



LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON ECONOMIC DEVELOPMENT AND TOURISM
Mr Jeremy Hanson MLA (Chair), Ms Suzanne Orr MLA (Deputy Chair),
Mr Michael Petterson MLA

Submission Cover Sheet

Inquiry into Building and Construction Legislation Amendment Bill 2019

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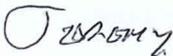


Mick Gentleman MLA

Minister for Advanced Technology and Space Industries
Minister for the Environment and Heritage
Minister for Planning and Land Management
Minister for Police and Emergency Services
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Obj # 19/34314

Mr Jeremy Hanson MLA
Chair
Standing Committee on Economic Development and Tourism
Legislative Assembly for the ACT
CANBERRA ACT 2601

Dear Mr Hanson 

As Acting Minister for Building Quality Improvement, I am pleased for the opportunity to address issues raised in the public domain about the important amendments included in the Building and Construction Legislation Amendment Bill 2019 (the Bill) on behalf of Minister Ramsay.

Relationship of the Bill to the ACT Government's building regulatory reform program

The ACT Government undertook a comprehensive review of the ACT *Building Act 2004* and the building regulatory system. The purpose of the review was to make sure the regulatory system remains effective in protecting the public from substandard building work and unfair practices.

In June 2016, after comprehensive public consultation on potential reforms to the system, the Government announced 43 reforms. As part of these reforms, the Government has increased protections in building and construction laws, such as expanding statutory warranties to all residential building owners. These reforms built on previous amendments to increase penalties for not complying with the building code or rectification orders. However, all of these civil and regulatory actions rely on there being an existing entity to take action against. If there is no entity, the protections are effectively negated.

Reform 37 in the current program is to consider expansion of rectification and other relevant powers to allow orders to be issued to people closely associated with an insolvent or 'disappeared' corporate licensee. This reform was included in the program in response to the findings of the review and public consultation, which identified the problems people have in getting defective works rectified on their buildings, and the need for reforms to help prevent 'phoenixing' and reduce the impacts of insolvencies on building owners and industry members. Amendments in the Bill respond to the reform program. Nothing that has happened subsequent to the release of the reform program suggests that the announced reforms are no longer required or relevant.

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Further, it is important that legislation is maintained over time and responds to identified and emerging problems. Provisions in the Bill include amendments arising from the administration of the laws and to improve public protections.

Consistency of provisions applying to executive officers and directors with corporations laws

I draw the Committee's attention to the Commonwealth *Corporations Act 2001* (Corporations Law), Part 1.1A – Interaction between Corporations legislation and State and Territory laws. Sections 5E(1) and (2)(a)(i) (copied below) provide that concurrent operation of Corporations Law is intended.

5E Concurrent operation intended

- (1) The Corporations legislation is not intended to exclude or limit the concurrent operation of any law of a State or Territory.
- (2) Without limiting subsection (1), the Corporations legislation is not intended to exclude or limit the concurrent operation of a law of a State or Territory that:
 - (a) imposes additional obligations or liabilities (whether criminal or civil) on:
 - (i) a director or other officer of a company or other corporation; or
 - (ii) a company or other body; or
 - (b) confers additional powers on:
 - (i) a director or other officer of a company or other corporation; or
 - (ii) a company or other body; or
 - (c) provides for the formation of a body corporate; or
 - (d) imposes additional limits on the interests a person may hold or acquire in a company or other body; or
 - (e) prevents a person from:
 - (i) being a director of; or
 - (ii) being involved in the management or control of;
a company or other body; or
 - (f) requires a company:
 - (i) to have a constitution; or
 - (ii) to have particular rules in its constitution.

Note: Paragraph (a)—this includes imposing additional reporting obligations on a company or other body.

This section demonstrates, clearly, that the Commonwealth Parliament did not intend to cover the field in the regulation of the duties of directors or other officers of corporations – indeed, the Corporations Law is expressed to avoid exclusion or limitation of the operation of any law of a State or Territory where that law imposes additional obligations or liabilities on a director or other officer of a corporation.

Section 28 of the *Australian Capital Territory (Self-Government) Act 1988* provides that a provision of an enactment has no effect to the extent that it is inconsistent with certain laws of the Commonwealth, but such a provision shall be taken to be consistent with such a law to the extent that it is capable of operating concurrently with that law. I can see nothing in the operation of the proposed amendments that would appear to be inconsistent with the Corporations Law.

In developing the provisions of the Bill, the Government has considered provisions already in place in ACT laws and in building laws in other jurisdictions. I enclose a summary of relevant liability provisions and regulatory powers in other jurisdictions' building laws. The powers included in the Bill have been tailored to the ACT system, and have a particular focus on rectification of non-compliant work under existing rectification powers as foreshadowed by Reform 37. The provisions relating to director and executive officers apply only in certain circumstances and not to all liabilities of the relevant corporation. Rectification and occupational discipline powers may be exercised only where appropriate to do so, and include review mechanisms. The limitations on the time periods in which actions may be taken in relation to a director, are the same as those for licensees.

In exercising existing powers to enforce the laws, it has become apparent that specific powers relating to directors are necessary. When directors choose to deliberately avoid the corporation's obligations to building owners and wind up or fail to comply with court and other orders it undermines the integrity of the regulatory system and confidence in the industry itself. This has flow on effects to the economy and investment in the Territory.

Relationship of ACT reforms to national work resulting from the Building Confidence Report

The 24 recommendations in the Building Confidence report (the report) are high level recommendations that relate specifically to compliance with the National Construction Code. The reforms in the ACT program relate to the whole building regulatory system, and include aspects such as contracting, education, dispute resolution and interventions for specific issues such as documentation that are not in the report but important to lasting reform.

The Building Ministers' Forum (BMF) has agreed to national work in relation to the 24 recommendations in the report, and to introduce consistent provisions where appropriate. States and Territories have not committed to abandoning their reform programs, or reducing the scope of their reforms down to the scope of the Building Confidence Report. It was agreed at the BMF that this would not be required and that no States or Territory should slow down its reform program. States and Territories already have many of the suggested features in their regulatory systems, and some, including the ACT, have existing reform programs addressing issues in the industry. While the ACT will continue to work with other jurisdictions on building reforms, the BMF has been clear that adoption of items developed nationally, and ultimate implementation of the Building Confidence report recommendations will remain the responsibility of the state and territory governments¹.

Recommendation 6 of the report relates to effective regulatory powers and is "That each jurisdiction give regulators a broad suite of powers to monitor buildings and building work so that, as necessary, they can take strong compliance and enforcement action". Of the types of powers suggested in the report, the only power the ACT regulatory system does not currently include in any form is the power to negotiate voluntary undertakings. Clause 42 of the Bill introduces this power. The report also suggests powers to make all necessary orders, undertake disciplinary processes and prosecution powers. Importantly, the report includes only minimum powers and does not detail how powers are

¹ <https://www.industry.gov.au/sites/default/files/2019-07/bmf-communique-18-july-2019.pdf>

to be expressed in law. It does not preclude powers relating to directors and partners of licensed entities. In addition, while the report does not suggest uniform powers, certain powers in the Bill are modelled on those already in place in other states and territories.

Therefore, not only is the Bill entirely consistent with national agreements in relation to building reforms, it relates directly to recommendation 6 of the report. However, notwithstanding the above, I note that neither the existing ACT reform program nor work under the BMF limits the actions the Government may take to make sure the building regulatory system is effective, and protects the community as intended. The BMF also agreed that reforms in the states and territories would not be delayed as a result of national work.

For detailed explanations of the policy intent and intended operation of the provisions in the Bill, I refer the committee to the Bill's explanatory statement.

I ask that the Committee publish this letter along with other responses to the Inquiry on the Bill.

I look forward to the Committee's report in November.

Yours sincerely



Mick Gentleman MLA
Acting Minister for Building Quality Improvement

11/11/19

ENCL – Summary of relevant provisions in other jurisdictions