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21 August 2014

The Research Director
Transport, Housing and Local Government Committee
Parliament House
George Street
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Dear Research Director

Queensland Building and Construction Commission and Other Legislation Amendment Bill 2014

Housing Industry Association (HIA) appreciates the opportunity to make a submission to the Transport, Housing and Local Government Committee on the *Queensland Building and Construction Commission and Other Legislation Amendment Bill 2014* ('the Bill').

Attached are HIA's detailed submissions.

We acknowledge that the Commission has been in recent dialogue with HIA as to our concerns regarding the content of the Bill, however we also look forward to the Committees consideration of our submissions.

Yours sincerely
HOUSING INDUSTRY ASSOCIATION LIMITED

Warwick Temby
Executive Director

SUBMISSION BY THE

Housing Industry Association

to the

Transport, Housing, and Local Government Committee

on the

Queensland Building and Construction Commission and Other Legislation Amendment Bill 2014

21 August 2014

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HIA is the leading industry association in the Australian residential building sector, supporting the businesses and interests of over 43,000 builders, contractors, manufacturers, suppliers, building professionals and business partners.

HIA members include businesses of all sizes, ranging from individuals working as independent contractors and home based small businesses, to large publicly listed companies. 85% of all new home building work in Australia is performed by HIA members.

1 Background

1.1 Housing Industry Association (HIA) appreciates the opportunity to make a submission to the Transport, Housing and Local Government Committee on the *Queensland Building and Construction Commission and Other Legislation Amendment Bill 2014* ('the Bill').

1.2 The enactment of the Bill will have a direct impact on every home building, renovating and contracting business in Queensland, the overwhelming majority of which are small family-owned businesses. Many of these impacts will be felt through the effects of the detail in the Bill and the accompanying Regulations which are not yet available for review. This limits HIA's potential to provide a comprehensive submission on the merits of the Bill.

1.3 While HIA acknowledges that the Government is keen to finalise its Ten Point Plan for the Queensland Building and Construction Commission ('the QBCC'), our concern is that the Bill has been drafted too quickly, evident by its inconsistencies, duplication and gaps. Moreover the opportunities to remedy these issues have been severely limited by the brief period within which the Committee has been charged with reviewing the Bill.

1.4 Against this background HIA considers that the Bill could be significantly improved if there was a little more time for closer consultation between industry, consumer and legal groups.

2 The Positives

2.1 Notwithstanding the comments above, there are many positive features of the Bill. In particular the Bill removes a material amount of ineffective regulation and administrative cost to the home building industry.

2.2 HIA appreciates that the removal of the onerous requirements for display homes, the prohibition on cost-plus contracts, non-payment for all unsigned variations, and the requirement to predict delays.

2.3 All these proposed amendments will have a positive effect on the already heavy administrative burden that the industry carries, while having little or no impact on the high levels of consumer protection that customers of the industry enjoy.

3 The Downside

3.1 Unfortunately the Bill dilutes many of the positives through the introduction of new requirements that will add to the administrative burden of contracting businesses. Furthermore, in some cases the consequences of the Bill will also negatively affect the cash flow of a business while adding to the potential for and scope of unnecessary disputes between contractors and their clients. Against these material costs and risks, the Bill is adding to the building administration process, with no tangible improvement in consumer protection being delivered.

3.2 The more serious of these issues are outlined below in the Major Concerns section of this submission.

3.3 Annexure A **(attached)** provides a more detailed list of concerns which HIA has with many of the provisions in the Bill.

4 Missed Opportunities

4.1 In addition to the concerns that are detailed below, HIA also believes that the Bill had missed opportunities to reduce the tangle of red tape that binds the home building industry and in ways that will have no detriment to consumers.

Requirement to use licenced trade contractors

4.2 The most glaring of these missed opportunities is the current requirement for builders to only engage with licensed sub-contractors. On the face of it, this requirement makes good sense but in practice it adds a considerable administrative load to a building company for little gain. There is little gain because the builder is responsible for the quality and timeliness of the work carried out on their site by sub-contractors. The QBCC will always act through the builder where there is a complaint about the quality of work, and leaves it up to the builder to pursue contractual remedies with his or her sub-contractors. In this way there is no detriment to consumers from the removal of the requirement to use licensed sub-contractors (trade contractors dealing directly with consumers could continue to need to be licensed).

4.3 If this requirement was removed most builders would continue to use licensed sub-contractors. But to make it an offence not to creates an administrative burden on building businesses. A larger home building company could have hundreds of sub-contractors that they are engaging at any one time. To ensure that these sub-contractors are all licensed, and continue to be licensed, is a significant cost. Enquiries through the QBCC website have to be made to confirm a sub-contractor's licence details, renewal dates then need to be recorded, and follow up enquiries need to be made once the renewal date is reached for every contractor.

4.4 With the builder responsible for the job, this administrative load adds nothing but cost to the home buying public.

4.5 HIA accordingly recommends that Part 3 Clause 42D of the current Act should be removed.

Unlawful to contract without "foundation data"

4.6 It is currently an offence for a building contractor to contract on a new home in the absence of "foundation data" (details of the soil condition and slope of the land). The Bill proposes to maintain this provision with very substantial fines of 100 penalty units if this condition is breached.

4.7 It is essential that a building contractor obtains this foundation data so that appropriate engineering designs can be done for the home being built. A building approval would also require the provision of foundation data and the associated engineering designs for foundations. Moreover contractors will also obtain foundation data to ensure that they comply with the requirements of the QBCC Subsidence Policy whereby homes with slab failure may be fixed through QBCC insurance without any fault being attributed to the builder.

4.8 Notwithstanding the need for this foundation data prior to a job starting, there is no need for it to be essential at the time of contracting with a consumer. Should a builder contract with a consumer in the absence of foundation data the legislation rightly then prohibits the

builder from seeking additional payment should the soil conditions prove to be worse than the builder expected. So consumers are not exposed through removing this requirement.

4.9 In the current housing market, it is almost the norm that land for residential building is being sold to consumers "on disclosure": that is where the land is sold in advance on title being issued for the block. Right now the delay between the land purchase and the issuing of the tile could be nine months or more. Where land is sold so far ahead of title being issued it is impossible to obtain accurate foundation data, leaving the builder and consumer in a state of uncertainty.

4.10 In this environment the legislation is stopping builders and their clients from entering into a building contract and locking in prices, designs and selections, giving both parties no certainty about their dealings. This uncertainty is putting a break on industry activity and planning.

4.11 HIA recommends to the Committee that Part 4 Division 1 clause 31(7) should be retained and all the other sections of this clause should be removed from the Bill. In this way parties would be able to get the certainty they are seeking and consumers would know that their contract price would not increase due to unexpected soil conditions.

5 Major Concerns

Powers granted to the Commission

Disciplinary Action

5.1 The Bill grants additional powers for the QBCC to take disciplinary action against a licensee for non-payment of subcontractors. The Bill in its current form does not define 'non-payment', which makes this power broad and discretionary, with potential for unintended consequences.

5.2 The *Building and Construction Industry Payments Act 2004* ('BCIP Act') provides a mechanism for resolution of payment disputes. The QBCC already has sufficient power to act upon the failure to make payment of a judgement debt, such as non-compliance with a BCIP Act decision, through the Financial Requirements for Licencing (as revised from 1 October 2012). An unsatisfied judgement debt can result in outcomes of licence suspension and/or cancellation, fines, and demerit points. Importantly these outcomes rely upon a decision under a regulatory mechanism not that of a 'discretionary' type judgement as provided for in the Bill.

5.3 HIA is of the view that additional disciplinary rights for the Commission are unnecessary, as there are already appropriate mechanisms in place to deal with 'non-payment' of subcontractors.

Removal of ability to apply to QCAT to stop actions of the QBCC

5.4 The Bill places additional constraints on the Queensland Civil and Administrative Tribunal (QCAT) from placing "stays", meaning a temporary stop, on actions by the QBCC. These constraints could lead to significantly negative impacts on fairness and natural justice for both consumers and licensees.

5.5 The right of a Court or Tribunal to stay execution of judgement in the appropriate circumstances is crucial for the proper administration of justice. Further, a decision of the

QBCC should be treated as an administrative decision, and therefore be capable of judicial challenge, and if necessary be stayed.

5.6 If approved in its current form, the Bill would allow the QBCC to process rectification works through the QBCC Home Warranty Insurance Scheme even if the building contractor is appealing the initial direction to rectify through QCAT. HIA appreciates that there may be some limited circumstances in which it is desirable to rectify work quickly to prevent further damage occurring. In these circumstances it may be appropriate to have the QBCC insurance respond while proceedings are on foot in QCAT. This is why the Government amended the *Queensland Building and Construction Commission Act 1991* ('the QBCC Act') in September 2013, to give the QBCC power to have an expedited hearing in QCAT to enable the Commission to process these urgent insurance claims while a dispute was being considered by QCAT.

5.7 In some instances a stay will be necessary to preserve evidence. This will particularly be relevant in disputes over alleged defective materials or workmanship that will require testing of evidence at trial.

5.8 To give the QBCC carte blanche to act in this way is dangerous and extremely prejudicial to the interests of licensees who would essentially being coerced into rectifying work themselves even if they believed that the work was of an acceptable standard. It is unacceptable for licensees to be exposed to this potential for coercion to address delays that the QBCC may be experiencing in accessing quick decisions from QCAT. The remedy is surely in a fine tuning of QCAT's processes to expedite urgent insurance matters.

5.9 HIA accordingly recommends that the provisions of Section 83 and 84 of the QBCC Act (as amended in September 2013) be preserved. Furthermore, for building disputes that the Tribunal has the continued right to grant a stay on the terms already afforded in Sections 22(3) and 22(6) of the *Queensland Civil Administrative Tribunal Act 2009* ('QCAT Act').

Red tape provisions which may result in cash flow difficulties

Progress payments and certificates of inspection

5.10 The Bill seeks to make stage inspection certificates from a certifier mandatory as a precondition for progress stage payments in domestic building contracts. Again while this might seem unexceptional on the surface, in practice certificates of inspection do not always align with stages of progression throughout contractual works. Even where the certificates of inspection do happen to align with progress stages in a building contract, smaller contractors may have to wait many days for certificates to be issued after an inspection depending on the pressures on their certifier. In the current busy conditions in the industry delays of two weeks are not unusual.

5.11 This requirement will therefore have the potential to cause building contractors to cease work for weeks while the certificates of inspection are issued. The contractor will thereafter be required to wait until the client provides the certificates to their lender, and the lender issues the progress payment. These delays are not in the interest of the

consumer or the contractor. Delays would affect not only work flows but also the cash flows of small businesses.

5.12 Currently the *Domestic Building Contracts Act 2000* ('the DBC Act') requires for certificates of inspection to be made available to a consumer as soon as practicable upon receipt. There are appropriate penalty units in place to discipline building contractors who fail to comply with this requirement.

5.13 In light of the impracticalities in linking certificates of inspection to progress payments, and the real potential of consumer and building contractor detriment, it is HIAs position that the current provisions of the DBC Act should be retained, and the proposed amendments under Schedule 1B Section 14(5) of the Bill should be removed.

5.14 Notwithstanding this new section HIA is also concerned that the Bill retains a provision for progress claims to be controlled through Regulation. It is HIA's understanding that the policy intention is to adopt similar provisions to that which apply in New South Wales under the *Home Building Act 1989*. However the drafting of this subsection suggests that the Regulations will prescribe progress payment schedules, or provide circumstances whereby progress payment percentages will be prescribed. The detail surrounding this is imperative to industry, and can have consequential outcomes should the detail not be consulted upon.

5.15 Accordingly it is recommended that provision under Schedule 1B Section 34(2) is removed. This would not stop the QBCC publishing guidelines on what standard progress schedules might be to enable the parties (including financiers) to have greater understanding in the claiming of and payment of progress claims.

Foundations data

5.16 See the "Missed Opportunities" section of the submission.

Extensions of time

5.17 The Bill creates an obligation on the building contractor to provide an extension of time document within 10 business days of the building contractor becoming aware of the delay. This provision fails to consider that the extent of a delay may not be fully realised for a period of time beyond where the contractor first 'became aware of the delay'. The illogical consequence of this provision is that a contractor should make a claim for every day that it rains and every day that it takes for the site to dry. This can be avoided by adding "extent of" (the delay) to Schedule 1B Section 42 (1) (c).

5.18 The Bill also requires extension of time claims to be signed by owners in order for the document to be enforceable. This provision purports to defy the common law doctrine of acceptance. Currently home owners under contract are given a reasonable period of time to dispute an extension to the building period, however are deemed to have accepted the extension if they do not respond or dispute in a given time. The proposed provision creates red tape and potential for unnecessary hold-ups in the construction schedule, with the obligation on the building contractor to continually follow up agreement with a signature. Furthermore this provision has the real potential to lead to disputes, especially where it is the actions of the client that has triggered the delay: Why would a client agree

to an extension when they have caused the delay, and they have contractual entitlement to delay damages?

5.19 Furthermore the Bill introduces an obligation on the building contractor to give a signed copy of the extension of time within 5 business days of the owner approving the claim, with penalty units attached should the building contactor fail to comply with the provision. This provision is a further red tape burden to industry, and presents a substantial risk through the risk of penalty units by failure to provide a copy of the document. This is a harsh and unnecessary consequence, which distracts from the building process.

5.20 Accordingly HIA recommends that the Schedule 1B Section 42 of the Bill is amended to enable a contractor to claim an extension of time within 10 business days of the 'cause and the extent' of the delay being realised. Furthermore it is recommended that the Bill is amended to remove the obligation on the owner to approve the claim, and the obligation on the building contractor to provide a copy of the signed document.

6 Impractical Requirements of the Bill

Practical completion

6.1 Practical completion should be a simple concept: that is that the work envisaged in the building contract has been completed except for minor defects or omissions (which will be fixed during the warranty period).

6.2 However the Bill complicates this approach by adding concepts of "not unreasonably affect occupation". This is totally inappropriate as not all building contracts cover the construction of a home to an "occupation" stage as many consumers want to do some of the work themselves.

6.3 Moreover the definition of practical completion (Schedule 1B Section1) contemplates that practical completion has only been reached when all certificates of inspection have been received. The building contractor can only provide to the home owner copies of certificates issued to the building contractor. In many instances the homeowner may be responsible for carrying out a portion of the works after completion of the works under the contract, and the homeowner's responsibilities are part of the planning approval, and therefore require certification. This is often experienced in circumstances whereby the homeowner wants to perform structural landscaping works at their leisure such as driveways, retaining walls, etc., and/or circumstances where a partial build has been contracted for.

6.4 Furthermore attaching practical completion with the provision of a defects document to the owner is flawed. Practical completion occurs as a matter of fact- it does not occur when the owner subjectively is satisfied the works have reached practical completion

6.5 HIA recommends the Practical Completion is defined for both Level 1 and Level 2 contracts as '*the day where the works are completed in accordance with the contract, except for minor defects and omissions'*.

Consumer Building Guide

6.6 The Bill provides homeowners with the ability to withdraw from a contract within five days of receiving the Guide. If the Guide is provided at the contract signing stage, which would be the norm, this cooling off period is not unreasonable. However if the Guide is not given to a consumer until much later in the building process due to an administrative oversight, the consequence of allowing the consumer to cancel the contract is excessively harsh. The penalty and demerit points as provided in Schedule 1B (18) for the building contractor are more than a sufficient deterrent.

Defects Liability period

6.7 The defects liability period for minor defects has been extended to two years from the current six months. Considering the scope of issues which may be 'minor defects', a two year defects period is not only excessive but also makes it difficult to distinguish between true defects, fair wear and tear, and homeowner maintenance issues.

6.8 This provision places a significant onus on the building contractor, which will certainly drive up contract prices for home owners, in turn effecting housing affordability. Furthermore the substantial extension of the warranty period further pressures the Commissions functions, in turn placing a greater financial burden on industry through the Commissions insurance, compliance, and dispute resolution functions.

6.9 If the Government has a mind to increase the warranty period for minor defects then doubling the period to one year should be more than adequate.

6.10 The Bill also provides the consumer a further six months to notify minor or major defective work beyond the warranty period. This is at odds with how warranties work for consumer products where defects have to be notified within the warranty period. This is excessive and will generate an additional field of dispute between clients and contractors about when the defect actually occurred; within the warranty period or the additional notification period.

6.11 Therefore it is recommended that Schedule 1B Section 29(2) is removed from the Bill to avoid this unproductive complication. The requirement in Schedule 1B Section 29(1) that the breach has to be notified within the warranty period is more than adequate and consistent with the application of other consumer warranties. HIA also notes in a similar vein that it is excessive for QCAT to be able to increase the duration of the warranty period at its discretion.

Annexure A

Queensland Building and Construction Commission and Other Legislation Amendment Bill 2014:	Subsection	Comments
Part 1: Preliminary		No Comments
cl.1 Short Title		
cl.2 Commencement		
Part 2: Amendment of Queensland Building and Construction Commission Act 1991		
cl.3 Act Amended		
cl.4 Amendment of s3 (Object of Act)		
cl.5 Amendment of s19 (Board's policy)		
cl.6 Replacement of s37 (When licenses to be renewed)		
cl.7 Amendment of s37A (Commission to advise licensee before license due for renewal)		
cl.8 Amendment of s37B (Applications for renewal of license)		
cl.9 Omission of s37C (Renewal fee increased if directions given		
cl.10 Amendment of s38 (Suspension for non-payment of fee)		
cl.11 Insertion of new pt 3, div 6		
cl.12 Amendment of s.42C (Unlawful carrying out of fire protection work)		
cl.13 Amendment of s 49B (Suspension or cancellation for failure to comply with Tribunal's orders and directions)		
cl.14 Amendment of s50A (Approved audit program)		
cl.15 Omission of s50B (Notice of proposed audit program)		

cl.16 Amendment of s50C (Supply of financial records and other documents under approved audit program or for other reason)		
cl.17 Amendment of s51B (Licensed contractor must not contract with unlicensed person)		
cl.18 Amendment of pt 3A, hdg (Excluded and permitted individuals and excluded companies)		
cl.19 Amendment of s56AC (Excluded individuals and excluded companies)		
cl.20 Omission of pt 3A, div 2 (Categorisation as permitted individual)		
cl.21 Amendment of s56AF (Procedure if licensee is excluded individual)		
cl.22 Amendment of s56AG (Procedure if licensee is excluded company)		
cl.23 Amendment of s.58 (Meaning of *permanently excluded individual*)		
cl.24 Amendment of s61 (When individual no longer permanently excluded individual)		
cl.25 Omission of s67AP (Relationship of this part with pt 7, div 4)		
cl.26 Amendment of s67AQ (Definition for pt 3E)		
cl.27 Replacement of s67AR (meaning of demerit offence)		
cl. 28 Amendment of 67AW (Demerit points for demerit matters)		
cl. 29 Amendment of s 67AX (When demerit points allocated for demerit offences)		
cl. 30 Amendment of s 67AZB (Limit on		

demerit points from single audit or investigation)		
cl. 31 Omission of s 67AZG (Notice that not a fit and proper person to individual who is not a licensee)		
cl. 32 Amendment of s 67AZM (Term of disqualifications)		
cl. 33 Insertion of new pt 4		
cl. 34 Insertion of new 71AC	71AC Tenders for rectification work	This clause is a replica of the clause provided for 71A under the 'Rectification of Work' section of the Bill. 4- This subsection suggests where an amount of building work is less than $20,000 only one tender is required to be sought by the QBCC., whereas 71A defaults to an amount prescribed by Regulation. *It is recommended that the '$20,000' is removed, and the amount defaults to an amount prescribed by Regulation.*
cl. 35 Omission of s73 and 74		No Comment.
cl. 36 Replacement of pt 5 (The statutory insurance scheme)	67WE Meaning of residence	(4)-This is provided for within section 6. (5)-The current provisions of the Act provide detail as to the calculation of storeys. Does subsection (1)(c) extend to a car park? It is unclear if the Regulation will provide any further detail beyond subsection (6). It is recommended a car park is excluded from the definition of a storey.
	68G Refund of insurance premium if notice of cover is revoked	Traditionally it has been a very difficult process for industry participants to rightly obtain refunds for insurance premiums. *It is recommended that a 28 day time frame is imposed obliging the Commission to provide refund within 28 days of revoke of notice.*
	69 Cancellation of cover and return of premium	(5)- As per above. *It is recommended that a 28 day time frame is imposed obliging the Commission to provide refund within 28 days of the Commission receiving cancellation of cover as required by subsection (1), (2), (3), or (4).*
	70 Residential construction work	(2)- The imposition of requiring a contractor to ensure each additional variation is covered through the warranty scheme as work progresses is

	carried out under a contract with a consumer	unnecessary, and creates a further red tape burden. For various reasons, variation are required through the course of construction. Many of these variation requests are initiated by the consumer because they have had a change of mind on a particular detail or aspect of the scope of works or materials to be used. The requirement to pay additional premiums on a per variation basis creates an unreasonable administrative burden and is impractical. In some instances builders as a general rule will simply refuse to agree to any owner initiated variations. Further the demerit points associated with such failure to continually purchase insurances throughout the works are wholly unfair, as the variation works are in more cases a reactive outcome to a client's request to omit or change something within the scope of the contract. *It is recommended that the Act is varied to require a building contractor to make payments for additional variations at the completion of the project or alternatively at the relevant progress stage where the variation works were carried out. Furthermore it is recommended that the demerit points for this provision are removed.*
	70A Speculative residential construction work	As per 70 above. *It is recommended that the Act is varied to require a building contractor to make payments for additional variations at the completion of the relevant progress stage where the variation works were carried out. Furthermore it is recommended that the demerit points for this provision are removed.*
	71A Tenders for rectification work	This appears to repeat the text of clause 34 which intends to provide a new section 71C.
	71D Multiple contracts for the same residential construction work	(2) The wording of this clause is ambiguous. Recommend that this clause is reworded to say '*For this part, the separate contracts are taken to be a single contract for which the contract price is the sum of the separate contract prices'*.
cl. 37 Replacement of pt 6 (Rectification of building work)	71H What is consequential damage	(1)(b) HIA fundamentally disagrees that the Statutory Warranty scheme should be extended to cover consequential damage to 'adjacent' sites to where the building works are carried out.

		It is not the purpose of the statutory insurance scheme to fund common law claims nor is the role of governments to exercise common law rights on behalf of land owners, in particular where conclusions will be made without the necessary evidence and burden of proof. Furthermore these measures will deleteriously impact on housing affordability as the cost of additional insurance will ultimately be borne by the new home owner, with most contractors simply passing on the additional insurance and premium costs in the base price of construction. *It is recommended that the words 'or adjacent to the relevant site' are removed.*
	72- Power to require rectification of building work and remediation of consequential damage	(8) This enables the Commission to provide a direction to rectify in circumstances where a person is not a party to a contract, and has not given a complaint to the Commission to Act upon. HIA repeats its comments above and wholly disagrees with this clause in relation to the ability to issue directions to properties 'adjacent to the relevant site'. There is no established contractual relationship between parties to enable access, nor would appropriate insurances be affected on site. *It is recommended that the words 'or adjacent to the relevant site' are removed from 71H(1)(b).*
	74B Proper grounds for taking disciplinary action against a licensee and former licensees	(1)(n) This provision provides additional powers for the Commission to take disciplinary action against a licensee for non-payment of subcontractors. "Non-payment" is not defined which would leave this power very wide and open to interpretation, and misuse. The Commission already has sufficient power to act upon the failure to make payment of a judgement debt through the Financial Requirements for Licencing, as introduced from 1 October 2012. An unsatisfied judgement debt can result in outcomes of licence suspension and/or cancellation, fines, and demerit points. There clearly are already appropriate mechanisms in place.

		It is recommended that this subsection is removed.
cl. 38 Insertion of new pt 6A	74H Filing of certificate as judgment debt	HIA opposes this provision. It is wholly inappropriate that decisions of a non-judicial government agency be enforced as if they were the equivalent of a Court judgment. QBCC decisions in many instances will simply be the penultimate result of a subjective assessment or opinion of an individual within the bureaucracy. They are not the same and should not be considered the same as a decision emerging from an impartial judicial process which considers evidence from both sides of the dispute. Of further concern is the proposed s74H(6) that requires a respondent to pay into Court as security the unpaid part of any "judgment". The payment of monies into Court should remain at the discretion of the Court and subject to the usual considerations, such as the merits of the case, the assets of and capacity of the respondent to pay and the requirements of justice. *It is recommended that this provision is removed.*
cl. 39 Amendment of s 77 (Tribunal may decide building dispute)	Amendment of s77 (Tribunal may decide building dispute)	Whilst HIA agrees with the policy intent to require parties to participate in an early mediation or conciliation process prior to applying to the Tribunal, the current drafting in the Bill is open ended and ambiguous. The phrase "the person has complied with a process established by the Commission to attempt to resolve the dispute" is subjective and does not clarify that the dispute resolution process is of a non-binding nature. In this regard, HIA understands that the QBCC is currently piloting a dispute resolution process that enables QBCC inspectors to issue binding determinations on building quality issues and defective work claims.

		Any attempt to remove the ability of a party to commence legal proceedings against the party in breach of contract is offensive to the rule of law and is opposed by HIA.
cl. 40 Replacement of s 83 (Proceeding in Tribunal stops unilateral action by Commission)		HIA wholly disagrees with this provision. HIA notes that the rationale behind the application of the proposed amendments is due to the misguided view that contractors are using section 83 of the current QBCC Act to prevent or delay the Commission from assisting consumers in relation to a dispute. HIA disagrees with this view. It is a fundamental right of any party to challenge an administrative decision that has the potential to have adverse outcomes. The amendments also serve as a defacto way for the Commission to interfere in contractual disputes, offending the rule of law, notions of a separation of powers, and principles of natural justice. For instance, this enables to the Commission to proceed in a totally unfettered way with issuing a contractor a direction to rectify and/or proceed through the insurance scheme whilst a contractual matter is being determined by the Tribunal. Whilst it is the Commission's intention to expedite matters for resolution, there are clear consequences of dealing with disputes in such a manner. This provision will potentially cause a contractor who is pursuing monies in relation to an unpaid progress stage, to be issued a direction to rectify for incomplete works. The contractor can quite rightly review the direction, and therefore may have two matters before the Tribunal for resolution. Whilst the two matters are ongoing, the contractor may receive a bill (likely of a much higher value than it would have been for the contractor to carry out itself) for rectification of building work. This resultant outcome is biased against a contractor who is quite rightfully exercising its rights of review. Furthermore the Act already provides for mechanisms for the Commission to act in relation to disputes before the Tribunal. These provisions were

		recently reviewed in September 2013. Section 83 and 84 of the Act currently provides rights for the Commission to apply to Tribunal to act in relation to a defective work where the dispute matter is before the Tribunal, such an application must be dealt with in an expedited manner, and the Commission considers the work needed to be urgently rectified or completed. *It is recommended that this provision is deleted in its entirety and the current sections 83 and 84 of the QBCC Act are retained.*
cl. 41 Omission of s 84 (Action by Commission while proceeding in Tribunal)		Disagree, for reasons as outlined above.
cl. 42 Amendment of s 86 (Reviewable decisions)		No comment
cl. 43 Amendment of s 86F (Decisions that are not reviewable decisions)		There is no section 86F within the current Act. It would appear that this amendment is intended for section 86(2)(b) of the Act.
cl. 44 Insertion of new 87A: No stay by QCAT of particular decisions of the Commission		HIA opposes this provision. It is associated with the proposed amendments to section 83 of the QBCC Act, also offending the notion of a separation of powers. The Commission in September 2013 introduced reviewed provisions of the QBCC Act to apply to the Tribunal for permission to proceed with directions to rectify, insurance, etc., whilst the matter is before the Tribunal. The right of a Court or Tribunal to stay execution of judgement in the appropriate circumstances is crucial for the proper administration of justice. Further, a decision of the Commission should be treated as an administrative decision, and therefore be capable of judicial challenge, and if necessary stay. As outlined above, this provision will also enable the Commission to

		proceed with claims through the insurance scheme whilst an associated matter is being determined through the Tribunal, removing a building contractor's right to ask for a stay of a decision whilst the initial (and associated) decision is being reviewed through the Tribunal. In some instances a stay will be necessary to preserve evidence. This will particularly be relevant in disputes over alleged defective materials or workmanship that will require testing of evidence at trial and might require further inspections. This proposed amendment is also subversive; as it effectively enables the Commission to side-step the Tribunal processes during the hearing of a contractor's claim for resolution. Whilst there are admitted issues in the time taken to determine disputes within the Tribunal, problems resulting from the resourcing and administration of the Tribunal should not be addressed in such an unfair manner. HIA accordingly recommends that for building disputes that the Tribunal have the right to grant a stay on the terms already afforded in sections 22(3) to 22(6) of the *Queensland Civil Administrative Tribunal Act 2009* ('QCAT Act'), namely: *(3) The Tribunal may, on application of a party or on its own initiative, make an order staying the operation of a reviewable decision if a proceeding for the review of the decision has started under this Act.* *(4) The Tribunal may make an order under subsection (3) only if it considers the order is desirable after having regard to the following—* *(a) the interests of any person whose interests may be affected by the making of the order or the order not being made;* *(b) any submission made to the Tribunal by the decision-maker for*

		the reviewable decision; *(c) the public interest.* *(5) Subsection (4)(a) does not require the Tribunal to give a person whose interests may be affected by the making of the order, or the order not being made, an opportunity to make submissions for the Tribunal's consideration if it is satisfied it is not practicable because of the urgency of the case or for another reason.* *(6) In making an order under subsection (3), the Tribunal—* *(a) may require an undertaking, including an undertaking as to costs or damages, it considers appropriate; or* *(b) may provide for the lifting of the order if stated conditions are met.* *It is recommended that the Tribunal retains the right to grant a stay on the terms set out in section 22 of the QCAT Act.*
cl. 45 Omission of pt 7, div 4 (Disciplinary proceedings) cl. 46 Amendment of s 97B (Stop orders)		No comments
cl. 47 Amendment of s 99 (Licensee register)		6- Often parties agree to resolve a dispute through dispute resolution channels via the QBCC insurance scheme. Display of such claims would be unreasonable in such circumstances. *Recommend an amendment to subsection 6(j) to enable the discretion of the Commission not to display claims where it would be unfair on the building contractor.*
cl. 48 Amendment of s 101 (Licensees must advise change of circumstances)		A $2000 for failure of notification is harsh given the broad nature of the section. *It is recommended this provision be removed.*

cl. 49 Amendment of s 103E (Publication of registers) cl. 50 Amendment of s 105 (Inspector to produce identity card and provide information)		No comments
cl. 51 Amendment of s 106 (Inspector's power to require name and address)		1(1)(b) HIA notes the intention to give Commission inspectors additional powers to provide identity. However requiring details as to a person's date and place of birth is unnecessary in most circumstances. *It is recommended s106(1)(1)(b) is removed.*
cl. 52 Amendment of s 106A (Power to require production of documents)		
cl. 53 Insertion of new pt 9B		HIA is confused about the need or justification for the insertion of the new Part 9B. The Commission is already able to obtain injunctions from the Supreme Court exercising its inherent jurisdiction. Accordingly, at best these provisions are unnecessary given the already broad array of powers available to the Commission (such as the ability of issue stop orders or urgently suspend licences). At worst the provisions appear calculated to again subvert the interests of justice by enabling the Commission to circumvent the need to present evidence and have that evidence tested under cross examination under a full hearing *It is recommended that this section should be deleted.*
cl. 54 Amendment of s 108D (Contracting out prohibited)		This provision appears to restate obligations as already set out within the Schedule 1B amendments. It is an unnecessary provision. *HIA recommends removal of this provision.*
cl. 55 Amendment of s 109A (Service of documents) cl. 56 Amendment of s 111 (Prosecutions for offences)		No comments

cl. 57 Amendment of s 111C (Liability of directors for amounts)		
cl. 58 Amendment of s 116 (Regulations)		HIA opposes this clause which purports to enable the Commission to introduce compulsory CPD via Regulation. It is noted that the Government's response to the Inquiry into the Operation and Performance of the Building Services Authority, Recommendation 39, provided for the introduction of a voluntary system of CPD. CPD is a poorly targeted instrument for achieving improved performance in any industry. Professional development needs are unique to the individual professional: someone actively performing in a profession would have very different need for professional development than a passive person. Yet CPD programs do not target the type of development activity the professional needs. This leads to CPD programs catering for the average professional in the most cost and time-effective way. The value of formal CPD programs in larger building firms where one individual, the nominee, is meant to undertake a CPD program is also questionable. The scope for abuse of CPD is substantial. QBCC licensees who are active in the industry would currently all be engaged in some form of professional development. All of these sources of professional development would be targeted at the specific needs of the individual licensee. However to document and verify this "on-the-job CPD" would be difficult for licensees to administer and would need a significant incentive for it to be worthwhile to manage voluntarily. There would also be a significant administrative burden on the Commission. *HIA recommends removal of this clause.*

Queensland Building and Construction Commission and Other Legislation Amendment Bill 2014: Schedule 1B	HIA Comments/Recommendations
Part 1: Interpretation	
1. Definitions for schedule 1B	Excluded building work- The new definition notes work relating to '*a building intended to be used only for business purposes'*. The broad nature of this definition means that domestic building work can now incorporate works relating to hotels, hostels etc., where some of the dwelling is used for residential purposes, not only business purposes. *Recommend the excluded building work definition defaults to the current position under the DBC Act, or alternatively , the wording 'primarily used' is inserted rather than the wording 'only'.* Practical Completion- HIA has significant concerns with both definitions proposed. In their current form, they are unworkable for industry. The definition of practical completion should not be affected by the monetary value involved; it rather should reflect a common standard. The inconsistencies between the two definitions will surely to lead to confusion amongst industry and consumers. (a) For a Level 1 regulated contract- This definition fails to consider where a building contractor may be responsible under the contract for performing only a portion of the works as reflected in plans and specifications. The definition also fails to consider where the works are practically completed other than for agreed minor defects and omissions which the building contractor has obligation to rectify within the statutory warranty period. (b) For a Level 2 regulated contract- This definition is also flawed for several reasons. Firstly it confuses practical completion with the provision of documentation to a home owner. The final certificate is a document issued under the Building Act to ensure that the work complies with the approved plans and the BCA. The building contractor can only provide to the home owner copies of certificates issued to the building contractor. In many instances the homeowner may be responsible for carrying out a portion of the works after completion of the works under the contract, and the

	homeowner's responsibilities are part of the planning approval, and therefore require certification. This is often experienced in circumstances whereby the homeowner wants to perform structural landscaping works at their leisure such as driveways, retaining walls, etc., and/or circumstances where a partial build has been contracted for. Furthermore attaching practical completion with the provision of a defects document to the owner is flawed. Practical completion occurs as a matter of fact- it does not occur when the owner subjectively is satisfied the works have reached practical completion *Recommend the Practical Completion is defined for both Level 1 and Level 2 contracts as 'the day where the works are completed in accordance with the contract, except for minor defects and omissions'.* Written form- this definition fails to reflect current and contemporary practices used in the building industry for written form correspondences. A building contract is not one required to be covered by the rules relating to the Statute of Frauds and accordingly should be taken to include documentation covered by the *Electronic Transactions Act 2001*. *Recommend the Written form definition extends to include handwritten, typewritten forms (which include email, and SMS), and any other form of communication as agreed under contract.* Recommend insertion of definitions: *Building Certifier definition as per section 17;* *Plans and Specifications as per section 15 and 23; and* *Suitability for Occupation definition as per section 24.*
2. Meaning of *contract price*	1(c)- Provides that the building contract price incorporates payments to third parties, whereby the homeowner may directly engage the building contractor themselves. This by default will mean the building contractor is responsible for payment of the owner engaged contractor, and for maintenance of these works, as they are deemed insurable works as part of the contract price. *Recommend insertion of a provision which excludes payments to third parties.*

3. Meaning of *domestic building contract*	*It is recommended that all these definitions are included in the schedule of definitions for readability purposes.*
4. Meaning of *domestic building work*	
5. Meaning of *regulated contract*	
6. Meaning of *level 1 regulated contract*	
7. Meaning of *level 2 regulated contract*	
8. Meaning of *foundations data*	
9. Meaning of *home*	This definition is not referenced within the text of Schedule 1B. *It is recommended that this definition is removed from the scope of the Act.*
10. Meaning of *provisional sum*	*It is recommended that this definition is included in the schedule of definitions for readability purposes.* 10(1) & 10(3) - These references separately define the meaning of a PS item, to include bot the estimated cost of providing particular contracted services, and the cost of supplying materials for the works. *It is recommended that subsection 3 is removed and subsection 1 is redefined to read ' A provisional sum, for a domestic building contract, is an amount that is an estimate of the cost of providing particular contracted services, including the cost of supply and installation of materials needed for the subject work'.*
11. Multiple contracts for the same domestic building work	No comment.
12. References to particular terms	
Part 2: Contracts and related documents	
13. Requirement for contract –	13(4) - This subsection states that the Regulations may prescribe other requirements of a contract, which the building contractor must comply with. This provision is open ended, and provides little

level 1 regulated contract	certainty as to the requirements for a compliant contract. *It is recommended that this provision is removed from the scope of the Act.* 13(5) - This provision leaves the whole contact unenforceable, leaving parties who fail to comply with this section with no remedies for resolution. This provision is not a productive contracting clause. Parties who fail to comply with this provision will be forced to result to statutory means to determine the ability to enforce the contract, and any potential remedies for failure to comply with the provision. The consequence of an inadvertent oversight will be the detriment of both the consumer and owner, and does little to protect the rights of either party. *It is recommended that this provision is removed from the scope of the Act.*
14. Requirement for contract – level 2 regulated contract	14(3)(a)- should read 'building contractor' not 'contractor' 14(5)- Should read 'building contractor' not 'contractor' 14(5) - Notes that the contract must contain a provision which prevents the building contractor from claiming payment unless the contractor has given the owner all certificates of inspection relevant for the stage. The proposal to mandate payment claims with certificates of inspection is flawed. The provision of certificates of inspection (or their equivalent) is a feature of the private certification model provided for in the planning legislation and the *Building Act 1975.* In practice certificates of inspection do not align with stages of progression throughout contractual works, nor do certifiers have such a positive obligation under the *Building Act 1975* to provide such certificates in line with the stages. In reality the certificate of inspection is often received by the contractor well after the stage has been reached, and well into completion of following stages. In light of this, to require a contractor to provide certificates to an owner as a precondition to payment is a serious disadvantage to both the contractor and owner, as such a provision is likely to cause unnecessary delays beyond the anticipated building period while waiting for the certifier's certificate. Furthermore, in line with concerns noted in section 1, a building contractor will be prevented from

	claiming payments for stages which are not certified where the homeowner is responsible for completing that portion of the works. *It is recommended that the Act continues to oblige the building contractor to provide certificates of inspection as soon as reasonably practicable upon receipt, however does not require provision of these certificates as a precondition to payment.* 10- This subsection states that the Regulations may prescribe other requirements of a contract, which the building contractor must comply with. This provision is open ended, and provides little certainty as to the requirements for a compliant contract. *It is recommended that this provision is removed from the scope of the Act.* 14(11) - This provision leaves the whole contact unenforceable, leaving parties who fail to comply with this section with no remedies for resolution. This provision is not a productive contracting clause. Parties who fail to comply with this provision will be forced to result to statutory means to determine the ability to enforce the contract, and any potential remedies for failure to comply with the provision. The consequence of an inadvertent oversight will be the determinant of both the consumer and owner, and does little to protect the rights of either party. *It is recommended that this provision is removed from the scope of the Act.*
15. Copy of contract for building owner	This provision requires a building contractor to give the building owner a copy of the contract, including any plans and specifications within 5 business days after entering into the regulated contract. Failure to comply with this clause can result in significant penalty units. It is of concern that 'plans' and 'specifications' are not defined, and failure to comply with the provision of such documents can result in significant penalties. *It is recommended that section 1 accordingly defines Plans and Specifications.* In some cases home owners supply the building contractor the plans and specifications outside the scope of the contract. The penalty attached to failure to comply with this clause is harsh and unreasonable in the circumstances whereby the home owner supplies the building contractor these documents. *It is recommend that this section includes a defence that where owner supplies the plans and specifications for the works, that there is no contravention of this section.*

16. Copy of commencement notice	The requirement for a notice of commencement is unnecessary red tape to the building process. A home owner has a copy of the contract which prescribes the building period (section 13(3)(f) and section 14(3)(g)) which enables them to determine the anticipated completion date. The inclusion of the date for practical completion could provide inconsistencies between the provided for building period by way of miscalculation, heightening the likelihood of disputation during or on conclusion of the building period. *It is recommended that this provision is removed from the scope of the Act.*
17. Copies of certificate of inspection	17(1)-'Building Certifier' is not defined. *Recommend insertion of the following definition in Section 1 (as per the definition under the Sustainable Planning Act 2009):* *'Building certifier is an individual who, under the Building Act, is licensed as a building certifier. A reference to a building certifier includes a reference to a private certifier.'* 17(3)- Need a further Defence in line with concerns as noted in section 1 and 14. *Recommend that a further defence is inserted which contemplates where the homeowner is responsible for completing a portion of the works which are not under the building contractor's contract of works.*
18. Copy of consumer building guide	No comment
Part 3: Warranties	No comments
19. Implied warranties	
20. Suitability of materials	20(5) - The drafting of (b) is overly complicated, and the burden of proof would be significantly complex. The section is of great importance as homeowner often nominates the use of materials, or purchases materials for the building contractor to use without consultation with the building contractor. This can have potential ramifications for the building contractor under the statutory warranty obligations, hence the ability to establish that the use of the materials was without influence of the contractor, should not have numerous impediments attached to the burden of proof. If an owner wishes to exercise their contractual right to choose materials, the risk should simply be bared by the home owner. Ordinary common law principles of duty of care should apply to the building contractor if they are reasonably aware that such products are non-compliant. Otherwise these are not matters requiring additional regulation. *It is recommended the wording under subsection b is deleted.*

21. Compliance with legal requirements	No comment.
22. Standard of work and exercise of care and skill	This section fails to recognise scenarios whereby the building owner nominates the use of their own contractors, similar to section 20 for the suitability of materials. This is a scenario which often occurs whereby a building owner nominates their own tradesperson and excludes a portion of the works from the subject work. *It is recommended that the current wording as reflected in section 20 is replicated as suggested above, however to reflect where works are carried out by someone other than the responsible person.*
23. Adherence to plans and specifications	*As per comments relating to section 15, it is recommended that plans and specifications are defined in section 1.*
24. Suitability of premises for occupation	The word premises is not utilised anywhere within the Act. *Recommend for consistency the section is changed to 'Suitability for occupation'* 'Suitable for Occupation' is not defined. Furthermore this section fails to recognise where a homeowner is responsible for a portion of the works under contract, which prevents the building contractor from obtaining certificates of inspection. *Recommend this section has the following subsections inserted:* *24(3) Suitability for occupation is where the subject work is suitable for habitation other than for minor defects and omissions.* *24(4) Suitability for occupation is not prevented where the building owner is responsible for works which do not form part of the building contractors subject work.*
25. Carrying out work with reasonable diligence	No comment.
26. Calculation of provisional sum and prime cost items	No comment.
27. Warranties run with building	27 (3) - The intent of the meaning of an 'associated person' is very ambiguous. It is thought that this meaning is intended to extend to 'subsequent owners'. *Recommend clarity by rewording to reflect intended position of extending meaning to subsequent owners.*

28. Protection of rights given by warranties	This section voids the parties' rights and ability to come to a legal settlement in a building dispute. This gives owners a right to legal settlement and further right to enforce a statutory warranty at a later date, which we have seen on multiple occasions. *Recommend this provision is deleted.*
29. Proceedings for breach of warranties	29(1) - Proceedings under this provision are not defined. It is very unclear who the proceedings are to be commenced by, the Commission and/or the building owner, and how will this interact with the Commission rectification of building work policy? *Recommend this section needs clarity as to the intent of proceedings.* 29 (2) & 29 (3) – These sections effectively enable a building owner two and a half years for a claim of non-structural defects, and six and a half years in total for structural defects. These periods are extensively longer than the provided for term under the current Warranty Scheme, effectively quadrupled for the purposes of non-structural defects. Considering the scope of issues which may be 'minor defects', a two year defects period is not only excessive but also makes it difficult to distinguish between true defects, fair wear and tear, and homeowner maintenance issues. The Bill also provides the consumer a further six months to notify minor or major defective work beyond the warranty period. This is at odds with how warranties work for most consumer products where defects have to be notified within the warranty period. This provision places a significant onus on the building contractor, which will certainly drive up contract prices for home owners, in turn effecting housing affordability. Furthermore the substantial extension of the warranty period further pressures on the Commissions functions, in turn placing a greater financial burden on industry through the Commissions insurance, compliance, and dispute resolution functions. Furthermore this provision will inevitably lead to disputes around when the breach 'becomes apparent' to the consumer'. All other consumer warranties require notification during the warranty period as stipulated in section 29(1). *It is HIAs position that a warranty period of one year for minor defects is sufficient. Access to the warranty should be restricted to where the notification as to the defect was within the warranty*

	period. 29 (6) HIA supports the provision of this defence. HIA notes that this mirrors similar amendments recently made by NSW Parliament to the *Home Building Act (NSW) 1989*. Erroneously however this Bill fails to include the additional defence available under section 18BA of that legislation, in particular a duty to provide reasonable access to the building contractor to rectify an alleged defect. Section 18BA imposes certain duties on persons who have the benefit of statutory warranty, including: - a duty on the person to mitigate their loss arising from a breach of the warranties (which extends to a person entitled to the same rights as those a party to the contract has in respect of the statutory warranties); - requiring the person to make reasonable efforts to notify a person against whom the warranty can be enforced within 6 months of a defect becoming apparent; - a person must not unreasonably refuse the person who is in breach of the statutory warranty such access to the site as that person reasonably requires to rectify the work; and - a failure to comply with a duty may be taken into account by the Court or Tribunal in subsequent proceedings or, in the case of refused access, must be taken into account This defence importantly balances the rights of building owners/ consumers and their advocates within the Commission, and may reduce the Insurance fund's exposure to unreasonable and vexatious claims. *HIA recommends the inclusion in the Bill of a defence mirroring Section 18BA of the Home Building Act (NSW).*
Part 4: Restrictions relating to contracts 30. Contracted services must not start before regulated contract complies with requirements	No comment.
31. Foundations data	This section obliges the building contractor to obtain all foundations data prior to entering into the

	contract. Should the building contractor fail to comply with this section it is recognised that this section presents the risk of penalty units, as well as limits the building contractor's right of recovery for additional works that would have been foreseeable had they had that data prior to entering into the contract. This provision fails to reflect contemporary building practice and unreasonably dampens commercial activity in the off-the-plan market, where a home owner/client has entered into a contract to purchase land but subdivision has not been finalised and issue of title is yet to occur. In such circumstances, where exact surveying and site boundaries are yet to be established it impractical to obtain the necessary soil and engineering reports to collect data to prepare a report for the individual site. The building owner is benefited by the early entering into the contract by securing the current market prices at the time of entering into the contract. Furthermore the building owner is protected by the provisions which prevent the building contractor from claiming any additional cost increases had they not relied upon the data. Moreover the conditions of the Commission's Subsidence Policy ensure that building contractors get foundation data prior to the commencement of construction. *It is recommended that the section removes penalties attached to the entering into of the contract in contravention of the section, and subsections (3) to (6) are removed.*
32. Arbitration clauses	The outright banning of arbitration clauses for all domestic building contracts is unreasonably restrictive, particularly the only solution of dispute resolution is a bureaucratised process driven by the Commission or failing that lengthy proceedings in QCAT. *In HIA's submissions parties should still be allowed to utilise contractual ADR mechanism such as expert determination or referral, conciliation and mediation in substitution to corralling all disputes through the Commission or formal Court processes.*
33. Deposits	No comment.
34. Progress payments for regulated contracts	34(2) - It is HIA's understanding that the policy intention is to adopt similar provisions to that which apply in NSW under the *Home Building Act 1989*. However the drafting of this subsection suggests that the Regulations will prescribe progress payment schedules, or provide circumstances whereby progress payment percentages will be prescribed. The detail surrounding this is imperative to industry, and can have consequential outcomes should the detail not be consulted upon. Any rules

	regarding progress payment claims need to be included in the text of the substantive legislation. *It is recommended that this subsection is removed.* *It is further recommended the stage definitions and/or percentages obtain further clarity to reflect contemporary building practice. Such clarity should be provided by way of explanatory notes (not Regulation), and/or 'building newsflashes similar to those of BCQ, which have regard to contemporary and most up to date industry practice. Such notes can be published on the QBCC website, with specific guides relating to categories of work (e.g. - alterations, additions and renovation guide, and kitchen and bathroom guide).* *The provision of such explanatory notes will enable the parties (including financiers) to have greater understanding in the claiming of and payment of progress claims, lessening the risk of disputation, and red tape burden. Furthermore such explanatory notes will quickly become the industry norm, with a likelihood of fewer issues as currently experienced with progress claim schedules.*
Part 5: Cooling-off period and withdrawing from regulated contracts 35. Right of building owner to withdraw from contract in cooling-off period	35(2)- This subsection provides the building owner the right to withdraw from the contract at any point in time pre or during the contract works. This is an open ended ability to withdraw from the contract, without any detail as to what remedies are available in the event the withdrawal is initiated. In HIA's submissions the building owner needs to demonstrate some detriment that is not able to be compensated in order to withdraw from a building contract under which work has already commenced. The penalty and demerit points as provided in Schedule 1B (18) for the contractor are more than a sufficient deterrent. *Recommend removal of this subsection.*
36. Restrictions affecting rights of withdrawal in cooling-off period	36(3)- Whilst this clause limits the rights of the building owner to withdraw in the cooling off period, it is recommended that this provision be removed. The receipt of 'formal legal advice' is ambiguously drafted and leaves the contracting parties opportunity for dispute in the early stages of the contracting arrangement. Moreover these provisions appear to be contra to recent simplification and improvements made to the *Property Agents and Motor Dealers Act 2000* closing a technical loophole for buyers to exit contracts when there has been trivial non-compliance with the disclosure and warning statement regime. Furthermore the building contractor faces penalty units for failure to provide the consumer building guide under section 18 of the Act, which in turn encourages compliance for provision of the document. *Recommend this subsection is replaced with a provision enabling the parties to be able to agree to waive the cooling off period where they agree to in writing.*

37. Withdrawal procedure	No comments.
38. Rights and obligations of parties following withdrawal in cooling-off period	
39. Waiving right of withdrawal	39(1)- 'Repair Contract' not defined. It should be the building owners right to waive the cooling off period despite the type of contract in place, should be able to waive under all contracts. *Recommend removal of the words 'under a repair contract'.*
Part 6: Variations of contract 40. Variations must be in writing	40(2)- *Recommend the 'written form' definition be redefined to include electronic communications such as emails as per HIA's recommendation in Section 1.* 40(3)(c)- *Recommend the drafting simplified by removal of 'on the building owner by the building contractor'.* 40(5)- *Recommend the term 'writing' is replaced with 'written form' for consistency.*
41. General contents of document evidencing a variation	No comments.
42. Extension of time	HIA disagrees that the contractual provision regarding extensions of time needs additional regulations. Further this provision as drafted is administratively cumbersome, and is unfair to building contractors. 42(1) (c) - This subsection limits the building contractor's right to claim an extension of time to be within 10 business days of the building contractor becoming aware of the delay. Such a timeframe is unreasonable and fails to consider that whilst a building contractor may become 'aware' of a delay, the full 'cause and extent of the delay' may not be fully realised for a significant period of time after the passing of the ten business days. This is especially in the case where the delay affects the scheduling of multiple trades. For example following heavy rainfall, whilst the building contractor may be aware of the need to claim a delay on the first day of rain, the rain may be experienced for several days, and the site may need a couple of further days to dry prior to recommencement of the works. In this scenario the full

	cause and extent of the delay could well surpass the ten business days allowed, and limits the building contractors rights to claim for delay that is only known on the 'tenth' business day. *It is recommended that subsection 1(c) is varied by removing 'of the delay' and inserting 'of the cause and extent of the delay'.* 42(1)(d)- Under this subsection, where an extension of time is provided, the extension of time is deemed disputed until such time an owner provides a positive affirmation to the extension of time. Again this is flawed. An extension of time is a contractual mechanism to extend the building period where either the owner has done something or unforeseen circumstances have arisen which are outside the control of the building contractor. Under current contract provisions, the building contractor must give notice and the building owner is provided the right to dispute the notice. There is no inherent unfairness in this process. Under the proposed provision if the building owner does not respond to an extension of time application within 5 days then the application is deemed to be disputed. This provision purports to defy the common law doctrine of acceptance. Acceptance is an unequivocal statement (oral, written or by conduct) by the offeree agreeing to the offer. Generally no particular form is required for acceptance. The test has been stated as follows: 'whether a reasonable bystander would regard the conduct of the offeree, including his silence, as signalling to the offeror that his offer has been accepted' (*Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd* (1988) 14 NSWLR 527). The building owner's failure to respond/sign the claim would in essence suggest the claim is disputed. This is unfair to the building contractor. The building owner is the only party who knows why the extension of time claim is to be rejected. Furthermore it is in their interests not to sign the extension of time notice, as contractual remedies provide for liquidated damages. If an owner is to reject an EOT claim they must positively do so and provide reasons why. *It is recommended that this subsection is removed.* 3- This subsection introduces an obligation on the building contractor to provide the homeowner a copy of the extension of time document despite them already having signed the document, and having the opportunity make their own copy of the document. This provision is a further red tape burden to industry, and presents a substantial risk through the risk of penalty units by failure to provide a copy of the document. This is a harsh and unnecessary consequence.

	It is recommended this subsection is removed. 4- This subsection provides circumstances whereby the Regulation may prescribe when a series of delays may be taken to be a single day for the purpose of this section. This provision is open ended and purportedly limits the rights of the parties to claim an extension of time without having regard for the contracting circumstances. Such detail should be within the substantive text of the legislation to enable detailed comment. *It is recommended this subsection is removed.*
Part 7: Building sites 43. Building contractor does not acquire interest in land of resident owner	Whilst it replicates existing provisions in the current Act, HIA opposes this provision in the Bill. In HIA's submission, building contractors should be entitled to secure and protect their contractual interest and rights just like any other commercial party. To the extent Parliament wish to circumscribe that right, HIA notes that in NSW charging clauses in home building contracts are only enforceable to the extent a Court or Tribunal has made an order or judgment that payment be made.
Part 8: Other matters relating to contracts 44. Effect of failure by building contractor to comply with requirement	No comments
Part 9: Miscellaneous 45. Relationship with other Acts	No comments.
46. Consumer building guide	There should be a right for an alternative Consumer Building Guide to be used where approved by the Commission. Similar to the Contract Information Statement as under the current Act, this will ensure that the Guide provides details and uses terms which are not dissimilar to the contract used by the parties. *Recommend the insertion of a further subsection enabling the Commission to approve alternate Consumer Building Guides.*