



Inner South Canberra Community Council

The Secretary
Standing Committee on Planning, Transport and City Services
ACT Legislative Assembly
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Canberra ACT 2601

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INQUIRY INTO THE PROPERTY DEVELOPERS BILL 2023

1. The Inner South Community Council (ISCCC) is a voluntary, not for profit, community-based association operating in the inner south area of Canberra, in the Australian Capital Territory (ACT). The ISCCC's objective is to preserve and improve the social, cultural, economic, and environmental well-being of Inner South Canberra and the Inner South Canberra community. Eight inner south community groups participate in ISCCC activities.¹
2. The ISCCC thanks the Committee for this opportunity to comment on the Property Developers Bill 2023 (the Bill).

RECOMMENDATIONS

That the Government should:

- 1. Continue with its scheme to license property developers as part of its plan to improve outcomes in the industry;**
- 2. Commit to reviewing the effectiveness of the reforms introduced by the Bill in five years' time (2029);**
- 3. Be prepared to make further changes to the regulation of the property development industry even before this review if they are necessary or convenient;**

¹ Deakin Residents Association, Forrest Residents Association, Griffith Narrabundah Community Association, Kingston and Barton Residents Group, Oaks Estate Residents Association, Old Narrabundah Community Council, Yarralumla Residents Association Inc and Red Hill Residents Group.

4. **Amend the Bill so that only natural persons can be licensed as property developers;**
5. **Amend the Bill or other appropriate legislation to give licensed property developers to counter sue any other body or person associated with a development if the property developer is subject to litigation in relation to a defect in a development;**
6. **Amend the Bill to require the Registrar to record the Director Identification Number of all current and former directors, as well as their names;**
7. **Resist arguments that certain preferred groups be carved out from the Bill and ensure that it applies to any person or corporate body which builds residential accommodation;**
8. **Amend the Bill to remove the power to appoint the Registrar from the Director-General of Environment, Planning and Sustainable Development Directorate (EPSDD) and assign to duty to someone outside EPSDD;**
9. **Introduce arrangement to register architects and similar professionals and licence tradespersons in the building trades;**
10. **Ensure that the Bill aligns correctly with the Building Act and other appropriate regulations;**
11. **Negotiate with the industry to determine an appropriate commencement date which should not be more than three years after the Bill received assent; and**
12. **Undertake a Regulatory Impact Statement of the Bill.**

COMMENTS

3. The ISCCC supports the objects in the Bill which are to:
Protect the public by ensuring that residential development activities are carried out by people that are competent and have the capacity and capability to undertake those activities.
Protect the public by ensuring property developers engaged in residential development activity are held responsible and accountable for development activities they carry out.
Promote public confidence in the standard of residential development activities undertaken by property developers
4. The ISCCC notes that the Explanatory Statement says:
By the nature of the role that property developers play in the development process they have significant levels of influence and control over development outcomes, including setting the culture of a project, and influencing many aspects of the design, quality, and construction.

Property developers are not currently subject to a licensing or regulatory scheme that expressly covers their role in the development process. Establishing an effective regulatory regime will build confidence in the sector and improve outcomes for building owners and occupants. It will also positively impact on the economic sustainability of the development sector in the ACT.

5. Residential property development is an issue of ongoing concern for many Canberrans. It seems to be generally accepted by almost all that there are serious problems with the industry, and the debate is about how best to remedy the situation in a timely manner while introducing the minimum necessary additional regulation. As a general comment the ISCCC welcomes this Bill as a step towards improving the situation.
6. Shortcomings in the property development industry have been of concern to the ISCCC for some years. In 2018 the ACT Standing Committee on Economic Development and Tourism held an Inquiry into Building Quality in the ACT. This elicited a total of 103 submissions, includes ones from the ISCCC, from one of our constituent residents' groups, Kingston Barton Residents Group (KBRG), and other groups representing residents including the Combined Community Councils of the ACT, and the Owners Corporation Network². Subsequently another constituent residents' group of the ISCCC, the Griffith Narrabundah Community Association (GNCA) lodged a submission as part of the Have Your Say process on Developer Regulation in 2023³.
7. Public concern about the property development industry remains a matter of interest to many residents, and the ISCCC believes that the recommendations of its 2018 submission, and those of the KBRG and GNCA and other submissions cited are still worth consideration, while recognizing that some will feel that it would not be appropriate to introduce some or all of these measures at this stage. We also recognize that, while undesirable behaviour by some property developers is a problem, regulation of property developers will not resolve all the development industry's problems, and further regulatory interventions in other areas may be required, for example in relation to certifiers.
8. The ISCCC consequently welcomes the Government's introduction of this Bill and the protection it will provide to the public. The ISCCC supports the licensing and regulation of property developers. It recognizes that some, and possibly many ACT developers already adopt best practice but when developers do not, purchasers have fewer protections than they do when they buy a fridge. However, we note that this Bill is in

² These submissions can be found as Submissions 53, 55, 46, and 23 to the Inquiry into the Quality of Building Construction in the ACT at <https://www.parliament.act.gov.au/parliamentary-business/in-committees/previous-assemblies/standing-committees-ninth-assembly/standing-committee-on-economic-development-and-tourism/inquiry-into-building-quality-in-the-act>

³ This submission is available on the GNCA website at <https://www.gnca.org.au/gnca-developer-regulation-submission/>

many ways ‘light touch’, attempting less than has been advocated by some critics of the industry and its problems. The ISCCC notes that this leaves the Government the option of imposing further regulation if this approach is ineffective, and consequently urges the Government to commit to a review of the impact of this Bill in five years’ time, 2029, to determine whether further changes are necessary or desirable.

9. The ISCCC believes that regulation of property developers is only worthwhile if this will lead to improved outcomes compared to the current arrangements, both workers in the industry, and property purchasers. Additional regulation is worse than useless if it does not achieve its intended outcome. The ISCCC consequently supports holding company directors personally responsible and liable for the rectification of defects. However, to assist holding property developers “*responsible and accountable for the residential development activities they undertake*” as set out in Clause 6(1)(a)(ii) of the Bill, only natural persons should be eligible to be licensed as a property developer under Part 3 of the Bill, removing the opportunity for dodgy directors to shelter behind the corporate veil. Clause 13(1) of the Bill lists the characteristics that the Registrar must take into account when determining whether an applicant is a suitable person. The first and presumably most important consideration is “*the applicant’s character, including, for example, the applicant’s honesty, integrity and professionalism*”. Corporations do not have character, nor do they display professionalism. In addition, natural persons are much more rarely wound up, placed into administration, receivership, or liquidation than are companies.
10. Although it is possible to specify proxies for an individual’s characteristics to be applied to corporate legal persons in determining a corporation’s suitability, these are artificial, cumbersome and it would appear, fairly easily evaded. Rather than setting up a lawyers’ picnic in devising ways to circumvent the intent of the Bill, why not avoid the whole problem altogether by specifying that a property developer can only be a natural person? We note that such a rule would also resolve concerns expressed by the Property Council of Australia (PCA) that corporate liability might impose retrospective responsibility for defects on directors who were not directors of the responsible corporation at the time the defect was created.
11. The ISCCC notes that while some submissions indicate support for property development industry reform, they also suggest that licensing of property developers be removed from the Bill. Given that the Government has decided on a licensing approach to improve industry outcomes it would be more convincing if those opposed to licensing could suggest alternative paths to reform which would be as effective.
12. Any attempt to improve outcomes in property development through the regulation of property developers requires as a corollary that the responsible property developer would have the right to counter sue against any builder, subcontractor, supplier, professional or

consultant that in the opinion of the property developer is the guilty party, even in the absence of a contractual relationship between the property developer and the other party. The property developer is far more likely than the typical development resident to know who was responsible for any defective work. The absence of such a provision would leave directors unfairly exposed to paying for remedial work for flaws for which they were not responsible. We have not been able to identify any such provision in the Bill but are not sure whether it would be appropriate to include such a power in this Bill or in the Building Act.

13. The PCA has expressed concerns that making directors personally liable for defects will drive development companies away from Canberra. Indeed, any move to tighten regulation, even in a very modest measure, could be expected to encourage some companies to reconsider whether they wish to continue working in Canberra, or whether it would be wise to do so. But this is the very intent of regulation, to change a company's behaviour when its activities lead to unacceptable social outcomes. The PCA's position would seem to be an argument to take no action in relation to the problems of the industry, which would be at variance to the general view that some action is necessary.
14. The ISCCC recognizes the need for affordable housing in the ACT and has read the submissions warning the Committee that this legislation will constrain development. On the other hand it can also be argued that the relatively frequency of building defects occurring under the current arrangements has deterred potential property investors, consequently reducing the amount of affordable housing available. The ISCCC is of the view that factors influencing the rate of new dwelling construction in the ACT are complex but feels that relatively minor changes to the regulatory regime will likely only have effects at the margin.
15. Clause 28 of the Bill requires the Registrar to keep a register of licensed property developers and specifies a number of details to be recorded, including in 28(2) (d) the "*names of current and former directors...*" This needs to be amended to read the "*names and Director Identification Numbers of current and former directors...*" The requirement that all directors have such a government supplied unique Director Identification Number (DIN) and use it in any interaction with any government agency has been a requirement since October 2022⁴. A major reason for introducing DINs was to combat phoenixing of companies, apparently a significant issue in the development industry, as well as the use of dummy or non-existent directors. Given that this requirement came into effect well before this draft of the Bill, the omission is somewhat surprising.

⁴ See Part 9.1A – Director identification numbers in the Commonwealth Corporations Act 2001

16. Clause 52 of the Bill gives the Registrar the power to issue a rectification order up to 10 years after the issuance of an Occupancy Certificate or similar certification of completion, or when work stopped on the project, although Clause 52(4)(a) seems to provide for 10 years and 6 months, and Clause 52(4)(b) 11 years, under specific circumstances. Given that buildings are rarely designed with an expected life of less than 25 years, it could be argued that liability for building defects should endure for a similar period. In this light 10 years appears to be a reasonable compromise.
17. The Property Council of Australia (PCA) has suggested that this period should be reduced to 6⁵ years. This would in our view be too short in light of the time required for individual residents to accept there is a problem, realise that it is not only their unit impacted, convince the body corporate to become involved, etc. The ISCCC believes the Bill is being realistic about when latent defects become evident and the inability of home purchasers to identify problems immediately. Certainly, the current 2 year period is ludicrously short, as you will get a new fridge for free if the compressor dies, even after two years. This discordance in consumer law protection between purchases of white goods and dwelling purchases is difficult to justify.
18. The ISCCC notes that at least one aged care provider has argued that such organisations should be excluded from the requirements of the Bill,⁶ If the Committee is persuaded by such arguments those providers should, at the very least, be required to comply with the recommendations of the Aged Care Royal Commission. For example, they should be required to build in compliance with the National Aged Care Design Principles and Guidelines.⁷ However, the ISCCC is not persuaded that it would be appropriate to introduce differing regulatory rules dependent on the supposed tax status of the eventual owner of the property. Aged people about to purchase a sublease in an old persons' residence surely deserve as much protection as younger people buying a home. Drafting legislation to apply effective regulation but exclude only genuine non-profit organisations would be complex and difficult, and would probably be ineffective within a year or so, as this would draw the attention of some very competent lawyers and accountants. It seems likely that there would be better, cheaper, and more direct ways to assist aged care provider if this were the Government's intention.
19. Currently, the Bill, in conjunction with the *Legislation Act 2023*, requires that the person who is the head of the Planning Authority to also be the person who appoints the Registrar. But the Registrar also has an accountability role in relation to planning. The Bill would be improved if the power to appoint the Registrar was removed from the Director-General of Environment, Planning and Sustainable Development Directorate (EPSDD), and a requirement inserted that a person independent of EPSDD make that

⁵ Submission 2 to the Inquiry into the Property Developers Bill 2023 p.2

⁶ Submission 6 to the Inquiry into the Property Developers Bill 2023

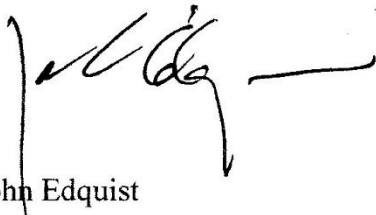
⁷ Recommendation 45 Royal Commission on Aged Care

appointment. Good governance requires that ‘mark your own homework’ arrangements are best avoided before they cause problems (or even the appearance of problems).

20. There are a number of other issues relating to the Property Development Industry that do not appear to have been dealt with in the Bill. These include:
- (i) Making clear the right of the identified property developer to counter sue any other party involved in construction of the development irrespective of the existence of a contractual arrangement or the like, as discussed above in paragraph 5. This should be addressed in this Bill either by becoming part of the proposed Act or as an amendment to the Building Act;
 - (ii) Requiring registration of architects and building designers, and licensing of all structural trades, eg builders, site or project managers, plumbers, electricians, carpenters, roofers, window fitters, concreters, tilers, fire safety related trades, water proofers, and any others which could impact the defects that occur most often, as suggested in various submissions;⁸
 - (iii) Ensuring that the provisions of the Bill align with those in the Building Act and with the various applicable regulations;
 - (iv) Providing an appropriate “lead-in” period to allow the industry to adjust to the new regime; and
 - (v) Requiring that the Bill be the subject of a Regulatory Impact Assessment.

21. The ISCCC would be happy to provide further information to the Committee.

Yours faithfully



John Edquist

pp Colin Walters
President
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6 March 2024

⁸ Submission 1, 2, 3, 4 to the Inquiry into the Property Developers Bill 2023 p.3, p.2, p.2, and p.6 respectively;