



Reducing Barriers to Business Dynamism

Submission to the Productivity Commission

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1. Executive Summary

This submission focuses on two key issues: the regulations that make it hard to run and grow a viable residential construction firm in Australia, and the rules and regulations that make it hard to rescue a viable but distressed residential construction firm.

It argues that the business dynamism problem in residential construction is not principally one of entry or exit in the traditional sense. It is that regulatory, contractual, and insolvency issues in the sector make it disproportionately hard to run, grow, and when necessary, rescue an otherwise viable residential construction business.

Drawing on findings from the Building 4.0 CRC Project #80, we identified four interconnected barriers.

- 1) First, regulatory complexity and administrative burdens consume the time, resources and capabilities of small builders operating without dedicated legal and financial support.
- 2) Secondly, fragmented licensing, security of payment and contract regulation create unnecessary costs, inconsistency and barriers to interstate growth and competition.
- 3) Thirdly, the financial architecture of the industry, including fixed price contracts, deposit caps and delayed payments, can leave builders and subcontractors exposed to cash flow shocks.
- 4) Finally, builders in financial distress often face significant barriers to rescue, including high costs of seeking professional advice and, in some jurisdictions, licensing consequences that prevent access to the small business restructuring regime.

These are not isolated problems. Together they discourage growth, increase insolvency risk and leave viable builders with no option but to enter liquidation. The regulatory complexity and financial architecture described in this submission do not simply make life harder for individual firms — they systematically suppress entry, constrain expansion, and convert recoverable financial distress into permanent exit. In doing so, they weaken housing supply, destroy productive capacity that has taken years to build, and generate losses that extend far beyond the insolvent firm itself: to subcontractors left unpaid for completed work, to consumers with unfinished homes and exhausted deposits, and to a broader economy that bears the cost.

The Commission should consider treating residential construction as a priority case study in how regulatory design, payment settings and insolvency law can either support or limit business dynamism.

Reform should focus not only on reducing unnecessary regulatory burden, but on national regulatory coherence, improving cash flow resilience, and ensuring viable firms can access rescue pathways before failure becomes inevitable.

2. Introduction

This submission is made by the research team behind the Building 4.0 CRC Project #80), *Why are insolvencies so high in the Construction Industry and what can be done about it?*. The project was a 9-month, multi-partner research program completed in September 2025. The final report was prepared by Dr Lyndall Bryant, Morgan O'Neill, Dr Amanda Bull, Dr Elizabeth Streten, Dr Fiona Cheung, and Dr Jessica Thiel.

The residential construction sector is suffering from a business dynamism problem, sitting at the intersection of the two key themes of this Inquiry: regulatory and administrative burdens, and the design and operation of insolvency frameworks.

It is a sector where the consequences of poor business dynamism are felt directly through housing supply shortfalls, consumer loss, subcontractor insolvencies, and broader economic contagion.

From a regulatory and administrative perspective, complexity collectively impacts how many firms enter and exit the industry, the size and quality of those firms and how quickly those firms can respond to opportunities (including opportunities for expansion). This submission details how:

- the overly complex nature of the National Construction Code, combined with the cumulative tax and compliance burden facing small businesses, suppresses growth and impacts firm survival, growth and adaptation because those builders operating in the industry lack the necessary business acumen, or the resources to access specialist advice, needed to understand and comply with these requirements (section 3);
- licensing and registration inconsistencies between States and Territories, together with jurisdictional fragmentations of security of payment legislation and construction contract regulation, creates a regulatory patchwork that raises compliance costs for builders seeking to operate across borders, limits interstate mobility and competition, and can produce unequal access to insolvency rescue mechanisms depending on where a firm is registered (see section 4);
- the financial architecture of residential construction contracts, including restrictions on rise-and-fall clauses, cost-plus arrangements and deposit caps, leaves builders structurally exposed to cost and cash flow shocks, reducing their willingness to take on projects, their capacity to adopt innovative delivery models, and their resilience to economic volatility (see section 5); and
- the interaction between Commonwealth insolvency law and State licensing requirements, particularly the suspension of licences on entry to the Small Business Restructuring regime, prevents otherwise viable firms from accessing rescue mechanisms, converting recoverable financial distress into unnecessary liquidation (see section 6).

Efficient business exit and re-entry are central to the economic and societal functioning of the Australian residential construction industry and the broader economy. When a residential builder becomes insolvent, the consequences extend well beyond the firm itself: behind each insolvency sits a chain of unpaid contractors, stalled housing projects, and families left with unfinished homes. The Reserve Bank of Australia has described this dynamic as 'financial

contagion' - the failure of one business transmitting stress to many others (Reserve Banks of Australia, 2022). As set out in this submission, this contagion effect can destroy otherwise viable capacity, suppress market participation, and result in the inefficient reallocation of resources, and it is compounded by a framework, that, as discussed in Section 6, frequently prevents distressed but viable firms from accessing the rescue mechanisms that could interrupt this cycle.

The Building 4.0 CRC Project #80 that informs this submission was a multi-disciplinary and mixed methods research project that sought to understand why insolvency rates in the residential construction industry are disproportionately high relative to other sectors of the Australian economy. The research drew on multiple methodological strands: qualitative interviews with key stakeholders; structured industry workshops; quantitative analysis of ASIC insolvency data; and a doctrinal analysis of the regulatory frameworks governing residential construction across all Australian jurisdictions. This combination of methods enabled the research team to move beyond aggregate insolvency statistics to examine the structural, regulatory, and contractual conditions that drive financial distress at the firm level.

3. Regulatory Complexity and Administrative Burden

3.1 Overview

Small businesses in the residential construction sector operate within a regulatory environment that is, by any measure, extraordinarily demanding. The National Construction Code, combined with jurisdiction-specific licensing, local planning, environmental, workplace health and safety, and industrial relations frameworks, creates a landscape that is genuinely difficult to navigate for any small business operator without dedicated compliance support. As explained at section 3.3, this regulatory complexity disproportionately burdens small businesses, increases the costs associated with complying with the regulations and, because the business owners are so focused on staying on top of these regulations, there is little time and money left for business growth.

Furthermore, structural design choices across in the education and training available to builders also impacts their capacity to understand these complex regulatory obligations.

3.2 Complexity of the National Construction Code

At the national level, the National Construction Code (NCC), administered by the Australian Building Codes Board, sets essential standards for building safety, health, accessibility, and sustainability. However, the NCC has grown to over 2,000 pages with updates every three years. Its' broad policy objectives, combined with state-by-state enforcement and additional state and local government regulations, create survival, scaling and adaptation issues across the industry.

One major issue that impacts builders' ability to scale their operations and adapt to change, lies in the technical complexity of the NCC. Our workshop participants reported that specialist knowledge is required to interpret and implement the NCC regime correctly. The impact of this complexity is disproportionately borne by small business builders and subcontractors, who struggle to understand their regulatory obligations without professional advice, resulting in increased compliance costs (including professional fees) and reduced incentives to expand (Australian Productivity Commission, 2025, pp. 4–5).

This is not a personal failing; it reflects the structure of vocational education pathways, which prioritise technical skills over business, legal, and regulatory literacy. The Certificate IV in Building and Construction, the minimum qualification required for builders to enter the industry in most jurisdictions, includes only four business, legal, or financial units, none of which adequately equip practitioners with the skills to ensure their business remains viable as it grows.

This gap means that builders can enter the industry technically qualified but operationally underprepared, creating conditions for later financial distress.

3.3 Tax and Business Compliance Burden

Small businesses operating in the residential construction industry disproportionately face a tax, compliance, and business administration environment that is significantly more complex than most businesses of a similar size operating in other industries— often without specialist staff to manage it (Bryant et al., 2025; Lignier et al., 2014).

Regulatory frameworks in Australia are largely designed without meaningful differentiation by business size (Douglas and Pejoska, 2017). A sole director building company turning over \$2 million a year faces essentially the same licensing obligations, safety requirements, environmental and reporting duties, and tax compliance obligations as large firms, despite having fewer resources and less administrative capacity.

The sole director/builder model means that the owner is typically managing all these obligations personally while simultaneously supervising multiple building projects, managing subcontractor relationships, handling client communications, and more often than not, is 'on the tools' themselves. This administrative burden is diverting the directors time from more productive work.

Although tiered compliance requirements appear an obvious solution, there are additional considerations that must be made when contemplating their design. Where regulatory obligations materially increase, businesses may rationally choose to remain below those thresholds rather than pursuing growth opportunities and triggering more onerous requirements (Douglas and Pejoska, 2017). In construction, this can mean deliberately limiting the scale of operations, declining larger projects, or avoiding the engagement of additional employees to stay below a regulatory trigger point. Such an approach, if badly designed, may directly suppress the business dynamism that this inquiry is seeking to promote.

4. Regulatory Fragmentation and Interstate Incoherence

4.1 Overview

A defining feature of Australia's construction regulatory environment is the absence of national coherence across the most critical instruments: licensing, security of payment, and contract regulation. What exists instead is a patchwork of eight jurisdiction-specific regimes, each with different rules, thresholds, timeframes, and enforcement practices. This section explains how this regulatory fragmentation raises legal and compliance costs, impedes interstate growth and weakens national integration.

4.2 The Licensing Gap: Technically Qualified but Operationally Underprepared

Every state and territory in Australia requires builders to hold a licence before they can legally carry out residential construction work. Most states and territories base their licensing requirements on the National Registration Framework for Building Practitioners (NRF), a non-binding national model developed by the Australian Building Codes Board in 2021. Under this framework, the minimum qualification for a residential builder is a Certificate IV in Building and Construction, combined with between two and seven years of supervised practical experience (Bryant et al, 2025, appendix B).

On paper, these requirements look broadly consistent across Australia. In practice, however, there are many inconsistencies in how the practical experience requirements are assessed. Some jurisdictions conduct rigorous assessments, whilst others treat the experience requirement largely as a matter of time served, with limited scrutiny of whether the applicant has actually demonstrated the competencies required. The result is that two builders holding equivalent licences may have vastly different levels of genuine preparedness to run a construction business. The uneven assessment of practical experience highlights a significant market design problem. It has the potential to distort competition between builders who have been required to demonstrate rigorous practical experience and those whose experience has been assessed largely by time served; to enable those with less rigorous requirements to expand into jurisdictions with higher standards and, in many instances, to encourage forum shopping by those seeking to enter the industry through the least onerous licensing pathway.

Further compounding this variability is the operation of Australia's Mutual Recognition Scheme (MRS) and the 2021 Automatic Mutual Recognition Scheme (AMR). These amendments are designed to enable a builder who holds a licence in one state to work in another state without obtaining a separate licence. This, in principle, reduces the administrative cost of operating across state borders and supports the efficient movement of skilled labour to where it is most needed. However, the CRC research identifies a significant structural challenge: the MRS creates an unintended consequence that directly undermines the licensing system's consumer protection function. Because licensing requirements differ between jurisdictions, practitioners strategically obtain their licence in whichever jurisdiction has the lowest bar and then use that licence to work anywhere in Australia (Bryant et al., 2025). When a builder moves from one jurisdiction to another under the MRS, the receiving state's regulator is provided only with the licence classification; not the underlying qualifications, the assessments that were conducted, or what financial probity checks were or were not applied (Bryant et al., 2026). There is no mechanism to verify whether the standards the originating licence was based on are equivalent to what the host jurisdiction would require under their regime.

This practice, known colloquially as ‘jurisdiction shopping’, means that firms compete through regulatory arbitrage rather than capability and efficiency. A state that invests in improving its licensing standards, to increase quality and better protect consumers, faces the prospect of those improvements being undermined by the MRS (Bryant et al., 2025).

This structural challenge does not render the MRS problematic in itself. Rather, it highlights that any reform to entry requirements must be implemented at a national level to be effective. State-by-state reform, absent national alignment, would be effectively neutralised by the MRS.

4.3 Security of Payment: Eight Regimes, No National Standard

Research consistently shows that poor cashflow is among one of the clearest indicators of financial distress (Master Builders Australia, 2023; Reserve Bank Australia, 2022; Bryant et al, 2025; Ernst & Young, 2025). Subcontractors occupy a particularly vulnerable position within this architecture. Their risk of insolvency often stems not from poor business practices, but from cascading financial failures higher up the contracting chain that are largely out of their control. As ASIC data confirms (Table 1), contractual disputes and defects are not simply individual business weaknesses but features of the payment architecture.

In response, all Australian states and territories have introduced Security of Payment (SOP) legislation aimed at safeguarding subcontractor entitlements by establishing a statutory right to claim progress payments, imposing strict timeframes for payment responses, and providing rapid adjudication mechanisms. Yet despite their national presence, there is no nationally consistent approach to implementation, monitoring, or enforcement.

A clear delineation exists between the East Coast Model, adopted by most states and territories, and the West Coast Model, used in Western Australia and the Northern Territory. As Table 2 highlights, these models differ significantly in how payment claims are initiated, processed, and enforced.

Table 2: Security of Payment Regimes – East Coast vs West Coast Models

Feature	East Coast Model	West Coast Model
Contractual override	Statutory scheme overrides inconsistent contract terms	Legislative terms implied only if contract is silent
Payment claim procedure	Formal payment claim served to the respondent under the Act	Follows contract procedure; adjudication only if dispute arises
Scope of claims	Limited to progress payments up the contractual chain	Broader scope, including debts and damages
Default penalty	Failure to respond results in liability for full claimed amount	No equivalent penalty
Timeframes for payment	Varies by jurisdiction (e.g. 10–30 business days)	Payment within 50 days (WA) or 28 days (NT) where contract exceeds limits
'Pay when paid' clauses	Void in all jurisdictions	Void in all jurisdictions

Workshop participants noted that awareness of SOP provisions remains low among subcontractors. Where awareness exists, subcontractors remain apprehensive about enforcing those rights against builders for fear of being blacklisted from future work (Australian Government, 2015). The lack of business acumen (discussed at section 2.2) also comes in to play here, as caselaw evidences that subcontractors frequently misunderstand their obligations under the SOP legislation (Australian Government, 2015; Turnkey Innovative Engineering Pty Ltd v Witron Australia Pty Ltd [2023] NSWSC 981). When legal rights are essentially unusable by a segment of the market, they do not support effective stakeholder participation.

The fragmented nature of SOP legislation means its protections remain underutilised. Multiple reports and academic publications have recommended national harmonisation (Australian Government, 2015; Bell and Vella, 2010; Coggins et al., 2020). The 2015 Senate Economics References Committee summarised the key issue:

'It is absurd that in this day and age there are eight separate SOP regimes which differ markedly from one another. Some of the differences are small while some are large and significant, but what they all do is present manifold difficulties for construction industry businesses that routinely operate in more than one state. This has resulted in a great deal of wasteful litigation in which parallel points of law are raised in the different jurisdictions.' (Australian Government, 2015, p. 156)

Cashflow certainty is a precondition for small business survival and growth. There is a need for national consistency and greater awareness of subcontractor rights under SOP legislation to improve business dynamism in this area.

4.4 Residential Construction Contracts: A Regulatory Patchwork

Residential construction contracts across Australian jurisdictions are governed by a complex mix of state and territory legislation, with differing mandatory content requirements, deposit limits, cooling-off periods, and monetary thresholds governing when stricter consumer protections apply. For builders operating nationally, this fragmentation imposes a direct compliance cost: standard contract templates, pricing models, and risk-allocation clauses must be re-engineered for each jurisdiction, with a legal review required whenever a builder seeks to operate across a state border. This duplication of legal and administrative effort is a fixed cost disproportionately borne by small and medium builders, who lack in-house legal teams and cannot spread compliance costs across a large multi-state pipeline of work.

Beyond administrative duplication, several jurisdictions impose substantive restrictions on how builders can price risk into a contract, most notably limits or outright prohibitions on rise-and-fall clauses and cost-plus contracting. These restrictions were designed as consumer protections against open-ended cost exposure, but they also remove the principal mechanisms by which builders can manage volatility in material and labour costs. In an increasingly volatile global political and economic climate, where a fixed price contract cannot be adjusted, builders facing a supply cost shock must either absorb the loss or build a larger contingency into quotes upfront, making their tender less competitive. In practice, this can make builders less willing to take on work or push them to decline projects in certain price bands altogether, reducing the supply of builders willing to compete for residential work.

These constraints matter for business dynamism in several ways. They raise barriers to the entry and expansion for builders wishing to operate across jurisdictions since the fixed cost of legal compliance is more significant. They reduce the ability for firms to reallocate capacity and re-price risk in response to changing conditions, which is a core feature of a dynamic market. And, by squeezing margins and limiting risk-sharing mechanisms, they elevate insolvency risk for small builders already operating on thin margins. Victoria's Domestic Building Contracts Amendment Act 2025 (which received Royal Assent in September 2025, with effect from

December 2026) signals a shift towards a more flexible framework, including permitting cost escalation clauses in contracts over \$1 million and streamlining variation procedures. This reform directly restores a risk-sharing mechanism that allow builders to take on large projects without needing to price for worst-case material and labour cost movements up front. This is likely to encourage more builders to bid for, and remain willing to complete, large-scale projects during volatile periods, which in turn supports entry, expansion and continuity of supply in an industry where business exits and collapse have been most acute. While these reforms are welcome, their impact will depend heavily on forthcoming regulations yet to be released, and they apply only to Victoria, leaving the broader national patchwork of contract regulation unaddressed. This reform therefore demonstrates the kind of targeted flexibility that supports a more dynamic building sector, but also how slow, fragmented, and limited in scope such reforms tend to be when left to individual jurisdictions.

5. Cumulative Financial Burden

5.1 Overview

The CRC research makes clear that small businesses operating in residential construction do not typically fail in their first years of operation. They fail after they have been operating for some time: building networks, taking on more projects, moving into larger contract values, and beginning to navigate the full weight of the regulatory, financial, and contractual environment the industry imposes. Insolvency is concentrated among small, well-established firms with a median operating history of more than five years before insolvency (Bryant et al., 2025). 60% of insolvent directors had operated companies for more than five years, and 44% for more than ten years (Bryant et al., 2025).

The issues described in this section are each, in isolation, manageable for a large, well-resourced business with dedicated compliance, accounting, and legal staff. For the sole-director small business building houses on a 5% margin, the cumulative weight of these barriers can suppress dynamism and result in business failure.

5.2 The Financial Architecture of Residential Construction Contracts

Fixed-price contracts are the dominant model in residential construction, and they impose structural cash flow risk on builders in ways that are not fully appreciated by the regulatory framework as explored in section 4.4.

Builders typically quote on the basis of costs known at the time of contract execution. Where those costs rise after execution due to material price inflation, supply chain disruption, or labour cost increases, the fixed-price structure means the builder absorbs the difference. This risk is particularly acute during periods of economic volatility. Several jurisdictions compound this problem by prohibiting cost-plus contracts or rise-and-fall clauses, removing the contractual mechanisms that would allow builders to adjust for cost uncertainty. The practical effect is that a contract price as viable at signing can become loss-making well before completion, with no lawful mechanism for the builder to recover the difference. Builders are then left to either complete the project at a loss, 'rob Peter to pay Paul' by borrowing funds from another project to complete the first, or seek to exit, none of which is a sign of a well-functioning market.

Deposit cap regulations, which limit the upfront amounts builders can collect from clients, further constrain cash flow. Victoria, Queensland, Western Australia and New South Wales impose strict limits on deposit amounts to prevent excessive upfront payments (Domestic Building Contracts Act 1995 (Vic), sec. 11; Domestic Building Contracts Act 2000 (Qld), sec. 64; Home Building Act 1989 (NSW), sec. 8(1); Home Building Contracts Act 1991 (WA), sec. 10(1)(a)). While designed to protect consumers from exploitative upfront payment demands, these caps do not account for the genuine preliminary costs that builders incur before construction commences - including design, approvals, and procurement. For builders using modern construction methods such as prefabrication, where significant costs are incurred before site work begins, current deposit caps create cash flow deficits from the outset of a project, regardless of how efficiently a builder operates

The combined effect of these settings is a financial architecture that locks otherwise viable firms into contracts that become loss-making through no fault of their own, while simultaneously discouraging the adoption of innovative delivery models whose cost structures do not fit the regulatory assumptions underpinning deposit and payment rules. Firms are left structurally

exposed: locked into fixed price contracts, constrained in their ability to recover cost increases, and limited in the upfront capital they can access to fund preliminary work.

This combination has direct consequences for business dynamism. A regulatory framework that systematically converts viable contracts into loss-making ones during periods of volatility increases the underlying failure rate of construction businesses, independent of their underlying efficiency or management quality, weakening the link between firm performance and firm survival.

It also raises the risk profile of growth itself: a builder seeking to scale up, take on larger projects, or expand into new delivery models faces a higher chance that ordinary costs movements during the contract period will erode or eliminate margins, making growth a source of additional fragility rather than resilience. The result is a sector less able to absorb shocks, slower to adopt productivity-improving innovations like prefabrication, and characterised by lower business survival rates and reduced entry and expansion – the hallmarks of an industry with low business dynamism.

5.3 Payment Flows, Banking Misalignment, and Subcontractor Vulnerability

The payment chain in residential construction flows from the client to the head contractor, and from the head contractor to a network of subcontractors and suppliers. Disruption at any point in this chain can rapidly cascade through the entire network.

Despite SOP legislation in every jurisdiction establishing statutory payment timeframes, workshop participants consistently reported that financial institutions frequently delay the release of funds beyond statutory deadlines, often beyond 30 days regardless of regulatory requirements. This misalignment between statutory payment obligations and banking practices means that even valid, adjudicated payment claims may not result in timely cash receipt for subcontractors.

Although ‘pay when paid’ clauses, which attempt to make a contractor’s payment obligations conditional on receiving payment from higher up the chain, are rendered void by SOP legislation in every jurisdiction, they persist in practice and contribute to confusion and misaligned expectations between contracting parties (Bryant et al., 2025). This persistence reflects and reinforces the structural fragility of the payment chain; they signal an acknowledgement and expectation, that payment risk can and will be passed down the chain. This practice compounds the cash flow pressures created by delayed banking processing of payment claims, further reducing builders and subcontractors’ ability to plan, invest, or absorb cost shocks of their own.

This payment chain fragility compounds the structural vulnerability already created by fixed price contracting and restrictive deposit settings. Where the financial architecture at the head contract level locks builders into thin or negative margins during cost shocks, delays and disputes further down the chain strip subcontractors of the working capital to absorb those same shocks, leaving firms exposed to risk from both directions simultaneously, with limited ability to buffer either. This constrains business capacity to invest in new equipment, take on staff, or bid for larger projects, meaning growth decisions are driven as much by exposure to payment chain risks as by underlying demand or business capacity. The result is a payment architecture that generates business failure largely disconnected from underlying firm performance. Capable firms are forced out, the remaining pool of builders operates with persistently depleted working capital and reduced capacity to take on new work, and the industry as a whole is left less resilient, less able to expand to meet demand, and characterised by churn that reflects payment architecture failures rather than genuine improvements in business quality.

6. Barriers to Rescue: Insolvency Risk and the Limits of the Framework

6.1 Overview

The Productivity Commission's terms of reference identify 'barriers to exit' as a key area of inquiry. In the residential construction sector, however, the key issue is not whether businesses can exit, but whether they can access timely and effective restructuring when they first encounter financial distress.

Insolvency rates in the industry are consistently high, yet the CRC research found that many residential construction businesses are not fundamentally unviable at the point they first experience financial distress. (Bryant et al., 2025, pp. 27–28) Many of these small businesses still have projects on foot, subcontractor relationships, and the capacity to complete work if they can address their difficulties proactively, usually with some form of professional advice. However, for many builders, those mechanisms are effectively unavailable because of the interplay between state-based licensing frameworks and the rescue pathways available to them.

6.2 Cancellation of Essential Licences and Insurance

As most builders operating in the residential construction industry are small businesses (Bryant et al., 2025), this submission focuses on the rescue pathway most relevant to those operators: the Small Business Restructuring (SBR) regime in Part 5.3B of the *Corporations Act 2001* (Cth).

The SBR regime was introduced in January 2021 to give small businesses a low-cost, accessible pathway to restructure their debts, as an alternative to the high costs of the one-size-fits-all voluntary administration regime (Bull, 2025). Directors retain control of the business while a restructuring practitioner helps develop a debt repayment plan. If a majority of creditors approve the plan, the business continues.

However, in some Australian jurisdictions, the appointment of a restructuring practitioner under the SBR regime triggers the suspension or cancellation of the builder's licence and potentially any associated insurance (Bull, 2025, pp. 151–152). Without a licence or insurance, the company cannot legally carry out building work; without the ability to carry out building work, it cannot successfully restructure under the SBR regime.

As a result, construction businesses are disproportionately excluded from accessing restructuring pathways that remain available to small businesses in other industries. This limitation has little to do with the business's underlying financial viability and much more to do with regulatory design. The result is that a potentially viable construction business may have no option but to enter liquidation.

6.3 Drivers of insolvency in the residential construction industry

Another important aspect of the barriers-to-exit question is that, in the construction industry, many of the key drivers of insolvency are themselves produced by the factors discussed in Sections 3, 4 and 5 of this submission: regulatory complexity, administrative burden, regulatory fragmentation, and financial vulnerability.

The CRC team’s analysis of ASIC data relevant to the sector reveals that financial distress is rarely caused by a single issue. Rather, it reflects a convergence of administrative, regulatory, operational, economic and legal pressures.

The data indicates that insolvency in the residential construction sector arises from a complex interplay of systemic factors and industry dynamics, including:

- inadequate cashflow or high cash use (n=1055, 54%) – which points directly to the financial architecture and payment flow issues discussed in Section 5 of this submission
- poor strategic management of business (n=967, 49.5%) – pointing to the licensing and capability gaps discussed in Section 4.2 of this submission
- other (n=870, 44.6%)

Our analysis of the ‘other’ category, reported as a significant cause of financial failure in this industry, can also be linked back to regulatory and structural issues:

Table 1: ‘Other’ causes of Financial Distress in Residential Construction (ASIC free text data, FY21–FY25)

Cause (free text field)	FY21	FY22	FY23	FY24	FY25	Total
Contractual disputes	3	23	42	40	68	176
Defects	1	3	19	32	18	73
Nature of construction industry	0	4	19	22	16	61
Health issues (excl. mental health)	0	4	6	7	18	35
Mental health	0	1	3	3	1	8
Family dispute	0	1	4	3	2	10
Insurance	0	1	2	4	2	9
Death	0	0	4	5	5	14
Total	4	37	99	116	130	386

The three most significant categories each point to a different dimension of regulatory and structural fragility:

1. **Contractual disputes**, the single largest cause, reflects the transaction costs and cash flow disruption created by the contractual architecture discussed earlier in this submission. Disputes delay payment, consume legal and administrative resources, and can rapidly convert a marginally profitable project into a loss-making one.
2. **Defects** reflect both the compliance complexity of residential construction and the financial exposure created by rectification obligations, which can fall on a builder long after the relevant project has been completed and its margin spent.
3. The **‘nature of the construction industry’** category captures the thin-margin, fixed-price operating environment described in Section 4 and 5, where builders have limited ability to adapt pricing or delivery to changing conditions in an industry with volatile and drawn-out supply chains.

Together, these categories show that the conditions giving rise to insolvency in residential construction are largely systemic rather than idiosyncratic. They reinforce the concerns raised in Sections 3, 4 and 5 of this submission regarding regulatory complexity and fragmentation, capability gaps, and the rigid financial architecture within which residential construction businesses operate. These matters not only affect the sustainability and growth of small businesses in this industry; they are also key drivers of insolvency. Once a business experiences financial distress, additional regulatory design issues may then prevent it from accessing a rescue pathway intended to be available to all otherwise eligible small businesses.

7. Recommendations

Drawing on the findings of CRC Project #80, this submission makes the following recommendations to the Productivity Commission aimed at improving firm viability, growth adaptation, and restructuring capacity:

- **Review licensing and registration requirements between jurisdictions and the National Registration Framework** to reduce regulatory arbitrage under the Mutual Recognition Scheme and ensure that cross-jurisdictional licence portability does not undermine consumer protection standards. This would lower the fixed costs of operating across state borders, improve interstate labour and business mobility, and support more efficient firm expansion into new markets.
- **Streamline compliance processes for construction small businesses** through tiered compliance models based on business size and risk profile, while ensuring that tiered models do not inadvertently create disincentives for business growth. This would reduce the fixed compliance costs that disproportionately burden small and growing firms, while preserving incentives for firms to scale up rather than remain artificially small to avoid crossing regulatory thresholds.
- **Conduct periodic, co-designed reviews of relevant regulations** to identify and repeal or simplify requirements that add cost or delay but deliver minimal safety or consumer benefit. Embed sunset provisions into new and existing building laws to ensure ongoing regulatory justification. This would prevent the gradual accumulation of low-value regulatory costs over time, keeping entry and compliance costs proportionate and supporting a more contestable, dynamic market.
- **Undertake a national inquiry into progress payment schedules in construction contracts and lending practices**, assessing whether current arrangements strike an appropriate balance between prudential lending obligations and the operational realities of residential construction small businesses, and explore reforms to introduce more flexible, milestone-based payment models. This would improve payment certainty and cash flow predictability for builders, reducing working capital constraints that currently limit firms' ability to take on new projects or invest in growth.
- **Review and rebalance deposit cap regulations to reflect actual upfront construction costs**, including preliminary costs incurred before contract execution, and the specific requirements of modern construction methods such as prefabrication. This would remove a structural cash flow barrier to the adoption of more productive, innovative delivery models, supporting the diffusion of new technologies and methods across the industry.
- **Undertake a review of Security of Payment legislation across all jurisdictions with a view to developing a nationally consistent SOP framework** that reduces compliance burdens for small businesses, ensures payment flows efficiently through the supply chain, and addresses the misalignment between SOP payment timeframes and banking payment release practices. This would improve payment certainty throughout the contracting chain, reducing the cascading flow risk that drives subcontractor exits unrelated to firm performance, and would lower the compliance costs of operating across jurisdictions.
- **Implement the 2023 Parliamentary Joint Committee recommendation for a comprehensive, independent review of Australia's insolvency law**, with particular attention to the needs of small business operators in sectors with complex licensing

obligations. This would support more efficient reallocation of resources by ensuring viable firms can be rescued and restructured rather than liquidated, preserving productive capacity that would otherwise exit the industry,

- **Review state and territory legislation and regulations to identify any unintended adverse consequences arising from the appointment of a restructuring practitioner to a residential construction SME** under Part 5.3B of the Corporations Act 2001 (Cth), with a view to ensuring that the SBR regime is accessible to builders in all jurisdictions on equal terms. This would remove a significant barrier to rescue, ensure equal access to restructuring pathways regardless of jurisdiction, and prevent productive firm capacity from being destroyed by a misalignment between Commonwealth and state law.
- **Clarify director obligations under insolvency law, including thresholds for voluntary administration and the scope of the safe harbour provision**, to reduce the uncertainty that delays engagement with rescue mechanisms. This would encourage earlier intervention when firms are in distress, increasing the proportion of viable firms that are successfully restructured rather than liquidated, and supporting a more efficient allocation of capital and labour away from failing operations and toward productive use.

8. Conclusion

Residential construction presents a business dynamism problem that cannot be addressed by adjusting a single regulatory setting. As this submission has shown, the sector is shaped by a combination of regulatory complexity, jurisdictional fragmentation, structural cash flow vulnerability and barriers to rescue that operate together rather than in isolation.

A builder carrying the compliance burden described in Section 3 has less capacity to manage the financial pressures described in Section 4. A builder facing the jurisdictional fragmentation described in Section 4 is less able to plan and respond to distress. A builder who cannot afford early advice, and who faces a licence suspension trap, cannot access the rescue mechanisms described in Section 6. In that sense, the problem is not simply that firms fail, but that they survive or exit for reasons disconnected from their underlying viability.

Reform should focus on improving regulatory coherence, strengthening cash flow resilience and ensuring that viable businesses can access rescue pathways irrespective of the jurisdiction in which they are located.

The cost of inaction is not abstract. It is measured in viable businesses that have failed, subcontractors left unpaid, homes left unfinished, and in a housing supply shortfall that affects all Australians. In residential construction, regulatory coherence and access to rescue pathways are not peripheral to business dynamism, but rather they are preconditions to it. The question is no longer whether reform is needed in this industry, but how quickly it can be delivered.

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Case Law

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