LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON ECONOMIC DEVELOPMENT AND TOURISM
Mr Jeremy Hanson MLA (Chair), Ms Suzanne Orr MLA (Deputy Chair),
Mr Michael Pettersson MLA

Submission Cover Sheet

Inquiry into Building and Construction Legislation Amendment Bill 2019

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HOUSING INDUSTRY ASSOCIATION

Submission to the
Standing Committee on Economic Development And Tourism

Building and Construction Legislation Amendment Bill 2019

13 November 2019

HOUSING INDUSTRY ASSOCIATION

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ABOUT THE HOUSING INDUSTRY ASSOCIATION

The Housing Industry Association (HIA) is Australia's only national industry association representing the interests of the residential building industry, including new home builders, renovators, trade contractors, land developers, related building professionals, and suppliers and manufacturers of building products.

As the voice of the industry, HIA represents some 30,000 member businesses throughout Australia.

The residential building industry includes land development, detached home construction, home renovations, low/medium-density housing, high-rise apartment buildings and building product manufacturing.

The association serves the ACT and Southern NSW from the HIA Home Inspirations Centre in Fyshwick, which is a local hub for home building services and advice.

HIA exists to service the businesses it represents, lobby for the best possible business environment for the building industry and to encourage a responsible and quality driven, affordable residential building development industry. HIA's mission is to:

> *"promote policies and provide services which enhance our members' business practices, products and profitability, consistent with the highest standards of professional and commercial conduct."*

The residential building industry is one of Australia's most dynamic, innovative and efficient service industries and is a key driver of the Australian economy. The residential building industry has a wide reach into manufacturing, supply, and retail sectors.

The aggregate residential industry contribution to the Australian economy is over $150 billion per annum, with over one million employees in building and construction, tens of thousands of small businesses, and over 200,000 sub-contractors reliant on the industry for their livelihood.

HIA develops and advocates policy on behalf of members to further advance new home building and renovating, enabling members to provide affordable and appropriate housing to the growing Australian population. New policy is generated through a grassroots process that starts with local and regional committees before progressing to the National Policy Congress by which time it has passed through almost 1,000 sets of hands.

Policy development is supported by an ongoing process of collecting and analysing data, forecasting, and providing industry data and insights for members, the general public and on a contract basis.

The association operates offices in 22 other centres around the nation providing a wide range of advocacy, business support including services and products to members, technical and compliance advice, training services, contracts and stationery, industry awards for excellence, and member only discounts on goods and services.

1. INTRODUCTION

HIA makes this submission in response to the *Building and Construction Legislation Amendment Bill 2019* (Bill) introduced into the ACT Parliament on 24 October 2019, and subsequently referred to the Standing Committee on Economic Development and Tourism for inquiry and report.

The Minister for Building Quality Improvement, Hon Gordon Ramsay MLA, has argued that the laws are attempting to place responsibility on individuals who have engaged in phoenixing activity. On introducing the Bill the Minister announced that:

> *"The amendments will prevent corporations from undermining the system and deliberately avoiding their regulatory obligations by winding up their company."*[1]

HIA opposes the Bill and disagrees that the Bill will achieve the Minister's stated objective. Instead, the approach will inappropriately tar all those operating in the residential building industry with the same 'dodgy' brush, stifle innovation, entrepreneurialism and building activity in the ACT.

What is often lost is that a distinction must be made between legitimate business rescue and intentional activities to avoid legal liabilities, the latter being known as 'illegal phoenixing activity'. HIA does not support individuals who wind up their company to deliberately avoid their legal obligations. Individuals who hide behind the shield of a company to incur debts and avoid liabilities abuse the corporate form. Those individuals obtain an unfair competitive advantage over the majority of businesses that comply with their obligations and are acting outside their legal obligations and community expectations. Strong punishment and sanctions should apply to such individuals.

However, measures in the Bill that, for example, propose to extend the current enforcement mechanisms under the *Construction Occupations (Licensing) Act 2004* (Licensing Act) to make directors personally liable for the actions of a company will do very little to improve building quality in the ACT. The proposal is also at odds with the fundamental principle of company law in Australia (and elsewhere) that a company is a separate legal person, independent of its directors and shareholders. The proposal also targets all companies, not just those engaged in wrongdoing. It will unnecessarily add to the day-to-day risks of running a small company, which would capture the majority of residential building businesses in the ACT that are small family owned business. Finally, the proposal ignores the current regulatory arrangements in the ACT in addition to the powers of the Commissioner of Taxation and the ATO, which have broad and extensive asset and debt recovery capabilities. New laws should not be a substitute for better resourcing and the better use of existing powers.

For some time HIA has called for the introduction of an offence of illegal corporate phoenixing in order to appropriately respond to such conduct, and sees that this is the only way to target such behaviour. This can and should be done at a Federal level.

Also of significant concern is the commencement and application of the proposed laws. The measures outlined in the Bill can be applied to building work carried out *prior* to the commencement of the reforms. Such laws are likely to be inconsistent with the general legal principle that a person cannot be expected to comply with a law that was incapable of being known and therefore unable to be complied with. It is simply unfair (and bad policy) to expect businesses to suffer consequences which were not know at the time of carrying out construction services.

[1] Greater protection for building owners (24 October 2019)

1.1. CONSULTATION

It is disappointing that while the government has clearly been considering the measures outlined in this Bill for some time – the Minister first foreshadowed these laws at the Legislative Assembly Economics and Tourism Committee inquiry into building quality some months ago – there was no discussion with industry or the community prior to the Bills introduction in the Assembly.

The industry have been aware of a number of recommendations made in 2016 - from the 2015 consultation paper *Improving the ACT Building Regulatory System* - that looked to reduce illegal phoenixing, such as expanding the capacity for the Registrar to consider an applicants or licensee's history, including the history of directors, partners and nominees, under other licences. However, the Government chose to move forward without consultation on the reforms outlined within the Bill.

If consulted prior to the introduction of the Bill HIA would have recommended:

- the consideration of the current probity measures regarding the issuing of a license; and
- the current role of the regulator in taking action under the current legal framework.

Beyond that, if the Bill is to progress HIA strongly recommends that a number of the proposed measures apply only to residential building work to which Home Warranty Insurance does not apply. This would mean that the some measures in the Bill would apply to residential building work of more than 3 storeys. Aside from such an approach better targeting alleged issues of building quality, it removes complexities associated with the potential for 'double dipping' in relation to the rectification of work via both the warranty system and through targeting directors personally.

1.2 REGULATORY IMPACT ASSESSMENT

The Explanatory Statement outlines that a Regulatory Impact Assessment (RIS) is not necessary in relation to the Bill as it amends the *Construction Occupations (Licensing) Regulation 2004*. A RIS has also been deemed unnecessary because amendments relate to reviewable decisions.

HIA disagrees with this assessment and strongly calls for the carrying out of a RIS to assess the true and real impacts of this Bill.

Some specific matters outlined in the Bill which will have a direct cost impact include:

- There is no doubt that as a result of new provisions enabling certifiers to request a broader range of certificates, that builders and homeowners will incur additional costs. The fact that this practice may be carried out informally at the moment does not detract from the need for an assessment to be carried out in order to make an informed decision regarding whether the benefits of this proposed provision outweigh the costs. In fact, it is arguable that given certifiers feel they can ask for these certificates currently, the need for a regulatory approach should be more closely examined.
- Proposed section 26C(2)(a) - (d) which effectively introduces a requirement to arrange for a regular professional assessment of a companies compliance with section 26B of the Licensing Act, to implement any recommendations and then ensure all employees, agents and contractors have a reasonable knowledge and understanding of the requirements under section 26B.
- The proposed section that requires that companies and partnerships have a written record of policies and procedures for effectively managing and supervising the nominee and their obligations in relation to their licence eligibility.

Any amendments that would interfere with the allocation of a businesses risk will have a cost impact on those operating in the residential building industry. For example, as a result of amendments that seek to make directors personally liable for company debts, many may decide to either close their business or not enter the industry. This lessens competition in the market allowing those left to charge more for the same product. Such long term consequences of the proposed Bill must be considered.

2. THE RESIDENTIAL BUILDING INDUSTRY

The residential building industry, including the home improvements and alterations market, is a key component of the Australian economy. The industry is heavily regulated when compared to other sectors of the economy.

Home builders must manage a complex web of national, state and local laws, regulations and codes. These range from planning, design, environment, health and safety, to local authority inspection and certification and a multitude of building, electrical, mechanical and plumbing processes.

Businesses must also comply with a legislative framework that spans licensing, ATO contractor reporting requirements, dispute resolution, builders warranty obligations and contractual requirements. The terms and conditions a builder must comply with when working on a residential building project in the ACT are numerous and there are significant cost implications associated with these regulations.

The current *Building Act 2004* (Building Act) and Licensing Act establishes a comprehensive consumer protection framework involving:

- systems for building approvals, building certification, stage inspections, stop notices and offences;
- implied statutory warranties that apply for 6 years on structural elements and 2 years on non-structural elements from completion;
- mandatory warranty insurance; and
- the responsibilities of construction occupation licensees and disciplinary and complaints processes for construction practitioners. The regulator also currently has a range of enforcement mechanisms at its disposal in order to target defective building work and recalcitrant industry participants.

Other non-regulatory elements in the residential building environment which pose challenges to industry participants include:

- the homeowner, whose significant emotional and financial investment places additional pressures on the builder and trade contractors;
- prescriptive statutory contractual arrangements;
- quasi regulation of payment terms through the involvement of financial institutions;
- ineffective, time consuming and often litigious methods of recouping late payments;
- demanding terms of trade from suppliers; and
- significant exposure to uncontrollable events such as inclement weather and fluctuations in the supply of building materials.

In the residential building industry, this regulatory burden falls most heavily on small businesses and self-employed independent contractors of which the ACT building industry is principally comprised. HIA estimates that more than 90 per cent of the residential building industry is comprised of small businesses and sole traders.

With such a high number of small businesses, this sector is particularly vulnerable to the negative impact of additional red tape and government regulation.

The high cost and highly regulated nature of the industry together with the small business profile of firms also means that they are especially susceptible to economic cycles and changes in government policies and regulation. Financial failure for some firms will be an unavoidable consequence of the competitive forces of Australia's market economy.

There are also inherent uncertainties in contract prices which arise from the fact that works are required to be priced before construction commences and are based on technical, financial and workforce assumptions, together with material costs/availability, access to site, timeframes, weather and statutory approvals/delays.

Home Warranty Insurance

One defining feature of the residential building industry is the mandatory regime of Home Warranty Insurance (HWI). HWI provides a completion guarantee for consumers.

Since 2001 the scheme has been one of "last resort". This means that a consumer can only access the benefit of the policy of insurance when the builder dies, disappears or becomes insolvent.

Under the Building Act any residential building project over $12,000 must obtain HWI (or a fidelity fund certificate) prior to the receipt of money or the commencement of work.

In order to obtain HWI a builder must be deemed 'eligible'. In determining eligibility a range of financial and non-financial information is provided by the business and is examined in order to assess the risk of potential threats to solvency.

Before granting eligibility, an insurer reviews a builder's business history and finances to assess their risk. Insurers impose an annual turnover limit on builders based on their assessment of the value of works that a builder can prudently undertake given their financial position. In some circumstances, insurers require a financial security or deed of guarantee or indemnity of some form before granting eligibility.

Warranty insurance does not operate like other forms of insurance, for example, it is not like workers compensation (which allocates risk based on payroll size and claims history) or third party insurance (which aggregates actuarially quantifiable risks to persons who have no control over the occurrence of that event). The scheme currently operates on a flat (one size fits all) premium structure, so regardless of the risk the premium level is simply based on contract value.

HWI operates as a 'check and balance' on the solvency and financial management of residential builders, a builder's financial position is consistently monitored by their insurer. The scheme operates as a quasi-regulator and a significant barrier to entry, preventing those without the requisite financial circumstances from trading.

These arrangements must be recognised when finalising the proposed legislation.

Impact of Licensing

To obtain a license to carry out construction services in the ACT an individual must:

- Have completed a nationally accredited training course in architecture, civil engineering, structural engineering or building - for example a Certificate IV in Building and Construction.
- Have at least 2 years full time building work experience substantiated by referee statements.
- Successfully completed an examination.

This approach reflects that a license to carry out construction services in the ACT is a combination of occupational licensing and business licensing. The occupational licence involves obtaining the qualification and competencies to perform the work while the business licence relates to the financial resources and management acumen to run the business and contract with the consumer.

HIA supports licensing of contractors who undertake work directly for the private consumer, subject to a monetary threshold. HIA also supports the need for individual applicants to satisfy a range of criteria in order to be eligible for a license. In HIA's view licence eligibility for builders should be based on, but not solely subject to each of the following:

- Technical competency.
- Industry experience.
- Business skills.
- Financial viability – for example, insolvency should trigger an automatic suspension of license.
- Business financial checks to be undertaken annually by warranty insurance providers, not consumer/licensing agencies.
- Personal probity.
- Warranty insurance eligibility.

Not all of these criteria are evident in the current license eligibility framework in the ACT and while the introduction of exams for new licence applicants can be seen as one way of improving the quality of applicants, the reality is that the license eligibility requirements in the ACT differs from those that operate in other jurisdictions. For example, most jurisdiction require that an applicant satisfy a 'fit and proper person test' which generally considers whether the individual is 'fit and proper' to hold a license. This test specifically requires the consideration of the applicants personal character including their honesty, integrity and professionalism. This is in addition to matters currently considered when issuing a license in the ACT such as:

- an individuals licensing history, such as whether a license cancelled, suspended or refused;
- compliance matters such as complaints, disciplinary actions, subject to an order, defective work; and
- any criminal history.

As such, the introduction of many of the new and punitive laws outlined in the Bill could easily be seen as 'putting an ambulance at the bottom of a cliff, rather than a good fence at the top.'

3. THE CORPORATE FORM

3.1 THE BENEFITS OF THE CORPORATE FORM

It is a fundamental principle of company law in Australia (and elsewhere) that a company is a separate legal person, independent of its directors and shareholders. A company is responsible for its own debts and liabilities.

These basic principles are one of the reasons why the corporate form is favoured for the conduct of commercial enterprise. It enables much of the entrepreneurship, investment and innovation that facilitates economic growth.

Incorporation means an investor can share in the profits of an enterprise without being involved in its management. It provides structures for joint ventures; continuing trusteeship; fund management; and, the co-enjoyment of property.

Importantly, incorporation enables a business to carry on with a perpetual existence. It is not dependent on the life of the owner/manager. Even if the shareholders, directors, and officers come and go, the corporation carries on. This

permanency means that management can make long-term decisions for the business. Investors also have a better chance to see a return on their money. The majority of companies are established with a view to this permanency.

In the residential building industry, the corporate structure is adopted by many businesses as this is the best way to enable management of the various business functions from general and financial administration to sales, marketing, ordering, design and occupational health and safety.

Adopting a corporate structure is regarded as an appropriate risk management strategy to respond to project and business risks.

The Bill unreasonably jeopardises the utility of the corporate form.

3.2 INSOLVENCY

The unique nature of the residential building industry, including its mandatory licensing of builders and HWI system (discussed earlier) reduces the ability of directors to utilise illegal phoenix arrangements. In fact, there are a number of legitimate reasons why a business in the residential building industry may become insolvent.

During a project, the first risk that threatens solvency is financial. Cost overruns can result from a number of reasons including poor estimating, under-budgeting, overly optimistic pricing or cut price tendering, poor coordination between design professionals and the trades, delayed project stage payments, and changing client demands.

The second risk relates to time. Time overruns (and delayed payments) can have devastating financial consequences for businesses in the construction industry.

The final risk relates to the design of the building. There is a risk that the completed building will not meet the owner's needs.

After the construction phase, ongoing responsibility for defects and warranties is a key risk. Some businesses manage these risks by using asset-poor, project specific companies.

HIA does not seek to discount illegal phoenix behaviour when it occurs, however it is important to recognise that these project specific vehicles are not as commonly used in the detached housing sector of the construction industry as they may be in other sectors.

HIA rarely comes across residential builders who deliberately sabotage the solvency of their business.

In HIA's experience, some companies in the sector fail because of poor business administration, while others collapses due to the actions of third parties, most notably non-payment.

Finally, a consistent challenge for builders is maintaining cash-flow under a negative cash-flow model. Whilst a trade contractor is typically paid for work in arrears and must finance this cost, the same holds true for builders who must 'finance' an owner's costs.

Subcontractors and suppliers will naturally not wait for the substantial client-to-builder payment late in the duration of the job and often builders must source other financing arrangements to keep cash 'flowing'.

Builders in the residential building industry ordinarily fund their works by way of debt financing. Revenue on the other hand is derived from client payments which are highly regulated and paid after completion of work and after the building costs are incurred. Yet, the activities undertaken are subject to a high level of risk.

The builder's reliance on cash-flow to manage operations and cyclical conditions exposes them to an even greater extent in the event of non-payment by a client.

These factors are amongst those that may contribute to the high levels of insolvencies in the construction industry. However, ASIC data does not disaggregate between large public infrastructure projects nor the civil, commercial and residential sectors, and as such, fails to paint an accurate picture of the level of insolvency in the residential building industry.

While an effective and efficient statutory framework is required to help business and creditors deal with the impact of insolvency, at the same time it must not seek to impose unnecessary regulation that makes it even more difficult for businesses to enter the market, grow, and hopefully prosper.

HIA is concerned that many of the proposals contained in the Bill, if adopted, will contribute to the risk of insolvencies in the residential building industry, rather than reduce them.

3.3 LEGISLATIVE FRAMEWORK

There are a number of Commonwealth laws in place to address and regulate corporate insolvencies and the behaviour of company directors.

Under the *Corporations Act 2001*, directors have a direct and positive duty to prevent their company from trading if it is insolvent. A company is insolvent if it is unable to pay all its debts when they are due. Directors must prevent their company from incurring debts where the company is insolvent, or becomes insolvent by incurring the debt(s) and at that time, there are reasonable grounds for suspecting the company is insolvent, or would become insolvent.

There are various penalties and consequences of insolvent trading, including civil penalties, compensation proceedings, criminal charges and/or disqualification from managing a corporation.

A company must also keep financial records to correctly record and explain transactions and the company's financial position and performance. A failure of a director to take all reasonable steps to ensure a company fulfils this requirement contravenes the legislation.

Directors' also have fiduciary duties, which include the duties to act in good faith in the best interests of the company, to act for proper corporate purposes and to avoid conflicts of interest. It has been held that the duty of directors to act in good faith and in the best interests of the company includes consideration of the interests of creditors upon insolvency.

Under taxation laws, directors' personal liability may arise where the Commissioner of Taxation issues a Director Liability Notice ("DLN") under Section 222AOE of the *Income Tax Assessment Act 1997* to the directors at a time when the company has failed to remit tax. The objectives of these provisions are to ensure that a company satisfies particular income tax obligations or is promptly placed into voluntary administration or liquidation.

Liquidators and external administrators have obligations to investigate causes of failure and identify and report breaches of law to ASIC. This is aimed at ensuring inappropriate director/corporate behaviour is identified and addressed by the party capable of taking disciplinary action, generally the corporate regulator.

Liquidators also have powers to investigate and void certain transactions such as unfair preference payments.

ASIC, in turn, has a number of powers to take action against such reported breaches. To enforce the deterrent intent of the current laws are being met, it is important that ASIC take effective action against reported breaches.

The above laws provide a solid and sound regulatory framework for regulating insolvencies and holding directors accountable for their role in an insolvency.

Both the level of enforcement funding provided to the regulators and operational matters such as the existence and attainment of Key Performance Indicators are pivotal in ensuring the effect of the current legislative arrangements are being achieved.

4. THE BILL

4.1 COMMENCEMENT

HIA disagrees with the comments made in the Explanatory Statement regarding the retrospectivity of the Bill. The position that the Bill is not retrospective is misleading and mischaracterises how the provisions will be applied in practice.

For example, the Explanatory Statement states that:

> *"All provisions in this bill apply prospectively. However this does not mean that certain new powers such as making rectification orders, giving written directions, and taking occupational discipline cannot be exercised in relation to contraventions of relevant laws that occurred prior to the notification day."*

In contrast the Bill *does* introduce new offences and makes conduct previously not punishable an offence. For example, proposed section 26C makes executive officers criminally liable for a failure to notify the registrar of certain matters. Currently licensees are held responsible for such a failure. This is a new offence that applies to a group of individuals who were previously not subject to such arrangements.

If the Bill is to proceed the preferred approach is to apply the proposed laws to conduct that occurred and contracts entered into *after* the notification date.

The NSW Government proposes to adopt this approach in relation to the application of a proposed duty of care outlined in the *Design and Building Practitioners Bill 2019.* Item 5 of Part 2 of Schedule 1 of that bill states that the duty of care *"does not apply to construction work carried out under a contract or arrangement entered into before the commencement of the duty"*. This is a sensible and pragmatic approach. The ACT Government should adopt a similar strategy.

4.2 PERSONAL LIABILITY AND ENFORCEMENT ACTIONS

HIA opposes the extension of the current regulatory regime to directors and partners in a partnership personally. If adopted the Bill would give the regulator the power to:

- issue rectification orders to directors and partners personally,
- deem directors personally liable for the outstanding debts of their company if the company becomes the subject of a winding up order, has an administrator appointed or is deregistered, and
- take disciplinary proceedings against individual directors and partners regardless of whether such action has been taken against the company or partnership and irrespective of whether or not the business is still operating. Such

actions can result in penalties of up to $20,000 for individual licensees, which now includes individual directors and partners or $100,000 for companies.

As outlined above, there are numerous mechanisms through which individual directors can be held accountable for their actions regarding company affairs. To add another layer will simply add complexity and inconsistency.

Further, the current compliance and enforcement framework provides an appropriate mechanism through which licensees and former licensees can be held accountable for their work. There are a range of offences and disciplinary measure available including:

- Pretending to be licensed. The offence has a maximum penalty of 50 Penalty units ($7500; $37,500). An infringement notice can also be issued.
- Providing a service not under the supervision of a licensed person. The offence has a maximum penalty of 50 Penalty units ($7500; $37,500). An infringement notice can also be issued.
- Allowing an unlicensed person to provide construction services. The offence has a maximum penalty of 50 Penalty units ($7500; $37,500). An infringement notice can also be issued.
- A complaints process through which the Register can take complaints about licensees and former licensees and must, if satisfied that a ground for occupational discipline exists, apply to ACAT for an occupational discipline order or:
    - Reprimand the licensee or former licensee;
    - Require the licensee, or if the licensee is a company or partnerships, a nominee of the licensee to completed a training course; or
    - Impose a condition of the licence.
- The Registrar has the power to impose licence conditions that include, for example, that the licensee must not be a nominee for a certain period, that the licensee must not supervise trainees or other licensees, and that the licensee must be supervised.

  HIA understands that the following conditions have been imposed on licensees:
    - They cannot take on new work until undertaking training.
    - They cannot contract for new work until work on other projects is completed.
    - They cannot be named as the licensee on a commencement notice for certain types of building work.
- The power to automatically suspend a license.
- The power to take an occupation discipline action against a licensee or former licensee for breach of the relevant law, the consequences of which can include:
    - An application to ACAT for an occupational discipline order, and could seek an interim suspension of the license.
    - Reprimand the licensee.
    - Require the completion of a training course.
    - Impose a condition on the license.
- The power to compel a licensee to undertake a skills assessment to assist in making a decision about occupational discipline.
- ACAT can also make an occupational discipline order of their own motion and may seek to:
    - Cancel or suspend a license.
    - Direct the registrar to place a condition or remove or amend a condition on a license.
    - Require the licensee to pay an amount of not more than $20,000 for an individual licensee or $100,000 for a company.
    - Require a written undertaking.
    - Disqualify the person from applying for a license indefinitely or for a certain period.

    - If the person gained financial advantage from the action that is the ground of the occupational discipline require the person to pay an amount assessed as the amount of the financial advantage gained.
- Rectification orders can be made against a licensee and a former licensee. It is an offence to fail to comply with a rectification order. The maximum penalty is 2000 penalty units which is currently equivalent to $300,000 for an individual and $1.5 million for a company or a partnership.
- The power to issue demerit points for most breaches of the Licensing Act. If a licensee incurs 15 or more demerit points within a 3 year period a license may be suspended.

The power to take action against a licensee or former licensee acts as a significant incentive to comply with the law. The prospect of having a license jeopardised acts as an extremely useful deterrent particularly when that license is the foundation upon which a person's livelihood is built.

Despite all of these powers, and claims of building owners needing *'better protection from dodgy builders and developers'* it has recently been reported that since July 2018 (to March 2019) Access Canberra has taken the following regulatory action:

- 139 demerit points given to construction occupation licensees.
- 2 Rectification Orders – (1 currently subject to review by the ACT Civil and Administrative Tribunal).
- 9 Notices directing building work to be undertaken.

There would seem to be a mismatch between the current enforcement approach and the alleged need for the Bill. It is clear that the introduction of these laws is a response to building quality issues that have manifested over the past two decades, in no small way due the failure of the government to manage and enforce its own existing building laws.

HIA strongly recommends that prior to the introduction of any new powers, an assessment be carried out of the use, by the regulator, of its existing powers and the application of the current enforcement mechanism.

Interaction issues with the existing regulatory arrangements

Nothing in the Bill prevents individuals, licensees, former licensees, companies and partnerships targeted simultaneous for the same contravention. It is entirely possible that the licensee, a company director and the company itself could all be issued with rectifications orders. There is nothing to explain how these powers would work in practice.

There is also nothing in the Bill that address the operation of a HWI claim and the liability that can be imposed on of an individual director under the Bill.

Under the Bill, notwithstanding the insolvency of a company, a director could be the subject of a rectification order personally, while that same work could be the subject of a HWI claim. Where a HWI claim is made the director can be subject to action by the insurer to recoup any losses incurred. If the insurance policy has been triggered and a claim accepted, the insurer must act in accordance with the policy, i.e. rectify the works. How is a person to act in accordance with a rectification order under these circumstances? If the insurer does not act, they could be in breach of the policy, however if the director does not act on the rectification order, there are significant consequences.

This outcome creates an untenable situation and must be resolved prior to the commencement of the Bill.

If the Bill is to proceed HIA strongly recommends that proposed sections 39A and 39B, s58AA and 126B not apply to projects of up to 3 storeys, in which cases HWI applies. This removes any unintended consequences that may result for the operation of HWI and the personal liability of directors.

Penalties for failure to notify

HIA understands that under the Bill directors and executive officers (which includes any person who is concerned with or takes part in the corporations management) can also be individually subject to criminal penalties of up to $16,000 for a failure to notify of specific events and circumstances linked to the eligibility to a hold a license and to automatic suspension grounds. It is a defence to provide that reasonable steps were taken to prevent the commission of the offence. In considering such a defence a court is required to consider:

- Whether the company has a professional assessment carried out regarding the compliance with licencing requirements and whether the company implemented any recommendations arising from such an assessment.
- Whether the companies employees, agents and contractors have a reasonable knowledge and understanding of the licencing requirements.
- Any action taken by the officer when they become aware that an offence was or might be about to be committed.

HIA has a number of concerns with this proposal.

The definition of executive officer is too broad and could extend to administrative staff. This is inappropriate. If the provision is to be adopted 'executive officer' should be replaced with 'officer' and defined in accordance with the *Corporations Act 2001*.

There are no further details or explanation regarding the defence set out in section 26C(2), nor has there been any attempt to assess the cost impact of carrying out a 'professional assessment of compliance with section 26B'.

It is also unclear why an executive officer of a licensee should be responsible for ensuring that 'contractors' understand and have a reasonable knowledge of the requirements in section 26B. Presumably, either a contractor is not subject to the requirements of section 26B or, if they are, they too would have their own responsibilities under proposed section 26C. HIA recommend that 'contractor' be deleted from section 26C(2)(c).

4.3 Time Frame for Issuing Rectification Orders

Another complex matter outlined in the Bill involves the application of the 10 year time period regarding the issuing of rectification orders. Currently a rectification order cannot be made more than 10 years after the act that caused the contravention happened or ended. The current examples in the Licensing Act reference 'completion' as the time from which the 10 years commences. The Bill and Explanatory Statement significantly muddy the waters on this matter.

The Explanatory Statement explains that the 10 years will start to run from the date a certificate is issued (set out under subsection 6 of proposed section 35), however if further work is carried out subsequent to this, then the 10 yeas would start to run (again) from the date the later work was completed. This could indefinitely extend the power to issue rectification orders. For example:

- In 2011, a licensee completes a bathroom renovation. In 2016, 5 years after completion, the licensee is issued with a rectification order to fix some water pooling in the shower. The licensee carries out the work. In 2023 the homeowner finds that some of the grouting is falling away resulting is some of the bathroom tiles becoming loose. This is 12 years since completion but is 7 years since the licensee carried out the latest rectification work – which timeframe applies?
- In 2005, a licensee completed a second storey addition. In 2010, the same homeowner asks the licensee to carry out an attic conversion. The works are finished in the same year. In 2019, the homeowner finds that some of the timber

door frames in the second storey addition are splitting. Can a rectification order be issued for works relating to the second story addition given that the latest date that works were carried out was 2010?

Matters such as the power of the regulator and the timeframe during which that power can be exercised must be clear. Under the current Bill such matters are not.

4.4 ENFORCEABLE RECTIFICATION UNDERTAKINGS

A novel proposal outlined in the Bill relates to the introduction of an *enforceable rectification undertaking* (Undertaking). The Undertaking must set out the rectification work to be undertaken and a number of other matters, including for example, a statement that the company recognises the regulators concerns in relation to the contravention or alleged contravention. HIA agrees that an undertaking should not be an admission of guilt or liability and should not be admissible as evidence in court or tribunal proceedings.

While in principle HIA does not oppose this approach, the consequences for non-compliance with an Undertaking are severe, including adverse implications for licence applications and renewals, the issuing of rectification orders or an application to the Magistrates Court for one of the following order to be made:

- To comply with the Undertaking.
- To pay to the ACT the amount assessed by the court as the value of the benefits anyone derived, directly or indirectly, from a failure to comply with the undertaking.
- To compensate someone who has suffered loss or damage because of the failure to comply with the Undertaking.

Costs can also be ordered against the contravening party and penalties of up to $320,000 can be imposed on a person for failure to comply with an order of the Magistrates Court. Other provisions of the Bill mean that such orders could be levelled against directors personally.

There is a sense that these Undertakings are being offered to alleviate an 'administrative burden' on the regulator and to short circuit the current process for issuing and complying with rectification orders.

The Explanatory Statement implies that an Undertaking would be used for a particular purpose. For example, a licensee agrees to carry out rectification work so as to not be the subject of a rectification order, the licensee fails to carry out the work and then the Registrar must issue a formal rectification order in accordance with the current process.

With the power to issue an Undertaking, the Registrar could either offer this at the point of voluntary compliance, or on a failure to carry out the work, without needing to go through the formal process of issuing a notice of intent and allowing the licensee an opportunity to respond.

As such, the incentive for a licensee to enter into an Undertaking is unclear; not only does the Bill provide a broad discretion in relation to the publication of information regarding an Undertaking but the consequences for a failure to comply with an Undertaking are severe.

Greater information regarding the operation, application and utility of Undertakings would be useful.

4.5 Expansion of the Public Register

Currently, information about licence suspension, cancellations and disqualifications and occupational discipline actions against a licensee in the last 10 years and rectification orders and contraventions of rectification orders in the licence register are available on the Public Register.

HIA opposes proposals in the Bill that seek to expand the matters contained in the Public Register to include:

- Details about any order by ACAT or a court in relation to rectification undertakings and any other details about the undertaking that the Registrar believes on reasonable grounds that it is necessary or desirable to protect the public.
- The publication of information regarding a cancellation as a result of an automatic licence suspension under Division 5.1 of the Licencing Act without waiting for the time period to elapse in relation to a review of the decision or the outcome of a review.
- Stop work orders.

HIA does not see any justification for the inclusion of these matters on a public register.

4.6 Other Matters

Engineers certificates - building certifier request

The Bill amends section 47 (clause 12) to provide that the owner of a parcel of land where building work is being, or has been carried out must, if requested by the certifier, give the certifier a certificate by a professional engineer about matters relating to safety, health and amenity of a building as erected or altered is fit to occupy or use.

While HIA is not opposed to the requirement for engineers report to be requested by the certifier for a project, however, not all building designs - particularly for a house - need to have a structural engineers report/design.

There are a range of Australian Standards called up in the National Construction Code (NCC) that enable a suitability experienced practitioner to design and construct various building elements including timber frames and concrete slabs without the need for engaging an engineer. These elements have suitable referenced standards such as AS 1684 and AS 2870 that if followed provide a Deemed-to-Satisfy Solution in accordance with the NCC. It is considered that the drafting of the Bill relating to certifiers being able to request additional engineers certificates will create unnecessary confusion unless clear guidance is provided on when and how this applies and make it clear that not all structural elements of a building require an engineer's design and certification.

HIA raised similar issues with the minimum design documentation guidelines and the building certifiers and builders Code of Practice.

Building Inspectors – Directions for building work

The Bill proposes new powers to permit building inspectors to issue stop work notices, rectification orders and other powers where they consider building work to be non-compliant with the Building Act incorporating the NCC and relevant referenced Australian Standards.

HIA is not opposed to inspectors having the ability to issue stop work notices or require rectification, however, there needs to be a proper process for this as often issues of citing of non-compliance with NCC or a relevant Australian Standard clause can be highly subjective and subject to varying interpretations by different parties. Therefore, careful consideration is needed as to how this clause could be applied in practice and there needs to be the ability for the builder or designer to appeal such interpretive matters.

It is noted that the Bill uses the language 'on reasonable grounds' yet this is considered subjective language and there needs to be guidance and clarity to underpin such determinations.

Procedure for supervision

The Bill proposes to require that companies and partnerships have a written record of policies and procedures for effectively managing and supervising the nominee and their obligations in relation to their licence eligibility. The Bill allows businesses 6 months to implement such procedures.

HIA opposes the proposal. Not only is there no evidence to support its introduction, it will simply result in additional red tape and administrative burden.

The proposal is explained to be based on a remaining view of some that *"as the licence is 'technical' rather than for constructing, and the nominee is the technically skilled party, the corporation cannot reasonably responsible for the nominee's failures".*

This view is not supported by any evidence and HIA is unaware of this view amongst its members. As outlined above, companies and company directors have an extensive range of responsibilities regarding a company's operations including compliance with the law. It would seem highly careless for a company that wishes to prosper in the residential building industry to claim no responsibility for the work of the company's nominee, presumably, the next job rests on the success of the previous one.

If the proposal is to move ahead, HIA recommends that 12 months be provided for businesses to establish the required policies and procedures.

Automatic License Suspension

Proposed section 53A of the Bill provides a new power to allow the Registrar to cancel a licence if after three months the ground for suspension still exists. HIA sees that the current approach that requires the regulator to act on automatic suspensions in a timely way is the most appropriate response and provides certainty to those subject to an automatic suspension.

Given HIA's opposition to proposed section 53A, HIA also sees that it is inappropriate to publish information regarding an automatic license suspension prior to the expiration of review timeframes. Not only is this at odds with the fundamental principles of procedural fairness and nature justice it is inappropriate for a regulator to have that much discretion and harm individuals and business.