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STANDING COMMITTEE ON PLANNING, TRANSPORT, AND CITY SERVICES
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Submission Cover Sheet

Inquiry into Property Developers Bill 2023

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HIA Submission

Inquiry into the *Property Developers Bill 2023* (ACT)

Standing Committee on Planning, Transport and City Services

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Introduction

The Housing Industry Association (HIA) welcomes the opportunity to contribute to the ACT Legislative Assembly Standing Committee on Planning, Transport and City Services inquiry into the *Property Developers Bill 2023* (the Bill).

The Bill proposes to establish a licensing scheme for those engaging in residential development activity, and a regulatory scheme to hold property developers accountable for building work they are involved in.

The Paper follows the comprehensive submission HIA made in March 2023 (HIA's 2023 Submission) to the Environment, Planning and Sustainable Development Directorate (EPSDD) in response to the public consultation on options to regulate developers in the ACT.

HIA's 2023 Submission remains relevant and will be referred to throughout this submission.

HIA has always argued that while developers should be held accountable for their actions, a careful balance needs to be struck between securing this outcome in a practical way and further regulation which simply imposes additional red tape and cost on the industry that is ultimately borne by the homeowner.

Mirroring previous consultation, HIA remains concerned with a number of aspects of the Bill.

Key concerns

Licensing of Property Developers

The Bill proposes to introduce a mandatory licensing scheme for residential property developers.

The activities which require a licence are broad, including those applying for development approval, building approval, building commencement notice or certificate of occupancy, and those who sell, or advertise the sale, of residential property off-the-plan.

HIA has significant concerns that residential builders who are already subject to the licensing scheme will be captured under this wide definition as well as trade contractors such as carpenters and bricklayers who currently do not require a licence in the ACT.

Licence Application Process

HIA has two key concerns in relation to the license application process:

- The proposal to use a ratings report to support an application.
- Extensive disclosure requirements.

Rating report
As previously highlighted in HIA's 2023 Submission, HIA maintains its opposition to the use a 'ratings tool'. Not only is its effectiveness questionable, other concerns including high costs associated with participation, a lack of clarity on how a star rating is improved, as well as posing an unjustifiable barrier for new market entrants dictate that the proposal should be revised.

Disclosure requirements
Section 13 of the Bill requires applicants to furnish extensive information to demonstrate their suitability for a licence. HIA argues that the level of scrutiny, potentially even surpassing that imposed by financiers, are burdensome. Notably, decisions made under this process are non-reviewable by ACT Administrative Appeals Tribunal (ACAT), and the extended scrutiny to include the applicant's associates and personal details further adds to HIA's reservations.

Statutory Chain of Responsibility

Compliance and enforcement powers to apply to all 'property developers'
The Bill proposes to introduce powers to issue rectification orders, stop work orders, and undertakings to any entity undertaking residential development activity and all 'property developers', regardless of whether they are licensed or not.

HIA is concerned that based on the current definition of 'property developer' most operating in the residential building industry will be captured by these proposed powers.

Definition of 'Property Developer'
The proposed definition is problematically expansive, encompassing any entity involved in the construction or organisation of residential building work. This broad definition introduces the potential for multiple parties to be classified as property developers for a single project, creating an intricate network of liabilities.

Although regulations may have provisions to exclude certain individuals from the 'property developer' definition, it is crucial to delve deeper into this aspect to prevent unintended consequences (notwithstanding the complexity with defining a 'property developer').

Of note, HIA expresses concern that 'property developer' is also defined as 'principal builder in the building work', subjecting builders to the compliance and enforcement powers proposed to apply to 'property developers' and also per above, the licensing requirements.

10-year retrospective
Under the Bill, rectification orders can be issued retrospectively for buildings constructed up to 10 years before the enactment of the new law. HIA consider that it is an inappropriate response that, this will not only duplicate a number of existing safety nets, but operates at odds with long standing principles regarding the ability of parties to factor in (and appropriately cost) known risk to contractual arrangements.

Reverse Onus of Proof (proposed under the *Building Act 2004*)

HIA strongly opposes the proposal to create a presumption that any defect identified by the affected party, within the first 2 years post building completion, are automatically the builder or developer's liability unless proven otherwise. This is simply unfair and unjust and at odds with notions of procedural fairness.

HIA also opposes the proposal that may allow affected parties to claim damages from both the builder and property developer for reasonably foreseeable loss or damage resulting from a defect.

Personal liability of a director

HIA opposes the Bill's proposal to provide power to hold directors (property developers) personally liable for rectification orders imposed on distressed corporations, and holding them accountable even if they were not in the office when the building was constructed.

Notwithstanding the existing law that building directors can be personally held responsible for building defects and could potentially incur financial penalties, the fact that the definition of 'property developer' remains broad brings in the question on whether there will be duplication of laws capturing builders. If this proposal is to be progressed, clarity is required regarding how personal liability will be triggered respectively for builders and 'property developer'.

Reliance on Regulations

A final concern is that several contentious proposals are open to further revision or amendment via unknown regulations. While further consultation will follow to develop the relevant regulations and Code of Practice, HIA anticipates that more work, certainty, and clarity will be required to ensure that the law serves to achieve the intended outcomes.

HIA elaborates on these matters below.

Licensing of Property Developers – Broad Application

Under the Bill activities which require a licence are broad.

The proposed Bill introduces threshold requirements mandating a licence for developers of residential properties, with the provision for regulatory expansion in the future outlined in Section 11 of the Bill.

It would appear that residential builders who are already subject to a licensing scheme will be captured under this wide definition. The triggers under Sections 11(a) and (b) of the Bill are akin to the type of activities that builders would typically undertake. Hence, the lack of clarity regarding the application of the Bill is concerning, and there is ambiguity regarding whether existing license holders will be required to apply for a licence under the proposed Bill. There is a need for greater clarity and consolidation of licensing requirements to facilitate understanding and compliance.

Overall, the Bill proposes a regulatory shift by tying the requirement for a residential property development licence to specific trigger events within existing laws. This seems very strange and will mean understanding the requirement for a licence will be hard to determine.

An exemption for licensed builders

As previously highlighted in HIA's 2023 Submission, HIA continues to seek a blanket exemption for licensed residential builders from being defined as developers, especially for the purposes of licensing.

Builders are currently recognised to have the relevant licence and qualifications as outlined in the *Construction Occupations (Licensing) Act 2004* (COLA). This means licensed residential builders are already able to be held accountable for their behaviour, practices, and their role in the building industry generally via an extensive existing licensing regulatory regime that covers all aspects of financial, ethical and workplace / product safety accountabilities.

The COLA outlines licensing requirements for construction practitioners, covering occupations like builder, building assessor, drainer, electrician, gasfitter, and plumber. Individuals, corporations, or partnerships can apply for licences, with appointing a licensed individual as a nominee for supervision. Applicants must demonstrate fitness, ability, and capacity for the authorised work, obtaining necessary certificates and experience. Licence classes determine specific requirements. Licences are granted with conditions outlined in the COLA, and additional conditions may be imposed by the construction occupations registrar.

Additionally all residential building projects of three stories and below, must be covered by home warranty insurance. The builder is required to obtain this insurance. In light of the current regulatory arrangements, requiring a licensed builder to apply for a developer licence is redundant, as the current arrangements provide sufficient and adequate consumer protection.

Excluding builders from the definition of 'property developer' and for the purpose of licensing not only aligns with the existing comprehensive licensing framework for builders but also mitigates potential confusion and unnecessary administrative burdens. By recognising the unique qualifications and licensing mechanisms already in place for builders, we can enhance regulatory efficiency, ensuring that the licensing system remains clear, effective, and supportive of the construction industry.

Rigorous criteria for developer licence application

The criteria for licensing application set out in Sections 13 and 14 of the Bill is of concern.

Section 15(2) of the Bill requires that applications include two key elements which are:

1. A Rating Report (If requested by the Registrar)
2. Information evidencing the applicant is a suitable person.

Rating report

Under section 14 of the Bill, a rating report is defined as an assessment crafted by a 'rating entity,' delving into the operational and financial capabilities of an applicant aspiring to be a developer. While the Bill lacks specific details, our understanding, based on past discussions, suggests a likely reference to the iCIRT 'star rating' system.

As substantially highlighted in HIA's 2023 Submission, HIA maintains its opposition to the introduction of a developer ranking system similar to that implemented in NSW, citing several key concerns/issues (in addition to high level concern over additional regulatory burden) such as:

- **Poor participation rates**: Currently in NSW, very low participation in the voluntary scheme render the system essentially valueless, even allowing for the infancy of the scheme.
- **High expense of participation**: Anecdotal evidence suggests that achieving a rating under the 'government funded' iCIRT system is costing participating developers tens of thousands of dollars, with one estimate sitting at $40,000.
- **Lack of transparency regarding the matters to be taken into account in determining the rating**: HIA questions who the arbiter would be of what is 'important' to a consumer when making a decision, which matters are 'worthy' of including when determining a rating, and how much weight would/should be attributed to certain factors.

- **A lack of clarity regarding how a star rating is improved**: Adding to the above, iCIRT currently provides very little (if any at all) publicly available information that gives detailed information about how to positively influence a rating. Large developers may have the combination of manpower, administrative expertise and financial resources to adapt and order new reports, but this is simply not a viable option for many smaller-scale developers.
- **Discouragement of new entrants to the market**: How is a developer rated on its work when it hasn't done any (or much) work early in the business development timeline?
- **Over-centralisation and restricting competition**: Instead of being encouraged to undertake a nuanced comparison of developers, many consumers will simply select one of the 'highest rated' developers. The rating would then inevitably lose its value once those with a 'low' star rating are eliminated from the market.
- **Concern over bias of ratings**: Developers report that the NSW rating system is based on a structure and criteria that favours some developer business structures over others. Additionally, whilst it is true that Equifax is 'independent' from any Australian Government agencies, it cannot be said that any private company is free from structural predispositions and entrenched interests.
- **Cost burden**: Who would pay for and maintain any state-based ranking system, and at what cost/benefit? HIA assumes that the costs of the system to Government would be passed on somehow (presumably licensing fees). In turn, consumers will then bear these costs.
- **Monopoly**: Has consideration been given to the inherent issues with a single entity (Equifax) effectively operating a monopoly over a mandatory (or even Government endorsed) ratings tool?

Information evidencing the applicant is a suitable person

Section 13 of the Bill outlines criteria for the Registrar to assess an applicant's suitability to hold the licence, based on character, compliance history, and financial capacity, etc.

The preparation of such detailed information will likely require significant time and resources from the applicants. This burden could be particularly challenging for smaller developers who may not have the same capacity as larger entities.

In addition, the level of scrutiny, especially regarding credit history, financial viability and past examples of a development, can be invasive of privacy. HIA would question the ability of such process to adequately balance the issues surrounding confidentiality, privacy and the commercial value/desirability of such data.

Moreover, the consideration of matters related to entities associated with the applicant or key persons, while intended to ensure a comprehensive assessment, has the potential to create extensive scrutiny into various aspects of the applicant's business and personnel. This could be perceived as overly intrusive, and care should be taken to balance the need for information with the protection of privacy.

The inability to have a licence refusal, renewal refusal, or licence condition imposition reviewed by the ACAT may be perceived as overly harsh. This lack of external review could potentially impact the livelihood of applicants significantly. A fair and transparent appeal process is important for maintaining trust in the legal and regulatory system. This warrants further consideration with respect to human rights obligations in the ACT.

10-year retrospective period for rectification orders

It is proposed that rectification orders apply retrospectively, impacting both new and older buildings, creating complex considerations and unexpected liability concerns for developers.

HIA outlines its concerns below:

- **Extensive liability:** This principle effectively exposes developers for projects completed a decade earlier, finding themselves accountable for defects emerging several years post-completion, surpassing customary warranty periods and typical limitation durations.
- **No recourse for developers**: In instances where a significant defect manifests post-warranty expiration, developers face potential exposure without recourse against those responsible for the defect. This circumstance might be perceived as unjust, especially if developers have adhered to industry standards and fulfilled contractual obligations.
- **Intricate liability**: Given the possibility of multiple parties being considered property developers for each project, the liability landscape becomes intricate. Joint and several liability along with the builder, means developers could be collectively and individually held responsible, potentially leading to disputes and legal battles over culpability allocation.
- **Unclear dispute resolution path**: The Bill lacks explicit clarification on whether parties retain their other legal rights against each other (e.g. under construction contracts or development agreements) during the rectification process. This absence of clarity introduces uncertainty and could complicate dispute resolution among development stakeholders.
- **Financial impact**: The retrospective nature of rectification orders introduces financial risks for developers, particularly if held responsible for defects in older projects. The potential for numerous claims and uncertainty regarding liability could impact financial stability, especially if rectification costs are substantial.

The observation that parties with greater financial resources may be the primary liability targets raises fairness concerns and questions the equitable distribution of responsibilities. This underscores the necessity for a nuanced approach to liability allocation based on actual contributions to defects.

The legislation needs to offer clearer guidance on the retrospective application of rectification orders and the allocation of liability among multiple parties/property developers.

While the Bill aims to enforce developer accountability for defects, maintaining a balance that does not unduly undermine investor confidence or discourage participation in property development is essential.

Extension of Statutory Warranty to developers

As highlighted in HIA's 2023 Submission, in principle, HIA does not oppose developers being subject to statutory warranties (in a manner that is comparable to NSW).

From previous consultation, HIA also understands that there is a future plan by the ACT Government to review statutory warranties as part of its future building reform program. HIA is willing to participate further in this work.

In any event, HIA is of the view that any potential extension of statutory warranties which involves the proposed definition of 'developer' from the Paper would still require revision/narrowing in scope to achieve its intended purpose.

Reverse Onus of Proof (proposed under the BA)

Section 89F(3)

HIA opposes the proposed reverse onus of proof.

The presumption has the potential to significantly impact the dynamics of defect claims in the construction industry. HIA elaborates below:

- **Distinguishing genuine and vexatious claims:** The proposal significantly empowers affected parties, particularly residents, as it assumes the existence of a defect if identified within the initial 2 years after building completion. This gives residents substantial leverage in their defect rectification claims, but it also raises concerns about the potential for vexatious claims.
- **Upsurge of claims:** Assigning the burden of proof to builders and developers to demonstrate the absence of a defect challenges the conventional legal principle of innocent until proven guilty. This departure from standard legal norms may be perceived as a significant shift. The presumption may incentivise affected parties to assert potential defects within the first 2 years strategically, aware that the burden of proof rests on the builder or developer. This could lead to an increase in defect claims during this initial period, and builders and developers may encounter practical challenges in disproving the existence of defects, particularly if the presumption is broadly applied. This, in turn, may result in heightened litigation and disputes over what qualifies as a valid defect.
- **Reasonable exceptions:** It is crucial to consider scenarios where a defect might genuinely be an oversight rather than a result of negligence or poor workmanship. The legislation should allow for reasonable exceptions and establish a fair process for builders and developers to present evidence. While safeguarding the empowerment of affected parties is vital for consumer protection, the legislation must strike a balance with fairness and due process.
- **Impact on delays and costs:** Furthermore, the potential rise in defect claims during the initial 2-year period may also strain the resources of builders and developers. Dealing with an increased volume of claims could divert their attention and resources away from ongoing projects and overall business operations. This may, in turn, impact project timelines and potentially result in delays and added costs.

Whilst HIA's reservations are clear, in the event that this proposal is to be progressed, considerations should be given to:

- **Narrow the scope of the defects:** adding qualifiers or limitations to the presumption, such as requiring that the identified defect must be substantial or meet specific criteria to trigger the presumption (i.e. all defects or only serious/major defects). This can prevent strategic use of the presumption and focus on genuine issues.
- **Periodic inspections and reporting**: Encourage periodic inspections and reporting by the owner during the first 2 years post-building completion. Homeowners would benefit from education relating to the nature of construction projects and distinguish between genuine defects and minor issues.

Section 89F(4) - additional remedy introduces for owners to claim for damages

The expansive nature of this proposal, enabling affected parties to seek damages from builders and property developers for any reasonably foreseeable loss or damage arising from a defect introduces a significant shift in liability. Its practical implications will depend on how legal interpretations unfold, how parties negotiate responsibility, and the adjustments made in contractual arrangements and risk management strategies within the construction industry.

This proposal also introduces the prospect of joint liability, prompting strategic manoeuvring by claimants to involve both entities. However, the potential lack of clarity regarding whether this proposal is constrained to claims made within 2 years post-building completion, akin to the reverse onus of proof provision, introduces uncertainty. Disputes over the interpretation of this aspect may arise, with a conservative interpretation suggesting a 6-year limit under the statute of limitations.

Given that both builders and property developers can be implicated in claims for damages, the determination of each party's responsibility for defects and resulting damages becomes a pivotal consideration.

Personal liability of a director

The Bill proposes to provide power to hold directors (property developers) personally liable for rectification orders imposed on distressed corporations. Furthermore, directors can still be held accountable even if they were not in the office when the building was constructed.

HIA opposes this proposal. Granting the Registrar the authority to pierce the corporate veil, particularly concerning residential building defects, represents a significant departure from the established principle of a corporation as a distinct legal entity. This conferred power raises crucial questions regarding its overarching implications for corporate governance, potentially acting as a deterrent for individuals considering directorial roles.

The potential retroactive liability for directors, even those not in office during the completion of residential building work, introduces an added layer of intricacy and risk. Directors could be held accountable for defects that occurred under previous leadership, potentially dissuading individuals from assuming or maintaining board positions within property development, especially in the residential sector.

In addition, the pursuit of personal liability from directors does not ensure meaningful recovery, particularly if both the developer company and its directors lack assets. The strategic reality of potential director bankruptcy further complicates the landscape of recoveries. The heightened risk of personal liability for directors may lead to more cautious investment decisions in residential developments within the ACT.

Provisions under the Corporations Act 2001 (Cth) (CA)
HIA contends that the existing provisions within the CA comprehensively outline the general duties, liabilities, and responsibilities of directors and company officeholders. Chapter 2D of the CA establishes a robust framework that mandates directors to exercise powers diligently, act in the company's best interests, and avoid conflicts of interest. HIA opposes imposing additional stringent provisions on directors, asserting that the current regulatory framework is sufficiently robust.

The CA already places significant obligations on directors, encompassing care, good faith, and conflict avoidance. Breaching these duties entails consequences such as civil penalties, financial sanctions, compensation orders, and disqualification. The Australian Securities and Investments Commission (ASIC) is entrusted with enforcing these provisions, with Section 184 establishing criminal offences for intentional or reckless misconduct.

Given the comprehensive coverage of liabilities, responsibilities, and accountability within the CA, HIA argues against imposing additional burdens on directors. The existing regulatory framework, enforced by ASIC, provides an effective and sufficient mechanism for ensuring directors adhere to their duties. Introducing new and stringent provisions would be redundant, potentially hindering the business environment without necessarily commensurate benefits.

Current personal liability on directors (builders)

Under section 126B of the COLA, director of companies can be made personally liable for building defects and could potentially incur financial penalties.

This means that if a company is convicted of an offence under the COLA and a penalty is imposed on the company (and is unpaid), liability will then be passed to each individual who was a director of the company at the time when the offence was committed, and the penalty was imposed.

The offences under COLA are comprehensive and include actions such as pretending to be licensed, advertising without adequate details, allowing unlicensed individuals to provide construction services, and general breaches of licence conditions or building codes. It is crucial to underscore the gravity of these offences and the potential consequences for both the company and its directors.

Offences under the COLA include:

- Pretending to be licensed or not carrying the proper licence.
- Advertising without details.
- Allowing unlicensed people to provide construction service.
- General breach of a licence condition or building code.

Other provisions under COLA affecting directors include:

- Section 58AA, enabling ACAT to make occupation discipline orders against director of company
- Section 35(3), enabling the registrar to make rectification orders against directors.

The broad definition of 'property developer' will mean the Bill will be imposed on the practitioners that are already subject to a comprehensive legislative framework.

Considering these potential challenges, it would be prudent for the legislation to incorporate safeguards and clarity on the circumstances under which the corporate veil may be pierced. For example, clearly defining the criteria under which directors can be held personally liable, such as specifying situations where the actions or decisions of directors directly contributed to the defects or where they knowingly neglected their responsibilities.

Enforcement Powers

HIA opposes proposals that would see extensive powers conferred upon authorised persons for entering premises without consent.

The Bill grants authorised persons the authority to enter premises without consent for compliance monitoring or investigating offences, excluding residential addresses, where a warrant is mandatory under Section 77(1)(c) of the Bill. It is unclear whether 'residential addresses' includes residential construction sites. If this is not the case, then HIA can only ascertain that residential building sites may be entered without consent. This is arbitrary and at a minimum a notice of entry should be given in advance.

HIA urges a careful reconsideration of the powers of entry outlined in the Bill. It is HIA's view that:

- Warrants or consent warrants be made mandatory for authorised persons entering premises, even with the occupier's consent, irrespective of residential status.
- Authorised persons should enter at reasonable times and issue written notices to occupiers. This approach allows occupants sufficient time to respond to the notice or warrant and be present during inspections, ensuring a smoother process.

Privilege against self-incrimination does not apply

HIA opposes proposed Section 74 of the Bill, asserting the critical need for limitations on the information gathered and used to prevent unwarranted fishing expeditions. HIA further argues that such proposal underscores the potential risks associated with granting the registrar expansive powers to access personal information for the purpose of assessing complaints.

Moreover, HIA emphasises the necessity for a comprehensive and well-defined framework that ensures a delicate balance between the investigative authority granted to the registrar and the protection of individuals' personal privacy. HIA calls for explicit guidelines and safeguards to be incorporated into the legislation to prevent any overreach or misuse of these powers.

Transparent and accountable processes are needed in relation to the exercising of these powers, urging lawmakers to establish robust mechanisms for oversight and regular review. Upholding the principles of fairness and due process in addressing complaints is critical as is avoiding any unintended infringements on individuals' privacy rights.

Latent Defects insurance (LDI)

The need for a competitive and sustainable insurance market

HIA has always argued that while there may be value in exploring options regarding the application of insurance to the multi-storey high-rise sector, a key element of any proposal must be that there is a competitive and sustainable insurance market. Whether the insurance industry will be able to develop or offer suitable insurance products at a viable price is critical to any future moves regarding LDI.

While limited information has been provided up to date on LDI, HIA can only ascertain that such model is 'inspired' by the Decennial Liability Insurance (DLI) cover recently introduced in NSW. It is important to note that the implementation of DLI is still at an early stage and hence, more time should be allowed to determine the viability of DLI, before such time that such model is to be mirrored in the ACT.

As the case in NSW, HIA is uncertain whether the NSW market for buildings over three storeys is attractive enough, particularly in light of the model proposed, to entice any insurer to enter the market, let alone a competitive and sustainable insurer.

HIA's submissions on DLI in NSW

Since 2022, HIA has been involved in DLI consultations in NSW and made numerous submissions, including the comprehensive feedback in September 2023. HIA welcomes the EPSDD to have a review of HIA's Submission which is accessible here.

While the intention behind the insurance is an assurance of security for the buyers, HIA maintains its opposition due to the lack of competitive and sustainable insurance market. The reluctance of mainstream insurers to offer this type of insurance indicated the perceived risks and challenges in assessing and managing claims related to building defects. Further, while this provides assurance to buyers, the cost of the insurance is likely passed on to them through the unit price. Arguably, the passing of the Bill in its current form may lead to an increase in legal actions related to defect claims.

Building Manual

HIA seeks further clarification on the proposed manual and its potential impact on the resolution of defects, especially those matters already routinely addressed by contractual defect liability periods and statutory warranties. HIA is particularly concerned about the practical implications and added complexities that might arise from the introduction of this manual.

It is difficult to see what, if any, impact such a manual could have on the resolution of defects, outside of matters that a certifier must already thoroughly examine and be satisfied with before deciding to issue an occupation certificate. This redundancy raises questions about the necessity and effectiveness of such an additional layer of documentation in the construction process. The building manual will likely be little more than an additional expense for the builder (and, in turn, the owner).

Furthermore, HIA acknowledges the common industry practice wherein the buyer assumes the responsibility of obtaining a certificate of occupancy in most building contracts. This practice, while commonplace, introduces an additional burden on the buyer, both in terms of effort and potential expenses. HIA argues that the proposed manual, if not carefully implemented, may inadvertently exacerbate these challenges, making the process more cumbersome for the buyer.

Different building types and scales may have different information needs, so establishing a detailed prescriptive list may be difficult. It would be beneficial to start only with the most obvious and critical items, and review the effectiveness of the building manual in a few years post implementation.

Disclosure Statement

HIA recognises the complexities within the development industry and acknowledges the need for measures that enhance transparency and consumer understanding. As highlighted in HIA's 2023 submission, while HIA is not inherently opposed to the exploration of statutory disclosure requirements for developers, concerns arise regarding the types of information proposed for disclosure. Details such as 'funding sources' and 'names of responsible individual directors or controlling shareholders' may be of limited value to the average consumer. These are matters that would be far more relevant to a sophisticated construction business that is performing due diligence, prior to entering into a contract with a developer - not an individual consumer.

HIA emphasises the importance of tailoring disclosure requirements to the diverse needs of stakeholders, suggesting a tiered approach that provides comprehensive information for industry professionals while offering a simplified version for individual consumers.

HIA expresses reservations about the inclusion of previous regulatory actions within a mandatory disclosure scheme. While understanding the value of informing consumers, HIA raises concerns about potential unintended consequences. HIA notes that regulatory actions should not serve as a 'death knell' for a company, as this could discourage consumers from engaging with developers who disclose prior infractions.

Transition Period

HIA understands that a transition period will be implemented before the licences will be required.

A reasonable timeframe must be considered for the legislation to be effectively integrated into industry practices. The Bill proposes novel and, in some cases, stringent requirements that developers and builders must adhere to.

These new legal provisions demand a comprehensive understanding of the changes, including potential shifts in compliance standards, documentation procedures, and liability frameworks. Given the complexity of the construction industry and the legal intricacies involved, a prolonged transition period is crucial to allow stakeholders to familiarise themselves with the nuances of the updated legislation.

Moreover, the nature of the construction process itself, characterised by long project timelines, intricate contractual relationships, and multifaceted legal considerations, necessitates a more gradual implementation of the amendments. Developers and builders often engage in projects with extended durations, spanning several years from planning to completion. A lengthier transition period acknowledges the intricate nature of these projects and provides the necessary breathing space for stakeholders to adapt their ongoing and upcoming endeavours to the revised legal landscape.

Additionally, a protracted transition period is essential for facilitating education and training initiatives within the industry. Builders, contractors, and relevant professionals will require time to undergo training sessions, workshops, and seminars aimed at imparting a thorough understanding of the legislative amendments. This ensures that industry participants are not only aware of the changes but also equipped with the knowledge and skills needed for compliant and successful project execution.

This measured timeframe would mitigate the risk of non-compliance due to oversight or misunderstanding, fostering a more cooperative and successful implementation of the legislative amendments within the construction sector.

It is currently challenging to determine the precise time frame HIA would consider appropriate until further clarity and refinement can be provided with respect to the Bill and any potential revisions.

Summary of Recommendations and Proposals to be considered for the Property Developers Regulation

At the outset, whilst several proposals and recommendations to assist with the drafting of the relevant regulations, HIA highlights the importance of firstly refining the definition of 'property developer' and those who are required to obtain/apply for a developer licence. As the definition and criteria (respectively) are so broad, it creates uncertainty with the remaining of the proposals.

	Key Issues	Recommendations/Proposals

1	Licensing of property developers	Consider:
		• narrowing the scope of those who may be required to obtain/apply for a developer licence, including exempting:
		  ○ licensed builders
		  ○ those projects which are already captured under home warranty insurance

2	Licence application process	<u>Rating Report:</u> Whilst this is only needed when requested by Registrar, there should be transition period until such time that the use of rating system for this specific purpose has matured. <u>Information evidencing the suitability of applicant:</u> • Consider providing a limitation on what is reasonably relevant to assist with the licence application assessment. • ACAT should be provided with a jurisdiction to review licence refusal, renewal refusal and any licence conditions imposed

3	Definition of 'Property Developer'	Refine the definition to:
		• provide exemptions for:
		  ○ licensed builders
		  ○ those projects which are already captured under home warranty insurance (as well as spec homes, noting that most times, they are also the landowners)
		  ○ smaller scale developments (i.e. 'mums and dads')
		  ○ those projects involving adding secondary dwellings
		  ○ Builders (who are already subject to stringent licensing requirements and responsibilities, i.e. reference to 'principal builder of the building work' should be removed, or at least refine further).
		• Specify who the intended target is as currently the definition is so wide, it captures almost everyone in the chain including financier, builders, landowners.

4	Reverse onus of proof	Section 89F(3) • adding qualifiers or limitations to the presumption, such as requiring that the identified defect must be substantial or meet specific criteria to trigger the presumption (i.e. all defects or only serious/major

		defects). • Measures should be implemented to prevent/deter vexatious claims. • Allow for reasonable exceptions and establish a fair process for builders and developers to present evidence, particularly when a defect is not a result of negligence or poor workmanship. • Placing an obligation for the owners to report defect as soon as it is found as opposed to waiting till the end of the 2-year period (where the defects might worsen and costing more to rectify). Section 89F(4) • Allow time for section 89F(3) to be tested first before adding further entitlement to the affected party, as serious as claiming damages • Time limitation should be clarified further as whilst the Bill refers to 2 years, there is still that possibility that the limitation could be brought up to 6 years under the statute of limitation legislation. • If progressed, clarify how each party's responsibility for defects and resulting damages are to be determined (those of the builder and the 'property developer').
5	10-year retrospective period for rectification orders	Provide clearer guidance on: • the retrospective application of rectification orders and • the allocation of liability among multiple parties/property developers
6	Personal liability of a director	Clarity is required regarding how personal liability will be triggered respectively for builders and 'property developer'.
7	Enforcement powers	• Clarify what 'residential addresses' mean and the intended target of those sites where power of entry applies without consent and warrant. • Warrants or consent warrants be made mandatory for authorised persons entering premises, even with the occupier's consent, irrespective of residential status. • Authorised persons should enter at reasonable times and issue written notices to occupiers. This approach allows occupants sufficient time to respond to the notice or warrant and be present during inspections, ensuring a smoother process.
8	Privilege against self-incrimination does not apply	Limitations need to be set on what information can be gathered or used to prevent 'fishing expedition'.
9	LDI	This requirement should not be implemented until such time that the market has matured
10	Building manual	Should not be mandatory until such time its purpose, benefits, and potential costs can be justified.
11	Disclosure statement	While previously proposed, there should be limitations on what details require to be included. Details such as 'funding sources' and 'names of responsible individual directors or controlling shareholders', and previous regulatory actions should not be included as consumers may move towards simply refusing to complete a contract with any developer who discloses prior infractions.