



**LEGISLATIVE ASSEMBLY**  
FOR THE AUSTRALIAN CAPITAL TERRITORY

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STANDING COMMITTEE ON PLANNING, TRANSPORT, AND CITY SERVICES  
Ms Jo Clay MLA (Chair), Ms Suzanne Orr MLA (Deputy Chair),  
Mr Mark Parton MLA

## Submission Cover Sheet

Inquiry into Property Developers Bill 2023

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Standing Committee on Planning,  
Transport and City Services  
ACT Legislative Assembly  
GPO Box 1020  
Canberra ACT 2601

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Dear Committee,

### **Inquiry into the Property Developers Bill 2023**

1. The ACT Law Society (the Society) welcomes the opportunity to provide a submission to the Committee as part of the inquiry into the Property Developers Bill 2023 (the Bill). The Society is the peak professional association that represents, advances, and defends the interests of an independent legal profession in the ACT. The Society has established a range of committees with relevant subject matter expertise and experience to support our purpose and strategic goals. In relation to this Bill, the Society has engaged with its Property Law Committee.

2. One of the strategic goals of the Society is to lobby for 'good laws' in the ACT, which uphold the rule of law and promote access to justice. It is for this reason that we engage with law reform processes, such as this inquiry into the Bill. This submission focuses on aspects of the Bill which relate to: complexity of legislation; the rectification order scheme; and reforms to the *Building Act 2004* (ACT).

#### **Complexity of legislation**

3. The Bill seeks to establish a licensing scheme for residential property developers in the ACT. While the administrative procedures for a property developer's licence will be set out under a new Property Developers Act, the events which trigger the need for such a licence will be set out in three separate pieces of legislation (as amended by the Bill).

4. It is important that the Territory's laws are simple to understand, easy to comply with, and consistently and fairly administered. Reducing the complexity of legislation can lessen legal uncertainty and minimise litigation. It can also support economic activity, as individuals engaged in business (such as property development) can more easily understand and fulfil their legal obligations.

5. To some degree, section 11 of the Bill acts as a signpost to the kinds of legislative provisions which will trigger the need for a property developer's licence. However, 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.

### **Rectification orders scheme**

6. The Bill seeks to establish a scheme to bring property developers into the regulatory chain of accountability for building work they are involved in (irrespective of whether they are required to hold a property developer's licence). Part 6 of the Bill deals with rectification orders, stop work orders and undertakings.

7. The Society wishes to draw the Committee's attention to several issues associated with Part 6 of the Bill. The Society notes that key elements of Part 6 of the Bill are similar to the *Construction Occupations (Licensing) Act 2004 (ACT) (COLA)*. The Society also acknowledges that some of the issues raised in this submission have been considered before, most recently in the context of 2019 reforms to COLA. However, these have not necessarily been clearly articulated in the Explanatory Statement accompanying the Bill. The Society therefore wishes to draw these issues to the attention of this Committee:

- potential retrospective operation as the rectification orders scheme applies to building works undertaken in the past (up to 10 years);
- 'piercing the corporate veil' and making directors personally liable for rectification orders where:
  - the property developer is a corporation; and
  - before or after the order is made, the property developer:
    - becomes the subject of a winding-up order;
    - is placed into administration, receivership or liquidation; or
    - is deregistered; and
- broad discretion of the Registrar in making rectification orders; and
- the practical implications of rectification orders being made against multiple parties.

8. In 2004, COLA introduced a scheme in which rectification orders could be made in relation to building works undertaken up to 10 years ago. Such orders could be made against multiple parties. In 2019, reforms to COLA provided for personal liability of directors in the same circumstances as contained in the Bill.

9. 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. In the COLA context, the ACT Government position (most recently restated in 2019) was 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.<sup>1</sup> The Committee may wish to consider whether the same arguments apply in the context of the Bill.

10. In relation to 2019 COLA reforms ‘piercing the corporate veil’, the ACT Government position was that the amendments were necessary to prevent ‘phoenixing’ and reduce the impacts of insolvencies on building owners and industry members.<sup>2</sup> The Society notes that departing from the separate legal entity principle – which is fundamental to corporate law – should also only be done in exceptional cases, which in the past have generally included fraud, injustice or abuse of the corporate structure. The Committee may wish to consider whether imposing personal liability on directors – including those who took office after building works were undertaken – is appropriate and proportionate in achieving the policy intention of the Bill.

11. 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.*”<sup>3</sup> 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.

12. 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.

13. In response to similar issues in relation to the 2019 COLA reforms, the ACT Government provided assurances that: “Who an order is made in relation to, and their obligations under the order, will be determined on what is appropriate in each particular case. It should be noted that the ... Registrar is not required to issue an order to more than one party ... The Registrar must still be satisfied that, amongst other things, whatever rectification order is made in relation to the entity is appropriate, and consider any submissions made by the entity in accordance with the law.”<sup>4</sup>

14. Another argument relied upon by the ACT Government at the time of the 2019 COLA reforms, was that the decision to issue a rectification order under COLA was reviewable by the ACT Civil and Administrative Tribunal (ACAT). However, Part 1.2 of Schedule 1 of the Bill, which sets out decisions which are reviewable by ACAT, does not include rectification orders made under section 52 of the Bill. Instead, proposed section 68 of the Bill allows a property developer to apply to the ACT Supreme Court to revoke or vary the notice (of intent to make an order) or the rectification order. Applications for review by the Supreme Court must be made within 30 days after the rectification order or notice is given. The policy rationale for excluding ACAT review in these circumstances has not been made clear. The Committee may wish to seek further information from the ACT Government in relation to this matter.

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<sup>1</sup> Government Response to the Economic Development and Tourism Report 7 of 2019 – Inquiry into the Building and Construction Legislation Amendment Bill 2019.

<sup>2</sup> ACT Government Submission to the Inquiry into Building and Construction Legislation Amendment Bill 2019.

<sup>3</sup> Explanatory Statement accompanying the Bill, emphasis added.

<sup>4</sup> Government Response., *op cit*.

15. Finally, the Society draws the Committee's attention to the relevant parts of section 54, which provide that a property developer still has the right to recover, from any other property developer, the costs incurred in complying with the rectification order. However, such civil proceedings would not stay the operation of the rectification order. The Society is concerned that the ability to issue rectification orders to multiple parties may lead to increased litigation between property developers, distracting from the goal of rectifying the defects in the building. Any increase in cases requiring judicial intervention could create a significant burden on the courts system.

### **Building Act reforms**

16. The Bill proposed to introduce new section 89F into Building Act which would allow an affected party to require a builder or property developer to rectify a defect after completion of residential building work. Such claims must be made within two years of the completion date of the residential building work.

17. Subsection 89F(3) provides that in any proceeding for such a claim, the work is presumed defective, and the responsibility of the builder/property developer to rectify, unless the contrary is proven. That is, there is a reverse onus of proof on the builder and/or property developer to establish that there is not a defect, or that the defect is not their responsibility (e.g., the result of poor maintenance or misuse).

18. The Society notes that in civil claims, the burden of proof usually lies on the person making the claim. Any departures from this general legal principle should be done cautiously, in a way that balances the interests of justice, fairness and efficiency. General principles guiding such departures may include where there is an imbalance in power, resources, information or expertise of the parties. The Society seeks to draw this issue to the attention of the Committee for its consideration of whether reversing the onus of proof is appropriate in these circumstances.

19. Under subsection 89F(4), in addition to rectifying the defect, the affected party may also claim damages for any loss or damage to the affected party, resulting from the defect that is reasonably foreseeable as a result of the defect. It is not entirely clear on the face of the Bill whether the two-year limitation period also applies to the related claim for damages, or whether the default six-year limitation period (under regulation 38 of the *Building (General) Regulation 2008*) applies. The Society therefore draws this to the attention of the Committee for its consideration.

20. The Society would be happy to respond to any questions of the Committee in regard to the comments made above, if this would be of further assistance.

Yours sincerely,

Simone Carton  
Chief Executive Officer