



ACT
Government

Developer Regulation

Discussion Paper

December 2022

Contents

Developer Regulation	1
Introduction.....	3
Review	3
Next steps	5
Background.....	6
What is the current state?.....	6
Building Lifecycle and the role of the developer in it.....	9
Focus areas	14
Accountability and transparency.....	14
Ethical behaviours and work practices	19
Project Capacity and Capability – financial and operational.....	25
Building Quality and Safety	29
Options	32
Questions.....	45
Appendices	47
Appendix A – Existing Recommendations / Commitments.....	47
Appendix B: ACT Building and Construction Industry and Market.....	50
Appendix C: Existing Regulatory Settings	53
Appendix D: Timeline of key regulatory reforms	55
Appendix E – Detailed Developer Process.....	58
References	59

Introduction

An effective building and construction regulatory system is important for the health, safety, and wellbeing of our community. Confidence in the regulatory system is critical to the economic sustainability of the building and construction industry. There is a public perception of developers that is not positive and largely comes from poor behaviour in a small portion of the industry.

Canberrans should be confident that when they engage with a developer, the developer will be competent, transparent and act ethically. The ACT Government is committed to introducing greater accountability measures for property developers and is investigating the best measures to achieve this.

The ACT Government is aiming to support the growth of the industry as well as improve consumer and public confidence in the development process. Prior to implementing regulation, the ACT Government will consult with the community and industry to determine the best approach.

This discussion paper considers various issues and options for improving the accountability of developers and providing consumers with greater information about developments and the developers behind them. This paper will inform further consideration by Government of this matter and will form the basis of consultation with stakeholders and the community.

Through a range of forums, the ACT Government has already received feedback about the role and activities of developers, options for regulation and suggestions for matters to be addressed. This feedback has informed the development of this paper.

Review

The ACT Government is reviewing the role of developers in the building and construction industry to determine measures to be introduced to improve accountability, protect consumers and sub-contractors, and provide consumers with greater information about developments and the developers behind them. The objective of the review is to develop a system that holds developers to account for the matters over which they have influence or control in relation to a development.

The building and construction industry consists of developers, licensed builders, contractors, subcontractors, and suppliers.

Developers have an important role in setting the culture of a building and construction project through their influence on many aspects of the process. The level of influence differs across projects and between developers: while some only invest financially in a project, others have complete control over a project from financing to the build to the sale and management.

The chain of accountability in the ACT's current building regulatory system places responsibility on the licensed builder to ensure that building work meets the standards required by legislation, including compliance with the National Construction Code (NCC). It does not currently encompass the role of the

developer or place regulatory responsibility on them for building quality issues identified post-construction and settlement/transfer of the property.

What are we trying to achieve?

Out of this review, the ACT Government will develop a framework that:

- Provides greater accountability for property developers within the building and construction industry
- Holds property developers to account for the matters over which they have influence or control
- Enhances consumer trust and confidence in the building and construction industry
- Shapes behaviour and supports a robust, efficient, and professional building and construction industry
- Improves the quality of buildings in the ACT
- Avoids unnecessary regulatory duplication, burden, and cost
- Complements existing regulatory settings.

Scope of the review

Development activity is broad and covers several stages of the building and construction process and various categories of buildings.

The focus of the ACT Government's review is on the role of developers in the context of the building and construction process, with a focus on large-scale residential and mixed-use property developments.

The ACT Government acknowledges the complex environment in which developers operate and that they work with, impact and are influenced by, a number of parties. It also acknowledges that they operate in a highly regulated environment with a range of legislative frameworks already in place to cover different parts of the property development process.

Overview of the paper

This paper focuses on the following areas:

1. [Accountability and transparency](#)
2. [Ethical behaviours and work practices](#)
3. [Project Capacity - financial and operational](#)
4. [Building quality and safety](#)

Detailed consideration of these main areas is designed to support measures that address the impact developers have on the quality and safety of design, construction and certification of buildings and other work practices.

Throughout the paper, questions are asked to prompt consideration of key issues and guide feedback.

Next steps

The paper will be used to guide discussion with key stakeholders on focus areas and options to inform further Government consideration.

We welcome your feedback on the following questions which are provided to prompt discussion and guide feedback. We also welcome any other comments you may have about the regulation of property developers in the ACT.

Please send written comments to EPSDDBuildingReform@act.gov.au by **10am Monday 27 February 2023**.

Following feedback, the Environment, Planning and Sustainable Development Directorate (EPSDD) will provide further advice to Government.

Background

The ACT Government has committed to several measures aimed at improving building quality and the operation of the building regulatory system in the ACT.

Reviewing the role of developers in the building and construction industry and developing a framework for regulating property developers that improves building quality is one of many ways the ACT Government is taking action to lift standards and practices across the building and construction industry.

Refer to [Appendices A, C and D](#) for further information about recent regulatory reforms and the existing regulatory framework.

What is the current state?

ACT Building and Construction Industry

The building and construction industry is a key contributor to the wellbeing of ACT residents and is one of our largest economic drivers. It is the fourth largest industry in the ACT contributing roughly \$3.64 billion annually and accounting for to 6.8% of all jobs (1)ⁱ. In Canberra, developers were responsible for the building of 18,066 medium and high-density homes between 2011 and 2018.

For more detailed information refer to [Appendix B](#).

ACT Regulatory Settings

There are several regulatory frameworks that apply to developers and the development industry in the ACT. Existing regulatory settings include the *Electoral Act 1992*, *Unit Titles Act 2001*, *Unit Titles (Management) Act 2011*, *Building Act 2004*, *Construction Occupations (Licensing) Act 2004*, *Civil Law (Property) Act 2006*, *Civil Law (Sale of Residential Property) Act 2003*, *Agents Act 2003*, *Planning and Development Act 2007*, *Building and Construction Industry (Security of Payment) Act 2009*. Other relevant operational Acts impacting the sector include the *Water and Sewerage Act 2000*, *Utilities Act 2000*, *Utilities (Technical Regulation) Act 2014*, *Electricity Safety Act 1971* and *Gas Safety Act 2000* and Commonwealth Acts associated with corporation and consumer law.

For detailed information about the application of existing regulatory settings refer to [Appendix C](#). A timeline of legislative changes since 2004, is at [Appendix D](#).

Reforms to date

The ACT Government has already implemented and continues to implement reforms to apply accountability and transparency to developers and development activity. Working closely with industry and other stakeholders, notable examples of recent work include:

- The [Building and Construction Legislation Amendment Act 2019](#) which made amendments to the ACT's Building Regulatory System to address issues relating to corporations avoiding action to address

ⁱ For full listing see Appendix A - Industry Gross Value Added, ACT, 2020-21 (a)

defective works (2). These amendments increased the avenues for consumers to pursue remedies against directors of building companies personally for defective works associated with their licence, including providing the Construction Occupations Registrar with the power to take disciplinary action and make rectification orders against corporations, including directors of a licensed corporation.

- The ACT Government has undertaken reforms to improve documentation provided with building approvals. In 2019, the ACT Government issued the [*Building Minimum Documentation and Information for Building Approval Applications – Class 2-9 Buildings Guideline \(the Guideline\)*](#). This guideline is for land owners and people preparing plans and other documents to accompany an application for a building approval for a new class 2-9 building or a substantial alteration to a class 2-9 building. Class 2-9 buildings under the NCC include residential apartment buildings, and buildings with a commercial or community use. The guideline includes requirements for documents and information (the required information) to be included in the plans and accompanying documents that form part of a building approval application. The Guideline confirms to designers and applicants the expectations for the minimum information to be included in an application for building approval. The Guideline also encourages landowners (developers) and designers to consult with the project's building certifier throughout the design process.
- The [*Unit Titles Legislation Amendment Act 2020*](#) which implemented the Managing Buildings Better reforms, changing the law to improve the management of apartments, townhouses and mixed-use developments and commercial units (3). The reforms introduced mechanisms to hold developers more accountable, including:
 - Developers must give owners buying off the plan a disclosure statement as a part of the contract.
 - Developers also need to provide updated statements to notify buyers of any significant changes to the development, including registration of the units plan and any material changes made since the contract was signed, including amendments to development applications and approvals.

These extra steps provide buyers with the information they need to rescind a contract if the unit or units plan is not as described.

- The [*Building and Construction Legislation Amendment Act 2020*](#) which introduced the framework for the establishment of a Residential Building Disputes Scheme that helps homeowners and the building industry resolve residential building disputes earlier and at less cost. The intention of the scheme is to facilitate constructive and productive dialogue between parties to a dispute, to ensure relatively rapid and low-cost solutions that are technically and legally workable while not requiring complex legal negotiations. The scheme is also intended to help resolve simpler matters without parties having to have the matter heard in ACT Courts and Tribunals. This scheme applies to residential building disputes between a building owner and either a building practitioner or a developer. A developer is defined for the purposes of the scheme as per the definition in the *Unit Titles Act 2001*.
- Amendments were made to the [*Civil Law \(Sale of Residential Property\) Act 2003*](#) in 2021 to provide improved consumer protections for Canberrans by regulating the use of sunset and delayed development clauses in off-the-plan property sale contracts (4). As a result of these amendments:
 - Developers are only able to use sunset and development delay clauses to rescind a contract if the buyer consents or if they are permitted by an order of the ACT Supreme Court
 - Developers wanting to rescind a contract must provide 28 days written notice to the buyer, setting out the reasoning behind the proposed rescission under the clause.

Related work

There are several related bodies of work currently being undertaken, or planned for future work, by the ACT Government that interact with this review. The intention is for this review and these related bodies of work to be complementary to each other.

- Planning System Review and Reform Project (EPSDD)
 - The [Planning Bill 2022](#) seeks to deliver a more ‘spatially-led’ and ‘outcomes-focussed’ planning system that is clear, easy to use and facilitates the realisation of long-term aspirations for the growth and development of Canberra while maintaining its valued character (5). The Bill includes several measures to approve transparency in the development application and decision-making process, including the availability of information relating to development applications in real-time on the planning website. The Bill includes a broad compliance and enforcement regime, with several avenues to seek accountability and compliance with legal requirements.
- Review of laws introduced in 2021 that were designed to protect home buyers from having their sales contracts cancelled (Justice and Community Safety Directorate)
- Implementation of the residential building work dispute scheme (EPSDD)
- Review of the ACT’s security of payments legislation (EPSDD)
- Review of the ACT’s residential building insurance settings (EPSDD)
- Improving documentation provided for building and construction projects (EPSDD)

Jurisdictional Comparison

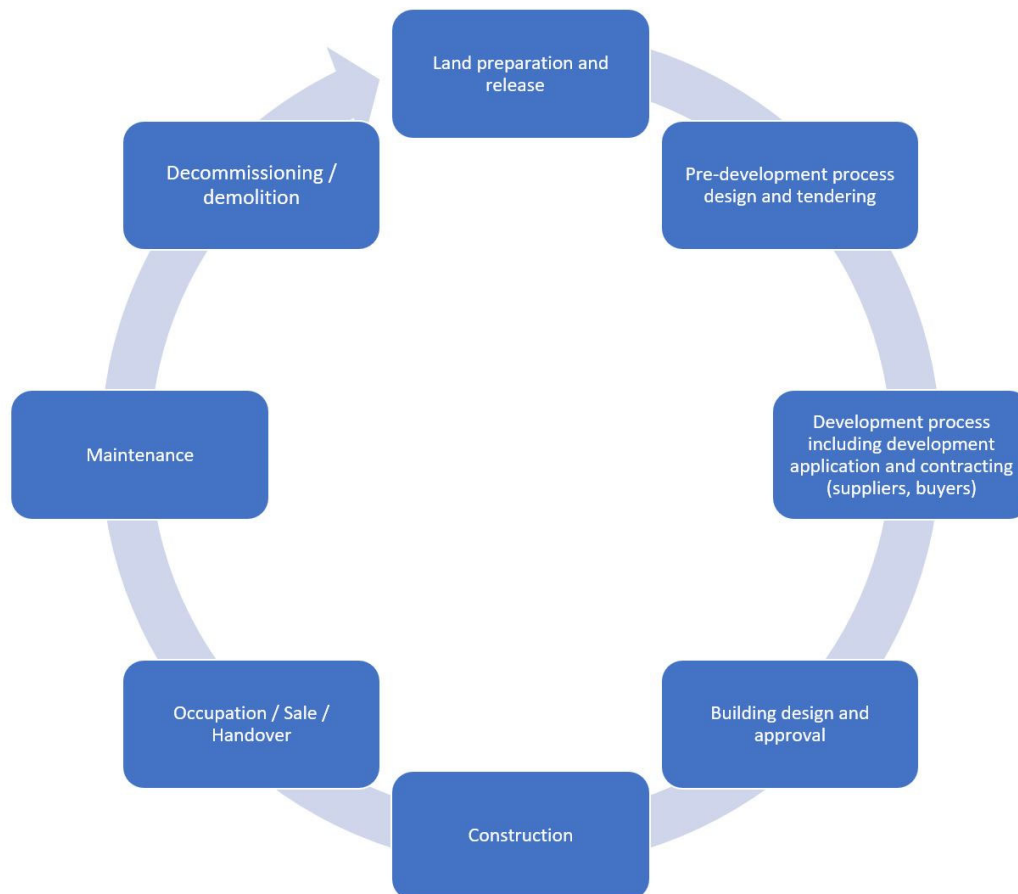
In developing a framework for the ACT, the ACT Government will look closely at the experience in other jurisdictions. A comprehensive analysis has been undertaken to understand the differing approaches to developer regulation across Australia. For example:

- Queensland is the only jurisdiction to have ever enacted a licensing regime for developers. This legislation was repealed in 2014 through the introduction of additional licensing exemptions. A Developer Review Panel has been established by the Minister for Energy, Renewables and Hydrogen/Minister for Public Works and Procurement. The Developer Review Panel released a discussion paper in November 2022.
- New South Wales does not license developers however, it does allow for oversight and sanctions to be issued to the developer. This includes powers for the regulator to issue prohibition orders, stop work orders and building work rectification orders to property developers. NSW also has a developer rating system in place to help inform the public when buying an off-the plan apartment. The Equifax Independent Construction Industry Rating Tool (iCIRT) seeks to collaborate with insurers, financiers, risk rating agencies and building industry to provide the public with an accessible rating tool to help inform them when buying an off-the plan apartment.

- Western Australia, while not specifically regulating developers, does identify their responsibilities under their regulatory framework for real estate agents. Developers themselves are not required to be registered.

Building Lifecycle and the role of the developer in it

The full building life cycle includes:



Who is involved in the development industry?

Participants in the development industry include the following:

- Landowners/Lessees
- Developers
- Financial Institutions
- Estate Agents
- Contractors (including builders and subcontracted trades)
- Professional team (including but not limited to planning and economic consultants, architects, quantity surveyors, engineers, project managers, solicitors, accountants).

Others involved in the industry may also include:

- Objectors
- Occupiers
- Public sector and government agencies (including planners)

Who is a developer?

Property developers can have complex legal and corporate structures and this needs to be well understood to ensure any regulation is effective and addresses the actual issues.

A key element for any regulatory framework developed by the ACT Government will be defining who is a developer and/or what constitutes development activity. Any regulatory scheme developed will require a robust definition to be effective.

It is acknowledged that it can be difficult for the general public to distinguish the different parties involved in a building and construction project and what aspects of the project the different parties are responsible for.

As part of its review into developer regulation, the ACT Government will consider whether regulating development activities presents a more effective regulatory model than regulating those undertaking the activity.

Current definitions of developer or development activity in the ACT

In the ACT, definitions of ‘developer’ can be found in the following legislation:

- The [Electoral Act 1992](#) defines a property developer as:
persons or a corporation that carries on a business involving the residential or commercial development of land to sell or lease for profit.
This definition is intended to cover for-profit companies whose core business is the development of residential or commercial land to on-sell or lease and not to cover not-for profit companies.
- The [Unit Titles Act 2001](#) defines a developer *as the lessee of a parcel who applies for the approval of the subdivision of the parcel under section 17* (Unit title applications—general requirements).

Definitions used in other Australian jurisdictions

There are a variety of definitions used by different entities and jurisdictions in Australia:

- The Premises Standard identifies a “A building developer, for a relevant building, is a person with responsibility for, or control over, its design or construction” and they use the following terms as examples, a property developer, property owner, building designer, builder, project manager or project lessee (6).
- The Australian Tax Office (ATO) for example does not specifically define developer but talks about property development activities that primarily operate in building and construction services (7) (8).

- The Australian Bureau of Statistics (ABS), while seeking to classify all occupations and jobs (9) does not have a specific definition or classification for Property Developer. They do however identify “Construction Manager” (133111) as a profession which undertakes tasks like monitoring costs, quality, budget, and risk leading and negotiating with stakeholders. These are all tasks that could be expected to be undertaken by a property developer.
- The Queensland [Electoral Act \(1992\)](#) defines a property developer as *a corporation engaged in a business that regularly involves the making of relevant planning applications by or on behalf of the corporation— in connection with the residential or commercial development of land; and with the ultimate purpose of the sale or lease of the land for profit.* (10)
- The NSW [Electoral Funding Act 2018](#) defines a 'property developer' as *an individual or corporation that carries on a business mainly concerned with the residential or commercial development of land, with the ultimate purpose of its sale or lease of the land for profit, and in the course of that business:*
 - *one relevant planning application has been made by or on behalf of the individual or corporation that is pending*
 - *three or more relevant planning applications have been made by or on behalf of the individual or corporation and determined within the preceding seven years* (11).

NSW also defines developer under at least three other Acts, with the [Home Building Act 1989](#), the [Residential Apartment Buildings \(Compliance and Enforcement Powers\) Act 2020](#) (12) and the [Strata Schemes Management Act 2015](#) (13) all defining developer (or derivatives of developer) in different but specific ways.

- The NSW [Residential Apartment Buildings \(Compliance and Enforcement Powers\) Act 2020](#) (12), specifically defines a developer in relation to building work as *any of the following persons (and any other person prescribed by regulation):*
 - a) *the person who contracted or arranged for, or facilitated or otherwise caused, (whether directly or indirectly) the building work to be carried out*
 - b) *if the building work is the erection or construction of a building or part of a building—the owner of the land on which the building work is carried out at the time the building work is carried out*
 - c) *the principal contractor for the building work within the meaning of the Environment Planning and Assessment Act 1979*
 - d) *in relation to building work for a strata scheme—the developer of the strata scheme within the meaning of the Strata Schemes Management Act 2015*
- In Western Australia a developer is defined in the [Real Estate and Business Agents Act 1978](#) as *a person whose business either alone or as part of or in connection with any other business, is to act on his own behalf in respect of the sale, exchange, or other disposal of real estate* (14).

What is involved in the developer process?

In the building and construction industry, a simplified developer process generally includes the following five phases (15) (16) (17) (18) (19):



These phases can be further refined to include the additional separate stages of initiation, investigation and analysis of viability, acquisition, design and costing, consent and permission, commitment, implementation, and marketing and selling. Often, many stages can and will occur concurrently, such as the marketing and selling of 'off-the-plan' dwellings in the pre-construction phase.

Refer to [Appendix E](#) for a detailed developer process.

Defining the role of the developer

A proposed definition of property developer could be:

A **property developer** is an individual or company or partnership that, with the consent of the landowner, seeks development approval for and then executes the outcomes to construct, redevelop or refurbish buildings for profit and or commercial gain (20) (21) (22) (23). A not-for-profit company is not a property developerⁱⁱ.

A proposed definition of development activity could be:

An entity is engaging in **development activity** if they:

- carry out residential or commercial development of land to sell or lease for profit;
- seek approval for the subdivision of the parcel of land or a building;

ⁱⁱ A not-for-profit company incorporated associations under the Associations Incorporation Act 1991 and other not-for-profit corporations, such as a company limited by guarantee that is not formed or carried on with the object of trading or obtaining pecuniary gain for its members or corporations registered with the Australian Charities and Not-for-profits Commission.

- have responsibility for, or are in control of, the development of land and/or building design or construction;
- monitor the costs, quality, budget, and risk in the development of land and or a building's design or construction.

Questions

1. What are the common responsibilities of a property developer?
2. Are they reflected in the proposed definitions?
3. Do you support regulating entities who meet the definition of property developer, or do you support a regulatory model that focuses on the activities being undertaken and regulating the manner and standard to which those activities must be conducted?

Focus areas

The research and analysis undertaken has identified four main areas of focus in considering developer regulation in the ACT. The identification of these focus areas has been informed by previous inquiries, stakeholder engagement, government reports, media reports, academic literature, and a jurisdictional review.

These focus areas capture the key roles and activities of developers and where interventions may be pursued to achieve improved accountability measures for developers and greater protection and information for consumers.

The four focus areas are:

1. [Accountability and Transparency](#)
2. [Ethical Behaviour and Work Practices](#)
3. [Project Capacity and Capability - Financial and Operational](#)
4. [Building Quality and Safety](#)

The following section of this paper provides an analysis of issues identified under each focus area. This includes a description of the identified issue, a clear issue statement, and a summary of what we have heard from the community, industry and stakeholders and research undertaken by the Directorate.

Accountability and transparency

Accountability measures are the mechanism through which one is held responsible for or to account for actions they have influence and control over when performing a specific activity and are about more than simply having done something but involve consideration of how it was done.

Accountability is based on the principle of responsibility and engaging in honest and ethical conduct towards others. Accountability involves a willingness to be transparent: to allow others to observe and evaluate your performance.

Transparency is a “public value embraced by society ...(it is)... synonymous with open decision-making ...(and sits)... alongside accountability” (24).

Feedback and research have identified the following issues that relate directly to accountability and transparency:

- [Industry Opacity](#)
- [Existing regulatory system](#)

Industry Opacity

The development industry is complex and largely opaque to those not involved.

Issue statement:

There is no mechanism for consumers to easily access independent information about those behind a development.

What we have heard:

Without regulation to increase transparency it is difficult for a person to find information on the developer behind, what is for many, their most significant investment, their home. The lack of transparency means that it is difficult to identify any information about the developer's record of performance, financial concerns or if the developer has been the subject of discipline actions and/or contraventions of rectification orders (25) (26) (27) (28).

These issues, along with the general complexity and layers of the system, is compromising the community's confidence in the system and their ability to fully participate in planning and development (29).

The existing system favours those who deal with the system daily. Full and accessible information allows anyone who is sufficiently motivated to navigate the system, know their responsibilities and defend their rights. The management and storage of all real estate, building and development records, including all drawings required during a build (electrical, irrigation, landscape, data, hydraulic etc.), is not readily accessible to the public (33).

Managing public disclosure of proprietary information can be a burden to industry. Any regulatory transparency through a mandatory disclosure system must be easy to collect, be balanced and useful to the end user and minimise the chance of proprietary information being mistakenly disclosed.

There is a tension between making information on contracting decisions public and protecting commercial confidentiality (30).

To build confidence in the system and to protect and advocate for all stakeholders (consumers and subcontractors) there needs to be mechanisms for accountability that include clear procedures and appropriate remedies. These accountability mechanisms need to make sure that obligations are accommodated (31).

The opacity in the current system needs to be replaced by transparency so that interested parties in the procurement process can move from their adversarial, lowest dollar bargaining positions to working productively (32).

The level of trust a community has in a profession depends upon transparency. The BCR noted "the great American litigator and jurist, Louis Brandeis, writing in 1913 on how banks use other people's money, mused that "Sunlight is said to be the best of disinfectants". If the actions of individuals, organisations or government are visible, then pro-social behaviours are more assured and the need for legal or regulatory intervention is lessened". (33)

What the evidence says:

Regulatory transparency through mandatory disclosure of information is effective when the information they produce becomes "embedded" in the decision-making process of users (34).

When disclosure of information is not mandatory, companies tend not to disclose any more information than is necessary (35).

Disclosure is there to enable the community to understand enough about a company so that they can make their own informed decisions based upon the reputation of the developer or in the absence of a track record, the quality of the directors and or financial backers (36).

Information disclosed needs to be useful, clear, concise, consistent, balanced, and unambiguous (37).

Existing regulatory system

There is a significant existing regulatory scheme responsible for planning, development, and construction in the ACT. The chain of accountability in the ACT's current building regulatory system places responsibility on the licensed builder to ensure that building work meets the standards required by legislation, including compliance with the NCC. The chain of accountability does not encompass the developer, whose responsibility includes setting the culture of a project and making decisions that affect the design, quality, and construction is not registered or licensed in anyway.

The primary drivers of a project can control and influence the performance of those contractors who act on their behalf and exercise sanctions or penalise their performance when necessary. The developer can set goals for a project and expect results, creating a scenario where there will be rewards or sanctions if those results are met (or not) (30).

Issue statement:

The current regulatory system does not recognise that developers have become far more intricately involved in decision making processes during both the planning and construction phase of a development leading to an inconsistency between their role and their levels of accountability.

What we have heard:

By placing all responsibility for a development on the licensed builder, the current regulatory system does not apportion responsibility across the chain of accountability in a reasonable and proportionate manner (38).

There is an inconsistency between the role of the developer and their levels of accountability. The "chain of accountability" within the building and construction industry requires each entity to make sure that products are compliant, suitable for their intended purpose and can perform to the standard expected (28) (39).

Property developers play a critical role in the industry; however, they are not held to the same standard as other participants (40).

The decisions and conduct of the developer are a far greater cause of problems than the conduct of builders (35).

The builder and the certifier are responsible for the compliance of the work and may be held accountable through a variety of legal mechanisms, but the developer has far less accountability for decisions they make but whose decisions can significantly affect the quality and performance of the building (41).

A change from direct to contracted provision ought not undermine the ability of individuals or organisations to seek redress for decisions or actions for which developers are accountable, developers must remain accountable for the performance of the functions they delegate (30).

Despite their significant influence on a project, there is a belief that developers have evaded many of their responsibilities with any regulative measures they are subject to being inconsistent with their level of project responsibility when compared with the builders and subcontractors they engage (42).

Accountability can be enhanced by requiring the developer to clearly specify the service to be delivered and to clearly and simply precisely allocate responsibilities between it and the contractor for delivery of the service. This makes it easier to identify the cause of any failure (30).

The current regulatory (and planning) regime

- Has led to an industry seeking to conform with the regulatory requirements to minimise risks and maximise their returns. This has discouraged innovative businesses practices, leading to poor built form outcomes, and fewer new players in the market (43).
- Encourages developers to minimise risk by producing designs that readily conform. By their nature, innovative proposals break from traditional and existing patterns of development, however planning procedures give the most credence to developers with an inherent interest in preserving existing development patterns (44).

Some developers are using a perceived weakness in the existing system to ‘push the boundaries’ or ‘game’ the system. As a result, the community see inconsistency leading to a lack of trust in developers and the system, discourages innovative businesses practices and the inclusion of new players in the market (38) (29).

“Unscrupulous builders” set up as developers regardless of any actions against them and this is leading to poor perception, mistrust of the industry and harming the reputation of all developers (45).

The current regulatory system does not recognise that developers have also become far more intricately involved in decision making processes during the construction phase of a development. By placing all responsibility for a development on the licensed builder fails it does not apportion responsibility across the chain of accountability reasonable and proportionate manner (38).

There is no need for additional regulations as the existing compliance and enforcement provisions contained within it are adequate to hold licenced entities, nominees, and directors to account for non-performance or non-compliance (46) (38) (27) (47).

The *Civil Law (Property) Act 2006* provides sufficient existing protection to owners that purchase apartments off-the-plan (47).

Providing information and education on the existing regulatory system creates a level playing field that allows anyone who is sufficiently motivated to navigate the system, know their responsibilities and defend their rights and resolve a dispute (43) (48).

Language of current legislation uses passive language leading to the inference that the activity is optional. The language should reflect a need for mandatory site inspections, occurring more frequently at appropriate stages of construction, with inspectors and certifiers forbidden to simply rely on documentation to approve builds (26).

A written code of conduct is important, as it provides a clear indication about behaviour and how individuals and entities are expected to behave. Queensland have previously incorporated a code of conduct into the developer licencing legislation (49).

The existing regulatory system coupled with special purpose vehicles are used to isolate risk and shift accountability to the a builder and the consumer (33) (50) (51) (51).

What the evidence says:

Any regulatory regime must balance control and discretion to promote flexibility and innovation. Prescriptive regulation emphasises consistency through compliance while performance-based regulatory regimes favour reliance on professional accountability. The evidence suggests accountability shortfalls undermine regulatory performance (52) (53).

The challenge for regulatory designers is how to plan and compensate for the “bad apples” when developing a performance-based system (52). The use of a hybrid model that incorporates a range of instruments from prescriptive regulations to discretionary approaches can be used to overcome the potential weaknesses of performance -based systems (53) (54).

Larger developers have a range of strategies for acquiring sufficient land for large-scale developments in the future. These strategies come with some risk and necessarily require higher returns to make the exercise worthwhile. To mitigate these risks a particular group/developer may seek to use the existing system to steer a particular policy direction over another equally valid use (45).

Off-the-plan developments involve significant risks for both sellers and buyers, however, some developers are rescinding contracts for the purposes of opportunistic profiteering (55).

The chain of accountability is a method of making sure a company meets its commitments and undertakes all that is reasonably practicable to deliver a product that is fit for purpose without unreasonably disadvantaging others.

The BCR(33) recommended that there should be greater accountability for all building industry practitioners, with more timely and more consistent enforcement of building laws. There must be appropriate liability spread across all industry participants that is proportionate on their level of influence, involvement, and their culpability (38).

Queensland are in the process of enacting new laws to enhance the powers of the Queensland Building and Construction Commission so that it can take disciplinary action against anyone in the supply chain for offences relating to building and building products.

NSW has instituted a developer rating system that merges data from different inspections and other regulators, this in theory provides greater intelligence, data sharing and targeted compliance action including occupation certificate audits (56).

Ethical behaviours and work practices

Ethical behaviour and work practices are characterised by honesty, fairness, and equity in interpersonal and professional relationships. These practices respect the dignity, diversity, the rights of people and entities and the professional delivery of services and products. This is underpinned by the concept that each person is accountable for their actions and that everyone has a shared responsibility to uphold ethical behaviour.

Property developers often set the culture of a project influencing many aspects of the design, quality, and construction. The level of control differs across projects and between developers, some only invest financially in a project while others exert complete control over a project from financing to construction and sale and management of a development (33).

Feedback and research have identified the following issues that related directly to Ethical behaviours and work practices within the sector:

- [Rescission of contracts](#)
- [‘Fit and proper’ requirements](#)
- [Business practices](#)
- [Conflicts of interest](#)

Rescission of contracts

Off-the-plan developments involve significant risks for both sellers and buyers, however off-the-plan contracts are generally written on behalf of the developers and are designed to protect them. This has allowed some in the development community to rescind or back out of contracts leaving some consumers homeless and others thousands of dollars out of pocket.

This matter is dealt with in the ACT through the Civil Law (Sale of Property) laws and is a fair-trading matter for which the Minister for Consumer Affairs, the Justice and Community Safety Directorate and Access Canberra have responsibility. On 8 September 2022, the Attorney-General announced that the ACT Government will review new laws that are designed to protect home buyers from having their sales contracts cancelled. It comes after a developer attempted to cancel more sales contracts for new townhouses at Throsby, despite the laws being changed a year ago. The Attorney-General has stated that the new laws will be reviewed to see they are doing the job as intended. This review will be undertaken in 2023.

Issue statement:

Some developers as part of the financing of the development process are rescinding contracts for the purposes of opportunistic profiteering (55).

What we have heard:

Off-the-plan contracts are focused on providing the developer with the flexibility needed for approvals, changes to construction process and for satisfying their financier’s requirements.

After accepting payment, a minority of developers have rescinded contracts and immediately readvertised the same property for up to \$200,000 more than the original contract price.

There have been numerous media reports highlighting the need to protect consumers. The media has reported a “Canberra developer (...) tearing up multiple contracts without giving sufficient reasons, according to customers” (57) and the same developer “attempting to cancel more sales contracts for its off-the-plan townhouses, less than a year after laws were changed to better protect ACT buyers” (58).

‘Fit and proper’ requirements

Fit-and-proper person requirements can support public trust in the integrity of practitioners. The findings from the Banking and Finance Royal Commission highlight the importance of good culture within any corporate entity (28). The BCR identifies a fit-and-proper person requirement as a foundation of public trust (33). Numerous media reports have highlighted the concerns of the community and perceived unethical behaviour (57) (58) (59).

This section of the paper focuses on suitability requirements for a person or entity to participate in development activity. The capability of a person or entity (such as qualifications) is covered under the Project Capacity and Capability focus area.

Issue statement:

There are no minimum standards or suitability test to become a property developer allowing some entities to subvert their responsibilities.

What we have heard:

Currently there are no ‘fit and proper’ requirements for people offering to sell a residential building off the plan or enter a contract for constructing and supplying a new building and the current system also does not prevent unscrupulous builders setting up as developers and carrying on regardless of any actions against them (41).

There should be a requirement that a developing entity, its key decision makers or other influential persons demonstrate a commitment to ongoing ethical behaviourⁱⁱⁱ. The lack of regulation has allowed some entities to subvert many of their responsibilities (60).

There need for education and information to make sure that developers have an understanding and knowledge of the law relevant to their business activities, including fair trading principles (61).

What the evidence says:

“Fit-and-proper person requirements are the foundation of public trust in the integrity of practitioners. These include such matters as bankruptcy and criminal checks. In the first instance, financial viability requirements are most relevant” (33).

That jurisdictions should prescribe consistent requirements for the registration of building practitioners including evidence of practitioner integrity, based on an assessment of fit-and-proper person requirements (33).

ⁱⁱⁱ CFMEU resolution agreed to at the 2019 ACT Labor Party Branch Conference

There should be nationally recognised qualifications for each category and sub-category of registered practitioners working in the building and construction industry (33).

There are a range of post graduate opportunities^{iv v vi vii viii} that aim to equip graduates with skills that allow them to participate meaningfully in the industry. These courses cover the modern principles of property investment, and development across the different phases of the development cycle including financial viability, risk management, sustainability as well as facilities and asset management.

Generally, the purpose of licensing and registration schemes is to address identified risks in relation to persons undertaking particular occupations and professional activities (62). These schemes often include initial eligibility criteria beyond qualifications, experience and demonstrated competency to include criteria that go to the overall conduct of the individual such as relevant criminal history or contraventions of Australian Consumer Law. Inclusion of these criteria must be carefully balanced against the rights of an individual to work in their chosen profession and to earn a living and must be assessed against and be compliant with ACT human rights requirements.

Business practices

The building and construction industry operates under a hierarchical chain of contracts which can lead to inherent imbalances in bargaining power (63). The developer is frequently the head of the chain of contracts and as such can have significant influence on a project and its culture. The BCR recommended that there should be greater accountability for all participants within the building industry, with timelier and more consistent enforcement of building laws with appropriate liability spread across all industry participants that is proportionate on their level of influence (33) (38).

What we have heard:

Approval timeframes (and the associated impact on holding costs) are a major concern for developer interests (44), they therefore seek to cut margins to complete a project as inexpensively as possible and to return a profit to the shareholders. This has resulted in a race to the bottom on building quality, with developers fighting to complete projects at the lowest cost possible in order to remain competitive in the market. Consequently, the incidence of defective developments has increased in the ACT, with homeowners often having to pay millions out of their own pockets in order to rectify faulty work (42).

When selecting builders and subcontractors, developers have already determined the price and timeframes for key milestones. This level of involvement carries an implied recognition of their heightened accountability and should therefore come with a corresponding greater degree of regulatory scrutiny (42).

Developers impose unrealistic timeframes and margins on building contractors that could reasonably be said to lead to, or have resulted in, unsafe work practices, breaches of a Commonwealth or Territory law or poor and have led to poorer building quality (47).

^{iv} [Master of Property and Development \(unsw.edu.au\)](https://www.unsw.edu.au/degrees/master-of-property-and-development)

^v [Master of Property Development \(Online\) | UTS Online](https://www.uts.edu.au/degrees/master-of-property-development)

^{vi} [Master of Property Investment and Development | Western Sydney University](https://www.westernsydney.edu.au/degrees/master-of-property-investment-and-development)

^{vii} [Master of Property - The University of Melbourne \(unimelb.edu.au\)](https://www.unimelb.edu.au/degrees/master-of-property)

^{viii} [Master of Valuation and Property Development - SD-93025 | Bond University | Gold Coast, Queensland, Australia](https://www.bond.edu.au/degrees/master-of-valuation-and-property-development)

Residents and future owners do not necessarily have an equal ability to a developer to negotiate and enforce a contract. While there are legal avenues open to parties for contractual disputes, the cost of taking any action may be prohibitive (54) (64).

The decisions and conduct of the developer are a far greater cause of problems than the conduct of builders (28).

Residential strata may be developed where the intent is to completely sell all strata units within a couple of years of completion. As developers usually do not intend to maintain ownership, sustainable quality is not a high priority as future maintenance will be the responsibility of the new owners (28).

Current regulation is inconsistent with the level of influence and project responsibility exercised by a developer. Despite often having limited control, the burden of responsibility is placed solely on the builder.

The current system of building certification leads to minimal inspections to save money and fails to adequately ensure building quality. Regular professional inspections, by qualified architects and engineers during construction, along with final certification by government-employed certifiers should be mandated (65) (26).

Published advertising material has included false or misleading representations (66).

A special purpose vehicle (SPV) or special purpose entity (SPE) is a formal accounting and contractual arrangement where a legal entity is created by a parent company but managed as a separate organization with a limited pre-defined purpose. This is done to isolate risk and protect the assets of the parent company and isolate or move risk to the client individual parties or subcontractors (50) (51) (51).

What the evidence says:

The structural changes that have occurred in the industry have affected the culture with developers and head contractors often having little regard for the impact of the pressures on subcontractors. "This results in a culture in which those with the greatest amount of power and the deepest pockets dismiss payment disputes, challenge adjudication decisions or take action to prevent subcontractors being able to obtain further work if they take action under security of payment laws" (67).

Larger developers have a range of strategies for acquiring sufficient land for large-scale developments in the future. These strategies come with some risk and necessarily require higher returns to make the exercise worthwhile. To mitigate these risks a particular group/developer may seek to use the existing system to steer a particular policy direction over another equally valid use (44).

The development industry lobby for or against development applications and/or territory plan variations based solely on competition issues (44).

The *Corporations Act (Cwth)* provides incentives for directors to take appropriate care. When directors fail to do so, in certain circumstances, ASIC can seek criminal or civil penalties (67).

Conflicts of interest

Due to the particularly small market in the ACT some stakeholders expressed a view that there are inherent conflicts of interest in the building and construction industry.

Issue Statement

The development sector in the ACT is small, inherently leading to perceived, potential, and actual conflicts of interest.

What we have heard:

Second buyer scenarios – where the developer also acts as the purchaser, meaning the developer has the right to select the certifier themselves to represent the final buyers who will purchase properties from the developer, with the developer profiting of these sales (64).

The non-disclosure or insufficient disclosure of associations between developers, their associates, builders, certifiers, property marketers, valuers, solicitors and lenders and of payments made to others increases the perception of conflicts of interest in the development and real estate sector (66) (61) (64).

The giving of investment and property advice by the same entity undertaking the development can lead to perceptions of misrepresentations of market value, rental returns, historical and prospective capital growth and of the degree of independence of valuations and legal advice (66) .

The private certification system could be considered as being flawed with significant potential for conflict of interest and a failure to meet community expectations (i.e. independent oversight of building quality and function) (33) (54). “The increase in private certification has resulted in a significant decline in the resources and capacity...(within)... government building authorities (33).

What the evidence says:

Most jurisdictions have legislated controls to mitigate conflicts of interest, however the BCR highlighted the importance of ensuring there is no perceived conflict of interest between those engaged in the certification of a building during construction and developers, builders and owners (33). It is important that the system provides assurance that performance standards are adhered to during the construction process without interference.

Research has found that the negative impacts of the private certifier regime stem from commercial pressures on private certifiers, due to the client-contractor relationship they enter (68).

The ACT’s building regulatory system while allowing a licensed building surveyor to provide advice on whether a building complies and any issues that need to be addressed, it prevents them being appointed as the building certifier for the project if they are engaged to provide design solutions during the design stage. If a person who has prepared, or intends to prepare, drawings (including plans, specifications and other technical documents) to be used in relation to the construction of the building has an interest in the work under the Act, they can’t be appointed. A building certifier must be independent and therefore cannot approve their own designs.

Project documentation/building plans

Issue Statement

Many aspects of the design and construct stage of the project may change after initial development and subsequent building approval is obtained, meaning the as-designed building documentation may be significantly different from the as-built building.

What we have heard:

Incorporating significant design changes after development approval meaning the as-designed building documentation may be significantly different from the as-built building. This leads to a concern among the community and those who have purchased of 'off the plan' apartments that:

- They are not receiving the product that they entered a contract for, and
- The perception that the government is allowing the construction of buildings that are different to those that were originally approved.

This creates several issues, especially for purchasers of apartments 'off the plan' as they have no rights to oversee the construction process and instead generally assume that regulatory controls have delivered a compliant building (33)..

What the evidence says:

The BCR passed some commentary on the role of developers and design documentation. It noted that the developer makes many decisions while it is the builder who must take responsibility for implementing them (33).

The BCR identified that to minimise costs documentation prepared and approved as part of the building approvals process is often inadequate with poor documentation regularly accepted by building certifiers in the building approval stages (33). This can present maintenance challenges for the first purchaser and then subsequent owners. This problem may be further exacerbated by developers engaging design professionals to development approval (DA) stage only and leaving the development of construction detailing to the builder/subcontractors.

ACT building legislation has long included clear requirements for ongoing approval of amended documentation by the building surveyor throughout a project.

Additional site inspections and audits of documentation undertaken because of increased funding for building inspectors in the ACT is helping the regulator to identify departures from approved plans and unapproved changes.

In the ACT, building work must be constructed in accordance with the approved building plans. This means that the eventual building should reflect what is in the approved plans. Where there are departures from the approved plans and additional documents for the building work, section 48 of the *Building Act 2004* outlines a range of documentation that the building certifier must give to the Construction Occupations Registrar, including all plans and drawings relating to the building work. The documentation must be given to the Construction Occupations Registrar within seven days of the certifier being satisfied the work

building work is completed. The ACT Government has committing to considering corresponding obligations on builders, design practitioners (including engineers) and landowners (developers) in relation to provision of documentation at the completion of work.

Project Capacity and Capability – financial and operational

The findings from the Senate Economics Reference Committee’s 2015 inquiry into Insolvency in the Australian construction industry and the Banking and Finance Royal Commission highlights that there are significant financial issues within the construction sector accounting for between 20-25% of all insolvencies throughout Australia (67).

Feedback and research have identified the following issues that relate directly to Project Capacity within the sector:

- [Financial capacity](#)
- [Capability](#)
- [Business structures](#)
- [Phoenixing](#)

Financial capacity

Issue statement

Poor financial structure, health, and governance of a project and the firm behind it can significantly affect vulnerable businesses, investors, and consumers. Major financial problems can subsequently negatively impact confidence in the entire industry.

What we have heard:

The industry’s level of insolvency is grossly disproportionate to its overall share of annual Gross Domestic Product (69). Compelling the demonstration of financial and operational capacity to complete any proposed developments and address any building defects that may arise will provide peace of mind to the community and industry (42).

The extension of liability could create an increased financial risk that may impact the commerciality of projects undertaken in the ACT (46).

There are a growing number of disputes over non-completion of work even though sufficient payments have been made. Developers and builders in financial difficulty or struggling to manage financial issues may borrow from one project to finance incomplete projects (41).

What the evidence says:

Small businesses experience the most insolvencies, though it is the larger contractors who are most at risk of becoming insolvent on a per capita basis and where the largest impact is felt across the industry and the community. Experience has shown that in relation to financial liquidity in particular, financial failure on a project has the potential to cause devastating effects for workers involved in the project, all the way down the contractual chain. This is particularly the case for a large-scale project.

The costs incurred by developers in complying with planning and zoning regulation and meeting statutory obligations (such as infrastructure charges and developer contributions) directly affect the profitability of their projects - the greater the infrastructure and compliance costs are, the less incentive developers have to undertake development projects (44).

The nature and dynamics of the property market can change markedly over the course of the development process. This can leave developers with a product unsuited to the prevailing market or trying to sell into a less buoyant market than was envisaged at the time of their due diligence (44).

Project Trust Accounts (41) require payments and retentions to be deposited into a statutory construction trust fund established by the head contractor. Such an approach is currently in operation in Queensland and other jurisdictions. Project Trusts Accounts are a proven means of preventing developers and builders from accessing funds designated solely for the payment of contractors and subcontractors engaged on projects (25).

Capability

Issue Statement

Consumers should know that the person undertaking a property development has not only the capacity, both financial and operational, to commence and complete the work, but also the capability to perform their role in the development.

What we have heard:

Through various forms of feedback, we have heard about the need for persons undertaking development projects to have necessary knowledge and experience to deliver quality developments and work within the regulatory framework.

The capability of the developer is essential to delivering a successful development outcome for the end users, as well as for shareholders. A developer lacking capability to undertake and complete the development presents a serious risk to the project and to purchasers relying on a successful development outcome.

The National Framework for Registration and Licensing of Building Practitioners developed by the ABCB Office in response to the BCR notes the importance of capability requirements when authorising a person or entity to undertake core functions and actions associated with the occupation (70). The National Framework benchmarks qualifications, competencies and experience requirements for a number of building practitioners.

Skills and capabilities can differ depending on the type of work and type of building (33).

The scope of work provided should be limited to what the person or entity has the demonstrated skills and experience to perform (33).

What the evidence says:

Capability can be addressed in several ways including setting minimum skill or qualification requirements, minimum experience or knowledge requirements, or suitability tests that must be met.

Given the role of the developer is broad, and the activities undertaken by a developer straddle several sectors, including construction management, property finance, real estate and consumer contracts, there is no one size fits all approach to capability requirements. Relevant experience, competencies and qualifications across all of the activities undertaken by the developer is likely to be required. This will need to be examined closely to determine whether existing training and qualifications opportunities are appropriate or whether new training and qualifications may be required.

There are potential significant risks to health, safety and the economic wellbeing of individuals and the broader community resulting from the provision of services where an individual attempts to provide them without the adequate qualifications, experience and/or competencies.

It is a reasonable expectation of the community that those providing an occupation or service are subject to a level of accountability and have the necessary qualifications, experience and competencies to provide those services to the community thus providing confidence in the community in obtaining those services.

Capability requirements operate alongside suitability (fit and proper) requirements to maintain public confidence in an industry.

Business structure***Issue statement***

Some developers are using business structures to limit risk and avoid responsibility or to shift responsibility onto other entities they engage or engaged with.

What we have heard:

This use of different business structures and special purpose vehicles to isolate financial and other risk from the parent company does not remove the risk from the project, it merely shifts the risk to others including the head builder, sub-contractors and consumers. This places significant strain on smaller entities and subcontractors within the sector.

It is a fundamental principle of company law in Australia (and elsewhere) that a company is a separate legal person, independent of its directors and shareholders and that it is responsible for its own debts and liabilities (71). There has been a thrust to hold directors personally liable through the requirement of nominating a 'natural person' as the developing entities nominee to give consumers and government access beyond the veil of incorporation. However, putting liability onto company directors may not be appropriate as it is the shareholder(s), not the directors, that are the ultimate beneficiaries of the company's financial performance and therefore redress against directors may not be effective (72) (38).

Private sector development companies come in a variety of forms and sizes from one person operations to multinationals. Their purpose is usually clear: to make a direct financial profit from the process of development.

What the evidence says:

The structure of the Australian building and construction industry has transformed “from an industry dominated by construction companies with large, directly employed skilled workforces’ towards a ‘pyramid of contractual relationships involving a head contractor at the top and multiple layers of smaller specialised subcontractors underneath” (67).

The existing regulatory system coupled with special purpose vehicles are used to isolate risk and shift accountability to the builder and the consumer (33) (50) (51) (51).

Any regulatory regime must balance control and discretion to promote flexibility and innovation. Prescriptive regulation emphasises consistency through compliance while performance-based regulatory regimes favour reliance on professional accountability. The evidence suggests accountability shortfalls undermine regulatory performance (52) (53).

The challenge for regulatory designers is how to plan and compensate for the “bad apples” when developing a performance-based system (52). The use of a hybrid model that incorporates a range of instruments from prescriptive regulations to discretionary approaches can be used to overcome the potential weaknesses of performance -based systems (53) (54).

Phoenixing

Issue Statement

Illegal phoenix activity (*phoenixing*) is the systemic stripping and transfer of assets from a company to another entity by a company’s directors or other controlling minds with the intention of defeating the interests of the first company’s creditors in that company’s assets (67) (73). Those affected by phoenixing include employees, other businesses and contractors who are owed money and statutory bodies (73) (74). Phoenixing provides companies with an unfair advantage over their competitors, damaging the competitive process.

What we have heard:

The practice of phoenixing contributes to the high rates of insolvency (67) and negatively contributes to the health and wellbeing of the construction industry participants (25).

What the evidence says:

Phoenixing occurs when a new company, for little or no value, continues the business of an existing company that has been liquidated or otherwise abandoned to avoid paying outstanding debts, which can include taxes, creditors and employee entitlements (37) (74). It ranges from the opportunistic to the systemic.

Phoenixing was a significant issue explored in the Senate Economics Reference Committee’s 2015 inquiry into [Insolvency in the Australian construction industry](#) (67). A July 2018 report by PricewaterhouseCoopers, prepared for the Phoenix Taskforce, estimated the annual direct cost to businesses, employees and government as a result of potential phoenixing to be between \$2.85 billion and \$5.13 billion in 2015-16 (73).

In 2020, the Commonwealth introduced the *Treasury Laws Amendment (Combating Illegal Phoenixing) Act 2020 (Cth) (Phoenix Act)*. The legislation made changes to the *Corporations Act 2001 (Cth) (Corps Act)*, *A New System (Goods and Services Tax) Act 1999 (Cth)* and the *Taxation Administration Act 1953 (Cth)* to give regulators greater power to “detect and disrupt phoenixing activity, and to prosecute directors and other professional advisors who engage in or facilitate the activity.” (74)

The Senate Economics Reference Committee’s 2015 inquiry into [Insolvency in the Australian construction industry](#)., recommended that industry develop partnerships with mental health support organisations to provide ready access to support, counselling and treatment for people in the industry who may suffer from the adverse mental health effects of the financial distress caused by contractual disputes and insolvency in the construction industry (67).

Building Quality and Safety

Improving building quality and safety aims to reduce the extent, severity, and impact that defects have on buildings and their occupants, while also making workplaces safer (54). All parties engaged in the development of a building should be held accountable for delivering a quality product that meets contractual obligations and does not mislead consumers or contractors through negligence or deliberate misrepresentation.

Feedback and research have identified the following issues that related directly to Building Quality and Safety within the sector:

- [Expectations of building quality and built form](#)
- [The need for additional rectification works](#)

Expectations of building quality and built form

Issue Statement

Sometimes building quality and the built form are not met and there are circumstances where there are limited mechanisms available for redress for consumers.

What we have heard:

In their evidence to the BQI, the HIA (ACT) said that “it is clear there are consumers in the ACT whose expectations of their home building experience have not been met” (64).

The current system does not adequately accommodate consideration of design quality or development appropriateness, putting at risk the valued character of Canberra and its suburbs (29).

Outcomes that are being delivered are out of date with community expectations and evolving government policy (75).

Currently build quality is not the responsibility of the independent certifier, rather it is the purchasers responsibility. A purchaser seeking a certain degree of quality ... must negotiate this with the builder and have it included in the contract. ... in the case of off-the-plan projects where the developer is the purchaser

... the developer is again responsible for any build quality requirements, while at the same time, profiting directly from the project (48).

A Residential strata model is often used by privately owned companies (developers) who intend to divest the property quickly. Therefore, sustainable quality and future maintenance are not a high priority as they will be the responsibility of the new owners (28).

Building owners and residents in new buildings should be confident the building is fit for purpose, is safe, and won't require additional funds to make right (54).

What the evidence says:

Most of the original purchases of a project are "off-the-plan ... sales contracts, so new owners provide little (if any) input into the design and construction" (54).

Effective monitoring is a key element in project success. Contracting agencies need to determine the most cost-effective approach to quality assurance and performance monitoring (30).

The construction of building is complex, and it is not always possible to meet everyone's expectations however it remains the duty of all parties engaged in to truthfully identify the product that they are providing and to meet their contractual obligations.

The need for additional rectification works

In the ACT, the regulator can currently only issue rectification orders to a licensee or former licensee under the *Construction Occupations (Licensing) Act 2004*.

Issue Statement

The current system does not hold developers responsible for rectification of building work relating to a project for which they were involved.

What we have heard:

Building owners and residents in new buildings should be confident the building is fit for purpose, is safe, and won't require additional funds to make right (54).

The current system does not adequately accommodate consideration of design quality or development appropriateness, putting at risk the valued character of Canberra and its suburbs (29)

Currently build quality is not the responsibility of the independent certifier, rather it is the purchasers responsibility. A purchaser seeking a certain degree of quality ... must negotiate this with the builder and have it included in the contract. ... in the case of off-the-plan projects where the developer is the purchaser ... the developer is again responsible for any build quality requirements, while at the same time, profiting directly from the project (48).

The process of obtaining a rectification order, or similar recourse, is difficult, costly and may require extensive litigation. The cost to the individuals and companies involved, the ACT Government and the economy is significant (64).

When a builder takes responsibility for development of both the design and construction components, with architects and engineers then engaged as sub-contractors. As the builder is responsible for the delivery of a completed building at an agreed price, attempts at cost savings will often occur throughout the design and construction process.

The entities responsible for the development and the defects should make them right.

What the evidence says:

In his book *Building pathology: principles and practice*, David Watt defines a building defect as “a failing or shortcoming in the function, performance, statutory or user requirements of a building, and might manifest itself within the structure, fabric, services or other facilities of the affected building.” (cited in (54))

Beyond projects like Opal Towers which have significant structural defects and have prompted a shakeup of the industry, the most common defects within newly constructed Australian buildings include exterior water ingress and penetration, internal and external wall cracking, defective roof coverings, guttering problems and tiling faults (76) (77).

Within multi-unit properties it can be more difficult, time consuming and expensive to have defects repaired (78). When faults occur within common areas, legal proceedings involving owners’ corporations and or a collective of owners action may be required to make sure that responsible parties complete rectification works (54).

The impacts that building defects have can cause significant harm psychologically (anxiety, distress, time), physically and financially (54).

Effective monitoring is a key element in project success. Contracting agencies need to determine the most cost-effective approach to quality assurance and performance monitoring (30).

Agencies should ensure that successful tenderers have in place appropriate quality assurance systems. The systems chosen should be kept as simple and inexpensive as possible. Quality accreditation and quality systems certification should be required only where the risk and cost of quality failure is high. In other cases, a good performance record and/or evidence of appropriate internal management systems will be appropriate (30).

Options

The ACT Government is committed to introducing appropriate and enforceable accountability and transparency measures for developers and those engaged in development activity that covers the decisions they make, their conduct and matters over which they have influence and control.

The key objectives for any measure introduced are:

1. Transparency and accountability
2. Enhanced community confidence
3. Establishing measures that will sustain through fluctuations in the market
4. No unintended consequences

Further detail is provided below on each option, with questions asked to guide discussion and feedback. Some options are stand-alone whereas others could be done in conjunction with other options to deliver the objectives the ACT Government is seeking to achieve through developer regulation.

Please note these options do not represent ACT Government policy or a commitment to pursue any or all the identified options. They are provided for discussion purposes, to assist with stakeholder feedback and to inform future Government decisions.

SUMMARY

The table below provides a summary of the options listed in this paper, which focus area they will seek to address and the main method for implementation. The options have been broken into regulatory and non-regulatory options. All options will require further detailed policy development, communication and education programs, and ongoing implementation and oversight.

OPTION	FOCUS AREA WILL/COULD ADDRESS	IMPLEMENTATION REQUIREMENTS
Regulatory		
Licensing Scheme	Accountability and transparency Ethical behaviour and work practices Project Capacity Building Quality and Safety	New legislation
Registration Scheme	Accountability and transparency Ethical behaviour and work practices Building Quality and Safety	New legislation
Disclosure scheme	Accountability and transparency Ethical behaviour and work practices Project Capacity	New or amendment legislation

OPTION	FOCUS AREA WILL/COULD ADDRESS	IMPLEMENTATION REQUIREMENTS
	Building Quality and Safety	
Documentation	Accountability and transparency Ethical behaviour and work practices Building Quality and Safety	Amendment legislation
Project trust accounts	Accountability and transparency Ethical behaviour and work practices Project Capacity Building Quality and Safety	New legislation
Bring developers into the regulatory chain of accountability for building work	Accountability and transparency Ethical behaviour and work practices Building Quality and Safety	Amendment legislation
Amendments to the Building Regulatory System	Accountability and transparency Ethical behaviour and work practices Building Quality and Safety	Amendment legislation
Non-regulatory		
Code of Practice (voluntary)	Accountability and transparency Ethical behaviour and work practices	Development and launch
Developer rating tool	Accountability and transparency Ethical behaviour and work practices	ICT system
Educative tools for the community and developers	Accountability and transparency Ethical behaviour and work practices Project Capacity Building Quality and Safety	Development and launch
Promote security of payment	Ethical behaviour and work practices	Development and launch

Regulatory Options

Licensing Scheme

This option outlines two different ways to introduce a licensing system in the ACT for property developers or those engaged in development activity.

Occupational licensing is often viewed as the primary tool by which to regulate a trade or profession and is used by Governments to set the conditions under which someone can practice an occupation. Occupational licensing schemes can send a powerful signal to consumers as to the quality and safety of a provider or service.

A. Development of a property developer licensing scheme (Positive Licensing)

A positive licensing scheme authorises one to carry out certain activities and sets minimum requirements that must be met to provide those authorised activities. Positive licensing schemes come with the need for regulatory oversight and the taking of regulatory action in relation to breaches of licence conditions.

Positive licensing schemes generally contain four core elements:

1. requirement to hold a licence prior to providing services
2. eligibility requirements
3. standards that must be complied with
4. compliance and enforcement mechanisms

A well-designed licensing scheme may provide some assurance of minimum service quality to consumers and the broader community.

A positive property developer licensing scheme in the ACT could include the following elements:

- Eligibility criteria to undertake development activity
- Minimum capability requirements to be a property developer, such as qualifications, experience and competencies
- Fit to practice requirements – suitability
- Disclosure obligations
- Evidence of an appropriate level of working capital for the life of the project
- Code of conduct – establishing industry standards and ongoing obligations
- Offences and associated penalties

Implementation Requirements

There are standard matters that must be given consideration when determining whether a licensing scheme is the appropriate mechanism by which to address a policy matter:

- Is there a role for government?
- Will licensing deliver real benefits to consumers?
- Will licensing improve the standard/quality of the services?
- What form of occupational licensing is appropriate?
- What are the specific licensing requirements that best target the problem?
- Is licensing the best approach?

- Can existing legislation address the issue?

The purpose of any regulation is to address risks that potentially cause harm or detriment to consumers, the general public or the environment. Positive licensing schemes are a detailed form of regulation that can simultaneously address several types of risk. The advantages and disadvantages of any particular licensing scheme will depend on the type of risks that need to be targeted and whether licensing is a cost-effective way of addressing those risks.

Positive licensing schemes generally come with significant cost. These include direct financial, administration and compliance costs for business, administration costs for government, and costs to consumers due to higher prices or less choice of suppliers or products and services. Industry and government bear the direct costs of managing and complying with licensing requirements.

Implementing a positive licensing scheme in the ACT for property developers would require new legislation to be developed. The standard timeframe for developing and passing legislation for such a scheme is 12 to 18 months. The scheme would need to be overseen by an appropriate regulator who would require appropriate supporting resourcing.

B. Negative Licensing

Negative licensing is a more targeted, less restrictive and less costly form of regulation than positive licensing schemes. Negative licensing schemes provide the regulatory tools to deal directly with those who behave illegally or in an incompetent, exploitative or predatory manner. They can provide an additional level of public protection with respect to unregulated professions, at a lower cost to the community than positive licensing schemes.

Negative licensing schemes can:

- Establish a statutory requirement that provides for anyone to practice a particular occupation, as long as that person does not breach legislative requirements that relate to unacceptable or unsatisfactory conduct. The negative licensing model provides sanctions for unsatisfactory conduct.
- Prohibit people from engaging in certain activities if they meet certain criteria, such as have certain convictions.

Negative licensing schemes do not require one to have a licence to practice in a particular occupation.

Under negative licensing schemes, the Government retains the authority to withdraw the right to practice if that person subsequently fails to meet minimum capability and professional standards of work and conduct.

A form of negative licensing is restrictions on entry based on certain negative characteristics (e.g., serious criminal convictions) rather than specification of any positive requirements for licensing (e.g., educational requirements).

Implementation Requirements

A negative licensing scheme can generally be implemented through amendments to existing legislation rather than requiring entirely new legislation to be developed.

Negative licensing schemes operate to address quality and safety matters after the fact, they are not proactive regulation. Negative licensing schemes unlike positive licensing schemes do not have an initial “screening process” for determining whether one is suitable to carry out a specific occupation or occupational activity. It requires a complaint and an investigation to occur which may allow one to operate inappropriately for some time before being detected.

Negative licensing schemes can support a performance-based approach to regulation as one is assessed after commencing practicing. This allows a regulator to look at the results of the business’s practices, not just its structure and the qualifications of the people involved. For negative licensing to work effectively, the government needs to allocate resources to identifying and pursuing businesses that do not meet acceptable standards.

Negative licensing schemes are generally more cost effective than positive licensing schemes through having lower compliance costs, impose fewer costs on participants and lower administrative costs for Government and industry. Currently, the administration of most positive licensing schemes is funded in part or in whole by cost recovery from the regulated industry.

Examples of potential negative licensing options for property developers in the ACT are:

- a) A prohibition on people participating in the industry who cannot satisfy suitability requirements, for example, have certain convictions
- b) A code of practice with associated enforcement powers for breach of the code.

Suitability requirements

Generally, the purpose of licensing and registration schemes is to address identified risks in relation to persons undertaking particular occupations and professional activities. These schemes often include initial eligibility criteria beyond capability requirements, such as qualifications, experience and demonstrated competency, to include criteria that go to the overall conduct of the individual such as relevant criminal history or contraventions of Australian Consumer Law. Inclusion of these criteria has to be carefully balanced against the rights of an individual to work in their chosen profession and to earn a living and must be assessed against and compliant with ACT human rights requirements.

Collecting suitability information, should be limited to information that is necessary for and relevant to the determination of person’s suitability under a regulatory scheme.

Code of practice

A written code of practice is important, as it provides a clear indication about behaviour and how individuals and entities are expected to behave. A code of practice could cover the following matters:

- a. Professional and personal conduct requirements:
 - i. Acting with honesty, fairness and integrity
 - ii. Not engaging in conduct that is detrimental to the profession or contrary to the public interest

- iii. Exercising skill and diligence and providing services with reasonable care
- b. Professional expertise; for example, awareness of the legal requirements that apply to their profession
- c. Management of conflicts of interest
- d. Record-keeping obligations
- e. Complaints handling processes
- f. Disclosure of commercial, business or financial arrangements with a third party

Registration scheme

This option is an alternative to a licensing scheme. It has many of the same benefits as a licensing scheme. However, unlike a licensing scheme, a registration scheme means that a person who is registered is lawfully able to carry out the activity for which they are registered and must comply with relevant standards, codes of practice etc in carrying out that work.

Mandatory registration of professions allows for benchmarks to be set with regards to qualifications, experience, competencies, and ongoing obligations relating to conduct and Continuing Professional Development (CPD). Registration has many benefits including providing increased information about practitioners to the public, consumers and employers and importantly gives regulators the ability to determine who can provide certain services in the first place and to take appropriate action in instances of breaches of requirements which increases consumer protections.

A property developer registration scheme in the ACT could include the following elements:

- Eligibility criteria to undertake development activity
- Minimum requirements to be a property developer, such as qualifications, experience and competencies
- Fit to practice requirements – suitability
- Disclosure obligations
- Code of conduct – establishing industry standards
- Offences and associated penalties

Implementation requirements

Like licensing schemes, there are standard matters that should be given consideration when determining whether a registration scheme is the appropriate mechanism by which to address a policy matter.

As noted above, the purpose of any regulation is to address risks that potentially cause harm or detriment and the advantages and disadvantages of any regulation will depend on the type of risks that need to be targeted.

Implementing a registration scheme in the ACT for property developers would require new legislation to be developed. The standard timeframe for developing and passing legislation for such a scheme is 12 to 18 months. The scheme would need to be overseen by an appropriate regulator who would require appropriate supporting resourcing.

Questions

4. Do you support the introduction of a positive licensing scheme for property developers in the ACT?
5. Should there be a threshold which you must meet to be required to be licensed / registered?
6. What does the Government need to consider in establishing what makes a person or entity suitable to be a developer or engage in development activity?
 - a. What minimum requirements should be set for a person/entity to be licensed / registered?
7. Should individuals or entities be required to be licensed / registered? If entities, should a person be required to be a nominee for the entity, similar to existing practices under the *Construction Occupations (Licensing) Act 2004 (COLA)*.
8. If the ACT was to go down the path of a negative licensing model premised on restricting certain persons or entities from the profession due to certain characteristics, what characteristics should prevent a person or entity from carrying out development activity in the industry?

Code of practice (mandatory)

Mandatory and enforceable codes of practice:

- Set minimum standards of conduct
- Target enforcement action to those who do not meet the minimum standards expected, for example, engage in unethical behaviour, use predatory or exploitative behaviour
- Empower the regulator to address patterns of conduct
- Present a cost-effective method of addressing the worst conduct
- Can lead to an overall improvement in standards across the occupation

Prescribed mandatory codes provide a set of rules or minimum standards for an industry. “In general, Australia is a mature nation with a sound foundation in law and a low incidence of corruption” (79). However, studies and reports show that ethical impropriety exists in the building and construction industry and development and professional institutions and government agencies play a crucial role in setting and maintaining ethical standards (79) (80) (81) (82).

Disclosure scheme

Our research has identified that there is an information constraint for consumers and the community when it comes to understanding the business structures used by those engaging in development activity and those “behind” a development. The ACT Government has committed to improving the information available to consumers can access about developers and developments. The Government has heard that there is generally a lack of detailed information available, especially when defects arise after a development is completed.

Information constraints can arise when:

- consumers do not have access to adequate information
- the cost of obtaining information is prohibitive
- consumers do not have the skills to collect or interpret the information
- consumers do not use the available information when they choose which products or services to buy

The development industry is complex and largely opaque to those not involved.

Disclosure schemes are designed to enable the community to understand enough about a company so that they can make their own informed decisions (36). Information provided through a disclosure scheme needs to be useful, clear, concise, consistent, balanced, and unambiguous (37).

When regulation's primary objective is to overcome a lack of consumer information on the product or service, or consumer rights and responsibilities, then mandatory information disclosure schemes can be more appropriate than comprehensive licensing.

Effective mandatory disclosure scheme can encourage entities to improve their standards, because consumers can more easily access information and make informed decisions. However, where the information is too technical or complex, then information disclosure scheme will generally be ineffective.

Disclosure schemes address concerns about transparency and ethical behaviours by improving the information available to consumers. In looking at any mandatory disclosure scheme the ACT Government is cognisant that there are other legal frameworks that may prevent the disclosure of certain information and that other information may be commercially sensitive.

Questions

9. What information should be included in any disclosure scheme?

For example:

- **Should funding sources be included?**
- **Should it include any regulatory action? If so, against whom and what types of regulatory action?**
- **Should a disclosure scheme include the names of responsible individual Directors or controlling shareholders?**

Documentation

Our research has indicated that there are several areas where documentation relating to development activity could be improved:

- The quality of documents provided by developers to contractors when tendering for the work
- Documentation provided to consumers and owners corporations at handover

- Quality of documents provided to consumers before sale or as part of the sale contract

Improved documentation can lead to improved transparency and reduce the risk of their being a disconnect between the as-designed building documentation and the as-built documentation.

Options for improving documentation include:

- Introducing minimum voluntary standards for documentation to be provided as part of the tendering process
- Implementing recommendation 13 from the Building Confidence report by requiring building approval documentation to be prepared by appropriate categories of registered practitioners.
- Ensuring existing legislation supports a comprehensive suite of documents being provided at handover
- Introducing standard contract conditions relating to documentation for sale contracts
- Introducing documentation standards and requirements into a code of practice for developers
- Developing guidance material for developers when producing documentation either as part of a tender process or when providing to consumers before and after sale.

Questions

10. What do you think about the options for achieving improved documentation in relation to developments?

11. Are there other options the ACT Government should consider?

Project trust accounts

The use and effectiveness of project trust accounts which require payments and retentions to be deposited into a statutory trust fund have proven to be effective in protecting funds designated solely for the payment of contractors and subcontractors engaged on projects (41) (25).

Unlike other jurisdictions, such as QLD, the ACT does not have any legislation at present that requires trust accounts for building and construction projects. However, other legislative frameworks in the ACT such as the *Agents Act 2003* includes requirements for trust accounts that hold consumers' money and have associated enforcement measures to ensure the integrity of these accounts.

There are a couple of models for project trust accounts:

- Project trust accounts: This option would require payments and retentions to be deposited into a statutory construction trust fund established by the head contractor.
- Deemed trust model: Under a deemed trust model, once retention monies are received by the head contractor, in law they would be deemed to be held on trust for the benefit of sub-contractors or for use on the project.

- **General project accounts:** Under this model, a distinct account or sub-account must be established for each project. The funds would not necessarily be deemed in trust but only payments directly relating to that project must be made from the relevant account.

This option could be used to ensure that any building defects that arise during construction or post-construction are able to be addressed without additional cost to the builder or home-owner.

This option would likely require new legislation to be developed. The standard timeframe for developing and passing legislation is 12 to 18 months. The framework would likely need to be overseen by an appropriate regulator who would require appropriate supporting resourcing.

Questions

12. Should the ACT Government consider introducing project trust account legislation for the building and construction industry?

13. If yes, what model would you recommend?

Bond schemes

This option is an alternative to project trust accounts.

Bond schemes, like that in NSW apply to defects identified during a limited period after construction. The NSW scheme only applies to residential and mixed-used, high-rise strata buildings of four storeys or more.

Bond schemes provide for money to be available to pay for rectifications even if the corporate entity that was established for the project no longer exists or has no funds. There is a question as to whether bond schemes are able to resolve all building defect and warranty issues.

The Inquiry into Building Quality recommended that:

the ACT Government investigate a building bonds scheme for multi-unit residential buildings requiring a percentage of the contract value of a property be withheld in a Trust until all defects and warrant issues are addressed satisfactorily.

An alternative or component of a bond scheme is decennial insurance. NSW is the only jurisdiction that currently offers such insurance, and this insurance product is limited to buyers of residential apartments. This product is part of their Strata Building and Inspections Scheme. It is noted that it took NSW 3 years to be able to offer this product. The product is currently optional while NSW create a mature and affordable decennial liability insurance market.

Questions

14. Should the ACT Government consider introducing a bond scheme for the building and construction industry?

15. If yes, should this mirror the NSW model?

16. Is a bond scheme preferable to project trust legislation?

17. Should the ACT Government investigate decennial insurance for the ACT?

Bring developers into the regulatory chain of accountability for building work

The ACT's Building Regulatory System already contemplates the bringing of counterclaims in actions for damages or loss relating to defective building work, defective construction work other than building work. It also provides that if a court decides to award damages, they must give judgment against each defendant to the action who is found to be jointly or severally liable for the damage for the proportion of the total amount of the damages that the court considers to be just, having regard to the extent of that defendant's responsibility for the loss or damage.

Our research indicates that developers have become far more intricately involved in decision making processes during the construction phase of a development (38).

This option requires:

- defining and developing a chain of accountability
- identifying and defining the common responsibilities of a developer
- defining the common obligations that a developer has
- identifying the reasonable and proportionate level of accountability within the building and construction industry
- legislative reform to bring the developer into the remit of the regulator

Questions

- 18. Should the developer and a builder have equal levels of accountability and the same level of responsibility in the regulatory chain of accountability?**
- 19. Are existing common law processes that enable a builder to join a developer to any proceedings relating to the development sufficient?**

Amendments to the ACT's building regulatory system

Aspects of the existing building regulatory system could be amended to meet community expectations in relation to developers and improve the regulator's powers in relation to developers and development activity during the building and construction process.

For example, NSW has introduced the following elements into its legislative framework for building and construction work:

- Developers are required to pay a levy into the Home Building Administration Fund. The levy is intended to support the regulator's new schemes and is hoped to avoid defects and rectification costs during a project's life cycle. (Section 6A *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (NSW)).
- Developers are subject to statutory warranties.
- Developers are liable for the quality of residential apartment buildings. (Section 9, 23, 33 *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (NSW))

- A developer has a duty to exercise reasonable care to avoid economic loss caused by defects, only if they carried out the construction work. The duty of care is owed to each owner of the land in relation to which the construction work is carried out and to each subsequent owner of land. (Section 37 *Design and Building Practitioners Act 2020* (NSW)).
- An owner's corporation or an association is taken to suffer economic loss if the corporation or association bears the cost of rectifying defects (including damage caused by defects) that are the subject of a breach of the duty of care. (Section 38 *Design and Building Practitioners Act 2020* (NSW))

The ACT Government is planning a review of statutory warranties as part of its future building reform program.

Questions

20. Should developers be subject to statutory warranties in the ACT?

21. Should developers be subject to rectification orders in the same way as other construction occupations are?

Non-regulatory options

Code of practice – voluntary

This option proposes the introduction of a voluntary code of practice which is a form of self-regulation. This code of practice could be industry developed or developed by Government with industry participation. Similar to the mandatory code of practice discussed earlier, a code of practice would set minimum standards of conduct which could lead to an overall improvement in standards across the occupation. Being voluntary in nature, the code would not be enforceable and would rely on the industry self-regulating.

Questions

22. Should a voluntary code of conduct be considered? If yes, should it be industry developed or developed by Government?

Developer rating tool

This option proposes the introduction of a developer rating tool. The tool would be based on a prescribed list of relevant matters, including behaviours, and would draw on data from multiple sources.

As a complex industry, providing consumers with transparent and accessible information should assist consumers to make informed decisions.

This option recognises that developers and those engaged in development activity do so under a 'social licence' and thus their reputation is a key component of whether they succeed or fail.

NSW have introduced the independent Construction Industry Rating Tool, or iCIRT and this could be used as a baseline for developing a tool for the ACT.

Questions

23. What would be the minimum information needed to establish an effective developer rating tool?

Educative tools for the community and developers

Education tools are a key means of providing consumers, industry and the community with information to enable them to make informed decisions and understand their obligations.

Education tools are a support option for other options considered in this paper. Education tools are not being considered as a standalone option.

Educative tools would be developed for two audiences:

- a) **Consumers/community** – objective being to provide the community with the understanding, skills and tools they need to understand and meaningfully engage with developers.
- b) **Industry** – objective being to support industry understand the regulatory settings in which they operate. Many in the industry are familiar with and understand how to discharge their obligations. However, amendments and changes to the system overtime may lead to a loss of currency in knowledge.

Promote security of payment

This option is about promoting the current security of payment processes to industry and how it can be utilised to address concerns raised about payments between parties involved in the various stages of the building and construction process. This option would look to educate those in the industry, particularly, those engaging in development activity, about the flow down effect of how they structure their contracts and payment arrangements.

The [*ACT Building and Construction Industry \(Security of Payment\) Act 2009*](#) establishes a rapid adjudication process so that people who carry out construction work, or supply goods and services, can receive timely payment. Under this process, if a person makes a payment claim and it is not paid in accordance with the process in the Act, they may apply to an authorised nominating authority (ANA) for an adjudication. The ANA appoints an adjudicator to hear disputes about account payments instead of the matter having to be heard in court.

The ACT Government is planning a review of its security of payments legislation taking into account the 2018 national review and recommendations from the Inquiry into Building Quality.

Questions

1. What are the common responsibilities of a property developer?
2. Are they reflected in the proposed definition?
3. Do you support regulating entities who meet the definition of property developer, or do you support a regulatory model that focuses on the activities being undertaken and regulating the manner and standard to which those activities must be conducted?

Licensing / Registration Schemes

4. Do you support the introduction of a positive licensing scheme for property developers in the ACT?
5. Should there be a threshold which you must meet to be required to be licensed / registered?
6. What does the Government need to consider in establishing what makes a person or entity suitable to be a developer or engage in development activity?
 - a. What minimum requirements should be set for a person/entity to be licensed / registered?
7. Should individuals or entities be required to be licensed / registered? If entities, should a person be required to be a nominee for the entity, similar to existing practices under the *Construction Occupations (Licensing) Act 2004* (COLA).
8. If the ACT was to go down the path of a negative licensing model premised on restricting certain persons or entities from the profession due to certain characteristics, what characteristics should prevent a person or entity from carrying out development activity in the industry?

Disclosure scheme

9. What information should be included in any disclosure scheme?

For example:

 - Should funding sources be included?
 - Should it include any regulatory action? If so, against whom and what types of regulatory action?
 - Should a disclosure scheme include the names of responsible individual Directors or controlling shareholders?

Documentation

10. What do you think about the options for achieving improved documentation in relation to developments?
11. Are there other options the ACT Government should consider?

Project Trust Accounts

12. Should the ACT Government consider introducing project trust legislation for the building and construction industry?
13. If yes, what model would you recommend?

Bond Schemes

- 14. Should the ACT Government consider introducing a bond scheme for the building and construction industry?**
- 15. If yes, should this mirror the NSW model?**
- 16. Is a bond scheme preferable to project trust legislation?**
- 17. Should the ACT Government investigate decennial insurance for the ACT?**

Chain of Accountability

- 18. Should the developer and a builder have equal levels of accountability and the same level of responsibility in the regulatory chain of accountability?**
- 19. Are existing common law processes that enable a builder to join a developer to any proceedings relating to the development sufficient?**

Regulatory reform

- 20. Should developers be subject to statutory warranties in the ACT?**
- 21. Should developers be subject to rectification orders in the same way as other construction occupations are?**

Code of practice – voluntary

- 22. Should a voluntary code of conduct be considered? If yes, should be industry developed or developed by Government?**

Rating tool

- 23. What would be the minimum information needed to establish an effective developer rating tool?**

Appendices

Appendix A – Existing Recommendations / Commitments

The Parliamentary and Governing Agreement for the 10th Assembly (PAGA) contains a commitment in Appendix 3 (5.2) to a licensing scheme for property developers.

Set up an Australia-first licensing scheme for property developers, including the creation of:

- a. a “fit and proper person” test and
- b. rigorously enforced penalty scheme

Inquiry into Building Quality

The Standing Committee on Economic Development and Tourism tabled its final report, Inquiry into Building Quality (BQI), in August 2020 (83). The committee made a total of 48 recommendations. The ACT Government responded to the BQI recognising the importance of compliance with building standards for health, safety, amenity and sustainability in maintaining quality of life. It also emphasised the extensive work that had been undertaken to date to improve the ACT’s building regulatory system and lift practices across the building and construction industry.

The BQI made several recommendations in relation to developers and/or development activity. The following recommendations were agreed or agreed in principle by the ACT Government (83):

- Recommendation 10: that the ACT Government strengthen processes to ensure that developers lodge plans “as built”, with an initial focus on large multi-unit developments
- Recommendation 11: that the ACT Government require developer lodged plans to provide a minimum standard of detailed design drawings/specifications for areas that are commonly defective.
- Recommendation 13: that the ACT Government:
 - provide information to consumers, including Owners’ Corporation Executive Committees, on their rights and processes to seek redress when building quality issues take place, including by developing tool kits to support those taking legal action; and
 - require builders to supply information on that material at the quote or draft contract stage
- Recommendation 20: that the ACT Government consider restricting the use of special purpose vehicles for the acquisition, development and sale of property.
- Recommendation 21: that the ACT Government amend the Unit Title legislation to make it mandatory, upon occupancy and creation of the Owners’ Corporation (OC), that an agreement be established between the developer and the OC for addressing all common property (building and landscape) issues.
- Recommendation 27: that the *Unit Titles (Management) Act 2011* be amended to prevent strata management companies being contracted for longer than 12 months during the period of developer control.

- Recommendation 40: that Certificates of Occupancy should not be issued on a building until:
 - a representative of the unit responsible for achieving and storing the drawings (and the certifier) has signed a document to verify that the drawings issued to the department are all of the relevant 'work as executed' structural (including shop drawings and precast drawings), architectural, mechanical, electrical, hydraulic, fire and landscape drawings;
 - detailed and accurate plans are lodged with the ACT government, and lodgement verified by the responsible officer; and
 - all documents are also lodged with corporate bodies.
- Recommendation 41: that the ACT Government investigate a building bonds scheme for multi-unit residential buildings requiring a percentage of the contract value of a property be withheld in a Trust until all defects and warrant issues are addressed satisfactorily.
- Recommendation 42: that the ACT Government consider amending legislation to make developers, in addition to builders, liable for breaches of statutory warranties under the *Building Act 2004*.

Building Confidence Report

In 2017, the Building Ministers' Forum (now known as the Building Ministers Meeting) commissioned the Building Confidence Report (BCR) (March 2018) into compliance and enforcement systems for the building and construction industry across Australia. The BCR includes recommendations for a national best practice model to strengthen the effective implementation of the NCC.

The BCR (33) passed some commentary on the role of developers.

- Noted it is common for developers to engage a builder to undertake a design and construct project for multi-storey buildings through contractual arrangements and that as the developer is not a builder, observed there is no requirement to be registered.
- Indicated the builder takes responsibility for development of both the design and construction components of the building with architects and engineers often engaged as sub-contractors. As the builder is responsible for the delivery of a completed building at an agreed price, attempts at cost savings will often occur throughout the design and construction process.
- Observed many aspects of the design and construct project may change after initial building approval is obtained, meaning the as-designed building documentation may be significantly different from the as-built building and indicated this creates a number of issues, especially for purchasers of apartments 'off the plan' as they have no rights to oversee the construction process and instead generally assume that regulatory controls have delivered a compliant building.

The BCR (33) also highlighted the importance of ensuring there is no perceived conflict of interest between those engaged in the certification of a building during construction and developers, builders and owners. This provides assurance people that performance standards are adhered to during the construction process without interference.

While the BCR did not include any specific recommendations relating to developers, it contained recommendations relating to the registration of various categories of building practitioners involved in the design, construction and maintenance of buildings. It also contained the following recommendations that could be applied to development activity:

- Recommendation 12: that each jurisdiction establishes a building information database that provides a centralised source of building design and construction documentation
- Recommendation 13: that each jurisdiction requires building approval documentation to be prepared by appropriate categories of registered practitioners, demonstrating that the proposed building complies with the NCC

Appendix B: ACT Building and Construction Industry and Market

Construction work done in the ACT can be broken into three sectors:

- Residential building is a building consisting of one or more dwelling units. Residential buildings can be either houses or other residential buildings.
- Non-residential building is primarily intended for purposes other than long term residential purposes. Note that, on occasions, one or more dwelling units may be created through non-residential building activity. Non-residential buildings are further classified by their functional use at time of approval - educational; health; aged-care; office; religious; transport; industrial; and commercial nature.
- Engineering Work incorporates all construction activity except the construction of new buildings or structural alterations, extensions or other additions made to existing buildings. This sector of the industry is not considered in this paper.

Building approvals (84), residential work done (85), dwelling unit commencements (86) and financial commitments in the ACT residential market shows trending growth across all sectors (87).

This industry is important to the ACT economy with residential development for June/July 2022 valued at \$214m(87).

Table 3: Building Approvals, ACT June 2022 (84)

	Level		Change (%)		
	Jun-21	May-22	Jun-22	Monthly	TTY ^{ix}
Residential					
No. of Approvals	327	871	533	-38.8	63
Value of Approvals (\$ million)	108	245	134	-45.3	23.7
Non-Residential					
No. of Approvals	45	37	32	-13.5	-28.9
Value of Approvals (\$ million)	566	202	79	-60.7	-86

ACT Market - What is the industry developing?

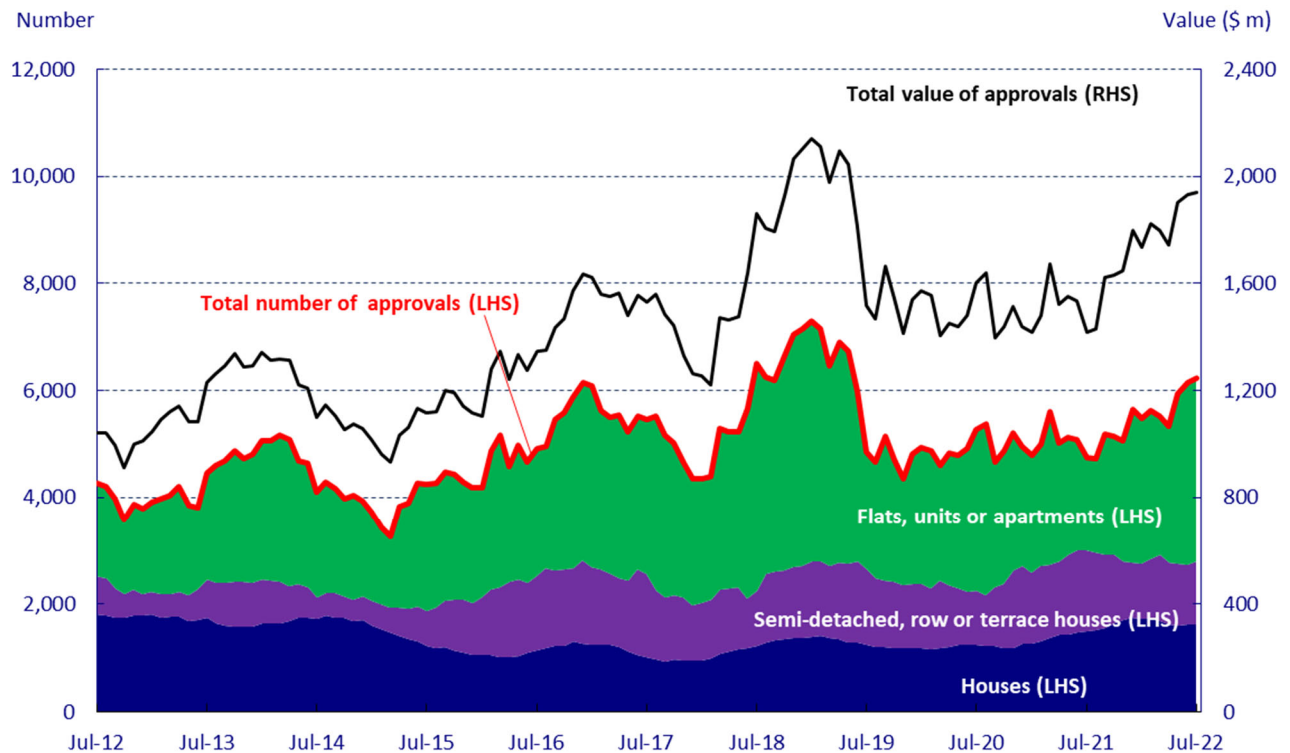
The ACT Government has clearly identified that it is planning for Canberra to be a city that is, among other policy outcomes, compact and efficient. This approach looks to limit urban spread by accommodating up to 70% of new housing within the existing urban footprint. This policy is reflective of the changing housing preferences of Canberrans as well as Australian Government incentives to invest in housing. Changing lifestyle choices, affordability, an ageing population seeking to downsize, and ageing place are helping to shape the housing market as well as what the development industry is delivering.

Private sector developers play an essential role in delivering the built form of our city within the established regulatory frameworks. This includes, for example, delivering the pipeline of dwellings for our housing supply, as well as building community facilities and the public realm.

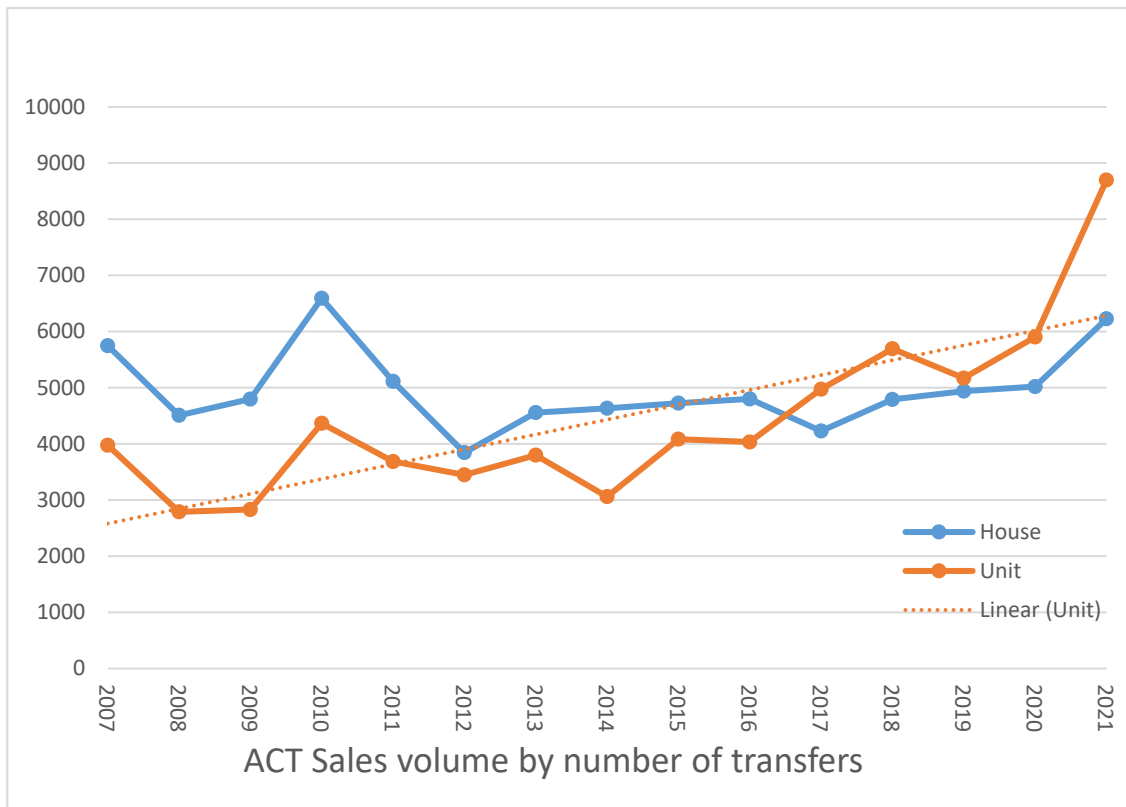
^{ix} Through the year (TTY) growth is the percentage change from the same period in the previous year

In Canberra, the development industry built 18,066 medium and high-density homes between 2011 and 2018. Data on the sales volume by number of transfers show a definite growth trend in the apartment market (88).

Building Approvals by Dwelling Type number and value (ACT Original data), 12-Month Moving Total (84)



Source: ABS Release: *Building Approvals, Australia*.



Source: AllHomes, ACT Real Estate Market Trends Report (88)

Appendix C: Existing Regulatory Settings

What are the current regulatory frameworks that apply to developers and the development industry?

- The [Fair Trading \(Australian Consumer Law\) Act 1992](#) applies the Australian Consumer Law set out in the [Competition and Consumer Act 2010 \(Cwlth\)](#), schedule 2 (including any regulation under that Act, s 139G) as if it were an ACT Law called the Australian Consumer Law (ACT). The Australian Consumer Law applies to all Australian businesses nationally and in all States and Territories and includes:
 - a national unfair contract terms law covering standard form consumer and small business contracts;
 - a national law guaranteeing consumer rights when buying goods and services;
 - a national product safety law and enforcement system;
 - a national law for unsolicited consumer agreements covering door-to-door sales and telephone sales;
 - simple national rules for lay-by agreements; and
 - penalties, enforcement powers and consumer redress options.
- The [Corporations Act 2001 \(Cwlth\)](#) is the main legislation that regulates businesses across Australia. It sets the obligations of, and the regulatory framework within which, corporations within Australia function. The Act identifies the duties of directors and other officers requiring that they must exercise their powers and discharge their duties with care and diligence. The Act also provides for a director identification which requires all directors of a company (and other bodies) to apply for a unique identifier, a “director ID”. The director ID will help prevent the use of false or fraudulent director identities. ASIC is responsible for enforcing director ID offences set out in the Corporations Act 2001.
- The [Electoral Act 1992](#) was amended in 2020^x to implement a government commitment to ban political donations or gifts from property developers prohibit gifts from property developers and their close associates to Members of the Legislative Assembly, political parties, candidates, and associated entities. This amendment was made in recognition that property developers are distinct from other groups in the community in that their profit depends heavily on decisions made by government in relation to land development applications.
- The [Unit Titles Act 2001](#) governs the arrangements under which land may be sub-divided into units, unit subsidiaries and common property. It identifies the rights, liabilities and obligations of owners, the owners corporation, executive committee and agents.
- The [Unit Titles \(Management\) Act 2011](#) sets out the rules relating to managing a unit plan in an accessible format to assist owners, managers and others involved in managing the unit plan to better understand their respective roles in the day-to-day activities of managing a unit plan.
- The [Building Act 2004](#) was introduced to replace the superseded *Building Act 1972* with provisions for compliance with the Building Code of Australia, Building Approval, inspection and certification and residential warranties and risk coverage.

^x [A2020-51](#) s 18

- The [Construction Occupations \(Licensing\) Act 2004](#) creates a single licensing and disciplinary regime for builders, electricians, plumbers, drainers, gasfitters, building surveyors (certifiers) and plumbing plan certifiers.
- The [Civil Law \(Property\) Act 2006](#) consolidates the law of property in the ACT into one body of law.
- The [Civil Law \(Sale of Residential Property\) Act 2003](#) establishes the process for the making and exchange of contracts for the sale of residential property in the ACT. It seeks to provide levels of consumer protection for both buyers and sellers of residential property including consumers who enter into off-the-plan residential property purchase contracts. The [Civil Law \(Sale of Residential Property\) Regulation 2004](#) are made under this law.
- The [Agents Act 2003](#) licences and registers real estate agents. The regulatory scheme requires licensees to meet competence standards, be of good character and undertake continuing professional development throughout their careers. It includes enforcement measures to ensure the integrity of agents' trust accounts holding consumers' money. The Act also identifies that it is an offence for an agent to quote unrealistically high or low estimated prices for real estate. Agents must also disclose any relationship with a person to whom the agent refers a client or prospective buyer, or benefits that might accrue to them or other people through a real estate transaction, aside from commissions, in dealing with their clients.
- The [Planning and Development Act 2007](#) sought to create a contemporary planning and land administration system, processes and practices that would provide greater certainty, clarity and consistency and which is flexible, timely, less repetitious and administratively manageable development.
- The [Building and Construction Industry \(Security of Payment\) Act 2009](#) entitles people who carry out construction work (or who supply related goods or services) to a timely payment for the work they carry out and the goods and services they supply.
- Other relevant Acts:
 - [Water and Sewerage Act 2000](#)
 - [Utilities Act 2000](#)
 - [Utilities \(Technical Regulation\) Act 2014](#)
 - [Electricity Safety Act 1971](#)
 - [Gas Safety Act 2000](#)
 - [Work Health and Safety Act 2011](#)

Appendix D: Timeline of key regulatory reforms

Year	Act	Intent
2004	<i>Building Act 2004</i>	This Act replaced the superseded <i>Building Act 1972</i> with provisions for compliance with the Building Code of Australia, Building Approval, inspection and certification and residential warranties and risk coverage. In conjunction with the COLA this Act sets up a single system of licensing for those involved in the construction and development industry.
2004	<i>Construction Occupations (Licensing) Act 2004</i>	This Act created a single licensing and disciplinary regime for builders, electricians, plumbers, drainers, gasfitters, building surveyors (certifiers) and plumbing plan certifiers.
2007	<i>Planning and Development Act 2007</i>	This Act sought to create a contemporary planning and land administration system, processes and practices that would provide greater certainty, clarity and consistency and which is flexible, timely, less repetitious and administratively manageable development.
2009	<i>Building and Construction Industry (Security of Payment) Act 2009</i>	This Act entitles people who carry out construction work (or who supply related goods or services) to a timely payment for the work they carry out and the goods and services they supply.
2011	<i>Unit Titles Management Act 2011</i>	This Act sets out the rules relating to managing a unit plan in an accessible format to assist owners, managers and others involved in managing the units plan to better understand their respective roles in the day-to-day activities of managing a unit plan.
2013 - current	ACT Building Reforms	Following a policy review of the ACT <i>Building Act 2004</i> and the associated regulatory and administrative system, the government has gradually been implementing a range of reforms to improve the effectiveness and transparency of the ACT building system.
2015	Establishment of Access Canberra	The intent in establishing Access Canberra was to bring a range of government regulatory functions into a single agency, and expand the current focus on engagement and education activities to encourage greater regulatory compliance.
2019	<i>Building and Construction Legislation Amendment Act 2019</i>	Made amendments to the ACT's Building Regulatory System to address issues relating to corporations avoiding action to address defective works (25). These amendments increased the avenues for consumers to pursue remedies against directors of building companies personally for defective works associated with their licence, including providing the Construction Occupations Registrar with the power to take disciplinary action and make rectification orders against corporations, including directors of a licensed corporation.

Year	Act	Intent
2019	<i>Building Minimum Documentation and Information for Building Approval Applications – Class 2-9 Buildings Guideline (the Guideline).</i>	<p>This guideline is for landowners and people preparing plans and other documents to accompany an application for a building approval for a new class 2-9 building or a substantial alteration to a class 2-9 building. Class 2-9 buildings include residential apartment buildings, and buildings with a commercial use. The guideline includes requirements for documents and information (the required information) to be included in the plans and accompanying documents that form part of a building approval application. The Guideline confirms to designers and applicants the expectations for the minimum information to be included in an application for building approval. The Guideline also encourages landowners (developers) and designers to consult with the project's building certifier throughout the design process.</p>
2020	<i>Building and Construction Legislation Amendment Act 2020</i>	<p>Introduced the framework for a Residential Building Disputes Scheme that helps homeowners and the building industry resolve residential building disputes earlier and at less cost. The intention of the scheme is to facilitate constructive and productive dialogue between parties to a dispute, to ensure relatively rapid and low-cost solutions that are technically and legally workable while not requiring complex legal negotiations. The scheme is also intended to help resolve simpler matters without parties having to have the matter heard in ACT Courts and Tribunals. This scheme applies to residential building disputes between a building owner and either a building practitioner or a developer. A developer is defined for the purposes of the scheme as per the definition in the Unit Titles Act 2001.</p>
2020	<i>Amendments to Electoral Act 1992</i>	<p>These amendments implemented a government commitment to ban political donations or gifts from property developers prohibit gifts from property developers and their close associates to Members of the Legislative Assembly, political parties, candidates, and associated entities.</p>
2020	<i>Unit Titles Legislation Amendment Act 2020</i>	<p>The Managing Buildings Better reforms changed the law to improve the management of apartments, townhouses and mixed-use developments and commercial units. These amendments allow owners corporations to tailor the way they manage their buildings to suit the size, location and specific needs of the building;</p> <ul style="list-style-type: none"> empowering consumers by helping them to be informed of their rights and responsibilities when purchasing off the plan; allowing a more equitable distribution of building costs, such as water, maintenance and insurance; modernising the administrative processes used for owners corporations by making it easier to conduct meetings and cast votes; and providing greater ability for people to keep pets in their apartments and townhouses. <p>The reforms also introduced mechanisms to hold developers more accountable, including:</p> <ul style="list-style-type: none"> developers must give owners buying off the plan a disclosure statement as a part of the contract developers also need to provide updated statements to notify buyers of any significant changes to the development, including registration of the units plan and any material changes made since the contract was

Year	Act	Intent
		signed, including amendments to development applications and approvals. These extra steps provide buyers with the information they need to rescind a contract if the unit or units plan is not as described.
2022	Amendments to <i>Civil Law (Sale of Residential Property) Act 2003</i>	<p>Amendments were passed to this Act to protect homebuyers from sunset and development delay clauses in illegitimate and unjustifiable circumstances.</p> <ul style="list-style-type: none"> • Developers are only able to use sunset and development delay clauses to rescind a contract if the buyer consents or if they're permitted by an order of the ACT Supreme Court • Developers wanting to rescind a contract must provide 28 days written notice to the buyer, setting out the reasoning behind the proposed rescission under the clause.
2022	Introduction of Planning Bill 2022	This Bill seeks to deliver a more 'spatially-led' and 'outcomes-focussed' planning system that is clear, easy to use and facilitates the realisation of long-term aspirations for the growth and development of Canberra while maintaining its valued character.

Appendix E – Detailed Developer Process



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