



LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON ECONOMIC DEVELOPMENT AND TOURISM
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Submission Cover Sheet

Inquiry into Building and Construction Legislation Amendment Bill 2019

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Standing Committee on Economic Development and Tourism
ACT Legislative Assembly
196 London Circuit
CANBERRA ACT 2601

By email: LACommitteeEDT@parliament.act.gov.au

Dear Committee

Inquiry into the *Building and Construction Legislation Amendment Bill 2019*

The Master Builders Association of the ACT (**Master Builders**) appreciates the opportunity to make a submission regarding the *Building and Construction Legislation Amendment Bill 2019* (the **Bill**). The Bill was introduced to the ACT Legislative Assembly on 24 October 2019 by the Minister for Building Quality Improvement without any prior consultation or engagement with key stakeholders, including Master Builders. In order to achieve genuine and optimal reform, significant and lengthy engagement, including a formal consultation period of not less than three (3) months, is required on this lengthy and complex Bill.

Due to the lack of consultation and engagement, and the short timeframe in which submissions to this Inquiry are due, Master Builders has limited the content of these submissions to the sections which will impose personal liability on directors and executive officers of licensed building companies.

This submission highlights seven (7) serious concerns with the Bill:

1. On a prima facie basis, the Bill conflicts with Commonwealth laws and a Council of Australian Governments (COAG) agreement (December 2010) which warrants further investigation before the Bill is finalised;
2. The ACT has existing powers to hold licensed companies and individual nominees to account, making these laws superfluous;
3. The Bill will be ineffective against the behaviour sought to be addressed, and there are unintended consequences which will cause harm to the majority of good quality builders;
4. The penalties proposed in the Bill, including criminality, are unfair and disproportionate to the relevant breaches;
5. The Bill fails to take into consideration the complexities of the building and construction industry, placing all responsibility on the licensed builder rather than apportioning responsibility across the building supply chain;
6. The Bill should not apply retrospectively, which includes buildings already constructed, or fines already imposed; and
7. The time provided to review the Bill is inadequate, and the lack of consultation unprecedented. A minimum period of three (3) months is recommended to review the Bill in detail and identify alternative and less harmful solutions to the problem sought to be addressed by the Bill.

Conflict with Commonwealth Laws

Master Builders is concerned that the following sections of the proposed Bill may conflict with the *Corporations Act 2001* (Cth) or other Commonwealth legislation and principles:

<p>Section 26: Criminal liability of executive officers – s 26B New section 26C – Construction Occupations (Licensing) Act 2004</p> <p>(1) An executive officer of a corporation is taken to commit an offence if –</p> <p> (a) the corporation commits an offence against section 26B; and</p> <p> (b) the officer was reckless about whether the offence would be committed; and</p> <p> (c) the officer was in a position to influence the conduct of the corporation in relation to the commission of the offence; and</p> <p> (d) the officer failed to take reasonable steps to prevent the commission of the relevant offence.</p> <p>(2) In deciding whether the executive officer took (or failed to take) reasonable steps to prevent the commission of the offence, a court must consider any action the office took directed towards ensuring the following (to the extent that the action is relevant to the act or omission):</p> <p> (a) that the corporation arranges regular professional assessments of the corporation’s compliance with section 26B;</p> <p> (b) that the corporation implements any appropriate recommendation arising from such an assessment;</p> <p> (c) that the corporation’s employees, agents and contractors have a reasonable knowledge and understanding of the requirement to comply with section 26B;</p> <p> (d) any action the officer took when the officer became aware that the relevant offence was, or might be, about to be committed.</p> <p>(6) In this section:</p> <p> executive officer, of a corporation, means a person, however described and whether or not the person is a director of the corporation, who is concerned with, or takes part in, the corporation’s management.</p>
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This section imposes criminal liability on an “executive officer” of a licensed entity. Whilst it is noted that “executive officer” is defined in the Bill, it does not provide an exhaustive or clear definition (such as the definition of director under the *Corporations Act 2001*) and may extend to people in an organisation who are unaware that they could now be criminally liable for an act

or omission of their employer, contradicting the principles of vicarious liability. The open definition may also extend to agents of a licensed entity, including paid professionals such as accountants and/or lawyers. This must be reconsidered and limited to **directors** only.

No evidence has been provided in the Explanatory Memorandum that state there have been instances where a licensed entity or its nominee has failed to notify the Registrar of an event referred to in section 26B of the Licensing Act occurring. It is the understanding of Master Builders that there is a high level of compliance with section 26B by the building and construction industry, and it does not sensibly follow that a criminal liability offence should be imposed on executive officers of an entity in these circumstances. The lack of clarity around who may be an executive officer is likely to lead to confusion and uncertainty of roles and responsibilities in a licensed entity. Further, the enactment of this particular section may conflict with Commonwealth laws and this should be reviewed by the ACT Government before the legislation is passed.

Section 56:	New section 126B <i>Construction Occupations (Licensing) Act 2004</i>
<u>126B: Director liability for amounts</u>	
(1)	Subsection (2) applies if – (a) a corporation is convicted of an offence against this Act or an operational Act; and (b) a penalty for the offence is imposed on the corporation; and (c) the amount of the penalty is not paid within the time required for payment.
(2)	Liability to pay the amount of the penalty mentioned in subsection (1) attaches to – (a) each individual who was a director of the corporation when the offence was committed; and (b) each individual who is a director of the corporation when the penalty is imposed.
(3)	Subsection (4) applies if – (a) the ACAT requires a corporation to pay an amount under section 58(3); and (b) the amount is not paid within the time required for payment.
(4)	Liability to pay the amount mentioned in subsection (3) attaches to – (a) each individual who was a director of the corporation when the act or omission that was a ground for occupational discipline

- happened; and
- (b) each individual who is a director of the corporation when the ACAT made the order for payment under section 58(3).
- (5) Subsection (6) applies if –
- (a) a corporation has a debt owing to the Territory under this Act or an operational Act; and
- (b) the debt is not paid when it is due.
- (6) Liability to pay the amount mentioned in subsection (5) attaches to –
- (a) each individual who was a director of the corporation when the debt was incurred; and
- (b) each individual who is a director of the corporation when payment for the debt is due.
- (7) A liability under subsection (2), (4) or (6) to pay an amount applies regardless of the status of the corporation, including, for example, that the corporation is being, or has been, wound up.
- (8) If a liability under subsection (2), (4) or (6) to pay an amount attaches to 2 or more people, each person is jointly and severally liable for payment of the amount.

It is noted that this section has been duplicated from section 111B of the *Queensland Building and Construction Commission Act 1991* in isolation, without any of the corresponding commission or licensing requirements that currently exist in Queensland. Introducing a penalty section in isolation without due regard for the broader reform and compliance framework will not assist the Minister for Building Quality Improvement or the Registrar in achieving quality and genuine reform in the building and construction industry.

The Explanatory Memorandum provided and the legislation itself does not indicate whether this section, which effectively operates as a guarantee by directors, will apply retrospectively to fines that have already been imposed by the ACT Government. It must be made clear in the legislation that this section will only apply to fines imposed by the ACT Government after the commencement of this legislation.

Further, the proposed Bill places the financial penalty solely on the directors, both past and present, of an organisation. In large building entities, directors are ordinarily appointed by the shareholders, but are not always one and the same. Directors are often paid a salary, and whilst they may retain responsibility under the *Corporations Act 2001* (Cth), the directors are not the ultimate beneficiaries of the company's financial performance – that is the shareholder(s).

This section fundamentally conflicts with the principles of an incorporated entity espoused in the *Corporations Act 2001* (Cth), and unnecessarily and arbitrarily pierces the corporate veil. There are ample and adequate protections in the *Corporations Act 2001* (Cth) for creditors where they

(and this includes the ACT Government) are owed money by a company that is placed into liquidation. Immediately attaching a debt to the directors of a licensed entity is a disproportionate response by the ACT Government.

<p>Section 41: New sections 39A and 39B <i>Construction Occupations (Licensing) Act 2004</i></p> <p><u>39A: Rectification order – licensee or former licensee wound up etc before order made</u></p> <p>(1) This section applies if –</p> <p> (a) the registrar believes on reasonable grounds that –</p> <p> (i) a licensee or former licensee (the entity) has provided a construction service otherwise than in accordance with this Act or an operational Act; and</p> <p> (ii) it may be appropriate to make a rectification order; and</p> <p> (b) the entity is a corporation; and</p> <p> (c) before the registrar makes the order –</p> <p> (i) the entity becomes the subject of a winding-up order; or</p> <p> (ii) a controller or administrator is appointed for the entity; or</p> <p> (iii) the entity is deregistered.</p> <p>(2) The registrar may give each person who was a director of the entity at or after the time the construction service was provided...</p> <p>(3) The registrar may make a rectification order in relation to a person who was a director of the entity at or after the time the construction service was provided if, after considering any submissions made within the 28 days, the registrar is satisfied –</p> <p> (a) the entity contravened this Act or an operational Act; and</p> <p> (b) it is appropriate to make a rectification order in relation to the person.</p>
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<p><u>39B: Rectification order – licensee or former licensee wound up after order made</u></p> <p>(1) This section applies if –</p> <p> (a) the registrar makes a rectification order in relation to a licensee</p>
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- or former licensee (the *entity*); and
- (b) the entity is a corporation; and
- (c) after the registrar makes the order –
 - (i) the entity becomes the subject of a winding-up order; or
 - (ii) a controller or administrator is appointed for the entity; or
 - (iii) the entity is deregistered.
- (2) The order is taken to have been made in relation to each person who was a director of the entity at or after the time the construction service was provided.
- (4) The person must arrange and pay for the thing to be done by someone who
 - (a) is licensed, authorised or qualified to do the thing; or
 - (b) if a licence, authorisation or qualification is not required to do the thing – has appropriate experience and skill to do the thing.

Master Builders strongly objects to the enactment of these sections, as they violate key principles of the *Corporations Act 2001* (Cth). In particular, Master Builders is concerned about the intention of this Bill to conflict and contradict the *Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Act 2017* and the *Corporations Amendment (Stay on Enforcing Certain Rights) Regulations 2018* and the *Corporations Amendment (Stay on Enforcing Certain Rights) Regulations (No. 2) 2018*.

In particular, this section denies a director of the entity at or after the time the construction service was provided with procedural fairness, as any rectification order issued (and upheld on any appeal) will automatically be deemed to have the rectification order made against them personally, without the ability to have this determined by a court of competent jurisdiction. Alternatively, a director would need to potentially reargue the matter through a court of competent jurisdiction if they wanted to clear themselves of the rectification order.

In addition to conflicting with Commonwealth laws, this section will discourage new entrants from entering the building and construction industry as directors, increase compliance and insurance costs for all building entities, and discourage experienced directors from joining the Boards of local building companies, which is valuable for diversity and innovation. It is apparent that the implications of these sections have not been thoughtfully considered by the ACT Government or have been done so without adequate regard and consideration of the impact this will have on the many quality participants in the building and construction industry.

Example

A building is constructed by XYZ Building Pty Ltd and the Certificate of Occupancy is granted in 2014. At the time the building is constructed, XYZ Building Pty Ltd has one director, Sam Smith. In 2018, Alex Adams becomes a director of XYZ Building Pty Ltd. Alex does not have an A-class licence, but is an experienced carpenter who is studying to obtain an A-class licence. Between 2014 and 2018, some minor work was required to be carried out on the building, but no rectification orders were made by the Registrar (or sought by the occupants). In 2019, Sam Smith unexpectedly dies. As a result of Sam's death and due to his prominence in the ACT building and construction industry, XYZ Building Pty Ltd begins to suffer financially and Alex Jones seeks the guidance of a registered liquidator who advises there is no choice but to place the company into liquidation.

Just prior to this occurring, the occupants of the building engage an expert to conduct a thorough examination of the building because they know the six-year statutory warranty period will expire soon. That examination identifies serious defects that ultimately lead to the Registrar issuing a rectification order. The rectification order is made on the day before XYZ Building Pty Ltd is placed into liquidation, therefore new section 39B would apply and Alex would automatically be personally subject to the rectification order. As Alex does not have an A-class licence, Alex is unable to perform the work. Alex is unable to afford to pay for another licensed builder to do the work and is ultimately forced into declaring bankruptcy.

Exposing directors personally to this type of liability is unfounded and without precedence. Comparisons have been drawn to the obligations imposed on persons conducting a business or undertaking in work health and safety legislation; however, there is a clear distinction between building regulations and the obligations imposed on all workers in work health and safety legislation. In work health and safety legislation, any worker can be fined or charged for failing to comply with safety laws as safety is everyone's responsibility. However, this building legislation is imposing a separate and far onerous responsibility on one category of persons only: directors of a licensed building entity. This obligation and personal liability does not extend to directors of developers, subcontractors or other trades.

Existing Enforcement Options

There are a number of existing enforcement options available to the Construction Occupations Registrar (the **Registrar**) pursuant to the *Construction Occupations (Licensing) Act 2004* (the **Licensing Act**), where it is determined that construction services have not been performed or provided in accordance with the *Building Act 2004* (ACT) (the **Building Act**). They are:

- Part 4 of the Licensing Act allows the Registrar to issue a rectification order where it is determined by the Registrar that construction services have not been performed or provided in accordance with the requirements of the Building Act. An entity who is subject to a rectification order is entitled to appeal to the ACT Civil and Administrative Tribunal (**ACAT**).

- Part 5 of the Licensing Act allows the Registrar to suspend a licence on certain grounds, and provides a mechanism for the Registrar to apply to ACAT for an occupational discipline order which may result in conditions being imposed on a licence, training being mandated, a reprimand, or in serious cases, the cancellation of a licence. When seeking an occupational discipline order, the Registrar may apply to have the order extended to the director or nominee of the licensed entity.
- Division 3.7 of the Building Act provides that it is an offence to carry out building work that fails to comply with the requirements outlined in the Building Act, whether knowingly or recklessly. This offence attracts a penalty of 300 penalty units, imprisonment for 3 years or both.

The existing enforcement options that are open to the Registrar are sufficient and appropriate to hold licensed entities, nominees and directors (if applicable) to account in the event that construction services have not been performed or provided in accordance with the Building Act, provided that they are pursued in a timely and consistent manner. These existing options provide adequate protection to the ACT community at large, and importantly, provide procedural fairness to licensed entities, nominees and directors as any action taken by the Registrar is appealable to the ACAT.

A recommendation of the *Building Confidence Report* is that there should be greater accountability for all building industry practitioners, with timelier and more consistent enforcement of building laws. This approach is supported by Master Builders. However, this greater accountability does not mean that the licensed builder (and its directors and/or nominee) should be the only industry participant who is held liable. There must be appropriate and proportionate liability spread across all building industry participants that is dependent on their level of involvement and their culpability, across the building supply chain.

Unintended Consequences

In addition to the concerns raised above, Master Builders has grave concerns for the unintended consequences that the proposed Bill will have on the majority of ACT builders who are good builders who do the right thing. These consequences are likely to have a negative impact on the broader ACT community and economy due to ultimately an increase in the cost of building and construction in the ACT, due to increased compliance costs, increased insurance premiums, and the exit of quality entrants who make a commercial decision that continuing to do business in the ACT is no longer a viable commercial option.

The following consequences must be reviewed and considered by the ACT Government before the Bill can be finalised:

- **Professional Indemnity Insurance Implications**
Whilst many building professionals may maintain professional indemnity insurance, it is uncertain whether the existing insurance policies would cover any claims made against a director personally, or whether the insurance companies will continue to provide professional indemnity insurance for directors personally. The retrospective nature of the rectification clauses outlined above (in that directors can now become personally liable whereas previously they were not), may mean that a director has not notified the

insurance provider of the potential claim at the appropriate time. It is clear the premiums for directors and officer's liability insurance will exponentially increase.

- Home Warranty Insurance / Fidelity Fund Implications

Home warranty insurance and fidelity funds are in existence as last-resort insurance for homeowners when the builder dies, disappears or becomes insolvent and there is either unfinished or defective building work. It is a fundamental principle of these schemes that all necessary steps against the builder are taken before a claim is made. As the ACT Government would have the ability to take action against directors for rectification orders made, and penalties imposed, it is crucial that clarification is included in the legislation about whether this action should be taken before a home warranty insurance or fidelity fund claim is made.

- Regulatory Burden and Compliance

The educational requirements to comply with new section 26C(2)(c) will be a regulatory burden on the licensed builder, and would require a licensed building entity to provide regular and costly educational programs to employees, agents and contractors in order to ensure that they are meeting their obligations under this new section. No information has been provided in the Explanatory Memorandum regarding the cost of the implementation of this legislation. This must be reviewed and considered before any legislation is passed by the Legislative Assembly, to ensure that any cost does not outweigh the need or the benefit, noting that it has been acknowledged that compliance with section 26B is quite high.

- Civil Liability

It is unclear whether the enactment of the proposed Bill will lead to a civil liability being imposed on directors and officers of licensed entities, that would allow homeowners, owners corporations or commercial building owners to bring civil action against directors and officers in circumstances where a rectification order has not been issued by the Registrar.

- Market Inconsistency

The obligations and liability imposed on builders if this legislation is enacted will create a two-speed market which will dramatically increase the cost of construction in the ACT due to red-tape compliance requirements and insurance costs, reduce the quality operators in the ACT who work across jurisdictions and make a commercial decision that they no longer wish to associate with the personal risk that working in the ACT brings, and will create a segregated building site where trade contractors and subcontractors may feel they are no longer responsible for the quality of the workmanship and work they produce because the builder and its directors are ultimately responsible. Because all trade contractors and subcontractors will be all too aware of this personal responsibility, it may be used as an unfortunate bargaining tool in contractual negotiations.

- Risk and New Entrants

Operating as a licensed builder in the ACT, a jurisdiction that does not implement mandatory CPD training and does not have trade contractor licensing, will be deemed as too high a commercial and personal risk for directors of quality building entities who are

either currently operating in the ACT, or who were considering entering the ACT market. Further, quality operators in the ACT will no longer be innovative and take risks (which often result in higher quality and more innovative, dynamic building quality outcomes), because the consequences of failing will be catastrophic.

Penalties are Unfair and Disproportionate

The penalties proposed in this Bill implement criminal provisions as a default way to allegedly produce better policy outcomes and drive behavioural change; this is a fallacy and bad policy. This is also counter-intuitive and in direct contrast to the norms of good government and a civil society, and fundamentally contradicts the efforts in other fields of the ACT Government policy to actively decriminalize behaviour, even if it is not desirable, such as marijuana consumption.

It is strongly recommended that any criminal liability attaching to executive officers (as proposed in the new section 26B) be removed from the Bill. It is possible for monetary penalties to be imposed without the need for criminal liability, and this should be considered by the ACT Government. Consideration also should be given to the timeframe after which criminal liability would apply, noting that twenty-four (24) hours may not be an adequate timeframe for an individual. Further, as outlined above, any requirement to report must only extend to directors (as defined in the *Corporations Act 2001* (Cth)), and not encompass the ambiguous term of executive officers.

Retrospective application

The proposed Bill will place a current liability on directors for past occurrences which is manifestly inconsistent with general legal principles.

Section 111C of the *Queensland Building and Construction Commission Act 1991* (QLD), on which the proposed section 126B of the *Construction Occupations (Licensing) Act 2004* (ACT) has been modelled, was introduced in 1999 in order to replace the Deeds of Guarantee and Indemnity that were required by the QBCC from all directors of a company that was licensed. This is in stark contrast to the current environment in the ACT, where no such requirement exists and where the retrospective application of the new proposed section 126B is unclear. As outlined above, sections of legislation from other jurisdictions should not be implemented in isolation; the QBCC regime is all-encompassing, and for example, imposes minimum financial requirements on licensed builders.

Lack of Consultation

Finally, a word about consultation and engagement.

The unprecedented lack of consultation during the draft of this Bill is appalling.

While the rest of Australia is working hard to reform various State and Territory building regulatory systems, it is concerning that the ACT Minister has chosen to act unilaterally, without reference to the expert report prepared by Bronwyn Weir and Peter Shergold (the “Building Confident Report”), and without drawing upon the collective experience of the local building industry.

It is concerning that the ACT Minister has cancelled regular meetings of the Building Regulatory Advisory Committee (BRAC), an industry reference group specifically established to advise the Minister on building regulatory reform, during the drafting of this Bill.

This approach will lead to substandard policy results.

This approach will leave a legacy of regulatory burden, uncertainty and complexity for the building industry and the wider community for years to come.

Master Builders believes the ACT Government should strive to develop and implement building quality reform to the same quality standards, that it expects of ACT builders and buildings. In order to achieve this, the ACT Government must engage in further consultation with the building and construction industry.

A minimum of three (3) months is recommended to allow industry and legal experts to review the laws and address the issues raised in this, and other, submissions to the Legislative Assembly Committee.

Conclusion

The ACT Government should delay the implementation of these laws. There is currently an *Inquiry into Building Quality* underway that is yet to report, and despite a commitment at the Building Minister's Forum, the Minister for Building Quality Improvement is yet to release a detailed implementation plan for the ACT of how the recommendations from the Building Confidence Report will be enacted. This must be a priority for the ACT Government, rather than announcing laws without any industry or stakeholder consultation.

I may be contacted on (02) 6175 5944 if you would like to discuss our submission.

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