



HIA Submission

Building and Construction Industry Review Discussion Paper

**Submission to Consumer and
Business Services**

17 January 2025





Contents page

Introduction.....	1
Executive summary	1
Housing affordability	2
Pace of change and regulatory fatigue	3
Reducing red tape	3
Approach to reform.....	3
Further consultation is required	3
Regulatory impact statements	4
Staging	4
Transitional arrangements	4
Building Dispute Resolution	4
Binding rectification order scheme.....	5
Court and tribunal processes	9
Compulsory conciliation conferences for building disputes	12
Building and construction industry contracts	13
Certificate of Occupancy and swimming pool requirements.....	13
Sunset clauses	15
Licensing and Registration	20
Building inspections.....	20
Building inspectors	21
Regulation of owner builders	23
Regulation of building developers.....	27
Qualifications and Recognition of Prior Learning	37
Setting PGE worker qualifications.....	38
Reviewing the scope of electrical work	39
Installation of stormwater piping	40
Access to Australian Standards	41
Continuous Professional Development	43
Compliance and Enforcement.....	51

Stephen Knight

Executive Director

Housing Industry Association

Cnr Port Road and Station Place

Hindmarsh SA 5007

Phone: (08) 8340 5900

Email: s.knight@hia.com.au



Increasing penalties.....	51
Use of another builder's licence in advertising	51
Unlicensed subcontractors	51
Building work supervision requirements.....	52
New Commissioner powers relating to practitioner training.....	57
Modernisation of domestic building laws	57
Limitations on margin	57

Stephen Knight
Executive Director

Housing Industry Association
Cnr Port Road and Station Place
Hindmarsh SA 5007
Phone: (08) 8340 5900
Email: s.knight@hia.com.au



Introduction

The Housing Industry Association (HIA) takes this opportunity to respond to the Building and Construction Industry Review Discussion Paper (Discussion Paper). HIA recognises the substantial efforts of Government in putting together a Discussion Paper of this scale which addresses a number of issues that are deserving of due consideration.

The Discussion Paper canvasses a range of subjects, spanning multiple legislative instruments and proposing many regulatory and non-regulatory options to address perceived problems across various sectors of the building and construction industry. Broadly, it covers matters in the following areas:

- building dispute resolution
- building and construction industry contracts
- licensing and registration
- continuing professional development
- compliance and enforcement

There is no single piece of legislation that is the focus of the Discussion Paper at present, however the *Building Work Contractors Act 1995* (SA) (BWC Act) and the *Planning, Development and Infrastructure Act 2016* (SA) (PDI Act) feature heavily in the key review areas and proposed reforms.

HIA has several overarching concerns with the Discussion Paper:

- the range of topics is too broad for a single Discussion Paper;
- little evidence has been provided to justify the necessity for amendments or reforms;
- the proposed options appear grounded on a presumption that there are significant existing problems with the way the SA building industry currently operates;
- the approach to addressing the perceived problems is unbalanced, weighed towards increases in consumer protection; and
- the salient features in respect of each of the proposed options are unclear.

The impact is that only high level feedback will be possible at this time, which would be suboptimal for the purpose of progressing any meaningful amendments or reforms. This underscores the necessity for more detailed consultation and examination of many of the topics broached, including a comprehensive regulatory impact statement (RIS) and cost benefit analysis for each matter.

Executive summary

Despite its concerns regarding the scope and level of detail in the Discussion Paper, an overview of HIA's positions on the matters raised is outlined below.

Impacts on housing affordability must be front of mind for Government when considering any changes to regulatory framework impacting the building and construction industry. Focus should be placed on reducing red tape and minimising the impact on building businesses, with any proposed changes supported by a RIS and thorough consultation.



HIA supports measures that allow for the timely, cost effective and fair resolution of building disputes. As such, HIA is predominantly supportive of the introduction of a statutory complaints process that involves Commissioner powers to inspect and make orders to determine disputes. However, there appears to be little value in a transfer of jurisdiction for building disputes from court to tribunal when mechanisms for improvement already exist.

HIA opposes further statutory intervention into building and construction contracts and has concerns around the prospective limitation or prohibition on the use of sunset clauses. Similarly, HIA would support the removal of the cap on margin under the BWC Act.

HIA's support for changes to existing licensing and regulation requirements is subject to a positive cost-benefit ratio. Licensing for developers appears unjustified and may raise barriers to homeownership, and requirements for low-risk stormwater work to be carried out by a licensed plumber would add unnecessary cost. Whereas further regulation around the work of owner builders and building inspectors would likely have benefits to consumers and industry in preventing misuse of these arrangements. Similarly, electrical work should be carried out by licensed electrical workers due to high associated risk.

HIA supports measures to deter those parties intentionally and systematically subverting the law, such as unlicensed businesses carrying on building work and misappropriating licence details. There appears to be no foundation at this stage for the increase of existing penalties, any further prescription of supervision requirements, nor any merit in transferring compliance duties across other parties in the contracting chain.

Finally, HIA supports continuing improvement and professional development to achieve acceptable standards of building quality delivered by a competent and skilled workforce.

Housing affordability

Housing affordability is a critical issue for homeowners and governments across the nation, with many initiatives currently underway to alleviate the impacts of both shortages and rising costs.

It is essential that Government takes into consideration the potential impact of any legislative amendments on housing affordability, weighed up against the benefit to stakeholders. The introduction of any changes to current legislative frameworks has the potential to impact the industry's ability to respond to the current critical shortfall in housing and to push up the cost of delivering a home.

A core factor in driving improvements in consumer outcomes, such as housing affordability and consumer confidence, is to reduce impediments to businesses. However, the Discussion Paper currently takes a narrow lens on improvement across industry, instead identifying its focus on improvements in consumer protection. This is a misconceived approach and should be adjusted to ensure that benefits to all stakeholders associated with the building and construction industry can be realised, by taking a holistic approach to improvement.



Pace of change and regulatory fatigue

The residential building industry has been through significant changes and challenges over recent years. The impacts of a near never-ending cascade of new and amended regulations, complex building codes and work health and safety changes, employment rules and business compliance obligations are all acting as significant barriers to the delivery of more housing. HIA continues to hold significant concerns with respect to the pace and quantity of change imposed on our members and the broader residential building industry.

The SA Government has previously acknowledged the impact of regulatory fatigue on the residential building industry by announcing a 10 year pause on the adoption of further National Construction Code (NCC) updates. This approach was supported by HIA and greatly appreciated by members.

HIA urges Government to take a similar approach to progressing any further reforms, ensuring any changes implemented are driven by a genuine need and designed to “do no harm”.

Without compelling proof to justify a regulatory response, typically HIA favours a non-regulatory approach to improvement as a first step. Proactive education for both industry and consumers is a powerful lever in changing behaviours and ultimately can lead to cultural shifts without the need for heavy-handed regulatory intervention that constrains commercial operations.

Another way to minimise the impact of prospective and necessary change on industry is to assess and take steps towards better using existing regulatory avenues to drive improvement. Until the full impact of measures already in place can be assessed and reviewed, no further reforms should be undertaken.

Reducing red tape

If improvement across industry is sought, one of the goals of the changes should be to reduce red tape. At present, we find that in many cases the proposals are lacking and, in some instances, may actually increase regulatory complexity. Care must be taken to avoid intensifying the burden of red tape and administration for industry where there is little-to-no measurable benefit and diverting the focus away from delivering homes to homeowners.

Approach to reform

Further consultation is required

The Discussion Paper comprises 75 pages and includes 63 numbered questions, however many of those are made up of multiple questions. This, in addition to the high-level nature of the information presented, has created challenges, including meaningfully consulting with members and in the significant amount of research required to thoroughly respond to each question. The lack of data and detail in the Discussion Paper has also meant that only general responses are possible at this time, despite attempts made to cover likely avenues of further inquiry.

Considering the quantum and breadth of the topics covered, the potential scope for discussion and review of each topic, the detail necessary to provide meaningful feedback and the significance of the proposed



changes, further information and consultation is critical before any steps towards reform or draft amendments are progressed.

Regulatory impact statements

Any approach to regulatory reform should ensure that the regulatory objectives are achieved, and genuine improvement is made, with minimal impact on housing affordability. HIA reiterates its position that measures to test any proposed reforms should include a RIS including a cost-benefit analysis and investigation of alternative approaches, comprehensive consultation and targeted engagement with stakeholders and industry representatives.

Staging

To ensure the impact on industry and other stakeholders is properly managed and ultimately minimised, and to facilitate optimal outcomes from the changes for all stakeholders, it is necessary to take a staged approach to implementation. The range of topics under consideration at present is simply too broad, and the required engagement too great, to implement all changes at once. To rush changes for the sake of a harmonised commencement date would also be ill-advised and is likely to lead to unforeseeable and adverse outcomes.

Similar approaches have been taken in other jurisdictions to a range of different regulatory amendments, including the adoption and commencement of the NCC, model work health and safety laws, changes to security of payment regimes, the implementation of the recommendations of the Building Confidence Report (BCR) and the rollout of various industrial relations changes.

The staging of amendments and reforms is a matter for consultation in itself and HIA remains available to advise Government on potential staging strategies once there is greater clarity on matters to be progressed.

Transitional arrangements

In addition, transitional and interim measures will be necessary to allow industry time to adjust to any new or amended requirements. As the Discussion Paper covers a range of issues at a high level, there is no mention of specific transitional and savings arrangements. It is likely given the scope of matters considered that each will have its own unique transitional arrangements depending on the specific impacts of any changes.

HIA requests Government continue to engage with stakeholders to ensure the timeframes for the introduction of new and amended requirements do not have unintended, costly or prohibitive consequences.

Building Dispute Resolution

Whilst the majority of business within the building industry is undertaken without issue or dispute, occasionally different views and disagreements develop between parties in the contracting and supply chain that require resolution. Such disputes can occur during the course of construction, or in some instances years after the work or supply of goods or services is completed.

One of the key difficulties in devising an effective policy and model for residential building disputes is that home owners and residential consumers have little experience in commercial rules of engagement. Rightly



or wrongly, they can become emotionally involved in the dispute and can focus on what they want or expect after the design and specifications are completed and the contract is signed. They measure their expectations in absolute terms meaning there are no grey areas nor opportunity for compromise.

Ineffective methods for resolving disputes and dealing with complaints between businesses and consumers not only affect cash flow and business operations, but they impact on the industry at large. Disputes, particularly where they are prolonged, also erode consumer confidence and industry reputation. For these reasons, the dispute resolution avenues, including any alternative dispute resolution (ADR) options, must be suitable and adaptable to respond to the broad range, unique nature, and specific issues typical of building-related disputes.

Binding rectification order scheme

Question 1.

Would the introduction of binding rectification orders enhance the building dispute resolution process in SA?

In resolving disputes between home owners and building contractors it is important to have mechanisms that are effective, low cost and also reflect the consumer protection environment in which the builder operates. It is optimal for the parties to have a range of dispute resolution options to choose from, to ensure the chosen method is appropriate for the scale, quantum, and complexity of the dispute.

The introduction of a statutory complaints pathway in SA involving the ability for rectification orders to be issued by the Commissioner appears to be a reasonable alternative option for parties typically involved in residential building disputes. The success of the scheme will turn on the details, which HIA anticipates will be provided for review by stakeholders in future as a part of further consultation. Another factor contributing to the success of the system will be ensuring there is appropriate funding to establish and resource the scheme so it can function without hindrance.

Question 2.

Is the proposed binding rectification order scheme appropriate?

It is difficult to provide conclusive support or objection to the proposal in its current form, as only a brief summary of the proposal has been provided on which to make such an assessment. While HIA does not oppose the use of a rectification order scheme in principle, there are various factors that must still be considered and on which consultation must be carried out.

Application

HIA is supportive in principle of the introduction of a statutory complaints process outside the current pathway through the Magistrates Court¹ which would allow disputes between builders or contractors and consumers to be dealt with in a quick and cost effective manner.

¹ BWC Act, s.37.



HIA supports a prerequisite to applications for statutory dispute resolution that the parties are required to convene and attempt to resolve the matters between themselves. This should include identification of the issues in dispute and a period of time in which the other party may respond to the claims. A form akin to a simple Scott schedule can be used to assist the parties with this process.

If the parties have attempted to resolve the matter between themselves, but have been unsuccessful, either party should be able to initiate the statutory complaints process with the Commissioner. The onus should be on the initiating party to substantiate the complaint and pay an application fee.

Assessment

Upon receiving an application, the Commissioner should have the power to accept or reject the application based on whether it meets the criteria for the process. For example, if the applicant has not provided the respondent with a list of issues to which they can respond or has not provided an opportunity to meet to resolve the issue, the application could be rejected.

HIA is supportive in principle of the Commissioner's ability to appoint a suitably qualified and experienced representative to assess any alleged defective work and to prepare a report with recommendations for consideration by the Commissioner and both parties. HIA is also supportive in principle of a system which would allow the parties to respond to the inspector's findings.

The availability of the statutory complaints pathway should not preclude or prevent contracting parties from utilising contractual ADR mechanisms such as expert determination or referral, conciliation, and mediation.

Orders

The Commissioner should have the power to issue rectification orders, but this should not extend to authority to issue show cause notices, penalty notices or licence suspension for non-compliance with a rectification order. Where the parties have reached an agreement between themselves on matters the subject of a complaint, this agreement could also be formalised in an order as a way of closing out the complaint.

Where the Commissioner has issued an order, there must be appeal rights available through a specialist division of the courts or the South Australian Civil and Administrative Tribunal (SACAT) within a specified period.

Resourcing

In order for this system to be effective and efficient, CBS must be properly resourced with personnel who have the necessary qualifications and experience to carry out the various functions of the system. For example, where the works the subject of the dispute require a licence, any inspector should themselves have the appropriate qualification, experience, and licence to make the necessary assessment.

Similarly resourcing must be adequate to ensure a timely response to complaints received. A system that allows disputes to be tied up for months on end in administrative processes and resourcing limbo would not be a good outcome and is likely to be under-utilised.



The current proposal per the Discussion Paper appears to be for CBS to engage independent contractors as building inspectors. There are issues with this approach where there may be a conflict of interest, and CBS would have little control or accountability for the outcome. In addition, as building inspectors are currently not registered in SA and have no minimum qualifications or experience, the responsibility would rest with CBS officers to ensure each inspector has the necessary skills to carry out this work, the ability to write a clear and balanced report, and ethics training to ensure any conflicts of interest are identified prior to accepting an appointment and throughout the process. In addition, this arrangement would require capacity checks upon each appointment to ensure the inspectors duties can be carried out expeditiously.

To this end, it may be more appropriate for CBS to engage inspectors as its employees to provide it with greater control over quality, skills, and timing. A system for internal checking and review of reports within CBS would also be appropriate prior to orders being made, particularly if inspectors are engaged as independent contractors.

Are there alternate models or mechanisms that would provide faster and cheaper resolution of domestic building work contract disputes for parties?

There is no one-size-fits all approach to the resolution of building disputes. HIA is supportive of a variety of options being available to parties seeking to resolve disputes, whether agreed between the parties under contract, or established under legislation.

Any available methods should assist the parties in resolving issues that arise in a timely and cost-effective manner and must be appropriate to the nature and scale of the dispute. However, a quick and cheap process should not come at the cost of integrity. As such, it is important that any statutory dispute resolution processes that are available operate under a robust framework for administration and appointment, as well as in the conduct of the process, and they should not limit the parties' ability to reach an agreement between themselves.

Adjudication

HIA supports in principle the expansion in coverage of the *Building and Construction Industry Security of Payment Act 2009* (SA) (SOP Act) to include construction contracts for the carrying out of domestic building work on premises in which the homeowner resides or intends to reside.² This change would provide an additional avenue for contracting parties to determine payment disputes.

However, there are various issues with the scheme in South Australia as it currently stands, including:

- The payment claim and adjudication processes are unnecessarily complex and difficult for builders and contractors to navigate.
- Determinations are unpredictable and are largely reliant upon the skills, knowledge, and position of the adjudicator, including any known or unknown biases.
- Adjudication fees in SA are currently uncapped and as a result can be grossly disproportionate to the value of a payment claim.

² SOP Act, s.7(2).



As such, the real impact of the expansion of SOP Act would be difficult to gauge. Unless there were moves to address the shortcomings of the existing system, it is arguable that this change may have little genuine benefit.

Furthermore, the expansion of coverage under the SOP Act would do nothing to assist with disputes that are not purely payment disputes.

Question 3.

How should rectification orders be enforced, and what should the consequences be for non-compliance?

For an order of any kind to be truly binding, it must be enforceable and the appropriate avenue for enforcement should be on application to a specialist court or tribunal.

Consequences of non-compliance

HIA opposes any move that would see Government representatives and inspectors gaining authority to issue show cause notices, penalty notices or suspend the contractor's licence, in circumstances where a builder or contractor does not comply with a rectification order.

Instead, the person seeking the benefit of an unfulfilled order should have the option to apply for the order to be enforced by a court or tribunal, or to have alternative orders made. For example, where an order has been made for rectification of defective work and the builder has not complied with the order or sought a review or an appeal, the homeowner should have the option to seek an alternative order for the cost of the rectification work to be carried out by others.

Further, the ability to seek an alternative order should be available to both parties. For example, if a builder has been issued with an order to rectify defective work, and the homeowner is being obstructive or abusive, the builder should have the option to apply to a court or tribunal for a monetary order in lieu of the rectification order.

Licence suspension

Suspension of a contractor's license impacts their livelihood and should be approached with caution. HIA reiterates its opposition to powers that would allow for licence suspension in the event of non-compliance with a rectification order.

However, if this option is under consideration, it should only be available at the discretion of the court and only in intentional, serious, and systematic circumstances.

Question 4.

Are there any unintended consequences the proposed rectification order scheme may have?

Further detail must be provided of the proposed model for comprehensive feedback to be given on this question.



What would be the costs and benefits for consumers and building practitioners if the proposed binding rectification order scheme was implemented?

The introduction of a new statutory complaints process and binding rectification order scheme should be the subject of a RIS, including a comprehensive cost-benefit analysis, to determine the impact on all stakeholders.

Court and tribunal processes

Question 5.

Would the transfer of the identified building disputes from the Magistrates/District Court to SACAT assist in improving the dispute resolution process in SA?

Regardless of whether building disputes are resolved by a tribunal or court, improvement to the current system will depend on whether the process is amended or established with the view that it is quick, efficient, flexible, and fair. It is likely improvements are already possible within the current pathway through the Magistrates Court.

HIA members provided feedback that the earlier processes for dealing with BWC Act disputes have been somewhat lost with the introduction of the electronic court management system (ECMS). A suggestion to address this is to provide a specialist Magistrate for BWC Act matters. By extension and regardless of the forum, there should be a specialised, independent building division (whether it be a tribunal or division of the courts) to deal with domestic building disputes.

Additionally, the success of any statutory dispute resolution process will depend on adequate government funding and resourcing to ensure matters are dealt with promptly, fairly and with the appropriate level of specialised expertise. Any reforms must be matched with ongoing funding commitments to ensure the system can operate as intended, including a periodic review and necessary adjustments made.

One shortcoming of the tribunal system is the inability for matters to be heard and decisions to be made to bind a party based outside of SA. Although interstate and international investors make up a reasonably small percentage of clientele in SA at present, this may change in future. Further, having a dual stream for resolution of the same complaint may ultimately confuse and cause additional headaches for businesses. A clear pathway is necessary to minimise ambiguity and duplication.

Question 6.

Are there any unintended consequences that could arise from the proposal to transfer identified building disputes from the Magistrates/District Court to SACAT, or other factors that should be taken into account?

Yes.

The challenges with the existing dispute resolution system through the court is the cost and time it takes for matters to be resolved. As discussed in further detail in response to Question 7, there are already established protocols and options for minor change within the existing court system which may assist in



improving the delays in the first instance. Moving from a court process to the tribunal system achieves nothing unless there are processes that would result in improvements in efficiency and timeframes to resolve matters, in addition to improved flexibility and fairness.

Whether the disputes are dealt with by a court, or a tribunal is not a determining factor in whether resolution will be efficient and effective. In fact, a general tribunal without a specialist judicial officer and specialist registrar may make the existing issues worse.

In addition, depending on the precise wording of the legislation giving jurisdiction to any new tribunal, the proposed changes will likely lead to jurisdictional challenges and satellite litigation. The prospect of such introduces scope for opportunistic claims and forum shopping, which prolongs and heightens the impacts of a dispute on the parties.

Question 7.

How could SACAT utilise experts when considering building work disputes?

SACAT should have the ability to utilise specialists and experts for reporting and expert witness purposes. The courts already have this power and if building disputes were to be transferred to a specialised division within SACAT, the tribunal should model the use of experts by the courts. The use of experts is to be tightly managed and subject to an enforceable code of conduct.

Further, any specialised building disputes division within SACAT should be presided over by a judge with ordinary members comprising building industry specialists and experts.

Question 8.

Aside from transferring the jurisdiction for domestic building work contract disputes to SACAT, are there other options to reduce the current expense and delays associated with court proceedings about domestic building work disputes?

(for example, changes to existing court processes and monetary limits)

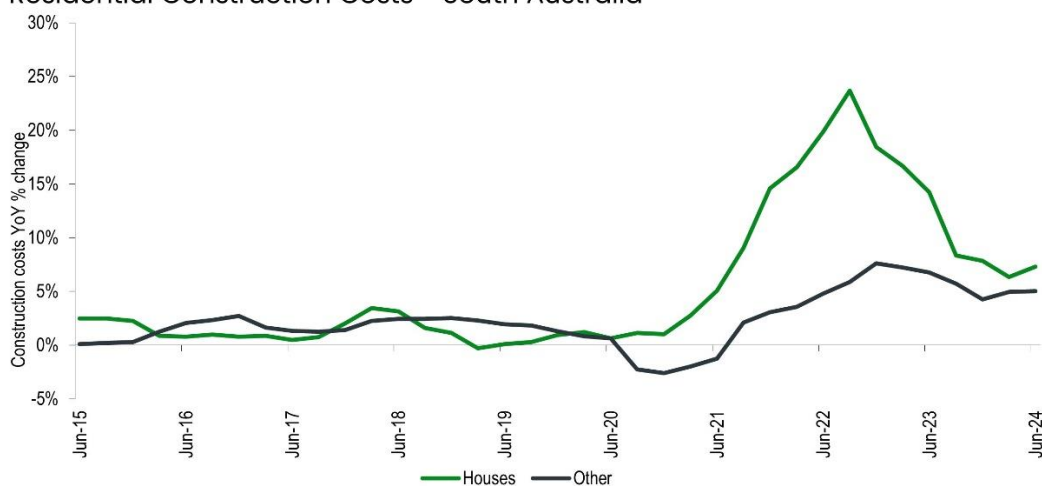
There are various ways in which the existing system could be improved to reduce the expense and delays currently experienced with court action, including:

- The BWC Act, s.37, already provides the Magistrates Court with powers to determine disputes in relation to statutory warranties as if they were a minor civil claim, irrespective of value. This function could be extended to any dispute in relation to a building matter, including non-payment.
- Initially, all building disputes should be channelled through the Court Registry to a specialist Registrar and/or Judge before any defence is filed.
- Any pre-action protocols for building disputes could be removed.
- Expedited hearing processes should apply depending on the value or nature of the dispute. For instance, smaller disputes should be decided via a small claims process with limited rights of appeal.
- The court or SACAT must be properly resourced to provide timely pre-hearing mediation for all matters utilising a mediator with residential building industry experience. This will assist in promptly distilling or

negotiating the issues in contention, including in cases of conflicting expert reports, and may avoid the matter proceeding to a hearing at all.

- Similarly early arrangements for concurrent expert evidence or expert conferral, also known as “hot-tubbing”, should be encouraged where possible. As set out in further detail in HIA’s response to question 21, two independent building experts should not be of completely disparate opinions in a largely objective, technical field. The utilisation of hot-tubbing early in the process would assist in reducing the matters in dispute.
- Another option may be to amend the SOP Act to allow the court to refer simple payment disputes to an adjudicator for determination, however HIA’s support for this option would be subject to improvements to the SOP scheme as outlined in response to Question 2.
- The right or requirement to have legal representation should be subject to the discretion of the court. Relevant discretionary factors should include the value and complexity of the dispute, where significant questions of law are involved or where the retention of legal representation will ensure a more efficient conduct of hearing.
- HIA’s economic data reveals construction costs in SA have increased by 54.4% since June 2020 and by almost 80% since 2008.

Residential Construction Costs – South Australia



Factoring a lead-in period from contract signing to the date a dispute arises (typically during or following construction) the value of building-related disputes is likely rise proportionately without a direct impact on complexity. As a result, it would be reasonable for court claim value thresholds for building disputes to be reviewed to ensure matters are not unnecessarily elevated to the jurisdiction of superior courts.

HIA suggests a starting point for improving the system would be to utilise existing functionality within the court system and explore options that may be simple to implement without legislative upheaval and complete reconfiguration of established systems, including funding and resourcing. Transferral of building matters to SACAT is a significant undertaking on many levels and could be considered if the initial measures in the court system are unsuccessful.



Question 9.

What factors need to be considered when contemplating any changes to court processes to facilitate improved resolution of building work contract disputes?

HIA refers to its responses to Questions 5 and 8.

Some further examples of matters that must be considered include:

- Hearing fees should be set keeping in mind the need to discourage the wasting of court or tribunal resources on vexatious claims or petty/minor disputes.
- The principles of natural and procedural justice should apply without the strict rules of evidence, so long as the matter proceeds according to the principles of equity and good conscience and there should be appeal rights.
- Any detailed proposal for change must be reviewed by people that are experienced in and understand residential building disputes.

It is likely that there are numerous further considerations, beyond those listed here which should be thoroughly analysed, depending on the proposed approach to improvement.

Compulsory conciliation conferences for building disputes

Question 10.

Should the expiable offence for non-attendance at a compulsory conciliation conference be applied to all traders who fail to attend compulsory conciliation conferences, including conferences relating to building disputes?

HIA strongly opposes mandating cooperative alternative dispute resolution (ADR) processes such as mediation and conciliation outside a tribunal or court process as a precondition to formal hearings. HIA refers to its position on mandatory ADR, as set out in its submission on the *Draft Statutes Amendment (Small Business Commission) Bill 2023*, 18 October 2023, as well as HIA's letter dated 30 April 2024 regarding the *Draft Statutes Amendment (Small Business Commission and Commercial Leases) Bill 2024*.

Under cooperative ADR processes the parties retain control over both the process and its outcome, providing a perception of fairness and increasing the likelihood for success.³ In addition, as the result is not binding, the parties must mutually agree to abide by the outcome. Mandatory participation undermines the very nature and reduces the prospect of a positive outcome from these ADR methods.

Statutory ADR processes should not interfere with the parties' freedom to come to a mutual agreement to commercial terms, whether related to the way the dispute is resolved, or the outcome of the dispute. The parties should not be precluded from determining their own pathway to resolve a dispute, whether under contract or otherwise.

³ P Gerber and B Ong, *Best Practice in Construction Disputes: Avoidance, Management and Resolution* (LexisNexis Butterworths Australia, 2013) p 220, 9.4.



There may be legitimate reasoning a party does not wish to participate in ADR, such as the nature or complexity of the dispute, or the quantum in dispute. The parties should be given the opportunity to submit such reasoning for consideration by CBS prior to scheduling a conference and CBS should be required to consider and provide reasoning as to why the process is or is not considered appropriate.

Penalties

The application of penalties for non-attendance unless associated with a pre-trial process is out of step with the nature of the process itself. HIA opposes the imposition of penalties on parties who do not participate or fail to attend conciliation conferences, including those related to building disputes. By extension HIA opposes any increases in the existing penalties for non-attendance, including expiation fees.

There could also be many reasons a party does not attend a scheduled ADR conference, and this should be taken into account prior to any fines or penalties being imposed. However, if a party has previously agreed to attend and fails to do so without good reasoning, they should be liable for costs to ensure both the ADR practitioner and the other party to the dispute are fairly compensated. This is a matter for the courts or SACAT. Similarly, consequences of not attending a resolution process which cannot compel any outcome should be left to the court or tribunal with jurisdiction to compel an outcome.

Despite HIA's opposition to mandatory cooperative ADR and associated penalties, all parties to a dispute should have the ability to apply for available ADR processes and similarly all parties should be subject to the same consequences for failure to attend or participate in mandatory processes. The Discussion Paper indicates an intention to increase penalties for traders only. In addition to being inequitable, this is at odds with the nature of the ADR process, serves to further undermine the relationship between the parties, and reduces the opportunity for a positive result.

Building and construction industry contracts

Certificate of Occupancy and swimming pool requirements

Question 11.

Would it be helpful to require information about the proposed COO requirements and swimming pool safety feature requirements to be contained within building work contracts?

HIA opposes the inclusion of mandatory information in building contracts related to COO requirements and swimming pool safety feature requirements.

It is inappropriate to place an obligation on a builder to inform a homeowner about work the builder may not be contracted to perform. This blurs the lines between works in and out of the builders' scope, potentially causing confusion for homeowners regarding the builder's responsibilities in relation to owner or third party work and increases the builder's risk for which they are not being compensated under the contract.



There is already a requirement for builders to include mandatory information in domestic building contracts.⁴ It is questionable whether consumers read this information and whether it has any real effect on consumer understanding. Despite its unknown impact, builders are required to include the Form 1 Notice with their building contract or risk a penalty of up to \$5,000.⁵

To be effective, consumer information should be succinct and focused on key matters for consumer protection, which will have the most impact for the majority of homeowners. These include topics such as checking the builder has a licence, understanding indemnity insurance requirements, and ensuring the contract meets legal requirements.

HIA would not oppose a review of the Form 1 Notice form to verify it does not include information surplus to requirements that may see the consumer discouraged from reading it.

Transitional arrangements

If Government did determine it was necessary to update the information in the Form 1 Notice to include additional information or require an additional notice to be given with the building contract (which HIA would oppose), it must also seek to minimise the impacts of this change on industry.

The Form 1 Notice is included in each of HIA's contracts, where required by the BWC Act. Although changes to HIA's online contracts can be implemented relatively quickly, updates to our print stock will be subject to sales. In addition, many builders and other contractors hold hardcopy stock of HIA contracts, and potentially their own contracts at their offices.

If the Form 1 Notice is updated, a transitional period of a minimum of 12 months from commencement of any amendments is appropriate, during which the prior version of the Form 1 Notice can be used. This time will also allow HIA to communicate the changes to members who may be using their own agreements and forms. Similarly, a period of 12 months from commencement would allow for HIA and industry to take steps to include any additional notice with contracts.

Question 12.

Are there other mechanisms which might increase the effectiveness of enforcement action in relation to the COO and swimming pool safety feature requirements?

HIA would support proactive government-run consumer education to ensure homeowners are aware of their responsibility to meet swimming pool safety requirements. Public information and education are not the role of the builder or pool contractor.

There is also an opportunity to improve and increase levels of engagement and enforcement by local councils.

⁴ *Building Work Contractors Regulations* (SA) (BWC Regulations), Schedule 3 - Forms, Form 1 - Notice (Form 1 Notice) under section 28(1)(f) of Building Work Contractors Act 1995.

⁵ BWC Act, s.28 (1)(f) and (2).



Question 13.

Should the COO and swimming pool safety feature requirements be included in a building work contract as obligations to be met by the builder, instead of information for the consumer? For example, should the pool builder be required to arrange installation of swimming pool fencing as part of the building contract, or should the consumer have the option of separately arranging a trader to install the fencing?

HIA would oppose the transfer of obligations currently held by the owner to the builder and any interference in the parties' ability to reach a mutual agreement regarding the appropriate scope of works. The owner should retain the ability and responsibility for carrying out the pool fencing themselves should they choose to do so. Furthermore, compelling all works to be done by the one builder would reduce competition, reduce flexibility for the owner and likely result in increased prices.

Sunset clauses

Either party can use a sunset clause to end the contract if the project is not completed on time. These clauses can support buyers by giving them the right to end a contract and pursue other property options if the building project is delayed. However, it is alleged in the Discussion Paper that there may be instances where a developer deliberately delays a project to activate a sunset clause and whilst the deposit is returned to the buyer the same property is sometimes then on-sold by the developer for profit.

Purchasing "off the plan" is by its very nature speculative and requires contracts with certain terms and conditions. Whilst some purchasers may assume they have bought a block of land, they have not. They have acquired a conditional promise from a vendor to produce and deliver a block of land or a unit in a strata development.

Sunset clauses are often inserted at the insistence of the purchaser, as without such they could wait for years while a developer tries to get a project started which could be delayed by planning, financial or a myriad of other reasons. For the purchaser, if the construction is delayed or late the purchaser can have their deposit returned. This could be advantageous to the purchaser if they feel they originally paid too much.

Developers too will have the right to rescind. Despite their best efforts they may be unable to obtain registration on time. In a strong rising market, there may be some incentive for a developer to invoke the sunset clause, return the deposit and sell the property a second time for a higher price, conversely in a falling market a purchaser may be awaiting the trigger to invoke the sunset clause to return the property and get their deposit back.

What is clear is that there are risks associated with either party invoking the sunset clause and a potential detriment that could be borne by both parties depending on the broader economic circumstances.



Question 14.

Are sellers, including developers, using sunset clauses inappropriately to terminate off-the-plan contracts with consumers in SA? Please provide evidence.

HIA is not aware of instances of inappropriate use of sunset clauses in SA. HIA's standard form contracts are for building work and subcontracting arrangements. We do not produce contracts for off-the-plan sales or property transfers and as such, HIA's contracts do not include sunset clauses.

The Discussion Paper and Fact Sheet do not provide any details or specific evidence that there is an issue with the use of sunset clauses in SA. The Discussion Paper notes CBS is aware of situations where building developers have indicated an intent to rely on a sunset clause unless consumers pay additional funds. However, this commentary is problematic for a number of reasons, including:

- it appears to be anecdotal;
- it provides no quantification of the number or frequency of the alleged instances, or the number of developers involved;
- it provides no context around the contractual arrangements, which may well permit the developer implementing a price increase under the agreement; and
- there is also no indication that such speculative action has ultimately been taken.

Question 15.

Should there be limitations on the use of sunset clauses similar to those implemented interstate?

Government should adopt a cautious approach when considering legislative changes that would impact long standing contractual provisions.

Freedom to contract

HIA supports the principle that consumers should be able to contract with confidence and certainty. However, as a general principle, HIA does not support further statutory intervention into contractual arrangements, such as the prescription or prohibition of provisions in building contracts. Contracting parties should have the ability to determine between themselves the terms of their agreement.

Protection of parties' interests

There are many aspects of a speculative purchase that contain complexity, uncertainty, and risk. This is largely due to the lengthy timeframes involved in such developments, as well as the various milestones and external factors that may delay or compromise the progress of a development.

Contractual measures are required to protect the interests of both parties. HIA submits it is not possible to impose government regulation across all of those matters; hence the need for negotiated and transparent contractual arrangements. The notion that *'a party to a contract should bear the risk where that risk is within that party's control'*⁶ is undermined when there is legislative interference within a contractual arrangement that distorts the contractual allocation of risk.

⁶ Abrahamson Principle



It is also necessary to look at a contract as a whole. Commonly off the plan property contracts include clauses covering a variety of circumstances affecting timings of performance and cost variations together with sunset clauses for withdrawing from an agreement. To carve out a certain provision and examine it in isolation overlooks the impact and effect of other provisions which may interact with a sunset clause.

Reforms must be justified

In most cases, the majority of off the plan projects are completed without incident. Unless a veritable, reoccurring problem with the use of sunset clauses is identified in SA, HIA opposes further statutory limitations around their use. For reform to be justified, there must be demonstrated systemic issues within the subject jurisdiction. Reforms are not warranted simply because there have been historical issues in other jurisdictions, or where there have been several reported cases of prospective misuse. HIA cautions government against taking a copy and paste approach to reform based on measures implemented in other states.

Even if sporadic instances of misuse of sunset clauses in SA were to be identified, this would still provide insufficient reasoning for progressing reforms. Legislative change that has broad ranging impacts on housing availability and affordability must be the subject of robust scrutiny and strong justification, not based merely on occasional and infrequent behaviour by a small minority of businesses. Context is also critical. Examples of reliance on sunset clauses over the last four years may not represent a business-as-usual approach and are instead likely to be a product of extreme and extenuating circumstances.

Despite HIA's objections, if investigations into appropriate limitations for the use of sunset clauses in SA were progressed by Government, a starting point may be to consider circumstances where the developer and the builder are related entities. In addition, any proposed regulatory intervention must take a balanced approach and have arrangements that apply equally to the buyer and property developer.

Finance

Any review of sunset clauses must be conducted in conjunction with a review of current barriers to finance for property development as well as personal mortgages. Any actual or perceived additional risk to financiers due to the removal or limitation of sunset clauses in off the plan contracts may drive tighter constraints on lending.

The historical and ongoing challenges in obtaining finance for both development projects and personal mortgages are detailed in [HIA's response to inquiry into the financial regulatory framework and home ownership, September 2024](#). The push to create an 'unquestionably strong' financial system as a result of the Global Financial Crisis has resulted in considerable restrictions on finance availability, with a reduced appetite for higher risk lending such as residential mortgages, interest-only loans and loans to investors resulting in higher borrowing costs and more stringent lending criteria.

Ultimately, the outcome has been reduced access to finance across the homeownership spectrum.⁷ In addition, state government regulatory interventions and measures by Australian Prudential Regulation

⁷ HIA's response to inquiry into the financial regulatory framework and home ownership, September 2024, pp 3-6.



Authority have introduced further roadblocks that have hindered finance availability, eroded development project feasibility and exacerbated the undersupply of homes.⁸

HIA consistently receives feedback from its members on the challenges in obtaining finance for development projects. Delays in finance approval and the inability to obtain finance by developers, as well as investors and homeowners, are significant driving factors in the potential use of sunset clauses. HIA suggests the restriction or prohibition of the use of sunset clauses, and thereby the introduction of further uncertainty and risk in an already risk-adverse system, will cause further delays and barriers for those seeking to progress otherwise viable projects. Rather than introducing more roadblocks into a lending system currently struggling to meet the demand for housing, Government's focus should be on facilitating improved outcomes from the finance sector.

Are there other options to address this problem?

Common law

Reflecting long established principal of the common law that a party cannot benefit from its own wrong the courts will not reward developers who breach their contractual requirements and deliberately delay registration to exercise their rights under sunset clauses.

In the Victorian case of *Joseph Street Pty Ltd v Tan* [2012] VSCA 113 the decision provided that *"It is well established that a party wishing to rescind cannot take advantage of its own ineffective or inefficient measures to comply with its contractual obligations..."*

Similarly, in the unreported decision of the Supreme Court in *Hawes v Cuzeno Pty Ltd*⁹ the courts refused to let the vendor rescind a contract when they have failed to get the plan registered because it commercially suited them not to have the plan registered in time.

In *Walker v Chanrich Properties Pty Ltd*¹⁰ the court indicated that in relation to clauses permitting rescission:

- the onus will be on the person resisting rescission to make out a case that the rescission is invalid;
- where the facts are in the camp of the developer, any onus on the other party is to a degree softened; and
- the question of fact that has to be decided is whether any act or omission of the developer materially contributed to the non-registration of the plan.

In HIA's view, these cases reflect the existing protections in the common law and would equally apply to alleged improper use of sunset clauses in SA.

⁸ Ibid, p 7.

⁹ [1999] NSWSC 1167

¹⁰ [2003] NSWSC 1064



Existing statutory protections

There is currently a range of protections for consumers against the inappropriate use of sunset clauses, including those under the *Competition and Consumer Act 2010* (Cth) Schedule 2, Australian Consumer Law (ACL), the *Fair Trading Act 1987* (SA) (FT Act) and the BWC Act.¹¹

The ACL comprehensively regulates business dealings and provides protection for consumers with prohibitions on misleading conduct, anti-competitive conduct and unconscionable conduct. It applies to contracts between business and consumers for the supply of goods and services and creates a basic set of guarantees for consumers who acquire goods and services from Australian suppliers, importers or manufacturers.

Under s.18 of the ACL a person (or company) shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive. It makes no difference whether the misleading or deceptive conduct was intentional or not. These protections are reflected also through the FT Act, which functions to apply the ACL as a law of SA and provides for state-based regulation and enforcement.

In addition, the BWC Act, s.21 sets out a range of matters for which disciplinary action can be taken against building work contractors and supervisors, which may in particular circumstances extend to developers. Specifically, s.21(1)(c) and (2)(b) prevent contractors and supervisors from acting unlawfully, or improperly, negligently, or unfairly, in the carrying on of their business or employment.

Contractual protections

Further, buyers are protected from breach of contract and may have the option to pursue the developer for a general damages claim in the event of a breach. HIA suggests these existing protections are appropriate to prevent the misuse of sunset clauses in SA and further provide for suitable avenues for recourse if misuse did occur.

Consumer education

Consumer education will also be a powerful tool in the event systemic issues with the use of sunset clauses in SA is identified. Consumers are now more educated and communicative than ever, and for better or worse, are adept at utilising the internet and social media to seek further information. This presents an opportunity for CBS to provide accurate, proactive consumer education and materials to support buyers in understanding their rights with regard to sunset clauses.

Question 16.

What would be the costs and benefits for consumers, developers and industry if there were limitations imposed on the use of sunset clauses to terminate off-the-plan contracts?

HIA refers to and reiterates its response to Question 15.

If limitations were placed around the use of sunset clauses by developers, there would be impacts on housing affordability and supply. Reasons driving this increase include, but may not be limited to:

¹¹ See, e.g. ACL, Part 2-3; FT Act, Part 7; BWC Act, Part 4.



- project feasibility will be impacted, with additional project risk hindering the ability to make the project commercially viable;
- similarly, the additional risk and potentially lower returns will also impact the ability for developers to obtain necessary finance to fund development projects; and
- developers would seek to protect themselves in other ways, which is likely to include increased upfront prices.

These outcomes would also disadvantage consumers, in addition to any likely effects on the availability of consumer finance.

Question 17.

If changes are implemented, what transition period should apply?

A transition period should apply for a minimum of 36 months to allow for projects in feasibility stages to move through the pipeline.

Once commenced any limitations should apply only to sales contracts signed on and from that date. For the avoidance of doubt, limitations should not apply retrospectively to contracts already on foot.

Licensing and Registration

Building inspections

Question 18.

Are the current council building inspection requirements (in Practice Direction 9) ensuring building work complies with the National Construction Code?

This question should be considered in conjunction with CBS data on the incidence of non-compliance. As this data has not been included with the Discussion Paper, HIA is unable to provide feedback at this time.

Question 19.

Is the approach to inspections consistent across council areas and building types?

Currently there is an inconsistent approach to building inspections across council areas. Some councils request and perform multiple inspections, whereas others reduce the number of notifications on the decision notification form, preferring not to inspect. Not only does this approach have the potential to impact building quality outcomes and may be subject to abuse by unscrupulous operators, but it also creates commercial challenges for businesses by fostering ambiguity and uncertainty.

HIA calls for a consistent approach to building inspections across all local council jurisdictions, which should not exceed the minimum guidelines as set out under Practice Direction 9 – Council Inspections 2020.



Are there specific stages of building work that should be inspected that are not being adequately or appropriately inspected?

HIA refers to an reiterates its response to Question 18 with regard to any shortcomings in inspections of specific stages of work.

Question 20.

Does the experience and expertise of the inspector have a large bearing on the effectiveness of the inspection?

Yes. It should go without saying that an inspector must have the relevant qualifications, skills and experience that would enable them to determine whether issues, whether a minor non-compliance or significant structural deficiencies, exist with the building work at the relevant stage of inspection. If they are not suitably placed to carry out this role the inspection may be ineffective.

Alternatively, an incompetent inspector who misdiagnoses defects and proposes unsuitable remedies could create a host of other complications with the building or between the contracting parties, including those with commercial implications or that cause rising tensions or disputes.

Should inspections be able to be undertaken by other suitably qualified and experienced building professionals (private building certifiers, architects, engineers, trade specialists, etc.)?

Yes. Required inspections should be undertaken by a competent building professional including a licensed builder, engineer or building surveyor. A building inspector should:

- have experience appropriate to the type of work they are inspecting;
- hold qualifications and competency appropriate to the type of work they are inspecting;
- hold appropriate PI insurance;
- be able to be held accountable for the observations, conclusions and recommendations outlined in their reports;
- be required to maintain knowledge of current building codes and standards; and
- comply with all regulatory safety standards.

It is unclear whether the qualifications and typical experience of Registered Architects in South Australia would place them in a cohort of professionals with suitable expertise to competently carry out the inspection of buildings works on behalf of local authorities.

Building inspectors

Question 21.

What evidence is there to indicate specific failures by residential building inspectors in SA?

Building inspectors are regularly engaged by homeowners during the building process; to act as the homeowner's representative in inspecting stage completions and to provide an inspection and defects



report at practical completion. In addition, building inspectors are often engaged by home buyers to prepare a report prior to the expiration of the cooling off period for property transactions.

They can have a significant impact on both the payment claim process and their client's confidence, regardless of whether they have appropriate qualifications or experience in a relevant building, construction or engineering trade or profession, to support the claims they are making.

HIA often receives calls from builders who have received lists comprising multiple pages and many "items" of defects, but which cite incorrect or irrelevant standards, relate to work that is in progress and work outside the builder's scope. This may occur multiple times throughout the building period. The time and cost for builders to respond to each item in each report can be significant.

In some cases, the inaccuracy and onerous nature of repeated reporting places considerable strain on the builder's relationship with their client, distracting the builder from progressing the work efficiently and providing little genuine benefit. Some reports are riddled with errors and inconsistencies, meaning comprehensive responses can take many hours to compile. However, in many instances the damage to the relationship between the client and the builder is already done, and the builder is left fighting an uphill battle justifying that they are already compliant.

Worse still, some building inspectors have developed a reputation as a "gun for hire" and are known to produce reports in favour of whichever party is engaging them. This is unethical, creates a burden on industry and ultimately is a disservice to consumers whose homes may be unnecessarily delayed due to prolonged disputes. There should not be a situation where the building inspectors engaged by each party reach two entirely disparate opinions in relation to what should be a primarily objective field of building compliance.

Question 22.

Should the Government increase regulation of building inspectors? If so, how?

Yes. HIA supports the licensing or registration of building consultants (including building inspectors) and refers to its response to Question 20.

The BWC Act currently defines a building consultant under s.20 as '*a person (other than a registered architect) who carries on the business of giving advice or furnishing reports in respect of domestic building work (whether being work already performed, work in progress or work that may be required in the future), and includes a former building consultant*'. While not expressly listed, this is likely to cover the services provided by building inspectors.

Building consultants are subject to disciplinary action for matters as set out in s.21(3) including acting in conflict to an assurance accepted by the Commissioner under the FT Act and acting unlawfully, improperly, negligently, or unfairly in the course of acting as a building consultant. Consequences for breach of s.21 are set out further throughout Part 4, alongside that for licenced building work contractors and registered supervisors. Notably, this is the extent to which the role of a building consultant is prescribed or limited by the laws.



By comparison, the licensing regime in South Australia currently requires builders and almost all trade contractors to hold a licence to carry out building works. Whereas building consultants who perform pre-purchase and private inspections and reporting during the building period are not required to hold any specific qualification and are not required to be registered. It stands to reason that inspectors checking the quality and workmanship of licensed parties should also be held to a similar standard and be subject to regulation.

HIA understands some building inspectors advertise holding a BLD number, however the associated license is restricted to specific trade activities and may reflect the range of expertise required for building. Given the complexity involved with building structures and the broad understanding of building processes necessary to effectively coordinate building works, building inspectors ought to be subject to minimum qualifications and a licensing regime to ensure they are equipped to perform this service.

And what would be the costs and benefits for consumers, building inspectors and other tradespeople in the construction industry?

Increased regulatory control around the operations of building consultants, including inspectors, may see improvements in the quality of advice, service standards and business conduct, as well as improved consumer confidence and protection.

It is well known across industry that the selection of a building inspector to check the progress of building work periodically, can mean the difference between ongoing trust between contracting parties, resulting in a smooth-running project, and a project peppered with tension and unnecessary delays. Similarly, the selection of a skilled building inspector for a pre-purchase inspection will ensure they produce a comprehensive and relevant report, rather than a report that is rambling, inaccurate and potentially misleading.

As with any additional regulatory requirements, there will be a cost to industry that will ultimately impact the cost of building a home. However, additional costs may be offset by a reduction in costs associated with disputes and potentially rectification costs. A RIS will be required to attain proper insight into the costs and benefits.

Question 23.

Who should be included in a registration scheme for building inspectors?

It would be appropriate to require registration of parties providing the following services, where they are engaged by the homeowner:

- carrying out residential building inspections;
- preparing inspection, pre-completion, defect, or similar reports; and
- providing advice on remedial and rectification work, and costs.

Regulation of owner builders

HIA has been a strong advocate for greater regulation of owner builders, given the issues with the current system. As such, HIA would support moves that would see greater oversight of owner builder work,



including owner builder permits or registration, and greater accountability for the work carried out by owner builders.

HIA does not oppose the right for an owner to carry out work on their own home. However, it must be acknowledged that building or renovating a home is not a simple task and can carry a substantial level of risk for current and future owners and occupiers. Owner builders must be appropriately supported in taking on this role and the system must not be open to misuse.

Question 24.

Are there problems with the quality of building work performed by owner builders in SA? Please provide evidence.

Yes.

Historically, members in most jurisdictions have raised concerns with owner builder activity and its scope. In response, governments have attempted to balance the view that a homeowner has an inalienable right to build or renovate their own home against the principles for licensing building trades and the consumer protection and safety considerations for future owners of the dwellings that flow from such regulation. The consequence of poor building work is often put forward as validation for a hard-line approach to regulating building occupations, yet there is very little done to apply the same rigour to those constructing homes as owner builders.

In taking on the role of an owner builder, a person should be liable for defective work, engaging licensed contractors as appropriate and ensuring a safe workplace. While an owner builder is not required to hold the same qualifications as a builder and has less experience and resources, failures to take due care and carry out their role which is beyond that of an ordinary homeowner, could have dire personal or commercial or consequences for building occupants and future owners. If they choose not to accept the level of responsibility that should be associated with the role of an owner builder, they have the option to engage a licensed building work contractor to take on those responsibilities.

A specific and very serious example in SA is a house at Victor Harbour that was built by an owner builder. Beginning with a grossly negligent design which was not identified by a private certifier or council at the time, the building ultimately contained potentially catastrophic defects that resulted in the issue of evacuation orders and subsequently required demolition.

Question 25.

Is there evidence indicating problems with unlicensed individuals masquerading as owner-builders in SA, whilst building, selling or renting homes for profit?

While it is difficult to provide specific details of instances of this behaviour occurring, HIA does receive anecdotal reports from its membership and consumers. Unlicensed businesses subverting the licensing system and utilising the owner builder pathway to build or renovate homes for profit is one example of misuse and is a big problem for consumers, industry, and the regulator.



If so, what options are there for the Government to address these problems?

The consequence of poor building work is often put forward as validation for a hard-line approach to regulating building occupations, yet there is very little done to apply the same rigour to those constructing homes as owner builders, whether legitimately or otherwise.

The PlanSA portal is an established system that enables the collection of various data, including details of parties involved in the building process. As a first step, government could easily monitor and analyse information submitted through the portal to identify parties potentially masquerading as owner builders and utilise this data to make further investigations.

There are various other ways to improve the regulator's monitoring and compliance powers in relation to misuse of the owner builder system, including:

- owner builder permits to be issued by CBS, which will maintain a central register;
- limitations on the number of owner builder permits issued to a person within a particular timeframe;
- limitations on the type and scope of residential building work that can be carried out by an owner builder;
- owner builders must be liable for defective work;
- audit inspections of building work on the proviso those who performing the inspections are adequately qualified and experienced (or registered);
- inclusion of a notation on the certificate of title that building work has been undertaken by an owner builder, which provides a warning of potential additional risks to prospective buyers, but is also likely to highlight dubious behaviour by unlicensed parties operating a business;
- a requirement for owner builders to obtain building indemnity insurance (BII) in the event the home is sold within a prescribed period;
- expanded avenues of recourse for contractors to an owner builder, to align with those available if contracting with a licensed builder, including adjudication; and
- an owner builder who commences work without the appropriate approvals should face the same penalties that a building work contractor would face for the same offence.

Question 26.

Is there evidence indicating that building work contractors are inappropriately persuading consumers to declare owner builder status for projects, in circumstances where the work performed by the building work contractor?

HIA suggests this type of behaviour is more often likely to be consumer driven, whereby building work contractors are approached by an owner builder to act as a 'project manager'. HIA often hears reports from builders being approached to engage under this arrangement as a way for the homeowner to "save on the margin".

This arrangement creates a multitude of problems. By agreeing to project manage the work the builder is exposed to the same, or greater, liability as they would incur if they were directly contracted as the builder



on the job. They do not, however, attract a margin on products and subcontracts and therefore the financial risk may be greater.

Furthermore, due to the direct contracting arrangements between the owner and the trades, the builder has little power to influence the sequencing or quality of work by the trades. The rectification of defects is left at the whim of the owner and their ability to influence the trades to return and address the problems. Arguably the owner's ability to compel a trade to return to site is less than that of a building business, which may have specific contractual terms and ongoing relationship as leverage.

If so, what options are there for the Government to address these problems?

If evidence is available that the scenarios described in the Discussion Paper are occurring, the first response by Government should be a consumer education campaign to support consumers in understanding the legal requirements. This will equip them with the knowledge to respond appropriately in the event they may be faced with this situation and similarly help them to understand that seeking to engage a building work contractor as a project manager may have undesirable consequences for their build.

Ultimately it may be very difficult to ascertain whether a builder is involved in coercing a consumer into entering an owner builder arrangement. Firstly, it would rely on the consumer making a complaint against the builder and secondly, they must be able to supply compelling evidence to demonstrate the builder's actions. In the absence of data evidencing a widespread and systemic issue of this nature, it seems unlikely that a complaint would arise at all, and even less likely the consumer would be able to produce documentation to support their claim.

Should a complaint of this nature arise, consumers already have a range of protections, including under the ACL and FT Act in relation to misleading and deceptive conduct¹² and avenues to address and resolve related disputes are currently available. This could form part of an approach to consumer education.

Question 27.

What costs and benefits might accompany increased regulation of owner builders?

(e.g., introduction of a permit scheme, a notification system or close monitoring of 'owner builder' planning approvals by councils)

An unintended consequence of owner builder regulations and the lack of power to monitor and enforce owner builder schemes is that it potentially affects the market for licensed builders. The burdens on licensed builders and owner builders are unfairly imbalanced particularly when it comes to compliance with work health and safety, warranty insurance and hiring of trades.

In its response to Question 25, HIA has identified various options to avoid misuse of the owner builder system by unlicensed operators. These options also have the benefit of supporting owner builders in the delivery of improved building outcomes and assisting in avoiding outcomes like the example provided in response to Question 24.

¹² ACL, Part 2-3; FT Act, Part 7.



In addition to the options provided under Question 25, HIA would support a requirement for owner builders to undertake nationally recognised training prior to being issued with a permit to carry out residential building work. Collectively, the suggested requirements for owner builders would ensure all those carrying out building work are operating on the same playing field and provide broad-ranging improvements in consumer protection.

Regulation of building developers

Developers in their many forms play a crucial role in the supply of housing and should be supported in continuing this role in a manner that promotes good building outcomes. Broadly, placing further constraints on developers is likely to have the opposite effect, ultimately working at odds with government's objective to address critical housing shortages and improve affordability across the housing spectrum. A cautious approach should be taken when considering regulatory changes that may result in significantly increased regulatory and administrative burden to the residential building industry, which is of critical importance to the economic prosperity and stability of the SA economy.

It is important to reinforce the use of regulation to address a defined market failure. Fundamentally, the Discussion Paper lacks strong evidence and reasoning for developer regulation. HIA does not support the implementation of additional regulation to address any issue that is not clearly defined and assessed in consultation with industry as requiring attention.

It is also necessary to recognise the nature of the commercial environment, and indeed society as a whole. There will always be a small percentage of bad behaviour by operators refusing to comply with the requirements of the law. While these issues may occur from time to time, the vast majority of industry is attempting to do the right thing. It is impossible to fully legislate against unethical or unscrupulous behaviour and it is unfair to impose harsh obligations on the majority of builders operating in the industry who do pay their contractors on time and operate lawful and complaint businesses.

The regulation of developers is an exceptionally broad topic. In its current form, the Discussion Paper is not sufficiently detailed to enable proper interrogation of the various issues within the scope of developer regulation. While HIA's overarching position is that there appears to be little justification for the regulation of developers in SA at this time, in order for any existing issues to be fully understood, as well as to do justice to the subject matter and its potential impacts, it is necessary for the topic to be addressed in a Discussion Paper of its own.

Question 28.

Are developers not meeting their obligations in residential development projects? Please provide evidence.

Currently in SA there is a shortage of available 'shovel ready' land, which is contributing to developers and builders being unable to progress and complete works. The supply of land is a significant contributing factor to pressure on building and development businesses, with the prolongation of project timeframes leading to additional costs and pressure on relationships with consumers.



There are various contributing factors to this shortage, and one in particular being unprecedented delays in the provision of power and water services to sites, in addition to delayed upgrades to existing infrastructure. HIA has raised this issue with Government and again reiterates the need for urgent action. The Discussion Paper identifies issues with a failure to provide common infrastructure in residential developments and this is categorised as a failure by developers, however HIA suggests that developers are not solely responsible for the delayed delivery of infrastructure.

Governments have a responsibility to implement infrastructure programs to sustainably support anticipated growth in a manner that ensures the investment cost is shared equitably across the whole community. Infrastructure provision should be planned, developed, and implemented in a coordinated manner by all levels of government, state, regional and local, in consultation with the residential building and development industry.

Aside from the single example involving a developer not providing a common roadway and services for a community title development, the Discussion Paper is silent on other circumstances in which developers are failing to meet their obligations. As such, it is unclear:

- what evidence there is of widespread issues with developer conduct; and
- what evidence there is that any specific kind of additional regulation will meaningfully improve developer behaviour to the extent that justifies the costs and burdens of those regulations.

Question 29.

Are consumers sufficiently aware of the different roles of developers and building work contractors, and their rights when entering into a contract with these parties?

For example, some consumers may enter a contract with a developer but not understand that physical building work will be undertaken by a separate entity with a building work contractor licence.

HIA is not aware of a shortcoming in the level of consumer knowledge on the difference between developers and builders and refers to its response to Question 11.

In addition, modern consumers are more informed than ever and have access to a range of information to support them at the click of a button. If there are remaining concerns that consumers are unaware of what they are contracting for beyond the building contract, there may be merit in CBS providing additional consumer education materials related to off the plan developments.

Effectively communicating the various development arrangements and roles of developers will be necessary as a part of any consumer information and identifying that there is no one-size-fits-all arrangement. For example, as identified in the Discussion Paper and in HIA's response to Question 32, the developer and the builder may in some circumstances be the same or associated entities.



Question 30.

Are there sufficient protections for consumers where a developer fails to complete essential infrastructure works (e.g., common roads, driveways and utilities connections) for a residential housing development? If not, what can the Government do to address this issue?

Consumer warranties and guarantees

The statutory consumer guarantees provided in the ACL apply to off-the-plan sales where goods or services form part the purchase. Under the ACL, goods or services, such as landscaping or furniture, must be of “acceptable quality”. There are other consumer guarantees which may also be relevant to off-the-plan sales. Goods are of acceptable quality if they are:

- fit for the purpose for which they are commonly supplied;
- acceptable in appearance and finish;
- free from defects;
- safe; and
- durable.

The ACL provides consumers with a right of action against a trader where there is a failure to comply with a consumer guarantee, however the remedy will depend on whether the failure is considered major or minor and may allow a buyer to recover any reasonable costs incurred in fixing a problem. Indeed, the ACL provides an avenue for a consumer looking for redress in respect of residential building work involving a developer.

The PDI Act also provides protections for consumers. A building owner can apply for a court order under s.202(1) where a builder has failed to comply with the Building Rules and other approval conditions as required under s.216.

Protection may also be available under the statutory warranties under the BWC Act, s.32, which include:

- the building work will be performed in a proper manner to accepted trade standards and in accordance with the plans and specifications agreed to by the parties;
- all materials to be supplied by the contractor for use in the building work will be good and proper;
- the building work will be performed in accordance with all statutory requirements;
- if the contract does not stipulate a period within which the building work must be completed - a warranty that the building work will be performed with reasonable diligence;
- if the building work consists of the construction of a house, it will be reasonably fit for human habitation; and
- if the building owner has expressly made known to the contractor the particular purpose or result of the building work, the building work and any materials used in performing the building work will be reasonably fit for that purpose.



In certain circumstances the statutory warranties will apply to developers where they are also building work contractors by virtue of being captured by the broad definition under s.3(1). Additionally, where a requirement to provide BII is triggered, consumers are afforded coverage for non-completion and defectively building work in the event of insolvency, disappearance, or death.

Insolvency

The Discussion Paper identifies concerns with property developers being some negative attention in the context of several high profile industry insolvencies.

No matter how stringent the regulation nor how effectively a business is managed, some corporate business failures will be inevitable. If the Government takes short-term steps to reallocate this risk to developers, it runs the risk of depriving the industry of the long-term benefits of the competition, entrepreneurship and risk-taking inherent in Australia's enviable capitalist free market economy.

It is important that, wherever there is a chain of responsibility, there is a clear 'endpoint'. Ultimately, no consumer, builder or trade is ever forced to contract with any particular developer and each party must take a level of personal responsibility to perform a suitable level of due diligence prior to entering into an agreement. Similarly, specific risks can be managed with the use of contractual protections, which in the case of consumers, may include sunset clauses.

Further to the available contractual protections, various other statutory protections exist for consumers and downstream contractors in relation to potential insolvency, including provisions of the SOP Act, as well as director's fiduciary duties and identification numbers under the *Corporations Act 2001* (Cth).

Question 31.

Is there a case for stronger regulation of building developers and, if so, what options should the government consider? For example, introducing a licensing scheme for developers or a developer rating scheme for consumers.

At present, the Discussion Paper provides no firm evidence of any need for additional regulation of building developers, which creates two challenges in responding to this question. Firstly, without a specific problem to address, it is not possible to identify an appropriate solution. Secondly, a swathe of alternative regulatory and non-regulatory options exist that may be applied to building developers, none of which are detailed in the Discussion Paper and to many of which HIA would be strongly opposed. It is not possible to provide targeted feedback on any particular option until such time as details have been provided.

Again, HIA points to the range of statutory protections that currently exist for the range of developer businesses and activities, and questions whether the existing frameworks can be better utilised to address any genuine issues. This should be the first step.

If problems remain and can be identified and evidenced, given the lack of any single, accepted, industry-wide definition of 'developer', determining the roles and activities a developer may perform will be the next step. This information is necessary to guide investigation into appropriate regulatory and non-regulatory steps for improvement.



Further, any proposed measures must be appropriate for SA. Suggestions that attempt to copy and paste approaches adopted in other jurisdictions such as project trust accounts, a bond scheme or even decennial liability insurance would ignore a number of unique features of the SA residential building industry, including, for example, the smaller size of the industry.

Licensing scheme

At this time, HIA does not believe the introduction of a developer licensing or registration scheme in SA is necessary, beneficial, or justifiable. At present, insufficient detail has been provided for HIA to comprehensively respond to the prospect of a licensing scheme for developers.

HIA supports reforms that assist the orderly operation of the residential building industry and improve conditions to facilitate more efficient and effective delivery of housing across SA. However, HIA maintains that the use of regulation should be limited to addressing a defined market failure, whether that be to protect or enhance the interests of consumers, business, or government.

All things considered, there is little evidence to suggest that any developer licensing scheme would meet these criteria at this stage, or that it would have tangible effects on developer integrity. On the contrary, the best existing case study of a developer licensing scheme within an Australian jurisdiction tends to suggest that such a scheme would be ineffectual.

Under the repealed *Property Agents and Motor Dealers Act 2000* (QLD) (PAMD Act) a license was required for a person to:

- complete more than 6 residential property sales in any 12-month period; or
- market residential property in which the property developer had an interest of at least 15%.

The former PAMD Act was abandoned in 2013, after failing to deliver a viable or workable system of property developer licensing. The PAMD Act focused on an identified role of property developers marketing and/or selling developed property.

In repealing these licensing arrangements in 2013, it was stated that:

'It is considered that this significant red tape reduction measure may generate employment growth, reduce barriers to entry in the property developer market, encourage market entrants and in turn, increase competition'.

HIA and the industry in general supported the repeal of the PAMD Act. The legislation was introduced in response to a vague presumption that there were significant existing problems with the way the Queensland development industry operated in a free market, and with the way developers operate and exert market power upon the construction industry supply chain. Evidence that such an urgent situation existed as to require additional regulation was scarce at best.



While HIA accepts that CBS may have received anecdotal complaints regarding developer behaviour, the Discussion Paper does not set out the evidence that a licensing scheme would materially address these complaints.

HIA also draws attention to the fact that licensing constrains the market's ability to provide services. By restricting entry, licence holders maintain an entrenched market position thus reducing competition. Furthermore, the introduction of developer licensing in SA would be another departure from the systems in place in other jurisdictions and would serve as a disincentive to any entities that might have otherwise pursued opportunities within the state. Once the expenses and administrative burdens of adhering to a licensing scheme are accounted for, investing in SA development activity could very well become an unattractive proposition.

Developers are financial investors, sitting atop a pyramid of building industry businesses that already exist within a stringently regulatory system, designed to ensure that the building supply chain ultimately delivers consumers safe and complaint buildings. A development business may carry out very little building work in its own right and would be reliant on and supported by the skill and expertise of those throughout the contacting chain, under the watchful eye of the various regulators.

The cost of a licensing scheme is also significant. There may be less costly options available than a positive licensing scheme, such as a negative licensing scheme or a similar but less onerous registration scheme. Yet, regardless of the form of the scheme, there will still be direct financial, administration and compliance costs for business, administration costs for government, and costs to consumers due to higher prices or reduced choice.

HIA questions whether there would be government appetite or budget capacity to actively fund and enforce a developer licensing scheme in any form. Ultimately, in the absence of appropriate resourcing, any potential benefits will be a moot point; an ineffectively enforced set of regulations could even give consumers a false sense of security. If SA developers were to be confronted with an ill-supported new agency or overburdened existing agency that will not be in a position to oversee the new regulatory requirements, without adding significant delays and administrative frustrations to the current development pipeline.

Rating scheme

The Discussion Paper provides no detail on what is contemplated in the implementation of a rating scheme or tool. Further detail is necessary to better understand the proposal and for HIA to provide more meaningful and specific feedback.

HIA is opposed to implementing a developer ranking system similar to the recent implementation in New South Wales. In doing so, HIA raises the following key concerns and issues in addition to high level concern over additional regulatory burden:

- Poor participation rates

Currently in NSW, very low participation in the voluntary scheme renders the system essentially valueless, even allowing for the infancy of the scheme.



- High expense of participation

Anecdotal evidence suggests that achieving a rating under the 'government funded' iCIRT system is costing participating developers tens of thousands of dollars, with one estimate sitting at \$40,000.

- Lack of transparency regarding rating criteria

HIA questions who the arbiter would be of what is 'important' to a consumer when making a decision, which matters are 'worthy' of including when determining a rating, and how much weight would/should be attributed to certain factors.

- A lack of clarity regarding how a star rating is improved

Adding to the above, iCIRT currently provides very little (if any at all) publicly available information that gives detailed information about how to positively influence a rating. Large developers may have the combination of manpower, administrative expertise, and financial resources to adapt and order new reports, but this is simply not a viable option for many smaller-scale developers.

- Discouragement of new entrants to the market

How is a developer rated on its work when it has not done any (or much) work early in the business development timeline?

- Overcentralisation and restricting competition

Instead of being encouraged to undertake a nuanced comparison of developers, many consumers will simply select one of the 'highest rated' developers. The rating would then inevitably lose its value once those with a 'low' star rating are eliminated from the market.

- Concern over bias of ratings

Developers report that the NSW rating system is based on a structure and criteria that favours some developer business structures over others. Additionally, whilst it is true that Equifax is 'independent' from any Australian Government agencies, it cannot be said that any private company is free from structural predispositions and entrenched interests.

- Accountability of third-party entities

The Government will have little direct ability (beyond threatening to terminate the relevant contracts) to monitor and influence the behaviour of any 'independent' ratings body. These entities are not infallible. By way of example, Equifax has been publicly reported to have:

- In 2017, suffered an enormous hack of personal financial data, being at least 143-million customers, which Equifax opted not to publicly disclose for several months; and
- In 2022, admitted to mass miscalculations of millions of US consumer credit scores, doubtlessly leaving many consumers without any compensation for declined/unfavourable applications for financial products.

- Cost burden

Who would pay for and maintain any state-based ranking system, and at what cost or benefit? HIA assumes that the costs of system to government would be passed on somehow, presumably through licensing fees. In turn, consumers will then bear these costs.

- Threshold for inclusion



Where would the entry threshold exist for an SA-based system of residential developer ratings? Would it only be for apartment builders, or for everyone who meets the Discussion Paper's proposed definition of a developer?

Whilst the intention appears to be to provide consumers with more accessible information, HIA has serious concerns that a rating scheme would be not only be ineffective but also create an unjustifiable barrier to entry for new entrants to the market. These entrants would not be eligible for a rating yet would need to compete with those who have already established a rating.

Disclosure scheme

HIA generally agrees that the development industry can be difficult for consumers to navigate and is therefore not necessarily opposed to the exploration of statutory disclosure requirements for developers.

However, due consideration would be necessary on a range of matters. For example, the type and extent of information to be disclosed should be appropriate and relevant to the residential building industry and its clientele. Consideration of commercial implications of disclosure will also be important, for example, a requirement to disclose previous regulatory action may have a myriad of unintended consequences, beyond what is reasonable for consumer protection purposes.

Building bonds

HIA would strongly oppose the imposition of a mandatory building bond and/or inspection regime. A bond scheme would significantly add to red tape and would consequently have a direct negative impact on housing affordability. HIA is of the view that its imposition would have many unforeseen and expensive consequences.

Statutory warranties

In principle, HIA does not oppose developers being subject to statutory warranties, which is not presently covered by the Discussion Paper. In any event, HIA is of the view that any potential extension of statutory warranties which involves the proposed definition of 'developer' from the Discussion Paper would be untenable, as detailed below.

Other non-statutory options

Subject to the provision of further detail on any problems that currently exist, HIA may consider some non-statutory options to be appropriate, such as voluntary codes of practice and educative tools.

Question 32.

How should a residential building developer be defined? Is the definition of a developer used in this discussion paper suitable?

The Discussion Paper provides no clear purpose for the definition of a 'developer', 'building developer' or 'residential building developer'. It is also unclear how any proposed term or definition will function within any particular piece of legislation. In addition to determining the problems to be solved in the first instance, context is vital in deciding upon proper terminology and its definition.

The definition of 'developer' proposed in the Discussion Paper is as follows:



‘...a person or entity that seeks approval for a building project on property that they have an interest in and arranges for construction activity to be carried out on that property for the purpose of improving its value.’

At this stage, little explanation has been provided for how the definition was arrived at, nor any significant elaboration or critical discussion.

HIA strongly opposes this definition on the basis it is overly simplistic and not sufficient to properly define the range of activities of a developer, or the entities involved in the business of development. HIA has a range of objections not least of which includes that, in its current form, the definition is likely to inadvertently capture ordinary homeowners.

It would appear that the intention is to ‘cover the field’ for a wide breadth of ‘developers’ with different forms and characteristics. However, the proposed definition applies as much to the largest high-rise developers in Adelaide as it does to an individual homeowner who renovates a detached dwelling. Without a workable definition, any proposals for developer regulation are a moot point.

Developer activities

Overall, the term ‘developer’ is not clearly defined across industry or capable of being summarised through a single set of common responsibilities. It is a broad term which typically includes an entity that carries out some combination of sub-dividing land, building and selling property off-the-plan, renovating for resale or knocking down and rebuilding houses. It has also become a catch-all phrase to describe an entity (individual, company or partnership) that carries out the function of bringing the many building professionals together to deliver a building project and acts as the owner of a building to sell the individual dwellings.

On the one hand, a developer is somebody who takes a financial risk with respect to the purchase, construction, marketing and selling of residential real property. In return, the developer seeks a profit from the development, either by selling land or a building or by holding the developed property to recover a profit as return on the investment.

On the other hand, some ‘developers’ may simply be financial investors, who subcontract all or most of the work out. Aside from providing funding for the project and selecting contractors, these entities do not necessarily play an active role in controlling the final product; at least to the extent of exerting a significant influence over day-to-day factors such as project timeframes and the selection of materials.

Some developers form construction companies to do the building work. Other developments occur via joint venture arrangements with arm's length, third party builders and appropriate construction contracts between all joint venture parties.

A developer’s role on a residential building project will depend on the profile of that developer, the type and size of the development and their business choices in relation to the number of functions they may perform directly as opposed to outsourcing.



The Discussion Paper includes on page 38 a list of activities that may be carried out by a developer. HIA broadly agrees with the list provided, although we note that the role of the developer goes further. The variety of functions that a developer may choose (or decline) to undertake includes:

- planning the building project, including assessing market demand and conducting feasibility studies;
- acquiring land or properties for development;
- ***consolidating or subdividing land for development;***
- securing, ***providing*** and/or managing finance for the project;
- ***preparing concept design, feasibility and staging plans;***
- ***engaging and/or coordinating the consultant team, including*** architects, engineers and other professionals;
- ***procuring contract documentation;***
- obtaining development approval;
- ***tendering and contracting for construction;***
- ***project*** managing construction of the project, ***including superintendent services and contract administration;***
- ***acting as the builder***, including ***engaging and*** coordinating the work of contractors and subcontractors;
- marketing, ***procuring sales contracts*** and selling the property or properties within a development;
- ***establishing strata or community title management structures;***
- ***retaining assets for investment – e.g. rental stock; and/or***
- ***ongoing asset management and maintenance.***

Property developers sit at the top of a pyramid of building professionals and at the end of the day they pay for the work completed. More importantly perhaps, they are the entity that contracts for the sale of a dwelling. Outside of that, developer responsibilities will vary greatly.

Other considerations

However, creating an adequate definition is not simply being able to reflect every possible kind of activity that a developer is likely to undertake. A suitable definition may also give heed to the type of entity and particular project value thresholds such as aggregate or individual project values, or number of properties on foot.

As it stands currently, the definition provided in the Discussion Paper captures so many entities as developers that the exact thresholds for regulatory intervention might be more important to businesses than the definition itself. This is also undesirable, given there is an additional administrative burden associated with monitoring activity to ensure compliance should a threshold apply.

HIA reiterates the need for these factors to be considered in a holistic manner when determining an appropriate definition. Included in this consideration should be the issues to be addressed, the cohort of



stakeholders involved, measures identified to address the issues, and the context of any changes. In any situation where it is ultimately concluded that regulation is justified, it is essential that the resulting legislation be tailored and appropriate to the specific regulatory mechanism which has been selected. Of course, this extends to crafting the definitions of critical terminology.

Caution should also be taken in an approach that attempts to cover all types of developer activity in a single definition, without questioning whether this serves the intended regulatory outcome. There are good reasons the NSW Government has not made ‘developer’ definitions consistent amongst every piece of NSW building legislation. For example, adopting the definition from the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (NSW) into the *Home Building Act 1989* (NSW) would result in the untenable situation that every entity that fits that incredibly broad descriptor of ‘developer’ would be responsible for providing statutory warranties, without discretion, and even if that entity’s involvement or facilitation of the project was indirect.

Qualifications and Recognition of Prior Learning

Question 33.

Should the Commissioner have discretion to not accept trade qualifications obtained wholly or partly through Recognition of Prior Learning? Are there other options to address this problem?

HIA is supportive in principle of entry to the industry via a range of pathways. This promotes diversity across industry and recognises different learning approaches and levels of experience. HIA is also supportive of ensuring builders and trades across industry have the necessary skills, qualifications, and experience to uphold safety, compliance, and quality standards in their area of work. To achieve this, there must be an established set of baseline requirements across the different licensing and registration pathways to ensure equivalency at entry level. Whether recognised prior learning (RPL) is counted in whole or part, for building supervisors HIA suggests equivalency is necessary to at least the Certificate IV – Building and Construction qualification.

Licensing qualifications should be as objective as possible and trade qualifications should be able to be accepted on face value. However, HIA has concerns with regard to the quality of training offered by third-party RTOs, in the following areas:

- the standard of applicants and their experience;
- the rigor and completeness of the organisation’s assessment process; and
- the occurrence of potentially fraudulent behaviour.

As an experienced industry RTO, HIA has a robust system for RPL. Over the preceding years, HIA has sent out multiple application kits for RPL, however the return rate has been low, if not non-existent in some states.

Some of the prospective applicants have chosen to formal study pathways instead of pursuing RPL. HIA understands other applicants may have chosen to apply for RPL with other training organisations where the application requirements for RPL are not as robust and in some circumstances may be insufficient.



HIA has been made aware of several instances where third party RTOs may not be providing services in a fit and proper fashion, however HIA understands these organisations are already known to various state regulators and in some instances have been subject to disciplinary action.

Initially the focus should be on improving RTO compliance. Strict controls should be in place to ensure third-party training and assessing organisations carry out their duties in the appropriate way. This is for the benefit of trainees, future practitioners and contractors, government organisations and the public. RPL assessments must also provide for industry accepted processes, clearly defined criteria, and stringent methodologies of assessment to ensure a consistent application of requirements are exercised across training organisations before granting RPL.

HIA is supportive in principle of the cancellation by Australian Skills Quality Authority (ASQA) of qualifications that have been improperly obtained. However, this has the potential to delay entry to the workforce during a time of shortage and is likely to have a personal impact for the prospective licensee.

To ensure the level of necessary skill is not undermined for the sake of workforce capacity, where a prospective licensee has not been complicit in circumventing the requirements and have been inadvertently caught up in fraudulent behaviour, they should be supported in working towards a valid qualification. A determination to this effect carries a level of complexity and requires procedural fairness, so ought to be a matter for SACAT or the court to determine. Yet given the potential cost and time implications of these processes, the costs may outweigh the benefits.

Setting PGE worker qualifications

Question 34.

Should the older qualifications for PGE contractors and workers be removed from the *Plumbers, Gas Fitters and Electricians Regulations 2010* (PGE Regulations), along with the power to prescribe qualification and experience requirements by regulation?

HIA believes the current system is adequate.

Regulations carry a level of flexibility that allows them to be updated more easily than an Act. This has been the reasoning for innumerable changes to state-based legislation in recent years, where prescription by regulation has been favoured to allow for necessary updates. However, amendment of regulations still carries a level of regulatory scrutiny which is appropriate for the matters included therein.

HIA supports the inclusion of prescribed qualifications for PGE workers in the Regulations. Given the time taken to produce and updated training courses, it is difficult to imagine a situation where a new or amended qualification would be introduced so rapidly that it would require the level of flexibility achievable solely by Commissioner approval. Similarly, it is difficult to see how minimum experience requirements would be necessary to amend quickly.

Further information should be provided as to the purpose of the Commissioner's power to approve qualifications and training and why this will be necessary to retain for future. If there is unnecessary



duplication between the Regulations and the approved list, this could be resolved by including the information by regulation only.

Reviewing the scope of electrical work

Question 35.

Should people who perform work on “off-grid” electrical installations that are not connected to a public electricity network require a licence or registration? Please provide reasons.

Yes, people who perform electrical installations, whether connected to or off-grid should be licensed.

Electrical work carries known risks to both workers and others, including consumers and the consequences of incorrect installation are catastrophic. HIA supports legislative amendments to ensure these risks can be managed with appropriate training and registration.

Question 36.

What types of “off-grid” electrical installations should require a registered or licensed electrical worker?

Any electrical work which is installed in a building and forms part of a structure should be carried out by a registered or licensed electrical worker.

Question 37.

What would be the practical benefits and costs to industry, workers and the community if new licensing requirements were introduced for “off-grid” electrical work?

Safety should be the primary concern in relation to the performance of electrical work. While there will likely be additional costs associated with the use of a licensed electrical worker for off-grid work, it is vital that these installations are carried out in a consistent and compliant manner to avoid risk to life and serious injury of workers and building users.

Question 38.

What types of work should electrical trade assistants be allowed to undertake, and why?

It may be appropriate for trade assistants to carry out certain low risk types of electrical work under direct supervision of a registered electrical worker.

A comprehensive review of specific types of electrical work, including the level of risk and potential consequences, should be undertaken to determine a detailed list of suitable activities. Consideration should also be given to the requirements in other jurisdictions.



Question 39.

What would be the practical benefits and costs to industry, workers and the community if electrical trade assistants were allowed to perform some tasks on un-energised electrical installations?

Currently industry is experiencing skills and labour shortages. The utilisation of a broader cohort of workers to carry out specific work would alleviate some of the strain across the relevant trade area.

Additional labour availability is also likely to ease pressure on building costs. While it is unlikely that pricing will decrease, there is potential for the rate of escalation to slow, resulting in a positive impact on housing affordability.

Providing additional on-the-job skilling opportunities for trade assistants also improves prospects of trade assistants moving towards registration as an electrical worker in future. While this will not be the single solution to developing and expanding the future workforce, improving visibility in career and business pathways is one of many contributing factors.

Question 40.

Are the current exemptions to electrical licensing requirements listed in the PGE Regulations appropriate?

At this time, HIA believes the current list of exemptions appears to be appropriate. However, more comprehensive feedback would be possible if further information were provided on known issues with any of the exemptions, including any data to demonstrate why they may no longer be suitable.

Installation of stormwater piping

Question 41.

Are there problems with the quality of stormwater piping work undertaken by people and businesses without a plumbing registration or contractor's licence? Please provide supporting evidence.

Despite indications in the Discussion Paper that some industry stakeholders have raised concerns about the quality of stormwater piping work conducted by people other than plumbers and reported substantial issues with non-compliant storm water installations, there are no examples or data provided on the frequency, severity or circumstances associated with these instances.

HIA has not been made aware of any significant defective building work associated with stormwater piping up to 90mm in diameter.

Question 42.

Should all stormwater work connected to public disposal systems only be undertaken by licensed plumbers? Please provide reasons.

HIA supports business licensing for builders undertaking domestic building work and occupational licensing of trade contractors who undertake high risk and specialised work.



However, stormwater connection is not a high risk activity, nor does it require specialised skills to carry out. If simple works can be done by the owner, for the owner, without risk to public or future property owners, then a licence should not be required. This approach is supported by the low incidence of defects associated with this type of work.

Question 43.

What would be the costs and benefits for consumers, plumbers and other tradespeople in the construction industry if the current exemption for stormwater piping work was removed?

Increasing the amount of work to be carried out by a registered plumbing worker on every new home and renovation involving simple stormwater works will undoubtedly have cost impacts for homeowners. This comes about not only in the increase in hours on site for registered plumbers, but also due to the current skills shortages with consequential price increases likely when demand for plumbers increases past current capacity.

By comparison, the benefits appear to be minimal. As no data has been provided on specific issues with defective work, and HIA is otherwise unaware of stormwater work by homeowners or other unlicensed parties creating significant problems, there appears to be little justification for removal of the exemption. It is HIA's position that this change would simply have a negative impact on housing affordability and place further pressure on industry's ability to deliver homes.

Access to Australian Standards

Question 44.

How can the Government ensure fair and equitable access to the Australian Standards for tradespeople working in SA?

The Discussion Paper identifies government is considering a range of options to advocate for fair and equitable access to the standards for builders and tradespeople in SA. This is a positive step and is supported by HIA. However, no further details have been provided as to which options are under consideration at present. This would be useful information on which to base more comprehensive and targeted feedback.

Review of referenced standards

The NCC calls up over 1,400 standards through primary, secondary, and tertiary references. This is in addition to any other legislative references to standards, such as the *Electricity Act 1996* (SA), as noted in the Discussion Paper. Collectively, obtaining all Australian Standards necessary for compliance creates a substantial cost ongoing to businesses and makes understanding what is required to comply exceptionally challenging.

State and local government planning and building regulations reference Australian Standards that are not called up by the NCC in an ad hoc manner. Typically, this comes about without a regulatory impact assessment in accordance with COAG principles for good regulation. While the NCC is produced at a national level with minimal state-based departures, HIA suggests a review is necessary to understand the extent of referenced standards across other state-based building legislation. Each referenced standard



should undergo a comprehensive regulatory impact assessment to prove a demonstrated need for the standard and demonstrate a net benefit.

Managing associated costs

With the creation of Standards Australia as a private company, its public good role appears to have been overshadowed by the commercial pressure to recover costs, leading to more and more standards being produced, in addition to rising costs of standards and recent changes to the pricing structure.

Australian Standards with which compliance is required by the NCC, or other legislation, should be easily accessible and available to industry at no cost, or at no more than marginal cost. In particular, standards should be readily available to the small businesses which need them. There are various ways this outcome can be achieved, including:

- Government funding for the development of any ‘public good’ standards, which would also assist in ensuring interests of all stakeholders are appropriately considered.
- Small business grants or incentives to support access to Australian Standards.
- The provision of subsidies for specific core standards through third-party providers, such as industry organisations.

The SA Government’s initiative to pause further changes under the NCC for a period of 10 years is also a very positive step and is supported by HIA and industry. By extension, this decision will have a positive impact in reducing the cost and administrative burden to businesses related to compliance with Australian Standards, as references standards will remain the same for at least 10 years, despite any updates by Standards Australia.

Understanding of acceptable standards

There has been a recent trend towards using unreferenced standards as de facto regulation. Courts and building tribunals appear to be increasingly relying on failure to comply with standards as a cause of action, despite the standard not being referenced in the NCC. Where compliance is not required by law, it would be more appropriate for an Australian Standard to be used as one of a range of factors considered in determining whether building work is defective.

The enthusiasm for reliance on ‘best practice’ standards sits uneasily with minimum effective regulation. The production of best practice standards is contrary to Standards Australia’s obligations under its Memorandum of Understanding with the Commonwealth which requires the company to develop minimum effective solutions. It conflicts with the objective of the NCC to set minimum acceptable technical requirements for ensuring the health, safety, amenity and sustainability of new buildings.

To better manage adverse outcomes in decision making, courts and tribunals must understand the unique characteristics of building-related legislation and the hierarchy of subordinate documents, including the relevance of referenced and unreferenced standards. Moves to maintain and establish building-specific streams through courts and tribunals, as broached earlier in this submission, are supported in principle by HIA and would so go some to ensuring the appropriate use of Australian Standards in decision making.



Continuous Professional Development

HIA supports continuing improvement and professional development to achieve acceptable standards of building quality delivered by a competent and skilled workforce. HIA leads, promotes, and provides professional development services and advice to the housing and construction industry and HIA strongly encourages industry participants to keep up to date with industry developments.

Question 45.

Are there areas of poor performance or non-compliance in SA that could benefit from building practitioners participating in professional development? To what extent are these problems with poor quality work due to lack of knowledge as opposed to work being done by 'rogue operators' or people without an appropriate licence? Please provide evidence.

CBS complaints data is necessary to determine whether there are specific areas of poor performance in the building industry. This should be released as a part of further, more detailed consultation, in order to obtain more targeted stakeholder feedback on appropriate measures to address any trends. At this time HIA is unable to provide insight in relation to the questions but may have further input following the release of the data.

However, as identified throughout this submission in relation to regulation of owner builders and building inspectors, HIA does not support rogue operators and unlicensed parties seeking to circumvent regulatory frameworks, to the detriment of compliant businesses, industry reputation and consumer outcomes. HIA refers to and reiterates the examples of adverse consequences provided in response to Questions 21, 22 and 24.

Question 46.

What evidence (including experience from other jurisdictions) is there that introduction of mandatory CPD will address problems with poor performance and non-compliance?

HIA supports continuous improvement that promotes quality in construction of the built form, in compliance, professionalism and customer support. However, there is no evidence that mandatory CPD raises on-site building standards or delivers a significant net public benefit with those states operating mandatory CPD schemes still encountering a similar level of building disputes and defects.

In those states where schemes operate, members remain critical of aspects of the system, such as the way points are allocated, the costs and the reporting and checking mechanisms and the apparent lack of compliance action against those not reporting or defrauding the system.

HIA again refers to the examples of poor outcomes with the work and services of owner builders and inspectors, as provided in response to Questions 21, 22 and 24. Although CPD may be beneficial for building inspectors, it would not be the panacea in relation to owner builders, rogue operators, or unlicensed individuals.



Question 47.

What other options besides mandatory CPD could be considered to address the problem?

Operating in parallel with mandatory professional development schemes, several states have industry training schemes that cover the residential building industry and require the compulsory payment of training levies, including the Construction Industry Training Fund in SA.

Question 48.

What types of professional development activity could be required?

HIA has consistently taken a position that the content and aims of CPD should be driven by the industry. CPD should address issues relevant to the builder or contractor's business. It should not be about training for training's sake.

When introduced, CPD must be available in a variety of flexible formats across a range of relevant topics. A common sense approach should be applied to avoid a highly structured and regimented learning process with rigorous assessment requirements and those which are not relevant to day-to-day building business needs. This is key to ensuring support from industry participants and ultimately for the success of the scheme. The approach should also reflect the intention of the scheme in relation to licence renewals and enforcement.

Structure and delivery methods

Points should be available for:

- Structured (accredited & assessable by RTO; non-accredited by RTO) learning (face to face or online);
- Unstructured learning including:
 - non-accredited classroom or online training provided by non-RTO;
 - trade events;
 - industry-specific conferences, forums, and workshops;
 - having an apprentice (up to a cap);
 - membership of an Association or active participation in Association Committees;
 - lecturing or tutoring in an educational setting;
 - examining or interviewing for registration purposes;
 - self-directed study;
 - formal mentoring programs;
 - other forms of CPD which can be substantiated by the submission of evidence of participation.

Subject matter

The BCR identifies a need for building practitioners to have an up to date knowledge of the NCC and recommendation 3 is for each jurisdiction to implement a CPD scheme to facilitate this. However, it is HIA's position that limiting a CPD to NCC topics overlooks a number of other topics vital to running a successful



building business and fostering positive outcomes in the building process. Some examples include safety, financial planning, contract administration and dispute avoidance.

This divergence highlights the importance of identification of objectives for the scheme that will inform the qualifying course topics. This matter is addressed further in HIA's response to Question 52.

Broad learning categories should be provided to allow flexibility and tailoring by a participant to their particular needs. Training should be linked to a number of learning categories that relate to the agreed objectives of the scheme such as:

- Technical topics (NCC, standards, safety)
- Legal topics (approvals, construction, contracts)
- Business topics (financial planning, tax, business management)
- Personal development (leadership, communication, conflict resolution).

Individuals should be permitted to select training from various learning categories with no minimum points for each category. Alternatively, there could be an approach to weight learning in each renewal period towards a key learning outcome. For example:

Renewal period	Key learning outcome
1	Business Topics
2	Technical and Legislation
3	Technical and Safety
4 and onwards	Individual choice from any category

The regulator should also have the power to mandate a specific training course for all practitioners. This must be counted as part of achieving the minimum points for a renewal period, not required as additional training. A similar approach should apply in the event the regulator has the power to direct a practitioner to carry out specific CPD as a disciplinary response. Further information on this matter is included in HIA's response to Question 63.

How much training and how frequently would it be required?

HIA supports an approach that would require 12 points per registered practitioner, per annum. Although there may be scope for some departure from a regimented calculation depending on the activity, points should typically be awarded as one point per hour of CPD undertaken. Such departures could include 1 point per annum for each person employed under a formal training arrangement such as an apprenticeship, or one point per annum for each membership with an industry association. Alternatively, activities with assessable outcomes could have a higher point value for time spent than those without, however this introduces additional complexity into the scheme.



If CPD is required to be carried out for the business, companies should be permitted to have key personnel obtain points on behalf of the business, up to a cap per person.

There is opportunity in several jurisdictions with existing CPD schemes for surplus points earned within a 12 month period to be carried over to the next period, however there are limitations on how this can be done, such a time limits and caps on surplus points. HIA supports an approach where a participant has undertaken learning in excess of their annual requirement can have excess points recognised as knowledge gained for the following year.

Question 49.

Who should deliver CPD training?

Professional development schemes should be designed and operated by industry for industry. HIA members have expressed a clear view that if CPD is to be made mandatory that industry has a seat at the table to guide the development of requirements and HIA should play an active role in the delivery of appropriate training for builders. Having recently participated in the development of the scheme in Queensland through formal government consultation arrangements, in addition to being the peak industry body and an RTO, HIA is well-placed to participate in the scheme development and delivery of CPD in SA.

Provider approval

CPD providers should include the regulator and those with a strong reputation and history of supporting industry training including RTOs and industry associations. However, Government should avoid an outcome that would see a focus placed on excessively onerous approval requirements.

There are pros and cons to placing limitations on those who can deliver CPD. There must be some checks and balances to ensure the objectives of a mandatory CPD scheme are being met, at an appropriate cost without imposing excessive administrative burden on both the regulator and the training industry. A RTO is subject to separate scrutiny by ASQA for all accredited training and no further oversight should be necessary via the CPD regime of their conduct.

Non-RTO training providers may warrant additional scrutiny by the regulator of their approach and their course offerings. A one off approval process may be of merit for those organisations not already an RTO.

Course approval

HIA supports a self-regulatory approach related to CPD courses.

There is no need for additional approvals for CPD courses, particularly if there is a requirement for those who can deliver CPD to be approved. CPD providers can assess the content to ensure compliance with the relevant learning outcomes and other criteria, and individual participants can assess whether the content is appropriate for their individual needs, as well as those of their business.

Again, there may be merit in further oversight of courses delivered by non-RTO training providers.



Question 50.

How well is the mandated CPD working in other jurisdictions and what evidence is there for this?

Any commentary on the success of CPD schemes will be merely speculative in the absence of data and robust analysis.

An assessment of the success of mandatory CPD schemes for builders and building contractors in other jurisdictions is a matter of analysis based on multi-factor data collected by state-based regulators. A range of information needs to be considered in order to form a holistic view of whether the scheme is working, including the date of introduction, complaint and dispute data, other concurrent and subsequent reforms, broader across the assessed timeframe such as economic and labour force information. Another important measure as to a scheme's success would be the rate of compliance.

As each jurisdiction has a unique CPD scheme and requirements for monitoring compliance, in addition to its own its own broader regulatory context, state-specific economic conditions and other factors such as dispute resolution and determination, the assessment will need to be carried out on a state-by-state basis. Ultimately it may not be possible to have an apples-for-apples comparison to measure the success of any CPD scheme.

In any event, this is a complex exercise and should be carried out by government as a part of a RIS associated with the introduction of any proposed system in SA.

Question 51.

Should CPD in SA be voluntary or mandatory?

In principle HIA supports a voluntary CPD scheme in favour of a mandatory CPD scheme. However, if such a proposal for mandatory CPD were to proceed HIA has a preferred approach as set out in this submission.

Who should be subjected to a CPD scheme and what form of CPD is appropriate?

The scope of individuals and businesses covered by the scheme should be informed by the scheme objectives. However, it is HIA's position that businesses contracting with a consumer and those with primary carriage of building quality outcomes would be covered.

Again, while it may be inappropriate to transplant a scheme from another state, queues can be taken from what is already in place.

While mandatory CPD in NSW was originally slated to apply to both residential builders and trade contractors and operates in a state where other builders are not required to be licensed or registered, the scheme to date has only applied to individuals licensed as a residential builder or swimming pool builder. Where the business operates as a company the CPD points must be obtained by the nominated supervisor on behalf of the company.

In recent years, the NSW Building Commission has been investigating a move towards a co-regulation model for licensing in the building and construction industry, the outcome of which may overlap with the



existing CPD framework. In its various submissions HIA raised overarching opposition to this approach, echoing its prior objections, in addition to identifying a range of complications and other impacts on CPD.

The Queensland system was proposed to apply to all licensed builders and all trade contractors. For those businesses that hold a company license, it was proposed that all individual license holders are required to comply with the CPD requirements. This would include:

- Key persons of influence;
- Nominees;
- Site supervisors;
- Project managers; and
- Occupational license holders.

In Tasmania, Building Service Providers must obtain the requisite CPD points. Given Tasmania does not have a structure that provides for company licenses, individuals with the relevant occupational license are captured.

In Victoria, the Government has indicated that both builders and trade contractors will be required to comply with CPD requirements.

With regard to the form of CPD that would be appropriate, HIA refers to its response to question 48.

Question 52.

If CPD were to be implemented, how could its success be measured? What indicators might suggest that the problems are being successfully addressed?

HIA refers to and reiterates its response to question 50.

The measure of success will be based on appropriate identification of the objectives the scheme is trying to address. For SA, these objectives are yet to be clearly identified, requiring a comprehensive stakeholder engagement process in addition to a RIS. These objectives will also inform the specific content authorised to count towards a CPD requirement.

Based on existing licensing requirements it is reasonable to accept that industry entrants commence their career with a level of technical skills but that over time technical requirements will vary; legislative controls will change, and business skills needed over the life of a business will vary. It is HIA's position that the objectives of a mandatory CPD scheme should be to :

- to support industry competence over the career duration of a practitioner;
- support public confidence in the industry and building quality; and
- promote the general acumen of those in the residential building industry.



Other jurisdictions

Consideration may also be given to schemes in other states as a starting point for further investigation as to the appropriate objectives for SA.

Queensland specified a number of key principles as a part of its pilot project from both the industry's perspective and the community, home owner and home buyer's perspective. For industry, the key principles were:

- Maintain and improve the standard of technical competency within the industry.
- Creating skilled jobs that are real careers with real career pathways.
- Helping licensed builders and sub-contractors build sustainable, successful businesses.
- Increasing skills to help industry to comply with requirements such as the *Building Industry Fairness (Security of Payment) Act 2017* (Qld).
- Reduced risk and harm to workers and the community.
- Improved quality of completed building work and reduced building defects.

For the community and home owners and buyers:

- Better customer service from the industry and greater consumer outcomes.
- A higher standard and quality of building work with reduced incidence of defects.
- Improved the quality of building products.
- Improved reputation of industry and those who work in it such as builders, trade contractors and licensed occupational trades.

According to guidelines issued by the NSW Director-General the purpose of the NSW scheme is:

“... maximising consumer protection outcomes, maintaining public confidence by ensuring that industry participants are continually up-dating their skills, raising the quality of building and construction standards, improving safety, and reducing building disputes in the NSW home building industry. In particular, the requirements aim at the long term upgrading of the professionalism and performance of builders and swimming pool builders by:

- *improving knowledge, skills and practice across industry in identified areas of marketplace concern; and*
- *maintaining or improving levels of competence, customer service and business management skills in the industry as a whole.”*

The Tasmanian approach is less formal citing the need to maintain and develop knowledge, skills, and competence to ensure a higher standard of service to consumers and assist in regulatory compliance.



Data-based assessment

As a part of establishing any CPD scheme in SA, government will need to consider the data it intends to collect in order to enable a future review against the objectives, in addition to monitoring compliance. This includes any record keeping and reporting requirements for participants and training providers. HIA would oppose the introduction of processes that place a high administrative burden on participants, providers, and the regulator, ultimately detracting from achievement of the objectives themselves.

Largely, HIA supports self-regulation within the CPD framework where possible, as this minimises red tape and administrative requirements. However, an outcome of self-regulation is an absence of data against which the success of a scheme can be tested, limiting the opportunity for review and genuine improvement. Administrative requirements must therefore be kept to a minimum. An example of this could be for participants to maintain a simple log sheet for submission with renewal applications, or the establishment of an online government portal that allows participants to record their CPD progressively.

Question 53.

How could it be ensured that CPD is appropriately targeted and addresses the problem areas in the construction industry?

HIA refers to its responses to Questions 48, 50 and 52.

Question 54.

Are there any costs or other potential impacts of a proposed CPD scheme that are not considered in this discussion paper, but which may affect the Government's decision to proceed with mandating CPD requirements?

There is support for the introduction of CPD across HIA's membership based on the reputational benefits that may flow, despite the likely costs. The industry recognises that there is a need for industry participants to continue to be informed about changes to the business environment and that it is good business practice to keep updated in relation to the technical requirements such as the NCC and relevant Australian Standards, and legislative requirements.

The challenge for HIA is to ensure that mandatory CPD, if introduced, is consistent in format and content across participating states and territories. There is no value in eight different CPD schemes in an era of growing national alignment of building industry conduct, compliance and oversight. This only creates confusion and cost across businesses operating in multiple states and reduces efficiencies with providers.

Further consultation and a RIS will be necessary in the first instance, to establish the fundamentals, such beginning with suitable objectives. Once the scheme structure has been finalised, appropriate transitional arrangements to allow to make the necessary preparations and ensure the new requirements are communicated to prospective participants. Support and education for all stakeholders to meet the new requirements. This is an undertaking HIA expects to take around 5 years.



Compliance and Enforcement

Increasing penalties

Question 55.

Are there particular penalties in the BWC and PGE Acts that should be reviewed? Please provide details.

HIA opposes increases to existing penalties under the BWC Act and PGE Act.

Use of another builder's licence in advertising

Question 56.

Would it be useful to introduce the proposed offence prohibiting unlicensed building work contractors from using another person's building work contractor's licence in advertising?

HIA would oppose the introduction of a specific offence where the opportunity already exists to prosecute a party for a breach of the laws. However, in this case the BWC Act does not extend to unlicensed parties and the introduction of a specific offence is necessary to ensure legitimate licensed and registered parties and consumers are not put at risk by those deliberately trying to circumvent the system.

While it is acknowledged that the BWC Act s.6 prohibits the carrying out of building work without the appropriate licence and provides for consequences in the event of a breach, this does not prevent the unlicensed party from falsely advertising. This may lead to a variety of outcomes including agency arrangements, subcontracting and novation, whereby the consumer ultimately ends up contracting with another party with whom they did not originally intend to engage.

For these reasons HIA would not oppose the introduction of a specific offence prohibiting unlicensed parties from using another party's licence details in advertising.

Unlicensed subcontractors

Question 57.

Would it be beneficial to introduce the proposed offence prohibiting building work contractors from engaging unlicensed subcontractors?

HIA opposes moves to introduce a new offence prohibiting building work contractors from engaging unlicensed subcontractors. The law presently has multiple layers of protection against the engagement of unlicensed parties to carry out building work under subcontract arrangements. Not least of which includes the statutory and contractual obligations upon the building work contractor engaged by the homeowner.

The responsibility borne by the building work contractor and its nominated supervisor to ensure appropriate supervision throughout the build allows for progressive assessment of quality and compliance, as well as early detection and rectification of defects. Furthermore, progressive inspections as required by the local authority allow for third-party checks at nominated points, supported by the framework of notifications and



certificates associated with the building approval. Some homeowners also choose to engage their own private building consultants to carry out progressive assessments.

Ultimately the building work contractor and their nominated supervisor carry responsibility for the quality and workmanship of the building work, and the homeowner has rights to pursue the building work contractor in various ways in response to a failure to rectify. For example, the statutory warranties under the BWC Act, s.32, provide the homeowner with a five year period in which the builder must respond to a claim or face the prospect of proceedings to address the breach.

The contractual and statutory protections are sufficient to dissuade the majority of builders from engaging unlicensed contractors. In addition, building work contractors are motivated by the prospect of reputational damage, which has become increasingly difficult to control with the surge in online review sites and social media use. As a result, most builders take care to ensure they engage not only appropriately licensed, but skilled and trusted tradespersons to carry out the work, putting in place additional protections such as a written contract to ensure they have clear rights and remedies available in the event of defective work.

The question also incorrectly implies building work contractors are largely responsible for the engagement of unlicensed subcontractors. HIA rejects this and suggests the unlicensed party plays an equal, if not greater role, in the subversion of regulatory requirements. Even so, as the Discussion Paper identifies, s.6 of the BWC Act already includes an offence for parties who carry out building work without the relevant licence, both disincentive and significantly penalising this behaviour.

Nevertheless, there is no CBS data provided in the Discussion Paper to demonstrate the frequency and circumstances surrounding the engagement of building work contractors. If this is indeed an issue justifying the introduction of a specific offence for building work contractors (as the principal in the subcontracting arrangement) the data should be provided as a part of consultation to assist stakeholders in better understanding the issues and providing more targeted feedback.

Question 58.

How can the Government hold subcontractors accountable for ensuring that they are appropriately licensed to undertake contracted work?

As independent businesses, HIA supports independent subcontractors maintaining primary responsibility for their own licensing. This statutory responsibility should not be passed to upstream contracting parties to ensure subcontractors are licensed to carry out the work they have represented they can carry out.

As identified in HIA's response to Question 57, CBS can already hold subcontractors accountable for carrying out building work that they do not hold a licence for. HIA suggests CBS review its data on historical non-compliance to determine whether a proactive project is necessary to improve education.

Building work supervision requirements

The Discussion Paper notes that CBS is aware there are varying degrees of understanding as to a building supervisor's role and scope of their required supervision tasks across industry. It is questionable whether a person should be registered as a supervisor in the first place if they do not understand their role and



responsibilities. If this is an issue, the time to address the matter is at the time the person is registered which may include required training and educative materials prior to the issue of their registration. In addition, CBS has subsequent opportunities to ensure a registered supervisor understands their obligations at the time approval is sought by a building work contractor for their appointment as a nominated supervisor.

The Discussion Paper also notes CBS is aware of instances where building work supervisors are being engaged in name only and not overseeing building work. If CBS is aware of licence lending activities, its role as the regulator is to take steps to investigate, followed by appropriate enforcement action. This is possible under the current laws and would be unchanged by any new definitions or requirements for record keeping. This type of behaviour not only has potentially catastrophic impacts for homeowners but also has negative reputational and commercial consequences for the majority of the residential building industry, who are complying with the legal requirements.

Ambiguity regarding supervision experience

Although it is not addressed in the Discussion Paper ambiguity exists in the laws regarding the ability for unlicensed but otherwise qualified and capable persons to carry out building supervision tasks under the management or direction of a licensed supervisor. This sits directly at odds with specific requirements for supervisory experience in connection with obtaining a supervisor's licence.

Further investigation is necessary in order to resolve this conflict and to provide a clear pathway to obtaining a supervisor licence.

Question 59.

Is the current guidance on “proper supervision” sufficiently clear for building work supervisors to understand their obligations?

HIA has previously provided feedback to Government, including a letter to CBS on 19 April 2022, on the Building Work Supervisors Supervision Guidance. HIA supports the continued use of this document in its current form.

For any future amendments or the production of additional materials to assist industry to comply with supervisory requirements, HIA's preference is for the use of suggestive language and avoidance of examples and language that may be misconstrued by consumers. HIA remains available for continued engagement with CBS in the preparation of these materials.

Further, HIA suggests the Building Work Supervisors Supervision Guidance is reproduced in other languages to assist those whose primary language is not English to better understand the expectations and improve compliance. This will also extend support for unlicensed and unregistered parties.



Question 60.

Should “proper supervision” requirements for building work supervisors be defined under the BWC Act?

The requirements for proper supervision of building work were clarified by the Supreme Court in 1997.¹³ HIA agrees that proper supervision remains vitally important to maintaining the integrity of the building process, however given it has been over 25 years since this decision, and it is not apparent that there is any need to codify the long-established position of the courts.

HIA would oppose the inclusion of a definition under the BWC Act for “proper supervision” on the basis it is not only unnecessary but also has the ability to materially alter the interpretation of proper supervision in the Homestead Decision. HIA remains supportive of the continued use of guidance materials in addition to further educational resources, in lieu of further regulatory prescription.

Given the existing jurisprudence, a legislative change is unlikely to drive improvement amongst those who are currently not meeting the requirements to supervise building works. This is the cohort of supervisors, potentially comprising a few ‘bad operators’, where improvement is most impactful.

A more effective approach than legislative change would be to improve education and information for supervisors both ahead of and following registration. Commendably, CBS has already taken steps in this direction with the recent release of the Building Work Supervisors Supervision Guidance. The success of this guidance could be monitored against data collected during proactive and reactive inspections, including notices and enforcement action, however this would require an approach to proactive distribution and data collection over several years, followed by a review.

By comparison, the introduction of a definition in the legislation that departs from the Homestead Decision could be incredibly disruptive to industry, adding to the administrative workload and introducing further confusion on top of any suggested existing ambiguity. Building work supervisors who are meeting the current requirements could become non-compliant simply by virtue of the change. Making previously compliant supervisors inadvertent victims of legislative tinkering does nothing to improve consumer protection.

Should this include record-keeping and reporting requirements for building work supervisors to keep track of inspections they conduct? Please provide reasons.

Firstly, the proposed introduction of a statutory requirement for a supervisor to keep records and carry out reporting is a separate issue to the initiative to introduce further codification around supervision of building work and should be treated as such.

Record-keeping

In the context of the question, it seems an unusual approach to require a supervisor to keep its own records for a specified duration as a mechanism to ensure they are properly supervising the works. The Discussion Paper provides no specific reasoning for this suggestion, however it could reasonably be assumed the

¹³ Homestead Award Winning Homes Pty Ltd v State of South Australia (1997) 72 SASR 299 (Homestead Decision).



intention is two-fold; firstly, to encourage compliance with an existing duty by introducing an arbitrary administrative step, and secondly to provide an additional layer of regulation for the purpose of improving prospects of enforcement.

In practice however, this approach simply creates additional administration and further scope for regulatory non-compliance, without facilitating genuine improvement in the supervision of work and early identification of defects. It also requires supervisors to create and retain evidence to support their own prosecution and that of the building work contractor that engaged them, which creates an array of conflicts and could drive deliberate nonconformity.

Functionally, the retention of up to 5 years' worth of rudimentary records means additional paperwork for businesses who are aware already of and meet with the supervision requirements. Despite the introduction of any record keeping requirements by regulation, arguably any building work supervisor would have their own internal record keeping policies as a part of their business (whether the business is of the contracted supervisor or as an employee within a building work contractor business), which would assist in managing risk related to statutory and other duties.

The introduction of specific requirements by regulation creates unnecessary space for breach. Further, while it is reasonable that a supervisor would retain records of the date and observations, it seems a peculiar requirement for an individual supervisor to keep a record of their own name. For these reasons, the information included in records and the duration of record keeping should be left to the person or business to manage.

It is also questionable whether there are sufficient resources for CBS to be able to monitor compliance with this additional requirement. Effectively, CBS would only become aware of a non-compliance with record keeping requirements in the process of a targeted inspection or a disciplinary enquiry. In this case, the non-compliance with record keeping requirements is likely to be secondary and additional to non-compliance with a more serious requirement, such as inadequate supervision. This simply creates a duplicate avenue for enforcement.

Reporting

The Discussion Paper provides no details of a proposed reporting structure. HIA is unable to make comments on any reporting proposal at this time and would encourage further engagement with CBS on this matter in future.

However, HIA notes the current Building Notification framework under the PDI Act may be an opportunity for simple inspection details to be reported in a manner that limits the administrative impact on industry compared to the introduction of record-keeping requirements. Notably, the PlanSA portal already allows for the inclusion of building work supervisor details.



Question 61.

Should the Government introduce an offence for building work supervisors who fail to provide adequate supervision?

The BWC Act, Part 4 currently details consequences available for both building work supervisors and building work contractors who fail to meet the requirements of the Act, including related to the inadequate supervision of building work. Available disciplinary action currently includes:

- fines up to \$20,000;
- conditions imposed on the licence or registration;
- suspension or cancellation of the license or registration; and
- limitations on directorship, employment and contracting arrangements.

The consequences of inadequate supervision are also set out on page 1 of the Building Work Supervisors Supervision Guidance.

Further, the consequences of contravention of certain SACAT orders made under s.25 are set out under s.26 and include penalties up to \$35,000 and 6 months imprisonment.

Given the laws currently provide for significant consequences amounting to meaningful deterrents and penalties, there appears to be no merit in a specific offence for failure to provide adequate supervision by building work supervisors. HIA opposes the introduction of a new offence on this basis.

Prior to introducing any new offences, a review should be carried out on the regulator's current approach to enforcement and use of its existing powers related to inadequate supervision. If this process reveals the existing powers are ineffective to appropriately deter or respond to inadequate supervision, then changes to the offences may be justifiable. Alternatively, if the current enforcement approach is not properly utilising the existing powers, the first step prior to further statutory intervention is to change the enforcement strategy.

Question 62.

What would be the costs and benefits for consumers, building work supervisors and other practitioners in the construction industry if specific requirements for building work supervision are codified?

Any increase in the current regulatory settings in SA will result in additional red tape, further cost and increased administrative burden for businesses, which will ultimately impact on housing affordability for consumers. This is at odds with HIA's understanding of the SA Government's priority to remove barriers to home ownership and respond to the critical housing shortage.

Further, HIA sees no genuine benefits to stakeholders in the codification of supervision requirements given established case law and the existing legislative provisions.

HIA repeats its call for a RIS, including a cost-benefit analysis, to properly interrogate the impacts of this proposed change.



New Commissioner powers relating to practitioner training

Question 63.

Should the Government introduce new powers enabling the Commissioner to direct a licensed or registered building practitioner to undertake further training?

There is a strong case for regulators and/or the judiciary mandating particular CPD programs for builders consistently or seriously in breach of regulations and standards. In principle HIA does not oppose the introduction of powers enabling the Commissioner to require licence and registration holders to undertake mandatory professional development. This should be utilised as an alternative to suspension or cancellation of a licence or registration as a result of disciplinary proceedings.

With reference to the response provided to Question 48 regarding appropriate CPD categories, the regulator should have the ability at any time to direct a licensee to undertake a specific category of CPD as the result of a disciplinary action. This model allows the regulator to respond directly to concerns with a licensee's conduct through the scheme.

What criteria should be satisfied before exercising this power?

The Commissioner's power to direct further training should only come about as a result of orders by SACAT under the BWC Act, s.25. This would ensure the disciplinary complaint is verified by the tribunal and the additional training required as a result of a fair and proper hearing.

If a rectification order system is introduced as contemplated in the Discussion Paper, it may also be appropriate to extend the Commissioner's power to direct specific CPD in response to the issue of a rectification order. Again, however, this must not be in addition to the practitioner's required annual points, if a CPD scheme is implemented.

Modernisation of domestic building laws

Although not specifically covered in the Discussion Paper, this process represents an opportunity to review the domestic building laws and to highlight any shortcomings in the current framework.

Limitations on margin

HIA members have identified the need to review the cap of 15% for a builder's overheads and profit under s.29(5) of the BWC Act, in light of growing inflationary pressure on operational costs to businesses.

HIA members have identified the prescribed cap on margin may impact a builder's eligibility for BII. Underwriting considerations for the purpose of BII eligibility are an appropriate gauge to assess whether the current cap is still appropriate. QBE evaluates several critical financial metrics, including the following benchmark standards:

- Gross Profit Margin (GPM): Ideally between 18-22%
- Net Profit Margin (NPM): Typically falls within the range of 5-10%



However, these benchmarks are not absolute. A high GPM may be offset by substantial operational expenses, resulting in a lower NPM. QBE employs a holistic approach, considering GPM and NPM within the context of a comprehensive underwriting model that also assesses the assets and liabilities of directors and the business, as well as working capital.

Given builders are required to obtain BII by law for domestic building work, it seems a perverse proposition to limit their ability to obtain BII by limiting their margin on domestic building work. Notably, the prescribed amount must also cover the builder's overheads, which include a range of other general business costs such as taxes, occupational licensing fees, employment costs, as well as the rising cost of compliance.

HIA does not support statutory limitations on the parties' right to reach a mutual agreement as to their preferred contract terms. Further, the statutory limitation on profit margins is an approach unique to SA and may serve as a disincentive for builders and trades to enter the SA market. Accordingly, HIA would support the removal of the prescribed limit on margin.

If Government would not consider removing the margin limit entirely, HIA would be supportive of a review and increase of the cap. A starting point for this review would be to consider the increase in the cost to build since the percentage was last amended. If this option is pursued further analysis and consultation would be encouraged.