15 October 2026

Law Council
OF AUSTRALIA

Business Law Section

Construction Policy and Reform Branch
Department of Employment and Workplace Relations
50 Marcus Clarke Street
CANBERRA ACT 2601

By email: WR.Building@dewr.gov.au

Dear Construction Policy and Reform Branch,

Potential Commonwealth Standards for the Construction Industry

1. This submission is made by the Infrastructure and Construction Committee of the Business Law Section (**BLS**) of the Law Council of Australia (the **Committee**) in response to the potential Commonwealth standards for the construction industry.

2. The Committee is comprised of experienced senior legal practitioners working in infrastructure and construction law. The BLS does not have a specialist workplace relations or industrial relations subcommittee, and has a policy of not addressing matters pertaining solely to those issues. Accordingly, the Committee responds only to the discrete aspects of the consultation set out below.

Regulatory Complexity

3. In reviewing the consultation questions across the various themes, including without limitation Themes 4 and 5, a common issue arises: the problem the potential standards seek to address is already the subject of existing regulatory regimes, albeit that there may be gaps in those regimes, such as the inability of States to regulate registered employee associations.

4. Regulatory complexity is a key productivity inhibitor in the Australian economy. Regulatory complexity can take a number of different forms, and may involve:

   (a) inconsistency between Federal, State and local government laws;

   (b) inconsistency between laws made by the same level of government and administered by different government agencies or regulators;

   (c) internal inconsistency within a single piece of legislation; and/or

   (d) complexity in the way in which the law is developed, which causes difficulties with navigating legislation to understand the regulatory position.

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5. The Committee believes that having a clear and coherent legislative framework would better support the objective of ensuring government financial arrangements drive quality, productivity, lawful behaviour and deliver safe, secure, well paid jobs and that government should be both: (a) actively addressing and seeking to reverse historical complexity that has arisen; and (b) taking better care not to unnecessarily add to regulatory complexity and/or inconsistency with existing laws when making new laws.

6. The Committee notes that regulatory complexity, duplication and fragmentation can create significant costs for businesses seeking to establish, operate and expand. Differences between Commonwealth, State and Territory frameworks can result in unnecessary administrative burdens and inconsistent compliance requirements. These costs are disproportionately experienced by small and medium-sized businesses that may lack the resources and administrative capacity of larger organisations.

7. Consistency across jurisdictions can reduce compliance costs, improve certainty and allow businesses to focus resources on productive growth.

8. Any additional Commonwealth involvement in this space should focus on ensuring simplicity, avoiding duplication with existing regimes, and not unduly burdening participants who already comply with existing systems with additional, costly administrative burdens that could affect solvency. In this respect, it is widely accepted that micro, small and medium sized businesses account for in excess of 98% of all construction businesses[1] and that the construction industry is highly represented in insolvencies.

Theme 1, Question 4: What criteria, including timeframes, should be applied to fit and proper requirements (for example, serious contraventions, phoenix activity indicators, criminal convictions)? Are there existing frameworks that should be leveraged, such as right of entry under the Fair Work Act, company director requirements, and legal practitioner admission requirements?

9. The Committee notes that the Productivity Commission has been tasked with reviewing the operation of the changes introduced by Schedules 1, 3 and 4 of the *Treasury Laws Amendment (Combating Illegal Phoenixing) Act 2020* (Cth).

10. In the Committee's 2022 submission it was noted that since the reforms took effect in 2020, the Committee was only aware of one successful Court decision.[2]

11. That remains the case today. The reasons for that are unclear. It is unlikely due to reduced incidents of poor conduct. It is more likely due to the fact that a liquidator appointed to a company whose assets have been stripped likely does not have the resources or funding available to pursue those responsible for such conduct.

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1 For example, Committee for Economic Development Australia (CEDA) reports that the amount of construction business with fewer than 20 employees is 98.5% - https://www.ceda.com.au/news-and-resources/media-releases/workforce-skills/size-matters-why-construction-productivity-is-so-weak

2 *Re Intellicomms Pty Ltd (in liq)* [2022] VSC 228; 70 VR 332.

12. The Committee refers to and relies upon paragraphs 112 to 117, of the Committee's submissions in response to the Productivity Commission's inquiry on Reducing Barriers to Business Dynamism.[3]

Theme 2, Question 8: How can existing dispute resolution pathways be strengthened or better used to resolve workplace, commercial and health and safety disputes fairly, effectively and in a timely manner? What early intervention or dispute prevention mechanisms should be considered to minimise project disruption and limit productivity impacts?

13. The Committee's response to this question addresses the reference to "commercial" disputes. The Committee encourages the use of Dispute Resolution Boards in the context of major projects and proposes that a major project in this context be projects over $50,000,000. Dispute Resolution Boards can assist in:

    (a) encouraging open communications;

    (b) identifying potential issues and assisting the parties to address them before they escalate either into claims;

    (c) making informal recommendations in a timely fashion which can reduce or eliminate the need for protracted dispute resolution proceedings;

    (d) preserving the working relationship both on the relevant project and for subsequent projects; and

    (e) monitoring project performance in real time.

Theme 2: Question 10, What measures would best support full and timely payment for subcontractors and suppliers without duplicating existing state and territory security of payment laws?

14. As correctly identified, state and territory security of payment laws presently exist in relation to payment.

15. However, there are instances where governments are not required to comply with the relevant existing legislation such as in South Australia, where the Crown is exempt for projects exceeding $4,000,000, and/or some Commonwealth projects, where the state legislation does not apply.

16. Additionally, there are serious commercial ramifications for a head contractor who seeks to rely upon entitlements it might have under legislation where a contracting party is a government entity. As a result, the commercial imbalance means that the maximum time periods for payment in respect of a claim under the relevant State Act will not be enlivened. It remains common to see payment terms for head contractors contracting with governments at all levels, and statutory authorities, exceeding the maximum payment terms in the relevant jurisdiction for claims made under the relevant Act.

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[3] Law Council of Australia, *Reducing barriers to business dynamism* (Submission to the Productivity Commission, 28 August 2026).

17. The Committee recommends that payment within the industry be facilitated by requiring federal, state and local governments and statutory authorities to contractually commit to complying with the payment timeframes in the security of payment legislation applicable in the state or territory in which the works are being undertaken, including, without limitation, the maximum payment terms.

Theme 5: Question 27: How should any construction standards manage the flow-through of compliance obligations across contractual supply chains, including to subcontractors and smaller businesses, to ensure responsibilities are clear, commercially fair, proportionate and do not create unnecessary administrative burden?

18. The use of 'balanced' standard form construction contracts by government — that are clear, commercially fair, proportionate and do not create unnecessary or unduly onerous administrative burdens, rather than complex, owner-biased contract forms — would facilitate similarly balanced downstream 'flow down' contracts.

19. Contracts entered into by government should enable the contractor to comply with their obligations under the unfair contract terms regime applicable under the Australian Consumer Law (**UCT Regime**). In this respect, unduly onerous and administratively heavy head contract burdens cannot necessarily be passed on to subcontractors under the UCT Regime, given over 98% of participants in the industry are small businesses.

Conclusion and further contact

20. The Committee does not support duplicative and inconsistent legislation, given the consequential impact on businesses (and their solvency) of complying with multiple regulatory systems, with different regulators and inconsistency in both the law and its application. Inconsistencies in law and application should be avoided.

21. Furthermore, contracting arrangements entered into at all levels should reflect and comply with legislative regimes.

22. The Committee would be pleased to discuss any aspect of this submission.

23. Please contact the Chair of the Committee, Owen Hayford [redacted] or Deputy Chair of the Committee, Megan Calder, [redacted].

Yours sincerely



Adrian Varrasso
Chair, Business Law Section