LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

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

Submission Number: 10

Date Authorised for Publication: 29 February 2024

Response to the Property Developers Bill 2023

The Community Clubs Industry Response to the Property Developers Bill 2023

Prepared by CLUBSACT

PREFACE

"(6) Facilitate planning and other processes to allow clubs to diversify to other revenue-generating streams, particularly development of available land for social housing and land supply purposes, that are supported by the community"

Appendix 1: E (6) The Parliamentary and Governing Agreement – 10th Legislative Assembly Australian Capital Territory

INTRODUCTION

ClubsACT welcomes the opportunity to provide comment on behalf of the ACT Not-for-Profit Community Clubs sector to the Property Developers Bill 2023.

ClubsACT was established in 1974 and is an industry association recognised by the ACT Government and its agencies as the principal representative for the ACT Club movement. The main objectives for ClubsACT are to be an effective advocate for ACT clubs, and to promote policies which maintain a dynamic and prosperous club sector, as well as enhancing the club experience for the broader community.

Canberra clubs play a vital part in the Canberra community and are seen to contribute substantially to the Canberra economy each year. Not only do clubs contribute financially, they are also contributors to many facets of life in Canberra. This includes but is not limited to contributions to community sport, maintenance of community infrastructure, support provided to local employment and form a key provider of entertainment and hospitality to Canberrans.

As of September 2022, there were 47 licenced clubs operating across Canberra. Based on a survey conducted by RSM on behalf of ClubsACT, which captured aggregate membership numbers of 21 responding clubs, their current total membership is over 505,000 members. The larger clubs who responded possess membership bases of between 40,000 to 83,000 members. These figures suggest that each adult in Canberra is likely to be a member of at least one club.

ClubsACT represents small, medium and large Member Clubs including:

ACT Rugby Union Club Turner
Austrian Australian Club
Ainslie Football and Social Club
Gungahlin Lakes Golf Club
Australian-Croatia Club
Belconnen Bowling Club
Canberra Services Club
Canberra Irish Club
Canberra Racing Club
Belconnen Soccer Club

Commonwealth Club
Raiders Gungahlin
Raiders Belconnen
Raiders Weston
Southern Cross Club Tuggeranong
Southern Cross Club Jamison
Southern Cross Club Woden
Southern Cross Yacht Club
Canberra Deakin Football Club
Eastlake Football Club Griffith
Eastlake Calwell
Eastlake Gungahlin
Federal Golf Club
Harmonie German Club
Mawson Club
Murrumbidgee Country Club
National Press Club of Australia
Royal Canberra Golf Club
Spanish Australian Club of Canberra
Vikings Erindale
Vikings Lanyon
Vikings Chisholm
Vikings Town Centre
Yowani Country Club

ClubsACT has also been working in collaboration with the Labor Club Group (representing 4 venues across the ACT) in the preparation of this response to the ACT Government.

At the outset it is important for this submission to stress that we have very grave concerns over several elements of the Bill that we believe inherently contradict the espoused provisions of Appendix 1: E (6) The Parliamentary and Governing Agreement – 10th Legislative Assembly Australian Capital Territory and the aspirations of the ACT Government as identified in the Preface to this submission.

We also believe that the Strategy Goals and Objectives of the ACT Housing Strategy will be fundamentally undermined by many elements of the Bill as currently drafted.

The ACT Government Strategy Vision outlines the following:

1. *An Equitable, Diverse and Sustainable Supply of Housing for the ACT Community*
    - *Provide land and housing development opportunities to meet demand.*
    - *Set a 15% target for social and affordable housing.*
    - *Maintain a healthy land and housing development pipeline.*
    - *Provide a diverse mix of housing types and choice.*
    - *Facilitate innovative design and delivery mechanisms.*
    - *Encourage well designed, environmentally sustainable and accessible housing.*

2. *Reducing homelessness*

    - *Build strong ACT Government and community sector partnerships to effectively address homelessness in the ACT.*
    - *Intervene early and reduce the intergenerational impacts of homelessness.*
    - *Address gaps in our services system and respond to new and emerging groups vulnerable to homelessness.*
    - *Improve pathways out of homelessness.*
    - *Develop a strong and sustainable homelessness services sector supported to enhance workforce and organisational capability.*
    - *Establish an integrated and coordinated human services system across the ACT Government.*

3. *Strengthening Social Housing Assistance*

    - *Grow and renew social housing to better meet demand.*
    - *Build a range of housing options that are designed to better meet the diverse and contemporary tenant needs.*
    - *Develop a tenancy service that focuses on client outcomes and responds to individual needs.*
    - *Provide a better customer experience through a modern and digital service platform for current and future tenants.*

4. *Increasing Affordable Rental Housing*

    - *Grow and diversify the community housing sector.*
    - *Grow the supply of affordable private rental properties.*
    - *Strengthen rights and protections for tenants.*
    - *Provide targeted advice and support to tenants and landlords.*
    - *Target programs to increase supply of affordable housing for vulnerable and disadvantaged households.*

5. *Increasing Affordable Home Ownership*

    - *Provide more affordable homes for purchase.*
    - *Increase home ownership through alternative finance and occupancy models.*

In term of this submission, we have refrained from deep diving into the significant complexities across the details of the proposed legislation and the new licensing requirements but have attempted to restrict to several key concerns that most specifically apply to our members and associated not-for-profit providers interests.

In broader general terms we share similar concerns as we understand have been raised by the property council as to the complexity of the legislation and the apparent haste to pass this legislation.

Of most specific concern to our industry is:

- **The retrospectivity of the proposed legislation;**
- **The Defect Rectification Regime;**
- **The proposed exposure of our members to the regime which has been designed to address failures in the construction market historically driven by commercial and for-profit developers and builders;**
- **The proposed individual exposure of directors and board members across our membership to personal liability for rectification costs; and,**
- **The prospective 10- year exposure that may apply individually to them under the provisions of this legislation.**

THE PROPOSED NEW REGIME

In terms of this submission, the comments we make in the submission reflect the interests of the ACT Licensed Club Industry, associated Social and Community House providers and other associated not-for-profit entities. We do not include in the scope of this submission, nor do we seek to represent, the views or interests of Commercial Housing developers.

In broad terms we think it a severe failure that there is no separate consideration and treatment of not-for-profit entities as compared with Commercial for-profit operators in the Bill. ClubsACT also considers the Bill directly conflicts in this regard with other ACT Government policy objectives.

The new licencing regime will have an incredibly broad scope, and will essentially touch every residential development from its earliest stages to make it virtually mandatory for residential developers to obtain a licence.

In terms of its application, it would obviously expose our members who have been seeking to achieve the stated objectives of the ACT Government Club Diversification agenda and the objectives of the ACT Government Housing strategy. This is a real concern where our members already have, or where they otherwise might have, considered an interest in potential residential developments.

While builds and renovations to residences are an obvious inclusion, the fact developers will need a license to subdivide or consolidate property, or apply to vary a lease, places a huge burden on our members.

The licensing requirements are spread across four pieces of legislation including the proposed Property Developers Act, meaning that many inexperienced clubs and not-for-profit entities will have a hard time understanding how to be compliant to this new ACT regime. The implications for our members and other not-for-profit providers who have less sophisticated ongoing exposure to ACT requirements in this area will be significant.

With regards to developer licencing, the complexity of the proposed framework seems inherently fraught given the requirements will manifest across different ACT and Federal laws, including the Building Act (2004), the Planning Act (2023), the Construction Occupations Licensing Act (2004) and at least three separate regulators including the Commonwealth under the Corporations Act (2001) the ACT Construction Occupations Registrar, the Administrator of Residential Building Disputes and potentially the Chief Planner. This complexity only adding to an inherent disincentive for our members to expose themselves to future residential developments.

THE DEFECT RECTIFICATION SCHEME

At the very core of our concerns about the Bill is the details surrounding the Defect Rectification Scheme. The concerns start with the definitions in respect of the scheme. The definition of a property Developer institutes broad interpretation as to this definition. It would be normal to anticipate that anyone who contracts and facilitates residential building work or maybe a land owner would normally be defined as a property developer. Under the proposed Rectification Order scheme anyone who contracts, arranges, facilitates or otherwise causes (directly or indirectly) residential building work including a landowner principal builders or units plan developers will fall under the scope of the definition.

There is little doubt as it stands that ClubsACT members who have or do venture into residential developments consistent with the Club Diversification provisions of the Parliamentary and Governing Agreement of the ACT Government and the objectives of the ACT Housing (Policy as identified above) will fall under the developer definitions of the Bill.

Whilst it is proposed that regulations can include or exclude certain developers from the scheme, we believe that this in insufficient comfort to our industry and other not-for-profit operators. We believe the Bill needs amendment to exclude the Club industry and other not-for-profit Social and affordable housing organisations from it more onerous provisions as identified in this submission.

The scheme also provides that in general terms, the Registrar can make a Rectification Order within a 10-year period. The 10-year period means 10 years, starting on the latest date of when the defective building works ended, and when the certificate of occupancy was issued. A Rectification Order can require a defect to be resolved by a developer within as little as one month.

Again, we stress that fact that the proposed 10-year period will become a major disincentive for the volunteer-based boards and management committees of our sector to expose themselves and future members of these Boards and management committees to residential developments. This risk exposure directly intersects with both the diversification objectives and the Housing strategy of the ACT Government.

The scheme has been crafted with the objective of addressing a significant and real issue in the commercial for-profit residential development market but its unintended consequences will most particularly impact on the not-for-profit sectors. This is inherently contradictory to other policy priorities and objectives of government in the housing sector.

Another controversial element of the scheme and a highly irregular one is that Rectification Orders can be issued retrospectively. This is highly unusual for legislation and imposes an untenable imposition on not-for-profit entities who have acted in good faith and with due diligence. The proposed scheme is designed so that it can capture developers for work that was done before the Bill was conceived, let alone drafted.

We also see potential issues and a lawyers picnic evolving from the proposal that Rectification Orders can apply to multiple parties.

DIRECTORS LIABILITY

Perhaps our gravest concern relates specifically to the proposed Directors liability provisions. Under the provisions outlined in the Bill, the Registrar can hold directors of the developer personally liable to rectify defects and Non-compliance would result in a personal fine up to $320,000.

Directors can be made personally liable for rectification if the Registrar intends to issue a Rectification Order to a corporate property developer; the developer is deregistered; subject to a winding-up order; in administration; receivership or liquidation; or the Registrar has considered whether a latent defects insurance policy covers the defect.

It is therefore not unreasonable to anticipate that third parties will look to sue developers as early, and for as much value, as possible. This is a foreseeable consequence since either the company will be exposed, or its directors will if these lawsuits force it into administration or winding up for example. Some serious risks arise for clubs and other not-for-profit entities from the possibility of personal liability being attached to formal and de facto directors (someone who controls the entity).

The scheme then creates a perfect storm of severe risk to our members and other associated not-for-profit entities through provisions that provide:

1. That a director could be held liable for work that was completed up to 10 years ago;
2. That a director could be held liable for work that was completed before they became a director of the developer; and
3. That developers and their directors are especially vulnerable to third-party lawsuits

The provisions of section 55 of the draft bill entitle the Territory to 'pierce the corporate veil' in circumstances where the 'developer' and its directors have not engaged in any form of misconduct. The current draft provides that the mere existence of the circumstances of a serious defect and the insolvency of the developer are sufficient to entitle the Territory to make an order against the directors.

The ability to make directors personally liable for company actions 'piercing the corporate veil' is rarely used by courts or included in legislation and, it is a key principle in Australian corporations law that a corporation is a separate legal entity from its directors and shareholders.

To deny a director the protection of the corporate limitation of liability where they have engaged appropriately qualified consultants and a licensed builder under arm's length contracts is unprecedented and lacks justification. The only justification appears to be the presumption that the developer, and by extension, the director has profited financially from the project and that therefore must be held responsible for defects and deficiencies of the licensed builder and consultants retained by the developer.

This scant justification does not exist where the developer is a Not-for-profit Licensed Club, Community Housing Provider or other not-for-profit entity that has engaged in residential development activity. The boards and management committees of these entities do not get any financial benefit from providing their time and, where the entity is a charity, cannot by law benefit from the proceeds of a development that the charity has engaged in.

The potential for incurring substantial liability for defects in buildings that are the responsibility of others, places a chilling effect on current and future directors of a Club, Community Housing Provider or other not-for-profit entity that has engaged in development activity. The retrospective nature of the liability is a substantial concern.

Whilst it is open to the Territory to disapply the application of section 55 to Clubs, not-for-profits and Community Housing Providers in the as yet unseen regulations, such protection can be undone by ministerial amendment of the regulations. If the Territory wishes to exclude the application of section 55 to not for profits and Community Housing Providers then such protection should be enshrined in the Act and not the regulations.

These provisions are of real and significant concern to our members and other not-for-profit entities. The scheme creates a framework where resigned directors, receivers and administrators can fall under the broad 'de facto director' banner and be liable.

Given that resigning will likely still not protect directors from liability, we are concerned these provisions have a real risk of creating an environment where volunteer Directors and Board members may see bankruptcy become a strategic reality.

Should these provisions remain unchanged we see a very real threat that directors will rethink their positions and it will either see a resistance by our members to expose themselves to residential developments or it may in a very real way deter people from volunteering to become directors of our members and other exposed not-for-profit entities.

Most significantly with all the new risk exposures created by this scheme ClubsACT has a very real concern that the legislation will either significantly slow or completely stonewall the active participation of our members in seeking to meet the objectives of the Diversification policy of Government or the objectives of the ACT Government's Housing Strategy at a time when the Government has committed to building 100,000 new dwellings by 2050.

CLUBS AND DIVERSIFICATION AGENDA

Consistent with the terms of the Parliamentary and Government Agreement as outlined above, a significant number of ClubsACT members have either been involved in or are currently in the development stages of a number of social and Affordable housing initiatives across the ACT. In some cases, these are joint ventures with Social and Affordable housing providers and others are stand-alone residential developments undertaken by the Clubs.

Clubs and Club Groups such as the Canberra Southern Cross Club, the Canberra Raiders Group, the Eastlake group and Thoroughbred Park represent some of the industry participants who have embraced in good faith the objective of increasing the residential housing stock of the ACT.

It is a concern of ClubsACT that current provisions of this Bill may have a significant impact on the progression of the Club Industries involvement in this area and the impact negatively on the objectives of the ACT Government in regards to the Diversification agenda and its housing strategy.

It is important to understand that the community clubs in Canberra are not-for-profit entities and the directors and board members of these clubs are volunteers and in almost all cases receive no remuneration or compensation for their involvement.

ClubsACT is significantly concerned about the scope of the proposed legislation and its direct impact on the directors and board members of our members and the not-for-profit housing providers (such as Havelock Housing Limited for example).

The retrospective and 10-year Prospective application of potential liabilities to the entities and their directors/board members as currently contained in the Bill will become a significant issue for all those organisations affected and will become a significant impediment to the entities continuing their exposure to the development of residential properties.

CONCLUSION

In conclusion, ClubsACT cannot stress enough that we see very real conflict between this Bill as proposed and the Parliamentary and Governing agreement of the ACT Legislative Assembly and the ACT Government Housing Strategy objectives.

By all appearance it would seem that the Bill has been conceived in a vacuum and ignorant of the other policy objectives of Government (that have been fully supported in good faith by the club industry and the not-for-profit Housing sector).

In the documentation associated with the Bill and made available for the consultation process, we have not been able to find any Regulatory Impact Statement associated with the Bill that would seemingly address any of the concerns that we have outlined in this submission. We would also request the release of the Regulatory Impact Statement as would normally be made available in a process such as this.

RECOMMENDATIONS

In summary ClubsACT on behalf of the not-for-profit Club sector we represent and other associated not-for-profit entities recommends:

1. ***The Bill should be re-opened for further consultation and consideration and any proposal that the legislation be passed and in place in any haste be re-considered as a matter of urgency;***
2. ***The Bill be amended to exclude the Club industry and other not-for-profit housing providers and their boards and management committees from the scope of the liabilities outlined in the Rectification Scheme;***
3. ***The Scheme exclude individual directors and management committee members of Clubs and other not-for-profit entities from the personal liabilities currently proposed by the Bill;***
4. ***That the retrospective provisions of the bill exclude clubs and the not-for profit sector from its scope; and,***
5. ***That the 10-year prospective exposure of Clubs and the not-for-profit sector in the Rectification Scheme be removed.***