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STANDING COMMITTEE ON PLANNING, TRANSPORT, AND CITY SERVICES
Ms Jo Clay MLA (Chair), Ms Suzanne Orr MLA (Deputy Chair),
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Submission Cover Sheet

Inquiry into Property Developers Bill 2023

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Dear Chair

INQUIRY INTO THE PROPERTY DEVELOPERS BILL 2023

Thank you for the opportunity to make a submission to the Standing Committee on Planning, Transport and City Services' (the Committee) Inquiry into the *Property Developers Bill 2023* (the Bill) introduced in the ACT Legislative Assembly on 30 November 2023.

The introduction speech and the explanatory statement, which were both tabled with the Bill, explain the purpose of the Bill and the benefits it will bring to Canberra. These can be found on the ACT Legislation Register.

The information below provides a summary of the Government's consideration and position on key issues raised during the development of the Bill to aid the Committee's understanding of these matters.

Background

Consumers and industry should be confident that when they engage with a developer, the developer will be competent, transparent, act ethically and have the capacity and capability to deliver quality buildings. An effective building and construction regulatory system is important for the health, safety, and wellbeing of our community. Confidence in the regulatory system and the building product being produced is critical to the economic sustainability of the building and construction industry.

Almost all key professions that are involved in the design and construction of residential buildings are required to be licenced or registered. This includes builders, plumbers, and electricians, who are required by the *Construction Occupations (Licensing) Act 2004* (COLA) to hold a licence. To be granted such a licence, they must demonstrate that they have the necessary skills, knowledge, and qualifications to carry out the functions that the licence permits them to. Likewise, practicing engineers and architects are required to demonstrate that they have the necessary skills, knowledge, and qualifications to be registered to operate in the ACT.

Property developers have considerable influence on outcomes throughout the development process. Among other things, they oversee the development project, arrange finance, engage planning consultants, architects, engineers, and principal builders. The decisions made by property developers influence the design, liveability, maintenance requirements, and build quality of the final product. However, unlike other key professions, property developers are not currently required to be licenced, nor are their activities directly regulated by the ACT Government in the same way that other professionals involved in residential development, in particular licensed builders, are.

The measures in this Bill constitute one of the policy approaches the ACT Government is taking to tackle the problem of defects in residential and mixed-use buildings. This will improve the experience of purchasing, living in, and managing dwellings constructed by property developers.

The Bill, together with its subordinate legislation, provides for the establishment of two mutually supportive schemes: property developer licensing, and property developer regulation. Its aim is to hold property developers responsible and accountable for the residential development activities they carry out and have responsibility for. While it is expected that most property developers captured by the scheme will operate as corporate entities, in order to make sure that consumers are protected the scheme can apply to both individuals as well as corporations.

Fundamentally, the Bill advances consumer protection and promotes accountability of developers in the construction process, seeking ultimately to improve the quality of residential building in the ACT. The policy rationale for the Bill recognises that owners of units/apartments are inherently vulnerable because they often buy off-the-plan giving them no rights to inspect the building or dwelling during construction and limited rights to rescind a contract if they are concerned about defects. Multi-storey buildings are complex, making it difficult for owners to easily discern whether their building is defective or understand the extent of defects that might exist within private property and across common areas. Costs for rectification or pursuing legal recourse can also be exceedingly high and decisions to incur costs for experts and legal advice are also complex, frightening, and hard for groups of people, such as an owners' corporation, to make amicably.

By making property developers accountable for defects on their projects, there is a direct incentive for developers to closely manage the quality of the design and construction of their developments, resolving defective work as it arises and not passing on defective buildings to consumers. Additional consumer protection elements in the Bill support the rights of purchasers to have defects remedied by those people who constructed and/or developed the building.

Consultation

In developing the Bill, the Government consulted extensively with the public, industry, key stakeholders, and other jurisdictions between December 2022 and November 2023.

A discussion paper was publicly released in December 2022. Public consultation through the ACT Government's Yoursay portal was undertaken between 30 January 2023 and 27 February 2023. Feedback was collected via written submissions and through an online feedback form and a quick poll. The discussion paper outlined a range of issues and asked questions about potential options to regulate property developers. The Government received 13 written submissions comprising seven industry and related industry organisations, one community body, four community groups and one member of the public. The Government also received five survey responses from the community and 47 quick poll responses. A Listening Report is available on the Yoursay website.

Extensive engagement has also been undertaken with key ACT industry representative bodies including the Property Council of Australia (ACT Chapter), the Master Builders Association of the ACT, the Housing Industry Association ACT/Southern NSW, the Construction Forestry Maritime Mining Energy Union, the Owners Corporation Network of the ACT, and Strata Community Association (ACT). This engagement included five stakeholder workshops as well as multiple individual consultations with these organisations.

The Government also met with counterparts from Queensland and New South Wales to discuss and understand their approach to developer regulation and related construction industry reforms.

This engagement has informed this Bill, including defining who the Bill applies to, the incorporation of associated entities and key persons for consideration when determining licence applications, and the inclusion of the option for the registrar to require reports from a regulated ratings agency.

The Government will continue to engage with these stakeholders on the implementation of the licencing and regulatory schemes that the Bill establishes, and in the development of subordinate legislation, which will include a Code of Practice for property developers.

Objects of the Bill

The Objects of the Bill are to:

a) Protect the public by ensuring—
    i) residential development activities are undertaken by property developers that are competent and have the capacity to undertake those activities; and
    ii) property developers are responsible and accountable for the residential development activities they undertake; and
b) promote public confidence in the standard of residential development activities undertaken by property developers.[1]

[1] s6, Property Developers Bill 2023.

This will be achieved by:

a) requiring property developers to be licenced;
b) imposing standards for practice and competency on licenced property developers;
c) requiring property developers to rectify serious defects, or possible serious defects, in buildings they arrange to be constructed; and
d) through monitoring and enforcement of compliance with the Bill, which introduces a range of new offences and associated penalties.[2]

Scope

The Bill focuses on the role of developers in the context of the building and construction process. The Bill is limited to residential property development, because of the likelihood of building defects and the fact that the impact of defects and costs associated with remediation are most often borne by individual consumers rather than institutional investors and commercial entities.

When referring to residential property development in the Bill, a *residential building* means a building classified under the Building Code of Australia as class 1 or class 2, including any other building class that contains a class 2 building. This definition covers a single dwelling being a detached house; or one of a group of attached dwellings being a semi-detached, duplex, town house, row house or the like, and multi-unit residential buildings such as apartments and mixed-use buildings. Residential building work means building work in relation to a residential building.

The Bill could, if later deemed necessary, be expanded to cover other types of property development, including commercial development.

Who is a property developer, and which property developers must be licensed?

The Bill defines property developers broadly. A property developer is defined as an individual or entity who contracts or arranges for, or facilitates or otherwise causes (whether directly or indirectly) the residential building work to be done. It also defines the owner of the land on which the building work is carried out at the time the building work is done and the principal builder of the building work as a property developer. Exclusions to this definition can be prescribed by regulation.[3]

To reduce confusion and facilitate cross boarder activity the Bill deliberately aligns the definition with the *NSW Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020 No 9*, also known as the RAB Act.

The Bill identifies that a licence is required for individuals and corporations that conduct the following activities under Part 3 of the Bill:

- seeking a development approval in relation to certain residential building developments under the *Planning Act 2023*;

[2] These offences, penalties, and an analysis of their human rights implications can be found in the Bill's Explanatory Statement.
[3] See Part 6 of the Bill.

- seeking a building approval, building commencement notice or certificate of occupancy in relation to certain residential building work under the *Building Act 2004*; and
- selling or advertising the sale of residential property off-the-plan under the *Civil Law (Sale of Residential Property) Act 2003*.

This means that there is not a general requirement to be licensed in the Bill. Rather, the requirement for licensing relies on activities and refers to the existing regulatory pathways listed above. This will prevent developers from being unlicensed when undertaking residential development activities.

The threshold for when a property developer will be required to be licensed will be determined through regulation. However, the Government does not intend to require those building a home as a primary place of residence, or those building a one-off dual occupancy to hold a license. A regulatory impact statement will support the determination of the licensing threshold set to capture developers undertaking multi-unit developments as well as volume single dwelling developers (such as those delivering multiple house and land packages). The threshold including any additional exclusions (if any) to the requirement to be licensed will be determined following further key stakeholder engagement and policy consideration in the implementation phase.

<u>Key elements of the Bill</u>

The key elements of the Bill include:

1. *Holding property developers accountable for their projects by adding them to the statutory chain of accountability for residential building work.*

   The statutory chain of accountability in the ACT's current building regulatory system places responsibility on the licensed builder to ensure that building work meets the standards required by law. It currently does not encompass the role of the developer who can both set the culture of a project and make decisions that affect the design, quality, and construction of a building and importantly the standard of the building work.

   The Bill gives the Property Developer Registrar, an ACT public servant, the power to take regulatory action, such as issue a stop work order or a rectification order individually against a property developer, or jointly against a property developer and the principal builder for a given project. The existing regulatory powers relating to licenced builders that are provided for in the *Construction Occupations (Licensing) Act 2004* remain unchanged.

   While adding property developers to the chain of accountability, the Bill still allows them and their principal builders to seek civil remedies against other responsible parties. It does not make them solely responsible for poor workmanship, processes, or products but does reinforce that, as ultimately the entity in charge, they have a responsibility to make sure those people they have engaged do their job well.

2. *Making the developer, in addition to the existing arrangements for builders, responsible for defects in their developments.*

The Bill achieves this by amending the *Building Act 2004* to require building contracts for work that is arranged by a property developer to contain a warranty by the property developer covering the same items that the Act requires for licenced builders.[4]

This warranty is in addition to the builder's statutory warranty. This means that the builder and the developer share responsibility for any building defects or the costs of rectification work that are covered by a building's warranty.

This extends the application of statutory warranties to property developers and provides consumers with legal recourse directly to both the property developer and the builder in the event that there are defects in the building work that amount to a breach of statutory warranties. The property developer and builder will be subject to claims for breach of statutory warranties in circumstances where the owner may not have a direct contractual relationship with the builder or property developer.

This element is intended to reduce the risk, delay and expense involved for consumers in bringing legal proceedings for alleged defects by providing them with recourse to both the builder and developer. Additionally, this reform should cause developers to increase their focus on making sure that their developments are delivered to an appropriate standard and that defects are identified and fixed at the earliest possible time, because they will now be directly accountable.

3. *Put the onus on property developers and builders (jointly) to prove that defects claimed by owners are not defects (for a time-limited period).*[5]

   This provision is known as a reverse onus provision and relates to the application of statutory warranties within the first two years after a certificate of occupancy for a project is completed. The purpose of this measure is to make it easier for owners to have defects remediated by creating a presumption that the alleged defect is the responsibility of the builder and the property developer. This means that rather than the new owners having to prove a defect, it is the responsibility of the property developer and their builder to prove it is not a defect. This simple change in favour of consumers establishes a clear obligation on the property developer and their builder to remedy the defect or compensate the owners quickly and acts as a disincentive to litigation. This element aligns with the other measures included in the Scheme to strengthen the position of new owners to have defects resolved promptly for the period over which it applies.

   The statutory presumption will apply for the first 2 years from the date of issue of the certificate of occupancy. After the first 2 years, owners may continue to bring claims for defects against the builder or developer for the statutory warranty period. Circumstances where a defect will not be attributed to the builder or property developer, will include where the defect is caused by lack of maintenance or was caused by a person other than the builder

[4] See Schedule 2, [2.13] New section 88 (2A) of the Bill.
[5] See Schedule 2, [2.17] New section 89F of the Bill.

or property developer or where the defect is not repaired promptly, similar to New Zealand's *Building Act 2004*.

The time-limited period for the statutory presumption in favour of the owner reflects the inherent knowledge imbalance in the short period following completion of the project between a developer and builder versus the new owner or newly formed owners' corporation.

This reform will be progressed through an amendment to the *Building Act 2004*.

4. *Offence provisions and compliance and enforcement powers, including stop work orders and building rectification orders.*[6]

   The objective of these measures is to lift the quality of completed building work by ensuring that any serious defects are identified prior to completion and before purchasers have settled on their contracts of sale. This will improve consumer outcomes and mitigate against costly and lengthy legal proceedings post completion. Enforcement action to require rectification of defects before settlement of the properties can occur will also ensure builders and developers act quickly in order to prevent delays to settlement. These rectification powers can also extend beyond completion of the building and beyond the statutory warranty period.

   Using the powers that the Bill will provide, the Government intends to conduct detailed audits on high risk developments. Where serious defects are detected, developers and builders will be given the opportunity to rectify or face orders to rectify.

   The Bill provides that where a development entity is wound up, in administration or deregistered, the Registrar will have the power to issue rectification orders on company directors (discussed in detail below).

5. *Increase transparency for purchasers of off-the-plan units.*

   This measure will enable consumers to have greater transparency about the development they are considering buying into so that they can make a more informed choice when deciding between apartments in different developments.

   The *ACT Civil Law (Sale of Residential Property) Act 2003* already includes numerous requirements for disclosure statements for off-the-plan contracts. The following additional disclosure statements for off-the-plan contracts will include the following information about the property developer:[7]

   - licence number;
   - information included on the public register like conditions on licence, details of associated entities and key people, any regulatory action taken, past and

[6] See Part 6 of the Bill.
[7] See Schedule 2, Part 2.4 of the Bill.

current development activities carried out by the licensee and their associated entities.

- a schedule of the fittings and finishes that will be included in the residence; and
- any other matter prescribed by regulation.

The disclosure requirements will also be required when a property developer sells new apartments after the development is completed as transparency to any purchaser of a new apartment should be the same regardless of whether the apartment was bought off the plan or after completion of the development.

6. *Provision for mandatory Latent Defects Insurance in the future.*

Latent Defects Insurance (LDI) for 10 years is project-based insurance for buildings that provides first resort cover to owners for certain types of serious defects in common property for a period of 10 years post-occupation. LDI policies are taken out by the developer before the first building approval is issued and come into force from the date that the certificate of occupancy is issued. The insurer has a right to subrogation from at fault parties. A condition of the policy coming into force would be for the insurer to undertake inspections during construction to complement inspections undertaken by the building surveyor. Although mandating LDI would be premature at this time, the ACT Government sees value in the product and its protections for consumers.

The Bill supports the take up of LDI products in the ACT through two key provisions.

First, LDI is encouraged as a voluntary measure by limiting the liability of company directors (natural persons) where the licensed company remains open and there is an LDI product in place.[8] In the circumstance where a defect arises and the Registrar is considering a rectification order, and the company is wound up, in administration or deregistered, the Registrar may consider whether it is appropriate to take action against a company director and must consider whether an LDI policy is in place. This incentivises company directors to take out LDI for the benefit of owners, to remain open, and to proactively identify and resolve defects which occur in the construction process. Where a company closes and LDI is not in place, liability for serious defects may sit with the company director/s.

A head of power is also included in the Bill to introduce mandatory LDI in the future for residential building work, when there is a stronger, more mature market for the product.[9]

7. *Requirement for a digital building manual to be prepared and approved before a certificate of occupancy can be issued.*[10]

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[8] See Section 55 of the Bill.
[9] See Schedule 2, [2.18] New Section 95A of the Bill.
[10] See Schedule 2, [2.5] New Section 48A of the Bill.

Producing a comprehensive set of documentation at the conclusion of a project should be at the cost and responsibility of the property developer. A common complaint is that not all relevant documents are provided, documents are lost over time, Owners Corporation representatives and building managers are changed, and the material may be difficult for owners to understand and apply to ensure ongoing maintenance and compliance obligations are met.

The requirement for a digital building manual to be prepared and approved before a certificate of occupancy can be issued will assist the new owners of the building to plan for maintaining their building. It will also assist in responding to unforeseen events, such as responding to equipment failure. Requiring the building manual to be prepared at the time of completion and approved by a building certifier will support an effective handover from builder/developer to owners corporation.

8. *The issuing of a rectification order against a company director/s*[11]*.*

I note that this element of the Bill is the most contentious for industry and I believe that we have achieved a balanced outcome that will deliver accountability while not disincentivising investment activity in the ACT.

The Bill is structured so that liability is first directed against the licensed corporate entity. Director liability will only arise where the company is wound up, in administration or de-registered. There will be no avenue for personal liability if the company remains operational and meets its obligations to customers and any regulatory orders. This is a direct disincentive to phoenixing activity.

The Bill includes further potential limitation of personal liability for directors if the company has obtained a latent defect insurance policy for the benefit of owners. This supports an outcome where owners are protected as beneficiaries of the insurance policy, while investment in the ACT is not disincentivised compared to other jurisdictions through personal liability for directors.

It should be noted that the proposed position on personal liability is less onerous on property developers compared to existing legislative arrangements for builders in the ACT regulatory system. This is considered appropriate as developers are now being made responsible for defects on their development projects where they don't have direct contractual relationships, while builders have direct supervisory responsibility for all building work undertaken on a project.

In relation to mitigating the risk of personal liability, simple and cost-effective actions a developer could consider include (noting many good developers have already adopted many of these practices):

a) Improving design quality by commissioning peer review at key design stages.

[11] See Section 55 of the Bill.

b) Mandating use and compliance with good practice construction guides, such as the NSW Design and Building Practitioner's Regulation and Design Guidelines Handbook.

c) Engaging registered architects, engineers and other professionals for the project from start to finish, or requiring the builder to do so in a design and construct model.

d) Select builders and trades with evidence of good practices and performance history.

e) Employing quality private certifiers who identify defects at the earliest possible time.

f) Appoint a representative/s of the developer to oversee construction and building work on site (such as a Building Superintendent or Clerk of Works).

g) Obtain latent defect insurance (such as decennial liability insurance) and offer extended warranty periods to cover defects which may arise.

Decision Making

The Bill retains the role of the Legislative Assembly in oversighting the creation and amendment of the Bill's subordinate legislation, including disallowable instruments.

Role of Property Developers Registrar

The Bill includes the establishment of a Property Developer Registrar (the Registrar) who will be responsible for licensing and regulation of developers and development activity. The Registrar will have strong powers to be able to take regulatory action against developers that do the wrong thing. It will compel them to fix problems and face fines or suspend their licence if they do not rectify works accordingly.

The Registrar will make decisions about issuing licences based on a wide variety of information. This will include the past performance of a developer; consideration of the performance and corporate behaviour of related entities and key decision makers, even if there not in leadership position, management, and capability to complete projects. The registrar will also be able to place conditions on licensees, for example, limiting the scope of their activities to a particular project or scale. In addition, actions taken against developers under this Bill, and any conditions placed on a licence, will be recorded on a publicly available register of property developers.

Economic impact

During the development of the Bill, the potential economic impact and negative impact on investment, with subsequent impact on delivery of new housing, have been raised by the development industry because of the Bill. This concern is largely based on an industry view that the licensing scheme, in particular the personal liability and reverse onus elements, will act as a barrier to investment in the ACT, especially from larger institutional investors.

In response to these concerns, I note that there will be some costs incurred by developers to participate in the scheme but that their participation and engagement in the rating process will lead to improved governance and business practices within those businesses. The outcomes of this process will lead to better business practices, improved brand value and increased consumer confidence, bringing a market advantage to the Territory and a more robust and profitable industry. This will promote investor confidence in the housing product produced in the ACT.

Many developers have already incorporated the practice improvements identified in the Scheme and have these costs already factored into their business models.

The legislation also proposes a mandatory review period of five years, which could be brought forward if needed, to consider the effectiveness of the scheme and whether any unintended consequences have arisen.

Conclusion

In summary, this Bill will improve the quality of buildings and construction practice in the ACT. It avoids unnecessary regulatory duplication, burden and cost and complements the existing regulatory settings we have in place. In developing the Bill consideration has also been given to the approaches to regulating property developers in other jurisdictions. This Bill aligns with the New South Wales Government's *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* thus minimising concerns for property developers working across the border. It takes a deliberately broad approach to definitions, inclusions, and its scope of regulatory powers and will be supported by regulations and disallowable and notifiable instruments. This will allow the government to respond to changes in policy, the development environment, and swiftly close any loopholes that people may seek to use to avoid being subject to the scheme.

I would be pleased to meet with the Committee to answer any questions.

Yours sincerely

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14/2/2024