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Australia's property industry
Creating for Generations

24 November 2022

Mr Angus Abadee
Director, Building and Construction Policy
Department of Customer Service
via email: BCR@customerservice.nsw.gov.au

Reforming Building Laws 2022

Dear Mr Abadee,

The Property Council of Australia welcomes the opportunity to provide a submission to the New South Wales Government regarding comments and feedback on the proposed reforms of the *Draft Building Bill (Parts 1, 2 and 3)*, the *Draft Building Compliance and Enforcement Bill* and both the *Draft Building and Construction Legislation Amendment Bill* and *Draft Building and Construction Legislation Amendment Regulation.*

Property is the nation's biggest industry, representing one-ninth of Australia's GDP and employing more than 1.4 million Australians, as well as being the largest employer in Australia. ln NSW, the industry creates more than $581.4 billion in flow on activity, generates around 500,000 jobs and provides around $36 billion in wages and salaries to workers and their families.

Our members are the nation's major investors, owners, managers, and developers of properties of all asset classes. They create landmark projects, environments, and communities where people can live, work, shop, and play. The property industry shapes the future of our cities and has a deep long-term interest in seeing them prosper as productive, sustainable and safe places.

The Property Council has continued to be heavily engaged in the building reform work happening across NSW, including making a submission in March and October 2022 regarding the *Home Building Act 1989 (NSW) & Tranche II Construct NSW Reforms*. We commend the work of the NSW Government and the Building Commissioner on their achievements to date in ensuring the integrity and quality of built form in multiple classes of buildings.

Regarding the proposed bills, the Property Council are in principle supportive of the bills as a way to raise the standards of building across the state. We do want to raise the following as points of interest that the Department needs to be aware of and act accordingly. These are as follows:

1. Expansion of trade licensing requirements needs to be considered, attainable and appropriate, allow time for trades to be informed and satisfy relevant criteria. This will

require time and a transition period is required for both industry to get qualified, and government to provide training and courses in order to be licensed.

2. If the statutory warranty period for 'major defects' is extended to 10 years, then this should only apply to material defects, and there should be mandated obligations on owners/building managers to maintain and provide maintenance records before being able to make a claim in that 10-year period.
3. Expansion of compliance and enforcement powers should be in line with expansion of the DBP scheme.
4. Compliance and enforcement powers should not cut across pre-existing arrangements that have been agreed by owners and developers/builders, i.e. no double jeopardy.
5. If compliance and enforcement powers are applied, then any other Court or settlement process that is in train should cease, i.e. no forum shopping.
6. Extending warranty and quality requirements further back in the supply chain is supported. Warranty of pre-fabrication by manufacturers is supported.
7. The two per cent strata scheme developer bond regime should not change (proposal to allow new defects to be notified in the final report, and extending the timeframe for the final report to three years).
8. Review rights for security of payment determinations supported. Reducing threshold for subcontractor trust accounts not supported.

The Property Council looks forward to continuing to work collaboratively with the Department as comments and submissions are reviewed and proposed changes are made.

The following comments below have been lodged via the Governments 'Have Your Say' Portal for consideration. Should you have any questions regarding the content of this submission, please contact Matthew Wales, NSW Senior Policy Adviser on mwales@propertycouncil.com.au or 0451 146 886.

Yours sincerely,

Adina Cirson
Acting NSW Executive Director
Property Council of Australia

Property Council Responses to Part 1

	#	Question	Response
Building Bill 2022 - Part 1 - Who can do the work	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?	Yes. The objectives provide the best avenue for work to be performed to a higher standard than today, because key trades will need to have a greater level of licensed workers. However, as further articulated in response to Part 3 of the Building Bill RIS, more needs to be done to discourage premature involvement of lawyers and partisan experts in post-completion disputes. Please refer to response to question 1 of Part 3 of the Building Bill RIS.
	2	After reviewing the Bill do you think that it supports these intended objectives?	Yes. Please also refer to response to question 1 of Part 3 of the Building Bill RIS.
	3	Does the definition of building work in Chapter 2 of the Bill capture most types of work performed in the building and construction industry?	Yes. As per response below re the BCE Bill, it would be beneficial for the definition of 'building work' in the Building Bill was aligned with the definition of 'building work' in the BCE Bill.
	4	What may have been unintentionally excluded or included in this definition?	Do these works apply to Student Accommodation, BTR or co-living precincts? And what is the position taken when student accommodation is less than 30% of overall development. Does the project still require these types of work to be performed by licensed people?
	5	Does the definition of regulated work capture the people who work in the industry?	The definition of regulated work includes "specialist work". Specialist Work is defined as including "waterproofing". Waterproofing should be licenced under the Building Bill.
	6	What may have been unintentionally excluded or included in this definition?	Yes, although from our understanding, specialist engineering roles like façade and acoustic are still excluded.
	7	Are you aware of defects in non-residential work?	Yes.

	#	Question	Response
	8	If you currently run commercial projects, what proportion of people on site hold a trade licence?	A transition period must be considered before any changes to licensing requirements. Trades will take time to comply with updated qualification requirements. And the "training centres" will need to be able to scale up due to capacity issues. Where there are new categories of licensing required (eg. Concreting, plasterboard, reo and post tensioning), then more time will be required to develop the appropriate qualifications, educate industry and facilitate training. Any new scheme must be accessible and consider current industry demands.
	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.	No. A demerit points scheme could add value.
	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.	No. Refer to response to question 8 re considerations for expanding licensing requirements into new categories. Rather than a wholesale expansion of licensing requirements into new areas, a considered and staggered approach focusing on higher risk trades should be rolled out.
	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.	Yes, but the question is does the Government/Regulator have the required number of competent and authorised people to assess the licensing applications and competence and experience of people requiring licenses or will this be a checking exercise and capable people don't get licenses? Also, what happens to projects in the transition period in the next 1-3 years?
	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?	Agree that the proposed builder licence levels strikes the right balance. Builder 1 – High-rise and commercial: unrestricted carry out building work for all NCC buildings.

	#	Question	Response
			Builder 2 – Medium-rise: restricted level carry out building work for all NCC buildings up to three storeys in height and 2,000m2 in area. Builder 3 – Low-rise, residential: restricted work in NCC classes 1 and 10 only.
	13	Do you think that a single class of builder licence should be considered? Why or why not?	An option is to strike a balance and have 2 licence categories: • Combine Builder 1 & 2 Medium and high rise • Builder 3 – Class 1 residential dwellings This would better align the skills and expertise of the trade bases. Alternatively, a single class type would provide ability of contractors working across multiple building classes flexibility without the need of holding multiple licences.
	14	Will there be any other costs or benefits associated with this proposal?	More information is required as to the implications for current licence holders. Would a current licence holder be re-named 'Builder 1 high rise and commercial' or will there be a reapplication process for existing licences? There are currently no licence requirements for a number of trades i.e. concrete, reo, post-tensioning, gyprock etc. The training and qualification criteria needs to be understood to make informed submissions. Consideration of transitional periods, and the appropriateness of criteria is important. Additionally for other trades where licencing exists i.e. hydraulic, electrical, mechanical, building – an appropriate period of time is required for additional training and licence criteria and applications (if needed). Costs incurred by government to implement the regulatory requirements. There will also need to be a build-up of qualified individuals within government who can assess builders and companies.
	15	Do you agree that builders should have their compliance record listed on the NSW licence register?	Yes.
	16	Will the proposed changes to corporation and partnership licence holders improve	Yes, but it may slow the process of construction because of the additional checking that will be required.

	#	Question	Response
		the oversight of work? Please provide evidence or data to support your view.	
	17	Do you think any additional responsibilities are required for either the corporation/partnership or nominee supervisor?	No.
	18	Is there a better way to determine who is a close associate?	No. The proposal is somewhat open ended, and could inadvertently pick up related bodies corporate etc. Given restrictions only apply where a 'close associate' exercises 'significant influence', it would be preferable to define 'significant influence', and outline what conduct and influence amounts to 'significant influence'. See further comments in response to question 20 below.
	19	Should additional elements be incorporated into the definition of close associate?	No additional elements should be incorporated.
	20	Should broad terms of family or personal, employment, or business associates be used to determine a close associate?	Yes, but the use of broad terms such as family or personal, employment or business associates should not be used as these may be difficult to interpret. A prescribed list could also be considered. Note also that the definition of 'close associate' currently incorporates anyone who exercises 'significant influence' over another person, which will pick up family or other associates provided they exercise 'significant influence'. 'Significant influence' should be defined for clarity and certainty. The definition should be with reference to the type of influence, eg. a family member may have influence over another person in some respects, but no influence whatsoever with regards to the subject matter of a licence.
	21	Is it better to itemise the relationships to be clear in law?	Yes, see comments above.

	#	Question	Response
	22	Have you experienced any difficulty in accessing existing courses to complete trade skills. If so, where are you located?	Not applicable.
	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, but for class 2 only. Poor waterproofing in multistorey construction is a higher risk than in class 1 as it impacts multiple owners. By making waterproofing a specialist category in class 2 only, it will appropriately reflect the level of risk without placing an undue cost burden on class 1 homes.
	24	Do you think that any existing categories of specialist work should be deregulated? Please provide data/evidence to support your answer.	No.
	25	Do you support licensing building designers and interior designers?	Agree with a licensing scheme, however scope of those included under such a scheme requires further definition/clarification.
	26	What scope of work should building designers and interior designers be able to do?	Consistent with current scope for non-registered designers and those not regulated under separate schemes.
	27	How would this licensing scheme interact with the Architects Act, which restricts "architectural service" to registered architects?	A defined scope for building designers and interior designers can ensure that their work does not clash with the kind of 'architectural services' expected of architects. Regulated Design for example can only be done by registered architects as registered practitioners.
	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, this should be a single framework.
	29	What are the likely impacts on existing business practices if all practitioners involved in fire safety systems would need to be licenced?	Potential short-term reduction in suitably qualified (and licensed) consultant/practitioner pool. Transition period to be carefully considered.

	#	Question	Response
	30	What consideration should be given to dealing with the cross-over of fire safety systems with electrical wiring work and plumbing work? What changes to current licences would be required to ensure a practitioner is competent in fire safety work and the other specialist trade area?	There is no (or limited) benefit with a 'regulatory' cross over, however practitioners who undertake different elements (e.g. wiring and hydraulic works as an example), need to be licensed for both elements under current licensing schemes.
	31	Do you agree that building inspectors should be licenced?	Yes, they need to be competent in inspecting the work and identifying issues.
	32	Which current construction industry occupations could hold a building inspector licence?	Architects, Engineers, Builders with a building license, regulated Design and Building practitioners. A new training scheme may need to be developed for building inspectors.
	33	Should any regulated work be carried out without a licence? Why or why not?	No, it shouldn't. A suggestion could be made that minor works in class 1 homes which are deemed low risk should not require a license to avoid undue cost where there is minimal risk attached.
	34	Do you consider a monetary threshold an appropriate way to exempt occupations from licensing requirements? Should the value vary by occupation?	Yes, however, the monetary threshold should also be risk assessed against the Class of building and the discipline.
	35	Should some professional work such as project managers and estimators be exempt from holding a licence?	If an employee is directly required to manage operations of a construction site, then they should require a license (e.g project manager). Pre-Construction employees such as estimators should not require a license. Licencing eligibility criteria would need to be reviewed, and the required timeframe for those to obtain the required licences needs to be considered, the transition period must be appropriate and achievable.
	36	What licences should be prescribed in the Regulation?	All licenses including their monetary thresholds.
	37	Are the current licensing levels in civil construction appropriate?	Yes.
	38	Do you support registering and oversight of these practitioners under separate	For consistency of the scheme, all practitioners should be covered under the bill.

	#	Question	Response
		pieces of legislation, or should they be brought into a whole of industry Bill?	
	39	If they are kept separate, what measures should be introduced to ensure consistent obligations apply to all involved in building work in NSW?	Co-regulation can also be used as an approach where practitioners can be licensed based off an approved list of pathways. For example, an architect registered under the NSW Architect Registration Board can be licensed under the Act. NSW Fair Trading to determine the approved list of co-regulation bodies and undertake periodic reviews of their quality and processes to determine consistency with the goals in NSW.
	40	If they are not kept separate, and incorporated into the Bill, what parts of the Bill should change to make this transition effective and consistent with the broader intent of the reform?	Irrespective of whether certain practitioners are included or not, there needs to be a transition period/arrangement which deems all existing practitioners to be licensed including a 1-3 year period of assessment and confirmation of their license.
	41	Do you support allowing professional bodies to play a role in accrediting practitioners?	Yes, and these bodies should be audited to make sure they are meeting the expected standard.
	42	What are the risks of this model?	They are not monitoring the required standards in confirming licenses or the CPD programs are inadequate.
	43	What other functions do you consider appropriate to give these bodies when they are operating as a co-regulator with Government?	Provision of CPD Program.
	44	Do you think there needs to be more regulation of the current owner-builder permits scheme?	Yes, Owner Builder permits must be more stringent. Currently, anyone can get it with limited knowhow.
	45	How do we ensure that owners are able to complete works on their home without risking defects and safety to subsequent owners?	Permits system needs to be more stringent. Anyone wanting to build must have enough knowledge to do so. They need to engage registered design practitioners and certifiers.
	46	What exempt building work should be allowed to be completed without a licence?	Exempt building work should include superficial/aesthetic improvements including garden sheds, carports, fences, repairing a window or painting a house.

	#	Question	Response
	47	Should dual occupancy dwellings be allowed under the scheme?	Yes.

Additional Comments
The proposition of introducing graduated license classes for builders on the complexity of the work they are carrying out, could be an issue for growing companies that employ competent/licensed people from larger companies who can't proceed to continue to deliver similar sized projects. Shouldn't it based on the experience of a company's people rather than a company's previous performance only?
Reforms are tabled to include classes 3 to 9 buildings. From previous documentation it was to include class 3 and 9 buildings. From the submission made to the department in October 2022, it seems the wording has been amended to Class 3 and 9c. **"Do you support the expansion of the DBP obligations to Class 3 and 9c buildings? If not, why?"**
Continuing professional Development (CPD) activity costs are expected to be a one-off implementation cost, why are they one-off if they are continuing development activities?
For aligning with the NRF categories proposed, there needs to be a transition phase otherwise there will be a shortage of housing produced. Needs to be based on individuals and company experience in the transition period.
For graduated licensing, over what period will those already working in the industry be able to continue to keep working?
Regarding business restructuring (bringing more experienced people) or limiting work they contract for - the position should be based on both the company experience as well as the individual or a project teams experience as this will allow new entrants onto a "closed market".
Regulatory compliance activities estimated at $118/hr, this cost could be understated based on cost increases that have occurred over the last two years.
The proposed list of classes of professional engineers under DBP legislation that would be replicated under the bill does not include hydraulic engineering.
While reforming the industry provides an opportunity to lift standards for all, this is also an opportunity to include Architects to raise standards and awareness for legislation reforms and best practices.

Property Council Responses to Part 2

	#	Question	Response
Building Bill 2022 - Part 2 - What work can be regulated	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 principle yes. More support, education and consultation with industry will be needed to facilitate transition and adoption including for current licence holders and for emerging market players.
	2	After reviewing the Bill do you think that it supports these intended objectives?	The intent of the Bill supports the objectives, however there are several nuances that might require further explanation or review. There needs to be some additional reform and clarity provided around areas such as workmanship and supervision, such as defined standards of work or more practical supervision requirements particularly with regards to work that is very low risk.
	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, but only if these standards are considered reference standards in the NCC. If they are not reference standards in the NCC then there should be no statutory obligation to comply, and they should not be linked to the issue of a license. Linking standards that are not considered reference standards in the NCC to a license could have unintended consequences in design and delivery.
	4	Are any changes required to other legislation to support clear expectations on the standard of work licenced people must carry out?	Clear expectations need to be mandated for the quality of work as much as compliance to codes, with clarity around who is responsible for the co-ordination of trade professionals on building works i.e. who provides the guidance to trades. The Property Council suggests that training may be required to provide these skills. The proposed ratios appear to restrictive, and some thought should be given to situations where a supervisor has multiple fronts of work on a single project and where the nature of the work is not deemed critical i.e. would result in loss of life. Additional information and/or training could be useful in describing what level of review equates to which level of supervision e.g. first-time or critical tasks require supervision at the time of work, whereas less critical tasks are reviewed periodically such as at the end of a work day or when complete but prior to additional works.

	#	Question	Response
			Classes of licence should include those whose works are considered infrastructure and where repair would generally require more intrusion into other trades e.g. wiring, framing, plumbing inside of plasterboard walls, but not the plasterboard itself.
	5	Do you support the expansion of a certificate of compliance to waterproofing work?	Yes and furthermore, clear definition of a responsible designer and when in construction, guidance on minimum warranty thresholds for installation would be required. If, however, there was a higher standard or a certificate of compliance covered matters over and above what is already captured under the existing regime, this may be of benefit.
	6	Do you support pre-notifying electrical installation work to the Regulator?	No. This would result in additional administration with no added benefit. Further inspections by qualified inspectors / Ausgrid to improve safety installation is supported. Currently, CCEW (certificate of compliance of electrical work) goes to Ausgrid and NSW Fair Trading once works are complete.
	7	Given the diversity in the types of buildings in the sector, how can the Bill ensure the whole of the industry is captured?	The Bill should reference classes of buildings as defined in the NCC as this definition is consistent across industries. Pre-manufactured buildings could utilise the shop drawing process as a means of notification and be used to schedule inspections of works. It is anticipated that the same level of supervision will be provided and in fact, this could be advantageous to the quality of the building due to the repetitive nature of work in 'controlled' environments.
	8	How can we introduce a robust regulatory scheme for pre-fabricated building work that will not unfairly disadvantage manufacturing and supply to NSW?	Pre-fabricated products (see further in question 9) should comply with the BCA (as applicable), as well as all other relevant standards (eg. relevant Australian Standards). There are 2 pathways, which could work in parallel: 1. Supplier accreditation: a system/framework should be developed for a prefabrication accreditation for prefab manufacturers. Different classes of accreditation would be required (specific to the product).

	#	Question	Response
			2. Consultant certification: If the supplier is not accredited, the supplier must obtain certification from designers / engineers in respect of the product, which must show design is integrated and complies with the BCA and other standards. Detailed public consultation with the prefabrication industry is required to better understand how this industry currently operates and what may form part of such accreditation. Refer also to question 9 below.
	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?	Pre-fabricated building work should be defined with reference to any system which involves multiple components (each with their own individual certifications) which are integrated into a modular product. Further to question 8 above: • each component of the pre-fabricated product should be certified • the accredited prefab manufacturer should provide certification to say that the product complies with the BCA and applicable standards • the pre-fabricated product should be certified as a complete system by the prefab manufacturer. Care also needs to be taken in definitional changes to differentiate portable dwellings from manufactured (land lease) homes to ensure that there are no unintended consequences that may arise from definitional change. Further consultation with the manufactured housing (land lease) industry is required on the wording of proposed definitions. Potential unintended consequences could include loss of Commonwealth Rental Assistance (CRA) for customers, loss of stamp duty concessions for customers and loss of land tax concessions for manufactured park / land lease community operators, all of which would have adverse financial implications for manufactured housing (land lease) customers and would impact the affordability of manufactured housing (land lease) for these customers.

	#	Question	Response
	10	Do you feel that all building work should be carried out by licensed practitioners?	Agree that licencing should be required for regulated design elements, eg waterproofing, mechanical, electrical and plumbing services. Fire rating / passive fire service providers should also be required to be licensed. Query the benefit and the training criteria / course applicable or that exists for other trades to obtain licencing. Agree with further licencing of principal building supervisors with a transition process to enable qualifications and licencing requirements to be met.
	11	How could building work done off site be certified as compliant with relevant standards?	In the context of building work covered by the D&BP Act, prefabricated products that include building elements or performance solutions must comply with the design and declare requirements under the D&BP scheme. Any non-regulated elements requiring compliance with BCA or relevant standards must also comply to the satisfaction of the certifier. Using a bathroom pod as an example, in practice this means that the pod supplier will provide design details to the registered design practitioner (most often the architect), who then prepares regulated design and compliance declarations in respect of the pod (eg waterproofing). An alternative to the existing D&BP system, which requires more reliance on the expertise of the prefabrication manufacturer is as follows: • there is a class of registration for prefab manufacturers (with appropriate qualifications and experience) • the registered prefab manufacturer is able to prepare regulated designs and declare compliance of those designs with the BCA and other relevant standards. If the prefabricated manufacturer does not have in house capability to certify components of its design, it would need to rely on specialist expertise of consultants

	#	Question	Response
			• the registered prefab manufacturer is able to issue a building compliance declaration to say that the prefabricated product has been built in accordance with the regulated design and compliance declaration • there is a class of registration for installers of prefabricated products. The registered installer must declare that the prefabricated product has been installed in accordance with the regulated design.
	12	How do we ensure that any certification process is scalable to the industry, noting the differences between those engaged in manufacturing discrete parts of a building against those who produce entire buildings off site?	Defining the objectives and risk profile of the off-site manufacturer is critical. Based on the risk profile the certification process should be proportionate. For example, pod manufacture, prefabricated truss framing and full-scale modular homes each have very different risk profiles and therefore the extent of certification should align proportionally. Pre-manufactured buildings could utilise the shop drawing process as a means of notification and be used to schedule inspections of works at hold points or utilise a system like QA inspections in factory environments. It is anticipated that the same level of supervision will be provided and in fact, this could be advantageous to the quality of the building due to the repetitive nature of work in 'controlled' environments. A principles-based approach may help the system be expanded to accommodate advances in technology.
	13	How do we ensure that pre-fabricated building work completed outside of NSW can be regulated?	Prefabricated products sourced outside NSW or Australia should meet the same standards as locally sourced prefabricated products. If prefabricated products are sourced from outside NSW or Australia, then the manufacturer should still comply with the final design, declare and certify scheme that is implemented (eg by teaming with a local agent). Prefabricated work should only be required to be certified to satisfy national codes and standards (not state specific codes and standards).

	#	Question	Response
	14	Should manufacturers be able to self-certify pre-fabricated buildings? Why or why not?	No - there is a conflict of interest here without additional regulation. If we treat pre-fabrication as a product, then Quality Assurance is required on the product, component and processes e.g. reviewing designs for compliance and functionality, reviewing the operation, assembly line etc to ensure co-ordination takes place, and where relevant, people licenced to carry out the works are employed to do so. Then final products should be QA tested prior to leaving the 'factory.'
	15	Do you support the proposed shift of the certification system from the planning system into the Bill?	Yes, the amalgamation make sense and holds all key requirements under one Bill/system.
	16	What additional regulatory burden, if any, do you consider should be taken into account by this proposed change?	Increasing the design, declare and certification requirements for prefabricated products will increase costs as industry adjusts to the additional oversight. If a class of registration was created specific for prefabricated manufacturers, there will be difficulties in creating classes of registration that are able to keep up with advances in technology and expansion of prefabricated. If the prefabricated manufacturer is not able to provide declarations and certifications in respect of their product, we query whether it is appropriate for certification of components by designers who have provided input as an alternative to a single overarching certification. Installation is currently largely unregulated, and controls are required. If regulation of prefabricated products is going to be expanded, using the existing infrastructure within the D&BP Act is worth exploring.
	17	What information do you think should be contained in a building manual?	Use, maintenance and warranty requirements and conditions should all be included in a building manual.
	18	Do you support the duty of care provisions under the DBP Act and EPA Act being consolidated in the Bill?	Consolidation is supported.
	19	How do you feel the duty of care provisions in the DBP Act have been	The duty of care provisions remain largely untested in Court.

	#	Question	Response
		working since they commenced on 10 June 2020? Do you consider any changes should be made to make them more effective?	In a class 2 context, experience has shown that owner corporations are including or adding claims for breach of the statutory duty to new and existing post-completion claims, however these claims are yet to reach a hearing. Therefore, it is currently unclear whether any changes are necessary. We note that insurance premiums have increased for builders/developers as a result of statutory duty of care provisions in the DBP Act.

Property Council Responses to Part 3

	#	Question	Response
Building Bill 2022 - Part 3 - Building compliant homes	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 principle, yes. However, whilst the quality of construction should improve as a consequence of these reforms, more needs to be done to avoid lengthy dispute processes involving expert consultants and lawyers that often don't serve the best interests of owners/consumers as they are costly, resource-intensive, and time consuming. The flowchart on p11 of the RIS indicates that where there are disputes as to work, owners have the option of 'Dispute Resolution' through NSW Fair Trading, followed by potential enforcement action, and subsequently unresolved issues being channelled through NCAT. In general terms, this is similar to the model applied in Victoria. One issue with this model is the ability to 'fast-track' disputes to NCAT where the expiration of statutory warranties is approaching. In Victoria, disputes are commonly fast-tracked as in many cases claims are made when warranty periods are close to expiring, thus subverting the intended objective of the Government regulator being more involved and proactive in resolving disputes. An alternative and less adversarial model would be preferential. This would avoid premature involvement from lawyers and partisan experts, and so avoids unnecessary expense and delays for owners/consumers. A system modelled on the Queensland regime would be more suitable, namely: • complaints of defective building work are submitted to the Queensland Building and Construction Commission (**QBCC**) by owners. • Assessments are undertaken by QBCC officers of complaints made. Documents may be requested, and the owner and builder are encouraged to try to resolve the complaint without further QBCC involvement. • The owner and the builder meet on site to review each item of alleged defective building work and decide a plan for the repair of any agreed items. • The builder undertakes all agreed repairs.

	#	Question	Response
			• If there are defective work items that cannot be resolved, a QBCC Building Inspector is assigned and will attempt to facilitate an outcome. • If an outcome cannot be facilitated, the QBCC Building Inspector may undertake a visual site inspection. This is critical, as the QBCC Building Inspector is an expert independent of both parties and is responsible for making a decision as to the existence of defects, without involvement from partisan experts or legal advisers. • The QBCC can issue directions to the builder to rectify defects after an inspection. • Disciplinary action can follow for non-compliance. These steps should be mandated before a claim can be made in NCAT or in Court. There should be no ability for parties to make a claim through one forum, in parallel with making a claim in another forum, i.e. no forum shopping and no double-dipping. To the extent that a limitation period for a statutory warranty may be close to expiry, this should either be able to be extended by agreement for a specified period between the builder/ developer and owner pending the determination of the Fair Trading inspection and any completion of agreed works and/or the limitation period is extended for 6 months where a Fair Trading process has been commenced. The BCE Bill should also recognise and mandate obligations of owners and building managers to undertake recommended and regular maintenance and ensure compliance with operation and maintenance (O&M) manuals (which is often a cause or contributing factor to defects). Failure to comply with maintenance obligations should be recognised in the BCE Bill in the context of determining whether there has been a breach.
	2	After reviewing the Bill do you think that it supports these intended objectives?	See comments above. More could be done to shift away from what is framed as an adversarial system, pitting owners against developers, most of whom want to do the right thing and raise quality standards and the reputation of the industry.

	#	Question	Response
			By introducing a mandatory pre-step involving regulator led resolution (including an inspections and evaluation of alleged defects by a building inspector where the parties cannot resolve issues), unnecessary proceedings will be reduced and customer/owners and developers will save time and money. The proposal to expand capability and capacity within NSW Fair Trading to meet the expected uptick in demand of dispute resolution services is supported.
	3	Do you support excluding the listed premises from home building work?	Broadly supportive of the exclusion. It would be beneficial to have clarity to determine how components of mixed-use buildings are to be treated. For example, where there are retail and commercial premises on the bottom two floors of a multi-level apartment building, and there are common property, shared services and lifts. There should be guidance in the Building Bill to determine how statutory warranties are to apply.
	4	Should any other types of buildings be excluded? If so, why?	None.
	5	Do you support restricting consumer protection guarantees to home building work, or should some of them be extended to other kinds of work?	Agree that consumer protection guarantees should be restricted to home building work.
	6	Do you think the definition of a developer should be broadened to capture more of the industry?	Expansion of the definition of developer in the Building Bill is supported. To avoid inadvertently picking up head contractors who are performing work for a developer, the definition of 'developer' should not include the principal contractor for the building work where that principal contractor is engaged by: 1. the owner of the land 2. the developer of the strata scheme 3. another person who has contracted or arranged for or facilitated or arranged for the building work to be carried out. Head contractors can be picked up where relevant as 'licence holders.'

	#	Question	Response
	7	How can we ensure that people responsible for building work meet their consumer protection obligations?	An education piece for consumers and owners' corporations on the importance of maintenance requirements and records to maintain statutory warranties would be beneficial. The proposals to strengthen and extend licensing requirements, the existing reforms processed through the DBP Act, and the enhancement of compliance and enforcement powers should all assist.
	8	Should the threshold for developers be lowered to 3-dwelling homes? Why or why not?	No comment.
	9	What other costs or benefits should the Department consider before progressing with a definition of developer?	Refer to question 6 above. No additional comments.
	10	Do you agree with the maximum progress payment provisions? If not, why not?	Capping progress payments may result in those undertaking works being left in a cashflow negative position, and unable to recover costs they have incurred in a timely way. This will impact builders and can have consequent impacts on the supply chain. There may be financial constraints for builders in the current inflationary market, and potential for increased insolvencies. Without knowing the proposed capped amounts for the various proposed stages of progress payments (which presumably will be contained in the regulations), it is difficult to provide an opinion. However, in principle those undertaking work should be entitled to payment for works that have been performed, and progress payments should not cap out at an amount lower than what is permitted / has been agreed under the contract. Separate payment arrangements may be required when advance payments, or down payments are required, for example, when a contractor must procure offsite materials from a supplier for which a down payment is required. It may also be appropriate to put an upper limit on the value of a contract into which the process is prescribed, noting the increasing level of complexity of contractual

	#	Question	Response
			payment arrangements as the value of works increases. For example, in the current market there is growing use of flexible pricing arrangements (eg. more provisional sum items, cost escalation clauses for key supply items, cost plus arrangements for some supply items, target price arrangements etc). The proposed stages also won't align with the program of works on many larger scale developments. Australian Standard and other industry forms of contract should ideally be updated in line with any prescribed requirements.
	11	Do you agree with the variation requirements? If not, why not?	The variation requirements are supported, as they will ensure variations are clearly documented. There is a concern that the prescribed variation process might cut across operational or project management requirements (eg. project delays caused by delays in issuing variation directions), so education and resources will be required to ensure players are aware of and comply with the requirements. Contractors will no doubt seek relief from time requirements associated with delays caused by the variation requirements. It may also be appropriate to put an upper limit on the value of a contract into which the process as prescribed. For example, a contract for a large residential apartment will likely already deal with variations in a suitable way. It may be more appropriate for the requirements to exempt contracts between developers and licensed contractors so that the variation requirements are targeted at customers rather than at those who are likely to already have agreed mechanisms for dealing with variations. Australian Standard and other industry forms of contract should ideally be updated in line with any prescribed requirements.
	12	Do you think a standard contract should be prescribed or do the current changes	A standard contract should not be prescribed, as it may lack flexibility to deal with a changing industry and project specific requirements.

	#	Question	Response
		provide enough support to the contracting parties?	We note that there are currently a number of industry standard form contracts that are available for use. These can (and most likely will) be updated to incorporate necessary requirements of the Building Bill, and are a good option for participants, without needing to be prescribed within the legislation. For example, the HIA contract works well, and is readily acceptable across industry, but isn't a prescribed requirement.
	13	Do you support the changes to statutory warranty duties? If not, why not?	The changes would have the effect of materially broadening the operation and reach of the Home Building Act regime. If changes to the statutory warranties were made, proper consideration would need to be given to the fairness of the regime and what constitutes a breach. We agree that warranties should include actual work completed rather than that outlined in the contract. We also agree that offsite supply of materials and pre-fabricated products should be included in the warranties subject to there being a clear and defined ability to pass on liability from the builder to the relevant subcontractor.
	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?	We are concerned about the term 'fit for habitation' and do not consider it to be a more appropriate legal test compared to fit for occupation. Fit for habitation is a subjective term which unnecessarily broadens the existing warranty at S18B(1)(e) which currently works satisfactorily. If the term is to be changed, the term should be defined in the legislation to give a clearer intent of the meaning of the test.
	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?	Yes, we agree that linking the statutory warranties to work actually complete rather than the contract achieves a better outcome for the consumer. Any changes would need to particularise how it is established that work is complete if it sits outside of the contract.
	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	Yes.

	#	Question	Response
		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?	
	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 agree that the current definition of 'owner' should be amended to avoid the limitations of the 'successor in title' terminology, subject to understanding who 'other person prescribed by the regulations' means. We are concerned to ensure that the definition is not unnecessarily broadened and skewed so as not to make legal sense.
	18	Do you agree that a 'home' within the Residential (Land Lease) Communities Act 2013 should be included within the definition of 'owner'?	We support the principle that owners of 'homes' as defined in the *Residential (Land Lease) Communities Act 2013* should have the benefit of the appropriate warranties, provided they are tailed appropriately to the nature of land lease homes, and in a way that ensures there are no unintended consequences from bringing them into the home building warranty regime. See comments above at question 9 of part 2 of the Building Bill relating to potential unintended consequences. Further detailed consultation with the Land Lease industry is required.
	19	Do you support including caravans and other moveable dwellings in the definition of home for the purposes of statutory warranties?	Yes we support this in principle, provided the provisions are tailed to the nature of land lease homes, and in a way that ensures there are no unintended consequences. See comments above at question 9 of part 2 of the Building Bill relating to potential unintended consequences. Further detailed consultation with the Land Lease industry is required.
	20	Are the current definitions of completion fit for purpose? If not, why not?	Yes, subject to clarifying the definition to accommodate staged developments and staged strata. See response to questions 21 and 22.
	21	Should completion be remodelled to relate to the latest date of certain listed scenarios?	No. If the definition is extended to include later scenarios this may cause delays for both consumer and builder/developer, including a consumer's ability to bring a claim. Delays should also be prevented by ensuring the definition adequately captures completion of part of a building where there is a part-building occupation certificate and/or where there is staged strata under Part 5 of the *Strata Schemes Development Act*.

	#	Question	Response
	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 not sufficiently certain as to whether new proposed definition of completion adequately captures part-building occupation certificates, nor whether it sufficiently reflects staged strata under Part 5 of the *Strata Schemes Development Act*. Staged completion is very common, particularly in larger development, and it is therefore a fairer way to reflect 'completion'. The definition of completion should clearly reflect that completion can occur in respect of part of a building where there is a part building occupation certificate.
	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)?	Yes.
	24	Are there any other issues with the definition of major defect? If so, please provide reasons to support your response.	Retention of the existing definition of 'major defect' is supported. However, the existing definition of 'major defect' currently in section 18E(4) of the Home Building Act would benefit with the following clarifications: (i) the inability to inhabit or use the building (or part of the building) for its intended purpose: a determination on this point should be made by an independent engineer or design practitioner (ii) the destruction of the building or any part of the building: this requirement should be clarified, as it currently could extend to minor or temporary works required to undertake remedial work. Presumably the intent is to cover only the destruction of material or load bearing structural parts of buildings (iii) a threat of collapse of the building or any part of the building: an independent registered structural engineer should determine whether there will be a threat of collapse. If there are concerns regarding the coverage of 'major defects', these concerns should be addressed by extending the list of 'major elements' in section 18E.

	#	Question	Response
	25	Do you think that the current definition for 'major defect' as defined in the HB Act should be retained? Why or why not?	Yes. The two-stage test, whereby: • there must be a defect in a major element and • that defect causes or is likely to cause inability to inhabit, destruction or threat of collapse, is considered appropriate, and particularly if the duration of the statutory warranties for 'major defects' is extended to 10 years. Please refer to response to question 24 above.
	26	Do you agree that the definition of 'serious defect' should be used instead of 'major defect' for statutory warranties? Why or why not?	No. The two-stage test incorporated in the 'major defect' definition is preferable. Maintenance obligations should be mandated in the Building Bill, and a failure of owners or building managers to undertake necessary maintenance or maintenance in accordance with O&M manuals which has contributed to a defect should be considered when determining whether there has been a breach of warranty.
	27	Do you think that providing six years cover for 'serious' defects and two years for 'other' defects is fit for purpose?	If statutory warranties for 'major defects' are extended to 10 years, it is important to ensure that the threshold definition of what constitutes a 'major defect' is appropriate and does not pick up non-major defects. The existing definition of 'major defect' should be retained, rather than 'serious defect.' Obligations for owners / building managers to undertake necessary maintenance and maintenance in accordance with O&M manuals should be mandated. If the warranty period extends to 10 year, owners/building managers should be required to provide maintenance records to evidence the maintenance undertaken. Refer also to response to question 24 above.
	28	Do you think that the time frame for 'serious' defects should be extended to	Refer to question 27 above in respect of the statutory warranty period for 'major defects' being extended to 10 years.

	#	Question	Response
		ten years and three years for 'other' defects?	The warranty period for non-major defects should remain at two years. Most non-major defects will be apparent within two years following completion (and most within the first 12 months), ensuring owners/consumers have adequate protections. There could be unintended consequences, for example with regards to insurance premiums, builder insolvencies, lagging costs for owners who have engaged experts and lawyers. All these factors create cost pressures and impact affordability. Any new Building Act should recognise and mandate obligations of owners and building managers to undertake recommended and regular maintenance and ensure compliance with operation and maintenance (O&M) manuals (which is often a cause or contributing factor to defects). Failure to comply with maintenance obligations should be recognised in any new Building Bill in the context of determining whether there has been a breach of statutory warranties.
	29	Do you think that Part 3, Div 2 of the Limitation Act 1969 should extend to statutory warranties?	If the statutory warranty period for 'major defects' is extended to 10 years, there should be no circumstances where that warranty period would need to be extended. If an already lengthy 10-year warranty period was able to be extended, it will create uncertainty, and will have implications for builders (eg. difficulties entering the market, lack of competition etc). It is important that there is certainty for statutory warranty periods. Whether Part 3, Div 2 of the Limitation Act should apply will depend on what the extenuating circumstances are to justify extending the statutory warranties.
	30	Do you agree with proposed 'home building work direction' refund power?	Position reserved pending review of regulations, which will contain the relevant details.
	31	What other directions would be useful as a home building work direction?	No comment.
	32	What will be the cost to licence holders for the changed requirements? For customers?	There should be no additional costs for license holders who are following the rules and delivering on their contracts in a timely manner. This scheme just provides

	#	Question	Response
			another avenue for a customer to notify Fair Work when a payment issue arises before escalating to NCAT or otherwise.
	33	Do you agree with the amounts of the five tiers used to apply to the penalties in the Bill? If not, why not?	No comment.
	34	Do you agree with the maximum penalty amounts specified in the Bill? If not, please identify the provision, amount or approach that you disagree with and why?	No comment.
	35	Do you have any comments or feedback about the Bill's provisions for insurance under the home building compensation scheme?	No comment.
	36	How can the Department support the industry transition into the licensing new scheme?	In the first instance individual training sessions with key industry bodies will assist in the high-level changes filtering through each practitioner class. Secondly information sessions should be made available for each practitioner class which will allow trade contractors to ask questions on the new requirements. Finally, frequent live communication with industry via a website outlining changes in a clear and concise manner. There should be a one stop shop of information regarding regulatory changes, transitional periods, links to training courses and the like for all practitioners to access and be notified of on a regular basis.
	37	Is a period of 2-5 years for transitioning into the new licensing scheme appropriate? If no, why not?	The transitional period depends on licensing requirements and whether the class of practitioner is already subject to licensing requirements or is part of a new class requiring licensing.
	38	How can the Department help incentivise individuals to enter the construction industry?	Targeted training sessions, industry events and live site visits with both vocational and university students in engineering, construction and property management disciplines.

	#	Question	Response
	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?	Yes.

	#	Question	Response
Building Bill 2022 – Building Compliance and Enforcement Bill	1	Do you support the concept of a single suite of compliance and enforcement powers for the building and construction industry? Why or why not?	A single suite of compliance and enforcement powers should assist compliance by providing alignment, clear line of sight and simplicity. It is supported.
	2	Do you think the definition of developer captures the characteristics of those who participate in the market?	To avoid inadvertently picking up head contractors who are performing work for a developer, the definition of 'developer' should not include the principal contractor for the building work where that principal contractor is engaged by: 4. the owner of the land 5. the developer of the strata scheme another person who has contracted or arranged for or facilitated or arranged for the building work to be carried out.
	3	Do you think that the definition of building work should be aligned across the Building Bill and the BCE Bill? If so, which is the preferred definition and why?	The definitions of 'building work' in clause 7 of the BCE Bill and clause 5 of the Building Bill should be the same. Note that repair and maintenance should not trigger or enliven application of a different (more current) BCA and codes (i.e. compared to the BCA in force at the time of original approval). This could lead to be major unintended consequences.
	4	Do you support the expansion of the ECN scheme, in-line with the expansion of DBP obligations to Class 3 and 9c buildings? If not, why not?	Expansion of the ECN scheme to cover buildings that are within the DBP compliance declaration scheme is supported. Before the application of the DBP scheme is expanded to other classes, there must first be consultation and consideration of benefits, costs and other outcomes. This analysis should consider the implications of expanding the ECN scheme before any expansion.
	5	Do you think having the levy rates reviewed by IPART provides a safeguard that the regulator has independent advice accounting for the impact on industry? Why or why not?	Review of the levy rates by IPART is a sensible approach. Expansion of the regulator's obligations and rights (for example, as regulatory powers expand into further classes), should not be disproportionately funded through increases to the levy.

Commented [MG1]: I am guessing this is supposed to be 4 & 5 as it relates to something?

	#	Question	Response
	6	Do you support the consolidation of enforcement powers across the building enforcement legislation?	Yes, consolidation of enforcement powers should hopefully enable better understanding of obligations and therefore compliance. However, as with the ECN scheme, expansion of the investigative powers (the role of authorised officers to gather information and inspect) and the audit powers should apply to buildings that are within the DBP compliance declaration scheme. Cost benefit analysis and consultation should occur prior to any expansion of the DBP scheme.
	7	Do you support the expansion of undertakings as a compliance tool? Should undertakings be available for all breaches? Why or why not?	The use of undertakings as a compliance tool is supported, subject to the comments below: 1. Consider expanding in line with the expansion of buildings covered by the DBP compliance and declaration scheme. 2. Undertakings should be available for breaches, however determination of whether there has been a breach needs to be objectively and independently determined, with regard to natural justice and procedural fairness considerations as a protection against incorrect or vexatious findings of breach. There must be protections in place to ensure that an undertaking scheme is used productively to improve quality and behaviour of industry practitioners and is not used as a mechanism to obtain outcomes in an opportunistic way. 3. In some cases, a person who provides an undertaking may be party to a pre-existing agreement relating to the subject matter of the undertaking. For example, a developer may be party to a settlement agreement with an OC in respect of defects at a building. Those arrangements must be considered in the context of determining breaches that could lead to the issue of an undertaking. An undertaking should not duplicate the work done by a settlement agreement, nor cut across a deal the relevant parties have agreed, i.e there needs to be recognition of these arrangements. We note that in time, these types of arrangements may become less prevalent as the expanded scheme and other initiatives are implemented.

	#	Question	Response
			If an undertaking is issued, then no further claims or agreements covering the same subject matter should be permitted (to avoid the same issued being addressed through different tools / forums).
	8	What limitations do you see in using undertakings that the Department should consider in designing an undertaking power and using it in practice?	Although undertakings are voluntary, the circumstances which lead to a licence holder, practitioner, developer or OC considering whether to provide an undertaking usually mean that the licence holder, practitioner, developer or OC has limited choice or few feasible alternatives available. Accordingly, there needs to be adequate, transparent and fair governance regarding determination of breaches that could lead to an undertaking being provided. Determination of whether there has been a breach needs to be objectively and independently determined, with regard to natural justice and procedural fairness considerations as a protection against incorrect or vexatious findings of breach. Industry needs to be given confidence that determination of breaches and the undertakings tool will not be used capriciously, and this will also give industry confidence of an undertaking as the appropriate mechanism in the event a true breach is identified. Please also see comments above regarding consideration and recognition of other arrangements that parties affected by the subject matter may have independently agreed (for example, settlement agreements or other negotiated outcomes). In time, these types of arrangements may decline in volume as reforms are implemented, but they are currently a common feature.
	9	Do you think the compliance notices should be used for defects other than serious defects?	Query whether it is practicable for compliance notices to be used for all defects (rather than just 'serious defects'). There needs to be consideration of the value for consumers in having compliance notices issued for all defects, which can be in most cases effectively dealt with by the parties directly. If compliance notices are issued other than for serious defects, and noting the proposal that compliance notices can be issued up to three years from completion, there needs to be a way to ensure that compliance notices either recognise or do not

	#	Question	Response
			cut across separate pre-existing agreements struck between effected parties. For example, if a developer and an OC have entered a settlement agreement whereby the OC is responsible for maintenance activities and the developer is responsible for rectifying certain defects or has paid a settlement amount, a compliance notice should recognise this arrangement (or not be permitted). Where a compliance notice has been issued by the regulator, the impacted parties should not then enter into a separate agreement, nor enter into a dispute resolution process, and dispute resolution processes in train should cease, with regards to the same subject matter as the compliance notice. In time, this will encourage use of the compliance scheme in the BCE Bill (rather than alternatives which can be lengthy and costly). In time, settlement arrangements and NCAT / court proceedings may decline in volume as reforms are implemented, but they are currently a common feature. Any expansion of use of compliance notices (beyond provisions that already exist) should be coupled with the expansion of the DBP Act. A description of 'compliance order' should be included in the glossary of the RIS although it's called 'compliance notice' in the Bill.
	10	Do you support the proactive use of compliance notices, that is not requiring a building dispute first?	Yes. However, if compliance notices are to become a proactive feature, some safeguards are required: • procedural fairness and natural justice must be maintained, for example in cases of arbitrary determinations regarding non-compliance • if compliance notices ae issued, there needs to be recognition of any pre-existing arrangement that impacted parties may have agreed if compliance notices are issued, then these should 'cover the field', meaning separate agreements or claims, dispute resolution processes, NCAT/court proceedings that cover the same subject matter should not be permitted (i.e. the same matter doesn't need to be dealt with in two separate ways).

	#	Question	Response
	11	Should these direction powers be expanded to all specialist work in line with the expansion of compliance certificates in the Building Bill?	If adopted, supportive of direction powers being expanded to all specialist work covered by the Building Bill.
	12	Do you agree with the increased penalty amounts? Why or why not?	Agree. Stronger deterrents will drive more consistent, quality outcomes.
	13	Do you support the expansion of building work rectification orders to all classes of buildings?	Expansion on the BWRO scheme should be aligned with the application of the DBP scheme. As the DBP compliance and declaration scheme expands, so too should the ECN scheme and the BWRO scheme.
	14	What do you think the trigger for issuing an order should be? Should it be limited to serious defect of a building element? Should it be expanded or narrowed?	BWRO should be issued in respect of serious defects of building elements.
	15	Do you think the demerit points scheme will act as a sufficient deterrent for industry players who repeatedly contravene legislation?	Incorporating a demerit point scheme adds complexity to the system. Compliance adherence, in the first instance should be education focus, and penalties should be applied if these are not adhered to.
	16	Should demerit points apply to non-licence holders?	No, refer above.
	17	Do you support mandatory education or training as the first-tier?	Yes – education should be the focus to uplift the industry in the first instance. Perhaps a CPD scheme similar to that for 'building professionals' such as architects etc can be applied to trade contractors. Note that costs absorbed by the persons undertaking the training will ultimately be passed onto the consumer.
	18	Do you support a mandatory six-month suspension as the second-tier?	Rather than suspension for a fixed period of time – the suspension should be in force until remedial action has been undertaken, such as undertaking training/CPD and implementing processes or measure to mitigate the risk. This will ensure that actions that lead to the suspension will be fixed going forward, which is more effective than simple suspension. Once these have been verified by the appropriate party, the suspension may be lifted.

	#	Question	Response
	19	Do you support a mandatory 12-month disqualification as the third-tier?	As above.
	20	Do you support the ability to seek removal of demerit points after 12 months?	As above.
	21	Do you support the publication of a demerit points register on the Department's website?	Disagree – publication of such infringements can be reputation limiting for license holders. The scheme is designed improve the standard of building in NSW, not to limit the pool.
	22	Do you agree with the amounts of the five tiers used to apply to the penalties in the BCE Bill? If not, why not?	No comment.
	23	Do you agree with the maximum penalty amounts specified in the BCE Bill? If not, please identify the provision, amount or approach that you disagree with and why?	No comment.
	24	Do you agree that penalty notices are an effective deterrent to regulatory non-compliance? If not, why not?	An objective of the BCE Bill is to improve the standard of building work in NSW, which is driven by education and experience. In the first instance, education and process implementation should be the focus, and implement penalty notices where the practices and training are ineffective.
	25	Do you think that directors should be liable for any offence that is able to be committed by a corporation? If no, why?	Directors should only have personal liability for offences committed by a corporation in very narrow circumstances, aligned with the threshold for an executive liability offence proposed in section 157(2)b) and (c). The threshold currently proposed is too low.
	26	Should executive liability offences apply to any other offence in the BCE Bill? What evidence do you have to support the seriousness of the offence?	No. The drafting of section 157(2) should refer to taking "reasonable steps" rather than "all reasonable steps", as this may create confusion.
	27	Are there other 'reasonable steps' that could conceivably be taken to prevent an offence from occurring (cl 157(7))?	The list of 'reasonable steps' should remain an open and inclusive list (i.e. not a closed list), with the items listed in (a) – (d) examples only, and not each and every item in (a) – (d) is required to show that an individual has taken "reasonable steps.

	#	Question	Response
			Some of the 'reasonable steps' proposed may be difficult to assess, for example in the context of creating a corporate culture of compliance.
	28	Do you think these measures will promote better corporate compliance? If no, why?	Hopefully yes.

	#	Question	Response
Building Bill 2022 – Building and Construction Amendment Bill and Amendment Regulation	1	Do you support the persons included in the chain of responsibility (clause 8B) being held accountable for non-conforming building products or for non-compliant use of the product? If not, why?	The supplier providing the product should be obligated to confirm that the product meets all codes and standards downstream of their supply. If the chain of responsibility is to extend to designers and builders / installers (section 8B(1)(b) and (c)), there should be safeguards for designers (including engineers and architects) and builders (including installers) who are relying on information provided by manufacturers, namely: • Designers and builders must be provided with prescribed information relating to a product by the manufacturer. If the manufacturer does not provide the required information, designers and builders must request that information • Designers and builders must be entitled to rely on information provided by manufacturers in respect of products supplied. Designers and builders are not responsible for any errors, non-compliances or misleading information contained within information provided by a manufacturer, and cannot be found to be in breach or liable as a consequence of such errors, non-compliance or misleading information • Obligations of designers to ensure that products, materials and systems that the designer specifies or approves for use are appropriately approved will be in reliance on information provided by the manufacturer. If there are errors in the information provided by the manufacturer, the designer should not be responsible for those errors • Builders/installers should be obliged to obtain all required information from manufacturers, install the products in accordance with required guidelines, and ensure that the builder complies with the relevant plans. However, builders should not be responsible for errors in information received from manufacturers in respect of products installed.
	2	Are there any other persons that should be added to the chain of responsibility and therefore be held accountable for	No.

	#	Question	Response
		non-conforming or non-compliant building products? If yes, who and why?	
	3	Do you support the following duties being imposed on persons in the chain of responsibility? If not, why? • Ensuring conforming products and compliant use of building products (clause 8E) • Providing information to others in the chain about a building product (clause 8F) • Builders and installers to provide information to the owner about the building products they use (clause 8F(4)) • Notifying the Secretary when becoming aware of non-compliance or safety risk of a building products (clause 8H) • Notify the Secretary of a voluntary recall (clause 8J) • Comply with any safety notices for warnings, bans or recalls (Part 3) • Provide safety notices or other information to others in the supply chain, if required (clause 15I and 15J) Manufacturers or suppliers may be requested to conduct a product assessment of a building product (clause 38)	Yes, subject to the response to question 1.
	4	Focusing on the duty to provide information about building products, are there any challenges associated with persons in the chain of responsibility satisfying this duty?	Those sitting below the manufacturer in the supply chain are reliant on information that is provided by the manufacturer. This must be recognised in the Bill, with those lower down the supply chain being able to rely on information provided by manufacturers, able to request information from manufacturers, and manufacturers being obliged to provide information when requested. Please refer to question 1.

	#	Question	Response
	5	Do you support the following additional powers for the Secretary to manage non-conforming or non-compliant building products? If not, why? • Building product warning (clause 15) • Building product supply ban (clause 15B) Building product recall (clause 15F)	Yes.
	6	The maximum penalty for breaching a building product use or supply ban or a building product recall will be: • $220,000 or 2 years imprisonment, or both and $44,000 each day the offence continues; or • for a body corporate, $1,100,000 and $110,000 each day the offence continues. Do you support this maximum penalty? If not, what do you think the penalty should be?	No comment.
	7	The reforms for building products will commence 12 months from passing through Parliament and receiving formal assent. Does this timeframe allow enough time for industry to prepare for the new requirements? If not, what timeframe do you propose and why?	24-36 months would be a more suitable period. Retrospective application of any changes / directions needs to be carefully considered. For example, developers / manufacturers / designers / builders who have specified or approved for use a product which at the time was conforming should not be responsible (and not bear costs of replacement) if the product is subsequently held to be non-compliant.
	8	Should the strata building bond paid by developers be extended to cover building defects identified in the final inspection carried out 21-24 months after the building has been completed? If not, why?	No. If 'new' defects were able to be included in a final report, there is no further report to close out the new defects. The purpose of the final report is to ensure that defects identified in the interim report have been rectified. Allowing a building inspector to identify further defects in the final inspection changes the nature of that inspection and the building inspector's scope. It would become a further interim inspection, confusing the process. There needs to be a clear end point to the SBBIS.

	#	Question	Response
			Major defects will typically be identified within the first 12 months, at which point there is more likely to be security held vis a vis contractors and trade contractors. If the duration for identifying new defects is extended to 21-24 months, lack of maintenance is more likely to be the cause (or at the very least a contributing factor) of a defect. Lack of maintenance results in many defects raised within a 21–24 month period after completion. There are also cost implications with the proposed reform (for example the commercial arrangements in place between developers with builders and trade contractors may require adjustment). Any reforms to the strata bond scheme should include a positive obligation on owners to maintain the building (eg. in accordance with the maintenance schedules provided by the developer / O&M manuals). This is an important means of mitigating the risk of long-term defects.
	9	Should the developer be given an extra 90 days to rectify defects identified in the final inspection or should the rectification costs come directly out of the building bond?	See response to question 8 above. If the inspector is permitted to identify additional defects in the final report, then the developer should be given the option of either rectifying those defects (with additional time allowed for this) or for the rectification costs to be deducted from the building bond, with the balance to be returned to the developer.
	10	Are there any issues with the strata building bond being retained for a longer period while defects are remediated?	Yes. Additional costs will be incurred by developers which in turn will be passed on to consumers/owners. If developers have shown good faith by rectifying defects promptly after the interim inspection, then the developer should not be financially penalised in respect of any additional defects that are identified in the 'final inspection.'
	11	The reforms for extending the building bond will commence 6 months from	There must be transitional provisions such that projects that have already commenced are exempted from amendments to the SBBIS. This is because projects

	#	Question	Response
		passing through Parliament and receiving formal assent. Does this timeframe allow enough time for industry to prepare for the new requirements? If not, what timeframe do you propose and why?	that have commenced will have been undertaken on the basis of a feasibility study which is prepared on a set of assumptions. The cost and other implications attached to revisions to the SBBIS will not have been allowed for. 9 - 12 months would be a more appropriate timeframe.
	12	Now that the strata building bond scheme has been in place since 2018, do you think it is reasonable to phase out the transitional period so that it applies to more buildings. If not, why?	No comment.
	13	Do you think it is reasonable for developers who commence strata building work after 1 January 2023, regardless of when contracts were entered, to have to comply with the scheme? If not, why?	No comment.
	14	It is proposed that all developers will be required to comply with the scheme if a construction certificate has been issued after 1 January 2023, even if they entered into the contract before 1 January 2018. Is there another way we could achieve the same outcome to ensure that all strata developers are required to pay the security bond?	No comment.
	15	Do you support the introduction of a formal framework for the approval of APAs to improve their accountability? If not, why?	No comment.
	16	The Bill will require an APA to have certain critical elements as part of the scheme to establish the strata inspection	No comment.

Commented [MG2]: Just wondering if there is a reason why we have provided no comment to all of these questions on this page?

Commented [MW3R2]: Should we look to seek Lexia's advice on strata? Or would she need to read the whole thing to get up to speed?

Commented [MG4R2]: Maybe just worth checking it off with her if you think it is appropriate? Not sure how much she will have to read!

	#	Question	Response
		panel (i.e. appointments process, disciplinary action and complaints handling policy, records keeping and reporting requirements). Are there any other critical elements that an APA should be required to have to manage the appointment of building inspectors?	
	17	Do you support that a penalty provision should be prescribed for a person that falsely represents themselves as a building inspection? If no, why?	No comment.
	18	A maximum of 300 penalty units ($33,000) will apply to this offence. Is this penalty sufficient? If not, what should it be and why?	No comment.
	19	Do you think that owners in a strata development should be able to access the NSW Fair Trading dispute resolution service before a building inspector is appointed under the SBBIS? Why or why not?	Given the mandatory SBBIS, we do not think it is appropriate or beneficial to implement a further dispute resolution process on top of the SBBIS. It creates uncertainty as to the impact of the NSW Fair Trading dispute resolution process upon the requirements under the SBBIS. For example, if the NSW Fair Trading dispute resolution process is enlivened and an inspector inspects the property, is the developer still obliged to appoint an inspector under the SBBIS?
	20	Do you support the proposal for approved professional bodies with a PSS to undertake competency assessments to determine whether an applicant has the appropriate qualifications, skills, knowledge and experience to hold registration as a certifier? Why or why not?	Competency testing provides alternate pathways to licensing applications for certifiers, providing greater flexibility outside of more typical justification methods.
	21	What benefits or challenges do you think arise from an approved professional	Skills and experience may provide a sufficient base to work effectively in a role. The challenge with such as scheme is the subjective nature of assessments from one candidate to another.

	#	Question	Response
		body undertaking competency assessments for registration purposes?	
	22	Do you consider that this pathway should be limited to bodies operating a PSS? Why?	This pathway should be limited to bodies operating as a PSS to ensure that the standard is maintained across the industry. A PSS provides a framework to operate in accordance with.
	23	Do you support the standardisation of CPD across the building and construction industry? Why or why not?	Standardisation is not effective across the building and construction industry because of the variety of roles and responsibilities. The nature of each role should be considered on a case-by-case basis and will be given the amount of training required. Some roles will require more CPD than others.
	24	Do you support extending CPD requirements to include specialist practitioners? Why or why not?	Strongly agree – the governance and compliance that governs specialist roles, such as electricians, plumbers and mechanical gasfitters, is frequently changing and being updated. The roles are required to keep up to date with these changing requirements. Further, these roles come with a level of risk that should be reviewed regularly to ensure a high standard is met.
	25	How many hours of CPD do you think the average practitioner should be required to do per year? Why?	No comment.
	26	Should it be up to industry or the regulator to determine the CPD requirements for individual practitioner types? Please explain your answer.	The CPD requirements should be determined in a collaborative manner between industry and the regulator.
	27	Are there any practitioner types that are not currently required to do CPD to be registered that you think should be required to do CPD? If yes, please give examples of the practitioner types you think should be doing CPD.	No comment.
	28	Do you agree that education and training notices may be more effective than monetary penalties to fix non-compliant	Education and training notices will likely have a greater impact on non-compliant conduct.

	#	Question	Response
		conduct and encourage permanent behaviour change? Why or why not?	Monetary penalties can be lost as a building expense.
	29	Do you have any concerns about introducing education and training notices as a form of early intervention disciplinary action? If yes, please explain what any challenges may be.	A framework will need to be integrated to verify that the training was completed legitimately.
	30	Do you agree that there should be a bigger focus on early intervention disciplinary action to proactively address non-compliance in the industry? Why or why not?	Early intervention and training will reduce the overall costs downstream and improve the standard of building across NSW. Early intervention will help builders
	31	Do you think that the proposed additional PIN for non-compliance with an education and training notice will be effective in encouraging offenders to complete the prescribed training (rather than opting to just pay the PIN amount)? If not, please provide any suggestions for how we could better incentivise offenders to complete the prescribed training.	Electing to pay the PIN amount and opting out of the education and training should not be an option. The training is required to improve the standard and understanding of the builder. Broadly supportive of an additional PIN for missing training/education deadlines.
	32	The reforms relating to Security of Payment will commence 6 months from passing through Parliament and receiving formal assent. Does this timeframe allow enough time for industry to prepare for the new requirements? If not, what timeframe do you propose and why?	Yes.
	33	It is proposed that when a builder serves a payment claim on a homeowner under the SOP Act, the payment claim must be	Yes. This will assist homeowners to understand how to comply with the Act and the consequences of non-compliance.

	#	Question	Response
		accompanied by a Homeowners Notice. This proposal is not for all payment claims made in the industry, only payment claims served on a homeowner by a builder. Do you support this proposal? If not, why?	
	34	The RIS identified potential impacts of the reform and how these have been moderated (i.e. narrowing the application and targeted education and awareness strategy). Are there any other challenges that need to be considered for successful implementation?	No Comment
	35	Do you agree providing homeowners with more information, including the consequences of not responding to a payment claim, would encourage prompt payment by the homeowner to the head contractor? If not, why? Are there any other strategies that could be considered?	Yes.
	36	Currently, the SOP legislation requires a head contractor to hold a subcontractor's retention money in trust if the head contractor's construction contract with the principal has a project value of at least $20 million. It is proposed for the project value threshold to be lowered to $10 million to capture more construction contracts (and subcontractors) and protect retention money withheld in the event of an insolvency. Do you support	We don't object to the lowering of the project value threshold. It is $10m in Queensland. If a head contractor is insolvent, it will protect more subcontractors. Whilst it is acknowledged that the establishment costs of a trust account for subcontractor retentions is low, there is additional administration required where head contracts sit above the threshold. In particular, the requirement to ensure retained funds are transferred to the trust account within 5 business days (meaning head contractors will be in breach if a transfer was made from day 6 and onwards), and the requirement to provide ledgers every 3 - 6 months. For head contracts valued at less than $20m, we query whether the administration required is justified by the benefit and security to subcontractors.

	#	Question	Response
		lowering the project value threshold for payment of retention money? If not, why?	
	37	If you do support lowering the project value threshold, do you support lowering it to $10 million? If not, what alternative amount do you support. Why?	Yes. It is $10m in Queensland. Consider any feedback or review of the Qld legislation after that $10m threshold was set to see if there have been any positive or adverse consequences.
	38	In the RIS it was noted that the costs associated with establishing and maintaining a retention money trust account are offset by the removal of the annual reporting requirements in December 2020 (which were estimated to cost head contractor businesses up to $10,000). Are there any other reasons for not lowering the $20 million threshold?	No, we are not aware of any. Consider any feedback or review of the Qld legislation after that $10m threshold was set to see if there have been any positive or adverse consequences.
	39	An adjudication review provides an additional opportunity for the original adjudication determination to be reviewed and a new determination issued (without the parties being required to go to court). Do you support the proposal to allow a party to seek a review of an adjudication determination to be heard by another adjudicator? Why or why not?	Yes, review of adjudication determinations is supported. This is considered a reasonable and fair approach to correct errors in determinations, where those errors could have meaningful consequences.
	40	Do you think there should be any limitation on which matters can be reviewed by another adjudicator (i.e. limited by monetary amount or type of matter)? Why or why not?	No. If there is to be a review procedure then it needs to be able take into account a wide variety of errors that an adjudicator may have made. If a threshold was to be introduced, a proposed threshold is supported, with that threshold being between a $100k - $200k difference between the claimed amount and the adjudicated amount. The Victorian approach is not supported.

	#	Question	Response
	41	Do you think there should be different eligibility criteria (i.e., qualifications, experience or additional training) for a review adjudicator? Why or why not?	Yes. There should be additional experience and qualifications required of review adjudicators, given review adjudicators will be opining on determinations that have been handed down. The review adjudicator should have a level of experience commensurate with being in a position to correctly review the matter. Similar to the WA legislation, review adjudicators should be required to attend a course on what the obligations of review adjudicators are.
	42	Currently, an adjudicator has powers to request further submissions, call a conference and carry out inspections. It is proposed to additionally allow an adjudicator to arrange for the testing of a matter and engage an appropriately qualified person to investigate and report on any matter (unless both the parties to the adjudication object). Do you support the additional powers recommended by this proposal? If not, why?	No. We very strongly disagree with this proposal. This will increase the costs of an adjudication, complicate the process and delay the adjudicator's determination. There will be no real benefit from the proposed changes. Adjudication is meant to be a quick interim determination of rights to payment, not a full detailed investigation of project disputes. For the purposes of preparing an adjudication application or adjudication response, the parties already have the opportunity to arrange for testing and to engage experts to investigate and report on any matter. This is done at their own cost. A party will incur that cost if it thinks there is a benefit to engaging the expert. It should not be a cost imposed on parties by an adjudicator. The proposed additional power to arrange for testing and to engage experts to investigate and report on any matter is far too broad for no perceivable benefit.
	43	Do you think that the benefit of the additional powers, such as a better-informed determination, outweighs any concerns that the proposal may lengthen the time for resolving disputes? If not, why?	No. We very strongly disagree with this proposal. Adjudication is meant to be a quick interim determination of rights to payment, not a full detailed investigation of project disputes. For the purposes of preparing an adjudication application or adjudication response, the parties already have the opportunity to arrange for testing and to engage experts to investigate and report on any matter. This is done at their own cost. A party will incur that cost if it thinks

	#	Question	Response
			there is a benefit to engaging the expert. It should not be a cost imposed on parties by an adjudicator. The proposed additional power to arrange for testing and to engage experts to investigate and report on any matter is far too broad for no perceivable benefit.
	44	Does the legislation need to address who is required to pay for any testing or the engagement of an expert to investigate and report on certain matters? Or should this form part of the fees of the adjudicator to be shared by the parties in such proportions determined by the adjudicator?	We consider the amendment should not be made. If it is made, liability to pay should form part of the fees of the adjudicator to be shared by the parties in such proportions determined by the adjudicator.
	45	Do you support the expansion of certifier powers to hand out WDNs where they identify a “serious defect”? Why or why not?	We don't object to the expansion. It will probably be an effective tool in reducing the prevalence of defects earlier in the construction lifecycle. The role of a certifier is to assess and determine whether a building has been built in accordance with the relevant plans. Accordingly, WDNs should be limited to circumstances where built form does not match the relevant plans (eg. DA and CC plans). To expand WDNs to “serious defects” would mean that certifiers are undertaking tasks that expand beyond their function, and tasks which certifiers are not currently qualified to perform (certifiers are not qualified building inspectors). If WDNs are expanded to cover “serious defects” (which is not supported), those in receipt of WDNs should have the ability to appeal or have WDNs reviewed to ensure adequate procedural fairness is maintained.
	46	Do you agree that BWROs should be able to be issued where non-compliance with the PCA is identified? Why or why not?	Yes. BWRO should be tied to breaches of the NCC (volumes 1 – 3).
	47	Do you think the expansion of the application of BWROs will improve the	Yes. More care will likely be taken in manufacture of these products.

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		way in which prefabricated products are regulated? Why or why not?	Expanding BWRO's to include Volume 3 of the NCC for plumbing will improve regulation of prefabricated plumbing components installed in modular homes and bathroom pods.
	48	Do you support that information gathered by the Department should be able to be used as evidence against a corporation? If no, why not?	The proposed changes could hinder open and frank communication and sharing of information.
	49	This reform will also apply to individuals in their capacity as a representative of a corporation such as a director of the company. Should the information collected from the representative be able to be used against the corporation in criminal proceedings? If not, why?	See response to question 48.
	50	Do you support the proposal to place a duty on a registered practitioner to take reasonable steps to ensure that persons they deal with aren't involved in intentional phoenix activity? Why or why not?	We support the proposal to place a duty on a registered practitioner to take reasonable steps, however we note the following: - Illegal phoenix activity is deliberate, deceptive and fraudulent. If a person engages in one form of illegal behaviour, it is possible that other illegal behaviours have taken place, adding complexities and barriers to identifying illegal phoenix activity (e.g. dummy directors, involvement of other credible professional third parties (i.e. friendly valuers), etc). No one liquidation is the same as the next and the same applies to illegal phoenix activity. - There may be difficulties in identifying illegal phoenix activity without access to confidential information. - Even publicly available information which may assist in identifying illegal phoenix activity can come at a significant cost to the registered practitioner. We suggest that reasonable steps: - Be clearly defined

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			- Need to consider the costs of undertaking searches – these steps won't identify most phoenix activity or distinguish between illegal and legal phoenix activity (see comments below) - Should include thresholds for materiality of the available information (e.g. a director associated with more than one insolvent entity in the last 10 years, a director of more than one entity that has changed its name to ACN 123 456 789 Pty Ltd (both registered and deregistered companies), has a non-registered insolvency-related practitioner been involved (pre-insolvency advisor – hard to know from the outset), etc). - Provide clarity in the event that illegal phoenix activity is identified after commencement of an engagement – i.e. should there be a practical timeframe to take appropriate action? - May possibly include a process to allow practitioners to raise concerns with the persons suspected of the illegal phoenix activity prior to reporting the activity. A registered practitioner falsely or incorrectly flagging illegal phoenix activity can result in negative repercussions on the practitioners (sued). There may also be other contractual consequences of disrupting the relationship that may impact on the financial viability of any current projects, which could negatively impact more stakeholders. As part of the registered practitioner's duty to take reasonable steps, it could be a requirement that they include a clause in all contracts and/or terms and conditions of engagement that the engaging party agrees to a statement that they aren't and have not been involved in illegal phoenix activity. Alternatively, registered practitioners could require the signing of a specific document whereby the engaging party agrees to a statement that they aren't, and none of their associates, to their knowledge are, or have been, involved in illegal phoenix activity.

	#	Question	Response
	51	Do you agree with the proposed definition of "intentional phoenix activity"? Why or why not? Please make any suggestions for change.	The proposed definition: - Is not consistent with ASIC's explanation / definition of "illegal" phoenix activity, which may create confusion for Registered Practitioners to which the duty is imposed. - Limits the activity to a person that is a "director of a body corporate", which in our experience does not cover other parties who are not directors but are still the controlling minds of the company. Suggestions: - That the definition be aligned with ASIC and ATO guidance materials, which state that illegal phoenix activity is: *the deliberate and systematic liquidation of a corporate trading entity which occurs with the intention to avoid tax and other liabilities, such as employee entitlements, and to continue the operation and profit taking of the business through other trading entities*. The economic impacts of potential illegal phoenix activity report | Australian Taxation Office (ato.gov.au) - Replacement of the word "intentional" with "illegal" consistent with ASIC's distinction between legitimate phoenix and illegal phoenix activity: *Not all company failures involve illegal phoenix activity, as genuine company failures do occur. Where a director has responsibly managed a company and it subsequently fails, they can operate the same business using another company without engaging in illegal phoenix activity. This is often referred to as a 'company restructure'…* *The key difference between a legitimate phoenix business rescue and illegal phoenix activity is the director's dishonest intentions or recklessness. Where a director sets out to intentionally avoid paying debts and liabilities, by transferring assets to another company without paying the true market value, or is reckless as to creditor harm, then the conduct is illegal.* Illegal phoenix activity | ASIC

	#	Question	Response
			That the definition might also reference an activity that is in breach of a director's duties pursuant to Sections 180, 182, 183, 184 and/or 588G of the Corporations Act 2001 (Cwth). Generally, if something is done to disadvantage a company then the directors would be breaching their duties (e.g. if directors sell company assets below market value to the 'new' entity). This would assist with identifying and developing a clear argument relating to behaviour or actions taken.
	52	Do you support that a failure to comply with the duty is addressed through disciplinary action rather than being an offence? Why or why not?	We support the proposed disciplinary approach for the following reasons: - It will allow a more customisable remediation approach, which considers and addresses the individual circumstances of the failure to comply, meaning the disciplinary action could be proportionate to the degree of failure (some reasonable steps were taken, but not sufficient vs little to no steps were taken, and if this a first or repeated failure). - It may also allow consideration of the relationship between a registered certifier and the party involved in the illegal phoenix activity (for example, have they been long time business associates turning a blind eye or is it a new relationship). - The possibility of having their licence revoked (as the disciplinary action model would facilitate) provides sufficient motivation for a registered practitioner to be aware of the duty and comply with it. If failure to comply with the duty was met with the alternative of an offence/penalty, the system could have a significant negative impact on industry players that are taking all reasonable steps to understand and comply with the amended legislation.
	53	Would you support a mandatory reporting requirement if a person reasonably suspected that a director of a company has, will or is engaging in intentional phoenix activity?	We would support mandatory reporting, however there must be a balance between confidentiality of the reporter and rights of the party being reported due to the following reasons: - A registered practitioner who has falsely or incorrectly flagged illegal phoenix activity may result in negative repercussions on that practitioner (i.e. they may be sued). - Reporting may also be done out of malice and to cause disruption to practitioners. Reporting may encourage competing practitioners to report

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			competitors to manipulate the market and cause temporary disruption in their favour (to win tenders for example). Would there be penalties for making false or incorrect reports? If reporting is mandatory, our suggestion is that the reporting channel is consistent to current channels (i.e. through ASIC and the ATO): Concerns about illegal phoenix activity | ASIC Channels established between ASIC and NSW Government would then allow the flow of information/reporting once illegal phoenix activity is substantiated so as to allow quicker industry specific remedial action and preventative measures to be put in place.
	54	Do you support the proposal to provide the Secretary with the power to give a written investigation cost notice requiring a person to pay some or all costs associated with an investigation? Why or why not?	Yes. This should result in industry participants implementing controls to ensure compliance.
	55	Do you believe that the limitation to the power for the Secretary to issue an investigation cost notice is sufficient? Why or why not?	Yes.
	56	Is the definition of "exceptional costs and expenses" reasonable?	Yes.
	57	Are the appeal provisions reasonable?	Yes.