GNCA COMMENTS ON DISCUSSION PAPER ON DEVELOPER REGULATION

24 February 2023

1. The Griffith Narrabundah Community Association (GNCA) (ABN 26503486416) is a not for profit, voluntary community-based organisation operating in the Griffith Narrabundah area. The objects and purposes of the Association are "to protect the amenity and interests of the Griffith and Narrabundah communities, particularly in relation to the preservation of community facilities and open space". The Association has 450 members. The GNCA is a member of the Inner South Canberra Community Council (ISCCC).

2. The GNCA welcomes the Discussion Paper on Developer Regulation of December 2022 and provides the following comments.

3. The GNCA notes that Canberra resident, Professor John Braithwaite of ANU, is a world expert in regulatory systems, who is recognised for his work on the regulatory pyramid.[1] This is not mentioned in the discussion paper but no doubt informed some of the work cited. The GNCA has regard to his pyramid in responding to the questions posed in the paper.

4. The GNCA applauds the extensive work on inquiries and research into the building industry and development throughout Australia. It encourages the government to consider lessons learned from the regulation of practitioners in other industries and professions. In particular the GNCA welcomes the recommendations in the "Inquiry into Building Quality" (BQI) released by the Standing Committee on Economic Development and Tourism in 2020, which are at least steps in the right direction.

5. The GNCA wonders what is the problem that needs to be solved here? The 'Introduction' to the Discussion Papers says "Canberrans should be confident that when they engage with a developer, the developer will be competent, transparent and act ethically." This situation would certainly be desirable, but the introduction of competence, transparence and ethical behaviour and improved "accountability" will achieve little if builders can still avoid the consequences of bad building practices.

[1] See J Braithwaite *To Punish or Persuade: Enforcement of Coal Mine Sa*fety (1995). See also B Fisse and J Braithwaite *Corporations Crime and Accountability* (1993); C.Dellit and B.Fisse 'Civil and Criminal Liability Under Australian Securities Regulation: The Possibility of Strategic Enforcement' In G Walker and B Fisse (eds) *Securities Regulation in Australia and New Zea*land (1994). 570.

6. The GNCA is of the view that the current discussion paper, and previous inquiries, have been daintily dancing around the elephant in the room, which is:
Why does a purchaser of (say) a fridge have considerably more consumer protection, consumer protection, and ease of access to appropriate remedies, than does the purchaser of a dwelling? Given that a house costs in the order of a thousand times as much as a fridge, surely, in a rationally organised society, greater protection would go with greater expenditure? The Government should remove the protections currently enjoyed by developers and make them liable for flaws in the buildings that they build for the lifetime of the building, or at least for 25 years, the shortest design life a building is likely to have. This should include liability to the body corporate for remedying defects.

7. Is it just that some developments of modern economic life, such as the limited liability company have compounded together to make consumer protection in relation to housing so difficult? Or is it that what we have now is the result of a succession of government decisions that have the net result of leaving the developer in a vastly more advantageous position than the individual residential purchaser. Particularly in large multi-unit developments, the difficulties of firstly discovering that a fault is widespread rather than an individual problem, then identifying how the widespread problem might be fixed (if this is possible) and then determining who should be held responsible for the necessary remediation (the developer?, the builder?, the architect?, the consultant engineer?, the responsible sub-contractor?, the building certifier?) puts a very considerable burden on the developments residents. In fact, the difficulties in obtaining timely remediation of building faults might lead an unbiased observer to suspect that this was a feature, not a fault of the system. This situation could be the result of a carefully designed ineffectiveness in the system.

8. Some of the problems in the ACT in relation to developers seem to be Australia wide, for example the imbalance in consumer protection for purchasers of dwellings compared with those that apply to the purchase of white goods. Others, however, such as the completely unworkable arrangements for building certifiers, seem unique to the ACT.[2] In relation to the latter example the probability of adverse outcomes from the proposed arrangement is so obvious that one may suspect that the outcome was what the government had sought. However, identifying all the decisions that led to the current highly undesirable outcomes would be a mammoth task and achieve little. The objective should be to make significant changes so that the system works for those who purchase dwellings as much as it does those who create these dwellings.

9. It seems to be generally accepted that the current state of housing construction in the ACT is the form of development that is in most need substantial changes. And although there are significant issues associated with buying off the plan, the really major issues relate to building flaws and defects. To achieve effective reform in this area the GNCA **recommends that**:

[2] The GNCA welcomes the EPSDD Tender REOI EP12583151 on Options for the Establishment of Publicly funded Certifiers within the ACT Public Service

R1. A natural person must be identified as the "Developer" in any Development Application;
R2 The Developer so identified in the DA is responsible for all aspects of the development and must remediate or make good any defect in the development and any shortfall in due payments to subcontractors, associated professionals and the like.
R3. The Developer be given the right to counter sue subcontractors, associated professionals and the like for recovery of remediation costs if he/she believes they bear some or all responsibility for the defect
R4 The ACT establish a Project Trust Account system to ensure that subcontractors and suppliers are paid appropriately
R5 The ACT establish an Insurance Bond scheme to insure remediation of faulty construction
R6 The "Developer" be required to demonstrate that he holds and insurance bond appropriate and suitable to the proposed development before a DA approval can be granted, and that failure to be honest about this be treated as fraud
R7 That the insurance bond remain available for the design life or the building, or 25 years, whichever is shorter.
R8 The government monitor issues in strata management with a view to seeing whether more government intervention is needed.

10. The GNCA's comments on the discussion papers are as follows:

11. **Page 9 -10** **Who is involved in the development industry?** The list should be expanded to include Building Certifiers. If it is intended that these are covered under the "Professional Team then they should be explicitly listed along with the other examples. The description of those involved in the development industry should be expanded including the list on page 10 of those who "may" be involved. Occupiers is an ugly word and has overtones of unsanctioned residence. We suggest it be changed to residents of the new development if this is what is intended. The list should also include community associations who work in the interests of their neighbourhoods to protect them against unprincipled and overzealous developers. When they are given an opportunity community organisations also consult with government and developers on proposed developments. Prospective lessees who seek to become landholders should also be included the list. The whole of Canberra, now and in the future, has an interest in a well-regulated development industry.

12. **Page 10** "It is acknowledged…"The GNCA agrees that it can be difficult for the general public to distinguish the different parties involved in a building and construction project and for what aspects of the project the different parties are responsible. As the paper says, the system is opaque.

13. When there is an intersection of discretion and secrecy and money then corruption is likely to follow. [3] And the proposed new planning laws that introduce "outcomes based" decision making increases the secrecy.

14. **Page 12** The GNCA notes the description of the developer process at p.12 and the more complete depiction at Appendix E and makes the following comments:

[3] J Black *Principles Based Regulation: Risks, Challenges and Opportunities* (2007) LSE.

a) The chart on page 12 does not include the building certification step but at Appendix E phase 4 shows certification by a building surveyor that construction has been completed in accordance with NCC and approvals. Unfortunately the discussion paper does not explain the relationship of that building surveyor with the developer and whether they are subject to regulatory or ethical standards. In several cases in ACAT when the GNCA has asked how it will be verified that a development has complied with ACT law (the PDA and the Plan) it has been told that the building certifier, who is employed by the developer, will sign off on compliance when construction is complete. This satiation is unsatisfactory.

b) At phase 1 of investigation there is no mention of consultation. Perhaps it is included in market studies. Well respected ACT developers undertake proper consultation with the community when they propose to develop sites in the community. Although this is a cost to them it pays dividends in providing a better outcome, reducing disputation, promoting ease of building operations and smoothing the entry of future occupants , including businesses, into the community.

c) The preconstruction phase should include acknowledgment of role of review of DA decisions. In Appendix E in phase 3 under approvals and documentation there is reference to plans aligning with planning regulations and obtaining government approval. In fact, when there has been government approval of a DA that is eligible for merits review, and that objectors consider is non-compliant, then there is likely to be merits review of the decision. Some developers approach this process in a constructive way seeing it as an opportunity to improve the plan. Many adopt litigious strategies with the aim of intimidating and oppressing objectors. Recent examples of this include threatening costs orders and fishing exercises in the tribunal. That said, there are many developments that are not subject to merits review because they are excluded from merits review under planning laws. Appendix E could be improved by emphasising compliance with the rule of law

15. Page 12 It is not clear why a Not for Profit company should be excluded from the definition of a property developer. This would merely encourage legal strategies to ensure that the critical development decision were made by a vehicle that transferred the profits of developments to other entities. A regular lawyers' picnic.

16. The proposed definition of 'Developer' put forward on p.12ff is unnecessary. A simpler way to unequivocally identify the 'developer' of a project would be to require every DA to advise the name of a natural person as the "Developer" as proposed in recommendation 1 above. And further require that any such developer so named demonstrate that they have taken out a valid insurance policy indemnifying future owners of part or the whole of the development against any flaws in design and construction,

17. Concerns about breaching the 'corporate veil' seem misplaced. If the ACT is not prepared to remove the ability for bad actors to evade responsibility for their actions via low capitalisation companies, then we should resign ourselves to developers acting in bad faith undertaking developments using a $2 shell company which can (and usually are) emptied of funds and closed down after construction.

18. The GNCA responds to the questions in the paper as follows:

1. **What are the common responsibilities of a property developer?**

   The property developer has a responsibility to comply with the law. For example, in seeking development approval for their development proposals they must comply with the planning laws. If review of the decision to approve is sought they must continue to comply with the law.

   The discussion paper does not adequately address issues of sustainability and the environmental and social impacts of developers' activities. These are now on the agenda of most businesses and corporate boards. They are a developer's responsibility.

2. **Are they reflected in the proposed definition?**

   No. The definition should include "in accordance with the law" in the definition. The GNCA trusts that issues of sustainability and the environmental and social impacts of developers' activities will be incorporated into the law that governs them. The definition could be further expanded to include "in accordance with the law and accepted social practice" to reflect the reality of a social licence applying to companies today.

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?**

   The GNCA does not regard this as a binary decision and supports both the regulation of development activities and those undertaking the activity.

Licensing / Registration Schemes

4. **Do you support the introduction of a positive licensing scheme for property developers in the ACT?**
   The GNCA believes that much more sweeping changes are necessary but failing any move to introduce reforms of the kind advocated in our recommendations above the GNCA supports the introduction of a positive licensing system for ACT property developers. This caveat also applies to the GNCA's replies below.

5. **Should there be a threshold which you must meet to be required to be licensed / registered?**

   The GNCA supports "fit and proper" requirements as the minimum threshold requirement to be met to be licensed or registered. The onus should be on an applicant to prove fitness to hold a licence.

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?**

The GNCA suggests that a critical focus for instilling public confidence in an organisation or system is the nature of its governance practices.[4] Obviously basic "fit and proper" requirements including bankruptcy, fraud and criminal convictions would be included. Ideally there would be a system allowing complaints about developers which would provide accessible statistics.

Of course, if a developer had to arrange a substantial insurance bond commercial pressures on any involved insurance company would impose fit and proper requirements far more stringently than could realistically be imposed by a government.

How would Australian defamation law impact of any possible government to deny a licence to a development due to knowledge of a past shortcoming not generally known to the public?

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).**

The GNCA supports the licensing of both individuals and entities. A licensed entity should have a named officer as nominee for the entity.

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?**

The GNCA does not support a negative licensing model. If this model were to be adopted the characteristics that should prevent a person from carrying out development activity in the industry should include evidence that they had engaged in illegal activities (including fraud, misleading advertising etc) or practices that caused financial loss to employee, contractors or consumers.

Disclosure scheme

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

- **Should funding sources be included?**

[4] For example, this was demonstrated in the Royal commission into Institutional Responses to Child Sexual Abuse *Final Report* 2017 Vol 7

Arguably funding sources are commercial in confidence but the nominated officer should be required to sign a statement saying that there is no funding from certain sources. These should be determined by regulation or notifiable instrument to allow public access to the sources under consideration. For example, funding sourced from activities causing environmental damage could be included in the list.

However, difficulties in enforcing such a scheme in the real world make it impractical and would merely result in the diversion of resources from more effective control scheme. Be suspicious if the government shows any enthusiasm for such a scheme.

It might be more effective to introduce tougher laws about acceptance of emoluments in cash or in kind by politicians, with any demonstrated f9nancial relationship with a developer automatically resulting in disqualification from the assembly and the appointment of the new member by countback.

o **Should it include any regulatory action? If so, against whom and what types of regulatory action?**

The disclosure scheme should allow more sunlight into the current opaque system of development of land that belongs to the people and is managed by their government. Regulatory action is needed. Disclosure should be required, and non-disclosure should be sanctioned.

o **Should a disclosure scheme include the names of responsible individual Directors or controlling shareholders?**

Yes. But would this clash with Australia's odd defamation regime?

Documentation

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

The GNCA notes that the ACT government owns and controls the release of land in the ACT. It also controls the ACT land and planning authority that decides on development applications and other land development. It benefits in two ways from more intensive developments. First, it gets returns from the sale of land. Secondly, it receives more rates and other income once land is developed.

It is not unreasonable to expect the government to oversee a proper system of checks on documentation on completion of work. In the GNCA's experience developers, builders and the Act government has an attitude of leaving compliance for "down the track" and consumers ultimately pay the price.

The GNCA endorses the summary of problems faced by purchasers "off the plan" when plans have been changed (p.24).

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

There are inevitable conflicts and differences between government and developers. Legislation and incentives need to be in place to ensure that developers put their case for desired changes publicly so that the interested public can monitor what is asked for and what the government agrees to. It is not in the ACT's interest for the government to just accommodate developer's demands (with a fair probability that funds have somehow moved from the industry to someone or something with ties to the party of government).

The GNCA supports more transparency, awareness of conflicts of interest, protection of whistleblowers and resources and support for the Integrity Commission.

Project Trust Accounts

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

The GNCA is aware of the practice of phoenixing in the Act (p.28) It supports the introduction of project trust accounts for the building and construction industry.

13. If yes, what model would you recommend?

The GNCA supports the model of a specific trust fund for every project. Every project of a reasonable size will have someone doing the accounts, so this is unlikely to add a significant financial or administrative burden.

Bond Schemes

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

The GNCA supports the introduction of a bond scheme for the building and construction industry. It sees this decision as independent of any move to protect subcontractors and associated professionals under a Project Trust Fund system. An insurance bond scheme protects building purchasers, rather than those who work on construction of a building for a property developer.

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

The GNCA supports a scheme that mirrors the NSW model.

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

As explained above the GNCA sees the two proposals as distinct and offering protection from wayward developers to two distinct groups of possible victims. The GNCA is at a loss as to why the authors of the discussion paper believe the two proposals to be exclusive alternatives.

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

The GNCA supports a system where owners are protected against the costs of remediating flaws in a building for a significant time. Ten years would be a minimum and the GNCA would have a preference for 25 years. Those that argue that the costs of such a lengthy bond would be prohibitive ignore the fact that the risk of losing money will encourage insurance companies to be very selective in who the grant these bonds to, so that it can be expected that a number of current operators in the sector may decide to reconsider their choice of occupation. This would be the market at work and should be commended by all. Owners Corporations, who have as much trouble with insurers as they do with developers, and are in an equally weak position, would welcome this.

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?

All participants in the chain should be accountable. The developer should have primary accountability, but the builder has responsibilities that must be met. For administrative simplicity it would be better if legislation permitted those seeking redress for a problem with a building to sue the developer while permitting the developer to counter sue any associate in the building process that the developer considered had contributed to the building flaw. Courts are better at discerning and allocating responsibility than are Owners Corporations.

19. Are existing common law processes that enable a builder to join a developer to any proceedings relating to the development sufficient?

The GNCA submits that common law processes are useful but insufficient. In particular, there is a significant cost risk in litigation when a small consumer takes action against a large developer. This deters potential litigants.

Regulatory reform

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

The GNCA supports statutory warranties.

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

Yes

Code of practice – voluntary

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

The GNCA submits that a voluntary code of conduct will be insufficient to control unprincipled behaviour by developers. The elements of such a code described on pages 36-37 are ideal but will be ineffective because, as work on regulatory structures shows, when a

significant monetary profit is at stake adherence to codes is ignored. There must be "sticks" including reputational risk and significant penalties to force appropriate behaviour. The GNCA believes that a move to an insurance bond model will be far more effective at improving standards in the industry, because of the pressure of financial incentives on the bond issuers, than any number of laws, rules, guidelines, or pious hopes introduced by a government.

Rating tool

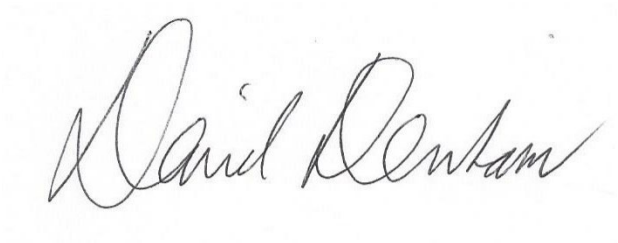
23. What would be the minimum information needed to establish an effective developer rating tool?

The GNCA suggests that an effective developer rating tool would include consumer satisfaction, especially with complaint resolution and delivery on time. Defamation law would need to be considered.

Other comments

The strata -management industry should also be reviewed

The strata management industry has been excluded from this discussion but has a role, particularly in the maintenance and rectification of buildings. Effective management of strata units is a natural outgrowth of the significant increase in the proportion of units in Canberra's housing mix. For example, 48% of the Inner South consists of apartments as a proportion of dwellings.[5] This is the highest percentage of all the nine Districts. Various participants in the building industry are engaged with this industry including developers, builders, insurers, strata managers, locksmiths etc. Consideration should also be given to better operations in that area.



David Denham

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[5] Draft Inner South District Strategy p.29 Figure 6 - by far the highest proportion of any area in Canberra