



# **HIA Submission Review of Western Australia's home building contract laws**

**Building and Energy**

17 September 2025



## Contents page

<b>Introduction</b>	<b>2</b>
<b>Productivity and housing affordability</b>	<b>2</b>
<b>Existing provisions</b>	<b>3</b>
<b>Awareness and Understanding</b>	<b>3</b>
Awareness	3
Proactive support for consumers and businesses	4
Notice for the Home Owner	5
<b>Home building work contracts</b>	<b>5</b>
Contract values	5
Scope of “home building work”	6
Cooling off periods	7
Site access	7
<b>Deposits and progress payments</b>	<b>8</b>
Deposit limits	8
Progress payments	8
<b>Price increases</b>	<b>9</b>
Pre-commencement delay provisions	9
Cost escalation clauses	12
<b>Termination</b>	<b>13</b>
Statutory termination rights	13
<b>Complaints and disputes</b>	<b>14</b>
Contractual complaints	14
Workmanship complaints	14
Mediation and conciliation	15
Jurisdictional limits	15
Building Commissioner powers	16



## Introduction

The Housing Industry Association (HIA) takes this opportunity to provide a further response to the Review of Western Australia's home building contract laws. This submission supplements the positions put forward by HIA and its representative members at the industry consultation session on 24 July 2025.

The purpose of the review is to consider the *Home Building Contracts Act 1991* (HBC Act), except Part 3A, and the dispute resolution and complaints process in Parts 2 and 3 of the *Building Services (Complaint Resolution and Administration) Act 2011* (BSCRA Act), as outlined in the Terms of Reference.

The HBC Act was originally passed in 1991 and has seen little change since, yet the building industry and economic environment have evolved considerably over the last 30 years. In particular, the pressures of the pandemic saw the legislation stress tested and during that period various ambiguities and shortcomings in the laws were revealed. While broadly, the home building laws continue to function we are aware that there are ways in which they can be improved to operate more effectively and provide clarity for homeowners, builders and government.

To this end, HIA welcomes the review. It represents an opportunity for the laws to be modernised, to address ambiguity, reduce red tape and unnecessary roadblocks for business, while continuing to uphold consumer protection fundamentals that promote confidence in the building industry.

The Act and regulatory framework must not unreasonably hinder the delivery of homes and instead must support improved housing affordability and productivity. There are opportunities for Building and Energy to become a proactive regulator, including the provision of education and information early in the building process. This will ensure both contracting parties, as well as third parties such as inspectors and lenders, are aware of their rights and obligations under the laws, and how to properly navigate the building process to avoid prolongation of contract timeframes and prevent disputes.

HIA supports a review of the scope of the HBC Act, to respond to a rise in construction costs since the thresholds were last reviewed almost 20 years ago. In addition, the connection and alignment with other legislation, such as the *Building and Construction Industry (Security of Payment) Act 2022* (WA) (SOP Act) and the *Work Health and Safety Act 2020* (WA) (WHS Act), is required, including clauses that address owner site access.

We also support more proactive dispute resolution pathways that allow for early intervention and prevent unnecessary escalation. Complaint timeframes must be reviewed, in particular, the ability to review and dispute a price increase issued prior to commencement and the approach to responsibility for defective work. It will be important to remove ambiguities within the provisions for delays in obtaining the necessary approvals and outcomes, such as the timing, number and consequences of a price increase, as this will reduce the likelihood of a dispute arising.

## Productivity and housing affordability

The residential building industry has been through significant changes and challenges over recent years. The impacts of a continual 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 volume of change imposed on our members and the broader residential building industry.



Although HIA and industry are supportive of a review of the HBC Act and BRSCA Act for the purpose of improvement and clarification, we urge Government to ensure any changes implemented are driven by a genuine need and are designed not only to “do no harm”, but to actively support the building industry to deliver homes to homeowners, with one eye on affordability. The Productivity Commission’s [Interim report on Creating a more dynamic and resilient economy](#) backs [HIA’s calls](#) for a pivot in government’s current approach to regulation and the rate of regulatory change.

It is essential government takes into consideration the potential impact of any legislative amendments on housing affordability, weighed up against the benefit to stakeholders. One of the goals of the review should be to reduce red tape and regulatory complexity to assist industry to respond to the current critical shortfall in housing and to avoid further inflating the cost of delivering a home. Government should avoid changes that will contribute to additional taxation on housing as outlined in the March 2025 Centre for International Economics Report on [Taxation of the housing sector](#).

## Existing provisions

Broadly speaking the HBC Act and BSCRA Act are reasonably well-balanced between the interests of consumers and industry. This is positive for all stakeholders, including government.

There are protections in the legislation for both parties when things don’t go to plan. For builders, the protections offered in relation to delays that allowed for price increases assisted a number of WA builders during the pandemic. If not for these provisions, more homes would have been completed at a loss or potentially left incomplete. In this way, by comparison to builders in other states, WA builders and as a result, WA homeowners, experienced better outcomes.

Despite this, in response to the multitude of unforeseeable challenges in recent years, contracting parties have sought ways to manage rising costs and delays under fixed price building contracts by testing and interpreting the mechanisms within the HBC Act. This has revealed a number of inherent opacities in the laws and drives the need for improvement to avoid those same challenges in years ahead.

The key to successful reforms will be retaining the existing balance and limiting additional statutory intervention, while increasing clarity in certain provisions.

## Awareness and Understanding

### Awareness

#### Industry awareness

There is always opportunity for improvement in knowledge of the legislative framework in which we work.

For builders, while the statutory requirements form a part of their day-to-day work, their knowledge is typically driven by their prior experience and developed on an as-needed basis. Residential builders face a considerable amount of regulation in all aspects of their business, and as a result it becomes necessary to prioritise critical information that is relevant to a point in time, and more frequently utilised. On this basis we have found builders have a reasonable level of knowledge of the HBC Act requirements.

However, the BSCRA Act is less widely understood by industry. Knowledge of the various processes available for the resolution of disputes is typically limited to those builders who have had prior experience with the complaints process. Many builders, for example, are unaware of the contractual complaints process and their ability to apply to the Builder Commissioner to deal with these matters.



## Consumer awareness

Consumer awareness of the HBC Act and the BSCRA Act is considerably lower. Consumers are not involved in the day-to-day application of the HBC Act until they build a home. In most cases they are unlikely to become involved in the complaints process under the BSCRA Act at all.

Generally, consumers are more informed than ever before and they have information available to them on demand, however, the quality of the information varies considerably, ranging from accurate, reliable and unbiased, to misinformation or potentially disinformation. Inaccuracy causes a variety of issues for both contracting parties, as well as government, particularly where consumers rely on other consumers or third parties with questionable interests, shared via internet forums or word of mouth.

## Proactive support for consumers and businesses

The statutory complaints pathway is set up to be a simple, low-cost process for parties to navigate without legal representation.

To optimise this, proactive guidance, information and training sessions led by the regulator for both consumers and industry would support each party from the early project stages through to navigating the dispute resolution process. Early intervention and education may assist in maintaining relationships, prevent disputes from arising, and support with the disputes process itself will aid in limiting unnecessary and overly complicated complaints.

Examples may include:

- sample complaint schedules to support with reasoning and responses;
- a proforma response template to assist parties in responding to complaints;
- information and guidance materials on the complaints process;
- a web or phone-based hotline, which could advise on or confirm the requirements of the statutory framework and address misinformation;
- “Homeowners 101” information sessions; and
- a series of short videos similar to those produced for the implementation of the Security of Payment laws, or HIA’s “Contracts Explained” series for Tasmania.<sup>1</sup>

Additionally, cross promotion of existing courses and materials prepared by peak bodies would also be useful. For example, HIA runs an [Understanding Contracts Course](#) for the WA HBCA Lump Sum Building Contract which provides guidance on the statutory framework in WA and a plain language explanation of the contract terms and conditions. This course could be adapted to provide education to both builders and consumers with government playing a role in promotion and subsidisation of this training.

However, the level of support provided by government must be carefully managed given the Building Commissioner’s independent role in dispute resolution and regulation of industry. The role of a proactive regulator should not extend to specific advice or support for either party in the lodgement of a complaint, or other services that risks creating an actual or perceived conflict of interest or bias. Ultimately, parties must be responsible for making their own complaints, in their own words, or seek their own independent advice.

To be effective appropriate funding and resourcing will be required, both for government departments and peak bodies.

---

<sup>1</sup> See e.g. [Building Contract Variations Explained](#) and [Building Defects](#).



## Notice for the Home Owner

The Notice for the Home Owner serves an important purpose, providing practical information in plain language to assist home owners in understanding their rights and obligations under the contract. It is required to be provided prior to contract signing, and for convenience is typically issued with the bundle of contract documents.

Builders' compliance with the requirement to issue the Notice is high, however the challenge arises in the consumer's appetite to read the Notice. It is understandable that the volume of documentation associated with the building contract may seem daunting, however the consumer's lack of motivation to read the Notice is neither a fundamental problem with the Notice itself, the method of delivery, or a failing on the part of the builder.

This reinforces the need for additional consumer education and information from a trusted source, such as Building and Energy. If a consumer is informed ahead of embarking on their building journey, they will not only understand the importance of reading the contract and associated documents before signing but also could be armed with a basic understanding of the contract terms. In this case the Notice would simply serve as reinforcement and a future reference point for their prior learning.

## Home building work contracts

### Contract values

Construction costs have increased by 45% in the last three years alone, yet the lower and upper thresholds for the value of a home building contract (Section 3 and Regulation 2A) were last amended in 2007. HIA supports a review of both value thresholds to better respond to current values of equivalent building work.

#### Lower limit

The lower value threshold allows lower-value, low risk work to be undertaken without the need for detailed contract terms. Further assessment and consultation are required on whether an increase to the lower limit is necessary and if so, to determine the appropriate amount. This process should include the preparation of a cost/benefit analysis in relation to the various options.

Options may include retaining the existing value, aligning the value with the "builder work" threshold of \$20,000, or another value to reflect increases in the cost of home building work since the prior amendment.

#### Upper limit

HIA supports an increase in the upper value threshold for home building work contracts.

The primary impact of an increase in the upper limit will be availability of consumer protection measures for a greater number of building contracts, including potentially contracts for some two-storey homes. Despite this, HIA members considered the potential outcome in increased consumer confidence to be a positive outcome for industry.

Consideration should also be given to the reduced availability of the mechanisms under the *Building and Construction Industry (Security of Payment) Act 2022* (WA) (SOP Act) to assist with the determination of payment disputes. One option to address this change would be to decouple the definitions that influence coverage under the SOP Act from those in the HBC Act. HIA would support coverage of all residential building contracts under the SOP Act, regardless of their value.



As with the lower limit, assessment and consultation will be required to determine the appropriate amount of the increase to the upper limit, including a cost/benefit analysis. Options could include:

- a nominal amount of \$750,000;
- at or 20% above the median house price to allow for future increases; or
- assessment based on the increase in building costs since the last amendment.

### **Review and adjustment**

It is important there is an indexation mechanism for review and amendment of the home building work contract values built into the legislation. However, review intervals should not be so frequent that confusion arises around when a contract must comply with the HBC Act. We suggest a triennial or five-yearly review period may be suitable. For the same reason, limits should be set as round figures.

If a legislated review mechanism is introduced, it will need to specify how the amended thresholds will apply. For example, a new threshold may be applicable on and from the date set by Regulation, capturing all contracts signed on and from that date. Similarly, the right to make a contractual complaint under the BSCRA Act should be linked to whether the contract was considered a home building work contract at the time of contract signing, not the adjusted threshold on the date the complaint is made or when the cause of action arises.

### **Scope of “home building work”**

HIA sees no justification for any expansion in coverage in the definition of “home building work” under the HBC Act.

Particularly concerning is the suggestion that preliminary services such as the preparation of plans or other work typically carried out under a preliminary agreement should be captured. Without considerably broader legislative amendments than are presently contemplated under the Terms of Reference, that is, changes to Part 3A, this change would unnecessarily trigger a requirement for home indemnity insurance for preliminary services and create a raft of challenges.

Firstly, this change is likely to inadvertently capture non-builders, such as architects, designers, engineers and surveyors, who are presently unable to obtain home indemnity insurance. Either design-only or consultancy work will no longer be possible, or significant changes to the existing home indemnity insurance scheme will be necessary to allow an initial certificate to be issued related to this work. A second, separate certificate of insurance would be necessary from the builder if engaged under a construct-only contract.

Secondly, the expanded definition will have flow-on effects for builders, such as higher initial upfront costs and administration for design and construct work, as well as earlier and more prolonged drawdown on annual or job-based indemnity insurance caps. If the insurance policy will respond to a claim for losses associated with preliminary services, which at this stage is unknown, the increased risk profile to the insurer due to the expanded coverage will undoubtedly be reflected in increased insurance premiums.

Combined, the result is higher costs for homeowners at the beginning of the project, which are unlikely to be offset by the potential reduction of risk due to the typically conservative pricing charged by builders under preliminary agreements, or under early-stage consultancy agreements. More broadly, the change would unnecessarily inflate the price of a home and contribute to further erosion of housing affordability.



HIA supports the ongoing exclusion of preliminary agreements under the HBC Act. Additionally, for the avoidance of doubt, agreements that are solely for services and not for physical building work, should be expressly excluded in the legislation. This approach is currently proposed under the *Domestic Building Contracts Amendments Bill 2025* (Vic) (DBCA Bill).

## Cooling off periods

HIA opposes the introduction of a cooling off period for home building work contracts.

There is typically several months of work carried out by the builder in preparing the design under a preliminary agreement, ahead of signing the home building contract. This provides both parties with the opportunity to consider the prospect of progressing with the building work and determine whether they wish to proceed, prior to signing. Arguably, the preliminary services period represents a greater opportunity to reconsider than any cooling off period, which would ordinarily be a matter of days.

Despite our objection to the introduction of cooling off periods, if they were to be introduced, both parties should have the ability to utilise them to ensure the process is fair. Additionally, the provisions must take into account the practical application of the required process for notifying a cancellation, with consideration of the typically timeframes associated with the service of documents, as well as modern service methods.<sup>2</sup>

## Site access

Builders acknowledge that inspection of the work by homeowners and their representatives throughout the course of a build is an important part of the building journey. It instils trust and faith in the process and the skills of the builder and their trades, it allows the owner to raise concerns progressively, and it fuels a sense of anticipation in the lead up to handover. Inspections are also necessary for assessment and approval of progress claims, which is important for the builder's cash flow.

Currently the HBC Act, s.26, requires builders to provide unhindered site access to the homeowner and their representatives for the purpose of inspection, limited only by the builder's normal working hours and the likelihood the visit will impede the progress of the work. The broad drafting of s.26 gives the impression that homeowners and their representatives are not required to provide the builder with prior written notice, are not subject to the builder's site safety requirements and can attend site as and when they wish, regardless of whether the site has been secured.

Section 26 is misaligned with the premise that the builder should have sole control over the building site for the duration of the work, which is necessary to allow the builder to properly manage the risks associated with building work. In particular, unrestricted site access compromises the builder's ability to fulfil the primary duty of care under the WHS Act, and the site security requirements under the *Work Health and Safety (General) Regulations 2022* (WA), s.298. HIA has received multiple reports from members describing circumstances where owners have broken into the site or the home, climbed on scaffolding and incomplete building structures and exposed themselves to safety hazards that would otherwise have been secured, claiming they have the right to do so under s.26.

Further, limiting the builder's ability to control site access has the potential to undermine the builder's insurance coverage, creates opportunities for theft or vandalism by third parties, can delay and interfere with the performance of work, and leads to additional administration and cost. For example, a supervisor may be required to make additional visits to site to reinstate security controls, replace broken locks, rectify damage or address unsafe conditions created by the owner or others.

---

<sup>2</sup> See, e.g., DBC Act, s.34, which prescribes a 5-day cooling off period, but does not account for typical service timeframes of up to 5 days by post.



There is also an expectation by some homeowners, that a builder will make themselves available to attend the site for inspections as and when demanded by the homeowner. For example, one HIA member reported a request from a homeowner to provide site access for four whole consecutive business days so they could inspect the works. Under the circumstances, for a build worth less than \$500,000, this was entirely unreasonable.

Members have also been threatened with the withholding of payments and complaints for requesting notice ahead of an owner's site attendance, or suggesting the owners' representatives, such as building inspectors, should provide insurance details or hold white cards.

Additional clarity is required in the HBC Act regarding the intersection and hierarchy of the laws related to site access. To assist builders in managing access to the building site effectively, without compromising an owner's ability to carry out inspections, s.26(2) could be amended to require:

- reasonable written notice by the homeowner or their representative (including inspectors and banks) ahead of the intended site visit, not less than 48 hours before the visit or as otherwise agreed by the parties;
- the duration and frequency of visits must be reasonable taking into account the stage, scale and complexity of the build;
- visitors must comply with the builder's WHS requirements, such as evidence of white cards (where applicable) and site-specific induction training, as well as any other reasonable on-site instructions; and
- owner representatives shall furnish the builder with proof of currency for public liability insurance and workers compensation insurance on request and prior to attending the site.

HIA suggests further consultation is required on this matter to ensure the parameters for site attendance are suitable to protect the interests of both parties.

## Deposits and progress payments

### Deposit limits

We support the retention of the deposit limit of 6.5 percent of the value of a home building work contract under s.10(1)(a)(i), as well as the prescribed amount of 20 percent for the contract value for off-site manufacture of cabinetry under r.3A.

### Progress payments

For a building business, cashflow is critical, yet it is often constrained by the ability to claim progress payments, whether under the contract, within the statutory framework, or by the financier.

In WA, the HBC Act currently permits progress payment claims under s.10(1)(b) for work already performed or materials or services already supplied. This is an appropriate approach and is sufficiently prescriptive to allow the parties to agree to payment schedules to suit their requirements, without exposing the homeowner to the risk of overpayment. In a practical sense, the frequency of progress claims is managed by the associated administrative burden – that is, builders are dissuaded from claiming too frequently given the time and cost involved in the process.



Additionally, subsection (2) provides a framework for progress payments for modular and prefabricated homes that allows payment to be claimed progressively in a similar way to that of an in situ build. With the current focus on “modern methods of construction”, such as prefabricated, modular and transportable homes across various jurisdictions, this provision represents a sensible approach to the protection of interests for both parties.

At present, HIA sees no need to depart from the current progress payment settings under the HBC Act. The challenge for builders in maintaining cashflow and getting paid on time sits within established financing practices. HIA often receives calls from WA builders who have been requested by lenders or brokers to reduce the number of progress claims, amend percentages or align with interstate practices, such as those prescribed under the *Domestic Building Contracts Act 1995* (Vic) (DBC Act). Aside from these laws not being applicable in WA, the Victorian progress claim stages are set against different building methods to those predominantly used in WA, meaning they don't necessary align with the building stages and proportion of costs incurred by the builder.

Further support from government is needed to ensure the finance industry is educated regarding the WA requirements and builders are supported to set their claim stages and frequency in alignment with the project requirements.

## Price increases

### Pre-commencement delay provisions

HIA carried out detailed consultation and review with members regarding the HBC Act, section 9 and Schedule 1. Industry is predominantly supportive of these provisions as a mechanism to ensure the interests of both parties are upheld in the event of unforeseeable delays.

However, there are benefits in additional clarification within these provisions to assist consumers and industry in anticipating price increases, navigating the process, and potentially avoiding them altogether. Further detail is also likely to improve dispute resolution outcomes, including the time and cost to resolve matters, and by reducing the requirement for interpretation by the State Administrative Tribunal (SAT), which would increase certainty for stakeholders.

### Timeframe to receive necessary approvals

HIA members considered whether the 45 working day timeframe, under s.9(1) remains a reasonable timeframe in which to receive the necessary approvals in today's home building environment. This was predominantly supported given the option for the parties to enter into a preliminary agreement to carry out services ahead of entering into the home building work contract.

However, should data be made available that demonstrates otherwise, HIA may consider an alternative approach to be appropriate.

### Delay events and circumstances

It would be beneficial for s.9(3) to be clarified as being one of various approaches to meeting the requirements of s.9(1). For example, a builder may lodge a certified building permit application within 35 working days of contract signing, and the 10 working day statutory timeframe for permit approval will apply. In this case, where the builder is further delayed in obtaining the necessary approvals for reasons beyond their sole control, they are entitled to a price increase as set out in Schedule 1.



The certified application pathway could also be expressly included in s.9(3), as “deemed to comply”.

It may not be necessary to set out all circumstances that give rise to a price increase in the legislation. Additional clarity could be achieved with supplementary guidance material that provides contract users with a range of examples as to when a delay prior to commencement may lead to the right to increase the contract price. For example, if a homeowner instructs the builder to delay an application for a building permit due to last minute design changes by the homeowner that may impact the approval, the builder may be entitled to a price increase.

### **Timing of price increases**

Schedule 1 should also be amended to expressly state when a price increase can or cannot be issued. While there is now precedent for the interpretation of Schedule 1, clause 4, in several SAT decisions<sup>3</sup> additional clarity could mitigate the escalation of disputes.

HIA supports an end to the builder’s right to a price increase as a result of a pre-commencement delay upon the date the works are commenced on site.

### **Number of price increases**

Schedule 1, clause 4 should be amended to clarify that multiple price increases can be applied, where multiple delay events occur prior to commencement of the works.

This provision would be somewhat self-limiting and is likely to be applicable in exceptional circumstances only. Typically, builders would avoid having to leverage even one delay-related price increase against a homeowner following the original agreement to the contract price, aside from own-requests. Inevitably price increases lead to additional pressure on the relationship between the parties, financial strain for the owner, and in some cases the inability for the owner to continue with the job.

By extension, it is difficult to imagine circumstances where a builder would put the relationship and the job at further risk by leveraging additional price increases unless genuinely necessary to ensure ongoing viability.

To ensure the homeowner remains protected, there should be clarification in the HBA Act that where multiple price increases are given for delays prior to commencement, that they are taken in aggregate for the purpose of termination rights under Schedule 1, clause 4(b).

### **Evidence of additional costs**

HIA supports changes to Schedule 1, clause 5(2), to provide additional clarity in the acceptable types of evidence to justify a price increase. Again, it is anticipated that further clarity will assist both parties with reasonable expectations related to price increases and help to avoid prolonged disputes.

Proof of a price increase is not always easy to demonstrate. Jobs are typically not fully quoted prior to contract signing and are largely based on known rates at the time. Builders are motivated to ensure prices are competitive with a reasonable amount included for their overheads and profit. This is a delicate balance.

---

<sup>3</sup> See e.g. [Chellem and Kulowall Construction Pty Ltd \[2022\] WASAT95](#); [Vadakkumkaraputhaveedu and Kulowall Construction Pty Ltd \[2023\] WASAT29](#); [Chetty and Kulowall Construction Pty Ltd \[2023\] WASAT 98](#).



Builders also face unique trading conditions under which they are required to hold a fixed price for the work years in advance of incurring the costs, and regardless of the impact on their margin. There is no other industry in the world that operates in this way and with this level of pricing risk. As the industry is built on independent contracting and supply arrangements, builders are beholden to the supply and contracting chains as to the actual costs they will incur and consequently, their business growth and ability to generate a return.

If the timeframe for commencement is extended beyond the builder's control, and trade or material rates increase beyond those they could reasonably anticipate, they should have the ability to increase the contract price. Unfortunately, the duration of the build will not typically allow them to ascertain or even prove the additional costs they will incur until such time as they have been fully quoted or incurred. As a result, demonstrating actual increases in costs becomes difficult, even though it is known prices will rise.

To address this issue, Schedule 1, clause 5(2) should be amended from "actual increases in costs" to "reasonable anticipated increases in costs" or "market prices prevailing".

Additionally, a "deemed to comply" pathway may offer a conservative approach to proving a price increase that ensures it is not excessive but has a lower administrative demand (and therefore cost) in providing proof. There are a number of measures that could be used as a basis; however, the data must be current and closely related to the building industry. The Australian Bureau of Statistics Producer Price Index may be one avenue, although does not take into account the separation between WA building trends and those in the Eastern States.

Further, the availability of a deemed to comply option should not limit the builder's ability to demonstrate increased costs in another way.

### **Timing for payment**

The timing for the builder to claim payment of additional amounts associated with a price increase is presently unclear under Schedule 1, clause 4. Under s.10(1), prior to commencement of the works the builder is limited to claiming 6.5 percent of the contract price as its deposit and is therefore restricted in claiming additional costs in accordance with s.10(1), aside from the deposit.

Clarity is necessary as to whether the builder can indeed claim and be paid the additional amounts within 10 working days of issuing the price increase, or whether they must be claimed following the completion of the work or services, or supply of the materials that are subject to the additional costs.

### **Termination**

HIA members considered whether Schedule 1, clause 4 should be amended to permit either party to terminate the contract, however, did not reach a consensus. There must be a reasonable balance between allowing both parties an avenue out of an untenable contract, prior to any work commencing, and preventing disingenuous use.

HIA supports further investigation into mutual termination rights following a price increase in excess of 5 percent.

### **Complaints**

Reviews and complaints regarding price increases must be addressed quickly to ensure the parties can continue with the project with certainty and minimal further delays. Currently the disputes process does not facilitate expeditious resolution of price increase complaints and should be reviewed.



To facilitate this, the complaints timeframe of 3 years under the BSRCA Act, s.6(3)(b) must be shortened as it relates to a price increase. An approach similar to that in s.6(3)(a) would be suitable, that allows an alternative timeframe to be listed in the HBC Act. HIA suggests a timeframe of 10 working days in which a complaint regarding a price increase under Schedule 1 must be made, from the date of the written notice.

Additionally, there should be the option for the parties to mutually agree to a price increase properly given in accordance with the HBA Act. Where mutual agreement is reached between the parties, the owner's right to make a complaint regarding the price increase should be extinguished.

HIA also supports a new dispute resolution pathway for price increase disputes, including the option for mediation or conciliation. This process should be carried out within a designated period of time, for example, within 10 working days of a complaint to avoid further prolongation of the dispute.

### **Cost escalation clauses**

Cost escalation clauses, or “rise-and-fall” clauses, are presently prohibited in home building work contracts, under the HBC Act, s.13.

HIA contracts do not include standardised rise and fall clauses, even in jurisdictions and for contract types where these clauses are permitted. There are various reasons for this, including the complexity in administering the clauses, the additional ambiguity and risk for both parties, and limitations on financing. In some circumstances they are used where the project is funded predominantly or entirely by the owner, however these contracts are also more likely to be for high value works.

There is also a range of other options available to deal with pricing risk that are not presently prohibited, and which are historically preferred to cost escalation clauses. These include provisional sums and prime cost items, force majeure clauses which may permit the recovery of some additional costs, as well as cost plus contracts.

### **Approval by government**

The survey questions include the prospect of a mechanism for government to approve the use of a cost escalation clause in WA.

A similar arrangement has been in place in Victoria for many years. Cost escalation clauses are currently prohibited under the DBC Act, s.15, unless the contract price is more than \$500,000 and the clause is approved by the Director of Consumer Affairs Victoria. Historically there have been no approvals given.

This approach will be amended under the DBCA Bill which will allow rise and fall clauses to be used for contracts valued over \$1 million. In effect, this amendment would provide a similar outcome in Victoria to that which is currently in place in WA, which uses the upper contract value limit under the HBC Act as the upper limit of the prohibition.

HIA sees no need to deviate from the existing arrangements, with the exception of a review of the contract value thresholds for home building work contracts as detailed in this submission. The option for government to approve a rise and fall clause for use in a home building contract may also create additional strain on government resources that could be better utilised elsewhere, such as the provision of proactive support and education.



## Termination

### Statutory termination rights

The existing provisions under the HBC Act that allow for termination by both the owner and the builder are adequate and appropriate.

#### **‘Sunset clauses’**

HIA opposes the introduction of a maximum timeframe for the completion of a project and consequential termination rights in the form of a ‘sunset clause’.

Assessment of time under a building contract can be a complex matter and delays to progress or completion may arise for various reasons. They may be caused by the owner, the builder, or a third party, or alternatively there may be a number of contributors. Delays also may arise as a result of a mutual agreement between the parties. Throughout the project timeline there can be concurrent and overlapping delays, or a series of related or unrelated incidents leading to a prolonged period of delay.

As there is no single set of circumstances, causes or an appropriate timeframe over which a building project may be delayed, it would be inappropriate to prescribe a statutory timeframe for delay in completion that would trigger a right to cancel the contract.

The parties already have the right to terminate the contract due to a substantial breach, which may include the failure of either party to meet their obligations with respect to time. This provides suitable flexibility given the multitude of factors that must be considered in relation to delays and contract performance.

However, if sunset clauses were to be introduced, the right to terminate should be available to both parties, subject to the cause of the delay. For the avoidance of doubt, the party in breach of the contract should not have the right to terminate as a result of that breach. Acknowledging this, however, introduces complexity into the framework.

#### **Mutual termination**

We do not support the introduction of a statutory right to mutually terminate a home building contract.

Firstly, the common law right to mutually terminate a contract already exists and can be exercised using a deed of mutual termination, irrespective of the introduction of a statutory right.

Additionally, a statutory right to terminate the building contract may inadvertently restrict the party’s ability to terminate mutually, as well as their rights and obligations relating to the contract or termination.

We would support additional educational resources from Building and Energy to assist industry and consumers to understand termination rights, including the appropriate approach to mutual termination. HIA has similar resources on both topics available to its members, however given the serious nature of termination, members are encouraged to seek independent legal advice if considering whether to proceed with any type of termination.



Should government be minded to introduce a statutory right to mutual termination, it should not be unnecessarily restrictive on the parties' ability to terminate and should seek to minimise additional cost to the parties, including any administrative burden associated with the process. Despite this, it should not undermine the serious nature of such an agreement, which would include provisions that address outstanding payments, defective works, future dispute resolution, and address any other ongoing or ending rights and obligations in relation to the contract.

## Complaints and disputes

### Contractual complaints

The period of 3 years from the cause of action for making a home building contract complaint remains appropriate, subject to necessary amendments for a complaint related to a price increase given under Schedule 1.

### Workmanship complaints

#### Timing

Currently building service providers are responsible for defective workmanship for a period of 6 years from lodgement of the BA7, which is required within seven days of practical completion, or from when the subject work was completed.<sup>4</sup> This means builders' liability for the work they carry out is not limited to 6 years from completion of the contract. Where they rectify defective work builders are liable for a further 6 years from the date they complete the rectification work.

In some instances, for example, with structural defects this may be reasonable. However, in other circumstances builders could be held responsible for minor or superficial defects of a non-structural nature for the life of the home and be liable to subsequent owners. Management of these types of matters, such as deteriorating paint or coatings, or hairline cracking, as well as issues arising as a result of inadequate cleaning or compliance with the manufacturer's instructions for upkeep, is effectively owner maintenance work and shouldn't be the ongoing responsibility of the builder.

There are several options to address this issue, including:

- the 6 year period should be taken from completion of the contracted work and not recommenced upon the rectification of the work;
- there may be merit in considering different periods for major and other (non-major) defects;<sup>5</sup> and
- enhanced standing should be given to the Guide to Standards and Tolerances in determining defective workmanship or maintenance issues.<sup>6</sup>

Further consultation on this matter is required.

### Complainants

Under r.5 of the BRSCA Regulations, only a person whose interests are being, or have been, adversely affected by the carrying out of the regulated building service can make a complaint.

---

<sup>4</sup> BSCRA Act, s.6(1)(b) and (2).

<sup>5</sup> See, e.g., *Home Building Act 1989* (NSW), s.18E(1)(b) and (4).

<sup>6</sup> See e.g., 14.03 Shower recess and components, "Silicone sealants may require replacement after five years. This is regarded as normal house maintenance which is the owner's responsibility."



While it seems counterintuitive that a builder would make a complaint about their own workmanship, HIA has heard of instances where builders and homeowners can reach an impasse. For example, a homeowner may insist the builder rectify work on the basis of an incorrect assumption or advice from a third party, such as a private building inspector's report. In this case it is incumbent upon the homeowner to make a complaint, and this is not always their preferred avenue to motivate the builder to address the issue.

Notwithstanding the option to request an inspection under s.65, an amendment of r.5 to allow the building service provider to apply to make a complaint may assist them with moving forward with the job promptly. It would then be up to the building service provider whether or not they choose to utilise this option.

## **Mediation and conciliation**

As identified in relation to price increases, we are supportive of broadened powers for the Building Commissioner to provide parties the opportunity to participate in conciliation or mediation in relation to contractual and workmanship disputes and there may be several approaches to this change.

Firstly, amendments may include the ability for either party to apply to the Building Commissioner for mediation or conciliation prior to commencement of the formal complaints process, subject to mutual agreement, to assist in addressing matters prior to escalation. This could function similarly to the general inspection process under the BRSCA Act, s.65.

An example of this process is in South Australia, where consumers have the ability to apply to Consumer and Business Services (CBS) for conciliation of a building dispute. The shortcoming of the South Australian system is that it is only available on application by the consumer. HIA has made submissions calling for the process to be available upon application from builders also.

Secondly, HIA supports broader availability of mediation and conciliation as a part of the complaints process. This may include the option to adjourn and carry out an inspection, or to conduct the process on the site, including attendance by an inspector and targeted questioning from the dispute resolution practitioner.

## **Costs**

The parties should be responsible for shared costs of mediation or conciliation, and there are ways in which the associated costs can be minimised, including careful preparation and managing expectations.

In line with the current process, both parties should be required to set out any matters complained of, and provide responses to those matters identified by the other party prior to commencement of the session. This may be as simple as the parties agreeing to a single matter in dispute, or may require the use of a complaint schedule, depending on the complexity of the matters in dispute and how far the matter has progressed.

Supporting information and guidance should also be made available to help the parties understand the purpose and process of facilitative alternative dispute resolution methods, including proper preparation of documentation ahead of time to ensure the issues to be addressed are clear and concise.

## **Jurisdictional limits**

HIA supports a review of the jurisdictional limits of both the Building Commissioner and SAT. A starting point for determining amended limits may be increases in building costs since the current limits were established, however a Regulatory Impact Statement will be necessary to test and demonstrate the effectiveness of the various options.



## **Building Commissioner powers**

### **Binding decisions**

The cost of an appeal for a building remedy through SAT, at face value, is relatively low. Particularly, the application fees are not sufficient to deter an aggrieved party from making an application to SAT for matters that may have little merit or are of a low value. However, we understand the costs to taxpayers of conducting a SAT proceeding are considerably higher, in addition to the cost and time associated with preparation and attendance of meetings and hearings by the parties, as well as the potential for legal fees.

To address the incidence of these types of appeals, the rights of the parties to seek a review on SAT of a building remedy order made by the Building Commissioner should be curtailed in circumstances where the value of the work or order is below a certain threshold.

To ensure procedural fairness and natural justice is upheld, the threshold for a binding decision by the Building Commissioner should be restricted to circumstances where the costs to the parties of the SAT proceeding outweigh the value of the decision. Further data is needed to determine an appropriate value for this threshold, including consideration of the above-listed costs.

### **Fees**

Alternatively, it may be appropriate to review the fees or contributions payable to SAT. While it is not our intention to make matters more costly, the fees should be sufficient to demonstrate the serious nature of the process and prevent vexatious applications.

### **Costs and expenses**

Both the BSCRA Act, in s.49, and the *State Administrative Tribunal Act 2004 (WA)*, under Part 4, Division 5, provide powers for the award of costs and expenses in connection with a complaint or proceeding. In determining the award of costs, the Building Commissioner and SAT may take into account the conduct of the parties, including the rejection of any reasonable offers of settlement.

Regardless of any steps taken to prevent low-value claims on SAT, further information should be provided to the parties to ensure they clearly understand the potential consequences of frivolous and vexatious applications, prior to applying to SAT. The existing powers must also be utilised by the Building Commissioner and SAT to help stamp out frivolous and vexatious claims.

### **Dismissed complaints**

A decision to dismiss a complaint by the Building Commissioner should be reviewable by the SAT in certain circumstances. For example, and however unlikely, if the Building Commissioner were to make an error in its decision to dismiss a complaint, and the complaint was of a considerable estimated value or otherwise may have significant consequences for one of the parties, that decision should be reviewable by SAT.

To prevent a change of this nature prompting frivolous and vexatious applications to SAT for review, it may be appropriate to consider specific circumstances under which an application can or cannot be made. For example, a similar estimated value threshold to that for binding decisions may be appropriate.

### **Public warnings and other action**

The survey questions contemplated an expansion of Building Commissioner powers allowing for the issue of public warnings or the ability to take other action in response to a large number of complaints about the same issue, organisation or person. We oppose the introduction of such new or amended powers in the absence of data to support a specific change to the current settings.



There is already a range of options available to government, or proposed for future implementation, to address identified issues of non-compliance, including:

- Building and Energy may issue a Building Industry Bulletin in response to identified issues requiring clarification, such as technical requirements or issues with defective work;
- education and information can be produced and circulated by Building and Energy to licensees to support awareness and compliance; and
- in June this year, the State Government [announced](#) enhanced regulator powers to investigate and take action in relation to prospective builder insolvencies.

To support community awareness regarding serial issues and offenders, media statements on prosecutions are circulated via mailing lists and published on the website.

The information included on the public building services provider registers was just recently expanded under the *Building Services (Registration) Amendment Regulations 2023* to provide consumers with better insight into the builder's capability to carry out the work in accordance with the relevant legislation. It now includes fines imposed by SAT; orders, cautions, reprimands and undertakings issued by the Building Services Board; and offences under the *Building Services Registration Act 2011* (BSR Act), BSCRA Act and HBC Act.

Although we object to the need for any further powers at this stage, if government intends to proceed with these changes, it must consult upon and give consideration to the following:

- The level and type of information must be relevant to improvements in industry knowledge or compliance, or the consumers' ability to make an informed decision. To include more information than is necessary could unduly influence a consumer and could unfairly impact upon the registered party's ability to carry on their business.
- The severity of the issue should be taken into account, for example, a builder should not be identified as problematic for a range of minor administrative issues. Where as it may be more appropriate for the purpose of consumer protection to publicly identify an unregistered party that has deliberately circumvented the licensing scheme.
- The duration and longevity of any listing or published information should be considered, as well as the ability to correct any errors. A mistake or review of a published a notice regarding a building services provider may not be easily corrected and could have lasting impacts on the commercial viability of their business.

### **Unregistered parties**

While the BSR Act is outside the scope for the current review, activity by unregistered parties is a shared concern for registered parties, consumers and the regulator. HIA is conditionally supportive of further measures to address unlicensed building activity, including listing details of unregistered parties prosecuted for unregistered activity in a location accessible to the public.