THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: PLC/EP&D:JvdPgl251122

25 November 2022

Policy and Strategy, Better Regulation Division
NSW Department of Customer Service
Locked Bag 2906
LISAROW NSW 2252

By email: hbareview@customerservice.nsw.gov.au

Dear Sir/Madam,

Draft Building Bill 2022

Thank you for providing us with the opportunity to comment on the Draft Building Bill 2022 ("Bill"). The Law Society's Property Law and Environmental Planning and Development Committees have contributed to this submission.

Our feedback on the Regulatory Impact Statements Parts 1, 2 and 3 is provided in the **attached** comments tables. We have several additional comments in relation to matters not specifically addressed in the Regulatory Impact Statements.

Disclosure obligations on sale

Absent a statutory disclosure regime, whether or not a vendor has complied with the *Home Building Act 1989* ("HBA") has been held to be a matter going to quality rather than to title (*Festa Holdings Pty Ltd v Adderton* [2004] NSWCA 228).

The HBA provides important consumer protection by requiring disclosure by some vendors of properties on which building work has been carried out. These disclosures typically entail evidence of insurance and an explanatory guide where insurance is mandatory, or a consumer warning where insurance is not required. The key sections are:

- section 95 (owner-builder work – including successors in title to that work);
- section 96 (residential work not carried out under contract);
- section 96A (developers); and
- section 96B (houses and units used for commercial purposes).

The first and fourth categories above have no insurance requirements.

The Building Bill 2022 maintains some disclosure obligations for developers (clause 121) and for vendors who have undertaken what is known as speculative work (clause 118). We support maintaining such obligations. However, in each case the obligation to provide an

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000, DX 362 Sydney
ACN 000 000 699 ABN 98 696 304 966
lawsociety.com.au
T +61 2 9926 0333 F +61 2 9231 5809
E lawsociety@lawsociety.com.au
Law Council OF AUSTRALIA
CONSTITUENT BODY

explanatory guide, as currently required under the HBA, has been removed. We believe the guide performed an important educative function and should be retained.

We are concerned that there appears to be no equivalent to sections 95 or 96B of the HBA in the Bill. We believe it is important for a purchaser to know that improvements on the land seen on physical inspection, which appear to attract the benefit of statutory insurance, in fact do not have the benefit of that protection. This is particularly important in the context of owner-builder work. We therefore suggest that an equivalent to section 95 of the HBA be included in the Bill while owner-builder permits are able to be issued. The disclosure obligations should be in place for the duration of the statutory warranty period.

We note that in our detailed responses to the Regulatory Impact Statements, we have suggested that owner builder permits be abolished. If owner building permits are abolished, transitional provisions would still be required.

The position regarding section 96B of the HBA is more complex. We note that the section relates to premises excluded from the definition of "dwelling" because the house or unit was designed, constructed or adapted for commercial use as tourist, holiday or overnight accommodation (HBA Schedule 1 clause 3(3)(f)). There does not appear to be any reference in the Bill to such premises, at least not described in those terms. It is not clear whether it is now intended that such premises be brought within the insurance framework, or whether they are to be dealt with in another way. If they are to remain excluded, we believe the Bill should include an equivalent to section 96B of the HBA, otherwise consumers may mistakenly believe those premises have the benefit of insurance.

We note that clause 126(2)(b) of the Bill removes a purchaser's right to rescind if the vendor serves evidence of insurance "before completion of the sale contract". In these circumstances, a purchaser needs sufficient time to review such evidence before completion in order to make an informed decision as to whether to rescind. We suggest that the removal of a right to rescind should apply only if the certificate of insurance is served not less than 14 days prior to the date on which completion is due to occur.

Dispute Resolution

Given the key role of the NSW Civil and Administrative Tribunal ("NCAT") as a dispute resolution forum in building disputes, in our view there should be consideration given to reviewing NCAT's jurisdiction in this area. In particular, we suggest that NCAT be specifically provided with the ability to make an early determination as to whether or not a defect is a 'serious defect'. In our view, the ability of parties to seek an early determination of this critical aspect of the claim would be of significant benefit to the parties in streamlining the preparation of the claim, thereby reducing time and costs for all parties involved.

Any questions in relation to this letter should be directed to Gabrielle Lea, Policy Lawyer on (02) 9926 0375 or email: gabrielle.lea@lawsociety.com.au.

Yours faithfully,

Joanne van der Plaat
President

Encl.

Building Bill 2022 – Regulatory Impact Statement
Part 1 – Who can do the work
Comments from the Law Society of NSW

QUESTIONS	COMMENTS
1. Key objectives of the Bill	
Question 1: Do the identified objectives support both the industry and regulator to be future focused, responsible and support all people who interact with it to achieve a fair outcome?	In our view, the four objects outlined in clause 4 of the Building Bill 2022 ("Bill") are appropriate.
Question 2: After reviewing the Bill do you think that it supports these intended objectives?	We support repealing and replacing the *Home Building Act 1989* and a harmonisation of the various current regulatory frameworks. We are, however, concerned about the extension of licensing to the non-residential sector, as there is a danger, in our view, that resources might be diverted from protecting consumers in the residential sector. Our specific concerns are further detailed in our responses to the three Regulatory Impact Statements and the covering letter.
3. Review of building licensing	
Expanding licensing into the commercial sector	
Question 9: Would any of the alternatives to licensing considered and not pursued contribute to reduced conflicts and defects? Please provide data/evidence to support your response	We support the retention of a (positive) licensing regime for the residential sector and agree that negative licensing should not be pursued in that sector. However, we are concerned that the expansion of licensing to the commercial sector will not produce benefits commensurate with the costs outlined at pages 31 to 32 of the Regulatory Impact Statement ("RIS"). We note that all-sector licensing was recommended by the Parliamentary Committee which led to the passage of the *Builders Licensing Act 1971.* However, Parliament limited the scope of that Act to the residential sector primarily on the basis that it was consumers of residential building work who were in greatest need of protection. Those engaging builders for other classes of work were considered to have the expertise, industry knowledge and access to advice so as not to need the protection of mandatory licensing.

QUESTIONS	COMMENTS
Question 10: Are there any other costs or benefits to the proposed licensing framework that are not detailed here? Please provide data to support your response?	One additional factor is that any broadening of the scope of licensing will probably add to the costs of transacting with commercial properties by way of sale, mortgage or lease. It is prudent for those acquiring interests in land on which residential building work has been done to inquire about the licence status (and insurance position) of the owner. Extending licensing to the commercial sector is likely to replicate those procedures to some extent. Otherwise, the costs and benefits identified at pages 32 to 36 of the RIS seem to capture the key issues.
Question 11: Will a licensing framework combined with regulatory oversight contribute to better quality, safer and more compliant buildings? Please provide rationale/evidence to support your response?	Any licensing system with a properly resourced regulatory framework is likely to improve quality and compliance. Having said that, given the extent of building defects occurring in the residential sector, we suggest prioritising measures to protect consumers in the residential sector over the expansion of licensing in the commercial sector.
Proposed changes to builder licences	
Question 12: Do you think the proposed builder licence levels strike the right balance? Should other descriptions such as floor space or building height be considered	Yes, in our view the proposed levels are appropriate and have the benefit of simplicity.
Question 13: Do you think that a single class of builder licence should be considered? Why or why not?	No, given the complexity of building work and the different skills required, a single class of builder licence would be unhelpful when choosing the appropriate builder.
Question 14: Will there be any other costs or benefits associated with this proposal?	Not in our view, we regard the costs identified at page 42 of the RIS as appropriate.
Question 15: Do you agree that builders should have their compliance record listed on the NSW licence register?	Yes, the matters that will be included in the compliance record as set out in clause 33 of the Bill are appropriate in our view as they are limited to matters that have been concluded, such as the results of relevant disciplinary determinations, or relevant matters such as details of the conditions on the licence.
Corporate licence holders and nominee supervisors	
Question 16: Will the proposed changes to corporation and partnership licence holders improve the oversight of work? Please provide evidence or data to support your view?	We support the proposed changes as they will allow increased flexibility for corporate licence holders. The requirement for a policy and procedure document is also welcome and should improve compliance in our view.

QUESTIONS	COMMENTS
Close associates	
Question 18: Is there a better way to determine who is a close associate?	We have no suggestions and support the approach that has been adopted.
Question 19: Should additional elements be incorporated into the definition of close associate?	We have no suggestions and support the approach that has been adopted.
Question 20: Should broad terms of family or personal, employment, or business associates be used to determine a close associate?	We are comfortable with clause 6 as currently drafted in the Bill and we would be happy to comment in due course on any proposed regulation that may further impact the determination of close associates.
Question 21: Is it better to itemise the relationships to be clear in law?	Yes, as a matter of general principle, itemisation provides greater clarity.
Engineers	
Question 23: Do you agree that waterproofing should be a specialist category of licence (ie. needed regardless of the size of the job)? Please provide data/evidence to support your answer.	Yes, and we note the data provided in the RIS at the top of page 50 which supports this approach.
Question 24: Do you think that any existing categories of specialist work should be deregulated? Please provide data/evidence to support your answer.	No, the existing classes are long standing and warranted given the significant risk to health and safety if the specialist work is not done competently.
Building Designers	
Question 25: Do you support licensing building designers and interior designers?	We support the harmonisation of licencing requirements across jurisdictions and have no difficulties with the National Registration Framework for Building Practitioners proposal.
Fire safety	
Question 28: Do you support combining existing licensing and registration requirements for fire safety practitioners into a single framework or should the schemes be kept separate?	Yes, we support combining into a single framework as the separate schemes are difficult to navigate.

QUESTIONS	COMMENTS
Building inspectors	
Question 31: Do you agree that building inspectors should be licenced?	Yes, the Law Society opposed the delicensing of building inspectors in 2009 on the basis of the important role such inspections play in the conveyancing process. Given the "serious repercussions for consumers" of these reports, as noted on page 64 of the Regulatory Impact Statement, we support the licensing of building inspectors as proposed.
What work can be done without a licence?	
Question 33: Should any regulated work be carried out without a licence? Why or why not?	No, in our view all regulated residential building work should be carried out with a licence as there is always a potential risk of harm to person or property, although this risk is higher in some types of regulated work than others.
Question 34: Do you consider a monetary threshold an appropriate way to exempt occupations from licensing requirements? Should the value vary by occupation?	No, in our view a monetary threshold is not appropriate, as we believe all residential regulated work, regardless of value, should be carried out with a licence. As page 65 of the RIS states in relation to the $5,000 threshold that currently applies under the *Home Building Act 1989*: "This threshold is imperfect as long-term detriment can still be caused by work valued up to the threshold".
Question 35: Should some professional work such as project managers and estimators be exempt from holding a licence?	No, as follows from our answers to questions 33 and 34.
Question 36: What licences should be prescribed in the Regulation?	No licences, as follows from our answers to questions 33 and 34.
Why are we keeping other building professionals separate?	
Question 38: Do you support registering and oversight of these practitioners under separate pieces of legislation, or should they be brought into a whole of industry Bill?	We note that the *Building and Development Certifiers Act 2018* and supporting regulation commenced on 1 July 2020, and the registration framework under the *Design and Practitioners Act 2020* commenced on 1 July 2021. In our view it would be premature to consolidate these provisions at this stage. We are therefore comfortable with keeping the registration and oversight of these practitioners separate.
Question 39: If they are kept separate, what measures should be introduced to ensure consistent obligations apply to all involved in building work in NSW?	Ongoing stakeholder consultation and review, once the Bill has been enacted, will assist in determining any inconsistencies in practice.

QUESTIONS	COMMENTS
Co-regulation	
Question 41: Do you support allowing professional bodies to play a role in accrediting practitioners?	Yes, in our experience, professional bodies can play an effective role in accrediting practitioners.
Question 42: What are the risks of this model?	The professional body must have the appropriate expertise and enforcement powers for the model to work effectively.
4. Owner-builder permit scheme	
What alternatives were proposed?	
Question 44: Do you think there needs to be more regulation of the current owner-builder permits scheme?	Our preferred position is to abolish the owner-builder permits scheme. In our members' experience, the owner builder permit scheme has consistently been abused to the detriment of subsequent owners. In our view, the scheme is not working as originally intended and should be abolished rather than further regulated. We support the comments on page 75 of the RIS: > Complaints and feedback received by industry have revealed that the current owner-builder permit scheme does not serve its intended purpose of assisting homeowners to complete works on their own home. Instead, feedback received shows that some people are using the scheme to by-pass their consumer protections and obligations under the home building compensation scheme. We also disagree that the abolition of this owner-builder permits scheme will necessarily lead to unregulated works, particularly if licensing requirements are increased.
Question 45: How do we ensure that owners are able to complete works on their home without risking defects and safety to subsequent owners?	In our view, there is no way of ensuring this, hence our preferred position of abolishing the owner-builder permits scheme.
Question 46: What exempt building work should be allowed to be completed without a licence?	In our view, there is no type of exempt building work that should be allowed to be completed without a licence, due to the potential risk of harm to person or property.
Question 47: Should dual occupancy dwellings be allowed under the scheme?	If the scheme is retained, in our view, dual occupancies should not be allowed as this is fundamentally at odds with the concept of allowing owner builders to work only on the home in which the owner-builder will reside.

Building Bill 2022 – Regulatory Impact Statement
Part 2 – What work can be regulated
Comments from the Law Society of NSW

QUESTIONS	COMMENTS
1. Key objectives of the Bill	
Question 1: Do the identified objectives support both the industry and regulator to be future focused, responsible and support all people who interact with it to achieve a fair outcome?	In our view, the four objects outlined in clause 4 of the Building Bill 2022 are appropriate.
Question 2: After reviewing the Bill do you think that it supports these intended objectives?	We support repealing and replacing the *Home Building Act 1989* and a harmonisation of the various current regulatory frameworks. We are, however, concerned about the extension of licensing to the non-residential sector, as there is a danger, in our view, that resources might be diverted from protecting consumers in the residential sector. Our specific concerns are further detailed in our responses to the three Regulatory Impact Statements and the covering letter.
2. Quality and build standards	
Standards of work	
Question 3: Do you agree that a licence holder should have a condition on their licence that requires them to carry out work to a required standard?	Yes. As set out in the Regulatory Impact Statement ("RIS"), this will make clear for both the licence holder and the end user what work the licence holder is obliged to do, and to what standard.
Question 4: Are any changes required to other legislation to support clear expectations on the standard of work licenced people must carry out?	It does not appear that any other legislation needs to be amended, given the complying development regime under the *Environmental Planning and Assessment Act 1979*.
Compliant specialist work	
Question 5: Do you support the expansion of a certificate of compliance to waterproofing work?	Yes. There is already a compliance regime, and the proposed changes appear to improve its administration and therefore effectiveness.
Question 6: Do you support pre-notifying electrical installation work to the Regulator?	Yes. It is inconsistent that plumbers have been subject to this requirement for a decade whilst electricians have not, in circumstances where the work of both trades has similar importance and impact on building works.

QUESTIONS	COMMENTS
Pre-fabricated and manufactured housing	
Question 7: Given the diversity in the types of buildings in the sector, how can the Bill ensure the whole of the industry is captured?	We agree it is important for the whole of the pre-fabricated and manufactured housing sector to be regulated, hence the definition of pre-fabrication needs to be as broad as possible so as to capture all types of building.
Question 8: How can we introduce a robust regulatory scheme for pre-fabricated building work that will not unfairly disadvantage manufacturing and supply to NSW?	As noted on page 33 of the RIS, bringing pre-fabricated and manufactured housing into the scheme will enhance consumer protection and the quality of these methods of construction. In our view, those benefits outweigh any additional manufacturing and supply costs.
Question 9: How should pre-fabricated building work be defined? How can this be differentiated from the installation of a product (such as pre-fabricated doors, windows, and trusses) under the Product Safety Act?	As set out in the answer to question 7, any definition adopted needs to be as broad as possible to capture all types of buildings, but should exclude any tent, or any caravan or other van or other portable device (whether on wheels or not) which is used for human habitation, and products (such as pre-fabricated doors, windows, and trusses) currently covered by the *Building Products (Safety) Act 2017*.
Question 10: Do you feel that all building work should be carried out by licensed practitioners?	Yes, in our view all residential building work should be carried out by licensed practitioners. The quality of building work on a pre-fabricated home, or the construction of one, is just as important to public safety as the quality of any other building work. In fact, it may be the more vulnerable consumers who are protected by ensuring that building work on a pre-fabricated home, or the construction of one, is done by licensed practitioners.
Question 14: Should manufacturers be able to self-certify pre-fabricated buildings? Why or why not?	We do not agree that manufacturers should be able to self-certify pre-fabricated buildings. As set out in the RIS, there is a conflict of interest where the manufacturer is also the certifier. It is not yet clear whether the New Zealand approach has been effective.
3. Building approvals and duty of care	
Building approvals	
Question 15: Do you support the proposed shift of the certification system from the planning system into the Bill?	Yes, we support the shift as appropriately streamlining and consolidating the regulatory framework for the industry.
Question 16: What additional regulatory burden, if any, do you consider should be taken into account by this proposed change?	There will be a need for stakeholders, including officers in local councils, to familiarise themselves with the changes, but in our view, this will not create a significant or long-term burden.

QUESTIONS	COMMENTS
Question 17: What information do you think should be contained in a building manual?	Based on our experience, the building manual should include, in addition to the items specified in the RIS, the key dates for critical building elements and any other elements with warranties.
Duty of care	
Question 18: Do you support the duty of care provisions under the DBP Act and the EPA Act being consolidated in the Bill?	Yes, in our view the consolidation is appropriate. As noted in the RIS on page 46, the change has the benefit of allowing assessment of the duty by reference to a single test.
Question 19: How do you feel the duty of care provisions in the DBP Act have been working since they commenced on 10 June 2020? Do you consider any changes should be made to make them more effective?	Given the relatively recent commencement of the duty of care provisions, we consider that any proposals for changes to the provisions would be premature at this stage.

Building Bill 2022 – Regulatory Impact Statement
Part 3 – Building and compliant homes
Comments from the Law Society of NSW

QUESTIONS	COMMENTS
1. Key objectives of the Bill	
Question 1: Do the identified objectives support both the industry and regulator to be future focused, responsible and support all people who interact with it to achieve a fair outcome?	In our view, the four objects outlined in clause 4 of the Building Bill 2022 ("Bill") are appropriate.
Question 2: After reviewing the Bill do you think that it supports these intended objectives?	We support the repeal and replacement of the *Home Building Act 1989* ("HB Act") and a harmonisation of the various current regulatory frameworks. We are, however, concerned about the extension of licensing to the non-residential sector, as there is a danger, in our view, that resources might be diverted from protecting consumers in the residential sector. Our specific concerns are further detailed in our responses to the three Regulatory Impact Statements and the covering letter.
2. Home building work in the Bill	
Question 3: Do you support excluding the listed premises from home building work?	We have some concerns about the exclusion of serviced apartments and nursing homes, as occupiers of those premises may have a degree of permanency which should be afforded protection.
Question 4: Should any other types of buildings be excluded? If so, why?	Yes, we note that there is currently an exclusion for a home or unit designed, constructed, or adapted for commercial use as tourist, holiday or overnight accommodation. For such properties, the end customer is likely to be a commercial customer rather than a residential customer, and it would be appropriate and consistent to continue to exclude those premises in our view.
Question 5: Do you support restricting consumer protection guarantees to home building work, or should some of them be extended to other kinds of work?	There may be merit in exploring the possibility of broadening the class of those who can rely on the legislative protections to include for example, building work undertaken on behalf of small not for profit organisations. We do not support broadening the consumer protections to all building work.
Definition of 'Developer'	
Question 6: Do you think the definition of a developer should be broadened to capture more of the industry?	Yes, we agree that the definition of developer should be broadened to cover more industry participants in the construction process as developers.

QUESTIONS	COMMENTS
Question 7: How can we ensure that people responsible for building work meet their consumer protection obligations?	We understand the intention of the suite of reforms proposed under the Bill is to provide the mechanisms for setting out the consumer protection obligations, liability for breach and dispute resolution processes, which should provide greater compliance with consumer protection obligations.
Question 8: Should the threshold for developers be lowered to 3-dwelling homes? Why or why not?	Yes, we agree lowering the threshold to 3-dwelling homes, given the increased prevalence of triplexes as a mode of development.
Contracting to do home building work	
Question 10: Do you agree with the maximum progress payment provisions? If not, why not?	Yes, in our view it is appropriate to provide a mechanism whereby progress payments are prescriptive but sufficiently flexible to balance the needs of both parties to a contract.
Question 11: Do you agree with the variation requirements? If not, why not?	Yes, we agree with the proposed variation requirements as they will provide consumers with greater certainty and builders with greater accountability, both key drivers for this reform.
Question 12: Do you think a standard contract should be prescribed or do the current changes provide enough support to the contracting parties?	We see merit in a prescribed form of contract, although views may differ as to its content. The alternative of prescribing standard terms may be an easier pathway to achieving consistency and better consumer protection.
3. What happens when something goes wrong?	
Statutory warranties	
Question 13: Do you support the changes to statutory warranty duties? If not, why not?	We support the changes proposed to statutory warranties. The decisions of *Oikos* and *Kell & Rigby* discussed at pages 32 to 34 of the RIS justify law reform, and in our view, the proposed approaches are appropriate.
Question 14: Do you think that fit for habitation is a more appropriate legal test compared to fit for occupation? Do you think fit for habitation should be a defined term?	Yes, we agree that a “fit for habitation” test is appropriate. We note that this phrase has been considered by the NSW Civil and Administrative Tribunal in the residential tenancies context. We do not support attempting to define the phrase - the concept will evolve over time and be dependent on the facts in each claim.
Question 15: Do you agree that linking statutory warranties to home building work, as opposed to having a ‘contract’, achieves a better outcome? If not, why not?	Linking the statutory warranties to home building work, rather than to the terms of the contract, is a welcome enhancement to consumer protection which we support.

QUESTIONS	COMMENTS
Question 16: Do you agree that the person responsible is the person who enters into a contract with the owner of the land if there is no contract, the person who contracts or arranges for, facilitates or otherwise causes, whether directly or indirectly, the work to be carried out? If not, why not?	We agree with the proposed identification of the person responsible.
Question 17: Do you agree that the new definition of 'owner' is fit for purpose? If not, please provide reasons and/or recommendations for change?	We support the proposed extension of the definition of "owner". We note it is proposed to allow the definition to be both extended and restricted by regulation. We consider this to be appropriate.
Question 18: Do you agree that a 'home' within the *Residential (Land Lease) Communities Act 2013* should be included within the definition of 'owner'?	We agree with this proposal to include pre-fabricated buildings into statutory warranties. Drawing from the existing definition of 'home' in the *Residential (Lend Lease) Communities Act 2013* is an appropriate way to achieve this, subject to the clarification referred to in our answer to question 19.
Question 19: Do you support including caravans and other moveable dwellings in the definition of home for the purposes of statutory warranties?	Broadly, we support this proposal as providing enhanced protection to a significant source of accommodation. However, we suggest that the definition of 'home' in the *Residential (Lend Lease) Communities Act 2013* should be further refined to exclude motor vehicles, for example by specifying that it includes portable devices *designed and* used for human habitation.
Question 20: Are the current definitions of completion fit for purpose? If not, why not?	We are concerned at the removal of specific circumstances for owner-builders. It has proven notoriously difficult to determine when work undertaken by an owner-builder is completed. In the experience of our members, in many cases the project proceeds on a sporadic basis, often due to funding or time pressures. Further, the commencement of a warranty period which is tied to attendance at the site to carry out work may be uncertain when the owner-builder is living on site.
Question 21: Should completion be remodelled to relate to the latest date of certain listed scenarios?	We do not support the proposed remodelling. If one of the triggering events occurs, in our view, that should be sufficient to enliven the protections. The alternative "last in time" approach is not supported as it would involve an investigation of whether, and when, all of the nominated events occurred, adding to the complexity of the claim.
Question 22: Do you think that the definition of completion for new strata buildings should incorporate occupation certificates for a part of a building? Does the current definition reflect this?	It is important that occupation certificates for part of a building be addressed. It does not appear that that proposed clause 51 adequately addresses the issue. Some staged developments may still be proceeding by way of the interim/final occupation certificate pathway. Consideration could be given to adopting the drafting approach in the *Conveyancing (Sale of Land) Regulation 2022*, Schedule 3, section 7.

QUESTIONS	COMMENTS
Question 23: Do you agree that completion occurs for a 'deemed contract' when the last person on site completed the work before a complaint for a statutory warranty (see clause 50(3) of the Bill)?	Subject to our concerns about owner-builders addressed at question 20, we agree with this approach.
Question 24: Are there any other issues with the definition of major defect? If so, please provide reasons to support your response?	We have no other issues to raise beyond those identified at pages 38 to 39 of the RIS.
Question 25: Do you think that the current definition for 'major defect' as defined in the HB Act should be retained? Why or why not?	As noted in the RIS at page 38, the current definition has had the benefit of judicial consideration, giving guidance and relative certainty to the industry. A markedly different definition may require additional judicial consideration. However, the waterproofing case study at pages 41 to 43 of the RIS provides a compelling example for either expanding the definition of 'major defect' as appears in the HB Act to cover waterproofing (and arguably the other issues identified at pages 38 to 39 of the RIS), or adopting the 'serious defect' definition in the Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020 ("RAB Act"). In our view, either expanding 'major defect' as described, or adopting the 'serious defect' definition in the RAB Act would be appropriate.
Question 26: Do you agree that the definition of 'serious defect' should be used instead of 'major defect' for statutory warranties? Why or why not?	See our answer to question 25.
Question 27: Do you think that providing six years cover for 'serious' defects and two years for 'other' defects is fit for purpose?	No. We have suggested in previous reviews of the HB Act that maintaining the two classes of defects adds significantly to the cost, complexity and uncertainty of dispute resolution. In the absence of a procedure for early determination of whether or not a defect is serious, reverting to a single statutory warranty period for all defects should be considered.
Question 28: Do you think that the time frame for 'serious' defects should be extended to ten years and three years for 'other' defects?	Yes, if our view expressed at question 27 suggesting a single time frame is not adopted, we would support the proposed extensions.
Question 29: Do you think that Part 3, Div 2 of the *Limitation Act 1969* should extend to statutory warranties?	The extenuating circumstances for an extension of time noted in the *Limitation Act 1969* should apply to the statutory warranty scheme. Our preference would be to reproduce these provisions in the Bill so that there is a single reference point for those availing themselves of the scheme.

QUESTIONS	COMMENTS
Dispute Procedures	
Question 30: Do you agree with proposed 'home building work direction' refund power?	Yes, as a part of a suite of notices to either repair or replace goods and services. If a business fails to repair or replace building goods or services, a notice to refund seems appropriate. We note that further details are to be provided in the regulations. It appears that a refund notice is envisaged where a business has failed to do any work at all. We suggest the regulations should consider how to determine the amount of a refund if there is partial replacement or repair. If the money is not refunded, the amount should be deemed a judgement debt.
Question 31: What other directions would be useful as a home building work direction?	In our view, directions to repair or replace building goods or services or refund the consumer are sufficient.
Question 32: What will be the cost to licence holders for the changed requirements? For customers?	In our view, any costs incurred by licence holders are appropriate because they arise from a breach of the licence holder's obligations. This will bring greater protection for consumers.
Question 33: Do you agree with the amounts of the five tiers used to apply to the penalties in the Bill? If not, why not?	We support the application of five tiers for penalties, noting that it will be for the courts to determine the penalty in each case.
4. Home building compensation scheme	
Question 35: Do you have any comments or feedback about the Bill's provisions for insurance under the home building compensation scheme?	We note that changes to scope of works for businesses may change, resulting in additional insurance requirements associated with changes to statutory warranties. We also note that SIRA is to publish a separate paper on the current scheme. We welcome taking a whole of industry approach and suggest that discussion of the home building compensation scheme be included in any further consultation on the Bill.
5. How do we transition industry into a new scheme?	
Question 36: How can the Department support the industry transition into the licensing new scheme?	We suggest supporting the transition for industry associations and other stakeholders through seminars, webinars and publications, to raise the awareness amongst businesses and consumers of the changes during the transition period.
Question 37: Is a period of 2-5 years for transitioning into the new licensing scheme appropriate? If no, why not?	Yes, in our view, that time frame strikes an appropriate balance between implementing important reforms and allowing sufficient time for preparation and education.

QUESTIONS	COMMENTS
Question 39: Do you think that savings and transitional provisions for statutory warranties should be tied to when the contract or 'deemed contract' was entered into? If not, why not?	It is proposed that the new statutory warranty scheme will apply on commencement of the Bill. On that basis, contracts entered into, or deemed to be entered into, prior to the commencement of the Bill should be excluded from the new scheme.