

13 November 2019

Mr H Finlay  
Committee Secretary  
Standing Committee on Economic Development and Tourism  
Legislative Assembly for the ACT  
GPO Box 1020  
CANBERRA ACT 2601

**By email: [LACommitteeEDT@parliament.act.gov.au](mailto:LACommitteeEDT@parliament.act.gov.au)**

Dear Mr Finlay,

**Inquiry into the Building and Construction Legislation Amendment Bill 2019 (ACT)**

The ACT Law Society (the Society) welcomes the opportunity to make a submission to the Standing Committee on Economic Development and Tourism (the Committee) regarding its Inquiry into the Building and Construction Legislation Amendment Bill 2019 (ACT) (the Inquiry). We note that the Building and Construction Legislation Amendment Bill 2019 (ACT) (the Bill) was presented to the Legislative Assembly by Mr Gordon Ramsay MLA on 24 October 2019 and was subsequently referred to the Committee for inquiry and report by 26 November 2019.

The Society is the peak professional association that supports and represents the interests of the members of the legal profession in the ACT. The Society maintains professional standards and ethics as well as providing public comment and promoting discussion regarding law reform and issues affecting the legal profession. The Society currently represents over 2,600 legal practitioners within the ACT.

Given the extremely short timeframe provided for responses, the Society is only able to make preliminary comments at this stage. It is of continuing concern that the legal profession is provided with such limited opportunity to comment on draft legislation. The Society believes that the input of experienced members of the profession contributes greatly to improved legislative outcomes.

The Society supports the policy intent of the Bill insofar that it seeks to strengthen existing laws in order to improve the regulation of the ACT building and construction industry. We are however, opposed to the provisions in the Bill which take effect retrospectively. These provisions displace the general presumption that legislation operates prospectively.<sup>1</sup> Even though the Explanatory Statement notes that the amendments are not retrospective,<sup>2</sup> the following provisions will take effect retrospectively.

- clause 18 (section 59A(4) of the *Building Act 2004* (ACT)) – the stop notices register (as maintained by the construction occupations registrar (the registrar)) must include certain information (i.e. the name of the person to whom the stop notice was issued) in relation to an issued stop notice. The stop notices register must include

<sup>1</sup> *Legislation Act 2001* (ACT) s 75B(1).

<sup>2</sup> Explanatory Statement, Building and Construction Legislation Amendment Bill 2019 (ACT) 37.



information about any stop notice (even if it was issued within 10 years of the register being formed and then subsequently updated). This provision takes effect retrospectively as information relating to any stop notice issued (up to 10 years) before the commencement of the Bill may become publicly available.<sup>3</sup>

- clause 41 (section 39A(3) of the *Construction Occupations (Licensing) Act 2004* (ACT)) – if the registrar is satisfied that it is appropriate, he or she may make a rectification order in relation to a person who was a director of the entity at or after the time the construction service was provided.
- clause 41 (section 39B(2) of the *Construction Occupations (Licensing) Act 2004* (ACT)) – if the registrar makes a rectification order in relation to a licensee (or former licensee) (the entity) and the entity is wound up after the order is made, the rectification order is taken to have been made in relation to each person who was a director of the entity (at or after the time the construction service was provided).
- clause 53 (section 107A(8) of the *Construction Occupations (Licensing) Act 2004* (ACT)) – the public register (as published by the Australian Capital Territory construction occupations registrar at least once a week on a website)<sup>4</sup> must include certain information (i.e. the name of each licensee).<sup>5</sup> Section 107A(8) requires that the public register must also include details about any ACAT or court order in relation to a rectification undertaking given by a licensee (providing that the licensee held a licence within 10 years of the register being updated). This provision applies retrospectively as information relating to a rectification undertaking by a licensee (up to 10 years) before the commencement of the Bill may become publicly available.
- clause 56 (section 126B(2) of the *Construction Occupations (Licensing) Act 2004* (ACT)) – in circumstances where a corporation is convicted of an offence under the Act and a penalty for the offence is imposed (and the amount of the penalty is not paid within the required time frame), an individual may be liable to pay the outstanding amount if he or she was a director of the corporation when the offence was committed and/or when the penalty was imposed. That is, prior to the Bill taking effect, a corporation may have a liability for a penalty which is unpaid – but the liability is only of the corporation, and not of the directors. After the Bill takes effect, the directors will also have that liability personally. The liability will be imposed on the directors by the legislation. The directors will not have had the opportunity to take action to protect themselves at the time of the corporation being prosecuted.
- clause 56 (section 126B(4)) of the *Construction Occupations (Licensing) Act 2004* (ACT)) – in circumstances where ACAT requires a corporation to pay an amount under section 58(3) of the Act (in relation to occupation discipline orders – licensees) and the amount is not paid within the time required for payment, an individual may be liable to pay the outstanding amount if he or she was a director of the corporation when the act or omission that was a ground for occupational discipline happened and/or when ACAT made the order for payment. That is, prior to the Bill taking effect, a corporation may have a liability for an order of ACAT which is unpaid – but the liability is only of the corporation, and not of the directors. After the Bill takes effect, the directors will also have that liability personally. The liability will be imposed on the directors by the legislation. The directors will not have had the opportunity to take action to protect themselves at the time of the ACAT order being made.
- clause 56 (section 126B(6) of the *Construction Occupations (Licensing) Act 2004* (ACT)) – in circumstances where a corporation has a debt owing to the Territory under the Act and the debt is not paid within the time required for payment, an individual may be liable to pay the outstanding amount if he or she was a director of the

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<sup>3</sup> Building and Construction Legislation Amendment Bill 2019 (ACT) cl 18 (section 59A(5)).

<sup>4</sup> *Construction Occupations (Licensing) Act 2004* (ACT) s 107A(1).

<sup>5</sup> *Ibid* s 107A(4)(a).




corporation when the debt was incurred and/or when the payment for the debt is due. That is, prior to this Bill, a corporation may have a liability for a debt which is unpaid – but the liability is only of the corporation, and not of the directors. After the Bill take effect, the directors will also have that liability personally. The liability will be imposed on the directors by the legislation. The directors will not have had the opportunity to take action to protect themselves at the time of the corporation being prosecuted.

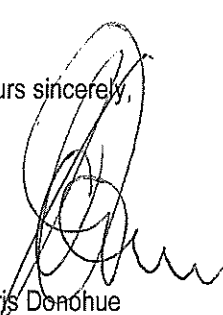
The Society makes the following additional comments in relation to specific aspects of the legislation.

- clause 18 (section 59A(5) of the *Building Act 2004 (ACT)*) – the registrar may publish information that is included in the stop notices register if he or she is satisfied on reasonable grounds that, *inter alia*, publishing the information is appropriate. This would appear to give too much discretion as “appropriate” is not qualified or defined in any way.
- clause 19 (section 133A of the *Building Act 2004 (ACT)*) – this section provides for penalties which may be appropriate in circumstances where safety is an issue. However, they are also proposed to apply to “compliance” issues, whether or not the compliance is integral to safety. There should be an entitlement for a person to be able to challenge an unreasonable direction and have it set aside.
- clause 26 (section 26C of the *Construction Occupations (Licensing) Act 2004 (ACT)*) – the existing 26B provides for a penalty for failing to give notifications of certain events (within 24 hours of the events). The new 26C makes an “executive officer” of a corporation criminally liable if the “corporation commits an offence”, and the officer was reckless, in a position to influence, and failed to take reasonable steps to prevent the commission of the offence. More importantly, the definition of “executive officer” is too wide and could entrap people that may not be intended – i.e. “concerned with, or takes part in, the corporation’s management”. This is made potentially wider by the reference in section 26C(2)(c) to employees, agents and contractors.
- clause 41 (sections 39A and 39B of the *Construction Occupations (Licensing) Act 2004 (ACT)*) – new 39A and 39B in relation to rectification orders puts liability onto “each person who was a director of the entity at or after the time the construction service was provided”. The director is not necessarily the person who will be the recipient of the building proceeds/profit, and can with unscrupulous groups be a person of “straw”. In such cases the protection or redress given will not be effective. The thrust of the legislation is an attempt to give consumers and government access beyond the veil of incorporation, but only focuses on directors.
- clause 56 (section 126B of the *Construction Occupations (Licensing) Act 2004 (ACT)*) – new section 126B makes directors liable for unpaid penalties, liabilities and debts incurred by corporations if they were directors at the time of the offence or other act, or when penalty is given, order for payment, or debt is due. The director is not necessarily the person who will be the recipient of the building proceeds/profit, and can with unscrupulous groups be a person of “straw”. In such cases the protection or redress given will not be effective. The thrust of the legislation is an attempt to give consumers and government access beyond the veil of incorporation, but only focuses on directors.

It is hoped that the comments outlined above are of assistance to the Committee. Please do not hesitate to contact the Society should you have any queries or require further information.



Yours sincerely,



Chris Donohue  
President