29 February 2024

ACT Legislative Assembly
Standing Committee on Planning, Transport and City Services

BY EMAIL: LACommitteePTCS@parliament.act.gov.au

Dear Committee Secretary,

Inquiry into the Property Developers Bill 2023

Thank you for the opportunity to provide a submission to the above Inquiry.

I have been advising and acting for owners corporations and apartment owners in the ACT since 2010. In that time, I have advised well over 100 owners corporations in relation to building defects. I am the author of the *Guide to ACT Strata Law*, published in 2017, and which has been cited in a number of strata decisions in the ACT.[1]

The Explanatory Statement

According to the Explanatory Statement to the *Property Developers Bill 2023* (hereafter "*the Bill*"), the purported objects of *the Bill* are to:

1. ensure residential developments are carried out by competent and capable persons; and
2. ensure developers of residential developments are held responsible for the developments they carry out.

[1] e.g. *The Owners - Units Plan No 14 v Wright (Appeal)* [2021] ACAT 55; *McMillan & Anor v Owners Corporation - Units Plan No 79 (Unit Titles)* [2019] ACAT 86; *Corby v The Owners Corporation – Units Plan No 1035 (Unit Titles)* [2019] ACAT 45; *SDNM Pty Limited v The Owners - Units Plan 3908 (Unit Titles)* [2018] ACAT 102

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Property Developers Bill 2023

A. Statutory Warranties

I support the proposed changes to statutory warranties in *the Bill*. In my first submission to the *Inquiry into Building Quality in the ACT* dated 19 July 2018 (copy **enclosed**) I had argued that developers (in addition to builders) be made liable for breaches of statutory warranties under the *Building Act 2004 (ACT)*. This would bring the ACT into line with NSW and provide an additional layer of protection for apartment owners without increasing the risk profile for ACT projects beyond that of NSW projects.

It is pleasing to see that *the Bill* will finally make developers liable for breaches of statutory warranties. It is a long overdue development, and it was always unclear to me as to why developers were exempt from such liability.

B. Personal Liability for Directors

I support the proposed introduction of personal liability for directors of developers in *the Bill*. In my second and fifth submissions to the *Inquiry into Building Quality in the ACT* dated 19 July 2018 I argued that:

1. developers should ensure adequate funds are spent on proper design development; and
2. there be a restriction on the use of special purpose vehicles for the acquisition, development, and sale of property. Such companies tend to be short-lived and only have assets for a very short period of time.

I frequently am called upon to review and advise upon arrangements developers have entered into (some of which are quite creative) and how they appear to deliberately restrict the ability of owners corporations and unit owners to recover losses arising from building defects.

It is pleasing to see the introduction of personal liability for directors of developers which will cut through or undermine these attempts to avoid responsibility for building defects. The risk arising from such personal liability can be managed by professional indemnity policies and therefore should not cause undue hardship.

The argument raised in some of the submissions to this Inquiry that somehow directors are too remote from the actual work being completed runs counter to my experience where developers are actively involved in their projects such that they demand builders design on the run and avoid costly detailed design work to maximise profit.[2]

As Ross Taylor, a leading waterproofing consultant, has argued:

> *The developer saves on consultant fees by only paying the architect or structural engineer enough fees to get building approval, but not enough to provide working drawings or address design anomalies between documents. Defects often originate in the gaps between professional's drawings. It is common for architect's drawings to say one thing and the structural engineer and hydraulic engineers drawings to describe something quite different, and there is no time or budget for reconciling and closing of these gaps.*
>
> *Once development approval is achieved the lowest-bid builder is asked to "value engineer" the design to effectively screw down his price or otherwise the next builder in line will get it. This builder is then contracted to take over full design responsibility at the reduced price. To afford this the builder is reliant on the subbies to design the details for free.*
>
> *Since time is now of the essence to meet the developers' sales program, the key designer of the details often will, by default, become the brickie or formworker who has to make it work as best they can. They have to change things on the go to make it fit the space or more importantly, the budget, available.*[3]

Indeed, such personal liability is consistent with the *Abrahamson Principles* which state that to achieve a fair and equitable allocation of risk in a construction project, a risk should be allocated to a party if:

- the risk is within the party's control;

[2] e.g. by the Property Council of Australia, Master Builders ACT, and the Housing Industry Association.
[3] Taylor, R, "New building laws won't stop dodgy developers cutting corners", Sydney Morning Herald, 12 September 2017

- the party can transfer the risk (for example, through insurance) and it is economical to deal with the risk in this way;
- the main economic benefit of controlling the risk accrues to the party;
- it is in the interests of efficiency to place the risk on the party; and/or
- when the risk occurs, the loss falls on the party in the first instance and, applying the preceding principles, there is no basis to transfer the loss to the other party (or it is impractical to do so).

It is from these principles that the ubiquitous statement 'the risk should be borne by the party best placed to bear it' is derived. This statement is often held out as the barometer of fair risk allocation in a construction contract.

Unfortunately, at present, it is owners corporations and unit owners (who are unable to properly manage the risk) who bear such risk and the allocation of this risk to directors of developers is a fairer allocation of risk.

C. Reverse Onus on Defects

I support the proposal in *the Bill* to reverse the onus on defects. This is a welcome development given the very common response of builders and developers when defects are first raised by owners corporations is that there is no defect because:

1. the building has not been properly maintained. In this regard, the proposed “building manual” provisions will assist in clarifying what is required in this regard;
2. water ingress is due to “wind driven” rain rather than the result of a defect; or
3. a unit owner has caused the defect.

These arguments appear designed to stymie the efforts of owners corporation to convince builders and developers to take responsibility for defects and also wear down and exhaust executive committee members who are volunteers and usually not experienced in building issues.

Further, in my experience, it is not uncommon for builders and/or developers to actively campaign amongst unit owners to sow dissent and doubt as to whether defects actually exist. Indeed, when anyone calls this behaviour into question, their competency on building issues is called into question.

The reverse onus will do away with, or at least lessen, the effectiveness these tactics.

D. Consistency of Laws Across Jurisdictions

Contrary to the complaints in a number of the submissions that the reforms in *the Bill* will create inconsistency with law in other jurisdictions in Australia[4], *the Bill* actually replicates the law and reforms found in other jurisdictions. Many of the proposals simply mirror many of the *Six Reform Pillars* being implemented by the *NSW Building Commissioner*.[5]

Additionally, from 1 December 2023, the *Building Commission NSW* will take on the role of regulator of the building and construction industry in NSW. That is, building and construction related work areas of *NSW Fair Trading* are being transitioned to the newly established *Building Commission NSW*.

In the ACT, there are now at least four separate Government bodies who have jurisdiction over the building industry in the ACT – the *Construction Occupations Registrar*, the *Residential Building Dispute Administrator*, *Australian Capital Territory Professional Engineers Registrar* and now the *Property Developer Registrar*. Consolidating all these functions into one office aligns the ACT with other jurisdictions, particularly with NSW, and would likely result in more effective outcomes.

Residential Building Disputes Scheme / Professional Engineers Act

Given the significant scope and ambition of *the Bill*, it is necessary that a not insignificant bureaucracy be put in place to administer the Act. In this regard, Part 2 of *the Bill* sets out just some of the numerous officials necessary to ensure that the legislation operates as intended. It should be further noted that at least some of these officials will need some building industry expertise to properly exercise the functions given to them.

In this regard, it is important to see *the Bill* in the context of other attempts by the ACT Government to address concerns in relation to residential buildings in the ACT, such as the *Residential Building*

[4] e.g. by the Property Council of Australia, Master Builders ACT, and the Housing Industry Association.
[5] Reforms to improve the building and construction industry, 23 January 2020 (https://www.nsw.gov.au/news/reforms-to-improve-building-and-construction-industry)

Dispute Scheme. These attempts, which likewise required the establishment of a not insignificant bureaucracy, have failed to work.

On 24 June 2022, Part 6A of the *Building and Construction Legislation Amendment Act 2020* commenced. This part introduced the *Residential Building Disputes Scheme* into the ACT which had the aim of increasing the efficacy of resolving residential building disputes.

The reform involved implementing an alternative disputes resolution model (ADR) for residential buildings and building work. This scheme provided a framework to facilitate constructive and productive dialogue between parties to a dispute. By helping to resolve simple residential building disputes without legal proceedings, the *Residential Building Disputes Scheme* was intended to provide rapid and low-cost solutions.

Division 6A.2 outlined the administration of the new scheme. The scheme was to be overseen by a new statutory office holder – the *Residential Building Dispute Administrator* – a public servant who holds relevant qualifications and experience relating to dispute resolution, including in the building and construction industry. The Administrator was to be supported by dispute resolution officers and technical assessors qualified to assess residential building work.

However, almost four years after the legislation was passed and almost two years after the relevant provisions commenced, the Residential Building Disputes Scheme is still to be operational.

On 23 May 2022 I emailed Minister Rebecca Vassarotti in relation to the commencement of the *Residential Building Disputes Scheme* and received the **enclosed** letter dated 23 June 2022 which stated inter alia that the delayed commencement of two years (from 2020 to 2022) was to allow for the appointment of officers to manage the scheme and consultation as to various aspects of the scheme.

A year after my initial email, on 24 May 2023 I emailed Minister Rebecca Vassarotti in relation to the commencement of the *Residential Building Dispute Scheme* and received the **enclosed** letter dated 13 April 2023 which stated inter alia that:

> the Building Reform team within the Environment, Planning and Sustainable Development Directorate has been actively investigating options to operationalize the scheme and has

been working closely with Access Canberra to establish criteria for officers to manage the scheme.

It should also be noted that the Explanatory Statement to the *Building and Construction Legislation Amendment Bill 2020* provided that:

> Reform 43 in the resulting Improving the ACT Building Regulatory System program is to implement an alternative dispute resolution (ADR) model for residential buildings and residential building work. **The broad parameters for an ADR model were subject to consultation in 2015-16** … (emphasis added).

In short, the Residential Building Dispute Scheme has been the subject of consideration by the ACT Government for almost ten years and notwithstanding is yet to be operational.

Another attempt which also still awaits commencement is the *Professional Engineers Act 2023*, (although it was notified on 11 April 2023) and involves the appointment of the *Australian Capital Territory Professional Engineers Registrar* together with various deputy registrars.

Why these schemes are yet to operate remains unclear. However, possible reasons for these failures include:

1. an inability to recruit suitable candidates with the requisite building industry qualifications and experience to administer the *Residential Building Dispute Scheme* and *Professional Engineers Act 2023*. Whether this inability arises from a lack of interest from the building industry generally or the limited pool of skilled people in the market, the result is the same; and/or
2. incompetence on the part of the ACT Government to make operational legislation that has been in place for almost four years.

However, no matter the reason, these same reasons are very likely to prove equally problematic for the implementation of *the Bill*.

Please contact the writer if you have any questions in relation to the above.

Yours faithfully,

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