



**LEGISLATIVE ASSEMBLY**  
FOR THE AUSTRALIAN CAPITAL TERRITORY

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

## Submission Cover Sheet

Inquiry into Building Quality in the ACT

**Submission Number: 43**

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24 September 2018

The Committee Secretary  
Standing Committee on Economic Development and Tourism  
Legislative Assembly for the ACT  
GPO Box 1020  
CANBERRA CITY ACT 2601  
(By email)

Dear Sir/Madam

**INQUIRY INTO THE QUALITY OF NEW BUILDINGS IN THE ACT**

Please find attached my submission to the Standing Committee on Economic Development and Tourism Inquiry into the Quality of New Buildings in the ACT.

I am prepared to meet with the Standing Committee to further inform the Committee about our experience in attempting to get remedies for a faulty building, constructed by a major ACT developer. However, any such meeting would need to be *in-camera* as we are at a critical stage of the process of seeking remedies.

I ask that you do not publish my contact details to maintain reasonable privacy.

Yours Sincerely

[REDACTED]

John Grant

# **SUBMISSION TO THE STANDING COMMITTEE ON ECONOMIC DEVELOPMENT AND TOURISM INQUIRY INTO THE QUALITY OF NEW BUILDINGS IN THE ACT**

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## **INTRODUCTION**

1. The ACT Government regulatory framework for residential construction in the ACT is broken and in desperate need of repair, particularly in relation to regulatory enforcement.
2. I make this statement not only as a unit owner and chair of an Executive Committee of an Owners Corporation, but as a former Chief Executive of the Australian Building Codes Board (ABCB). I was the Chief Executive in the lead up to and when the National Performance-Based Building Code was introduced in 1996, which included the privatisation of building certifiers.
3. The ACT Government, through the Construction Occupations Registrar in Access Canberra, is the only Australian jurisdiction that issues a Certificate of Occupancy. In other Australian jurisdictions, the Building Certifier issues the Certificate of Occupancy. As the issuer of the Certificate of Occupancy, the responsibility of reasonable duty of care lies with the Regulator.
4. The issuer of a Certificate of Occupancy must be expected to take reasonable steps to ensure that the building is ready for occupancy — it has a clear duty of care in this respect. From the construction problems that have occurred in the ACT for many years and continue to occur today, it is not unreasonable to conclude that the Construction Occupations Registrar fails in its reasonable duty of care.
5. This ongoing failure by the Government Regulator to fulfil its responsibilities has allowed developers and builders to construct residential dwellings in the ACT that fail to meet Australian Building Codes requirements and the most fundamental of engineering standards. Such failures are breaking the law.
6. It also has allowed the building certification to perform without professional standards and with little, if any, risk of reprimand or penalty.
7. In my view, the underlying laws and regulations are generally adequate, regularly reviewed and updated and not the problem. The problem is lack of regulatory oversight and enforcement.
8. When considering this submission, I had initially thought to condemn or place blame on the developers and builders of shoddy constructions.
9. But, as I reflected on the causes of the poor construction practices in the ACT, it was apparent that the sources of the problem are the absence of even basic regulatory enforcement and the abject failure of the Government Regulator to reasonably perform its duty of care.
10. Sadly, the weak regulator is aided and abetted by complacent Government and Legislative Assembly representatives who have to date been unprepared to act to remedy this wretched environment. This has resulted in significant hardships for numerous home and unit owners.
11. This needs to change immediately. Poor construction practices have significant negative impacts economically on the ACT, as well as socially.

## RECOMMENDED ACTIONS

A. The ACT Government and other Legislative Assembly representatives commit to urgently making changes in practices and, if necessary, laws and regulations that will solve the problems, and provide confidence for future construction projects in the ACT.

B. Improve oversight of high-density dwellings developments and construction – there is no one looking after the future Owners' rights when developers are constructing units and selling off-the-plan.

C. A strong Regulator is needed, with a preference for action to resolve poor practices.

Where systemic construction problems become evident, the Regulator must act in a timely fashion to stop those problems and ensure the offender repairs the problem.

D. The Regulator should be prepared use its powers to compel developers and builders to effect immediate rectification work in circumstances where the built product or the work in progress is in breach of the law, building codes or other construction standards, particularly where such defects poses a threat to life or limb.

E. Actively stop developers and builders with histories of poor construction practices from reentering the construction market under new business names or as silent partners.

This is not a difficult task as construction industry participants, like other industries, know who is operating in the market.

F. Introduce a professional Building Certifier cadre. This is essential if Building Certification is to remain privatised.

This means that Building Certifiers must be at both professional risk and financial risk if they certify construction work that fails to meet Australian Building Codes or engineering and other technical standards.

G. Have a website that identifies buildings that have experienced construction problems that identifies by company and individual names the developers, builders, engineers, certifiers and, where appropriate, the contractors at fault.

It should also identify where remedial action has been taken to resolve the problems so that buildings are 'cleared' when remediation has been successfully completed.

H. Mandatory insurance should be a requirement for developers, builders and building certifiers.

I. Ten-year liability limitation periods should be legislated to ensure that once an occupancy permit is issued, plaintiffs will have 10 years to issue legal proceedings for construction defects.

## **BACKGROUND**

12. The construction industry is a significant driver of economic activity in Australia. It produces about 8% of Australia's Gross Domestic Product (GDP).
13. In the ACT the construction industry accounts for about 6% of Gross State Product (GSP) by industry gross value added. (Gross State Product – 2016-17, ACT Chief Minister, Treasury and Economic Development, 17 November 2017)
14. Poor construction practices have significant negative impacts economically and socially.
15. The continuing history of poor construction practices in the ACT is not sustainable. It imposes significant costs on Government and citizens.
16. It is not difficult for Government to ensure that the quality of construction in the ACT.
  - The underlying laws and regulations are generally sound but need some adjustment at the margin.
  - It requires a strong regulator. Significant changes in philosophy and practice are required from existing approaches by the Government and its administrative arm, Access Canberra.
17. There have been many reviews in the last 25 years by the ACT Government, other State and Territory Governments and the Federal Government, few of which have resulted in adequate solutions to existing problems.
18. The ACT Government can be a leader in reform of the construction industry.

## **LAWS AND REGULATIONS**

19. The underlying laws, regulations and standards relating to technical construction practices and requirements are generally sound.
20. The National Construction Code is a performance-based code containing all Performance Requirements for the construction of buildings. The Performance Requirements represent the minimum level that buildings and associated trades must meet. The Performance Requirements are supported by Deemed-to-Satisfy Solutions. These are solutions which are deemed to satisfy the Performance Requirements and make up the bulk of the National Construction Code. If any designer, builder or the like, does not want to develop a new means of achieving compliance with the Performance Requirements, they can choose to use a Deemed-to-Satisfy Solution.
21. However, the Standing Committee will be aware that the costs of poor construction practices, many of which are illegal, are exacerbated in high-density developments. The negative impacts are exacerbated because of the large number of owners who are negatively impacted by systemic poor practices (such as structural failures and waterproofing deficiencies) in a high-density development. Also, the cost of remediation can be greater because of the complexity of such developments.

22. The ACT Government and other Legislative Assembly representatives must commit to urgently making changes in practices and, if necessary, laws and regulations that will solve the problems, and provide confidence for future construction projects in the ACT. [Recommendation A]

23. A significant problem exists in the ACT residential construction market, demonstrated by the number of significant building defects that have been identified. In particular, there is an unsustainably high failure rate in basic construction practices, such as (but not limited to) waterproofing and building structures, in relation to high-density residential apartment developments.

24. Presently, there is no one looking after the future Owners' rights when developers and builders are constructing apartment blocks and selling off-the-plan. In practice, the developer (or its agent) is selling to uninformed buyers who are likely to be going to make the largest financial commitment of their lives.

25. Buyers rely on laws and regulations to protect them from unscrupulous vendors, in this case developers and builders.

26. Yet, the ACT Regulator appears to have taken no action to eradicate poor construction practices and provide reasonable assurance for apartment buyers that they are not purchasing a problem building.

27. The ACT Regulator must improve oversight of high-density dwellings developments and construction – there is no one looking after the future Owners' rights when developers are constructing units and selling off-the-plan. [Recommendation B]

28. The expansion of statutory warranties in 2016 to all private residential buildings, including to buildings higher than three storeys was one important action by the Government to improve protection for residential apartment owners.

## **A STRONG REGULATOR**

29. The Regulator cannot be a friend of the industry. It must be respected. It should work with industry to improve the operation of the sector. Importantly, it must be prepared to enforce the laws and regulations that it administers, particularly where there is widespread non-compliance.

30. The Regulator must have a bent towards action. [Recommendation C]

31. My experience with Access Canberra, and that of many ACT citizens who I talk to, has been a lack of willingness to act against rogue developers and builders. One Access Canberra officer said to me that Access Canberra preferred to work with the industry, rather than get into confrontation with the industry (by requiring compliance with regulatory requirements).

32. The Officer was quite taken aback when I responded that the Regulator has been created to ensure compliance and needs to be active when there is such widespread lack of compliance.

33. The Regulator should have a leading role in understanding the industry and identifying problems as they emerge. The Regulator should work with the industry to deal with such issues early, before they become systemic.

34. Where failures in construction are identified, the Regulator should have statutory intervention powers that allow the Regulator to enter property and effect public protection works immediately.
35. Additionally, the Regulator should be prepared use its powers to compel developers and builders to effect immediate rectification work in circumstances where the built product or the work in progress is in breach of the law or poses a threat to life or limb. These powers need to extend beyond the date upon which the building work has been completed even if the building has been occupied for some years. There should be no permanent loss of amenity in such rectification. [Recommendation D]
36. In this context, fast and cost-effective dispute resolution procedures should be introduced that are dedicated to building disputes and which have the power to appoint expert witnesses who are suitably qualified to identify and quantify rectification costs.
37. Finally, the ACT Government, should move to introduce powers that allow its Regulator, Access Canberra, to actively stop developers and builders with histories of poor construction practices from reentering the construction market under new business names or as silent partners. This is not a difficult task as construction industry participants, like other sectors, know who is operating in the market. [Recommendation E]

## **PROFESSIONALISM AND ACCREDITATION**

38. All participants in the construction industry – including builders, engineers, architects, draftspersons, building inspectors and surveyors – should be required to be licensed and registered under a strong licensing regime.
39. They could also be required to pay annual registration fees to help meet the cost of an effective regime.
40. Builders must obtain builders licenses. Trades are accredited. Engineers must belong to a professional society to practice in jurisdictions.
41. But developers are not accredited.
42. Further, building certifiers appear to lack a professional body that requires continual development and oversight actions where practice does not meet professional requirements.
43. This needs to change.
44. Building Certifiers need to work under a professional society, with formal professional qualification and continuing professional development. Building Certifiers must be at both professional risk and financial risk if they certify construction work that fails to meet Australian Building Codes or engineering and other technical standards. [Recommendation F]
45. Developers need to be not only registered (as is the case in the ACT), but deregistered if their projects fail to meet building codes and engineering and other professional standards.
46. A strong licensing body must be in place to register, discipline and de-register practitioners.

47. Consideration could also be given establishing a website that identifies buildings that have experienced construction problems and that identifies by company and individual names the developers, builders, engineers, certifiers and, where appropriate, the contractors at fault. I understand that this is a potentially difficult suggestion, but it could be developed in collaboration with industry bodies and construction unions who often make public statements about their commitments to a high-quality industry. The website should also identify where remedial action has been taken to resolve the problems so that buildings are 'cleared' when remediation has been successfully completed. [Recommendation G]

## **INSURANCE AND LIABILITY**

48. Mandatory insurance should be a requirement for these groups, including developers and building certifiers. Such insurance could be modelled along the lines of the legal fraternity and practitioner registration regimes, like Victoria where all building practitioners will be insured by law. [Recommendation H]

49. One of the possible benefits of an insurance regime is that poor performers are likely to either be subject to higher premiums or not be able to obtain insurance. This would provide a market-driven regulation of industry participants.

50. Further ten-year liability limitation periods should be legislated to ensure that once an occupancy permit is issued, plaintiffs will have 10 years to issue legal proceedings for construction defects. The right to issue legal proceedings will by law expire after 10 years. [Recommendation I]

## **A SUPPORTING ROLE FOR INDUSTRY BODIES AND UNIONS IN CONSTRUCTION PRACTICES**

51. Industry bodies, such as the Master Builders Association and the Housing Industry Association, and the construction unions should be encouraged to identify and call out bad construction practice.

52. These bodies should work hand-in-glove with the Regulator to promote a high quality of construction in the ACT.