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

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Australia's property industry
Creating for Generations

Committee on Planning, Transport and City Services
ACT Legislative Assembly,
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Sent via email: LACommitteePTCS@parliament.act.gov.au.

Dear Committee Members,

Inquiry into the Property Developers Bill 2023

The Property Council of Australia is pleased to provide a submission to the inquiry into the *Property Developers Bill 2023* (**Bill**), providing a regulatory regime for 'developer licensing'.

We have engaged with the Environment, Planning and Sustainable Development Directorate (EPSDD) in good faith since August 2023 where the policy position was first presented to us. We have grave concerns with the current policy working and believe that this will have serious impact for our residential sector and more generally risk future investment in the Territory.

The Property Council of Australia advocates on behalf of that industry that employs 1.4 million Australians and shapes the future of our communities and cities. Property Council members invest in, design, build and manage places that matter to Australians: our homes, retirement villages, shopping centres, office buildings, industrial areas, education, research and health precincts, tourism and hospitality venues and more. Our industry is a significant contributor to the Australian Capital Territory's economy, accounting for more than $4.5bn in economic activity and 1 in 7 jobs while also being among the largest contributors to the ACT Government's revenue pipeline. Our members are generally the sector that delivers the ACT's housing supply.

The Property Council is very supportive of measures to improve building confidence and transparency in the ACT. We support elements within the proposed regime including:

- Developer accreditation, disclosure and a suitable person regime.
- Better consumer protection tools that support and promote transparency accountability and fairness.
- The inclusion of Developer Information on Advertising Material.
- The lifting of building quality without discouraging investment.

- An industry led code of conduct.

That said, reforms must deliver safe, compliant buildings and dwellings in an efficient and cost-effective manner. We do not support the current proposal to implement a developer licensing regime which will add significant costs and regulatory burdens while failing to effectively address issues of building defects.

We have a housing problem in Canberra. ABS data from September Quarter 2023 shows that our housing prices are now more expensive than Melbourne largely due to our population growth and housing shortage. The ACT Government has rightly committed to delivering 30,000 new homes over five years to improve supply but if the Bill remains unchanged this will be highly unlikely. The ACT Government needs the support of the private development sector, as it is that sector which delivers the ACT's housing supply. We fear that housing supply will be constrained and our housing prices rise even further. We must resolve the issue contained in this Bill to support building confidence while continuing to have the residential development conditions that allow us to meet our housing targets. Therefore, we strongly recommend adopting our amendments to the Bill that we have provided in detail in the following section. In summary, the Bill must:

- Remove the personal liability for directors of residential development – this creates an extreme consequence for developing in the ACT and will see major local and interstate development and investment diverting from Canberra to other jurisdictions.
- Remove the retrospectivity element that will see directors being made personal liable for developments that occurred before they were appointed as directors.
- Amend the rectification orders liability period to align with the Building Act statutory warranty period by decreasing any liability from 10 years to up to 6.
- Create consistency with other jurisdictions that bring everyone involved in the development cycle accountable including subcontractors such as water proofers.
- Allow for a developer to hold to account subcontractors and suppliers whom they currently do not have a contractual relationship with.

It is imperative that we amend the Bill to provide the housing we need. Additionally, the Government should conduct an independent economic assessment to understand the impacts of the developer licensing and defect rectification regime. It is crucial that the Government, industry, and the public are made aware of the impact to our economy, investment and housing costs should this legislation be passed. This assessment should include an analysis of the percentage of developers that will continue in the residential sector in Canberra if this Bill is passed in its current form.

We would welcome the opportunity to discuss the proposed concerns in detail with the committee and the members.

Yours sincerely,

Shane Martin
ACT and Capital Region Executive Director
Property Council of Australia

Submission to the Committee on Planning, Transport and City Services

Inquiry into the Property Developers Bill 2023

February 2024

Recommended amendments to the proposed Bill

The Property Council has grave concerns about the impact that the Bill will have on our housing supply and affordability if the Bill is not drastically changed. It is an incredible concept to believe that a law is contemplated that seeks to make someone responsible for the actions of another. The Bill literally proposes that developers become the guarantors of builders and their subcontractors.

Our recommendations are:

1. Remove personal liability for directors
2. Bring all requirements for licensing within the Bill rather than disperse them across other pieces of legislation
3. Remove any aspect of retrospectivity
4. Align the rectification order liability period with the Building Act statutory warranty period
5. Exempt not for profits organisations, retirement village operators and Build-to-Rent operators
6. Provide for a clear transitional period within the Bill to allow enough time to obtain licenses and to modify practices to adjust to the impact of the new law
7. Require the ACT Government and its agencies to also hold a license for residential development
8. Insert a timeframe's for licensing applications to be decided upon to ensure there are no further delays to homes being built
9. Allow for a developer to hold to account subcontractors and suppliers whom they currently do not have a contractual relationship with.
10. Conduct an independent economic assessment to understand the impacts of this new regulation on the ACT
11. Ensure consistency of laws across jurisdictions

These recommendations are discussed in detail below.

1. Personal Liability for Directors and other investment disincentives

The Property Council supports and promotes transparency, accountability and fairness in the construction industry. The Governments proposal seeks to hold individual company directors liable for building defects with the objective of being seen to improve accountability for residential developers, while delivering a range of serious drawbacks and challenges as highlighted below. If we pursue this path of personal liability it will result in residential developers taking their business interstate resulting in a crippling impact on our housing supply. We are concerned that there has not been an independent economic assessment commissioned by the Government for this likely outcome.

The real consequences of the ACT's personal liability proposal include:

- **Disincentivising residential development, investment and jobs growth in the ACT**. The proposal will position the ACT as the only jurisdiction in Australia to pursue this licensing category. By proposing to also hold directors (and their successors) personally accountable, the ACT Government will most likely shift residential development, jobs and investment into neighbouring jurisdictions offering more balanced regulatory settings.
- **Limited deterrence potential.** Residential developers vary in size, scale and financial capability to fully cover the cost of defects. By holding individual company directors accountable under this policy approach, there is a strong likelihood that some developers may apply for insolvency rather than be deterred from practices and decisions that may arise in building defects.
- **Complex decision-making processes**. The thrust of the Governments suggested regime successfully ignores the very fact that construction projects involve multiple parties, including architects, engineers, contractors, subcontractors, and suppliers. Decisions are more often made collectively on the best available advice of those best qualified to give such advice. Attributing personal liability to the developers' company directors (and their successors), regardless of their involvement in the processes, will not accurately reflect the complexities of decision-making or apportion risk equitably. Indeed, the Bill proposes to impose arbitrary liabilities on participants in the development chain that have not directly contributed to or in point of fact caused a relevant defect.
- **Fundamentally overstates the influence of some directors on day-to-day operations**. Directors may not be (and non-executive Directors are certainly not) directly involved in the day-to-day operations of a development project. They might quite properly not have the relevant technical expertise to make or oversee construction decisions, in relation to product selection and substitution. Holding directors individually liable for defects will discourage qualified professionals from serving on boards, hindering effective corporate governance. In reality it is qualified professionals who entities and directors rely on to exercise and bring their skills and experience in designing, overseeing and delivering each development. A law which penalises rather than encourages the best professionals to be company directors, as well as business decisions and investments into the ACT cannot be a good law.

- **Risk aversion and innovation.** Imposing personal liability will lead directors to be overly risk-averse, avoiding innovative construction methods or materials that might ultimately benefit projects, the environment or the community. Fearing over reaching legal consequences, directors might opt for traditional, but not necessarily best, practices. This will be particularly damaging at a time where there is an international race to innovate construction approaches, especially those that promise better environmental outcomes through a project's life.
- **SMEs.** Many development companies are small or medium-sized enterprises. Imposing personal liability on directors of these companies could disproportionately impact them, potentially stifling competition and diversity within the construction industry, driving up prices, reducing job creation opportunities and forcing such SME's to seek opportunities to invest in more welcoming jurisdictions.
- **Professional Indemnity Insurance.** Directors typically carry professional indemnity insurance to protect themselves from liability arising from their decisions. Imposing personal liability will likely increase insurance costs or make it harder or impossible for directors to obtain coverage. It is highly likely that insurers will not offer insurance to cover the sort of liability the Government now seeks to impose. In any event such insurance would be unaffordable if attainable at all.
- **Piercing the corporate veil.** This power is typically reserved for extreme breaches of Australian corporations law, including companies being used as mere agents of directors or shareholders,[1] or being used to evade legal obligations.[2] We believe that there is no justification for the use of this power in the circumstances, as it places an incredibly onerous burden on companies and their directors. The idea of companies was to allow investors to take risks with their investment decisions without the fear of personal recourse. This accepted principle of every day business should not be overturned.
- **Vulnerability to Third-Party Litigation.** Given that personal liability for directors is only accessible once a corporate property developer has been wound up, deregistered, or is in administration, receivership or liquidation, affected residents will likely seek to force companies into one of these situations through litigation. We foresee this practice becoming prevalent in the ACT should the Bill's drafting remain as is. So the threshold pre-conditions before directors become personal liable becomes illusory.

2. Licence Requirements are dispersed

Rather than include the licencing regime in the Bill, the requirements have been disbursed to other pieces of ACT legislation. Having the requirements in multiple places will make it very confusing and challenging for a new or inexperience property developer to obtain a licence or manage their exposure to defect rectification. We cannot see why this was done, especially because initial drafts of the Bill previously had the licencing regime in one place within the Bill. To save the Territory Planning Authority, building certifiers and the Construction Occupations Registrar from

[1] Ian M Ramsay and David B Noakes, 'Piercing the Corporate Veil in Australia' (2001) 19 Company and Securities Law Journal 250, 258.

[2] *Dennis Willcox Pty Ltd v Commissioner of Taxation (Cth) (1988) 79 ALR 267, 272 (Jenkinson J).*

applications that misinterpret or omit key aspects of the licencing requirements, we suggest that the licencing regime return to one place.

3. Retrospective Operation

The rectification order regime contemplates that rectification orders can be issued retrospectively and up to 10 years back in time. This is entirely unreasonable and inappropriate for several reasons, including:

- Companies and potentially their directors could be liable for work completed before the Bill was even contemplated. It is not fair to hold people accountable to a scheme that they could not have predicted or had no notice of.
- If someone became a director of a company (a successor) after residential building work had been completed, that director could be liable for any rectification orders for that work. It cannot be reasonable to hold a person personally liable for things out of their control, that were not their fault or for which they were ever involved in.
- The Bill does not specify why rectification orders can be issued for up to 10 years ago. Clear reasoning should be given as to why this decision was made, especially given the harsh consequences this system can inflict.
- This is a very dangerous precedent for the community and does not breed trust in the Government properly exercising its significant power (particularly when there is no senior house of review, unlike in other jurisdictions)

Allowing a scheme to operate retrospectively, and for such a long period of time into the past, sets a dangerous precedent by forcing developers to act in a way that looks to minimise future liabilities rather than focusing on pressing concerns in the present. We urge that the retrospective element of the rectification order regime be removed and that the Bill apply to projects which arise after the commencement of the new law.

4. Statutory Warranty and Statutory Limitation Alignment

Another issue with the 10-year liability contained within the Bill is the lack of alignment with the statutory warranties and statutory limitations that developers will be required to provide under the *Building Act*. These have an expiry date of up to 6 years. After those 6 years the Developer has no avenue to pursue damages against those who are really responsible for causing the defects. There should be no retrospectivity contained within the liability and any liability that is contained within the Bill should be harmonised with the Building Act statutory warranty and limitations period. This would create alignment for industry that identifies if there any defects from the date of completion generally within the first 2 years.

5. Defect Responsibility

- **Definition of *'Property Developer'*.** Who can be classified as a *'property developer'* in the rectification order regime is incredibly broad, to the point where (under its current drafting) it can pick up ordinary individuals who may decide to lend their hand into building a new dwelling. Further, given how many entities could be classified as *'property developers'* in developments, there is the strong potential for liability battles to be fought as opposed to

remedial action when rectification orders are issued. We ask that the definition be amended to exclude ordinary people who in the traditional sense are not property developers, or alternatively that draft regulations be circulated that list who will be excluded from the definition.

The Bill is too broad in its application and the following should at least be excluded from its operation:

- Not for profits (eg community housing providers, community organisations and Churches) and their developers and builders;
- Retirement village operators and their developers and builders
- Build to rent providers and their developers and builders

- **Defect Presumption.** The amendments to the *Building Act* create a 2-year presumption that all defects notified in defect liability claims are indeed defects until proven otherwise. This places extraordinary power in the hands of claimants and will force considerable expense and effort to be poured into ascertaining whether a defect is a defect, as opposed to progressing the claim so that any defect is promptly rectified. We also foresee this resulting in vast amounts of claims being made against developers, as the barriers for commencing a claim have been significantly lowered by this change. We ask that the presumption be removed and that claims be required to submit evidence alongside defect liability claims.
- **Limitation Period for Duty of Care.** It is patently unclear whether the statutory duty of care to be added to the *Building Act* has a 2-year or 6-year limitation period. We anticipate that it is intended to have a 2-year limitation period, but the imprecise wording of the provision invites the interpretation that the conventional limitation period for claims under the *Limitation Act* applies. We ask that the limitation period of 2 years by clearly identified an applied to the statutory duty as well.
- **Access to Subcontractors and Suppliers.** As highlighted above, the Bill provides ample opportunity for people who had nothing to do with defects to be held responsible. However, in many instances, developers are aware, or are able to determine, who is at fault through their management of the relevant works. We ask that a statutory right be inserted into the Bill for developers to pursue subcontractors, suppliers and/or other entities involved in the works for defects caused by them and their products, as this will better manage the plethora of liabilities involved and better lead to swift results. Responsibility should rest with those who cause the defect in the first place.

6. Transitional Provisions

The Bill proposes a considerable overhaul to residential property development in the ACT. Many people will be instantly affected by the Bill and will require time to prepare accordingly. However, it is not apparent when the various regimes of the Bill will take effect. Further, given the severity of the changes, it would be highly desirable that a grace period be put in place so ACT developers can be ready for the new scheme. Accordingly, we urge that transitional provisions be circulated as soon as practicable so the industry can appropriately prepare for the changes. The industry must be given a reasonable period to apply for an obtain their licence before the requirement to have a licence commences.

7. Government Licencing Exemption

We note the Government's response to the Bill as being a positive change for residential development in the ACT that will ensure better quality. However, we also note that ACT Government entities are exempt from the licencing regime. We cannot see why the Government is exempt from this requirement, especially given the intent of the Bill. We ask that that Government and its agencies, like the ACT residential development industry, be required to comply with all aspects of the Bill. If having a licence is required of the private sector then how it is justifiable that a government enterprise competing with the private sector is exempted. This double standard should not be permitted as it undermines the integrity of the licencing scheme.

8. Licence Application Timeframes and Appeal Rights

We note that there is no timeframe in the Bill for the Property Developer Registrar to decide on licence applications. We also note that refusals or acceptances with restriction for licencing applications must be reviewed internally before ACAT review is permissible. Similarly, there is no timeframe for the internal reviews to be completed by. This mechanism is incredibly harsh on applicants, as there is no incentive for the Registrar to process applications as soon as practicable. Further, given the influx of applications the Registrar can expect when the licencing scheme comes into effect, we foresee considerable delays being experienced immediately by the ACT residential development sector.

To alleviate these concerns, we urge that a timeframe be inserted for the Registrar to consider licence applications. We also urge that the need for internal review be available to applicants as well as path directly for ACAT review. This dual pathway for review is available for applicants contesting a DA decision. If an applicant believes that the ACAT process is fairer or more timely then they should have that choice to go direct to ACAT. These changes will serve to smoothly integrate the licencing regime and lighten the burden on the Registrar once the scheme is operational.

9. Conduct an independent economic assessment to understand the impacts of this new regulation

As indicated by the Government's media release this is Australia's first licence scheme for property developers and it will have significant impact on the way development happens in Canberra. The Government should commission an independent economic assessment to understand to understand the impacts of the Developer Licensing regime. It is crucial that the Government, industry, and the public are made aware of the impact on our economy, investment and housing costs should this legislation be passed. In Queensland they are currently undergoing their own review of regulation around developers and have commissioned such a study. We recommend that Canberra also do this.

This assessment should include an analysis over the percentage of developers that will continue in the residential sector in Canberra with this Bill in place.

10. Ensure consistency with other jurisdictions

It is also imperative that a new regulation for developers is consistent with other jurisdictions. Inevitably when our industry makes decisions they must factor in consideration of the framework

of regulation in each jurisdiction where an investment might be made and the extent to which regulation is reasonable and practical and balanced.

The current proposal goes above and beyond what is found in places such as NSW and QLD. This creates the very real risk that developers and institutional investors will develop and invest in other jurisdictions and reduce ACT housing supply and make worse the housing affordability crisis in the ACT.

The Bill should be amended to be consistent with NSW that allow for all parties involved in the development to be held to account

Conclusion

The ACT's proposals will almost certainly limit the supply of new homes to buy or rent in the ACT, driving up prices as the Territory faces an affordability crisis and preventing the ACT from meeting its own stated housing targets and those under the National Housing Accord. It will negatively impact economic activity and jobs.

Instead, the Government should champion an industry-supported pathway to improve outcomes for occupants, and the building and development industry. The property industry has been calling for the Commonwealth, state and territory governments to take collective and uniform action on the 24 recommendations contained in the Shergold Weir report on building compliance and confidence. These recommendations are the blueprint for reform and primarily focus on the need to strengthen enforcement and compliance with building standards and improve public confidence in the quality of our built environment.

The ACT has consistently suffered setbacks in meeting its housing targets and this proposal will worsen the prospect of real and sustainable improvement in supply, particularly of affordable housing. At a time when the Territory faces a rental and affordability crisis, along with a new planning system, now is not the time to introduce investment-stifling policy that will worsen the housing supply deficit.

We urge the committee to consider the issues raised in this submission and make recommendations to the Government to continue consultation on the Bill and remove the personal liability element.

We have been working in good faith through solutions that will satisfy the *Parliamentary and Governing Agreement*, lift building quality and result in an outcome that benefits consumers and increases their confidence in the built form community. We believe our suggestions made in this submission appropriately achieve this outcome and are consistent with our good faith discussions with officers of the Territory.