

# Unveiling the *ACT Property Developers Bill 2023*: A Comprehensive Overview (Part 1 of 2)



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## Newsletter

July 2024: Issue 2

In this newsletter, Part 1 offers an overview of the *ACT Property Developers Bill 2023* ('the Bill'), outlining its key objectives. Additionally, the newsletter delves into the background and legislative history of the Act, explores key concepts, and examines a significant amendment: personal liability of directors.

## Introduction

With building defects costing Australians \$2.5 billion annually nationwide and exceeding \$50 million annually within Canberra alone, there is a growing concern regarding the controversies surrounding construction defects and the conduct of residential property developers. In response, the Australian Capital Territory (ACT) Government introduced the *Property Developers Bill 2023* (ACT) (**'the Bill'**) on 30 November 2023, following extensive deliberation.

Notably, the Bill enshrines both a positive licencing regime for residential property developers to combat “developers that do the wrong thing” and a regime for the rectification of residential building defects to “give Canberrans the confidence that their homes will be built to the highest standard by trustworthy professionals.”<sup>1</sup> Property developers will be held liable for defects along with builders and landowners for up to ten years under the ACT Government’s licencing legislation that was introduced to the Legislation Assembly on 30 November 2023.

This newsletter will begin by introducing the ACT’s Bill, providing insights into its core objectives and legislative context. We will delve into key considerations for acquiring and applying for a license under the Bill, outlining essential steps and developer requirements. Additionally, we’ll explore a significant amendment related to the personal liability of directors, focusing on its implications for corporate governance and accountability within the property development sector.

Part 2 of the newsletter will delve into recent amendments related to the reverse onus of proof, statutory duty of care, and rectification orders. These amendments are crucial in understanding the evolving regulatory landscape and its impact on developers and stakeholders alike.

## *Property Developers Bill 2023*

### **The meaning of ‘property developer’**

As per section 49 of the Bill, a **property developer** is any of the following in relation to **residential business work**:

- (a) a person who contracts or arranges for, or facilitates or otherwise causes (whether directly or indirectly) the building work to be done;
- (b) the owner of the land on which the building work is undertaken at the time the building work is done;
- (c) the principal builder of the building work;
- (d) for a residential building under a units plan—the developer, as defined in the Unit Titles Act 2001, dictionary, in relation to the units plan;
- (e) a person prescribed by regulation.

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<sup>1</sup> Vassarotti Rebecca, ‘ACT Government to introduce Australian first licence scheme for property developers’ (Media Release, 29 November 2023).

Section 49(b) extends the definition of 'property developer' to include not only traditional developers but also the owner of the land, the principal builder and a person who contracts or arranges for building work to be undertaken. Although this definition applies only to Part 6 of the Bill (the rectification order regime), its breadth is noteworthy, potentially classifying multiple parties as developers for each project. This broad scope may result in a complex network of liabilities, potentially confusing for all parties involved.

Based on the Standing Committee on Planning, Transport, and City Services key findings in formulating these regulations, it was recommended that the ACT Government consider granting exemptions to not-for-profit development organisations. These exemptions would apply to entities that both own and lease developments for a minimum period of 10 years.

The Bill also proposes to insert a new definition for "property developer" in the *Building Act 2004* (ACT) (**BA**) limited to subparagraphs (a) and (b). Given the recent introduction of the *Territory Plan 2023* (ACT) and subparagraph (d), there is a possibility that an individual who subdivides their RZ1 block into dual occupancy housing and sells the second dwelling could be classified as a property developer. As a result, they may not only require a licence under Part 3 of the Bill but also may be subject to a defect rectification order under Part 6 of the Bill.

### **The Objectives of the Bil**

Several sources have attributed the Bill's genesis to the influence of the Construction, Forestry, Maritime, and Energy Union (**CFMEU**) on the ACT Government. While certain aspects of the Bill stem from the *Parliamentary and Governing Agreement*<sup>2</sup> between the ACT Greens<sup>3</sup> and the Australian Labor Party, it extends beyond the requirements of that agreement.

Under section 6 of the Bill, the objectives are to protect the public by ensuring that:

- The 'residential development activities are undertaken by the property developers that are competent and have the capacity to undertake those activities';<sup>4</sup>
- 'Property developers are responsible and accountable for the residential development activities they undertake'<sup>5</sup>; and
- Promoting public confidence in the standard of residential development activities undertaken by property developers.<sup>6</sup>

Such objectives are to be achieved by (a) establishing a licencing scheme to ensure various residential activities are only undertaken by licenced property developers; (b) imposing standards of practice and competency for the residential development activities undertaken by licenced property developers; (c) requiring property developers to rectify serious defects, or possible serious defects, in residential

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<sup>2</sup> Australian Capital Territory, *Parliamentary & Governing Agreement*, 10<sup>th</sup> Legislative Assembly.

<sup>3</sup> The Greens, 'ACT Government to Introduce Australian First Licence Scheme for Property Developers' (Media Release, 29 November 2023).

<sup>4</sup> *Property Development Act 2023* (ACT), s 6(1)(a)(i)

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid* 6(1)(b).

buildings they arrange to be constructed; and (d) providing for the monitoring and enforcement of compliance with this Bill.

## Background and Legislative History

### Policy Rationale

The purpose of the Bill is that developers hold significant sway over the quality of apartment buildings and dwellings, thus they should bear the responsibility for ensuring the safe and compliant construction of these structures.

Rebecca Vassarotti, Minister for Sustainable Building and Construction, said that delivering Australia's first licencing and regulation scheme for property developers will tackle the issue of defects and compliance failures in residential property developments that occur before, during, and after construction.<sup>7</sup> In a media statement, Vassarotti stated:

“Over recent years, high profile cases of poor development have undermined the trust of Canberrans in the home building industry.... The Government takes accountability within the development industry seriously, and these decisive steps to enhance the regulation and monitoring of the industry will help to make sure that it operates at its best and upholds the highest standards.... This Australian-first move aims to give Canberrans the confidence that their homes will be built to the highest standards by trustworthy professionals. To put it simply, it's all about quality.”<sup>8</sup>

### Explanatory Statement

Defects and compliance failures in construction can incur significant rectification costs, including assessment, inspection, and legal expenses. Moreover, they pose heightened safety risks to building users, diminish property value and income, and erode trust in the construction sector. Consumers often bear the financial burden of rectification costs and potential loss of property value, alongside enduring the physical and mental health effects these defects can induce.<sup>9</sup>

Independent market research commissioned by the NSW Government on “*The State of Consumer Confidence*”<sup>10</sup> revealed that low confidence in residential property purchases stemmed from distrust of developers. This research underscored a lack of sufficient information for informed decision-making, with 50% of respondents expressing a lack of confidence in buying an apartment. Given that property developers are currently not subject to a licencing or regulatory scheme, establishing an effective regulatory regime will build confidence in the sector, improve outcomes for building owners and occupants, as well as positively impact the economic sustainability of the development sector in the ACT. The Bill's development included consideration for compatibility with human rights under the *Human Rights Act 2004 (HRA)*.

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<sup>7</sup> Vassarotti Rebecca, ‘ACT Government to introduce Australian first licence scheme for property developers’ (Media Release, 29 November 2023).

<sup>8</sup> Ibid.

<sup>9</sup> Explanatory Memorandum, *Property Developers Bill 2023 (ACT)*.

<sup>10</sup> Building Commission New South Wales Government ‘The State of Consumer Confidence, May 2023.

## Critics of the Bill

### *Increase the cost of new housing*

Critics of the Bill have raised several concerns, notably concerning its potential impact on the cost of new housing. The introduction of this legislation has sparked controversy in the ACT, with the Property Council asserting that the proposed developer licencing scheme could limit the supply of new homes available for rent or purchase, drive up the cost of new homes, and potentially deter investors and developers from investing in Canberra.<sup>11</sup> Given the Territory's existing affordability crisis, reconciling the objectives of the Bill during a national housing affordability and supply crisis presents an intriguing policy conflict.

Property Council ACT executive director, Shane Martin, criticised the bill, contesting that it was rushed through and expressing concern over proponents' claims that it was the first of its kind in Australia, and possibly the world. Martin maintains that the proposed developer licencing scheme could indeed increase the cost of new homes and potentially drive investors and developers away from Canberra.

In response, the Construction Forestry Maritime Mining and Energy Union (CFMMEU) dismissed these claims as groundless scaremongering tactics that neglect factual evidence. CFMMEU argues that while upfront costs may increase, non-compliance often arises due to cost-cutting practices. Nevertheless, the reforms are expected to minimise the prevalence of defects in new residential buildings, resulting in a net reduction in the real cost of new homes. It's worth noting that the cost to rectify defects post-construction is significantly higher than ensuring compliance during the building process.<sup>12</sup> Trustworthy builders, who already adhere to compliance standards and produce safe homes, will face only nominal expenses for obtaining a new licence. By eliminating competition from subpar performers, this measure is poised to bolster consumer trust, ultimately benefiting the industry as a whole.

Among the other seven recommendations, the Property Council advises for the removal of personal liability for directors, consolidating all licencing requirements within the Bill itself rather than dispersing them across other pieces of legislation, and the removal of any aspect of retrospectivity

## Key Concepts

### **The need for a licence**

The Bill does not mandate a residential property developer to take out a licence directly. Instead, the Bill merely convolutes the licence requirements through related legislation such as the *Building Act 2004 (ACT) (BA)* and the *Planning Act 2023 (ACT) (PA)* to suggest that if a particular trigger event occurs, then a licence will be required. A person will need to obtain a licence to:

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<sup>11</sup> Property Council of Australia (ACT Division, Submission to the Committee on Planning, Transport and City Services, *Inquiry into the Property Developers Bill 2023* (February 2024) 3.

<sup>12</sup> Weir Bronwyn, 'The ACT is Punching Above Its Weight!', *Weir Legal and Consulting Pty Ltd* (online, 30 November 2023) < <https://www.linkedin.com/pulse/act-punching-above-its-weight-bronwyn-weir-gomjc/>>.

- Apply for development approval in relation to certain residential building developments under the *Planning Act 2023* (ACT)
- Apply for a building approval, building commencement notice or certificate of occupancy regarding certain residential building work under the *Building Act 2004* (ACT)
- Sell, or advertise the sale of, residential property off-the-plan under the *Civil Law (Sale of Residential Property) Act 2003* (ACT)

Under section 162A(4) of PA, a **residential building development** is defined as:

- Building or altering a residential building on land; and
- For the purpose of building a residential building on land —
  - undertaking earthworks or other construction work on or under the land;
  - subdividing or consolidating the land;
  - varying a lease relating to the land (other than a variation that reduces the rent (payable to a nominal rent)); or
  - demolishing a building on the land.

The key details regarding licence application and administration include:

- How the Bill defines 'residential building development' for the purposes of the PA, licences will be required to be able to lodge DAs seeking subdivision or consolidation of land
- The ACT's Planning Authority must not accept development applications (**DAs**) for proposed residential building developments unless the proponent for the development or a related entity of the proponent holds an unrestricted licence.
- Certifiers are barred from considering residential building approval applications under the BA unless all parties arranging for the building work or related entities hold unrestricted licences.
- The Bill makes it an offence to engage in an off-the plan contract for the sale of residential land if the seller or a related entity lacks a licence or holds a licence that restricts them from entering into the off-the-plan contract.
- Licence can be issued for up to seven-year terms, alleviating the need for frequent renewals

### **Applying for a licence – Application**

To acquire a licence, a written application must be submitted to the ACT Property Development Registrar (**the Registrar**), and must include the two following elements listed under section 15(2) of the Bill:

#### **1) Rating report (if requested by the registrar)**

Section 14 of the Bill defined a 'rating report' as a report crafted by a '*rating entity*' which assesses the operational and financial capacity of the applicant to conduct a business as a developer. This would likely encompass assessments such as an iCert star rating report provided by Equifax.

## 2) Information evidencing the applicant is a 'suitable person'

Section 13 of the Bill outlines various criteria that the Registrar must assess when determining if an applicant is a suitable person. The criteria include the applicant's:

- Character;
- History of compliance;
- Ability to comply with the new law;
- Operational and financial capabilities (including past undertaking developments, credit history, and financial viability); and
- History of insolvency.

If the applicant is a corporation, the registrar may also consider the criteria for 'suitable person' in relation to an associated entity (i.e. related corporation) or 'key person' for the corporation, as well as a former associated entity or 'key person' for the corporation.

Compiling this information will require a significant amount of time and will grant the Registrar access to vast and sensitive details regarding the applicant. Additionally, the Registrar may also evaluate these same factors for any entity associated with the applicant or for any key person of the applicant.

Concerningly, the decision to refuse someone a licence, refuse a renewal or impose a condition on a licence is not reviewable to the ACT Civil and Administrative Tribunal (**ACAT**).

## Amendments to the *Property Developers Bill 2023*

### Personal Liability for Directors

This area of the Bill is arguably the most controversial. The Bill allows the Registrar to hold developer's directors personally liable if a rectification order is issued or intended for a corporate property developer that is deregistered, subject to a winding-up order or in administration, receivership or liquidation, and section 55(2) of the Bill allows the Registrar to hold directors of the developer personally liable for the order.

Pursuant to section 12(a), a *key person*, for a corporation, includes a director or secretary of (i) the corporation; or (ii) an associated entity of the corporation.

This presents several challenges for companies and their directors. First, directors may be held personally liable for serious defects in residential buildings constructed up to 10 years ago. This aspect of the Bill may dissuade individuals from assuming or maintaining directorial roles in corporate property development, though many may already face potential liability with limited recourse. Second, directors may be personally liable whether or not they were a director of the company at the time the building was built, as section 55(2) of the Bill encompasses an individual who became director of the corporate property developer after the residential building work has stopped. Third, there is an

incentive for third parties to inundate property developers with one or several lawsuits to force them into a situation where directors can be personally liable for the order.

The Bill allows the Registrar to pierce the corporate veil, a remedy typically available in very limited circumstances. This includes instances where Australian courts have found that the company was utilised to circumvent a legal or fiduciary obligation,<sup>13</sup> or where the company operated as a mere agent of its directors or shareholders.<sup>14</sup>

ACT Minister for Sustainable Building and Construction Rebecca Vassarotti wrote in her submission to the inquiry that the Bill was structured to ensure liability is first directed against the corporate entity, not the director. Vassarotti stated that: “Director liability will only arise where the company is wound up, in administration or deregistered.” Ultimately, failing to comply with rectification order is an offence under section 57 of the Bill.

Three other significant amendments highlighted in the Bill include the **reverse onus of proof**, **statutory duty of care**, and **rectification orders**. These amendments will be discussed further in the upcoming newsletter.

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<sup>13</sup> *Dennis Willcox Pty Ltd v Commissioner of Taxation (Cth)* (1988) 79 ALR 267, 272 (Jenkinson J).

<sup>14</sup> Ian M Ramsay and David B Noakes, *Piercing the Corporate Veil in Australia* (2001) 19 *Company and Securities Law Journal* 250, 258.