



LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON ECONOMIC DEVELOPMENT AND TOURISM
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Submission Cover Sheet

Inquiry into Building Quality in the ACT

Submission Number: 71

Date Authorised for Publication: 5 December 2018



HOUSING INDUSTRY ASSOCIATION



Housing Australians



Submission to the Standing Committee on Economic Development and Tourism

Inquiry into the Quality of Recently Constructed Buildings in the ACT

28 November 2018



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ABOUT THE HOUSING INDUSTRY ASSOCIATION

The Housing Industry Association (HIA) is Australia's 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 subcontractors 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.

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 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 stationary, industry awards for excellence, and member only discounts on goods and services.

1. GENERAL COMMENTS

HIA takes this opportunity to respond to the *Inquiry into the Quality of Recently Constructed Buildings in the ACT*, being conducted by the Standing Committee on Economic Development and Tourism.

HIA agrees that when entering into a building contract and/or purchasing a property 'off the plan' the purchaser should reasonably expect that the final product, is built in accordance with, and meets the requirements set out in the ACT building legislation. Further, that the builder and those associated with the building works, for example a certifier and licensed trades, are accountable for the building works in accordance with any applicable statutory warranty provisions.

HIA is concerned that the Discussion Paper makes a number of claims that are difficult to substantiate with regards to the issue of building quality, which have the potential to alarm, rather than contribute to a meaningful debate.

The publication of the figure of \$114 million for the cost of rectification works for dwellings completed in 2016-17, from HIA's perspective is misleading – as it does not specify the type of construction work, and is an extrapolation of data not related to the ACT. Equally, the claim of 10% of all dwellings approved being subject to a complaint conflates planning and construction issues, and likely includes complaints that were disproven or vexatious.

Likewise, HIA does not agree with the statement that 'the buyer is always at a disadvantage' with respect to the purchase of a home. The majority of dwellings built in Australia are built by small and medium family businesses, with the largest 100 builders accounting for only 34% of new homes¹ and the dominance of small businesses in the industry makes disputations an equally difficult time for all parties concerned. There are well documented cases where home buyers have been disappointed (and worse) in the final result of their home building experience, but this is the exception rather than the norm, with thousands of Canberran's each year experiencing the joy of taking possession of their new home.

It is problematic that the Terms of Reference and the subsequent Discussion Paper combine issues of building quality and contractual matters, with matters to do with the ACT's building administrative framework and certification regimes. These areas are quite distinct and their conflation is unhelpful. HIA considers that they require separate consideration.

During 2015/16 a building regulatory reform process was commenced by the ACT Government, which sought to respond to matters raised with respect to the ACT building and construction industry. As a result of the reforms changes were made across various aspects of the industry, although it is acknowledged that we are now midway through 2018 and few of the 43 recommendations made in this review have been implemented.

It is also noted that concurrent to this review is a national review into the effectiveness of the building administrative system across Australia as it relates to the application of the National Construction Code (NCC).

A number of the matters identified in the Terms of Reference consider those matters. It is HIA's view that a cautious approach must be taken in light of the actions currently being taken Ministers who are progressing some of those measures. Particular measures that relate to quality and adequacy of plans and specifications and accountability of those preparing them are under active consideration. It would seem pre-emptive to undertake further review and reform within this context.

¹ HIA Housing 100 2016/17



2. CERTIFICATION REGIME

2.1 CERTIFICATION

Under the current building administrative framework the construction of a building has 4 key stages, those being:

1. Detailed Design
2. Design Approval
3. Construction, including stage inspections by certifiers
4. Completion & Occupation Approval

For each of the above stages it is considered there are some improvements that can be made to support greater compliance with the ACT Building Act and in turn the NCC and relevant Australian Standards.

In particular, HIA considers that the detailed **design and approval stage** presents a number of opportunities where the current system could benefit from enhancements. If applied, these would have a substantial flow on effect to the improved compliance and enforcement and we consider could address some of the more relevant issues identified in the Discussion Paper.

1. *Design Stage*

Substantial improvements can be made by addressing the quality of the plans being prepared and the accountability of those people preparing the plans and specifications. Currently the accuracy of the plans in many cases cannot be relied upon to verify that the design complies with the ACT Building Act and in turn the NCC and relevant Australian Standards.

For builders and subcontractors this becomes problematic, as they should have confidence that if they construct the building in accordance with the approved plans it will result in a building that complies with the relevant requirements that applies to it.

In our experience design details on plans and specifications currently are significantly lacking. In many instances the plans and specifications focus more on aesthetics as opposed to design detailing of complex construction elements.

The people charged with the preparation of the plans and specifications, including any specialists engaged to design specific elements of a building, should have the fundamental knowledge to ensure compliance of the building's design.

Often the notion of compliance focusses on those responsible for constructing specific components of the building. However, the first step in the process will always be focused on the people responsible for the design of buildings, and the subsequent verification of that design against the ACT Building legislation, the NCC and other relevant standards.

The people involved in the design will include architects, building designers, engineers (fire, structural, mechanical, acoustic, etc.), energy assessors and access consultants.

For the person engaging these professionals, and those assessing and approving their designs, they must be able to rely with an appropriate level of confidence that the individuals are adequately skilled and experienced to produce designs that comply with the technical requirements that apply to it. As such the building administration framework should make these design professionals accountable for their design and it's attestation to compliance.

2. *Design Approval (Plan Check)*

The next key step in the compliance and enforcement system is the formal approval of the design documentation to allow the issuing of a building approval. This part of the process is often referred to as 'plan check'. For the building certifier, in many respects the plan check has become heavily reliant on reports and documentation from others to confirm that specific elements meet either the NCC or other relevant design standards.



The ACT Building legislation rightly gives discretion to the certifier as to who they rely upon and what details should be obtained at this point in the process. As outlined above, this approach recognises the variation in buildings and complexity in design that needs to be addressed in an approval regime.

However, there is scope for a more guided approach to be taken through the use of standard arrangements or checklists.

This could be created by ACT Government, to provide clarity on the items that should be checked as part of plan check. In HIA's view this could fundamentally improve the quality of building applications to ensure they meet the relevant requirements, NCC, standards, etc. and create transparency and clarity of expectations for the parties involved in the design and approval process.

This approach could be provided to assist all design professionals, builders, home owners, and most importantly, building surveyors, so that everyone is aware of the obligations and requirements in authorising a set of building design plans.

It is also suggested that there is a need for greater certainty regarding the documents submitted with a building application, it is also important that approval authorities do not simply fall into an arrangement that requests an ever growing list of additional supporting documentation and reports, in addition to the plans and specifications. Options such as a Queensland form 15 and 16 arrangements at least make it clear to the building owner what is expected and create a consistency in the options used by the building certifier and may warrant greater consideration as an outcome of this review.

The other issue that warrants consideration is the meaning and interpretation of the granting of a building approval. In preparing plans and supporting documentation, it should be possible to provide an extremely high level of certainty as to compliance with the NCC. The designs either do, or do not, comply. The granting of a building approval is taken by the market place as verification of this fact. HIA supports this interpretation of the purpose of a building approval.

3. Construction Stage

The construction of a building is a function of both the design and the approval of the building, which may include conditions and direction for the conduct of the building work and critical stage inspection of work. In addition to the approval(s) for building work, the construction stage brings into play other parties who are required to hold licenses or qualifications to complete particular activities.

In a residential situation, where licensing and home warranty are applied, the builder has overarching responsibility for the project as a whole, including the work of all trade contractors. The role encompasses NCC compliance, adherence to the conditions of approval and managing the workplace to be safe.

As part of the construction stage, the building certifier is required to inspect various stages of the building works, to ensure that the work is being undertaken in accordance with the plans and specifications with respect to completion of:

- excavation, placement of formwork and placement of steel reinforcing for the footings before concrete is poured;
- structural frame work before the placement of internal linings;
- any reinforced concrete member before any concrete for the member is poured (not applicable to Classes 1 or 10); Where a second storey, before the slab is poured; and,
- building work approved in the relevant building approval.

Other stages may be inspected in accordance with an agreement between the builder, client and the certifier. The onus is on the builder to advise the certifier when each stage of the building works, where a mandatory inspection is required, is ready for inspection.

HIA has previously recommended that guidance material be developed and made available to industry with regard to the building certification processes to assist all parties involved in the construction works to be aware of the critical stage inspections but to also ensure transparency of this process.

Further guidance/warning should also be provided to consumers through appropriate channels with respect to occupying a dwelling where a certificate of occupancy has not yet been issued.

4. Completion and Occupational Approval

Once the work has been completed and the certifier is satisfied that the works have been completed in accordance with the approved plans, a certificate of completion will then be issued.

Currently there is significant confusion around what this certificate means and what is expected of the final approval stage. The *occupation certificate* or *certificate of completion* is not a certificate indicating that each and every element in the building has been checked and that they comply with the NCC and other relevant regulations.

Rather, this certificate is effectively a certificate of likely compliance stating that the building is fit for occupation. What this means is that the approval authority is indicating to the owner, the builder and to the community, that based on the plans that were approved, and the subsequent construction work that has been undertaken by appropriately qualified professionals, they consider the building is safe, the person responsible for the building work has completed fixed milestones and actions, and that on this basis it is deemed that the building complies with these relevant requirements.

The building may have additionally been subjected to notification/verification or inspection stages for key building elements i.e. structural, fire safety, waterproofing, etc. This is a fundamental concept that has existed in building regulation for many decades in Australia. The system cannot be expected, nor is it realistic or practical, to require one person, or one authority, to 'sign off' that each and every element of the building meets every single requirement that applied to it.

In light of recent events, and the trigger for this review, it seems apparent that greater consideration needs to be given as to what 'final approval' and the issuing of a certificate of completion should rightly attest to.

HIA supports the current position that this 'sign off' cannot practically verify all elements of the building work and that the process must seek to give an appropriate level of certainty, based on a series of preceding events (i.e. design, plan check and construction) being appropriately managed, combined with the final authorisation itself verifying that clearly identified outcomes have been achieved. Again, this may be in the form of a checklist or guideline that sets out a consistent approach to issuing an occupancy approval.

Many building certifiers have developed their own version of this approach, but this creates great variability and only adds to the confusion regarding what a final sign off should entail. The provision of clear guidance by government authorities could greatly assist this outcome.

2.2 AUDITS & CONFLICT OF INTEREST

As mentioned in the General Comments section, concurrent to this review has been a national review the effectiveness of the building administrative system across Australia. The matters of proactive audits by building approval authorities and independence/integrity of building certifiers were 2 specific matters discussed.

In terms of proactive auditing - particularly for commercial buildings and high occupancy buildings - it suggests that state building authorities should undertake additional risk based/proactive audits of those types of buildings looking at safety critical items.

HIA is not opposed to the recommendations in the report of this matter and believe this arrangement already forms part of the ACT. However, any such audit should be pragmatic and where items of non-compliance are found that the builder is provided with opportunity in the first instance to rectify as opposed to penalties or fines being issued.

In terms of independence/integrity of building certifiers, the recommendation on this matter looked at the development of a Code of Conduct for building certifiers, with legislative status which would outline principles to mitigate conflicts of interest and increase transparency for the roles and responsibilities of private building certifiers.



HIA considers this a sensible recommendation that the ACT Government should give further consideration to, and notes that Building Ministers at their August meeting subsequently supported this recommendation being progressed.

2. CONTRACTUAL REQUIREMENTS COVERING BUILDING QUALITY

Currently section 88 of the *Building Act 2004* provides a number of implied warranties in relation to workmanship. These provide homeowners with a surety that the building work will be done skilfully, using materials that are 'fit for purpose' and in accordance with the plans.

HIA does not believe there is any basis on which to disturb the current arrangement. There is certainly no guarantee that including further mandatory terms/implied warranties as to building quality will lead to any measureable improvements.

Matters relating to building quality are complex, for example while the principal contractor has an obligation to the home owner to provide statutory warranties the contract between the principal and the subcontractor is a commercial arrangement to which the home owner is not a party.

As the statutory warranties are contractual in nature, subcontractors, who are strangers to the contract between the builder and the client, traditionally had no legal liability. Most domestic building contracts make it clear that the principal provides the statutory warranties, if a contract fails to state this the warranties are implied into the contract by legislation in any event.

While HIA considers that the builder should be the person liable to the consumer under statutory warranties, and the extent of subcontractors' liability should be a matter between the builder and subcontractor, the consumer has no access to the contract between the builder and the subcontractor and no means of knowing whether the work performed by the subcontractor was in accordance with that contract.

Further, particular difficulties arise where, under the contract, part of the work and/or materials are the responsibility of the owner and not the builder. The builder will not warrant, and the policy of insurance will not cover, work that is not work under the regulated contract, yet subsequent purchasers at present have no way of knowing there is unwarranted building work on the property.

For example, where the building contract states that the owner will supply their own windows, and the windows prove defective and allow unobserved water entry, a subsequent purchaser may be left with no warranty cover for a major defect in the premises. They may have a tort claim against the owner under the principles in *Bryan v Maloney* but not against the builder. Homeowner should be required to mitigate their loss under statutory warranties.

HIA considers that this is essentially a matter of consumer advice and education, but if a builder provided an owner with a written maintenance schedule for their home and the homeowner failed to follow that schedule, the builder should have a statutory defence against any warranty claim that arose due to the owner's failure to follow the schedule.

HIA is generally supportive of ways in which certainty can be provided for the industry. In this vein, consideration may be given to the use of a policy outlining NSW Fair Trading's approach to the rectification of building work. As has seemingly been the case in Queensland, further guidance in this area has the potential to help the efficient and effective resolution of disputes.

3. INDUSTRY SKILLS & PROFESSIONAL DEVELOPMENT

3.1 BREADTH OF OCCUPATIONAL LICENSING IN THE ACT

The licensing of residential building work 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.



Although there are benefits in licensing, licensing also constrains the market's ability to provide services. By restricting entry, license holders maintain an entrenched market position thus reducing competition. In this regard, the need for licensing of any particular trade activity should be assessed against the risk involved. If licensing is justified according to risk, an important task is to identify those risks that require regulation.

HIA does not support the licensing of trade subcontractors who work exclusively for builders/principal contractors. Issues of quality or contractual disputes should rightfully be settled as a commercial matter through the appropriate channels. An exception to this position is where trade subcontractors undertakes high risk work, such as electrical, plumbing and gas-fitting work.

HIA supports licensing of contractors who undertake work directly for the private consumer, subject to a monetary threshold. The regulation of these trades will place some burden with regard to the quality and suitability of their products and workmanship but to also allow for some recourse in the event where a claim for poor workmanship causes damage or loss to the home owner as a result. The monetary threshold should align with the home warranty insurance threshold for residential building work, being \$12,000 in the ACT.

Where there is a high monetary threshold for licensing – or limitation on the occupations that are required to be licensed - a greater range of building work will not require a licence. This might have the consequence of increasing competition amongst non-licensed practitioners at the lower-end of the market, which in turn could have potential to expose consumers to increased risk from unlicensed builders. However, removing compliance costs for the lower end of the market will result in lower costs, greater choice for consumers and more targeted regulation where it matters the most.

Despite the existence of a national training framework, the number of years of experience required and the level of training qualifications required to be licensed (for builders) varies from region to region. Hence there isn't uniformity in the levels and skills and knowledge provided by different courses, which range from diploma and degree courses to Certificate IVs in Building.

Likewise, there can be a significant variation in the experience levels of recently licensed builders - in the case of the ACT there is no requirement for a Certificate III. With this in mind, HIA does have concern about the standard of some new licensees.

There have been changes to the mandatory qualification across Classes A, B and C builder's licenses including the introduction of a mandatory test for all new Class C applicants as well as the proposal for all builder licence applicants being required to pass an exam from 2019. The testing of applicant's has provided some alarming figures regarding the competency of Class C applicants. ACT Government have advised that approximately 48% of applicants will fail their first attempt of the exam with a further 44% failing their second and final attempt.

HIA recommends that the impact of these recent changes be assessed prior to any further measures being taken in relation to licencing.

3.2 ONGOING SKILLS AND EDUCATION

HIA supports an industry culture of continuous improvement that promotes quality in construction of the built form, in compliance, professionalism and customer support.

There are currently a plethora of courses and training opportunities (both short workshops and national recognised training) that are available to industry practitioners in the ACT. These are delivered by both industry organisations (such as HIA) and private providers.

In recent years, the issue of continuing professional development (CPD) for building practitioners, both builders and trade contractors, has been a matter of discussion by several states. Currently two mandatory schemes are in operation in NSW and Tasmania for builders. More recently Victoria and Queensland have announced an intention to introduce mandatory requirements.



In 2005 the NSW government introduced mandatory CPD requirements for builders and swimming pool builders. As a result of many builders that are based in the ACT also holding NSW licensees, there are a number practitioners in the Territory that record CPD points when they undertake an eligible activity.

The NSW requirements have changed over time, and have been the subject to review with a recent undertaking - by the NSW Independent Pricing and Regulatory Tribunal² - recommending that the scheme be disbanded.

HIA supports this recommendation, and contends that there is no evidence that mandatory CPD raises on-site building standards or delivers a significant net public benefit with those states operating mandatory CPD schemes still encountering a similar level of building disputes and defects.

The ACT Construction Occupations Licensing Registrar does have powers under the Construction Occupations (Licensing) Act 2004 (ACT) to be able to direct a licence holder to undertake targeted training in an area or to request a skills assessment where there have been no projects undertaken in the previous licensing period.

HIA does not oppose requiring industry license holders to undertake mandatory professional development where it is imposed by the licensing authority as an alternative for those who would otherwise have their builder licence cancelled or suspended as a result of disciplinary proceedings.

Licence eligibility should be based on a number of factors including, but not limited to, technical competency, industry experience, business skills, financial viability and satisfaction of checks undertaken by third parties, eligibility for insurance cover, and personal probity.

4. IDENTIFICATION AND RECTIFICATION OF DEFECTS

4.1 CURRENT MECHANISMS FOR DEFECT IDENTIFICATION AND REDRESS

Access Canberra is responsible for the investigation of breaches in relation to building work in the ACT. Powers to investigate such complaints are provided in the *Planning and Development Act 2007* (the Planning Act), the *Construction Occupations (Licensing) Act 2004* and some operational acts such as the *Building Act 2004* (Building Act).

General guidance is available to builders and consumers about what might constitute a defect, such as the HIA Guide to Materials and Workmanship for Residential Building Work, the NSW Fair Trading Guide to Standards and Tolerances and the Victorian Building Authority Guide to Standards and Tolerances.

These documents generally provide an overview of acceptable standards and tolerances, the identification and measurement of tolerances and how to go about inspecting alleged defects as well as providing information and examples of common building defects in areas including slabs, footings and foundations, masonry, framing, wet areas and waterproofing, internal fixings, tiling and coverings and painting. These documents are used extensively throughout the industry.

Resolving issues of defective building work is a difficult task, often resulting in tension between contracting parties and battles between consultants.

HIA understands that there are mechanisms through which Access Canberra plays a role in the resolution of such matters.

Construction enforcement action, as determined by an Access Canberra inspector, where the alleged non-compliance with the relevant legislation is deemed to be non-urgent, may occur. The procedure for an investigation may result in the issue of a prohibition notice, an order for rectification and/or a search and seizure order, depending on the alleged contravention.

² 'Reforming licensing in NSW, Review of licence rationale and design, Regulation Review - Final Report'. Independent Pricing and Regulatory Tribunal, September 2014.



In the event of an issue with the work of a licensed building professional a complaint may be made to the Construction Occupations Registrar under the Construction Occupations (Licensing) Act 2004.

Examples of complaints that can be investigated by Access Canberra include:

- queries with regard to a licence – whether it is unlicensed work or a contractor pretending to be licensed;
- undertaking building works without approval if required;
- failing to comply with the NCC, where required; and
- unacceptable standards of building work.

Where it is ascertained that a serious issue does exist, the Registrar has the power to issue a Rectification Order to the builder for the rectification of a defect. The details of a rectification order can be challenged in the ACT Civil and Administrative Tribunal (ACAT) and/or the Registrar can require a licence holder to undertake further training or provide evidence of skill and/or expertise, if required.

HIA agrees that complaints with respect to risks to the health and safety of others require urgent attention and should be dealt with accordingly. Equally, where defective work is found, rectification should occur.

HIA does note, however, that should the building certification process be sufficient and carried out in accordance with the requirements, the likelihood of such complaints should be greatly reduced.

4.2 EFFECTIVENESS OF EFFORTS TO ADDRESS PHOENIXING

Corporate phoenixing is a complex problem and despite a number of government inquiries, policies and legislative proposals to address illegal phoenix activities, it remains a persistent public policy problem.

Phoenix activity is associated with the transfer of assets from one company to another to avoid paying creditors in circumstances where there is a link between the two companies. Commonly, the new company will have a similar name, management and ownership to the company that has been wound up.

HIA does not support individuals who engage in illegal phoenixing. Individuals who hide behind the shield of a company to incur debts such as payments due to employees and subcontractors without any intention of paying those debts, 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.

HIA would advise that a cautious approach be taken when undertaking an assessment of the 'effectiveness of efforts to address 'phoenixing'.

While the territories licencing framework may include factors that consider phoenixing activity, this is overwhelmingly a matter for the Commonwealth Government to respond to.

Licensing

The ACT licencing regime currently requires that an applicant fulfil a number of criteria, for example, that the individual has completed the relevant qualifications and has the requisite building work experience. Further, the applicant must disclose a range of matters, for example, whether they have a builder's licence suspended or cancelled in Australia or overseas, whether they have been subject to disciplinary actions or complaints anywhere in the country and whether they have been convicted or found guilty of a criminal offence.

In reviewing the current criteria, HIA does not oppose consideration of whether individuals or company officers have previously been involved in the management of a company, which has experienced an event of insolvency or experienced a personal bankruptcy for the purposes of granting a licence. In those circumstances the insolvency/bankruptcy event is

one factor amongst many to be taken into consideration when determining a registration application. In those circumstances the applicant should be provided an opportunity to provide additional information in such circumstances and discretion in making such a decision should be applied.

Commonwealth Regulatory Framework

There are a number of Commonwealth laws in place to address and regulate corporate insolvencies and respond to illegal phoenixing activity.

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 1936* 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.

Commonwealth reforms on foot

The Commonwealth Government is currently directing significant resources at the issue of corporate phoenixing.

HIA understands the following to be a summary of the Commonwealth activity:

- *The Phoenixing Taskforce*

In 2017, the Minister for Revenue and Superannuation, Kelly O'Dwyer established a taskforce to address illegal phoenixing. The taskforce comprised over 20 Federal, State and Territory government agencies, including the ATO, ASIC, the Department of Employment and the Fair Work Ombudsman. The aim of the taskforce is to provide a whole-of-government approach to combatting illegal phoenix activity, using sophisticated data matching tools to identify, manage and monitor suspected illegal phoenix operators.



- *Director Identification Numbers*

In August 2017, the Commonwealth government announced the introduction of director identification numbers (DIN) to track company directors. The implementation of this requirement is ongoing and has been referred to in other inquiries, such as the Black Economy Taskforce.

- *Combatting Illegal Phoenixing*

The *Treasury Laws Amendment (Combatting Illegal Phoenixing) Bill 2018*, seeks to implement a number of reforms proposed by a 2017 discussion paper *Combatting Illegal Phoenixing*, including creating new offence provisions for certain transactions entered into within 12 months of liquidation and ensuring directors are held accountable for misconduct by preventing directors from improperly backdating resignations or ceasing to be a director when this would leave the company with no directors.

- *Changes to the Fair Entitlements Guarantee (FEG) scheme*

To respond to certain ‘sharp’ corporate practices that are said to be leading to more reliance on FEG to account for unpaid employee entitlements. It has also been observed that many of these practices are associated with phoenix behaviour.

- *Changes to GST Withholding on Residential Properties*
- *Changes to the Superannuation Guarantee*

5. COST EFFECTIVENESS OF COMPLIANCE AND DEFECT RECTIFICATION

With respect to Alternative Dispute Resolution (ADR) HIA have developed a set of principles that we believe, if adopted, will improve dispute resolution processes in the ACT. These are set out below.

1. *Non-compulsory ADR*

In the event of a dispute or difference, the parties should first be required to utilise non-binding ADR mechanisms such as conciliation, mediation and on-site negotiation between the builder and home owner, facilitated by an independent third party. In HIA’s view, many disputes escalate because of a failure of either party to be able to talk to each other, so this should be first step before the parties take any formal steps under the contract or pursue litigation.

At present, some consumers expect the Government to resolve their dispute for them as a first response, and refuse to recognise their obligation to negotiate in good faith with their builder.

2. *Binding Contractual ADR*

HIA considers that the parties should be allowed to adopt binding contractual ADR mechanisms, such as expert determination, claims adjudication or referral.

3. *A specialised building court/tribunal/expert panel for domestic building matters*

For those matters that do proceed to formal litigation, there should be a specialised, knowledgeable, independent building jurisdiction (whether that be a statutory panel, a tribunal or division of the courts) to deal with domestic building disputes. This body should be presided over by judges but with a list of specialists and experts with building industry experience or knowledge.



4. Mediation/non-binding conciliation a first step in any court process

Referral to mediation/non-binding conciliation should be a first step in the formal litigation processes if the parties have not already attempted formal ADR. The party initiating the dispute should detail earlier attempts to resolve the dispute. Separate lodgement and hearing fees would be payable, with both fees being set having regard to the public need to discourage the wasting of court or tribunal resources on vexatious claims or petty/minor disputes.

5. Timely case management

Disputes will be initially case managed by the Registrar, before being determined by hearing. The parties would initially attend a directions hearing which would take place within a week of filing and on a dedicated domestic building directions hearing day. As part of the case management processes, the body would also have the discretion to refer technical disputes off to court appointed expert determination and contract/variation claims off to adjudication. The existing security of payment laws provides a basis for contract adjudication.

6. Small claims for smaller disputes

Expedited hearing processes, similar to a small claims tribunal, would apply to smaller value disputes, in which case the tribunal/court will hold inquisitorial powers rather than merely adjudicate on the evidence presented by the protagonists. Such case would immediately go to hearing, rather than through a case management process. There would be limited rights of appeal on questions of law.

7. Flexible pleading rules

To hasten proceedings where workmanship disputes are involved, rather than the Court/Tribunal relying on formal pleadings, the initiating party should be required to file a document that lists the items in dispute (such as allegations) in one column, the other party's version of events, and then provides a third column for the judge to write his or her findings³. Pleadings would ordinarily only be necessary for more complicated disputes, such as those involving mixed questions of fact and law.

8. Right to legal representation & costs

Legal representation to argue the case in point will be subject to the discretion of the tribunal/judge. Relevant discretionary factors will include the amount of the dispute, where significant questions of law are involved or where the retention of legal representation will ensure a more efficient conduct of hearing. To discourage vexatious litigation and abuses of process, the Tribunal should also have discretion to make orders for costs. Relevant discretionary factors will include the issues in dispute, whether legal representative are involved and the conduct of the parties during the course of proceedings.

9. Dispute monies

Where work has been completed, HIA supports the builder's right to apply to have the disputed amount paid into the appropriate body to abide the outcome of the dispute.

6. THE ROLE OF ACCESS CANBERRA

Access Canberra has responsibilities under the Building Act, the Planning and Development Act, the National Construction Code (also known as the Building Code of Australia), and applicable Australian Standards.

HIA is concerned that the Directorate has for some time, been under resourced to properly undertake its functions. This is currently manifesting in significant planning delays, and has been a problem also with respect to oversight of building quality.

³ This is often called a Scott Schedule.



The level of resourcing to the Directorate is, in our view, not proportionate to:

- the economic value of building and construction to the ACT;
- the importance of ensuring building quality is maintained; and
- the cost of rectification of substandard work.

HIA considers that Access Canberra could undertake a proactive role in developing practitioner information sheets/practice notes, targeted seminars and advice line for practitioners on codes and standards matters. This could specifically include developing up targeted material where they are commonly getting complaints or audits are seeing common issues of non-compliance.

In HIA's experience this proactive, targeted approach to emerging or pertinent issues can far outweigh other forms of regulatory responses that don't go to addressing the actual problem.