Legislative Assembly for the Australian Capital Territory
Standing Committee on Planning, Transport, and City Services

Inquiry into Property Developers Bill 2023

Legislative Assembly for the Australian Capital Territory
Standing Committee on Planning, Transport, and City Services

Approved for publication

Report 17
10th Assembly
April 2024

About the committee

Establishing resolution

The Assembly established the Standing Committee on Planning, Transport, and City Services on 2 December 2020.

The Committee is responsible for the following areas:

- City Renewal Authority
- Suburban Land Agency
- Planning and Land Management (excluding parks and conservation)
- Transport
- City Services including waste and recycling
- Housing (excluding service provision)
- Building and Construction

You can read the full establishing resolution on our website.

Committee members

Ms Jo Clay MLA, Chair

Ms Suzanne Orr MLA, Deputy Chair

Mr Mark Parton MLA

Secretariat

James Bunce, Committee Secretary

Adam Walker, Assistant Secretary

Nicola Straker, Assistant Secretary

Lydia Chung, Administrative Officer

Justice-Noah Malfitano, Graduate

Contact us

Mail Standing Committee on Planning, Transport, and City Services
Legislative Assembly for the Australian Capital Territory
GPO Box 1020
CANBERRA ACT 2601

Phone (02) 6205 0199

Email LACommitteePTCS@parliament.act.gov.au

Website parliament.act.gov.au/parliamentary-business/in-committees

About this inquiry

The Property Developers Bill 2023 was presented in the Assembly on 30 November 2023 and referred to the Standing Committee on Planning, Transport, and City Services. Standing Order 174 refers all bills presented to the Assembly to the relevant standing committee for inquiry. A Committee has three weeks from the date of presentation, or one week after the tabling of the relevant scrutiny report, whichever is later, to advise the Speaker on whether it will undertake an inquiry.

If the Committee does decide to undertake an inquiry, it must report within three months from the date of presentation of the bill, with the exception of bills presented in the last sitting period of a calendar year, in which case the Committee has four months to inquire and report.

However, at its meeting on 30 November, the Assembly passed the following resolution:

> 'That, notwithstanding the provisions of standing order 174, this Assembly refers the Property Developers Bill 2023 to the Standing Committee on Planning, Transport and City Services for consideration of Inquiry and, should the Committee decide to inquire, report by the last sitting day in March 2024.'

The Committee decided to inquire into the bill on 14 December 2023. In line with the Assembly's resolution, the reporting date was set to the last sitting date of March 2024, being 21 March 2024.

Committees may seek an extension from the Assembly of up to one month for the reporting date of a Bill inquiry. The Committee sought and was granted an extension for this inquiry on 6 February 2024, with the new reporting date being 30 March 2024.

The Committee sought a further extension on 20 March 2024, with the new reporting date being 5 April 2024.

Contents

About the committee i

Establishing resolution i

Committee members i

Secretariat i

Contact us i

About this inquiry ii

Acronyms & Abbreviations v

Legislation Terminology v

Findings vi

Recommendations vi

1. Introduction 1

Background to the Bill 1

Developer regulation review 1

Defects 3

Conduct of the inquiry 5

2. Summary of Bill provisions and legislative scrutiny comments 6

Bill provisions 6

Part 1: Preliminary 6

Part 2: Registrar and deputy registrars 8

Part 3: Licensing of Property Developers 8

Part 4: Rating entities 9

Part 5: Licensed property developers – regulatory action 10

Part 6 – Rectification orders, stop work orders and undertakings 11

Part 7 – Enforcement 12

Part 8 – Offences 13

Part 9 – Complaints about property licences 13

Part 10 – Information sharing 14

Part 11 – Notification and review of decisions 14

Part 12 – Miscellaneous 14

Legislative Scrutiny comments 15

Human Rights Act 2004 15

Henry VIII clause 16

Legislation Act 2001 16

3. Matters considered and issues raised in evidence 18

Licensing of property developers 18

Support for licensing scheme 18

The role of property developers 19

Concerns for the proposed licensing scheme 25

Definition of 'Property Developer' 31

Personal liability for directors 41

Reversing the onus of proof 44

Retrospectivity 48

Effects on housing availability and cost 51

Administration 53

Role of the registrar 54

Review of decisions 56

4. Conclusion 61

Appendix A: Submissions 63

Appendix B: Witnesses 64

Thursday, 7 March 2024 64

Appendix C: Gender distribution of witnesses 66

Appendix D: Additional Comments by Ms Suzanne Orr MLA 67

Property Developer Licencing 67

Public Certifiers 68

Further Reform 69

Conclusion 69

Appendix E: Additional Comments from Mr Mark Parton MLA 70

Recommendations 71

Acronyms & Abbreviations

Acronym or Abbreviation	Long form
ACNC	Australian Charities and Not-for-profit Commission
ACAT	ACT Civil and Administrative Tribunal
ACT	Australian Capital Territory
BCR	Building Confidence Report 2018
CFMEU	Construction, Forestry and Mining Employees Union
HIA	Housing Industry Association
ISCCC	Inner South Canberra Community Council
Legislation Act	*Legislation Act 2001*
MBA	Master Builders Association of the ACT
NSW	New South Wales
NRSCH	National Regulatory System for Community Housing
OCN	Owners Corporation Network
PAGA	Parliamentary and Governing Agreement for the 10th Legislative Assembly
Property Council	Property Council of Australia
RLC	Retirement Living Council
Scrutiny Committee	Standing Committee on Justice and Community Safety (Legislative Scrutiny)
Scrutiny Report	Standing Committee on Justice and Community Safety (Legislative Scrutiny), Report 38, 31 January 2024
The Bill	Property Developers Bill 2023

Legislation Terminology

A bill proposing new, stand-alone legislation (as opposed to amendment bills) contains clauses, subclauses, paragraphs, and subparagraphs. In footnotes, these are abbreviated to 'cl', 'subcl', 'para', and 'subpara'. Upon enactment, clauses and subclauses become sections and subsections. In footnotes, these are abbreviated to 's' and 'subs'.

Findings

Finding 1

The Committee finds that in developing the regulations, the ACT Government should give consideration to exemptions from property developer licencing and the personal liability provisions of the Property Developers Bill 2023 to not-for-profit developing organisations that will own and rent the development for a period no less than 10 years.

Finding 2

The Committee finds that in relation to developing the regulations to exempt certain developing organisations from the scheme, the ACT Government should consult thoroughly with the various parts of the sector to ensure that they receive the certainty required to undertake complex, long-term residential developments.

Recommendations

Recommendation 1

The Committee recommends that in the five-year review of the legislation, ACT Government consider whether the Code of Conduct and regulatory system should apply to all property developers, including Government agencies that undertake property development.

Recommendation 2

The Committee recommends that the ACT Government introduce amendments to this Bill that amend Part 6 as appropriate to accurately reflect the stated policy position that rectification orders will not be retrospective in application.

Recommendation 3

The Committee recommends that the ACT Government clearly establish the administrative arrangements for running the scheme prior to commencement of the Property Developers Bill 2023.

Recommendation 4

The Committee recommends that the ACT Government review the arrangements for appointing the registrar with a view to introducing amendments to provide for the appointment to be made by Cabinet or pursuant to statute.

Recommendation 5

The Committee recommends that the ACT Government consider amendments to the Bill that will facilitate the use of ACAT in contesting orders made by the Registrar before resorting to the Supreme Court, and if amendments are not introduced provide a clear policy rationale for bypassing ACAT.

Recommendation 6

The Committee recommends that the ACT Government introduce amendments to the Property Developers Bill 2023 to include a requirement for the Bill to be referred to the relevant

Legislative Assembly committee to consider the conduct of an inquiry as part of the five-year review of the Act's operation.

Recommendation 7

The Committee recommends that, after considering and responding to the recommendations in this report, the Legislative Assembly pass the Property Developers Bill 2023.

1. Introduction

Background to the Bill

1.1. Clause 5.2 of the *Parliamentary and Governing Agreement for the 10th Legislative Assembly* (PAGA) between the ACT Labor Party and ACT Greens commits the ACT Government to:

> Set up an Australia-first licensing scheme for property developers, including the creation of a "fit and proper person" test and rigorously enforced penalty scheme.[1]

1.2. The Minister for Sustainable Building and Construction also made clear in their speech when introducing the Bill, that the Bill was also developed in response to issues and national media reports relating to defective apartment buildings.[2]

Developer regulation review

1.3. In developing the Bill, the ACT Government released a Developer Regulation Discussion Paper for community engagement from 30 January to 27 February 2023 as part of a review of the role of developers in the building and construction industry.[3]

1.4. The objective of the review was to 'develop a system that holds developers to account for the matters over which they have influence or control in relation to a development'.[4] Other goals of such a system include:

a) Enhance consumer trust and confidence in the building and construction industry;

b) Shape behaviour and support a robust, efficient, and professional building and construction industry;

c) Improve the quality of buildings in the ACT;

d) Avoid unnecessary regulatory duplication, burden, and cost; and

e) Complement existing regulatory settings.[5]

1.5. The review focused on the role of developers in the context of the building and construction process, with a focus on large-scale residential and mixed-use property developments.[6]

1.6. The Discussion Paper identified four main focus areas for developer regulation:

a) Accountability and transparency;

b) Ethical behaviour and work practices;

---

[1] Parliamentary and Governing Agreement for the 10th ACT Legislative Assembly, p 16.
[2] Legislative Assembly, *Proof Hansard*, 30 November 2023, p 4069.
[3] ACT Government, *Developer Regulation Discussion Paper*, December 2022, pp 3-5.
[4] ACT Government, *Developer Regulation Discussion Paper*, December 2022, p 3.
[5] ACT Government, *Developer Regulation Discussion Paper*, December 2022, p 4.
[6] ACT Government, *Developer Regulation Discussion Paper*, December 2022, p 4

c) Project capacity and capability – financial and operational; and

d) Building quality and safety.[7]

1.7. Each of these areas are examined in greater detail in Chapter 3.

1.8. The Paper also outlined several options (summarised in table 1) for developer regulation to improve the accountability of developers and improving the level of information about developments and developers to consumers.[8]

Developer Regulation - Summary of Options

OPTION	SUMMARY	FOCUS AREA WILL/COULD ADDRESS	
	REGULATORY		
Licensing Scheme	Regulation of people and activity	Accountability and transparency Ethical behaviour and work practices	Project Capacity Building Quality and Safety
Registration Scheme	Regulation of people undertaking the activity only	Accountability and transparency Ethical behaviour and work practices	Building Quality and Safety
Disclosure scheme	Improve information available to consumers through making disclosure of certain information mandatory	Accountability and transparency Ethical behaviour and work practices	Project Capacity Building Quality and Safety
Documentation	Improve documentation provision related to development activity	Accountability and transparency Ethical behaviour and work practices	Building Quality and Safety
Project trust accounts	Protection of funds to address defects, payments to subcontractors, etc	Accountability and transparency Ethical behaviour and work practices	Project Capacity Building Quality and Safety
Bring developers into the regulatory chain of accountability for building work	Expand existing regulatory system to incorporate developers into the regulatory framework directly	Accountability and transparency Ethical behaviour and work practices	Building Quality and Safety
Amendments to the Building Regulatory System	Expand existing regulatory system to directly place specific obligations on developers	Accountability and transparency Ethical behaviour and work practices	Building Quality and Safety
	NON-REGULATORY		
Code of Practice (voluntary)	Voluntary statement of expectations of behaviour within the industry	Accountability and transparency	Ethical behaviour and work practices
Developer Rating tool	Development of a tool to support consumers to make informed decisions about a developer	Accountability and transparency	Ethical behaviour and work practices
Educative tools for the community and industry	Educative resources to support consumers to make informed decisions and support industry to understand their obligations	Accountability and transparency Ethical behaviour and work practices	Project Capacity Building Quality and Safety
Promote security of payments framework	Educative resources for industry about the flow down effect of how they structure their contracts and payment arrangements	Ethical behaviour and work practices	

Table 1: Summary of Options for Developer Regulation [Source: ACT Government, *Developer Regulation Discussion Paper,* December 2022, pp 32-33.

[7] ACT Government, *Developer Regulation Discussion Paper*, December 2022, p 4.
[8] ACT Government, *Developer Regulation Discussion Paper*, December 2022, pp 32-33.

1.9. The discussion paper identified that the building and construction industry consists of the following: developers, licensed builders, contractors, subcontractors and suppliers.[9] The paper noted the important role played by developers in the industry:

> Developers have an important role in setting the culture of a building and construction project through their influence on many aspects of the process. The level of influence differs across projects and between developers: while some only invest financially in a project, others have complete control over a project from financing to the build to the sale and management.[10]

1.10. Presently, the existing building regulatory system places responsibility on the licensed builder to ensure building work meets required legislated standards, and does not place regulatory responsibility on developers for building quality issues identified post-construction and settlement/transfer of the property.[11]

1.11. Following stakeholder engagement, the Government produced a listening report in May 2023.[12]

Defects

1.12. One of the key justifications for the Bill, and an aspect examined in detail during this inquiry, related to the outcomes experienced by consumers in relation to housing construction in the ACT. According to the ACT Government:

> Consumers and industry should be confident that when they engage with a developer, the developer will be competent, transparent, act ethically and have the capacity and capability to deliver quality buildings.[13]

1.13. According to the Inner South Canberra Community Council (ISCCC), it is 'generally accepted by almost all' Canberrans that 'there are serious problems' in the property development industry.[14]

1.14. In regard to the scale of the defect issue, according to the Owners Corporation Network (OCN) the ACT Government estimate of $50 million per year in costs to address defect is 'extremely conservative'.[15] The OCN noted that it is aware of single complexes resulting in as much as $20 million in rectification costs, as well as 'many in the range of $6 million to $10 million'.[16]

[9] ACT Government, *Developer Regulation Discussion Paper*, December 2022, p 3.
[10] ACT Government, *Developer Regulation Discussion Paper*, December 2022, p 3.
[11] ACT Government, *Developer Regulation Discussion Paper*, December 2022, pp 3-4.
[12] ACT Government, *Listening Report: Developer regulation*, https://yoursayconversations.act.gov.au/developer-regulation, accessed 28 March 2024.
[13] ACT Government, *Submission 3*, p 1.
[14] Inner South Canberra Community Council, *Submission 26*, p 1.
[15] Owners Corporation Network, *Submission 1*, p 1.
[16] Owners Corporation Network, *Submission 1*, p 1.

1.15. The ACT Government also addressed rectification costs, noting that while the Bill's explanatory statement estimated costs in excess of $50 million annually, 'it is very difficult to fully contemplate the actual cost'.[17]

1.16. Ross Taylor explained how these defects can amount to such large costs across buildings and complexes, noting that one design error 'can get repeated 200 times in a medium size high rise residential building'. Mr Taylor noted that these systemic defects are almost always due to design failure, and contrasted this with isolated defects that relate to a failure of workmanship. In the latter, Mr Taylor stated that 'builders will generally go back and fix the small, one off defects' and as such these do not need regulatory support.[18]

1.17. Further, the OCN stated that these rectification costs are borne largely by the community and strata owners, as the ACT Government has avoided liability as the providers of occupancy certificates and 'developers have typically contributed zero'.[19]

1.18. Mr Gary Petherbridge, President of the OCN, provided evidence from the University of New South Wales which was supported anecdotally by the membership of the Network, that more than half of residential developments are subject to expensive rectifications.[20]

1.19. The Property Council of Australia (Property Council) noted that the scale of the defect issue in residential construction in the ACT has not been effectively assessed. Mr Service told the Committee that the Property Council had not been provided with any data by government.[21]

1.20. Mr Service, Division Councillor of the Property Council, contested evidence put to the Committee about the scale of the defect issue in residential property in the ACT. According to Mr Service:

> The vast majority of projects completed in this city do not have the four or five problems that might have been alluded to this morning by a number of witnesses. The vast majority of projects do not have defects; they are not poorly built; they are not poorly designed.[22]

1.21. Mr O'Brien, President of the ACT Division of the Property Council commented on the data that is currently available on the scale of the defect issue:

> For the data that we have got, obviously, Access Canberra is involved with the complaints and the rectification complaints that people receive. Our understanding is, basically, across a year, only four have actually been suggested by Access Canberra as being within that realm of possible serious defects.[23]

[17] Mr Ben Green, Executive Group Manager, Planning and Urban Policy, Environment, Planning and Sustainable Development Directorate, *Proof Committee Hansard*, 7 March 2024, p 71.
[18] Ross Taylor, *Submission 27,* p 2.
[19] Owners Corporation Network, *Submission 1*, p. 1.
[20] Mr Gary Petherbridge, President, Owners Corporation Network, *Proof Committee Hansard*, 7 March 2024, p. 18.
[21] Mr James Service, Division Councillor, Property Council of Australia, *Proof Committee Hansard*, 7 March 2024, p. 24.
[22] Mr James Service, Division Councillor, Property Council of Australia, *Proof Committee Hansard*, 7 March 2024, p. 24.
[23] Mr Phil O'Brien, President, ACT Division, Property Council of Australia, *Proof Committee Hansard*, 7 March 2024, p. 25.

1.22. Mr Christopher Kerin, Director of Kerin Benson Lawyers, raised the savings that could be realised by efforts to address the prevalence of defects, noting that 'every dollar not spent on design' results in $30 in repairs later, once the defects become evident.[24]

1.23. Ms Rebecca Vassarotti MLA, Minister for Sustainable Buliding and Construction, linked this to giving consumers of residential property developments greater certainty around the defect issue:

> This is about ensuring that consumers have a good understanding, when they are making that investment, about who is driving that process—that they do meet a fit and proper person test, that we have an understanding about their track record and that there is accountability, particularly when things go wrong. We know that building is a complex process. Defects will happen. But what we want to ensure is that consumers are protected when things go wrong and that there is accountability that sits with the right group who has controlled the process.[25]

1.24. The ACT Government also noted the intended consumer protection aspects of the Bill:

> I think one of the key issues around things such as defects and rectification is that we know that these costs are externalized, and they are actually borne by consumers primarily. It is probably not surprising that a part of the sector that actually does have the control is pushing back quite significantly on accountability and on ensuring that consumer protection is in place. We know the costs, whatever they are, are being worn by consumers further down the track.[26]

Committee comment

1.25. The scale of the defect issue has been clearly established in evidence. Defects are clearly having a major impact in the Canberra community, and steps towards addressing their prevalence are required.

Conduct of the inquiry

1.26. The Committee resolved to conduct an inquiry and called for submissions on 14 December 2023, which closed on 16 February 2024. A total of 29 submissions were received by the Committee. A list of all the submissions received is provided at **Appendix A**.

1.27. The Committee held a public hearing on 7 March 2024 and heard from 25 witnesses. A list of witnesses who appeared before the Committee is provided at **Appendix B**.

1.28. The Committee met on Wednesday 3 April 2024 to consider the Chair's draft report, which was adopted on the same day, for tabling on 5 April 2024.

---

[24] Mr Christopher Kerin, Director, Kerin Benson Lawyers, *Proof Committee Hansard*, 7 March 2024, p. 8.
[25] Ms Rebecca Vassarotti MLA, Minister for Sustainable Building and Construction, *Proof Committee Hansard*, 7 March 2024, p. 66.
[26] Ms Rebecca Vassarotti MLA, Minister for Sustainable Building and Construction, *Proof Committee Hansard*, 7 March 2024, p. 70.

1.29. In this report, references to Committee Hansard are to Proof Transcripts of evidence. Page numbers may vary between proof and official transcripts.

2. Summary of Bill provisions and legislative scrutiny comments

2.1. This Chapter will discuss the new provisions set out in the Bill, followed by comments from the Standing Committee on Justice and Community Safety (Legislative Scrutiny) (the Scrutiny Committee).

Bill provisions

2.2. According to the Explanatory Statement, the Bill:

- Establishes a licensing scheme for individuals and entities that engage in residential development activity.
- Establishes a regulatory scheme to bring property developers into the regulatory chain of accountability for building work they are involved in.
- Imposes obligations on individuals and entities that undertake residential development activity.
- Creates a statutory presumption that a claimed defect is a defect unless the builder and/or property developer prove to the contrary for a time-limited period.
- Extends the application of existing statutory warranties for residential building work to property developers to provide consumers with legal recourse directly to both the property developer and the builder if there are defects in residential building work to which the warranties that apply that amounts to a breach of statutory warranties.[27]

2.3. The Bill is split into several parts each dealing with a discrete part of the Bill.

Part 1: Preliminary

2.4. Part 1 contains administrative provisions for the proposed Bill, including the naming of the Act, once passed, as the *Property Developers Act 2023*.[28]

2.5. Commencement of the Bill is split, with clause 2(1) providing that the Bill, with the exception of the license requirement provisions, will commence on a day fixed by the

[27] Property Developers Bill 2023, *Explanatory Statement*, p. 1.
[28] Property Developers Bill 2023, cl 1.

Minister by written notice.[29] Clause 2(3) provides that the Minister can separately commence the license requirement provisions on a day fixed by written notice.[30]

2.6. Clause 2(5) provides that section 79 of the *Legislation Act 2001* does not apply to the Bill. Section 79 of the *Legislation Act* provides that postponed laws (I.e. laws that do not commence on their notification day) to automatically commence if the law has not commenced 6 months after its notification day.[31]

2.7. Instead, the Bill provides that if the Bill (not including the license requirement provisions) has not commenced with two years of its notification day, it will automatically commence once the two years has elapsed. Similarly, the Bill's license requirement provisions will automatically commence if those provisions have not commenced within three years from the Bill's notification day.[32]

2.8. Clause 5 provides that other Acts, specifically the *Criminal Code* and the *Legislation Act 2001* also apply in relation to offences against the Bill.[33]

2.9. Part 1 also provides for the objects of the Bill and how they are to be achieved.

2.10. The objects of the Bill are:

a) protect the public by ensuring—

i) residential development activities are undertaken by property developers that are competent and have the capacity to undertake those activities; and

ii) property developers are responsible and accountable for the residential development activities they undertake; and

b) promote public confidence in the standard of residential development activities undertaken by property developers.[34]

2.11. These objects are to be achieved by:

a) establishing a licensing scheme that ensures certain residential development activities are only undertaken by licensed property developers; and

b) imposing standards of practice and competency for the residential development activities undertaken by licensed property developers; and

c) requiring property developers to rectify serious defects, or possible serious defects, in residential buildings they arrange to be constructed; and

d) providing for the monitoring and enforcement of compliance with this Act.[35]

[29] Property Developers Bill 2023, cl 2(1).
[30] Property Developers Bill 2023, cl 2(3).
[31] Legislation Act 2001, s 79.
[32] Property Developers Bill 2023, cl 2(2) & 2(4).
[33] Property Developers Bill 2023, cl 5.
[34] Property Developers Bill 2023, cl 6(1).
[35] Property Developers Bill 2023, cl 6(2).

Part 2: Registrar and deputy registrars

2.12. Clause 7 provides for the Director-General of the Environment, Planning and Sustainable Development Directorate (EPSDD) to appoint a public servant as the Australian Capital Territory Property Developer Registrar (the registrar) for a term of five years by notifiable instrument.[36]

2.13. Clause 8 allows the registrar to delegate their functions under the Bill and any other territory law to a public servant.[37]

2.14. Clause 9 provides for the registrar to appoint deputy registrars, also for a 5 year term by notifiable instrument.[38] Clause 10 provides that deputy registrars may exercise the functions of the registrar, other than the power of delegation itself, and allows the registrar to place limits on the functions exercised by a deputy registrar, including giving the deputy registrar written directions about the exercise of a function.[39]

Part 3: Licensing of Property Developers

2.15. Part 3 establishes a scheme for licensing property developers.

Division 3.1 – Preliminary

2.16. Division 3.1. sets out the purpose and key definitions of the licensing scheme.

2.17. Clause 11 specifically outlines that the purpose of a license is to enable property developers to:

a) apply for development approval in relation to certain residential building developments under the Planning Act 2023, section 162A;

b) apply for a building approval, building commencement notice or certificate of occupancy in relation to certain residential building work under the Building Act 2004, section 27(1)(ca), section 28AA and section 69(1)(c);

c) sell, or advertise the sale of, residential property off-the-plan under the *Civil Law (Sale of Residential Property) Act 2003*, division 2A.2.[40]

Division 3.2 – Property developer licenses

2.18. Division 3.2 deals with the application process for licenses, including how to apply for a license (clause 15), who is eligible to be given a license (clause 16), how a person can apply for a license renewal (clause 17), who can apply to have their license renewed (clause 18), the term of a license (clause 24), and the content of a license (clause 25).[41]

2.19. Clause 19 provides that the registrar can require an applicant for a license or license renewal to provide further information the registrar reasonably needs to decide the

[36] Property Developers Bill 2023, cl 7
[37] Property Developers Bill 2023, cl 8.
[38] Property Developers Bill 2023, cl 9.
[39] Property Developers Bill 2023, cl 10(2)-(3).
[40] Property Developers Bill 2023, cl 11.
[41] Property Developers Bill 2023, cl 15-251.

application, and that the registrar can refuse to consider the application further if the applicant doesn't comply.[42]

2.20. Clause 21 outlines the process for deciding applications, which is done on the basis of whether or not a person is eligible or not for a license.[43]

2.21. Clause 23 outlines conditions which licenses are subject to, and the process in which conditions must be imposed.[44]

Division 3.3 – License variations and change of circumstances

2.22. Clause 26 provides for the registrar to vary a license on written application by the license, and outlines the process in which this must be done.[45]

2.23. Clause 27 places an obligation on licensees to inform the registrar of change of circumstances within 14 days of becoming aware of the matter, and outlines the circumstances in which it applies to.[46]

Division 3.4 – Register of licensed property developers

2.24. Clause 28 provides that the registrar must maintain a register of licensed property developers, and the details which the registrar must keep about a licensee or former licensee (for up to 10 years) in the register.[47]

2.25. Clause 29 provides that the registrar must make the register publicly available, subject to a request by the licensee or former licensee that the information not be made available to the public, and the registrar being satisfied that the publication of the information would, or could reasonably be expected to, endanger the life or physical safety of a person, or jeopardise national security.[48]

Part 4: Rating entities

2.26. Part 4 establishes a scheme of rating entities which prepare rating reports on property developers.

2.27. Clause 30 outlines the process in which an entity can be approved as a rating entity, the length of an approval and the conditions that can be placed on an approval.[49]

2.28. Subsequent clauses deal with applications for a new approval by an entity (clause 31), the variation of an approval by the Director-General (clause 32), and the circumstances and process in which the Director-General may revoke of an approval (clause 33).[50]

[42] Property Developers Bill 2023, cl 19.
[43] Property Developers Bill 2023, cl 21.
[44] Property Developers Bill 2023, cl 23.
[45] Property Developers Bill 2023, cl 26.
[46] Property Developers Bill 2023, cl 27.
[47] Property Developers Bill 2023, cl 28.
[48] Property Developers Bill 2023, cl 29.
[49] Property Developers Bill 2023, cl 30.
[50] Property Developers Bill 2023, cl 31-33.

Part 5: Licensed property developers – regulatory action

2.29. Part 5 deals with matters of regulatory action against licensed property developers.

Division 5.1 – Automatic license suspension

2.30. Clause 34 outlines the circumstances in which a licensee's license is automatically suspended.[51]

Division 5.2 – Regulatory action

2.31. Division 5.2 deals with regulator actions, which clause 35 defines as including the following:

a) Reprimanding the licensee;

b) directing the licensee to undergo an assessment of the licensee's—

i) required qualifications, experience and competencies; or

ii) operational and financial capacity to undertake residential building activities including by providing an additional rating report;

c) directing the licensee to undertake stated training;

d) imposing, or amending, a condition on their licence;

e) suspending their licence for either a fixed period or until a particular event happens;

f) cancelling their licence.[52]

2.32. Clause 36 outlines the grounds for which regulator action may be taken against a licensee, such as the licensee knowingly or recklessly used false or misleading information to become a licensee, the licensee has failed to comply with a condition of their license, or the licensee has stopped being eligible to be licensed.[53]

2.33. Clauses 37 to 39 outline the process by which the registrar may initiate and then decide to take, or not take, regulatory action against a licensee.[54]

Division 5.3 – Immediate suspension or cancellation of license

2.34. Clause 41 outlines the process by which the registrar can immediately cancel or suspend a licensee's license, and the duration of that suspension or cancellation.[55]

2.35. Clause 43 lays out the process by which the registrar can revoke an immediate suspension or cancellation.[56]

Division 5.4 and 5.5

2.36. Clause 44 provides for licensees to voluntarily cancel their licence in cases where the registrar is satisfied this is appropriate, and Clause 45 applies in cases where the registrar

[51] Property Developers Bill 2023, cl 34.
[52] Property Developers Bill 2023, cl 35.
[53] Property Developers Bill 2023, cl 36.
[54] Property Developers Bill 2023, cl 37-39.
[55] Property Developers Bill 2023, cl 41.
[56] Property Developers Bill 2023, cl 43.

has cancelled or suspended a licence and provides for applications to ACAT to have persons disqualified from applying for a licence following regulatory action to cancel a licence under Division 5.2.[57]

2.37. Division 5.5 allows the registrar to consult any person they deem appropriate in exercising functions under Part 5.[58]

Part 6 – Rectification orders, stop work orders and undertakings

2.38. Part 6 sets out the processes for issuing undertakings against a property developer, including rectification and stop work orders.

Division 6.1 – Preliminary

2.39. Clause 47 provides that Part 6 applied to all residential building work, including that started or completed before the bill's commencement, up to ten years old.[59]

2.40. The meaning of property developer is established in Clause 49 and includes a 'person who contracts or arranges for, or facilitates or otherwise causes' building work to be undertaken, landowners where building work is undertaken, principal builders, or any other person prescribed by regulation. It also allows for persons to be excluded by regulation.[60]

2.41. Clause 50 defines 'serious defect' as 'relating to a failure to comply with the building code or defective design, that causes or is likely to cause an inability to use the building or the destruction or collapse of any part of the building'.[61]

Division 6.2 - Rectification orders

2.42. This division sets out the process for issuing a rectification order by the registrar in cases where they reasonably believe that building works could result in a serious defect.[62]

2.43. It includes the process for issuing an emergency rectification order, and orders that apply to more than one property developer.[63] Additionally, Clause 55 provides for such orders to be given to director(s) of a property developer in cases where the developer has ceased to operate.[64]

2.44. Clause 56 provides that the occupiers of land may be required by the registrar to permit access for rectification to be undertaken.[65] The offenses for failure to comply with a rectification order including penalties.[66]

[57] Property Developers Bill 2023, cl 44-45.
[58] Property Developers Bill 2023, cl 46.
[59] Property Developers Bill 2023, cl 47.
[60] Property Developers Bill 2023, cl 49.
[61] Property Developers Bill 2023, *Explanatory Statement*, p. 10.
[62] Property Developers Bill 2023, cl 51-52.
[63] Property Developers Bill 2023, cl 53-54.
[64] Property Developers Bill 2023, cl 55.
[65] Property Developers Bill 2023, cl 56.
[66] Property Developers Bill 2023, cl 57.

Division 6.3 – Rectification work arranged by Territory

2.45. Clause 58 states that this section applies in cases where a rectification order is contravened by an ordered party, and allows for the ACT Government to authorise a person to enter land to undertake the actions set out in a rectification order.

2.46. Clause 59 establishes the strict liability offence of hindering or obstructing the process in Clause 58, and Clause 60 and 61 relate to minimising damage while entering buildings or sites and processes for reasonable compensation for damage. Clause 62 prevents a person authorised to undertake rectification from liability in certain circumstances.[67]

Division 6.4 – Stop work orders

2.47. This division provides for stop work orders to be issued by the registrar, and the circumstances under which they can be issued, included in cases of unlicenced work or if regulatory action is proposed or being undertaken.[68]

2.48. Clause 64 establishes an offence for failure to comply with a stop work order.[69]

Division 6.5 – Compliance undertakings

2.49. Under this division, property developers may undertake to rectify a serious defect or other contravention of the bill or other relevant law, and provide a financial security to the registrar to cover rectification costs. Clause 66 sets out offences and penalties for failing to comply with such an undertaking.[70]

Division 6.6 – Miscellaneous

2.50. Clause 67 provides for the registrar to recover the reasonable costs of compliance action from property developers.[71]

2.51. Clause 68 states that property developers may apply to have orders or notices under this division revoked or varied by the Supreme Court within 30 days of the order being made. Under Clause 69, the registrar may take action in cases where a certificate of approval has been issued for building work.[72]

Part 7 – Enforcement

2.52. This part sets out the enforcement powers that support the licencing and regulation scheme established under the bill. It includes provisions for the appointment of authorised people appointed by the Director-General, the issuance of identity cards to authorised people, and the conditions under which they exercise their powers.[73]

2.53. Clause 74 provides that the provision of documents and answers to questions cannot be refused on the grounds that it may tend to incriminate a person, and further that

[67] Property Developers Bill 2023, cl 59-62.
[68] Property Developers Bill 2023, cl 63.
[69] Property Developers Bill 2023, cl 64.
[70] Property Developers Bill 2023, cl 65-66.
[71] Property Developers Bill 2023, cl 67.
[72] Property Developers Bill 2023, cl 68-69.
[73] Property Developers Bill 2023, cl 70-73.

information obtained is not admissible in evidence against the person in civil or criminal proceedings.[74]

2.54. Division 7.3 sets out the ability of authorised persons to direct individuals to provide information, and establishes an offence for failure to comply with such directions.[75]

2.55. Under Division 7.4, the conditions under which authorised person can enter premises,[76] the process for obtaining consent to enter premises,[77] and general powers upon entry.[78] Clause 79 establishes an offence for failure to comply with the powers upon entry.[79]

2.56. Division 7.5 sets out warrant application processes for entering premises, including the role of magistrates in relation to hearing applications, remote applications, and conditions for the use of a warrant to enter premises.[80]

2.57. Division 7.6 allows an authorised person to seize things connected with an offence, or where such seizure is authorised by a warrant or necessary to protect the item. It also sets out the conditions that apply after such a seizure.[81]

Part 8 – Offences

2.58. This Part establishes a range of offences, including:

- False or misleading representations about a licence;
- Failure to comply with the conditions of a licence; and
- Failure to conduct work consistent with the approved code of practice.[82]

Part 9 – Complaints about property licences

2.59. This Part sets out the process for making complaints about property developers including the circumstances where a complaint may be made, the form and content of complaints, and the process for investigating and dealing with complaints.[83]

2.60. Division 9.4 sets out how complaints are finalised, including by concluding no further action is required, referral of complaints to other entities, and notice of action taken by the registrar in relation to complaints to effected parties.[84]

[74] Property Developers Bill 2023, cl 74.
[75] Property Developers Bill 2023, cl 75.
[76] Property Developers Bill 2023, cl 77.
[77] Property Developers Bill 2023, cl 78.
[78] Property Developers Bill 2023, cl 79.
[79] Property Developers Bill 2023, cl 79.
[80] Property Developers Bill 2023, cl 80-87.
[81] Property Developers Bill 2023, cl 88-94.
[82] Property Developers Bill 2023, cl 97-99.
[83] Property Developers Bill 2023, cl 100-107.
[84] Property Developers Bill 2023, cl 108-110.

Part 10 – Information sharing

2.61. Part 10 allows for information sharing between ACT Government entities and other non-territories agencies, particularly where information relates to public safety.[85]

2.62. Division 10.2 establishes offences for the unauthorised disclosure of protected information.[86]

Part 11 – Notification and review of decisions

2.63. This Part relates to applications for reconsideration of internally reviewable decisions and the requirements for such applications.[87] It also sets out processes associated with the reconsideration of internally reviewable decisions, and that affected persons may apply to ACAT for relevant reviewable decisions.[88]

Part 12 – Miscellaneous

2.64. Clause 121 allows for the Minister to approve a code of practice for property developers, which would be a disallowable instrument.[89] The Explanatory Statement notes that this is a 'key element of the property developer framework' that will be further explored with 'industry and key stakeholders during the implementation phase'.[90]

2.65. Clause 122 empowers the Minister to determine competency requirements for property developers, which will also be done via a disallowable instrument.[91]

2.66. Clause 123 transfers civil liability for honest conduct by public officials in the exercise of their legitimate functions under the bill to the territory.[92]

2.67. Clause 124 allows for regulation or instruments under the bill to adopt or change a law or Australian Standard.[93] It also disapplies section 47(6) of the *Legislation Act 2001* so as to allow for 'a consistent approach to the incorporation of instruments/documents whether copyrighted or not or otherwise publicly available'.[94]

2.68. Under Clause 125, the Minister is empowered to determine fees relating to the bill via disallowable instrument, and Clause 126 provides for the power to make regulations.[95]

2.69. A review of the scheme is to be conducted as soon as practicable after five years of operation, and reported to the Legislative Assembly.[96]

[85] Property Developers Bill 2023, cl 113-114.
[86] Property Developers Bill 2023, cl 115.
[87] Property Developers Bill 2023, cl 117.
[88] Property Developers Bill 2023, cl 118-120.
[89] Property Developers Bill 2023, cl 121.
[90] Property Developers Bill 2023, *Explanatory Statement*, p 21.
[91] Property Developers Bill 2023, cl 122.
[92] Property Developers Bill 2023, cl 123.
[93] Property Developers Bill 2023, cl 124.
[94] Property Developers Bill 2023, *Explanatory Statement*, p 21.
[95] Property Developers Bill 2023, cl 125-126.
[96] Property Developers Bill 2023, cl 127.

Legislative Scrutiny comments

2.70. This section discusses comments from the Standing Committee on Justice and Community Safety (Legislative Scrutiny) (Scrutiny Committee).

2.71. The Scrutiny Committee raised concerns with the Bill in Scrutiny Report 38 (the Scrutiny Report).[97]

Human Rights Act 2004

2.72. The Scrutiny Report notes that this Bill engages with several rights under the *Human Rights Act 2004*.

2.73. Specifically, requiring property developers to establish their suitability to hold a licence will include a requirement to consider a person's criminal record, which may limit the right to non-discrimination under the *Human Rights Act*.[98]

2.74. The Scrutiny Report lists a range of provisions in the Bill which may limit the protection of privacy, including:

- Providing personal and sensitive information relating to current and former key persons of a corporation.
- Requiring a ratings report from a ratings entity which includes details on a person's criminal and regulatory history.
- The requirement to establish a public register, which will include the names of individual licencees and directors and the details of regulatory actions taken.
- Providing the authority for authorised persons to enter premises, view and copy documents, seize or restrict access to things, and require the provision of information.
- Authorising the Registrar to access personal information while assessing complaints and taking regulatory action.
- Allowing for sharing of personal information between prescribed agencies.
- permitting authorised person to enter premises in order to undertake rectification work in the event that property developers fail to comply with rectification orders.[99]

2.75. The Scrutiny Report also notes that the right to liberty may be limited by the creation of offences which include maximum penalties of imprisonment, and that the offences that relate to misleading representations about licensing status may limit the right to free expression.[100]

2.76. The ability of the Registrar to immediately suspend or cancel a licence without notice or opportunity to respond, as well as automatic suspensions in the event of bankruptcy, insolvency, unpaid fees, winding up, or being placed under administration were highlighted

[97] Standing Committee on Justice and Community Safety (Legislative Scrutiny), *Report No. 38*, 31 January 2024, p 7.
[98] Standing Committee on Justice and Community Safety (Legislative Scrutiny), *Report No. 38*, 31 January 2024, p. 7.
[99] Standing Committee on Justice and Community Safety (Legislative Scrutiny), *Report No. 38*, 31 January 2024, pp. 7-8.
[100] Standing Committee on Justice and Community Safety (Legislative Scrutiny), *Report No. 38*, 31 January 2024, p. 8.

by the Scrutiny Report as limiting the right to a fair trial. Additionally, this right is further limited by the reversal of the onus of proof for any defects notified within two years of completion for residential developments.[101]

2.77. The liability offences created under the Bill may limit the presumption of innocence. This right may be further limited by the dis-application of the privilege against self-incrimination, however the Scrutiny Report notes that 'any information, document or thing obtained can only be used for an offence arising out of its false or misleading nature'.[102]

2.78. Finally, the right to work may be limited by making the holding of a licence a condition on the ability to carry out residential property development.[103]

2.79. The Scrutiny Committee noted that the explanatory statement accompanying the Bill recognises these limitations and sets out a justification for why they are reasonable.[104]

2.80. The Scrutiny Committee has drawn these matters to the attention of the Assembly but does not require that the Minister provide further information.[105]

Henry VIII clause

2.81. The Scrutiny Report raised concerns about Part 13 of the Bill, which authorises transitional regulations modifying Part 13, 'including in relation to another Territory law, to make provision for anything that… is not adequately or appropriately dealt with'.[106]

2.82. According to the Scrutiny Committee, this inclusion is not justified in the explanatory statement, and the Scrutiny Report asks that the Minister provide further information on why the Henry VII clause is necessary including:

- What limits, if any, are placed on the scope, subject matter and duration of the Henry VIII clause so as to restrict the potential impact of any regulations; and
- What alternatives to the Henry VIII clause, either to the clause itself or the use of a Henry VIII clause in general, were considered and why those alternatives were not accepted.[107]

Legislation Act 2001

2.83. The Scrutiny Report notes that the Bill allows for 'regulations or instruments under the Bill to incorporate laws, Australian Standards and other instruments as in force from time to time', and that Subsection 47(6) of the *Legislation Act 2001* will not apply. This displaces

[101] Standing Committee on Justice and Community Safety (Legislative Scrutiny), *Report No. 38*, 31 January 2024, p. 8.
[102] Standing Committee on Justice and Community Safety (Legislative Scrutiny), *Report No. 38*, 31 January 2024, p. 8.
[103] Standing Committee on Justice and Community Safety (Legislative Scrutiny), *Report No. 38*, 31 January 2024, p. 9.
[104] Standing Committee on Justice and Community Safety (Legislative Scrutiny), *Report No. 38*, 31 January 2024, p. 7.
[105] Standing Committee on Justice and Community Safety (Legislative Scrutiny), *Report No. 38*, 31 January 2024, p. 9.
[106] Standing Committee on Justice and Community Safety (Legislative Scrutiny), *Report No. 38*, 31 January 2024, p. 9.
[107] Standing Committee on Justice and Community Safety (Legislative Scrutiny), *Report No. 38*, 31 January 2024, p. 9.

the requirement to notify any incorporated law, standard, other instrument, or future amendments on the notification register.[108]

2.84. According to the Scrutiny Report, this disapplication means there is no requirement to make all incorporated instruments and Australian Standards to be made available, and requests further information from the Minister prior to the Bill being debated 'on why it was necessary to exempt notification requirements for all incorporated instruments, including Australian Standards'.[109]

[108] Standing Committee on Justice and Community Safety (Legislative Scrutiny), *Report No. 38*, 31 January 2024, p. 10.
[109] Standing Committee on Justice and Community Safety (Legislative Scrutiny), *Report No. 38*, 31 January 2024, p. 10.

3. Matters considered and issues raised in evidence

Licensing of property developers

Support for licensing scheme

3.1. Part 3 of the Property Developers Bill 2023 (the Bill) establishes a scheme for the licensing of property developers. Several stakeholders provided evidence in support of the proposed licensing scheme.[110]

3.2. For example, the Construction, Forestry and Maritime Employees Union, Construction and General Division, ACT Divisional Branch (CFMEU) in its submission (endorsed by the Housing for the Aged Action Group) noted that it has been calling for developer licensing for several years now:[111]

> Our Union believes that an essential method of improving the safety, accountability and quality of construction in Canberra is through strong regulatory systems, such as enforcing compliance through licensing.[112]
>
> By having the licensing regime in place, checking people as they enter the industry, we avoid the problem of shadow corporations, shadow directors - things that have no real sort of reality or anything to them that can be relied on to rectify a problem when it emerges eventually.[113]

3.3. A similar sentiment was shared by Mr John Grant, a former head of the Australian Building Codes Board, former apartment owner and member and Chair of the Executive Committee in a complex that experienced significant construction defects:

> This Bill is a crucial element of improving building outcomes in the ACT. The Property Developers Bill 2023 should be supported without amendment. The introduction of a licensing scheme for residential property developers in the ACT is a major step towards better assuring construction quality in the ACT.[114]

3.4. ACT Shelter, a not-for-profit peak housing body, told the Committee that the Bill will help to reduce the likelihood of the serious outcomes of structural faults in medium and high-density multi-unit complexes seen by their colleagues in Western Sydney:

> ...establishing a regulatory framework for developers, including licensing, with clear, enforceable penalties for non-compliance will ensure the ACT is better

[110] See, for example: ACT Shelter, *Submission 17*, p 1; Inner South Canberra Community Council, *Submission 26,* p 3; Mr John Grant, *Submission 22*, p 1; CFMEU, *Submission 12*, p 1; Owners Corporation Network, *Submission 1*, p 1; and *Proof Committee Hansard*, 7 March 2024 p 19; Kerin Benson Lawyers, *Proof Committee Hansard*, 7 March 2024 p 3.
[111] CFMEU, *Submission 12*, p 1.
[112] CFMEU, *Submission 12*, p 1.
[113] Mr Michael Hiscox, Assistant Secretary. CFMEU, *Proof Committee Hansard*, 7 March 2024, p 87-88.
[114] Mr John Grant, *Submission 22*, p 1.

> placed to reduce the likelihood of similarly expensive and traumatic outcomes for owners and tenants here in Canberra. [115]

3.5. The Committee heard from Kerin Benson Lawyers that many aspects of the proposed regulatory scheme including licensing, already apply to builders:

> The interesting thing about [the] Bill is that is does not do anything to a developer that is not already being done to a builder. A builder is already personally liable potentially for rectification orders. The Builder is already liable for statutory warranties. The Builder already has to be licensed. All of these things already apply to builders, that they are simply applying to developers should not be controversial. [116]

3.6. The CFMEU also drew a comparison between the regulatory oversight of builders and property developers. It maintained that the current regulation of property developers is not commensurate with their role in the construction process:

> Currently, property developers are at the top of the construction process hierarchy, but are not subjected to the same degree of regulatory scrutiny as the builders and subcontractors working under them. This lack of regulation is fundamentally at odds with the duties they owe, both as a corporate citizen and a major player in one of Australia's most lucrative and important industries.[117]

The role of property developers

3.7. According to the ACT Government, property developers hold 'considerable influence' on outcomes throughout the development process:

> Among other things, they oversee the development project, arrange finance, engage planning consultants, architects, engineers, and principal builders. The decisions made by property developers influence the design, liveability, maintenance requirements, and build quality of the final product.[118]

3.8. Despite this, at present the ACT Government stated that property developers are not either licenced or regulated. Its submission highlighted the role of the Bill as 'one of the policy approaches' taken to 'tackle the problem of defects in residential and mixed-use buildings'. As such, the Bill is intended to 'improve the experience of purchasing, living in, and managing dwellings constructed by property developers'.[119]

3.9. At present, the ACT Government noted that 'almost all key professions' engaged in residential building design and construction are required to be registered or licenced, including builders, plumbers, electricians, engineers and architects. In order to be granted

[115] ACT Shelter, *Submission 17*, p 2.
[116] Mr Kerin Benson, Director. Kerin Benson Lawyers, *Proof Committee Hansard, 7 March 2024*, p 3.
[117] CFMEU, *Submission 12*, p 2.
[118] ACT Government, *Submission 3*, p 2.
[119] ACT Government, *Submission 3*, p 2.

a licence or registration, professionals in these areas must 'demonstrate that they have the necessary skills, knowledge and qualifications'.

3.10. Minister Vassarotti outlined the central premise for the Bill in relation to the role played by property developers:

> It is really looking at the accountability chain and looking at a group within the construction and development sector that has significant influence and is really controlling part of the development construction process, which is currently not really regulated.[120]

3.11. The CFMEU told that Committee that:

> Currently, property developers are at the top of the construction process hierarchy, but are not subjected to the same degree of regulatory scrutiny as the builders and subcontractors working under them. This lack of regulation is fundamentally at odds with the duties they owe, both as a corporate citizen and a major player in one of Australia's most lucrative and important industries.[121]

3.12. Mr Michael Hiscox, of the CFMEU, further noted that 'throughout the whole building industry… so many players have different regulations, rules and legislation that they have to comply with'. In contrast, despite being 'at the top of the tree' and 'making the most decisions', property developers currently 'have almost the least structure'.[122]

3.13. Advanced Structural Designs, a structural engineering company with experience in assessing building defects in Canberra, noted that property developers 'can, and often do, influence both design and construction practices in negative way'. Mr Malcolm Wilson, Director of Advanced Structural Design listed the following aspects of design control that he has observed being exercised by developers:

- The existence of extent of set downs at balconies.
- Whether there are waterproof hobs and how they are formed.
- Whether there are falls in the formed concrete surface.
- What quality of water proofing membrane is to be used.
- What structural framing system is to be used.
- What the maximum floor to floor height is to be.
- What cladding system is to be used.
- The quality of the paint system.[123]

[120] Ms Rebecca Vassarotti MLA, Minister for Sustainable Building and Construction, *Proof Committee Hansard, 7 March 2024*, p. 66.
[121] CFMEU, *Submission 12*, p 3.
[122] Mr Michael Hiscox, Assistant Secretary, CFMEU, *Proof Committee Hansard, 7 March 2024*, p 86.
[123] Advanced Structural Design, *Submission 11*, p 2.

3.14. Mr Wilson related this control by developers to the current lack of a regulatory framework. He told the Committee that 'because developers are operating in a legislative vacuum… whoever spends the least on their building is going to make the most money'.[124]

3.15. Mr Wilson provided an example of the type of cost cutting the lack of ramifications leads to:

> I remember a conversation with a well-known Canberra developer where he instructed us to document no set downs in internal wet areas. I told him that was a very bad idea because there would be a step-up walking into the bathroom that people would be kicking their toes on. His response was "I know that, you know that, but the average person buying a unit has no idea, and I have just saved $500 on every unit."[125]

3.16. The CFMEU also put concerns around the role property developers play in the decision-making process:

> …developers have also become far more intricately involved in decision making processes during the construction phase of a development, often themselves selecting the builders and subcontractors they wish to engage on a project and setting timeframes. This level of involvement carries an implied recognition of the heightened accountability on the part of the developer for the work of the contractors they select and the timeframes they impose.[126]

3.17. The CFMEU highlighted the increasing role of developers over the last two or three decades with the following example:

> They have a much more hands-on role in design choices, material choices, time frames, and even, in some cases, safety decisions. To just give one example, we would normally be in discussions with builders about how many people would be employed directly by that builder for any given site. We have been told on different occasions that developers have said, "No; you only need two or three people for that role, not four or five." Normally, you would just leave the builder to say, "You can resource the job how you like, as long as it is within certain parameters."[127]

3.18. Ross Taylor, Managing Director of Ross Taylor Associates, echoed these concerns about the role developers play in building design, stating that:

> The average developer sees expenditure on design consultants as an impost on their already entitled projected margin. A necessary evil to be managed and minimized. They then engage designers on a shoestring and whip them into line by hiring a Project Manager to keep them lean, mean and siloed. No opportunity

[124] Mr Malcolm Wilson, Director, Advanced Structural Designs, *Proof Committee Hansard, 7 March 2024*, p 11.
[125] Advanced Structural Design, *Submission 11*, p 2.
[126] CFMEU, *Submission 12*, p 3.
[127] Mr Michael Hiscox, Assistant Secretary, CFMEU, *Proof Committee Hansard*, 7 March 2024, p 86.

> for that essential design coordination between the Architect, Structural engineer, façade Engineer and Hydraulic Engineer which prevents snafus and defects.[128]

3.19. Mr Taylor told the Committee that 'the average developer in the ACT' focuses on 'time and cost', and that engaging designers in the process is 'predicated on only paying designers sufficient to get building approval'. Finalisation of design is then achieved via a 'design construct contact or similar', under which 'the contractor, who usually has little or no design resources or training then passes on their design risk to subcontractors – who do it for free'.[129]

3.20. Mr Kerin also noted the role of developers in the design process arguing that it is 'a complete furphy' that developers are 'remote from the process'. According to Mr Kerin:

> They can determine how much design is done on a project or not, what sort of reputable consultants, reputable builders, where corners might be cur, doing deals with people to… make special arrangements.[130]

3.21. Mr Kerin further stated that this Bill 'does not do anything to a developer that is not already being done to a builder'.[131] According to Mr Kerin:

> A builder is already personally liable, potentially, for rectification orders. The builder is already liable for statutory warranties. The builder already has to be licensed. All of these things already apply to builders. Having them simply applying to developers should not be controversial.[132]

3.22. Mr Petherbridge noted that developers are involved at other stages of residential property construction beyond the design stage.[133] He raised a specific example of a residential development involving approximately $20 million in rectification works:

> With that property, the cost to rectify went to the builder, although a lot of it could have been laid out to the developer, because the builder was very much directed by the developer to do things in certain ways.[134]

3.23. Mr Kerin argued that under the current legal regime developers are able to structure their affairs to avoid responsibility for defects. According to Mr Kerin 'the only way you could sue a developer for building defects is if they have a contractual warranty in their sale of land contract'.[135]

3.24. Mr Kerin further stated that the use of these contractual warranties have tended towards not being included in sale of land contracts during his time practicing this field of law.[136]

---

[128] Ross Taylor, *Submission 27*, p 3.
[129] Ross Taylor, *Submission 27*, p 4.
[130] Mr Christopher Kerin, Director, Kerin Benson Lawyers, *Proof Committee Hansard*, 7 March 2024, p 5.
[131] Mr Christopher Kerin, Director, Kerin Benson Lawyers, *Proof Committee Hansard*, 7 March 2024, p 3.
[132] Mr Christopher Kerin, Director, Kerin Benson Lawyers, *Proof Committee Hansard*, 7 March 2024, p 3.
[133] Mr Gary Petherbridge, President, Owners Corporation Network, *Proof Committee Hansard*, 7 March 2024, p 15
[134] Mr Gary Petherbridge, President, Owners Corporation Network, *Proof Committee Hansard*, 7 March 2024, p 15.
[135] Mr Christopher Kerin, Director, Kerin Benson Lawyers, *Proof Committee Hansard*, 7 March 2024, p 3.
[136] Mr Christopher Kerin, Director, Kerin Benson Lawyers, *Proof Committee Hansard*, 7 March 2024, p 3

3.25. However, Mr O'Brien contested the view put that developers play a central role in shaping the design of residential developments:

> So, the concept, Chair, that the developer tells the engineer or tells the architect what to do, which would risk breaching their profession indemnity insurance—and I can imagine who has put that concept to you—is simply not the case. That is not the way good developers behave. That is not the way property developers behave. That is not the way 95 per cent of developments you see around this city have been developed.[137]

3.26. The CFMEU argued that the central issue the Bill seeks to address is not the motivation of developers as such, but rather that:

> The key issue is the system that is in place. It is one that does not hold them accountable at all, so they are acting in response to that. There is no accountability for decisions they make, so they make them with the idea of just maximising their profit as much as possible.[138]

3.27. Mr Service outlined his view of the role of property developers to the Committee:

> I think the starting reason is that the developer risks capital to invest and get a return. There is nothing wrong with a return. We should want every participant in a project to make a return. The developer's interest in doing a good quality project starts from the day they begin. If they approach their project right, they have the right engineer, the right architect, the right builder, the right project manager, the right certifier.[139]

3.28. The CFMEU also related the role of property developers in residential construction to the profits that can be make – up to 20 percent in the eastern Australian states. According to the CFMEU, this potential for profit has not led to a 'stable and reliable pipeline of developments', but rather an industry 'beset by an alarming track record of corporate failure, burnt customers and building defects'.[140]

3.29. In addition to concerns about the built outcomes, as noted above the CFMEU noted that 'decisions that developers are making go broader than just building quality', and also relate to site safety. In this regard, the CFMEU told the Committee that consideration should be given to the broader application of developer regulation to incorporate commercial and industrial construction.[141]

3.30. The Property Council put a different view of the role of developers, noting that the Bill essentially proposes to make developers into 'the guarantors for builders'. According to

[137] Mr Phil O'Brien, President ACT Division, Property Council of Australia, *Proof Committee Hansard*, 7 March 2024, p 24.
[138] Mr Michael Hiscox, Assistant Secretary, CFMEU, *Proof Committee Hansard*, 7 March 2024, p 89.
[139] Mr James Service, Division Councillor, Property Council of Australia, *Proof Committee Hansard*, 7 March 2024, p. 26.
[140] CFMEU, *Submission 12*, p 3.
[141] Mr Michael Hiscox, Assistant Secretary, CFMEU, *Proof Committee Hansard*, 7 March 2024, p 86.

the Property Council, placing responsibility for rectifying defects on developers is 'going for the deepest pocket', rather than applying risk where it is incurred.[142]

3.31. Mr O'Brien elaborated on the role of property developers in relation to risk:

> In managing risk, risk should be borne where it is best managed. In the design process, and the quality of that design and the outcome of that design, that should be borne by the consultant and/or the builder. They are the party the developer engages to take the risk.[143]

3.32. The CFMEU similarly noted that at present risk is being carried by builders and subcontractors, stating that:

> [Property developers] push a lot of that risk down but are still taking most of the benefit of it all. What we are hoping to achieve here is that, if you are going to have the majority of the benefit, you deserve to have at least the same amount accountability as anyone else in the supply chain.[144]

3.33. This, in essence, leads to a situation where builders are taking on the risk of delivering on decisions for which they are not responsible. According to the CFMEU:

> There are a lot of different decisions throughout the process, but the developer makes a lot of significant decisions around the time frame for what has to be built and the design of the building. The builder does not have the final say on all those sorts of things. In theory, they have the final say in the sense that they could say, "We're refusing to build it," but, more likely than not, someone else will come along who will.[145]

3.34. Minister Vassarotti echoed evidence about the imbalance of accountability among the various actors in the residential construction sector:

> Currently, we see the majority of accountability sit at the licensed builder phase. So we are working through a program of looking at the accountability chain. We have done engineers quite recently. We are looking at developers. I have announced last week that we are also looking at trade licensing. Certainly, there is very clear evidence that developers are a clear part of that accountability chain. They have significant influence in terms of how the process happens, and what we are really focused on is ensuring that we provide strong consumer protection, particularly for probably one of the biggest investments consumers will make in their entire lives.[146]

---

[142] Mr Chris Wheeler, Division Council Member, Property Council of Australia, *Proof Committee Hansard*, 7 March 2024, p 23.
[143] Mr Phil O'Brien, President ACT Division, Property Council of Australia, *Proof Committee Hansard*, 7 March 2024, p 23.
[144] Mr Michael Hiscox, Assistant Secretary, CFMEU, *Proof Committee Hansard*, 7 March 2024, p 88.
[145] Mr Michael Hiscox, Assistant Secretary, CFMEU, *Proof Committee Hansard*, 7 March 2024, p 89.
[146] Ms Rebecca Vassarotti MLA, Minister for Sustainable Building and Construction, *Proof Committee Hansard*, 7 March 2024, p 66.

Committee comment

3.35. The Committee notes the intention behind the Bill is to bring property developers into the accountability framework for residential property construction in the ACT. Given the current status, wherein a key link in the development chain falls outside the accountability chain, in the Committee's view this is a worthy goal and is central to the intent of the Bill and the scheme more generally.

Concerns for the proposed licensing scheme

Costs, complexity and regulatory burden

3.36. The Master Builders Association of the ACT (MBA) did not believe there had been widespread support for a licensing regime including in any ACT or Federal reviews into building regulatory reforms and was concerned that the proposal for licensing had been adopted without review or consideration of the alternatives.[147]

3.37. Additionally, the MBA was concerned that property developer licenses would:

- introduce additional costs for industry through license fees and indirect costs on the applicant through requirements to obtain the various reports and evidence needed to apply for and acquire a licence;
- introduce complexity potentially requiring a single development group to obtain several licences because of different company structures, investment arrangements and land owner relationships; and
- potentially take months to prepare and weeks or months to assess by government potentially delaying development projects and the general supply of more housing for the ACT community.[148]

3.38. The MBA recommended that the requirement for a property developers license be removed from the legislation and consideration given to whether the Government's objectives could be achieved through the addition of minimum standards and an enforcement regime to existing legislation.[149]

3.39. The MBA additionally noted that while many jurisdictions including New South Wales (NSW) include property developers within their enforcement regimes, no other jurisdiction has introduced a property developer's licencing scheme.[150] The MBA told the Committee:

> We absolutely support greater accountability for property developers to lift building standards, but we do not think the requirement for a licence adds any value to that. We think there are far more effective and efficient ways to lift standards and hold developers to account without introducing a licence scheme,

[147] Master Builders Association of the ACT, *Submission 4*, p 2.
[148] Master Builders Association of the ACT, *Submission 4,* pp *2-3.*
[149] Master Builders Association of the ACT, *Submission 4*, p 3.
[150] Master Builders Association of the ACT, *Submission 4*, p 2.

> and I would look to New South Wales legislation for the closest and best example of that.[151]

3.40. When asked by about suggestions from submitters that the Bill should take a similar path to NSW, Minster Vassarotti responded that certain key elements of the Bill are strongly aligned with New South Wales model.[152] The ACT Government explained that:

> ….our scheme does two things. It has a licensing component and it has a regulatory powers component. With the regulatory powers, our scheme is aligned with the definitions and powers in the New South Wales Residential Apartment Buildings Act.[153]

3.41. It went on to explain the reasons for the addition of a licensing component in the ACT:

> What we have done here is also add the licensing component because what we have seen with a scheme that is designed around regulatory powers and look back powers to issue rectification orders, we could have a situation where we have a developer who has 10 defective developments, all with rectification orders on them, and not be able to stop them doing the 11th development.[154]
>
> That is where a licensing scheme plays a complementary role to say: "We have regulatory powers to issue orders on defective buildings. We also have a licensing scheme that sets minimum standards and thresholds. The government does due diligence on who can enter that scheme. We look at your capability capacity and performance history about whether you are the right sort of person or entity to be able to undertake development activity in the ACT.[155]

3.42. Several submitters expressed concern that the proposed licensing regime would introduce additional complexity, and lead to delays, additional costs and regulatory burden for industry.[156]

3.43. For example the Property Council[157] and the Housing Industry Association (HIA)[158] were concerned about the potential costs and regulatory burden of a licensing regime.

3.44. Another submitter expressed similar concerns:

> Now we have another attempt to address the quality of building work and latent defects by introducing licensing for property developers. I've read the explanatory

[151] Mr Michael Hopkins, CEO, Master Builders Association of the ACT, *Proof Committee Hansard*, *7 March 2024*, p 29.
[152] Ms Rebecca Vassarotti MLA, Minister for Sustainable Building and Construction, *Proof Committee Hansard*, *7 March 2024,* p 75.
[153] Mr James Bennett, Executive Branch Manager, Building, Design and Projects, Environment, Planning and Sustainable Development Directorate, *Proof Committee Hansard*, *7 March 2024*, p 85.
[154] Mr James Bennett, Executive Branch Manager, Building, Design and Projects, Environment, Planning and Sustainable Development Directorate, *Proof Committee Hansard*, *7 March 2024,* pp 75-76.
[155] Mr James Bennett, Executive Branch Manager, Building, Design and Projects, Environment, Planning and Sustainable Development Directorate, *Proof Committee Hansard*, *7 March 2024*, p 76.
[156] For example, Property Council of Australia, *Submission 2*, p 2; Master Builders Association of the ACT, *Submission 4*, p 2; Name withheld, *Submission 23*, p 1; Housing Industry Association, *Submission 5*, p 4-5.
[157] Property Council of Australia, *Submission 2*, p 2.
[158] Housing Industry Association, *Submission 5*, pp 4-5.

> statement and the objectives of the Bill, and my first thought is more red tape and increased bureaucracy to administer. The construction industry is struggling and is strangled with red tape and excessive delays on approvals.[159]

3.45. The submitter went on to add:

> Most of our property developers in the ACT are home grown and have made an enormous contribution to the ACT economy and more importantly to providing affordable and social housing in the territory.[160]

3.46. Some submitters were also concerned that the full costs of the licensing regime are not fully known in the absence of a regulatory impact statement.[161]

3.47. In its written submission the ACT Government acknowledged that developers would incur costs but explained that it expected the positive benefits of the licensing scheme to ultimately promote investor confidence:

> …there will be some costs incurred by developers to participate in the scheme but that their participation and engagement in the rating process will lead to improved governance and business practices within those businesses. The outcomes of this process will lead to better business practices, improved brand value and increased consumer confidence, bringing a market advantage to the Territory and a more robust and profitable industry. This will promote investor confidence in the housing product produced in the ACT.[162]
>
> Many developers have already incorporated the practice improvements identified in the Scheme and have these costs already factored into their business models.[163]

3.48. When asked about the costs of the scheme, Minister Vassarotti explained that the ACT Government will be undertaking a regulatory impact assessment to determine the costs as part of the implementation.[164] The ACT Government went on to say:

> …during the development of the regulation, which is where we will be making the final decisions on what the actual policy is that we can cost, we will do a regulatory impact analysis when we have got government agreement to what the final regulation is, because that is the thing that will determine what the cost of the scheme finally is.[165]

3.49. Several submitters[166] including the Canberra Business Chamber voiced concerns about increasing compliance requirements for property developers at a time when the ACT

---

[159] Name withheld, *Submission 23*, p 1.
[160] Name withheld, *Submission 23*, p 1.
[161] Master Builders Association of the ACT, *Submission 4*, p 6; Property Council of Australia, *Submission 2*, p 1 and p 6.
[162] ACT Government, *Submission 3*, pp 10-11.
[163] ACT Government, *Submission 3*, p 11.
[164] Ms Rebecca Vassarotti MLA, Minister for Sustainable Building and Construction, *Proof Committee Hansard*, *7 March 2024*, p 68.
[165] Mr James Bennett, Executive Branch Manager, Building, Design and Projects, Environment, Planning and Sustainable Development Directorate, *Proof Committee Hansard*, 7 March 2024, p 69.
[166] Canberra Business Chamber, *Submission 24*, p 1; Property Council of Australia, *Submission 2*, p 2; ClubsACT, *Submission 10*, p 8.

Government is looking to address problems with housing supply and affordability in Canberra:

> The Bill creates another level of compliance that will make property development more difficult, at a time when we need to accelerate freeing up land for property development and building more houses.[167]

> Increasing the compliance requirements and complexity for property developers could incentivise developments outside the ACT boundaries, in border suburbs such as Queanbeyan which do have developer licensing requirements.[168]

3.50. The Committee also received evidence expressing concern about the complexity of the licensing requirements in the Bill:

> The licensing requirements are spread across four pieces of legislation including the proposed Property Developers Act, meaning that many inexperienced clubs and not-for-profit entities will have a hard time understanding how to be compliant to this new ACT regime. The implications for our members and other not-for-profit providers who have less sophisticated ongoing exposure to ACT requirements in this area will be significant.[169]

3.51. The ACT Law Society also touched on this point:

> Dispersing licensing requirements across multiple Acts may make it difficult for those intended to be regulated to navigate, comprehend, and comply with their obligations under the proposed reforms. Ideally, licensing requirements and the licence application and administrative process would be contained within one Act. If this is not the preferred policy approach, the Society encourages the ACT Government to utilise the delayed commencement period to raise industry awareness of the changes and provide appropriate guidance to assist property developers to comply with the new requirements.[170]

3.52. The HIA considered that greater clarity and consolidation of licensing requirements was required:

> The triggers under Sections 11(a) and (b) of the Bill are akin to the type of activities that builders would typically undertake. Hence, the lack of clarity regarding the application of the Bill is concerning, and there is ambiguity regarding whether existing license holders will be required to apply for a licence under the proposed Bill. There is a need for greater clarity and consolidation of licensing requirements to facilitate understanding and compliance. Overall, the Bill proposes a regulatory shift by tying the requirement for a residential property development licence to specific trigger events within existing laws. This seems

[167] Canberra Business Chamber, *Submission 24,* p 1.
[168] Canberra Business Chamber, *Submission 24,* p 1.
[169] ClubsACT, *Submission 10*, p 5.
[170] ACT Law Society, *Submission 9*, p 2.

> very strange and will mean understanding the requirement for a licence will be hard to determine.[171]

3.53. Echoing some of the comments above, the Property Council noted its objection to having licence requirements located in several pieces of legislation and recommended that all licensing requirements be contained in the Bill to avoid confusion and simplify the process of obtaining a licence.[172]

3.54. Addressing the perceived complexity of the licensing regime, the ACT Government explained that drafting the legislation to make it simple and easy to read was a key consideration while also integrating the legislation into the existing broader building construction industry:[173]

> The main substance of this bill for property developers is contained in the Property Developers Bill. But what we have sought to do is integrate that into really key parts of the existing development process. So the requirement to hold a license is then put into the time when you are engaging in an off-the-plan contracts, when you are applying for building approval or a certificate of occupancy use under the Building Act, and then when you are applying for planning approval.[174]

3.55. In its oral evidence MBA told the Committee it does not have a clear understanding of how the proposed licensing scheme will work:

> …we are not sure whether an individual licence is going to be needed for every single project, or whether this is a one-off cost that might be borne once a year or maybe once every three years. I think the point of our answer to your question is that we actually do not know, which is why we have asked for a regulatory impact statement to be prepared before the Bill is finalised.[175]
>
> Is it one licence per project? Is it one licence per company that might be involved in a joint venture project? Is it once per year? Is it once every three years or longer? We do not know, but it is extremely complex.[176]

3.56. The ACT Government responded to a question from the Chair of the Committee on this point:

> We have had discussions with the industry working group that we have had, and we have shared the information that this would be a licence for the entity. We have also talked with that group about the possibility of a parent company holding a licence, and if they establish several joint ventures that are wholly

[171] Housing Industry Association, *Submission 5*, p 3.
[172] Property Council of Australia, *Submission 2*, pp 1, 3 and 4.
[173] Mr James Bennett, Executive Branch Manager, Building, Design and Projects, Environment, Planning and Sustainable Development Directorate, *Proof Committee Hansard,* 7 March 2024, p 67.
[174] Mr James Bennett, Executive Branch Manager, Building, Design and Projects, Environment, Planning and Sustainable Development Directorate, *Proof Committee Hansard,* 7 March 2024, p 68.
[175] Mr Michael Hopkins, CEO, Master Builders Association of the ACT, *Proof Committee Hansard*, 7 March 2024, p 29.
[176] Mr Michael Hopkins, CEO, Master Builders Association of the ACT, *Proof Committee Hansard*, 7 March 2024, p 29.

> owned subsidiaries of that parent company, there would only need to be one licence. We have tried to reduce the regulatory impact of that, appreciating the way that the sector operates in setting up special purpose vehicles for particular developments.[177]

3.57. The ACT Government also addressed the issue of the licence term:

> ….we also resolved some of the licence term being for a period of seven years so people would not have to come back for a licence during the construction process; so we would cover it for the whole process but also incorporating mandatory disclosure requirements if anything changed around the licensed entity.[178]

Committee Comment

3.58. Some stakeholders do not feel as though they understand the nature or extent of the costs that will be imposed by a licensing regime. In this regard, the Committee is mindful that a full regulatory impact assessment is yet to be undertaken and is intended to take place following the passage of the Bill, but prior to the regulations being made.

3.59. Additionally, some stakeholders believe the licensing regime is complex and hard to understand, and that its provisions are spread out across various pieces of legislation.

Other

3.60. The Committee also received evidence raising concerns about other specific aspects of the proposed licensing scheme.

3.61. For example, the HIA identified concerns about the proposal to use a ratings report to support a license application, and the disclosure requirements to establish suitability for a license:

> HIA maintains its opposition to the use a 'ratings tool'. Not only is its effectiveness questionable, other concerns including high costs associated with participation, a lack of clarity on how a star rating is improved, as well as posing an unjustifiable barrier for new market entrants dictate that the proposal should be revised.[179]

3.62. The HIA was concerned that the level of scrutiny involved in the license application process would be onerous:

> Section 13 of the Bill requires applicants to furnish extensive information to demonstrate their suitability for a licence. HIA argues that the level of scrutiny, potentially even surpassing that imposed by financiers, are burdensome. Notably, decisions made under this process are non-reviewable by ACT Administrative

[177] Mr James Bennett, Executive Branch Manager, Building, Design and Projects, Environment, Planning and Sustainable Development Directorate*, Proof Committee Hansard*, 7 March 2024, p 79.
[178] Mr James Bennett, Executive Branch Manager, Building, Design and Projects, Environment, Planning and Sustainable Development Directorate*, Proof Committee Hansard*, 7 March 2024*,* pp 79-80.
[179] Housing Industry Association, *Submission 5,* p 1.

> Appeals Tribunal (ACAT), and the extended scrutiny to include the applicant's associates and personal details further adds to HIA's reservations.[180]

3.63. The Property Council drew the Committee's attention to the lack of a timeframe for licence applications decisions and requests for review.[181] It also highlighted the requirement for applications to be internally reviewed before ACAT review is permissible.[182]

3.64. Additionally, the Property Council recommended that a timeframe for the processing of licence applications be inserted in the Bill along with a dual pathway for review so that applicants can choose an internal review, or choose to go straight to ACAT if they believe that pathway is fairer or more timely:[183]

> These changes will serve to smoothly integrate the licencing regime and lighten the burden on the registrar once the scheme is operational.[184]

Definition of 'Property Developer'

3.65. Several submitters,[185] including the ACT Law Society, commented on the scope of the Bill inherent in the broad definition of 'property developer':

> We observe that the definition is very broad and it will pick up a large range of persons. We understand that the regulations will perhaps be used to trim that down a little bit. Of course we have not seen the regulations yet, so we wait to see how the regulations and the bill will interplay.[186]

3.66. The ACT Law Society noted that the legislation could capture persons who were not the target of the legislation:[187]

> The stated intention of the Bill, is to introduce "appropriate and enforceable accountability and transparency measures for developers and those engaged in development activity that covers the decisions they make, their conduct and matters over which they have influence and control." The Society is concerned that the wide definition of 'property developer' and its extension to directors of corporations in their personal capacity (in certain circumstances) could operate in practice to capture persons who are not involved in the development decision making process. For example, ordinary individuals associated with building activities on their land (including dual occupancy housing) and persons who became directors of corporations after residential building works were undertaken.[188]

---

[180] Housing Industry Association, *Submission 5*, p 2.
[181] Property Council of Australia, *Submission 2*, p 6.
[182] Property Council of Australia, *Submission 2*, p 6.
[183] Property Council of Australia, *Submission 2, p 6.*
[184] Property Council of Australia, *Submission 2, p 6.*
[185] Canberra Business Chamber, *Submission 24*, p 1; Property Council of Australia, *Submission 2*, pp 4-5; Housing Industry Association, *Submission 5*, p 2 and pp 3-4.
[186] Mr Adam Peppinck, Chair, Property Law Committee, ACT Law Society, *Proof Committee Hansard*, *7 March 2024*, p 49.
[187] ACT Law Society, *Submission 9*, p 3.
[188] ACT Law Society, *Submission 9*, p 3.

3.67. The Canberra Business Chamber raised concerns about whether the definition of 'property developer' would capture individual homeowners that might subdivide their properties which would have the effect of reducing the supply of new land for housing.[189]

3.68. The Property Council was concerned that the definition could pick up ordinary individuals building a new dwelling.[190]

3.69. The MBA Association expressed similar concerns:

> It [the Bill] could as it is drafted apply to the building of a dual occupancy by a very small local family wanting to do one investment in their lifetime, who may actually be trying to deliver affordable housing, where tens of thousands of dollars would be a substantial cost.[191]

3.70. The Committee heard evidence from the HIA about the risk of regulatory duplication. The HIA noted that residential builders who are already subject to a licensing scheme will be captured by the wide definition of property developer, as well as trade contractors such as carpenters and bricklayers who currently do not require a licence in the ACT:[192]

> The proposed definition is problematically expansive, encompassing any entity involved in the construction or organisation of residential building work. This broad definition introduces the potential for multiple parties to be classified as property developers for a single project, creating an intricate network of liabilities.[193]

> Yet again we are seeing a system where there is a highly regulated system where builders are licensed, where there is residential building insurance in place, and we are simply saying, "We have got to ensure, as one of the key things we do, is make sure, where there is coverage at the moment, we are not overlapping and creating additional unnecessary regulation.[194]

3.71. The HIA advocated narrowing the scope of those who would be required to obtain a property developer licence, including exempting licensed builders who are already subject to a licensing scheme under the *Construction Occupations (Licensing) Act 2004*:

> We think also, with respect to a licensed builder, there is very strict regulation over licensed builders. So we would also question why a licensed builder should also be declared as a property developer when they already have that existing form of regulation. Some of the mechanisms that are being introduced on property developers already apply to builders.[195]

---

[189] Canberra Business Chamber, *Submission 24*, p 1.
[190] Property Council Australia, *Submission 2*, pp 4-5.
[191] Mr Michael Hopkins, CEO, Master Builders Association of the ACT, *Proof Committee Hansard*, *7 March 2024*, p 28.
[192] Housing Industry Association, *Submission 5*, p 1.
[193] Housing Industry Association, *Submission 5*, p 2.
[194] Mr Greg Weller, Regional Executive Director, Housing Industry Association, *Proof Committee Hansard*, *7 March* 2024, p 35.
[195] Mr Greg Weller, Regional Executive Director, Housing Industry Association, *Proof Committee Hansard*, *7 March 2024*, p 36.

> Excluding builders from the definition of 'property developer' and for the purpose of licensing not only aligns with the existing comprehensive licensing framework for builders but also mitigates potential confusion and unnecessary administrative burdens. By recognising the unique qualifications and licensing mechanisms already in place for builders, we can enhance regulatory efficiency, ensuring that the licensing system remains clear, effective, and supportive of the construction industry.[196]

3.72. The HIA also recommended excluding building projects already captured under home warranty insurance:

> …where there is residential builders insurance in place, then there is an existing scheme with a policy that has already been taken out that protects the consumer. So we would certainly argue in the first instance that anywhere that has a home warranty or a fidelity fund certificate in place with the project should not be covered by developer regulation because there is an adequate consumer protection mechanism already in place.[197]

3.73. Additionally, the HIA supported excluding from the legislation smaller scale, 'Mum and Dad' type developments and projects involving secondary dwellings.[198]

3.74. The ACT Government clarified the intended scope of the Bill in both its oral and written evidence noting that the definition of 'property developer' in the Bill is deliberately broad, with the final application of the Bill to be determined by regulations:[199]

> The threshold for when a property developer will be required to be licensed will be determined through regulation. However, the Government does not intend to require those building a home as a primary place of residence, or those building a one-off dual occupancy to hold a license.[200]
>
> A regulatory impact statement will support the determination of the licensing threshold set to capture developers undertaking multi-unit developments as well as volume single dwelling developers (such as those delivering multiple house and land packages). The threshold including any additional exclusions (if any) to the requirement to be licensed will be determined following further key stakeholder engagement and policy consideration in the implementation phase.[201]
>
> It takes a deliberately broad approach to definitions, inclusions, and its scope of regulatory powers and will be supported by regulations and disallowable and notifiable instruments. This will allow the government to respond to changes in

[196] Housing Industry Association, *Submission 5*, p 4.
[197] Mr Greg Weller, Regional Executive Director, Housing Industry Association, *Proof Committee Hansard*, *7 March 2024*, p 36.
[198] Housing Industry Association, *Submission 5*, p 13.
[199] ACT Government, *Submission 3*, p 11.
[200] ACT Government, *Submission 3*, p 5.
[201] ACT Government, *Submission 3*, p 5.

> policy, the development environment, and swiftly close any loopholes that people may seek to use to avoid being subject to the scheme.[202]

3.75. A number of submitters called for the following sectors to be excluded from the definition of 'property developer' and thus exempted from the application of the legislation:[203]

- aged care and residential living;
- clubs and non-profit organisations; and
- community housing and build to rent sectors.

3.76. The Community Housing Industry Association who represent not-for-profit registered providers of social and affordable accommodation in the ACT, told the Committee that it supports the intent of the Bill and '…our concerns are merely about ensuring the legislation recognises our particular operating environment and does not put at risk the sector's ability to contribute to increasing social and affordable rental housing in the ACT.'[204]

3.77. It pointed to existing registration and regulatory requirements for community housing providers who are required to be registered with the Australian Charities and Not-for-profits Commission (ACNC) and the National Regulatory System for Community Housing (NRSCH).[205]

3.78. The Community Housing Industry Association raised concerns about the potentially negative impact that imposing personal liability for directors could have on director recruitment and retention:

> Increasingly we draw non exec Directors from the corporate and financial world. In the overwhelming majority of cases these directors receive sitting fees rather than a market rate of enumeration. We also draw on the expertise of retired individuals, those in low waged employment and on occasion tenants.[206]

3.79. It went on to highlight some further potentially adverse outcomes for the community housing sector if directors are subjected to personal liability:

> …the other risk is that directors restrict the operations of community housing providers so that they carve out development activity because of that personal liability if there is not the statutory carve-out. It would mean the only way community housing providers in that situation could grow is if there is stock transfer of properties from, say, a state or territory government, or through the acquisition of completed properties, but it takes out the entire development process, which is a key growth channel for community housing providers.[207]

---

[202] ACT Government, *Submission 3*, p 11.
[203] Property Council of Australia, *Submission 2*, p 5; Goodwin Aged Care Services, *Submission 6*, p 1 and p 4; Community Housing Industry Association, *Proof Committee Hansard*, 7 March 2024, pp 53-57; Clubs ACT, *Submission 10*, p 9; Eastlake Group, *Submission 13*, pp 2-3.
[204] Community Housing Industry Association, *Submission 7*, [p 1].
[205] Community Housing Industry Association, *Submission 7*, [p 1-2]; *Proof Committee Hansard*, *7 March 2024,* p 53 and 54.
[206] Community Housing Industry Association, *Submission 7*, p [1].
[207] Mr Andrew Hannan, CEO, Community Housing Canberra, *Proof Committee Hansard, 7 March 2024,* p 54.

> In the context of the federal and territory [community housing] schemes that I mentioned, the effect of this policy unless there is a statutory carve-out, would be to severely impede the ability to deliver on those objectives from the federal and territory government. Indeed, the federal money would flow to other jurisdictions where there is not this impediment and constraint on the operations of community housing providers.[208]

3.80. It called for community housing providers to be exempted from the legislation or at least be granted a statutory exemption from the proposed rectification orders and personal liability for directors to enable them to continue to attract and retain directors, deliver their full range of activities and grow the supply of affordable social and rental housing in the Territory.[209]

3.81. Goodwin Aged Care Services, representing aged care and retirement living operators presented similar arguments and urged the Committee to exempt the aged care and retirement living sector from the legislation. They explained why they considered that property developers in this sector should not be treated as normal residential property developers:

> From our perspective, the critical thing is that we all own and operate our own facilities. The people that live with us are not owners of their properties. They live with us, and they enter under various different arrangements, depending on which type of service they are receiving from us, but, ultimately we are the owner of the building. We build our villages and our buildings for the long term to keep, to own, to manage, to fix, to maintain.[210]

> So we have inherently a vested business interest - if nothing else - to make sure that the buildings that we build are fit for purpose, will last the length that they need to, and are really well maintained and really well designed. That is probably the other element I should point out: we design the buildings to last and to have the longevity they need to.[211]

3.82. They pointed the Committee to existing regulatory protections and incentives already applicable to the aged care and retirement living sectors:

> …existing obligations in the Building Act, Building Regulations, Construction Occupations (Licensing) Act and the Retirement Villages Act provide both the owner (ie the aged care and retirement living operator) and residents with legislative protection. For example, under the *Retirement Villages Act*, a resident can create a charge over the land of the property they occupy (and do not own) which makes it more difficult for the operator to 'walk away' and leave the resident without recourse. We also point out that there has been no history of

[208] Mr Andrew Hannan, CEO, Community Housing Canberra, *Proof Committee Hansard, 7 March 2024,* pp 54-55.
[209] Mr Andrew Hannan, CEO, Community Housing Canberra, *Proof Committee Hansard, 7 March 2024,* p 56.
[210] Mr Stephen Holmes, CEO, Goodwin Aged Care Services, *Proof Committee Hansard, 7 March 2024,* p 41.
[211] Mr Stephen Holmes, CEO, Goodwin Aged Care Services*, Proof Committee Hansard, 7 March 2024,* p 41.

> aged care or retirement village developments in the ACT which have incurred serious defects, requiring rectification.[212]

3.83. In its written submission, the Retirement Living Council (RLC) shared the view that additional regulation of property developers in this sector is not necessary:

> While the RLC is supportive of measures designed to improve building quality and promote transparency within the development sector, we believe such measures are already 'baked into' the retirement village operational model, with high levels of accountability to the residents who occupy the dwellings within a village.[213]

3.84. Goodwin Aged Care Services echoed the concerns presented by the Community Housing Industry Association in relation to the effect that imposing personal liability on directors for serious defects could have on their ability to attract and retain skilled board members:

> Many – in fact, a significant majority - of the organisations in our sector in the ACT are not for profit organisations. We do not pay our boards very much, if anything, depending on which organisation you are talking about.[214]

> People join our boards with various skill sets, and they join because they want to be able to give back to the elder generation or to organisations and be a critical part of the community in servicing the needs of senior Canberrans. To be able to attract people to sit on boards, we need to make that as easy as possible without putting at risk - that which is not already at risk through other mechanisms - their future livelihoods and their future beings...[215]

3.85. Goodwin Aged Care Services was concerned about the prospect of any further impediments to service delivery in the aged care services sector:

> There are plenty of road barriers in the whole system, from land release, to planning, to approvals - all those sorts of things that are already there make it really hard for us as a sector. We are really keen on making sure that there are not additional legislative and regulatory obligations coming at us that are going to make that even harder and result in us not be[ing] able to meet the projected needs of servicing senior Canberrans.[216]

3.86. ClubsACT provided evidence to the Committee on behalf of the ACT not-for-profit community club sector. It recommended that the Bill be amended to exclude the not-for-profit club sector and other not-for-profit housing providers and their Boards and management from the scope of the rectification scheme, personal liability for directors, the retrospective provisions of the Bill and the 10 year prospective exposure.[217]

---

[212] Goodwin Aged Care Services, *Submission 6*, pp 3-4.
[213] Retirement Living Council, *Submission 8*, p [1].
[214] Mr Stephen Holmes, CEO, Goodwin Aged Care Services, *Proof Committee Hansard*, 7 March 2024, p 41.
[215] Mr Stephen Holmes, CEO, Goodwin Aged Care Services, *Proof Committee Hansard*, 7 March 2024, pp 41-42.
[216] Mr Stephen Holmes, CEO, Goodwin Aged Care Services, *Proof Committee Hansard*, 7 March 2024, p 42.
[217] ClubsACT, *Submission 10*, p 9.

3.87. ClubsACT was of the view that its not-for-profit members should not be subject to a regime '… designed to address failures in the construction market historically driven by commercial and for-profit developers and builders':[218]

> In broad terms we think it a severe failure that there is no separate consideration and treatment of not-for-profit entities as compared with Commercial for-profit operators in the Bill. [219]

3.88. ClubsACT also viewed the Bill as being in direct conflict with other ACT Government policy objectives:

> …ClubsACT cannot stress enough that we see very real conflict between this Bill as proposed and the Parliamentary and Governing agreement of the ACT Legislative Assembly and the ACT Government Housing Strategy objectives.[220]

> Consistent with the terms of the Parliamentary and Government Agreement as outlined above, a significant number of ClubsACT members have either been involved in or are currently in the development stages of a number of social and Affordable housing initiatives across the ACT.[221]

3.89. ClubsACT noted that clubs and club groups such as the Canberra Southern Cross Club, the Canberra Raiders Group, the Eastlake group and Thoroughbred Park represent some of the industry participants who have embraced in good faith the objective of increasing the residential housing stock of the ACT'.[222]

3.90. It was worried that the '… current provisions of this Bill may have a significant impact on the progression of the club industries involvement in this area and a negative impact on the objectives of the ACT Government in regards to the diversification agenda and its housing strategy':[223]

> Most significantly with all the new risk exposures created by this scheme ClubsACT has a very real concern that the legislation will either significantly slow or completely stonewall the active participation of our members in seeking to meet the objectives of the Diversification policy of Government or the objectives of the ACT Government's Housing Strategy at a time when the Government has committed to building 100,000 new dwellings by 2050.[224]

3.91. ClubsACT echoed the concerns of other not-for-profit submitters about the impacts of the director liability provisions of the Bill on the recruitment and retention of directors:

> Should these provisions remain unchanged we see a very real threat that directors will rethink their positions and it will either see a resistance by our

[218] ClubsACT, *Submission 10*, p 4.
[219] ClubsACT, *Submission 10*, p 4.
[220] ClubsACT, *Submission 10*, p 9.
[221] ClubsACT, *Submission 10*, p 8.
[222] ClubsACT, *Submission 10*, p 8.
[223] ClubsACT, *Submission 10*, p 8.
[224] ClubsACT, *Submission 10*, p 8.

> members to expose themselves to residential developments or it may in a very real way deter people from volunteering to become directors of our members and other exposed not-for-profit entities.[225]

3.92. Contrary to the submissions identified above, the ISCCC did not support exemptions for aged care providers and other non-profit organisations:

> Aged people about to purchase a sublease in an aged care residence deserve the same protections as young people when buying. Drafting legislation to apply effective regulation but exclude only genuine non-profit organisations could be complex and difficult and would probably be ineffective within a year or so, as this would draw the attention of some very competent lawyers and accountants.[226]

3.93. In its written submission the ACT Government noted that 'The Threshold including any additional exclusions (if any) to the requirement to be licensed will be determined following further key stakeholder engagement and policy consideration in the implementation phase.[227]

3.94. In response to a question from the Chair of the Committee, Minster Vassarotti also indicated that further consideration would be given to exempting non-profit organisations from the application of the Bill:

> When we were looking early on at the definition of property developers, we were also looking at definitions like the Electoral Act that actually do the carve out of particular not-for-profit organisations. When thinking about this issue, we have primarily been thinking about it in terms of the property development activity, and the consumer protection that is needed.[228]

> You picked up on the issues for the retirement villages. One of the things that I would observe is that the ownership models for these providers are ones in which they do retain ownership. So they have a direct incentive to actual[ly] build and construct quality buildings.[229]

3.95. Minister Vassarotti noted that the ACT Government is also mindful of the need to avoid regulatory duplication:

> We have been stepping through in terms of, "Just because there is a vulnerable consumer, do they require less protection than other people?" It is true that the community housing sector and the retirement village sector do have However, I

[225] ClubsACT, *Submission 10*, p 8.
[226] Inner South Canberra Community Council, *Submission 26*, p 6.
[227] ACT Government, *Submission 3*, p 5.
[228] Ms Rebecca Vassarotti MLA, Minister for Sustainable Building and Construction, *Proof Committee Hansard*, *7 March 2024*, p 73.
[229] Ms Rebecca Vassarotti MLA, Minister for Sustainable Building and Construction, *Proof Committee Hansard*, *7 March 2024*, p 74.

think the examples that you talk about in terms of the community housing sector existing regulatory oversight around their operations.[230]

We are taking some further engagement around ensuring that we are reducing regulatory duplications, so we are not doing something twice through this process while making sure that consumers are protected.[231]

What we would be really conscious of there, is looking at those sectors where there are existing legislative registration and accountability frameworks in place, like for the community housing sector, and making sure that we appropriate[ly] reference and pick up those other regulatory schemes.[232]

Exemptions in legislation or regulation

3.96. ClubsACT expressed concern about exemptions for certain categories of property developers being made through regulation rather than in the Bill itself:

One of the things I would be particularly concerned about would be that the government might seek to address this issue through regulation rather than through the legislation itself. Obviously we are talking about long-term investment decision-making that takes place, and the regulation obviously does not necessarily have the certainty associated with it that the actual bill might have.[233]

…we actually think it needs to be in the substantive part of the legislation rather than something that could be varied at some point by a decision of a newcomer to the Assembly or otherwise.[234]

I think that is still an exposure risk that we would have to deal with as an industry, if there was only a regulation giving a protection.[235]

3.97. This concern was shared by the Community Housing Industry Association who was aware that the ACT Government was considering exemptions to the legislation and noted its preference that this be achieved through a statutory carve out rather than regulations.[236]

3.98. The Chair of the Committee asked[237] the ACT Law Society to provide its view on using regulations to specify who falls within the scope of the scheme:

I do not think it is an uncommon way to deal with it. As you have said, we need to get it right in the regulations, in terms of exactly what does make its way into

[230] Ms Rebecca Vassarotti MLA, Minister for Sustainable Building and Construction, *Proof Committee Hansard*, 7 March 2024, p 73.
[231] Ms Rebecca Vassarotti MLA, Minister for Sustainable Building and Construction, *Proof Committee Hansard*, 7 March 2024, pp 73-74.
[232] Mr James Bennett Executive Branch Manager, Building, Design and Projects, Environment, Planning and Sustainable Development Directorate, *Proof Committee Hansard,* 7 March 2024, p 74.
[233] Mr Craig Shannon, CEO, ClubsACT, *Proof Committee Hansard*, 7 March 2024, p 64.
[234] Mr Craig Shannon, CEO, Clubs ACT, *Proof Committee Hansard*, 7 March 2024, p 64.
[235] Mr Craig Shannon, CEO, Clubs ACT, *Proof Committee Hansard*, 7 March 2024, p 65.
[236] Mr Andrew Hannan, CEO, Community Housing Canberra, *Proof Committee Hansard*, 7 March 2024, p 56.
[237] *Proof Committee Hansard*, 7 March 2024, p 49.

those regulations. As long as that is clear, then I think that is a way of managing the concern.[238]

3.99. When asked by the Chair of the Committee how exemptions to the legislation would be made, the ACT Government confirmed that any exemptions would be made via regulations using the heads of power in the Act.[239] The Government noted that regulations are not without scrutiny processes.[240]

Committee comment

3.100. The Committee notes that the current definition of a property developer in the Bill is very broad and could capture persons that are not involved in the development decision-making process that the scheme was not intended to capture. The Committee acknowledges that the final scope of the licencing scheme under the Bill is yet to be determined. The stated intention is to exempt some classes of developer through regulation and the Minister assured the Committee that government is open to further consultation and refinement of the list exemptions.

3.101. The Committee heard from a variety of respondents that not-for-profit organisations should be exempt from the provisions including community housing providers, builders of aged persons accommodation and community clubs.

3.102. In the Committee's view, there is a case for exemptions to the definition of property developer, and hence the scheme, to be made. The exemption should be limited to not-for-profit providers that undertake developments which will be owned and rented by the not-for-profit provider, not properties which are built for sale or built and then sold. A developer who owns and rents out the property they develop will need to make any repairs to that property themselves, and so the consumer protection elements of the scheme are not required.

Finding 1

The Committee finds that in developing the regulations, the ACT Government should give consideration to exemptions from property developer licencing and the personal liability provisions of the Property Developers Bill 2023 to not-for-profit developing organisations that will own and rent the development for a period no less than 10 years.

3.103. In regard to making exemptions via legislation or regulation, the Committee understands the view held by some submitters that, for certainty, the exemptions should be spelled out in the statute. In order for parts of the sector to receive the assurance they need to

[238] Mr Adam Peppinck, Chair, Property Law Committee, ACT Law Society, *Proof Committee Hansard*, 7 March 2024, p 49.
[239] Mr James Bennett, Executive Branch Manager, Building, Design and Projects, Environment, Planning and Sustainable Development Directorate, *Proof Committee Hansard,* 7 March 2024, p 74.
[240] Mr Ben Green, Executive Group Manager, Planning and Urban Policy, Environment, Planning and Sustainable Development Directorate, *Proof Committee Hansard, 7 March 2024,* p 75.

effectively undertake long term construction projects, the Committee considers that thorough consultation will be required.

Finding 2

The Committee finds that in relation to developing the regulations to exempt certain developing organisations from the scheme, the ACT Government should consult thoroughly with the various parts of the sector to ensure that they receive the certainty required to undertake complex, long-term residential developments.

3.104. The Committee observes that the Property Developers Bill does not apply to entities such as Government agencies. Suggestions were made in evidence that the ACT Government and its agencies be required to comply with all aspects of the Bill.

3.105. There are a number of agencies which undertake residential development, including Housing ACT, ACT Health as well as the Justice and Community Safety Directorate. In these cases, the agency will construct, retain and maintain the dwellings which are then rented out to tenants, subject to selection criteria. The agencies will retain the dwellings for extended periods of time. They may dispose of the assets after the dwellings ae no longer suitable for their intended purpose.

3.106. The Suburban Land Agency is responsible for developing and selling land in the ACT. The City Renewal Authority undertakes similar functions within a specific area of Canberra. The Suburban Land Agency has developed display villages and has designed and is about to commence the construction of affordable dwellings in North Wright. The ultimate intention for the display village and the North Wright development is that the dwellings be sold. In such a situation it seems reasonable that the licensing requirements in the Property Developers Bill be applied.

Recommendation 1

The Committee recommends that in the five-year review of the legislation, ACT Government consider whether the Code of Conduct and regulatory system should apply to all property developers, including Government agencies that undertake property development.

Personal liability for directors

3.107. Clause 55 of the Bill provides for directors to be held personally liable for defects in certain circumstances.[241] This aspect of the Bill was discussed at length in evidence to this inquiry.

3.108. The ACT Law Society noted that this departs from the 'separate legal entity principle – which is fundamental to corporate law' – and should only be 'done in exceptional cases,

[241] Property Developers Bill 2023, Section 55

which in the past have generally included fraud, injustice or abuse of the corporate structure'.[242]

3.109. Mr O'Brien argued that this constituted 'piercing the corporate veil':

> This power is typically reserved for extreme breaches of Australia's corporation law. Our members firmly believe that there is no reasonable justification for the use of this power in the circumstances. It will place an incredible, onerous and uninsurable burden on companies and their directors. Corporate decisions should be made without fear of personal recourse This accepted principle of everyday business should not be overturned in the pursuit of this legislation which seeks out a very small minority in our community.[243]

3.110. According to the Property Council, this inclusion 'creates an extreme consequence for developing in the ACT' that will discourage investment and divert it to other jurisdictions.[244] The Property Council noted that the objective of the provision is to 'improve accountability for residential developers', but as the ACT is the only Australian jurisdiction pursuing this category of licencing the effect will be to shift investment into neighbouring jurisdictions.[245]

3.111. The Property Council also argued that personal liability would have 'limited deterrence potential', as it creates 'a strong likelihood that some developers may apply for insolvency rather than be deterred from practices and decisions that may arise in building defects'.[246]

3.112. Further, the Property Council told the Committee that this approach does not effectively take account of the complexity of decision making in residential construction, which involves multiple parties including architects, engineers, contractors, sub-contractors and suppliers. This collective decision-making is not effectively accounted for by attributing personal liability to developer company directors, and 'will not accurately reflect the complexities of decision-making or apportion risk equitably'.[247]

3.113. Additionally, the Property Council noted that this provision 'fundamentally overstates the influence of directors on day-to-day operations', and that many directors might 'not have the relevant technical expertise to make or oversee construction decisions'. Effective corporate governance could then be hindered by discouraging qualified professionals from serving on boards.[248]

3.114. The Property Council further noted that the impact of this provision would be disproportionate for small and medium enterprises in the ACT, changing the competitive environment within the construction sector and driving up costs and job opportunities. Additionally, personal liability would increase professional indemnity costs or even make it unobtainable.[249]

---

[242] ACT Law Society, *Submission 9*, p 3.
[243] Mr Phil O'Brien, President ACT Division, Property Council of Australia, *Proof Committee Hansard*, 7 March 2024, p 21.
[244] Property Council of Australia, *Submission 2*, p 3
[245] Property Council of Australia, *Submission 2*, p 6.
[246] Property Council of Australia, *Submission 2*, p 6.
[247] Property Council of Australia, *Submission 2*, p 6.
[248] Property Council of Australia, *Submission 2*, p 6.
[249] Property Council of Australia, *Submission 2*, p 6.

3.115. Risk aversion would lead to stifled innovation and competition through disadvantaging small or medium sized enterprises and the fear of overreaching legal consequences. According to the Property Council:

> Fearing over reaching legal consequences, directors might opt for traditional, but not necessarily best, practices. This will be particularly damaging at a time where there is an international race to innovate construction approaches, especially those that promise better environmental outcomes through a project's life.[250]

3.116. The MBA raised the need for the transfer of liability, in light of the personal liability provisions:

> If a director of a development company is held personally liable under the current bill, the issue that they would face is how they can then transfer the liability to other people in the contractual chain. I do not think there is any dispute that just one individual director should not be held 100 per cent liable for everything and every defect when it is in the twenties of millions of dollars. The issue with holding a director liable is they have no contract with the builder themselves and they have no contract with the subcontractors.[251]

3.117. According to the MBA, the period of personal liability of ten years is misaligned with statutory warranty periods under the *Building Act 2004*. The MBA told the Committee that in the period between the six and ten years 'only the director of a development company or the nominees of building companies are liable with no recourse against others'.[252]

3.118. The ACT Government justified its position on personal liability, noting that the position in the Bill 'is less onerous on property developers compared to existing legislative arrangements for builders'.[253] Similarly, Mr Kerin noted that builders are 'already personally liable, potentially, for rectification orders' and that the Bill 'does not do anything to a developer that is not already being done to a builder'.[254]

3.119. Further, the ACT Government stated that:

> The Bill is structured so that liability is first directed against the licenced corporate entity. Director liability will only arise where the company is wound up, in administration or deregistered. There will be no avenue for personal liability if the company remains operational and meets its obligations to customers and any regulatory orders. This is a direct disincentive to phoenixing activity.[255]

[250] Property Council of Australia, *Submission 2*, p 6.
[251] Ms Ashlee Berry, Member Services Director, Master Builders Association of the ACT, *Proof Committee Hansard*, 7 March 2024, p 33.
[252] Ms Ashlee Berry, Member Services Director, Master Builders Association of the ACT, *Proof Committee Hansard*, 7 March 2024, p 33.
[253] ACT Government, *Submission 3*, p 9
[254] Mr Christopher Kerin, Director, Kerin Benson Lawyers, *Proof Committee Hansard*, 7 March 2024, p 3.
[255] ACT Government, *Submission 3*, p 9

3.120. Additionally, it incentivises the mitigation of risk through the following 'simple and cost-effective actions' that could be taken by a developer, which the ACT Government notes many good developers have already adopted:

- Improving design quality by commissioning peer review at key design stages;
- Mandating use of compliance with good practice construction guides;
- Engaging registered architects, engineers and other professionals, or requiring the use of a design and construct model by builders;
- Selection of trades and builders with good performance histories;
- The employment of private certifiers to detect defects early;
- Appoint representatives to oversee construction work; and
- Obtain latent defect insurance and offer contractual warranty periods.[256]

Committee comment

3.121. The Committee notes the range of concerns that were raised by the Property Council, and other submitters and witnesses to this inquiry. It further notes that the application of personal liability to directors is a departure, in some ways, from established legal practice as was noted by the ACT Law Society.

3.122. However, the Committee notes that the intention of this provision is to provide a disincentive to 'phoenixing' activity, which has unfortunately become associated with the property developer and construction sector in recent years. While this is a worthy goal, it is important to balance the outcome with the steps taken to achieve it, particularly when departing from established legal principles.

3.123. Dispersal of liability is another key aspect of this discussion. In the Committee's view, this Bill will hold property developers responsible for the defects they are liable for under the scheme and will encourage behaviour from property developers to avoid those defects. This includes periodic inspections and the process of engagement of contractors and sub-contractors.

Reversing the onus of proof

3.124. One key issue that emerged during this inquiry is the reversal of the onus of proof for perceived defects for a period of two years after construction. The ACT Government explained the nature of this provision as putting 'the onus on property developers and builders (jointly) to prove that defects claimed by owners are not defects' for a defined period.[257]

3.125. The ACT Government elaborated on this provision:

> This provision is known as a reverse onus provision and related to the application of statutory warranties within the first two years after a certificate of occupancy

[256] ACT Government, *Submission 3*, p 9
[257] ACT Government, *Submission 3*, p 6.

> for a project is completed. The purpose of this measure is to make it easier for owners to have defects remediated by creating a presumption that the alleged defect is the responsibility of the builder and the property developer.[258]

3.126. By shifting the responsibility for proving that problems with buildings are not defects caused by the developer and builder, rather than having owners prove they are, the ACT Government is seeking to establish:

> …a clear obligation on the property developer and their builder to remedy the defect or compensate the owners quickly and acts as a disincentive to litigation. This element aligns with other measures included in the Scheme to strengthen the position of new owners to have defects resolved promptly for the period over which it applies.[259]

3.127. According to the ACT Government:

> The time-limited period for the statutory presumption in favour of the owner reflects the inherent knowledge imbalance in the short period following completion of the project between a developer and builder versus the new owner or newly formed owners' corporation.[260]

3.128. While not commenting on its appropriateness or otherwise, the ACT Law Society noted that this approach is 'a departure from what you might regard to be the norm'.[261] According to Mr Peppinck, Chair of the Property Law Committee of the ACT Law Society:

> Normally, it is more typical that, if someone is making a claim, then the onus is on them to prove that claim rather than it being on the person who is defending the claim—the onus being reversed in that way. We observe that this is a departure from what we regard to be the norm. It might be a justified departure, but, again, we are just wanting to pressure-test the approach.[262]

3.129. This aspect of the scheme received strong support from some submitters and witnesses to this inquiry. For example, Mr Kerin characterised this provision as 'helpful'.[263] Kerin Benson Lawyers noted that:

> 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:
>
> - 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;

[258] ACT Government, *Submission 3*, p 6.
[259] ACT Government, *Submission 3*, p 6.
[260] ACT Government, *Submission 3*, p 7.
[261] Mr Adam Peppinck, Chair, Property Law Committee, ACT Law Society, *Proof Committee Hansard*, 7 March 2024, p 46.
[262] Mr Adam Peppinck, Chair, Property Law Committee, ACT Law Society, *Proof Committee Hansard*, 7 March 2024, p 46.
[263] Mr Christopher Kerin, Director, Kerin Benson Lawyers, *Proof Committee Hansard*, 7 March 2024, p 4.

- water ingress is due to "wind driven" rain rather than the result of a defect; or
- a unit owner has caused the defect.[264]

3.130. Kerin Benson Lawyers argued that the argument above 'appear designed to stymie the efforts of owners corporations to convince builders and developers to take responsibility' and 'also wear down and exhaust executive committee members who are volunteers and usually not experienced in building issues'.[265]

3.131. Mr Petherbridge was also supportive of reversing the onus of proof for defects, but argued the provision did not go far enough:

> It is an important change, but it is not long enough. As I just said, the latent defects do not occur in the first two years. Having the onus of proof on the developers for the first two years is not a long enough period, and I have said that in my submission. As a compromise, six years might be a reasonable number, because that is the current structural timetable for defect rectification. Ten years would be much better. I would argue for 10 years but, as a compromise, I would come back to six.[266]

3.132. The HIA told the Committee that this provision was 'very concerning'. It stated that:

> … placing the burden on the party to disprove something is obviously more difficult and sets quite a high bar on the obligations on that party, and how you might rebut that presumption in a legal sense is quite difficult.[267]

3.133. The MBA argued that the reversal of the onus of proof would neither 'reduce the occurrence of building defects' nor 'speed up their resolution'. Rather, MBA stated that the 'measure will only encourage more disputes to be resolved through legal action'.[268] As a result, it told the Committee that this provision should be removed from the Bill and be replaced by the completion of the alternate dispute resolution reform legislation from 2019.[269]

3.134. The Property Council similarly noted that reversing the onus of proof:

> … places extraordinary power in the hands of claimants and will force considerable expense and effort to be poured into ascertaining whether a defect is a defect, as opposed to progressing the claim so that any defect is promptly rectified. We also foresee this resulting in vast amounts of claims being made against developers, as the barriers for commencing a claim have been significantly

[264] Kerin Benson Lawyers, *Submission 19*, p 4.
[265] Kerin Benson Lawyers, *Submission 19*, p 4.
[266] Mr Gary Petherbridge, President, Owners Corporation Network, *Proof Committee Hansard*, 7 March 2024, p 18.
[267] Ms Melissa Adler, Senior Executive Director, Housing Industry Association, *Proof Committee Hansard*, 7 March 2024, p 35.
[268] Master Builders Association of the ACT, *Submission 4*, p 5.
[269] Master Builders Association of the ACT, *Submission 4*, p 6.

> lowered by this change. We ask that the presumption be removed and that claims be required to submit evidence alongside defect liability claims.[270]

3.135. The HIA considered that the reverse onus of proof would:

- Significantly empower affected parties, especially residents, and given them substantial leverage in relation to rectification claims, which would in turn raise concerns about the 'potential for vexatious claims';
- Lead to an upsurge in claims as a result of incentivising 'affected parties to assert potential defects within the first two years strategically';
- Not take effective account of scenarios where defects 'might genuinely be an oversight rather than a result of negligence or poor workmanship'. Instead, allowance should be made for reasonable exceptions and a fair process for builders and developers to present evidence to balance the need for consumer protection with fairness and due process; and
- Cause delays and cost implications that strain the resources of builders and developers, as increasing numbers of claims divert attention and resources from ongoing projects.[271]

3.136. The HIA argued for a narrowed scope of defects to be defined through qualifiers and limitations to the presumption 'such as requiring that the identified defect must be substantial or meet specific criteria'. Further, the HIA considered that encouraging 'periodic inspections and reporting by the owners' in the two years after completion would act to education owners in relation to 'the nature of construction projects and distinguish between genuine defects and minor issues'.[272]

3.137. In responding to the concerns, the ACT Government emphasised the need to address the 'power and knowledge imbalance between the developer, who has just built the building and has intimate knowledge of its workings versus the newly established group of owners and owners corporation', who 'may have never had experience in being on an owners corporation before'.[273]

3.138. The ACT Government elaborated on the intended effect of the reversal of the onus of proof:

> Our view of that is that it would inspire greater initiative by the developer to fix the problem that is alleged, and we have prioritised consumer protection and the prioritisation of getting problems and defects fixed over that usual principle that the owners corporation—and one of the significant costs that owners corporations and owners incur is the cost of legal representation and obtaining

[270] Property Council of Australia, *Submission 2*, p 9.
[271] Housing Industry Association, *Submission 5*, p 7.
[272] Housing Industry Association, *Submission 5*, p 7.
[273] Mr James Bennett, Executive Branch Manager, Building, Design and Project, Environment, Planning and Sustainable Development Directorate, *Proof Committee Hansard*, 7 March 2024, pp 77-78.

> experts to establish the nature of the defect. So it is not just the rectification cost; it is also the legal and expert engagement to support their case.[274]

Committee comment

3.139. In considering the reversal of the onus of proof, the Committee is of the view that it is important to also consider the dynamic between a property developer and an affected party. The Committee also acknowledges that departures from established legal principles around the onus of proof being on the accuser must be clearly justified.

Retrospectivity

3.140. Under Part 6 of the Bill, the registrar is empowered to make rectification orders for ten years following the completion of a residential building or the issue of a certificate of occupancy (or similar), whichever is later.[275]

3.141. The ACT Law Society told the Committee that:

> The common law presumption against retrospective application of civil laws, reflects the general principles of maintaining a fair, stable and predictable legal environment that upholds the Rule of Law and protects individual rights. Legislation which seeks to apply retrospectively should be subject to careful consideration and a robust policy rationale.[276]

3.142. The HIA noted its concern about the perceived retrospective nature of the provisions:

> It imposes a new obligation on those that have already entered into arrangements and contracts and costed risk. We heard a lot about risk this morning. It is not the general way that the law operates. In most instances parties enter into an agreement on the basis of the situation they have in front of them, and this certainly turns that on its head.[277]

3.143. The Property Council raised similar concerns, characterising the scope of perceived retrospective operation of this provision – up to ten years in the past – as setting a dangerous precedent that forces 'developers to act in a way that looks to minimise future liabilities rather than focusing on pressing concerns in the present'.[278]

3.144. The Property Council elaborated on the reasons behind this concern:

- Companies and potentially their directors could be liable for work completed before the Bill was even contemplated. It is not fair to hold people accountable to a scheme that they could not have predicted or had no notice of.

[274] Mr James Bennett, Executive Branch Manager, Building, Design and Project, Environment, Planning and Sustainable Development Directorate, *Proof Committee Hansard*, 7 March 2024, p 78.
[275] Property Developers Bill 2023, Part 6, Section 52.
[276] ACT Law Society, *Submission 9*, p 2.
[277] Ms Melissa Adler, Senior Executive Director, Housing Industry Association, *Proof Committee Hansard*, 7 March 2024, p 34.
[278] Property Council of Australia, *Submission 2*, p 7.

- If someone became a director of a company (a successor) after residential building work had been completed, that director could be liable for any rectification orders for that work. It cannot be reasonable to hold a person personally liable for things out of their control, that were not their fault or for which they were ever involved in.

- The Bill does not specify why rectification orders can be issued for up to 10 years. Clear reasoning should be given as to why this decision was made, especially given the harsh consequences this system can inflict.

- The Property Council believes this is a very dangerous precedent for the community and does not breed trust in the Government properly exercising its significant power (particularly when there is no senior house of review, unlike in other jurisdictions).[279]

3.145. As a result, the Property Council called for this provision to be removed.[280]

3.146. The Law Society noted that, in this specific case, there are arguments for these laws not necessarily being considered retrospective. The provisions in the Bill are similar to those outlined in the *Construction Occupations (Licensing) Act 2004*, under which the ACT Government argued that:

> statutory provisions were not retrospective simply because they relied on conduct or events that happened before the provisions existed. That is, that laws which base future action (such as issuing a rectification order) on past events (defective building work undertaken prior to the commencement of the amendments) are not retrospective in operation. The argument is that such laws do not change rights and obligations with effect prior to their commencement, rather they create new obligations and liabilities that apply from the date the amendments commence.[281]

3.147. In relation to the current Bill, the Law Society noted that 'there is a technical argument that there are no consequences for past acts', and that instead 'there is future action would could be taken against past acts'.[282] Ms Sengstock, Senior Policy Officer of the Law Society elaborated:

> The rectification happens in the future. The order happens in the future based on a past event, but the compliance enforcement is about failure to comply with the rectification order. That technically means it is not retrospective.[283]

[279] Property Council of Australia, *Submission 2*, p 7.
[280] Property Council of Australia, *Submission 2*, p 7.
[281] ACT Law Society, *Submission 9*, pp 2-3
[282] Ms Elsa Sengstock, Senior Policy Officer, ACT Law Society, *Proof Committee Hansard*, 7 March 2024, p 51,
[283] Ms Elsa Sengstock, Senior Policy Officer, ACT Law Society, *Proof Committee Hansard*, 7 March 2024, p 51.

3.148. While in Ms Sengstock's view, the scheme as proposed is 'not unreasonable, as a general principle', it does raise some concerns when coupled with the personal liability of directors discussed above.[284] According to Ms Sengstock:

> Our concern is also that, when you look at the personal liability of directors, the personal liability happens whether you were a director at the time or not. You can go back to the fundamental, "You should have been complying at the time," and they may not have been involved at all in the process.[285]

3.149. Minister Vassarotti took a different view, contesting that the provisions are retrospective, and that the Bill 'was never intended to be retrospective'.[286] The ACT Government elaborated on the intend of these provisions, noting that it mirrors the requirements placed on builders in relation to rectification, and pointed to the transitional provisions contained in the Bill:

> We will have a transition period before you need to obtain a licence, so the licensing element will have a transition period to allow people the time to understand what their requirements are to obtain the licence, prepare that information and be ready to apply. So there will be a transition period for that. On the regulatory aspects, those regulatory aspects will only apply to building work undertaken after the commencement of the bill.[287]

3.150. Minister Vassarotti also expressed openness to addressing the concerns around these provisions, stating that:

> To ensure clarity and remove any confusion in the minds of the Property Council and others, we are really happy to explore amendments to the bill that we could consider in the debate stage to make it explicit, but it was never the intention and the way that it is written is standard to all legislation.[288]

Committee comment

3.151. In the Committee's view, there is some inconsistency between the evidence received from industry stakeholders and from government on the retrospective application of the rectification orders within Part 6 of the Bill.

3.152. While the ACT Government has explained why, in their view, these laws are not intended to have retrospective application, the Committee notes that section 47(1) of the Bill explicitly states that the rectification powers of the registrar apply to work that started or finished before the commencement of the Bill.

---

[284] Ms Elsa Sengstock, Senior Policy Officer, ACT Law Society, *Proof Committee Hansard*, 7 March 2024, p 51.
[285] Ms Elsa Sengstock, Senior Policy Officer, ACT Law Society, *Proof Committee Hansard*, 7 March 2024, p 51.
[286] Ms Rebecca Vassarotti MLA, Minister for Sustainable Building and Construction, *Proof Committee Hansard*, 7 March 2024, p 80.
[287] Mr James Bennett, Executive Branch Manager, Building, Design and Project, Environment, Planning and Sustainable Development Directorate, *Proof Committee Hansard*, 7 March 2024, p 81.
[288] Ms Rebecca Vassarotti MLA, Minister for Sustainable Building and Construction, *Proof Committee Hansard*, 7 March 2024, pp 80-81.

3.153. In this regard, the perspective put by stakeholders such as the Property Council is entirely understandable, and the concerns they raise are warranted. Before this Bill progresses through the Assembly, the Committee sees a need for this concern to be effectively addressed via an amendment.

Recommendation 2

The Committee recommends that the ACT Government introduce amendments to this Bill that amend Part 6 as appropriate to accurately reflect the stated policy position that rectification orders will not be retrospective in application.

Effects on housing availability and cost

3.154. The Property Council of Australia noted that it held 'grave concerns' about the current approach outlined in the Bill, and its belief that 'this will have serious impact for our residential sector and more generally risk future investment in the Territory'.[289]

3.155. Mr O'Brien argued that aspects of the Bill 'will have a disastrous effect on the Territory's housing supply, employment and government revenue'. Mr O'Brien explained the reasons for this belief:

> Residential capital goes where capital is welcome, and we want to make it very clear that what is currently in the draft legislation is creating an environment where capital is not welcome.[290]

3.156. Mr Michael Hopkins of the MBA made a similar point, noting that:

> …in the midst of a housing crisis, when our residential building approvals are at least 25 per cent, if not 40 per cent, below where they should be, it would seem an extremely unusual action by the government to introduce new regulation on an industry that is trying to meet a housing supply need for the community. The committee should be very attuned to that risk.[291]

3.157. Mr Wilson downplayed the potential impact on housing construction in the ACT. He highlighted the adaptability of the housing industry, noting past instances of building reform have been met with changes in the market that ultimately lead to lower costs.[292]

3.158. Minister Vassarotti told the Committee that government engaged with the potential cost-of-living impacts of the Bill in developing the legislation, stating that the increased costs are already happening, in that consumers currently bear the costs of defects.[293] Ms Vassarotti elaborated:

---

[289] Property Council of Australia, *Submission 2*, p 1.
[290] Mr Phil O'Brien, President ACT Division, Property Council of Australia, *Proof Committee Hansard*, 7 March 2024, p 21.
[291] Mr Michael Hopkins, CEO, Master Builders Association of the ACT, *Proof Committee Hansard*, 7 March 2024, p 31.
[292] Mr Malcolm Wilson, Director, Advanced Structural Designs, *Proof Committee Hansard*, 7 March 2024, p 14.
[293] Ms Rebecca Vassarotti MLA, Minister for Sustainable Building and Construction, *Proof Committee Hansard*, 7 March 2024, p 69.

> …this bill is simply ensuring the homes that are built are of the appropriate quality, and if things go wrong, consumers are protected. In terms of affordability, I think that is a worthy investment and an investment that the community expects: that we ensure that we regulate part of the industry that has significant control to ensure the homes we live in actually perform to an appropriate standard. If we are suggesting that we are unable to build homes affordably without putting that check and balance in, I think that there is a really big problem.[294]

3.159. While the ACT Government acknowledged the 'very minor impact on the costs of a new dwelling' that the licencing scheme will impose, Minister Vassarotti told the Committee that the overall costs of expensive defects has been the main focus:

> We know that this mechanism to create greater accountability makes sure that they will pick up those defects earlier. It will reduce the need to pick up much more expensive defects further down the track, because they will have the accountability, and there is an incentive to ensure that those defects are picked up as early as possible and cost as little as possible to rectify.[295]

3.160. Mr Hopkins noted that the compliance costs of the scheme proposed in the Bill are currently unknown. He stated that the MBA has not been provided any information about the compliance costs of the scheme, and further that no regulatory impact statement had been completed for the scheme.[296]

3.161. Minister Vassarotti said that a regulatory impact assessment would be undertaken in due course.[297] However, Minister Vassarotti explained the ACT Government's understanding of the indicative costs of the licencing scheme:

> We do recognise that those upfront costs will probably be passed onto consumers. We expect that this will be in the order of one to two per cent of a purchase price. Every dollar, when you make this significant a purchase is important, but that will be significantly reduced in relation to the rectification costs of a poor quality building down the track.[298]

3.162. Latent defence insurance was examined as one of the key additional costs to residential construction that is likely to flow from the licencing scheme. In terms of insurance costs, the ACT Government told the Committee that it is estimated to add 1.5 to two percent to the cost of construction.[299] Further:

---

[294] Ms Rebecca Vassarotti MLA, Minister for Sustainable Building and Construction, *Proof Committee Hansard*, 7 March 2024, p 70.
[295] Ms Rebecca Vassarotti MLA, Minister for Sustainable Building and Construction, *Proof Committee Hansard*, 7 March 2024, p 71.
[296] Mr Michael Hopkins, CEO, Master Builders Association of the ACT, *Proof Committee Hansard*, 7 March 2024, p 28.
[297] Ms Rebecca Vassarotti MLA, Minister for Sustainable Building and Construction, *Proof Committee Hansard*, 7 March 2024, p 69.
[298] Ms Rebecca Vassarotti MLA, Minister for Sustainable Building and Construction, *Proof Committee Hansard*, 7 March 2024, p 71.
[299] Mr James Bennett Executive Branch Manager, Building, Design and Project, Environment, Planning and Sustainable Development Directorate, *Proof Committee Hansard*, 7 March 2024, p 72.

> That is an insurance policy that is to the benefit of consumers in that, if there is a significant structural defect, the insurance company will pay out, will rectify the problem and have the consumer no worse off, and then the insurance company will then take that forward in pursuing others who are responsible for that. That is the order of magnitude of insurance costs.[300]

3.163. Minister Vassarotti put the view that the development of a market for this insurance will act to reduce costs over time:

> If we look across other jurisdictions, New South Wales is probably a good example of the fact that they are going down this pathway as well. These kinds of insurance products will become more and more common within the market with more requirements around that. That will actually create more of a market. So we would expect that that would actually create the market and actually put downward pressure on costs for some of these products rather than upward pressure.[301]

3.164. The ACT Government noted that the need for this type of insurance will act to increase quality within the residential construction sector in Canberra.[302] In regard to latent defect insurance, the ACT Government told the Committee that:

> …with this particular product, the insurance company requires its own independent assessment process throughout the construction process. You sign up with the insurance company and you sign up to an inspection regime and, at the end of that process, if the insurance company is satisfied that it can issue you the policy because it is satisfied, through its own checks and balances during the construction process, they are happy to issue you that product.[303]

Committee comment

3.165. All contributors to this inquiry broadly agreed that this scheme will add to the cost of housing for consumers. The issue that appears contested is the extent of this cost.

3.166. The Committee is pleased to note that a full regulatory impact assessment will be undertaken. However, it is important that the cost of the scheme to consumers be minimised to the greatest extent possible.

Administration

3.167. Kerin Benson Lawyers noted that, in light of the 'significant scope and ambition of the Bill', a 'not insignificant bureaucracy' must be put in place to ensure effective administration.

---

[300] Mr James Bennett, Executive Branch Manager, Building, Design and Project, Environment, Planning and Sustainable Development Directorate, *Proof Committee Hansard*, 7 March 2024, p 72.

[301] Ms Rebecca Vassarotti MLA, Minister for Sustainable Building and Construction, *Proof Committee Hansard*, 7 March 2024, p 72.

[302] Mr James Bennett, Executive Branch Manager, Building, Design and Project, Environment, Planning and Sustainable Development Directorate, *Proof Committee Hansard*, 7 March 2024, p 72.

[303] Mr James Bennett, Executive Branch Manager, Building, Design and Project, Environment, Planning and Sustainable Development Directorate, *Proof Committee Hansard*, 7 March 2024, p 72.

This in turn would require 'numerous officials' with at least some possessing 'building industry expertise to properly exercise the functions given to them'.[304]

3.168. According Kerin Benson Lawyers, the operation of the Residential Building Dispute Scheme offered a salient example. This scheme 'provided a framework to facilitate constructive and productive dialogue between parties' and would help 'to resolve simple residential building disputes without legal proceedings'. However, after almost two years of the commencement, these scheme is yet to become operational.[305]

3.169. According to Mr Kerin, the Scheme:

> …is in force, but it is not actually there. I suspect it is because they cannot find the technical people in the jurisdiction to administer the act. That raises a question. It is great to have an act that does things, but, if no one is administering it, it is pointless.[306]

3.170. In responding to the concerns about effectively staffing and administering the licencing and regulation proposed by the Bill, Minister Vassarotti acknowledged the significance of the reforms it proposes, and that work is being undertaken to ensure that the resources and systems are in place to administer and implement the scheme effectively.[307]

Committee Comment

3.171. The assurances provided by Minister Vassarotti notwithstanding, the Committee is aware of the scale and ambition of the reforms proposed by this Bill, and notes the considerable effort that will be required to ensure that it is effectively implemented.

3.172. In this regard, the Committee notes that early efforts to ensure the resources are available to administer the scheme will be vital to its effective operation from commencement. As such, prior to commencement identification of the appropriate administrative arrangements within the relevant directorates is going to be key to its effective operation.

Recommendation 3

The Committee recommends that the ACT Government clearly establish the administrative arrangements for running the scheme prior to commencement of the Property Developers Bill 2023.

Role of the registrar

3.173. The ACT Government outlined the role of the registrar:

> The Bill includes the establishment of a Property Developer Registrar (the Registrar) who will be responsible for licensing and regulation of developers and

[304] Kerin Benson Lawyers, *Submission 19*, p 6.
[305] Kerin Benson Lawyers, *Submission 19*, p 7.
[306] Mr Christopher Kerin, Director, Kerin Benson Lawyers, *Proof Committee Hansard*, 7 March 2024, p 4.
[307] Ms Rebecca Vassarotti MLA, Minister for Sustainable Building and Construction, *Proof Committee Hansard,* 7 March 2024, p 82.

> development activity. The Registrar will have strong powers to be able to take regulatory action against developers that do the wrong thing. It will compel them to fix problems and face fines or suspend their licence if they do not rectify works accordingly.[308]

3.174. Part 2 of the Bill outlines the process for appointing a Property Developer Registrar, noting that they are to be appointed by the Director-General for a period of five years via a notifiable instrument.[309]

3.175. The ISCCC took issue with the process of appointing the Registrar, noting that at present the Bill requires the head of the Planning Authority to be the person appointing the Registrar.[310] According to the ISCCC:

> The Bill would be improved if the power to appoint the Registrar was removed from the Director-General of Environment, Planning and Sustainable Development Directorate (EPSDD), and a requirement inserted that a person independent of EPSDD make that appointment.[311]

3.176. The CFMEU stated that it remained of the 'view that the reforms should be overseen by an independent Commissioner, with greater independence from the Minister'.[312]

3.177. The ACT Law Society noted its concerns about the 'broad discretion' in the registrar's ability to issue rectification orders, particularly in light of the person financial and criminal liability applied to developers.[313] Specifically, the Law Society told the Committee that:

> The risk of extending financial (and potential criminal liability) to such persons is compounded by the broad discretion of the Registrar to make orders where they are 'satisfied it is appropriate' to do so. This broad discretion is also relevant to the ability of the Registrar to issue rectification orders to multiple property developers, who may have varying degrees of financial liability (if any) for rectification works.[314]

Committee comment

3.178. Under the Bill, the Registrar is to be appointed by the Director-General. If the Director-General with responsibilities under the *Planning Act 2023* or *Building Act 2004* is also appointing the Registrar, the potential exists for perceptions of conflicts of interest to emerge. The Committee concurs with the suggestions that consideration be given to whether the Director-General responsible for issuing planning and building approvals will also be the Director-General that registers property developers and can take action to terminate their licence. In the Committee's view, changing this arrangement so that the

[308] ACT Government, *Submission 3*, p 10.
[309] Property Developers Bill 2023, Part 2, section 7.
[310] Inner South Canberra Community Council, *Submission 26*, p 6.
[311] Inner South Canberra Community Council, *Submission 26*, pp 6-7.
[312] CFMEU, *Submission 12*, p 3.
[313] ACT Law Society, *Submission 9*, p 3.
[314] ACT Law Society, *Submission 9*, p 3.

Registrar is instead a statutory or Cabinet appointed position may help to avoid public perceptions of conflicts of interest.

Recommendation 4

The Committee recommends that the ACT Government review the arrangements for appointing the registrar with a view to introducing amendments to provide for the appointment to be made by Cabinet or pursuant to statute.

Review of decisions

3.179. Decisions made by the registrar about key matters are excluded from appeal to the ACAT, and under section 68 of the Bill property developers 'may apply to the Supreme Court to have a rectification order, stop work order or compliance cost notice revoked or varied' within 30 days of the relevant order being made.[315]

3.180. According to the Law Society, the 'policy rationale for excluding ACAT review in these circumstances has not been made clear'.[316] Additionally, Mr Peppinck stated that confining certain appeals to the Supreme Court:

> …brings into play concerns that we have around over-clogging of the court system and whether it might be appropriate, given other powers under the act can be appealed to ACAT, for this one to be similarly dealt with.[317]

3.181. Ms Elsa Sengstock argued that confining certain appeals to the Supreme Court raises inconsistencies with other aspects of the Bill:

> In other circumstances where that has happened in this field of legislation, ACAT review is available. It is given as a bit of an insurance mechanism that there is a way—not suggesting the registrar would do something inappropriate, but, if the registrar does not get the decision right, there is a process before having to go to court.[318]

3.182. Further, Mr Peppinck detailed the concerns about the potential for confusing stemming from the issuance of orders to multiple developers:

> Our concern is that, if multiple property developers can be pursued for the same crime, there will be some confusion around exactly how that is responded to and the ultimate desire to fix the works that need to be rectified. There might be a distraction.[319]

[315] Property Developers Bill 2023, *Explanatory Statement*, p 13.
[316] ACT Law Society, *Submission 9*, p 3.
[317] Mr Adam Peppinck, Chair, Property Law Division, ACT Law Society, *Proof Committee Hansard*, 7 March 2024, p 49.
[318] Ms Elsa Sengstock, Senior Policy Officer, ACT Law Society, Proof Committee Hansard, 7 March 2024, p 50.
[319] Mr Adam Peppinck, Chair, Property Law Division, ACT Law Society, *Proof Committee Hansard*, 7 March 2024, p 48.

3.183. The ACT Government, in responding to these concerns, noted that the appeals process only occurs in cases where a building has been found to be defective, and that it is possible to avoid 'being in court if you do not build a building with defects'.[320]

3.184. Additionally, the ACT Government stated that:

> …fixed on the developer's own doing, we would not be there, because the problem would be fixed. Only when we get to the point where we have a dispute or an unwilling party brought to the table is when we then end up in that situation.[321]

3.185. Finally, the ACT Government linked the appeals process to the reversal of the onus of proof provisions in the Bill:

> Our view of that is that [reversing the onus of proof] would inspire greater initiative by the developer to fix the problem that is alleged, and we have prioritised consumer protection and the prioritisation of getting problems and defects fixed over that usual principle that the owners corporation—and one of the significant costs that owners corporations and owners incur is the cost of legal representation and obtaining experts to establish the nature of the defect.[322]

Committee comment

3.186. Under the Bill, rectification orders, stop work orders and compliance cost notices are not reviewable by ACAT, and appeals sought by property developers to such orders are required to be directed to the ACT Supreme Court.

3.187. The bypassing of ACAT as an intermediary step before taking matters to the courts has not been fully explained either in the Explanatory Statement or the evidence by the Government to this inquiry.

3.188. The Committee is also cognisant of the concerns raised by the Law Society in relation to it being beneficial that there be an intermediary step before resorting to court proceedings, and that bypassing ACAT carries the potential for further delays through over-clogging of the court system.

Recommendation 5

The Committee recommends that the ACT Government consider amendments to the Bill that will facilitate the use of ACAT in contesting orders made by the Registrar before resorting to the Supreme Court, and if amendments are not introduced provide a clear policy rationale for bypassing ACAT.

[320] Mr James Bennett, Executive Branch Manager, Building, Design and Project, Environment, Planning and Sustainable Development Directorate, *Proof Committee Hansard*, 7 March 2024, p 77.
[321] Mr James Bennett, Executive Branch Manager, Building, Design and Project, Environment, Planning and Sustainable Development Directorate, *Proof Committee Hansard*, 7 March 2024, p 77.
[322] Mr James Bennett, Executive Branch Manager, Building, Design and Project, Environment, Planning and Sustainable Development Directorate, *Proof Committee Hansard*, 7 March 2024, p 78.

Expansion of the licensing scheme

3.189. Several submissions suggested that the proposed licensing scheme should be expanded to bring a wider range of professionals and tradespeople involved in the building process into the chain of accountability.[323]

3.190. Mr Petherbridge supported the licensing scheme but thought 'the broader we make the licensing regime the better'.[324] He called for the licensing and regulation of a wider range of people involved in the building process:

> Although I understand Engineering Registration is about to be implemented, OCN and comments from the community suggest there is agreement with MBA that further licensing/registration is needed across the full chain of responsibility. This should include architects/designers, water proofers, roofers, window fitters, concreters, tilers, fire safety related trades and any others which could impact the Defects that occur most often. It is accepted that there may be some reasonable exemptions for trivial/minor works. [325]

3.191. Ms Caroline Wenger fully endorsed the OCN's view that licensing is needed across the full chain of responsibility.[326] The Inner South Canberra Community Council also supported the licensing and registration of architects and similar professionals and tradespersons in the building trades.[327]

3.192. The ACT Division of the Property Council also advocated bringing other building industry participants into the chain of accountability to capture the full range of participants:

> There are a range of regulations, but the key people who play in this space are not just the developers: they are the architects, the engineers, the surveyors, the certifier, the builders. To try and regulate one, effectively small segment of the process is the biggest problem with this legislation. The thing that is missing in this process is that the legislation and the drafting has not gone far enough to capture the people that actually have the responsibility, the technical capacity and the expertise and who that develop all these designs…[328]

3.193. The MBA commented extensively on this issue in its written submission stating that unless amended, the Bill would lead to 'Unfair consequences for certain building practitioners, while other practitioners remain unaccountable for their role in, or contribution to building defects'.[329]

---

[323] For example: Caroline Wenger, *Submission 18*, pp 1-2; Voices of West Belconnen, *Submission 20*, pp [1-3]; Inner South Canberra Community Council, *Submission 26,* p 7; Owners Corporation Network, *Submission 1*, p 3: Property Council of Australia, *Submission 2,* p 7; Master Builders Association of the ACT, *Submission 4,* pp 4-5; CFMEU, *Submission 12,* pp 1-2.

[324] Mr Gary Petherbridge, President, Owners Corporation Network, *Proof Committee Hansard*, *7 March 2024,* p 19.

[325] Owners Corporation Network, *Submission 1*, p 3.

[326] Caroline Wenger, *Submission 18*, pp [1-2].

[327] Inner South Canberra Community Council, *Submission 26,* p 7.

[328] Mr James Service, Division Councillor, Property Council of Australia, *Proof Committee Hansard*, *7 March 2024*, p 22.

[329] Master Builders Association of the ACT, *Submission 4*, p 1.

3.194. It cited the Building Confidence Report 2018 ('BCR') which recommends the registration of additional building practitioners, including a site or project manager, architect, engineer, designer/draftsperson, fire safety practitioner, adding that 'The approach recommended in the BCR recognises that regulating only the builder and developer is not sufficient to ensure buildings are constructed without defects'.[330]

3.195. The MBA went on to say:

> Placing additional regulation on builders and property developers (as the Bill proposes) without introducing supporting regulation of other critical building practitioners only increases the regulatory risk for builders and property developers without providing adequate accountability measures for those practitioners who actually perform design and building work.[331]

3.196. It pointed to the most obvious illustration of this point being the lack of regulation for waterproofers in the ACT despite building audits and feedback from building owners indicating that waterproofing defects are among the most common in the ACT.[332] It noted that 'the ACT's approach is in direct conflict with other jurisdictions who regulate and enforce minimum standards for waterproofers'.[333]

3.197. The MBA called on the ACT Government to 'commit to implement Recommendation 1 of the BCR, with the addition of licensing for structural trades'.[334]

3.198. The CFMEU also held strong views on the need to expand the proposed developer licensing scheme to include trade licensing:

> The Union has advanced the licensing agenda at various levels of the construction industry, and has taken part in several inquiries in order to advocate improved licensing practices. This has included proposing the introduction of occupational licensing for trades such as carpentry and water proofing; advocating for stricter conditions on the licensing requirements of ACT builders; and pursuing the implementation of a licensing framework for the ACT Labour Hire Industry.[335]

3.199. It viewed trades licensing as a way of '…attacking the problem from the ground up':[336]

> It is sort of saying, "We want to make sure everybody that is on building sites is appropriately skilled and has the right qualifications,' and there is a system in place that is making sure that they are held accountable to everything".[337]

[330] Master Builders Association of the ACT, *Submission 4*, pp 4-5.
[331] Master Builders Association of the ACT, *Submission 4*, p 5.
[332] Master Builders Association of the ACT, *Submission 4*, p 5.
[333] Master Builders Association of the ACT, *Submission 4*, p 5.
[334] Master Builders Association of the ACT, *Submission 4*, p 5.
[335] CFMEU, *Submission 12*, p 1.
[336] Mr Michael Hiscox, Assistant Secretary, CFMEU, *Proof Committee Hansard*, *7 March 2024*, p 86.
[337] Mr Michael Hiscox, Assistant Secretary, CFMEU, *Proof Committee Hansard*, *7 March 2024*, p 86.

Committee comment

3.200. While acknowledging the importance of the evidence received about further strengthening the chain of accountability in relation to construction in the ACT, the Committee also notes that further regulation and licencing falls outside the scope of the Bill before this inquiry.

3.201. Expansion of the licencing requirements to incorporate other participants is a matter for future consideration by the ACT Government.

4. Conclusion

4.1. This Bill represents a significant reform that will have considerable, long-term effects on residential property development in the ACT. Some of the provisions in the Bill are the first of their kind in Australia.

4.2. The potential for unintended consequences to flow from any ambitious reform requires proper scrutiny. In the case of a reform on this scale, these consequences may not emerge until the provisions have been in operation for a period of time.

4.3. In this regard, the Committee notes that at present, the Bill contains provisions for a review after five years of the operation of the scheme. This review is contained in Clause 127, which states that the Minister must review the operation and effectiveness of the scheme as soon as practicable after the end of the fifth year of its operation.[338]

4.4. In the Committee's view, the scheme proposed in the Bill would benefit from scrutiny conducted by the relevant Legislative Assembly committee. The committee inquiry process, being largely public, provides an opportunity for stakeholders to provide feedback to a party external to the operation of the scheme and indeed to executive government more generally.

Recommendation 6

The Committee recommends that the ACT Government introduce amendments to the Property Developers Bill 2023 to include a requirement for the Bill to be referred to the relevant Legislative Assembly committee to consider the conduct of an inquiry as part of the five-year review of the Act's operation.

4.5. In gathering the evidence for this inquiry, it was clear to the Committee that there is widespread support for the scheme outlined in this Bill. The provisions of this Bill seek to provide greater certainty to those purchasing homes, and have been crafted in a such a way to ultimately reduce the costs of housing to the ultimate consumers – the homeowners.

4.6. By reducing the rectification costs in the long-term through a process of ensuring those who sit at the top of the property development chain are exercising the appropriate level of oversight, and have the necessary liability insurance, this Bill will help to ensure that design issues and latent defects are identified early in the development process. This will lead to considerable overall savings in the long-term by negating the need for owners and owners corporations to address defects after the fact.

4.7. In this regard, the Bill makes a real contribution to the process of developing and constructing residential property in the ACT more generally. By bringing property developers into the accountability chain for defects and other issues in residential construction, all parties to the process will ultimately benefit.

[338] Property Developers Bill 2023, cl 127.

Recommendation 7

The Committee recommends that, after considering and responding to the recommendations in this report, the Legislative Assembly pass the Property Developers Bill 2023.

Ms Jo Clay MLA

Chair, Standing Committee on Planning, Transport and City Services

5 April 2024

Appendix A: Submissions

No.	Submission by	Received	Published
1	Owners Corporation Network (ACT)	10/02/24	15/02/24
2	Property Council of Australia – ACT and Capital Region	15/02/24	26/02/24
3	ACT Government	15/02/24	26/02/24
4	Master Builders Association of the ACT	16/02/24	26/02/24
5	Housing Industry Association	16/02/24	26/02/24
6	Goodwin Aged Care Services	16/02/24	26/02/24
7	Community Housing Industry Association	16/02/24	26/02/24
8	Retirement Living Council	16/02/24	26/02/24
9	ACT Law Society	21/02/24	01/03/24
10	ClubsACT	23/02/24	01/03/24
11	Advanced Structural Designs	24/02/24	01/03/24
12	CFMEU ACT	22/02/24	01/03/24
13	Eastlake Group	28/02/24	20/03/24
14	Greater Canberra	28/02/24	20/03/24
15	Scott Lambert	28/02/24	20/03/24
16	Kevin Cox	29/02/24	20/03/24
17	ACT Shelter	29/02/24	20/03/24
18	Caroline Wenger	29/02/24	20/03/24
19	Kerin Benson Lawyers	29/02/24	20/03/24
20	Voices of West Belconnen	29/02/24	20/03/24
21	Linda Medic	29/02/24	20/03/24
22	John Grant	29/02/24	20/03/24
23	Jerry Howard	01/03/24	20/03/24
24	Canberra Business Chamber	05/03/24	20/03/24
25	Better Renting	06/03/24	20/03/24
26	Inner South Canberra Community Council	06/03/24	20/03/24
27	Ross Taylor	08/03/24	20/03/24
28	Name Withheld	09/03/24	20/03/24
29	Housing for the Aged Action Group	12/02/24	20/03/24

Appendix B: Witnesses

Thursday, 7 March 2024

Kerin Benson Lawyers

- **Mr Christopher Benson,** Director

Advanced Structural Designs

- **Mr Malcolm Wilson**, Director

Owners Corporation Network

- **Mr Gary Petherbridge**, President

Property Council of Australia (ACT and Capital Region)

- **Mr Phil O'Brien**, President, ACT Division
- **Mr Shane Martin**, Executive Director, ACT and Capital Region
- **Mr James Service,** Division Councillor
- **Mr George Katheklakis,** Council Member
- **Mr Chris Wheeler,** Council Member

Master Builders Association of the ACT

- **Mr Michael Hopkins**, CEO
- **Ashlee Berry**, Director Member Services

Housing Industry Association

- **Ms Melissa Adler**, Senior Executive Director

Goodwin Aged Care Services Unit

- **Stephen Holmes**, CEO
- **Patrick Reid**, CEO, Illawarra Retirement Trust

ACT Law Society

- **Mr Adam Peppinck**
- **Ms Elsa Sengstock**, Senior Policy Officer

Community Housing Industry Association

- **Mr Andrew Hannan**, CEO
- **Ms Wendy Hayhurst**, CEO

ClubsACT and Eastlake Group

- **Mr Craig Shannon**, Chief Executive, ClubsACT

- **Mr Anthony Ratcliffe**, Chief Executive, Eastlake Football Club Ltd

ACT Government

- **Ms Rebecca Vassarotti MLA**, Minister for Sustainable Building and Construction
- **Mr Ben Green**, Executive Group Manager
- **Mr James Bennett,** Executive Branch Manager

CFMEU ACT Branch

- **Mr Michael Hiscox**, Assistant Secretary
- **Mr Tom Fischer**, Legal Industrial Officer

Appendix C: Gender distribution of witnesses

Beginning in April 2023, in response to an audit by the Commonwealth Parliamentary Association, Committees are collecting information on the gender of witnesses. The aim is to determine whether committee inquiries are meeting the needs, and allowing the participation of, a range of genders in the community. Participation is voluntary and there are no set responses.

Gender indication	Total
Female	3
Male	18
Non-binary	0
Gender neutral	0
No data	3

Appendix D: Additional Comments by Ms Suzanne Orr MLA

Property Developer Licencing

1.1. Property Developers have an important role in the delivery of our built environment and in turn a large level of social responsibility. With this responsibility should come accountability. While the *Property Developer Bill 2023* (the Bill) is an important step towards realising proper accountability in the Property Development sector it should not be viewed as the last step.

1.2. Property developers are uniquely placed in the building and construction sector with oversight and decision-making responsibility over a building from its inception, design, and delivery. The construction phase is however one aspect of the full spectrum of activity undertaken by a property developer. It is disappointing the Bill does not address other aspects of the important role developers have in delivering the planning vision of the city.

1.3. As a community we rely on private development to provide a range of built forms that are crucial to the makeup of our city and the opportunities that our built environment provides. From housing, to workplaces, public facilities such as libraries, we as a community rely on the property developers to deliver not only the physical building but also the public interest inherent in its intention.

1.4. In my capacity as a local member, a longstanding member of the Standing Committee of Planning, Transport and City Services Committee and its counterpart in the 9th Assembly, the Standing Committee on Planning and Urban Renewal and as a member of the 9th Assembly's Standing Committee on Economic Development and Tourism which undertook the Building Quality Inquiry, I have heard consistently that what is promised in a development proposal is often not delivered.

1.5. This is perhaps best evidenced through mixed use developments which propose a commercial development component only to have the proposal amended after approval and prior to completion, sometimes entirely removing the commercial aspect, other times substituting commercial activity which achieves a very different outcome. Other examples include amending the number of one or two or three bedroom apartments leading to an abundance of some and a scarcity of others.

1.6. These changes can have a significant impact on the urban environment that is delivered. Places that should be vibrant commercial areas have those aspirations built out. Housing that should provide options for a range of needs become focused on typologies that suit some but not others leading to less choice for people who may wish to move through the housing ladder while staying in place. In short, these changes can fundamentally change the options available to our community for the areas we live, work and play. However, the inception and design of the building and how well these are delivered by the completed development feature less prominently in the coverage of the Bill.

1.7. To fully realise the benefit to the community of the Property Developer Licencing Bill consideration should be given to the delivery of the final project against the urban outcomes originally sought. For example, an audit of past works completed by a developer, to ensure that what was originally proposed as far as urban outcomes are concerned was actually delivered with penalties for consistent or unjustifiable compliance provisioned under the Bill.

Recommendation 1

The potential for the property developer licencing scheme to improve the delivery of urban outcomes through stronger regulation and compliance mechanisms should be considered in future reviews of the Bill.

Public Certifiers

1.8. Improving the rigour and accountability of the building and construction sector is not and should not be limited to one actor in the sector.

1.9 The importance of the Bill in addressing the role property developers should have in being accountable for the quality of what is constructed cannot be understated. The Bill shall ensure and improve build quality in the ACT.

1.10. However, it needs to be acknowledged that there are further areas of improvement, which if implemented, will complement the property developer licencing scheme and further improve the quality of buildings in the ACT.

1.11. The 2020 commitment from the ACT Government to establish a team of building certifiers within the ACT Public Service needs to be delivered.

1.12. The commitment came after years of concerns being raised regarding the conflict of interest inherent in a private system where the certifier is appointed by the developer of building. This was particularly pertinent to multi-unit developments, where the intended owners do not take ownership until construction is completed and have no say over who is appointed as the certifier during construction.

1.13. Removing this inherent conflict of interest will provide greater confidence in the certification process. It is disappointing that almost four years after the commitment was made, the ACT Government has not yet appointed a single publicly employed building certifier this needs to change.

Recommendation 2

The ACT Government should deliver on its commitment to establish a team of building certifiers within the ACT Public Service without further delay.

Further Reform

1.14. The program of regulatory reform to ensure the quality of the built environment in the ACT should not stop at the implementation of Property Developer Licensing or the establishment of a team of publicly employed building certifiers.

1.15. Once these two reform commitments are completed, attention should turn to other areas of improvement where greater accountability and rigour can be introduced across all parts of the sector, with the benefit of improved built environment outcomes.

1.16. For example, consideration could be given to additional hold points being added to the certification process, more trades being subject to occupational licencing, or more accessible dispute resolution processes than legal proceedings being established.

1.17. Without addressing these additional areas of potential reform, the gains made by the current reforms will be limited.

Recommendation 3

The ACT Government should give further consideration to future regulatory reforms in the building and construction sector including the fit for purpose of the certification process, the breadth of occupation trade licensing, and dispute resolution mechanisms.

Conclusion

1.18. The establishment of a Property Developer Licencing Scheme is an important accountability measure within the building and construction sector. However, this should not be the only regulatory reform pursued. The commitment for a team of publicly employed building certifiers needs to be delivered and future areas of reform across other parts of the sector need to be identified. It is only through addressing all areas in the development and construction process that we will achieve a system Canberrans can truly have confidence in.

Ms Suzanne Orr MLA

04/04/2024

Appendix E: Additional Comments from Mr Mark Parton MLA

1.1. This Bill responds to a genuine problem experienced by many in the ACT community. Over a period of years, we've seen many ACT residents heavily impacted by building defects. The buck passing and legal wrangling that has eventuated from these cases has resulted in heartbreak and extensive financial impacts on a number of our citizens. The government has responded to those ongoing problems with the creation of this Bill, which does follow the lead set by some other jurisdictions but goes several steps further in constructing regulations around 'property developers' in the ACT which are more far reaching than the rest of the nation. The Bill sets out to provide significant public benefits, but, in its current form could have several unintended consequences, the biggest being reduced investment by property developers in the ACT, which will result in less homes being built at a time when they are desperately needed.

1.2. It must be said that the vast majority of work completed by our construction sector is done so without the hint of building defects and additionally that previous inquiries in this space have pointed towards our building certification regime as being problematic as well as an inability for the ACT Government to enforce its own rules. I fear that in its haste to find somebody to blame, and to be seen to coming up with a solution, this Bill lands on the 'progressively populist' position, that all of the problems are the fault of the person who took the risk to build something in the first place.

1.3. Laws are drafted to have consequences and if I believed that these laws would do nothing other than to protect ACT residents from the pain of costly defects, then I'd be wholeheartedly supporting the Bill in its current form. A change of this magnitude will likely have additional consequences and we heard much evidence during the hearings to support that view.

1.4. Many of those unintended consequences would likely play out in the community based and not-for-profit housing sector and I'm pleased that this committee has arrived several recommendations designed to rectify the Bill in that space. It goes without saying that I thoroughly support those recommendations, and that if those changes were not made, then I would not support this legislation passing.

1.5. There are other potential unintended consequences around retrospectivity, but one of the things that became clear during the hearings is that those retrospectivity clauses remain unclear and it's up to the government to definitively state its position on these matters. Again, I would say that until such time as the retrospectivity issues are cleared up by the government, it would be difficult for me to support the Bill.

1.6. By far and away, the biggest unintended consequence of this Bill is likely to be reduced investment by developers in Canberra and the complete failure of the government to achieve its housing targets. In the middle of a housing unaffordability and supply crisis this could have extreme consequences on many Canberrans. Additionally, as we see a national construction labour shortage and with a number of building firms becoming insolvent in

and around our jurisdiction, it's likely that the imposition of these laws will further slow housing construction at a time when it's desperately needed.

1.7. We also heard evidence and received submissions during the hearings pertaining to exposure to subcontractors and suppliers who are not targeted by this Bill. We're left with a situation whereby 'the developer' will be liable for defects that were clearly the fault of subcontractors and suppliers. It would seem just for developers to be able to pursue subcontractors and/or suppliers or other entities who actually caused problems. Surely responsibility should rest with those who cause the defect in the first place.

1.8. The ACT Government is one of the largest property developers in the territory and as such it's baffling that it's left itself out of this Bill. Surely if these important law changes apply to all property developers, they should apply to the ACT Government. The government should explain why the provisions in this Bill don't also apply to senior bureaucrats or indeed with Ministers themselves. If the government doesn't wish to itself drink from this chalice, does it suggest that the drink is poisoned somewhat

1.9. Concerns were raised during the hearings about the reverse onus of proof provision on building defects in the first two years. I have major concerns with the procedural fairness of a clause which creates a presumption that any defect identified by the affected party within the first two years post completion, are automatically the builders liability unless proven otherwise.

1.10. And there are concerns about the definition of 'property developer' which is extremely broad in the context of this Bill. The government needs to specify who the intended target of the Bill is because the current definition is so wide that captures almost everyone in the chain and could well be applied to 'Mum and Dad developers who were simply doing a dual occy on their RZ1 block.

1.11. And finally, I have some concerns with the core element of this Bill, that is the direct personal liability component. Although there are many in the community who are quite pleased with the prospect of 'piercing the corporate veil,' I think genuine modelling needs to be conducted to determine what impact this major change to the law will likely have on the construction landscape in the ACT. At a time when housing supply is the largest issue effecting housing affordability, it would surely not be wise to push developers interstate. And those who choose to continue building in the ACT will surely secure additional insurance protection against this Bill which inevitably will increase the cost of each dwelling they complete.

1.12. And so, I make these additional recommendations.

Recommendations

Recommendation 1

That the ACT Government explore legal mechanisms to allow for the transfer liability from directors to other parties in cases where fault lies elsewhere.

Recommendation 2

That the ACT Government consider whether the Code of Conduct and regulatory system should immediately apply to all property developers, including government agencies that undertake property development.

Recommendation 3

That, regarding the reverse onus of proof clause, 89F, the government consider adding qualifiers or limitations such as requiring that the identified defect must be substantial or meet specific criteria to trigger the presumption. Additionally, the government should consider how to prevent vexatious claims and establish a fair process for builders and developers to present evidence to contest these claim.

Recommendation 4

That the government refine the definition of 'property developer' and consider giving exemptions for already licensed builders, those projects which are already captured under home warranty insurance and 'small scale' developments.

1.13. I fall just short of recommending that the Bill not pass, but until such time as these recommendations, and the recommendations made by the committee as a whole are given genuine consideration and acted upon by the government it would be extremely difficult for me to support it.

Mr Mark Parton MLA

3/4/2024