LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

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

Submission Cover Sheet

Inquiry into Building Quality in the ACT

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By Email: LACommitteeEDT@parliament.act.gov.au

Standing Committee on Economic Development and Tourism,
Legislative Assembly for the ACT,
GPO Box 1020, CANBERRA ACT 2601.

Attention: The Committee Secretary

Dear Sir/Madam,

SUBMISSION TO DISCUSSION PAPER 'INQUIRY INTO THE QUALITY OF RECENTLY CONSTRUCTED BUILDINGS IN THE ACT' ('DISCUSSION PAPER')

We commend the Committee for preparing the Discussion Paper. It raises many important issues, which are worthy of debate and, in that regard, we provide our submission to assist. We would also refer the Committee to our previous submissions of 12 February 2016 (a copy of which is **enclosed** for your convenience).

Extension of and Changes to the Licencing System

1. The Discussion Paper contemplates the extension of the current licencing regime to include a broader range of professions, such as water-proofers, fire-proofers, architects, carpenters and engineers.

2. We note that a broader licencing scheme exists in New South Wales under the *Home Building Regulation 2014 (NSW)*. We would suggest, however, that the extension of the scheme has done little to address the build quality concerns in NSW. The experience in NSW would suggest that this approach is not necessarily an answer. NSW and other jurisdictions all seem to be confronted with similar issues. Instead we would advocate an evidence-based regulatory reform.

3. Further, in relation to the concern about what is referred to as 'phoenixing', there seems to be a misunderstanding as to what the law does or does not allow. The seminal case is *ASIC v Somerville & Ors* [2009] NSWSC 934 which, in short, is proposition that Company A cannot transfer assets to Company B without proper consideration so as to defeat the interest of creditors as a whole. As a general

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proposition, there is nothing illegal about a company which has liabilities but does not have the resources to meet those liabilities going into external administration of some sort. Indeed, the failure of the directors to take that action exposes the directors themselves to various sanctions. Moreover, what is perhaps not appreciated is that if there is an issue with the building work for which the corporate entity is liable, the corporate nominee still has a legal liability.

4. As outlined in our previous submissions, these sorts of concerns could be cured by regulation. The Regulation could impose mandatory financial or management requirements for either the nominee or the corporation for various types of work. There already exists such a system in the public works environment whereby public works contractors have to be prequalified. Different types of prequalification require different metrics (financial and management). We would refer the Committee to the *ACT Procurement Webpage*. Taking this submission to its ultimate conclusion, we would envisage that, for example, by regulation, a Class A corporate builder would be required to meet various financial and management metrics which is commensurate with the complexity of the building work being undertaken. This could be regulated by conditions of building approval or some similar mechanism.

Supervision and regulation of the certifier

5. This would go hand in hand with regulatory reform tied to the external supervision of the construction work. Presently, there is a lacuna in the builder/developer environment. There is usually no supervision of the builder. The building certifier does not fulfil this role currently and there are no doubt concerns in the industry as to whether certifiers have the technical skills to carry out the role. We would refer the Committee to our previous submissions under 'Part 2. Stage inspections and on-site supervision' and would encourage a review of the inspection stages, both in terms of their frequency and their ambit.

6. We also submit the role of the certifier could be strengthened by requiring that the certifiers be not only engaged by the owners but also paid by the owners directly as this could remove the current potential conflict where a certifier, although engaged by an owner, is paid via a builder. In relation to the concern where the certifier is engaged by the builder/developer, this concern could be alleviated by some of the other ideas for reform, including by strengthening the statutory audit processes for certifiers.

Reform to Statutory Warranties

7. In *Koundouris v The Owners - Units Plan No 1917* (2017) ACTCA 36, the Court of Appeal of the ACT extended the scope of the statutory building warranties contained in the *Building Act 2004* ('the Act') further than it was previously understood they reach. The High Court, in its special leave disposition, noted that any unintended consequences were a matter for the legislature.

8. There is currently a confusion as to the metes and bounds of obligations in relation to defective work in the most general sense.

9. We submit that the legislature ought to review the legislation and provide clarity, particularly in light of the interaction with the limitation period contained in section 10 of the Act.

10. We further submit that the upshot of the Court of Appeal's decision is that builders have a liability longer than most participants in the industry ever expected. Such a state of affairs could act as a disincentive for builders to repair complex defects, as it can mean that the commencement date for the limitation period is unwittingly postponed. Further, it could act as a very significant barrier to entry to new entrants who cannot possibly take on the risk of indefinite warranty periods. Further, from an economic cost perspective, this could mean over the long run that costs may increase for consumers as builders start to factor those risks into their construction costs.

Build Quality Requirements

11. We would refer the Committee to Part 1 of our previous submissions and would supplement them.

12. The starting point for building quality is the design and we understand anecdotally that there is a case for having a continuity of designers in the whole of the construction process. In other words, rather than having a disjointed design response whereby one designer does the DA documentation and another does the BA and construction documentation, that there is continuity in having the same designer or design team involved ending with the preparation of as built drawings and plans. This approach however should be supported by evidence based regulation.

13. We suggest that there is the case for minimum design requirements and documentation for different types of construction, and there is some statutory

design review. We understand that presently there is an informal major design review at major project level already existing in government but this should be strengthened by regulation.

Insurance Scheme

14. In light of the above, it may be that the best option for consumer protection, keeping in mind the need to encourage small business in the builder sector, is a scheme in the nature of a fidelity fund.

15. How the insurance scheme would operate should be considered carefully. One idea would be that the scheme is a government or quasi-government scheme funded by levies for Building Approval. This is because it recognises that some building problems have community wide implications. This recognises, for example, that it may take years before problems present or are identified, such as in the case of asbestos. It also recognises that it may be unfair to saddle one particular entity or person to a liability when there has been a change in the understanding of building technologies, over the medium to longer term.

16. The other reason for having a government scheme is that it potentially alleviates the issues associated with access to private insurance. However, before implementing any mandatory insurance scheme, it is necessary to do a cost benefit analysis because, ultimately, the cost of insurance will be passed on to consumers.

17. On a different point, but one perhaps worthy of raising, is that the establishment of a local building products approval system akin to the Victorian Building Authority model may be useful in avoiding future problems.

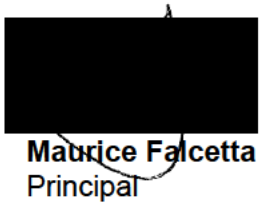
Regulator and Alternative Dispute Mechanisms

18. In some respects, if the overall system is improved, it must follow that the frequency of disputes must also diminish over the long run. That said, it is acknowledged that there will also be disputes involving consumers and government.

19. Focussing on disputes and the economic cost of disputes is reactionary. There is a case, we suggest, for government and other stakeholders, including groups such as the Law Society and the MBA to take a greater educative role. For example, greater emphasis could be placed on the need for inspection and review of other critical documents, such as the minutes of owners corporations and statutory required building reports. Moreover, reform could be strengthened by regulating exactly what can be included, or more importantly, what cannot be excluded from

a building report and where they are required. For example, there is no requirement to obtain a building report for a Class A Unit.

Yours faithfully,
Trinity Law



Maurice Falcetta
Principal