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THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

GOVERNMENT RESPONSE TO THE ECONOMIC DEVELOPMENT AND TOURISM REPORT 7 OF 2019 – INQUIRY INTO THE BUILDING AND CONSTRUCTION LEGISLATION AMENDMENT BILL 2019

Presented by
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Recommendation 1

The Committee recommends that the ACT Government continue to consult with stakeholders and the wider community.

Response

The ACT Government will continue to consult with stakeholders and the wider community on matters relating to building quality, compliance with building and construction laws, and unfair practices in the building and construction industry.

Recommendation 2

The Committee recommends that the Minister for Building Quality Improvement provide additional information to the Assembly on the interaction between the Bill and Commonwealth legislative instruments referred to by submitters including the *Personal Liability for Corporate Fault Reform Act (Cth) 2012,* the *Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Act 2017,* the *Corporations Amendment (Stay on Enforcing Certain Rights) Regulations 2018* and the *Corporations Amendment (Stay on Enforcing Certain Rights) Regulations (No. 2) 2018*.

Response

The information previously provided to the Committee can be applied to the legislative instruments with the same result, as the Commonwealth instruments all amend the Corporations Law. This means that once implemented, the provisions of the Commonwealth instruments are covered by section 5E(1) of the Commonwealth *Corporations Act 2001*, which provides that the Corporations Law 'does not exclude or limit the concurrent operation of any law of a State or Territory.' The Government sees nothing in the proposed amendments that would appear to be inconsistent with any of the Commonwealth instruments as the proposed amendments in the Bill regulate the liability of an officer of a corporation for actions taken by corporate licensees in the building industry, whereas the Commonwealth Laws regulate:

- personal liability of company directors and the operation of ipso facto clauses in contracts, both being in the context of reducing instances of companies proceeding to

formal insolvency processes prematurely (Treasury Laws Act, Corporations Amendment Regulation 1 and Corporations Amendment Regulation 2); and

- personal criminal liability for corporate fault relating to administrative lodgement requirements, appointment of auditors, managed investment schemes and pecuniary penalty orders for contravention of civil penalty provisions (Personal Liability for Corporate Fault Reform in respect to the provisions amending the Corporations Law).

The Personal Liability for Corporate Fault Reform Act also refers to the Council of Australian Governments' (COAG) Directors' Liability Reform, which includes a set of principles for national adoption as the reforms aim to achieve a nationally consistent and principled approach to the imposition of personal criminal liability of directors or other corporate officers for corporate fault (COAG principles).

Amendments in the Bill are consistent with the COAG principles. The provision of the Bill that applies criminal liability (clause 26, new section 26C) is a Type 1 executive responsibility offence as preferred under the COAG principles, which requires the prosecution to prove every element of the offence alleged to have been committed by the executive officer, including the element (the responsibility element) that he or she failed to take all reasonable steps to prevent or stop the commission of the offence by the corporation.

Recommendation 3

The Committee recommends that the Minister for Building Quality inform the Assembly whether administrative staff and agents are intended to fall within the definition of "executive officer" in s26 of the Bill.

Response

The Bill's definition of an 'executive officer' of a corporation, is made up of the following two elements:

(1) 'a person, however described and whether or not the person is a director of the corporation', and
(2) 'who is concerned with, or takes part in, the corporation's management'.

While worded slightly differently, the definition of 'executive officer' under s 9 of the Commonwealth Corporations Law has the same two elements and case law applying to the Corporations Law definition is relevant. An authoritative case on the meaning of the term 'executive officer' is *Australian Securities and Investments Commission v Vines* [2005] NSWSC 738 per Austin J. This case assessed the statutory definition of 'executive officer' by reference to two components: the meaning of 'management' and the degree of

participation necessary to attract the definition (i.e. the meaning of 'concerned'/ 'takes part in'). It was ruled that:

(1) the term 'management' comprehends activities relating to the business affairs of a corporation that has some significant bearing on the financial standing of the corporation or the conduct of its affairs; and

(2) to be 'concerned with' or 'take part in' management requires involvement in the decision-making processes of the corporation. Merely clerical or administrative activities would be insufficient.

It follows that the definition of 'executive officer' in the Bill is not intended to cover administrative staff carrying on clerical responsibilities for the corporation, or experts engaged to advise the corporation, such as lawyers or accountants, where those officers do not have a responsibility for making decisions that affect the corporation's operations.

The ultimate test is not the title by which an officer of a corporation goes by, but the duties that officer carries out and the extent to which the officer has discretionary powers to make decisions about the business operations of the corporation that would have a significant bearing on the financial standing of the corporation or its operations.

The definition used in the bill is already used in a range of other ACT legislation from the *Environment Protection Act 1997* to the *Waste Resources and Recovery Act 2016*, and is consistent with definitions in corresponding laws of other states and territories.

Recommendation 4

The Committee recommends that the Minister for Building Quality Improvement respond to the issues raised by submitters about the possible retrospective effect of the Bill.

Response

A statutory provision is not retrospective simply because it relies on conduct or events that happened before the provision existed. Legislation only operates retrospectively if it provides that rights and obligations are changed with effect prior to the commencement of the legislation. This is not the case with the Bill, as the amendments commence after the Bill is notified and create new obligations and liabilities that apply from the date the amendments commence.

The term 'retrospectivity' does cause some confusion where a law that operates on and from its commencement date applies new consequences to actions or events that occurred prior to the law's commencement. This is because there is a fine distinction between legislation having prior effect on past events (i.e. retrospective effect) and legislation basing future

operation on past events (e.g. the Bill), which does not have retrospective effect. This was outlined in *Coleman v Shell Co of Australia Ltd* (1943) 45 SR (NSW) 27 (Coleman) at 31 per Jordan CJ:

> …as regards any matter or transaction, if events have occurred prior to the passing of the Act which have brought into existence particular rights or liabilities in respect of that matter or transaction, it would be giving a retrospective operation to the Act to treat it as intended to alter those right or liabilities, but it would not be giving it a retrospective operation to treat it as governing the future operation of the matter or transaction as regards the creation of further particular rights or liabilities.

In the context of the Bill, the provisions relating to liability of executive officers (cl 26), rectification orders (cl 41), rectification undertakings (cl 42), occupational discipline (cl 51) and directors liability for amounts (cl 56), create new liabilities that can only be imposed after the commencement of the amendments in relation to actions or events that took place before or after the commencement of the amendments. In line with the Coleman principle above, this is 'governing the future operation of the matter or transaction as regards the *creation of further particular … liabilities*' (emphasis added) and is therefore *not* retrospective in operation.

Further, it has been held that it is lawful to impose fresh obligations on an existing class of persons (i.e. the existing licensees under the Act), and such a provision does not operate retrospectively merely because it changes the existing rights or duties of that class of persons: *Dubbo Base Hospital v Jones* [1979] 1 NSWLR 225 per Moffit P, Reynolds and Mahoney JJA.

The Explanatory Statement tabled with the Bill outlined the intended application of certain provisions and information about perceived retrospectivity. Further information about the intention of the provisions is provided in the revised Explanatory Statement for the Bill.

Recommendation 5

The Committee recommends that the Minister for Building Quality Improvement explain to the Assembly how rectification orders will be applied where there are multiple entities (eg licensees, directors and the company itself) against which they could be issued.

Response

The ability to issue a rectification order in relation to multiple entities already exists under the current rectification order provisions. The provisions relate to many occupational areas and services provided by a range of different entities, including corporations and partnerships that must have nominees (natural people who must themselves hold individual licensees).

Who an order is made in relation to, and their obligations under the order, will be determined on what is appropriate in each particular case. It should be noted that the Construction Occupations Registrar is not required to issue an order to more than one party, or directors of a licensed corporation at the same time as the licensed corporation. The Registrar must still be satisfied that, amongst other things, whatever rectification order is made in relation to the entity is appropriate, and consider any submissions made by the entity in accordance with the law. The decision to issue an order is also reviewable.

Recommendation 6

The Committee recommends that the ACT Government clarify how director liability will interact with home warranty insurance or fidelity fund claims.

Response

Claims in relation to a residential building insurance (referred to in the recommendation as home warranty insurance) policy or fidelity fund certificate can be made only within five years of completion of work, while a rectification order can be issued up to 10 years after completion. The required insurance under the Building Act is for limited amounts, and does not provide a guarantee of completion of all necessary work. Further, the insurance provisions apply in relation to certain residential buildings of three storeys or lower, rather than all buildings.

If no rectification order is made at the time a corporate licensee becomes insolvent, the Registrar may consider it inappropriate to issue an order where a claim can be made and it will fully address the contravention.

If an order has been made, the order is taken to have been made in relation to each director, which is reviewable. Under section 180 of the Legislation Act a power given by a law to make a decision includes power to reverse or change the decision, exercisable in the same way, and subject to the same conditions, as the power to make the decision. The Registrar can change an order to allow for rights in relation to insurance to be exercised.

It is not the intention that the period in which an order can be issued must be ended or that the Registrar must expressly refuse to issue an order before an insurance claim can be made. Unlike litigation or other actions that a building owner may take, a rectification order is not an avenue a claimant can personally exhaust. A building owner cannot apply for an order. Like other powers of the Registrar, issuing a rectification order is a discretionary power exercisable where the Registrar considers it appropriate.

Recommendation 7

The Committee recommends that the ACT Government clarify whether the proposed new s35(6) of the *Construction Occupations (Licensing) Act 2004* could have the effect of extending the power to make rectification orders beyond 10 years from completion.

Response

The intended application of the provision is described in the Explanatory Statement tabled with the Bill, and is not to allow for indefinite extension of the powers to contraventions of relevant laws. Further information about the intention of the provisions is provided in the revised explanatory statement for the Bill.