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

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ACT Legislative Assembly
Standing Committee on Economic Development and Tourism

Via email: LACommitteeEDT@parliament.act.gov.au

Dear Committee Secretary,

INQUIRY INTO BUILDING QUALITY IN THE ACT

Thank you for the opportunity to provide a submission to the above Inquiry.

I have been advising and acting for owners corporations and apartment owners in the ACT since 2010. In that time I have advised approximately 80 small and large owners corporations in relation to building defects.

This submission is in two parts. Firstly, some comments on the contents of the discussion paper provided and secondly, my submissions to the Inquiry.

Commentary on the Discussion Paper

One of the troubling aspects of this Inquiry is that the Discussion Paper accompanying the Inquiry contains a number of inaccuracies.

Firstly, the conclusion that "Access Canberra received complaints on the equivalent of ten per cent of the housing stock approved in 2016-17" (see page 4 of the Discussion Paper). I suggest that this is an underestimate given many of the complaints received would have been from owners corporations. That is, one complaint from an owners corporation on behalf of three hundred dwellings would increase the percentage from 10% to 15%. Indeed, I advised a number of owners corporations during 2016 and 2017 to make such complaints. If Access Canberra took this issue into account, I suspect that the percentage of complaints would likely increase significantly.

Secondly, it is not true that "every contract for the sale of a residential building and every contract to carry out residential building work is taken to contain a warranty except if the

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building work is exempt from requiring building approval and/or the cost of works is less than $12,000" (see page 9 of the Discussion Paper). It is only true of contracts which were entered into on or after 20 August 2017. This effectively means that currently in the ACT, no residential buildings above three storeys have statutory warranty protection (given buildings arising from contracts entered into on or after 20 August 2017 would not yet be complete). In the light of the High Court decision in *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 36 (**Brookfield**), this means that many larger residential owners corporations have no recourse against their builders whatsoever.

I notified the ACT Government of the problems created by the decision in Brookfield in October 2014, shortly after it was handed down by the High Court, and regularly sought updates as to what steps the ACT Government was taking to provide rights to ACT apartment owners. It took the ACT Government three years to make the required change to the legislation and in the interim numerous apartment complexes were constructed which are now effectively without any rights against their builder in relation to building defects. In this regard, I have met with and advised at least two large residential buildings completed in the last three years who are in this situation and will need to raise significant funds from lot owners to complete extensive rectification work.

Thirdly, the details regarding residential building insurance coverage on page 10 only apply to residential buildings of three storeys or less. This is an important and significant limitation on the benefit of this insurance.

Submissions

There are nine submissions that I make to the Inquiry. They are:

1) make developers liable for breaches of statutory warranties under the *Building Act 2004* (ACT) (in addition to builders). This would bring the ACT into line with New South Wales and also provide an additional layer of protection for apartment owners without increasing the risk profile for ACT projects beyond that of New South Wales projects. Given many national builders run or oversee their ACT operations from a Sydney office, there would be little disruption to their management of risk if such an amendment was made. This additional layer of protection would motivate developers to ensure that the quality of the work completed by builders is high;

2) requiring developers to ensure that adequate funds are spent on proper design development leading to better specifications and detailed drawings for builders. A condition for the issue of a building commencement notice could be that a minimum standard of detailed design drawings/specifications be provided for areas that are commonly defective such as balconies and facades;

3) introducing a building bonds scheme similar to that which commenced in New South Wales earlier this year. This would, to an extent, provide some security to apartment owners that at least some money is available for the rectification of building defects. It is an especially effective response to the use of under-resourced special purpose vehicles commonly used by builders and developers;

4) broadening the application of the implied warranties under Division 2.9.3 of the *Civil Law (Property) Act 2006* (ACT) by removing the requirement of knowledge of defects on the part of the seller. The prerequisite of knowledge of specific defects limits the potential liability of developers for defects. It is unclear why such a prerequisite is necessary or appropriate given the consumer protection nature of the provision. The removal of this provision would bring these warranties more in line with the statutory warranties in the *Building Act 2004* which have no prerequisite knowledge for their operation;

5) restricting the use of special purpose vehicles for the acquisition, development and sale of property. Such companies tend to be short lived and only have assets for a very short period of time. They are deliberately used by developers to silo risk, avoid responsibility for defects and maximise profits;

6) ensuring that, in the first instance, appropriate prudential standards are set for fidelity funds under Part 6 of the *Building Act 2004* (and section 103, in particular) and further, that once set, such prudential standards are maintained and enforced. The current prudential standards for fidelity funds (if any exist) are not publicly available. This is of concern given the anecdotal evidence that the Master Builders Fidelity Fund is the largest provider of residential building insurance in the ACT for apartment buildings. In this regard, I refer to the failure of the ACT Government to notice for almost a decade that QBE Insurance had failed to meet prudential standards by not lodging written statements as required under section 95(4) of the *Building Act 2004*;

7) more transparent statistics regarding disciplinary action against licensees and the imposition of more significant penalties for breaches. In relation to the former, the language used to describe disciplinary actions is unclear (for example, what is a “complex case”?). Further, in the five years between 2010/11 and 2014/15, there were over 1,500 complaints about licensees but only eight licence cancellations, five of which were in 2013/14. It should be noted that these license cancellations did not necessarily disqualify the licensee from ever applying for a license in the future;

8) not allowing a building to be given any industry award until four years has passed since its completion and any defects which manifest during that period be taken into account when considering that building for an award. This would enable a more realistic assessment of the quality of design and construction of a building;

and

9) the establishment of a public register of residential buildings which have been the subject of a notice of intention to issue a rectification order together with the names of the builder, developer and any directors of building and development companies involved with such residential buildings. Quality issues in relation to cars, refridgerators, washing machines, credit cards, health insurance policies, etc are constantly analysed by consumer organisations like Choice. There is no reason that this cannot be done for residential buildings.

   Given the ACT Government appears to admit that it will no longer issue rectification orders (see page 12 of the Discussion Paper), the regime of rectification orders could still be used for this purpose.

To conclude, I make one final observation. Regulation tends to have a self-generating property. That is, the more regulation you have, the more you seem to need. Indeed, notwithstanding the ever increasing level of building regulation which has been introduced over the years in the ACT, the quality of building work seems to have become worse, not better as developers and builders are not changing their behaviours in the face of greater regulation. There may be a range of reasons for this including the general failure or inability of the ACT Government to police and enforce such greater regulation (see my comments above in relation to rectification orders and disciplinary action) and the dependency of private certifiers on developers for repeat work.

Developers and builders are far more likely to change their behaviour if they know there is an increased likelihood of action by property owners who have a vested financial interest in the rectification of building defects in their property and are thus highly motivated to act against developers and builders who produce defective buildings. That is, give property owners the proper tools to address building defects and building standards should eventually improve.

Please contact the writer if you have any questions in relation to the above.

Yours faithfully

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