THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: PLC:JvdPgl231122

23 November 2022

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

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

Dear Sir/Madam,

Draft Building Compliance and Enforcement Bill 2022
Draft Building and Construction Legislation Amendment Bill and Regulation 2022

Thank you for providing us with the opportunity to comment on the draft Building Compliance and Enforcement Bill 2022, draft Building and Construction Legislation Amendment Bill 2022 and draft Building and Construction Legislation Amendment Regulation 2022. The Law Society's Property Law and Business Law Committees have contributed to this submission.

Our feedback on the two Regulatory Impact Statements issued for the draft legislation is provided in the **attached** comments tables.

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

Yours faithfully,

Joanne van der Plaat
President

Encl.

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Law Council
OF AUSTRALIA
CONSTITUENT BODY

Building Compliance and Enforcement Bill 2022
Regulatory Impact Statement – August 2022
Comments from the Law Society of NSW

QUESTIONS	COMMENTS
Objective and rationale of the BCE Bill	
Compliance and enforcement approach	
Question 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?	Yes, we agree with the rationale outlined in the Regulatory Impact Statement ("RIS") that a single legislative framework will provide the opportunity for transparent and comprehensive regulation. It will also allow for a more proactive approach, not just reactive enforcement as has largely been the case to date.
Part 1 – Preliminary	
Question 2: Do you think the definition of developer captures the characteristics of those who participate in the market?	Yes, we believe the definition is broad enough to capture all market participants. We also consider it appropriate that there be a power to both include and exclude categories of participants by regulation, allowing flexibility as the market evolves.
Question 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?	We support consistency across the various Bills. The definition of building work in the Building Compliance and Enforcement Bill 2022 ("BCE Bill") is the appropriate starting point due to its breadth.
Part 2 – Completion of notifiable building work	
Regulatory benefits and costs of the proposed expansion	
Question 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?	Yes, this will ensure vulnerable occupants of such buildings are subject to the same protections as those people living in class 2 buildings and ensure those businesses responsible for operation of the buildings can be confident in the quality of the building work. It is also likely to reduce ongoing costs to those businesses, incurred due to rectification of defects and displacement of residents, because of faulty building works.
Building levy	
Question 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?	Yes, there needs to be regular review to ensure suitability of rates. In our view, IPART is well suited to this task.

QUESTIONS	COMMENTS
Part 3 – Compliance and enforcement powers	
Audit powers	
Question 6: Do you support the consolidation of enforcement powers across the building enforcement legislation?	Yes, it is appropriate to have one comprehensive set of enforcement powers across all the relevant legislation in our view. Not only is enforcement easier for authorised officers, but one comprehensive set of powers assists participants to understand their compliance obligations more easily. We also note that it will be critical to ensure that the regulator is adequately resourced to manage the increased workload.
Part 4 – Remedial actions	
Undertakings	
Question 7: Do you support the expansion of undertakings as a compliance tool? Should undertakings be available for all breaches? Why or why not?	Yes, given undertakings are enforceable and there are repercussions for non-compliance, we consider they are an effective compliance tool. We consider undertakings should be available, but not necessarily offered, for all breaches, provided the regulator is satisfied that an undertaking is sufficient in the particular circumstances.
Question 8: What limitations do you see in using undertakings that the Department should consider in designing an undertaking power and using it in practice?	An undertaking should not be offered or accepted where the regulator is not satisfied that it is appropriate: for example, where the offence or breach is sufficiently serious that other enforcement action, such as a penalty, is more appropriate. The Department may need to consider implementing a policy or guidance setting out when undertakings are appropriate, and when they are not, but also allowing for the appropriate use of discretion by the authorised officer.
Compliance notices	
Question 9: Do you think the compliance notices should be used for defects other than serious defects?	Yes, provided there is adequate resourcing of NCAT to ensure anticipated increased applications for review can be dealt with in a timely manner.
Question 10: Do you support the proactive use of compliance notices, that is not requiring a building dispute first?	Yes, provided there is adequate resourcing of NCAT to ensure anticipated increased applications for review can be dealt with in a timely manner.
Plumbing and drainage work directions	
Question 11: Should these direction powers be expanded to all specialist work in line with the expansion of compliance certificates in the Building Bill?	Yes. All specialist work has the potential to cause a serious impact if improperly carried out, but direction powers should only be used where a serious impact is anticipated.

QUESTIONS	COMMENTS
Question 12: Do you agree with the increased penalty amounts? Why or why not?	Yes, noting the deterrent effects of such penalty amounts and that the recipient of the penalty is able to apply for a review.
Part 5 – Rectification of serious defects	
Building work rectification orders	
Question 13: Do you support the expansion of building work rectification orders to all classes of buildings?	We support the expansion of building work rectification orders for class 3 and 9c buildings and ongoing further review and consideration in relation to other classes.

Question 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?	In our view, the trigger for issuing a building work rectification order should be a defect which:
	• causes one or more of the following:
	  ○ the inability to inhabit or use the building for its intended purpose;
	  ○ the destruction of the building or any part of the building;
	  ○ the threat of collapse of the building or any part of the building;[1] or
	• constitutes a substantial failure to comply with approved plans or a relevant standard.
	
	In our view it is not appropriate to limit the trigger for issuing a building work rectification order to building elements. Overall, we are suggesting a narrowing of scope as we are concerned that the broad definition of 'serious defect' may lead to an overuse of building work rectification orders.

Question 15: Do you think the demerit points scheme will act as a sufficient deterrent for industry players who repeatedly contravene legislation?	A demerits points scheme may act as a deterrent for some industry players and in our view, it is appropriate to adopt such a scheme.
Question 16: Should demerit points apply to non-licence holders?	Yes, provided it only also applies to those who hold a registration or authorisation under building enforcement legislation, as well as office holders of those licence holders (including members of a partnership and directors of a corporation).
Question 17: Do you support mandatory education or training as the first-tier?	Broadly yes, however we note the regulation will specify the points to be allocated for certain offences, and until this is determined, it is difficult to comment as to whether we wholly agree with the tier system. For example, the first tier starts at 10 points, but it is not yet known the types or number of offences that would correspond to 10 points.

[1] The three sub-criteria replicate the terms of subclause (b)(ii) of the definition of serious defect in Schedule 2 Dictionary, BCE Bill.

QUESTIONS	COMMENTS
Question 18: Do you support a mandatory six-month suspension as the second-tier?	Generally, yes, but subject to further information being provided about the points allocated to offences, as referred to in our answer to question 17. We note that the remedial action of a six-month suspension will not apply for a non-licence holder if the demerit points scheme is to apply to non-licence holders. It may be difficult to have a distinct second and third tier for non-licence holders.
Question 19: Do you support a mandatory 12-month disqualification as the third-tier?	Generally, yes, but subject to further information being provided about the points allocated to offences, as referred to in our answer to question 17. We note that the remedial action of mandatory 12-month disqualification will not apply for a non-licence holder if the demerit points scheme is to apply to non-licence holders. As noted in relation to Question 18, it may be difficult to have a distinct second and third tier for non-licence holders.
Question 20: Do you support the ability to seek removal of demerit points after 12 months?	Yes, provided the Secretary is satisfied as to those matters set out in the RIS on page 60. Removal of demerit points should not be automatic. We also suggest that historical information regarding past demerit points should be retained and visible when published on the Department's website.
Question 21: Do you support the publication of a demerit points register on the Department's website?	Yes, part of any enforcement scheme is incentivisation against offending. The points register will allow participants to make an informed choice when choosing tradespersons and builders. We suggest clarification is required as to whether the demerit points register will only be published once a licence holder has reached 10 points so as to be subject to remedial action, or whether one point will be sufficient for publication on the demerit points register.
Part 8 – Offences and proceedings	
Question 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?	Yes, we agree, the amounts applied adequately reflect the seriousness of each tier.
Question 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.	Yes. Whilst the maximum amounts are quite high, ultimately a Court will decide what amount to impose up to the maximum by considering relevant matters and it is unlikely the maximum amounts will be imposed except in the most serious of cases.
Question 24: Do you agree that penalty notices are an effective deterrent to regulatory non-compliance? If not, why not?	Yes, penalty notices are a proven deterrent to regulatory non-compliance. Additionally, media attention is often drawn to those non-compliances that are more serious, further enhancing the deterrent aspect of the penalty.

QUESTIONS	COMMENTS
Question 25: Do you think that directors should be liable for any offence that is able to be committed by a corporation? If no, why?	Yes, in our view the circumstances set out in clause 156 of the BCE Bill are appropriate.
Question 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, clause 157 is sufficiently broad in our view. We consider clause 157 of the BCE Bill should be a strict liability offence, that is, the level of seriousness is not relevant.
Question 27: Are there other 'reasonable steps' that could conceivably be taken to prevent an offence from occurring (cl 157(7))?	We consider that clause 157(7) of the BCE Bill is sufficiently broad.
Question 28: Do you think these measures will promote better corporate compliance? If no, why?	Yes, until now corporate officers have had the benefit of the corporate veil. Provided sufficient education is provided, we expect that corporate officers will be concerned to protect themselves by taking the steps set out in clause 157(7) of the BCE Bill, which should result in better corporate compliance.

Building and Construction Legislation Amendment Bill 2022
Building and Construction Legislation Amendment Regulation 2022
'Amendment Bill RIS'

Regulatory Impact Statement – August 2022
Comments from the Law Society of NSW

QUESTIONS	COMMENTS
Discussion and assessment of options	
1. Ensuring building products are safe and suitable	
Question 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?	Yes, in our view, parties that supply defective products to builders should be accountable for those defective products. The final user of the product should have access to all relevant information relating to the product and be able to ascertain whether the product is defective or not. The proposal reflects changes to the *Design and Building Practitioners Act 2020* and aligns responsibility with the *Australian Consumer Law* while capturing products not used for personal or domestic consumption.
Question 2: Are there any other persons that should be added to the chain of responsibility and therefore be held accountable for non-conforming or non-compliant building products? If yes, who and why?	No, and we note that other persons may be added to the chain of responsibility by regulation, if, and when required.
Question 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)	Yes, we support the proposed comprehensive duties as specified in the Building and Construction Legislation Amendment Bill 2022 ("Bill").

QUESTIONS	COMMENTS
• 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)	
Question 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?	One challenge will be to ensure that each supplier in the supply chain obtains and passes on the information, whether that be hard copy or electronically. Each person in the supply chain will need to check contracts and practices to ensure that the information is obtained and passed on.
Question 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, the Secretary should have the power to monitor, restrict and warn on building products. The proposal aligns responsibility with the *Australian Consumer Law* while capturing products not used for personal or domestic consumption.
Question 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?	We support the proposed penalties as providing an effective deterrent.
Question 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?	Yes, in our view that should be sufficient time for industry to prepare, provided appropriate educational resources and communications issue from the Department.

QUESTIONS	COMMENTS
2. Enhancing rectification of strata buildings	
Question 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?	Yes, in our experience it is not unusual for further defects to be identified at the final inspection and it is appropriate in our view that the bond be available to enable rectification of these further defects.
Question 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?	We consider it appropriate to give the developer an extra 90 days to rectify defects identified in the final inspection, noting that the developer may apply for an extension of time.
Question 10: Are there any issues with the strata building bond being retained for a longer period while defects are remediated?	No, not that we have identified.
Question 11: The reforms for extending the building bond 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, provided appropriate educational resources and communications are provided.
Question 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?	Yes, particularly as the Bill is not likely to commence until 2024.
Question 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?	Yes, there are unlikely to be many projects where contracts were entered into prior to 2018 where building work will not have commenced by January 2023. It is in the interests of purchasers buying into such projects to have recourse to the building bond scheme.

QUESTIONS	COMMENTS
Question 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?	In our view the proposed approach is appropriate, and we have no suggested alternative.
Question 15: Do you support the introduction of a formal framework for the approval of APAs to improve their accountability? If not, why?	Yes, this would assist to ensure consistency of approach in the exercise of these functions of the Authorised Professional Associations.
Question 17: Do you support that a penalty provision should be prescribed for a person that falsely represents themselves as a building inspector? If no, why?	Yes, given the important role that building inspectors play.
Question 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?	Yes, this penalty is appropriate as a deterrent.
Question 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?	Yes, we support giving the owner the choice of resolving the dispute via NSW Fair Trading or proceeding directly to NCAT to have the matter heard before a building inspector is appointed. We agree with the benefits of this change as outlined on page 45 of the Regulatory Impact Statement ("RIS"), including that "Timelier dispute resolution will lead to the defective work being rectified earlier which may reduce the severity of the defect and cost of repairs".
3. Improving professional standards and competencies	
1. Flexible pathways for certifier registration	
Question 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?	We support this proposal. The role of a Professional Standards Scheme is one with which the legal profession is familiar, and the expertise of approved professional bodies is useful in enhancing competency standards.

QUESTIONS	COMMENTS
Question 21: What benefits or challenges do you think arise from an approved professional body undertaking competency assessments for registration purposes?	The key benefit seems to us to be the detailed industry knowledge of approved professional bodies. The key challenge is ensuring that the body devotes sufficient resources to fulfilling this important role, especially when it undertakes numerous other activities.
Question 22: Do you consider that this pathway should be limited to bodies operating a PSS? Why?	Yes, the safeguards which accompany the making, review and amendment of schemes under Part 2 Division 1 of the *Professional Standards Act 1994* provide important protections to the quality of the pathways for registration of certifiers.
2. Continuing Professional Development	
Question 23: Do you support the standardisation of CPD across the building and construction industry? Why or why not?	We support standardisation of CPD industry-wide. Standardised obligations are more readily understood across the industry, especially given the tendency for industry participants to work across more than one industry sector. This should be an aid for compliance.
Question 24: Do you support extending CPD requirements to include specialist practitioners? Why or why not?	We are supportive of broadening rather than restricting the classes of industry participants who are required to undertake CPD. In our view, specialist practitioners have a greater need for mandatory CPD than non-specialists, for example as reflected in the legal profession CPD requirements.
Question 26: Should it be up to industry or the regulator to determine the CPD requirements for individual practitioner types? Please explain your answer.	We believe the regulator should ultimately determine CPD requirements, but only after consultation with industry, including relevant industry associations.
3. Training as a response to a breach	
Question 28: Do you agree that education and training notices may be more effective than monetary penalties to fix non-compliant conduct and encourage permanent behaviour change? Why or why not?	In our experience, compliance regimes generally benefit from having a portfolio of possible remedies available, sometimes usefully applied in combination.
Question 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?	We have no concerns about this proposal provided appropriate resources are made available. One challenge may be to ensure compliance with the education and training notice.
Question 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?	We agree with this proposal. Early intervention will often stop a problem from compounding, particularly in industries where a participant may be undertaking multiple projects simultaneously.

QUESTIONS	COMMENTS
Question 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.	We are unsure if the desired outcome will be achieved and suggest that non-compliance should result in adverse implications for the licence holder, such as restrictions on the licence.
4. Ensuring fair and prompt payment	
Homeowners Notice – information symmetry between homeowners and builders	
Question 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?	Six months will likely be sufficient for the legal industry to review and prepare for the changes, but we cannot comment in relation to other industries.
Question 33: It is proposed that when a builder serves a payment claim on a homeowner under the SOP Act, the payment claim must be 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?	We support the Homeowners Notice, provided it is implemented with substantial education and awareness strategies, given the serious ramifications of non-compliance for builders.
Question 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?	The brevity and clarity of the content of the Homeowners Notice will be a key factor in the success of the initiative, together with education and awareness strategies.

QUESTIONS	COMMENTS
Question 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?	In our experience, some debtors do not make prompt payment because of an absence of information regarding their obligations. In our view, a separate notice to the contract, clearly setting out statutory obligations, should assist in encouraging prompt payment.
Securing greater protection of retention money for more projects	
Question 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 lowering the project value threshold for payment of retention money? If not, why?	We agree that the project value threshold should be lowered to afford greater protection to subcontractors.
Question 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?	We suggest a phased lowering of the project value threshold is appropriate, and in our view $10 million is too high for the threshold. We note that Western Australia has adopted a phased approach to lowering the threshold to a much lower value, and from 1 February 2024, the project threshold will be lowered to $20,000. In our view, as a matter of general principle, thresholds are not appropriate for situations where a party holds funds for a specific purpose. We note the strict regulations that apply to solicitors and conveyancers when holding their clients' funds on account of costs and disbursements in a regulated trust account.
Question 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?	We see no reason for not lowering the threshold, including the costs of compliance associated with establishing and maintaining a retention money trust account.

QUESTIONS	COMMENTS
Adjudication Review Mechanism	
Question 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, such a review is appropriate in our view. It is preferable to moving immediately to litigation with the associated costs, delay, and uncertainty.
Question 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?	It is appropriate, in our view, to limit the matters that may be considered by the review adjudicator to those matters which were considered at the original adjudication. We support a limitation by monetary amount or type of matter, in keeping with the recommendations of the Murray Report as discussed on page 65 onwards of the RIS.
Question 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?	We note that pursuant to Schedule 3, Item 7 of the Building and Construction Legislation Amendment Bill 2022, proposed new clause 26AF of the *Building and Construction Industry Security of Payment Act 1999* provides that the authorised nominating authority refers the review application to the review adjudicator. The authorised nominating authority should have the ability to allocate the review to an adjudicator it considers would be appropriate to review the matter, having regard to factors such as expertise and experience. We additionally suggest that the parties should have the right to make submissions to the authorised nominating authority regarding the necessary expertise or experience of the review adjudicator.
Adjudicator Powers	
Question 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?	Yes, in our view, it is appropriate that the adjudicator has these additional powers, to enable the adjudicator to access all relevant information and considerations in making the adjudication.

QUESTIONS	COMMENTS
Question 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?	Yes, and arguably the earlier input from an appropriate expert may actually reduce rather than lengthen the time taken to resolve the dispute.
Question 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?	Yes, in our view, the legislation should address the adjudicator's power to order payments by the parties to cover the cost of any testing or engagement of an expert during the adjudication. However, the final apportionment of fees is appropriately determined by the adjudicator, having regard to all the circumstances, including the final determination.
5. Robust regulatory intervention	
Rectifying defects early	
2. Issuing BWROs for products failing to comply with the NCC (not limited to the BCA)	
Question 45: Do you support the expansion of certifier powers to hand out WDNs where they identify a “serious defect”? Why or why not?	Yes, we support the broadening of such powers as proposed, because it should assist in early identification and rectification of defects.
Question 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, again this should assist in early identification and rectification of defects.
Question 47: Do you think the expansion of the application of BWROs will improve the way in which prefabricated products are regulated? Why or why not?	Yes, due to the increasing use of prefabricated products, this would be appropriate in our view.

QUESTIONS	COMMENTS
3. No privilege against self-incrimination for body corporates	
Question 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?	Yes, we agree that the legislation listed on page 82, namely the *Building and Development Certifiers Act 2018*, *Building Products (Safety) Act 2017*, *Home Building Act 1989*, *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020*, *Strata Schemes Management Act 2015* and the *Fair Trading Act 1987* should be amended to clarify that the right against self-incrimination will not apply to corporations. As pointed out in the RIS, this will align this legislation with the common law and other legislation that regulates the activities of corporate entities, such as the *Protection of the Environment Administration Act 1991*.
Question 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?	Yes, as this reflects the position at common law.
4. Promoting accountability to deter intentional phoenix activity	
Question 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?	No, we have several concerns with this proposal. There may be difficulties in determining whether the steps taken were reasonable as well as difficulties in enforcing such a duty. There is also a more fundamental problem, however, in that the question of whether a person has been involved in "intentional phoenix activity" may be too difficult a question for a registered practitioner to be able to form a view about, given the complexity of such an assessment, and the limited knowledge they will have of the building activities and financial standing of the other party.
Question 51: Do you agree with the proposed definition of "intentional phoenix activity"? Why or why not? Please make any suggestions for change.	This definition does not focus on the disposal of a company's assets at under value, which is the traditional focus of unlawful phoenixing regulation under insolvency laws. Further, the use of the word "intention" imports a challenge for those who will seek to implement the new legislation (proving an "intention" being notoriously difficult) - therefore, we suggest a focus on the effect of what has happened with the assets. We also suggest that a definition of "assets" for the purposes of the new legislation be introduced so that it is clear that "assets" includes employees (including casual employees) to cover situations where labour hire entities simply transfer employees to a new labour hire entity.

QUESTIONS	COMMENTS
	The reference to "economic entity" could be defined to be any entity trading with an Australian Business Number. This is proposed to cover situations where phoenix operators use trust structures to hinder creditors. We suggest the definition be amended to the following effect: ***113 Meaning of "~~intentional~~ unlawful phoenix activity"*** (1) *In this Act, a person is involved in ~~intentional~~ unlawful phoenix activity if the person is a director of a body corporate [or economic entity] (**the first body corporate**) and is directly or indirectly involved in—* (a) *~~liquidating~~ disposing of or otherwise dealing with the assets of the first body corporate [or economic entity] ~~with the intention of~~ which has the effect of preventing the value of those assets from becoming available for ~~avoiding~~ the payment of debts of the first body corporate [or economic entity], including taxes, employee entitlements and amounts due to creditors, and* (b) *establishing, ~~the registration~~ registering, or taking control, or management of another body corporate [or economic entity] (**the second body corporate**) with the ~~intention~~ effect that the second body corporate [or economic entity] ~~will—~~* (i) *continues business activities similar to the business activities of the first body corporate [or economic entity] and using assets of the first body corporate[or economic entity], and* (ii) *~~be~~ is under the control or management of persons who are, or are close associates of, persons who had control or management of the first body corporate [or economic entity] before the ~~liquidation~~ disposition or other dealing mentioned in paragraph (a).*
Question 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 suggest that this proposal be further examined by the Phoenixing Taskforce (being the taskforce led by the ATO as referenced on page 83 of the RIS).

QUESTIONS	COMMENTS
5. Recovering costs to maintain a strong regulatory approach and increase accountability	
Question 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?	No, we do not support the proposal. Costs of investigation for non-compliance are, in our view, properly borne by government in the first instance, subject to any right of recovery in subsequent prosecution or litigation.
Question 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?	
Question 56: Is the definition of "exceptional costs and expenses" reasonable?	
Question 57: Are the appeal provisions reasonable?	