

16 February 2024

The Committee Secretary
Standing Committee on Planning, Transport and City Services

Via Email: LCommitteePTCS@parliament.act.gov.au

Dear Committee Secretary

Submission from Master Builders ACT to the Committee Inquiry into the Property Developers Bill 2023

Thank you for the opportunity to make a submission on the *Property Developers Bill 2023* (the 'Bill').

This Bill (as drafted) has the potential to provide significant public benefits, however in our view the Bill as drafted will have a significant impact on property developers and building practitioners which should be addressed before the Bill is finalised. If the concerns raised in our submission are not addressed, we believe the consequences for the ACT will include:

- Reduced investment by property developers in the ACT.
- Failure to achieve the Government's housing targets.
- Unfair consequences for certain building practitioners, while other practitioners remain unaccountable for their role in or contribution to building defects.
- Unfair consequences for volunteer directors of community based, not-for-profit, housing providers.

Context

Master Builders ACT (the 'MBA') has had a long-standing commitment to improving building quality in the ACT. This commitment extends to supporting legislative reforms which include appropriate accountability measures for building practitioners, improved and ongoing training requirements for building practitioners, and greater enforcement by regulators of existing laws.

The MBA has advocated for strong building reforms through the following mechanisms:

- Release of a Building Quality Policy Paper in 2014,
- Made a comprehensive submission to the ACT's Building Regulatory Review in 2016
- Made a submission to the Legislative Assembly's Inquiry Into Building Quality in 2018, and
- Fully supported the recommendations of the Building Confidence Report since 2018.

We have also contributed constructively to the consultation sessions on the proposed Bill throughout 2023.

In our various submissions to the ACT Government, we acknowledge that the client (which includes property developers) play a critical role in setting the safety and quality culture on a building site and should be held accountable to minimum standards as part of the ACT's building regulatory framework.

Further, we support the Government's stated objective of property developer licensing (as stated during our consultation meetings) and the Construction Occupations Registrar stated objective, that Government is seeking "building defects to be remedied". We don't believe, however, that the Bill or the existing builders license framework will achieve this objective.

While we acknowledge that steps have been taken by the ACT Government to improve the building quality framework, we are frustrated that the pace of reform remains too slow.

Specific Areas of Concern

Requirement for Property Developers License

Broadly, the Bill has two main elements:

- It introduces a requirement to obtain a ***Property Developers License*** for certain forms of development, and
- It introduces ***minimum standards*** for property developers, including a Code of Practice (yet to be released), minimum training requirements (yet to be prescribed), and enforcement mechanisms such as the ability to issue rectification orders and other penalties.

Many jurisdictions include property developers within their enforcement regimes, most notably our closest neighbour New South Wales, however no other jurisdiction has introduced a Property Developers license. This specific element of the Bill has been proposed by the Construction, Forestry and Maritime Employees Union (CFMEU). It has not been proposed by any other stakeholder, nor is it recommended in any ACT or Federal reviews into building regulatory reforms. This element has been adopted, without review or consideration of alternatives, by the ACT Government and forms part of the ACT Labor and ACT Greens Parliamentary and Governing Agreement.

During stakeholder consultation on the Bill, there was a lack of willingness to genuinely consult on alternative ways (other than a license) to meet the Government objectives through other legislated mechanisms. This is unfortunate and disappointing, and will ultimately limit the effectiveness of Bill, even if amended

The introduction of the concept of a Property Developers license introduces a number of complexities which do not exist in current ACT building legislation, or in similar legislation from other jurisdictions, including:

- A license introduces additional costs on industry, both directly paid to Government through license fees, and indirect costs on the applicant through requirements such as the need to obtain a financial assessment report, preparation of financial documents, collection of entity and key person history.
- A license introduces complexity which may require a single development group to obtain many individual licenses because of different company structures, investment arrangements and land owner relationships. This complexity is likely to require a mid sized property developer operating in the ACT to require multiple licenses, potentially

requiring additional inhouse resources to manage the various licenses, any conditions applying to the license, and the expiration date of the license.

- A license application may require many months to prepare and weeks or months to assess by Government, potentially delaying development projects, including affordable housing, build-to-rent projects, community housing projects, and the general supply of more housing for the ACT community.

While the opportunity to assess various ways to hold property developers to account, other than through a licensing mechanism, has not been permitted during the consultation period, it is important that this Committee consider whether the addition of a property developers license adds any value, or whether all of the objectives of Government can be achieved through the addition of minimum standards and an enforcement regime to existing legislation.

Personal liability of directors and nominees

The Bill proposes to make directors of property development companies accountable for building defects. The new provisions apply in addition to the accountability measures that apply to licensed building companies, directors and nominees. The Bill proposes that rectification orders can be issued to builders and property developers and that reverse burden of proof measures apply for the first two years after the building's completion.

The Bill attempts to apply enforcement measures on property developers in the following order:

- Firstly, the property development company
- Secondly, an insurance claim be made to cover the defects (if insurance is in place)
- Finally, the director of the property development company if the company no longer exists or insurance is not in place.

Similar order of enforcement measures do not apply in the *Building Act 2004* for licensed building companies, directors or nominees.

Our concerns with the Bill and existing Building Act measures are as follows:

- The misalignment for personal liability for property developers, directors, building companies and nominees means responsibility for building defects does not apply consistently and fairly to all parties.
- The misalignment of personal liability will lead to unintended consequences.
- The potential enforcement measures for directors and nominees are unlikely to result in defects being fixed if the cost of rectification exceeds the capability or capacity of individuals to comply with rectification orders.
- There are other enforcement measures such as fines, penalties and enforceable undertakings which should be considered, and may be more effective in fixing defects depending on the circumstances of each project.

The main reason holding individuals accountable for building defects will be ineffective is because individual directors or building nominees are not parties to the subcontract agreements with designers and trade contractors who actually perform the building or design work, creating a serious privity of contract issue. Individual directors are generally not licensed to undertake building work by themselves. Without a direct accountability connection between the entity being held accountable by the regulator and the entity responsible for performing the design or building work, then the enforcement mechanism on individuals, directors and nominees will be ineffective.

Liability period for developers, builders and nominees

The *Building Act 2004* sets a statutory warranty period of six years for structural work and two years for non-structural work (Regulation 38, *Building (General) Regulation 2008*). The ACT Supreme Court decision of *Koundouris v The Owners – Units Plan No 1917* (2017) ACTCA 36 altered the liability for licensed builders and nominees in that the decision held where defects existed, it was reasonable to assume the building was not in fact completed, and therefore the time on the statutory warranty period did not start. Section 142 of the *Building Act 2004* (ACT) introduces a ten-year 'long-stop' limitation on claims, including regulatory action from the Construction Occupations Registrar.

The Bill proposes that builders and property developers are liable to fix building defects (of any type) for ten years.

In the case of builders and developers the liability period can be extended where subsequent work is completed on the building or where latent defects are identified by the building owners or regulators.

Our concerns with the Bill and existing Building Act measures are as follows:

- The term of the statutory warranty period for builders and property developers is unclear in the existing Act (because of ACAT decisions) and the drafting of the Bill.
- The ten year period extends beyond the commonly held position that builders are responsible for building structural defects for six years and non-structural defects for two years from the date of completion of the building.
- The ten year period extends beyond most product warranties provided by building product manufacturers.
- The ten year period extends beyond the statute of limitations which allows builders and property developers to take civil action against subcontractors, suppliers and designers in the event of a building defect, leaving the builder or developer to be responsible for the work of others.
- Existing defects liability insurances (which are referenced in the Bill) do not reflect ACT building laws and hence are unlikely to be adopted by industry until they do.

Proportional liability of building practitioners

The Bill contains new accountability measures which effectively mean property developers are accountable for the work of others, notably builders, designers, trade contractors and suppliers. A similar principle exists in the Building Act for builders and nominees.

This principle relies on developers and builders putting in place a method of supervision to cover other building practitioners.

The experience of the three most recent decisions of ACAT to issue rectification orders to nominees highlights that this principle has not proven successful to avoid building defects. In fact, the recent ACAT decisions have highlighted a significant flaw in the ACT's regulatory approach and increases the uncertainty about what constitutes adequate supervision and how a licensed builder or nominee can fulfil this duty to prevent building defects.

The Building Confidence Report 2018 ('BCR') recommends the registration of additional building practitioners, including a site or project manager, architect, engineer, designer/draftsperson, fire safety practitioner.

The approach recommended in the BCR recognises that regulating only the builder and developer is not sufficient to ensure buildings are constructed without defects.

The ACT's lack of regulatory framework for design practitioners, structural trades (such as carpenters), supervisors (site or project managers) and critical services (such as fire safety practitioners) present significant gaps in the ACT's building regulatory system.

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.

The most obvious illustration of this point is the ACT's lack of regulation for waterproofers. ACT building audits and feedback from building owners generally agree that waterproofing defects are amongst the ACT's most common, especially in residential buildings. Waterproofing defects often have the most impact on building occupants. Yet, the ACT's building regulatory system allows anyone to promote their company as a waterproofer without any regulatory oversight, minimum qualifications or experience. The ACT's approach is in direct conflict with other jurisdictions who regulate and enforce minimum standards for waterproofers.

To address these concerns, the ACT Government should urgently align and clarify the following:

- Align the liability period for builders, property developers, directors and nominees (confirmation of the 6 year period for structural defects is recommended).
- Fix the existing gap which prevents builders and developers (and their nominees) from taking legal action against other practitioners when building defects occur due to lack of privity of contract and/or misaligned limitation periods.
- Clarify building supervision requirements for builders and property developers.
- Commit to implement Recommendation 1 of the BCR, with the addition of licensing for structural trades.

Preventative Measures and Alternate Dispute Resolution

The measures in the Bill which propose to reverse the burden of proof when building defects occur within the first two years will not reduce the occurrence of building defects or speed-up their resolution. This measure will only encourage more disputes to be resolved through legal action.

The ACT made a positive step towards implementing dispute resolution measures when it introduced the Alternate Dispute Resolution (ADR) legislation in 2019. However, this framework legislation has never been fully implemented through regulation.

To complement the range of property developer and building reforms proposed, further resources and reforms are required to assist building disputes to be resolved in a timely manner and without commencing litigation. Completing the ADR reforms would assist this.

Recommendations

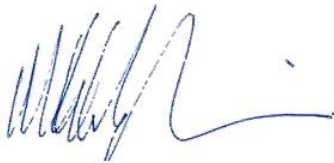
We recommend the Committee adopt the following recommendations to address the concerns raised in our submission:

1. That the ACT Government proceed with strong regulations which hold property developers accountable for their role in the design and construction process.
2. That the requirement for a property developers license be removed from the legislation.
3. That the ACT Building Act (and Regulations) and the Construction Occupations Licensing Act (and Regulations) be aligned with the proposed accountability measures in the Bill. This will heighten the level of protection for consumers and prevent matters being delayed due to scapegoating or gaming of the statutory warranties amongst building practitioners.
4. That the ACT Government commit to urgently address the registration of building designers and architects, fully implementing Recommendation 1 from the Building Confidence Report, and introducing trade licensing for all structure trades.
5. That the personal liability measures in the Bill and similar provisions in the Building Act be reviewed.
6. That the proposed measures in the Bill which reverse the burden of proof when building defects occur within the first two years be removed from the Bill, and in their place, Government completes the Alternate Dispute Resolution reforms.
7. That the Government prepare a Regulatory Impact Statement prior to the adoption of the Bill.

Conclusion

Thank you for considering our comments and recommendations.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Michael Hopkins', with a long horizontal flourish extending to the right.

Michael Hopkins
Chief Executive Officer