require a combined effort from Government and industry

To be successful, the transition from voluntary to mandatory should be well understood by industry to make clear the benefits of being an early mover and securing DLI over the strata bond, including:

- ability to market that building is covered by DLI,
- building up more evidence of high quality design and build process that may lead to lower premiums for future buildings (a competitive advantage over those who wait until it becomes mandatory to adopt),
- leveraging insurer verification checks to pick up design and build faults sooner – saving money and lowering risk of claims being made.

Industry should work with Government to co-design a communications strategy to explain DLI and its benefits, the ultimate transition to a mandatory scheme, and the work of industry and Government to make DLI affordable and accessible to trustworthy operators.

It is likely that some operators in the class 2 space will no longer be able to operate due to a combined effort of the DBP Act and RAB Act addressing defective design and building work, iCIRT addressing information asymmetry to give consumers and practitioners with the information they need to make informed decisions, and DLI. This will need to be carefully managed to explain these operators are not being pushed out because of “red-tape” but because their work does not meet the standards of competence and delivery now expected in NSW. To support this, Government needs to develop a targeted engagement strategy that carefully explains the benefit of DLI to the developer and the consumer and why it is will be mandatory.

Given the ongoing pressures on the housing market, these evidence-based communications must be rolled out promptly to give the market adequate time to become aware and then to understand the changes.

Recommendation 11

Government establish an industry consultative group to support the design of any legislative changes required to implement the preferred model, and to inform industry and community engagement and communication of the rollout of DLI in NSW.

Panel's alternative model

While supporting a mandatory DLI model, the Panel provides that if this option was not progressed, the NSW Government could enhance the viability of developers securing DLI by making changes to the strata bond scheme and Home Building Compensation scheme. The Panel does not consider that these changes will be sufficient, but they could be used to test the viability of DLI over the short-medium term before Government seeks to move to a mandatory model.

The alternative model would adopt the basic design elements of the DLI outlined under the Panel's preferred model, but would substitute the mandatory proposition with the requirement for developers to choose to take out a DLI product or pay a strata building bond, which would increase from its current two year and 2% cost to a six year and 5% cost.

This proposal addresses some of the concerns with the currently regulatory framework, including providing a longer term pool of funds that can be easily drawn down to pay for remediation work, aligns the bond period with a developer's liability under the statutory warranty scheme, reduces the costs of litigation to pay for remediation.

The alternative model also provides an incentive for developers to take out DLI by making the cost proposition more attractive (despite DLI being a sunk cost) and more certain (with developers unable to accurately predict the amount of bond that would be refunded).

This approach would also realise the guiding principles for the Panel as it would still support efforts to address preventable defects (to ensure bond is refunded) and provide a more effective consumer protection than is currently available.

However, the alternate approach is likely to place a more significant burden on project costs, housing supply or housing prices with developers subject to a higher upfront cost, which will be passed onto consumers. While consumers have indicated a willingness to pay more for longer term protection, only 25% of consumers have indicated a willingness to pay up to 5% more on their purchase price,[31] which would likely be lower when they were aware of the lower levels of protection offered by the bond in contrast to DLI.

[31] 'Research on consumer confidence to purchase apartments' *NSW Government* (Web Page, 27 May 2022) <https://www.nsw.gov.au/building-commissioner/research-on-consumer-confidence>.

Recommendation 12

The NSW Government supports the development of a viable market for decennial liability insurance by making the current strata building bond scheme a less attractive proposition for developers by increasing the bond to 5% (from the current 2%) and bond duration to six years (from the current two years) during the transition period to ensure that a more effective consumer protection is made available to residential apartment building owners

If the alternative model is adopted, a developer should be exempt from taking out a strata building bond or coverage under the Home Building Compensation scheme where they have secured a DLI policy that covers all building elements.

This would provide an incentive for DLI to be taken out, without double charging developers for coverage.

Recommendation 13

Where a developer of a new class 2 building secures decennial liability insurance for all building elements, they are not required to take out a strata building bond or coverage under the Home Building Compensation scheme under the *Home Building Act 1989*.

Appendix A: List of stakeholders consulted

The Panel consulted with the following stakeholders to inform its position:

- Urban Taskforce
- The Law Society
- Housing Industry Association (HIA)
- Property Council of Australia
- Engineers Australia
- National Electrical and communications Association (NECA)
- Icare
- Urban Development Institute of Australia
- Master Builders Association
- Insurance Council of Australia
- State Insurance Regulatory Authority
- Construct NSW working group.

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Appendix B: Interjurisdictional analysis

	France	UAE	Belgium	Jordan	Spain	UK	Iraq	Kuwait	British Colombia
Commencement	1978	1985	2018	1976	2000	Early 1980's	1951	1980	1998
Codified DL regime	✓	✓	✓	✓	✓	✗	✓	✓	✓
Mandatory DLI	✓	✗	✓	✗	✓	✗	✗	✗	✓
Strict Liability	✓	✓	✓	✓	✓		✓	✓	
Liability	Architect, contractor, technician or other person bound to owner by contract and hire work Any person who sells, after completion, a work which he built or had built.	Architect and Contractor	Architect, Contractor and other service providers	Architect/ Engineer and Contractor	Architect, Contractor and other professionals	A person taking on work for or in connection with the provision of a dwelling.	Architect/ Engineer and Contractor	Architect/ Engineer and Contractor	Residential builder and Vendor
Beneficiary	Owner/Purchaser of work and anyone who derives title from owner	Owner and Employer of work		Employer of work	Owner	Owner	Any person who acquires an interest		
Assignable	✓				✓	✓			✓
Liability Period	10 years		10 years	10 years	10 years (3 years for other constructive defects related to habituality of building and 1 year for "aesthetic" defects)	10 years	10 years	10 years	10 years (2 years - defects in material and labour and 5 years - defects in building envelope incl. water penetration)

	France	UAE	Belgium	Jordan	Spain	UK	Iraq	Kuwait	British Colombia
Scope of Liability	Damages, even resulting from a defect of the ground, which compromise solidity of work affecting it in one of its constituent elements or one of its equipment elements, rendering it unfit for purpose;	a) Total or partial destruction of these buildings or fixed constructions; and b) every defect endangering the solidity and security of building	Such defects that seriously impair or be likely to impair the structure and robustness of the construction or part of it.	Total or partial structural collapse and any defect which imperils the strength or safety of a building.	Defects in the structure and stability of building	Damage to the whole building caused by a latent defect in the structural parts of the edifice.	Total or partial collapse and any defect which may threaten the strength and safety of a building or fixed installation	Total or partial destruction or damage and any defect that threatens the strength and safety of a building or fixed construction	Structural defects
Not covered	Minor defects		Aesthetic damage, immaterial damage and damage less than 2500 EUR	Other installations		Cover for first year after practical completion			
Limitation period **(from collapse or discovery of defect)**	3 years			1 year	15 years (delay of prescription) 1 year	3 years	1 year	3 years	
Premium	0.8% -2.0% (of the cost of works)					0.7% – 1.0%			

Appendix C: A customer journey