LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON PLANNING, TRANSPORT AND CITY SERVICES

(Reference: Inquiry into Property Developers Bill 2023)

Members:

MS J CLAY (Chair)
MS S ORR (Deputy Chair)
MR M PARTON

TRANSCRIPT OF EVIDENCE

CANBERRA

THURSDAY, 7 MARCH 2024

Secretary to the committee:
Mr J Bunce (Ph: 620 50199)

By authority of the Legislative Assembly for the Australian Capital Territory

WITNESSES

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Amended 20 May 2013

The committee met at 9.20 am.

KERIN, MR CHRISTOPHER, Director, Kerin Benson Lawyers

THE CHAIR: Good morning. Welcome to this public hearing of the Standing Committee on Planning, Transport and City Services for our inquiry into the Property Developers Bill. We will be speaking with peak bodies, unions, individuals, community organisations, and government agencies.

The committee wishes to acknowledge the traditional custodians of the land we are meeting on: the Ngunnawal people. The committee wishes to acknowledge and respect their continuing culture and the contribution they make to the life of our city and our region. We would also like to acknowledge and welcome any other Aboriginal or Torres Strait Islander people who may be attending today's event or are watching the web-streaming from somewhere else.

We are recording, Hansard staff are transcribing, and we are publishing. Also, we are broadcasting and web-streaming live. If you take a question on notice, could you say, "I will take that on notice." That will help us and our secretary to track down the answers. I might begin with checking that you have received our privilege statement.

Mr Kerin: Yes.

THE CHAIR: Great. Do you agree to abide by the rights and obligations in that statement?

Mr Kerin: Yes.

THE CHAIR: Thank you very much. Thanks for coming in. We will ask a question each, going down the line. I do not know whether you have been to hearings of ours before.

Mr Kerin: I have—yes.

THE CHAIR: Excellent. I was very interested in your submission, Mr Kerin. You were pretty supportive of the bill, based on some experience you have had with owners corporations. It looked like you had the benefit of reading some other submissions. You seem to think that the bill has struck, on balance, consistency with laws in other jurisdictions and appropriately allocating risk. Have I got that right? Is that your general feeling about this bill?

Mr Kerin: I should have said "one other jurisdiction", and that is New South Wales. Parts 6 and 7 of the bill are basically very close to the residential apartment buildings act in New South Wales. The rectification order provisions, the enforcement provisions, are very closely aligned. The provisions in relation to statutory warranties—and maybe developers' love for registered statutory warranties—are the same as in New South Wales. It has been like that in New South Wales for decades. There is nothing unusual or different about that. Victoria is also apparently looking at that now. In Victoria and Queensland, they are looking at accreditation schemes for

developers as well. This bill goes a bit further than certainly what is being envisaged in Victoria and Queensland, and, also, it goes further in some aspects than what is currently provided for in New South Wales, but that is not necessarily a bad thing.

THE CHAIR: This bill does a number of things, but it essentially makes accountability and risk in property development sit with the property developers. What is the harm that you have observed in the absence of this bill? What harm have you seen over the last decade of your practice without having that accountability?

Mr Kerin: Developers usually structure their affairs to avoid responsibility for things. Currently, in the ACT, the only way you could possibly sue a developer for building defects is when they have a contractual warranty in their sale-of-land contract. That is a warranty that says that they have done the work very well and with good materials, and so forth, and so a lot owner might be able to sue a developer for breach of that contractual warranty. I was acting for some owners who did that some years ago and we successfully got money from the developer, but the developer did not expect it—they had not anticipated it—because they thought that there was not going to be a problem. Since then I have not seen provisions like that in sale-of-land contracts. They have not put those sorts of contractual warranties in.

Secondly, there is also the possibility that a developer might be liable for implied warranties under the Civil Law (Property) Act, but, again, I know of at least one large law firm in the ACT that structures the selling contracts in a way to avoid that. Basically, it is very hard to sue developers for defects. There are really only two ways, and both of those ways have been addressed by lawyers acting for developers.

THE CHAIR: Given the negotiating power between a developer and, for instance, someone who is buying off the plan, and given the current state of the market, would most prospective buyers know about the types of contractual clauses and would they be able to negotiate those into contracts, or do they need this kind of regulation to protect them?

Mr Kerin: Most purchasers would not have a clue. They are really more focused on European kitchen appliances and things like that than which warranties are in the contract. Most people are simply unaware of it. Sorry—there was a second part to your question.

THE CHAIR: Given the negotiating power they have and the current state of the market, if they were aware of it, would they be able to put that kind of contract clause in?

Mr Kerin: I would suggest not. The contracts are proforma. Each of the law firms that act for the developers have their own bespoke sale contracts with their own clauses. You might ask for an amendment. Whether you get it is another question. It probably depends on the market conditions. I am not a conveyancer and I have never done conveyancing in the ACT, so I cannot speak from experience in these matters, but I would be surprised if it were happening.

MS ORR: Mr Kerin, picking up on some of the comments you have made about the ways that people can take legal action to get rectifications and looking at contractual

warranties, what is the threshold for actually proving that the products used were not of good quality or that poor craftsmanship has actually led to the problem of someone who is taking action against a developer?

Mr Kerin: It is expensive. If that is hard, then, yes. The difficulty is that you have to get an expert to look at what has happened. It takes time because, unfortunately, even though developers are required to give the owners corporations the plans and specifications at the first meeting, it actually does not happen a lot. Even though they are required by legislation to give you the documents, a lot of developers simply do not comply with the legislation, so you are starting from scratch. You do not have those things, so you have to get the building file from Access Canberra and give that to the expert. Hopefully that accords with what has actually been built, and then the expert has to work out what has happened. That is a long process and it is expensive. So it is difficult, and then, of course, there is always push-back from the builder-developer. There are games that they play in terms of drawing out the process: looking like they are coming back and doing work but not taking it very seriously. That buys time. They try to drag you beyond the six-year limitation period. There are common tactics that are used by builders in this regard.

MS ORR: We are looking at property developer licensing, and you have mentioned builders. Do you think there is enough accountability for developers in the process? We have had a number of submissions, particularly from industry, saying it is unfair to single out the property developer and that there are a lot of other people who are responsible for the work, and they should have responsibility for rectifying. I am interested in your experience and where you have taken action. Is there a need to bring developers into the picture and to put more accountability on the actions that they are taking, given that there is a range of players in delivering a building?

Mr Kerin: The interesting thing about the bill is that it does not do anything to a developer that is not already being done to a builder. A builder is already personally liable, potentially, for rectification orders. The builder is already liable for statutory warranties. The builder already has to be licensed. All of these things already apply to builders. Having them simply applying to developers should not be controversial. Sorry—the other part of your question was—

MS ORR: I think that answers it. The other part I am going to is more about the relationship between the developer and the builder.

Mr Kerin: It is a complete furphy to say that somehow developers are remote from the process—that, really, they are vulnerable to the actions of consultants and builders, in terms of the way they go about the job. The reality is that the developers are completely in control of the process. They can determine how much design is done on a project, the sorts of reputable consultants and reputable builders, where corners might be cut, and making special arrangements—let us just leave it at that. Developers are right in the thick of it. The idea that they somehow come to these things with clean hands cannot be a serious idea.

MS ORR: Mr Kerin, is it fair to say that builder-developers have personal liability for defects, but, because developers have such a role in influencing the decisions they make, it is almost an unfair system at the moment and the builders are taking on a lot

of responsibility for developers' decisions—

Mr Kerin: It is certainly unfair if you look at it from a New South Wales point of view, where there is equal liability. A developer is equally liable for breaches of a statutory warranty as a builder. In Canberra, they have had a free run, basically, which has always puzzled me a little bit. Whether something is fair or unfair is not really a legal question; it is a subjective question. But it is probably a bit unreasonable.

MS ORR: Going to the reversal of onus of proof in 89F, a few people have raised that how this section is working is not quite fair. I do not know whether you have the bill in front of you and know—

Mr Kerin: I am aware of the provision.

MS ORR: Do you have any views on whether you think it is legally fine that you could briefly share with us?

Mr Kerin: The thing is: who is in play here? Typically, if the bill goes through, this is about a builder-developer versus apartment owners, housing owners. Those owners know nothing about what is going on in the building work, so typically, when something is eventually raised—owners are not looking for problems and they do not want to spend time on these issues; it has to be bad for an owner to be motivated sufficiently to reach out to the builder to get things fixed—the immediate response is: "You haven't maintained the building," "It is wind-driven rain" or "It is not a design issue or a building issue"—that somehow the owner has done something that has caused the defect. These are common responses that I hear from builders and developers. The reverse onus is helpful in terms of avoiding that sort of nonsense counter-argument, which basically wastes everyone's time.

MR PARTON: Mr Kerin, in your submission—and it is really important that you have led us to this—you expressed frustration with the new framework around the residential building dispute administrator. You have done so because it is clear that with this bill, if it is passed, it will be necessary to have bureaucracy in place to administer the act. Walk me through, if you could, the frustration that you have with the fact that the residential dispute administrator framework is something that has been flagged for a long time but is clearly not in place.

Mr Kerin: The bill is fine, and if it were passed, that would be fantastic, but you would have to actually have people to administer the bill. At least some of the people who have to administer the bill would have to have some technical knowledge of the building process. I do not know quite why the residential building disputes scheme has not actually—

MR PARTON: Materialised.

Mr Kerin: It is in force, but it is not actually there. I suspect it is because they cannot find the technical people in the jurisdiction to administer the act. That raises a question. It is great to have an act that does things, but, if no-one is administering it, it is pointless. It is a very unusual situation, I might say, to have legislation passed that creates a scheme and then there is no-one administering the scheme and it simply does

not operate. I just wonder how that is going to work in this situation, because you add another layer of bureaucracy.

MR PARTON: So, despite your optimism regarding the bill as it stands, do I detect some pessimism in terms of the outcomes, ultimately, if indeed we end up going down the same path as the residential building disputes administrator and there is no-one in place to actually enforce it?

Mr Kerin: I can see a problem—yes.

MS ORR: On dispute resolution, a few submissions suggested that we do not really need property developer licensing; we just need to get dispute resolution up and running. Would you agree with the view that it needs to be one or the other, or is there a place for both?

Mr Kerin: They are not the same thing. The reality is that some builders simply, for whatever reason, do not have any money and go under. In New South Wales, you always kind of pivot to the developer. There is a back-up plan, as it were. Most buildings now are large and above three stories, so there is no insurance if the builder goes under and there is no rectification order. And rectification orders are not a given; they are not issued like confetti. They are rarely actually ordered by the Construction Occupations Registrar. With this bill, you have a developer sitting there. The other thing about that is that a lot of developers—I could not give you a percentage—use special-purpose vehicles, so there is not necessarily money there anyway. The bill, firstly, enables action against the developer, and then, secondly, hopefully enables money behind the developer, either through the director or through an insurance program or whatever it is. I think it is helpful in that regard.

THE CHAIR: Mr Kerin, we have had a number of submissions asking for exemptions to property developer licensing and to some of the protections. Specifically, people have asked for exemptions for community housing, retirement villages and build-to-rent. One of the witnesses said that there had been no major defects in retirement village construction. I did not see any evidence about risk in community housing or build-to-rent. Have you had any experience and do you have any views about whether certain types of building in those categories should be exempted or whether they should comply with the same requirements?

Mr Kerin: I have no views. I have never acted for any of those entities in the ACT or New South Wales, so I am not familiar with the problems they might suffer or whether they are endemic or not. I cannot really make any comment on that.

THE CHAIR: That is okay.

Mr Kerin: I might say—with perhaps gratuitous comments—that there is the idea that this is going to cost more money in terms of the end product. Ross Taylor, who is a waterproofing expert and has worked closely with the New South Wales Building Commissioner and is very involved in the next iteration of the Building Code of Australia, has indicated that every dollar not spent on design results in $30 in repair later on. There is the argument that the product is going to be more expensive. I think that, in the medium term, it is not, because people have to fix the defects at some

point when they realise there are defects, and it is actually more expensive to fix them later than to have got it right in the first instance and have the additional cost worked into the sale price. I think that is a bit of a furphy, in terms of the panic.

THE CHAIR: We have certainly heard that case made by a number of people—that there is a cost somewhere—and the notion that the cost of licensing and compliance would be higher than the cost of avoiding the problems in the first place, and that where those costs are borne is quite—

Mr Kerin: The longer it goes on, in terms of the failure to rectify, the more likely it is that the owner is going to be paying. That is just the reality.

MS ORR: On the cost, Mr Kerin, would this be the view: if developers and builders were building appropriately, there would not be defects, so the only cost that is going to be put on people is by those who are not doing the correct thing in the first place?

Mr Kerin: It is very common for developers not to do detailed design development. They do the minimum design. I have indicated this in the submission. They do the minimum design in terms of getting development consents and so forth, but the detailed design—which you would normally do to make sure of all the consultants and that various designs align and that things are developed and not done on the run or delegated to subcontractors or people who are not really skilled at doing them—is the problem. If a bit more money is spent on that design and development process, it might cost a little bit more money, in terms of the product, but you are saving huge amounts of stress, money and time down the track.

MS ORR: So—

THE CHAIR: We are at the end of our session now. Sorry.

Mr Kerin: Sorry—I am not sure I answered that question.

THE CHAIR: I am so sorry. We have a lot of people to see. Thank you so much for coming in. If there is anything else that you need to tell us, you are welcome to put in a quick written statement.

MS ORR: Mr Kerin, are you happy to take some questions on notice if we send them through?

Mr Kerin: Sure.

MS ORR: Thanks.

THE CHAIR: We will lodge questions on notice within five working days, if we have them. Thank you very much.

Mr Kerin: Thank you.

Short suspension.

WILSON, MR MALCOLM, Director, Advanced Structural Designs

THE CHAIR: Thank you very much for coming in, Mr Wilson. Do you have anything to add about the capacity in which you appear?

Mr Wilson: We are property forensic specialists, so we look at a lot of buildings that have got problems in the ACT. The majority of those are residential multistorey construction.

THE CHAIR: Thank you. Have you received and read the privilege statement, and do you agree to abide by the rights and responsibilities?

Mr Wilson: Yes, I do.

THE CHAIR: Great. Thank you.

MR PARTON: I wish everyone's submission was as succinct and to the point as yours.

Mr Wilson: I do not have a lot of time.

MR PARTON: Neither do we, so it is really good. You are a fan of the bill. You made an interesting statement in your submission that, since starting your own company, you have basically avoided clients developing apartment units, or perhaps they have avoided you. Can you just expand on that statement for us?

Mr Wilson: I think it is important that everyone understands the process. Developers are operating in a legislative vacuum, basically, so whoever spends the least on their building is going to make the most money and, essentially, that will make them the most successful developer. So they will shop around for everything, not just the building. This is a problem because they are shopping around to builders, saying, "How can this be cheaper? How can this be cheaper?" When a builder says, "I can make it cheaper by having no set-downs or by using cheap waterproofing membranes," they just keep thinking, "Well, who is going to know? Will that affect the price?"

It is the same when they come to a structural engineer. They will come to me and say, "Mal, we love your work. We really want you to do this job for us," and I will say, "That's great. Here's the fee." They just laugh at it and say, "Look. We want you to do the job but for half the fee." I will sometimes say, "Who is giving you that fee that you reckon is half mine?" They will tell me, and I will say: "Here are five jobs that are falling down that I have got props under, all done by this guy, and here's the documentation. It's five pages, and we would have done 25 pages. Here are all the mistakes in it." They just say, "I don't care about any of that. It makes no difference to me. I want the minimum price and I want a cheap build. That's all I want. I don't care about anything else."

That is why I cannot have that discussion with the developer. I just say goodbye. I have got plenty of work. If someone wants to sit down and a have a coffee and talk

about five per cent of my fee then I will do it. But if they want to do it for half the price then go ahead, because that is another job for me later on. I will be putting props under that building in five years time.

MR PARTON: Thank you.

THE CHAIR: It was a great submission, and it was a really great explanation of the market failure.

Mr Wilson: Thank you.

THE CHAIR: We have heard, from the witness who came before you and in a lot of the submissions, about the cost of poor building, poor development. Part of your business line is obviously to fix up some of those problems.

Mr Wilson: That is correct. Yes.

THE CHAIR: We have heard about some of the cost savings that developers are making. They are often quite small cost savings to do poor development. Can you run me through some of those numbers? Have you got any of those, or hypotheticals?

Mr Wilson: I am not sure whether I should be mentioning the names of specific jobs. There was one job where, with the QS, we sat down and said, "These are the things you do to make the building compliant with codes." They were not current codes but codes at that time. The cost of the building, to make it compliant, was $20 million. The cost to knock the building down and build it again was $22 million.

I go into these meetings and I have to see single mothers who have just spent everything on their unit, and I am standing there, telling them their unit's worth nothing because somebody saved five per cent in building it. Somebody did not pay a decent structural engineer to do the job. It is just horrific. That is an extreme case, but there are plenty of cases where people are suing for millions. If I think of the lawsuits going on at the moment, there is one for $60 million and there is one for $20 million. They are the ones I know about for sure, but, for a lot of the others, tens of millions is not unusual.

THE CHAIR: The explanatory statement to the bill estimated $50 million per year in the ACT as the cost of poor development. A lot of witnesses have estimated that that is a pretty low-ball figure.

Mr Wilson: That sounds ridiculous.

THE CHAIR: Yes.

Mr Wilson: One of the things you need to understand is that when I come in and tell somebody their building has got a lot of structural problems, they will often have come to me to say, "Look, we've got a little bit of cracking here." I will look at it and see if I can get the drawings. That is another thing, and probably an important thing to talk about: actually getting the drawings can be quite a battle.

It is important to understand the legislation. There is a lot of great legislation on developers. One of the classic examples would be that all developers have to give a full set of all plans to the body corporate at the first meeting. I have maybe been involved with a hundred body corporates. That has never happened, to my knowledge, because the penalty for that is not $100,000, plus $5,000 for every day you are late. It is zero. It is nothing. There is no penalty for it.

Developers know they have got the cheapest structural engineer, and the cheapest everybody, that they possibly can. The last thing they want to be doing is giving drawings to the strata manager. Fortunately for them, they appointed the strata manager, under a 10-year contract, so they are their best mate and they are, or their associated company is, selling their units around town. The strata manager is there fundamentally to make sure that none of this gets caught at an early stage and that no reports get done. The poor old mums and dads do not realise that the person they are relying on to manage the building is the enemy in the room. It is just so sad. It is pointless to write legislation that says, "You will do this and you will do that," if there are no ramifications and no policing. It is just pointless. That is part of the problem.

What I was going on to say was that, when I get the drawings, I then find: "Yes, you've got problems here. There's not enough steel there and that's why you've got a problem." In getting to that that, when I model it, I find that there are three other problems and it looks like those problems are everywhere. A lot of people just say, "Mal, you've said enough. We're paying you. We're burying this. Nothing will ever happen on this." And even when they are going to do something, the last thing they want to do is let anybody know. That affects the price of every single unit. When somebody sits there and says, "We know it's $50 million a year," nobody knows what it is, because everybody's hiding what it is. It is bad. It is big money. Just one of the lawsuits in the last couple of years was $60 million. So the idea that it is $50 million is just a nonsense.

MR PARTON: If you had a young relative, let's say in their twenties, who came to you and said, "Uncle Mal, I am considering buying an apartment off the plan here in Canberra," what would you advise them, under the current regime?

Mr Wilson: People ask me that a lot, and I say that if it was built in the sixties and seventies it tends to be pretty good, in my experience. Other than that, I would want to know the structural engineer. If I know them personally or I know the company there is a good chance I can give advice. But I would say that 50 per cent of the answers you would give me, if you happened to know that information, would be quite protected as well. I was looking at putting down big money to buy a unit once, and the developer would not tell me who the structural engineer was because, again, it is not in their interest. They have shopped it around everywhere. They have got probably the worst engineer in town to do it, and they are not advertising that.

I would love a situation where people were saying, "Some particular engineer, TTW, was our engineer and it was peer reviewed by Hyde in Sydney—completely no relation to the company. If people were advertising that, instead of having lovely looking ladies with glasses of wine sitting looking at the view, then I might be buying that because that is what I would like to see in the industry, but that is not what happens. It is all about image. You can understand that it is about what people can see.

People walk in there and they see the granite benchtop—bang! They see the European appliances—bang! Of all the things that are a disaster, I can see some but I cannot see a lot of them, because they are hidden. That is the way a developer thinks, and it is the way most people would think. If you put them in a regulatory vacuum and said, "If you spend the least amount of money, you win," they are going to spend the least amount of money. But, hopefully, we can change all that.

MS ORR: Mr Wilson, I want to pick up on some of the previous commentary that we have had on the need for developers to have accountability. We have had submissions that have said that that is not quite right, because developers are not the ones that do the building, they are not the ones that do the work, and it should be the works people who have the responsibility for any defects or rectification.

Mr Wilson: Could not possibly be more wrong.

MS ORR: Okay. Can you explain why?

Mr Wilson: I have been in a situation where I had a preliminary design sent to me and I said, "Yes; here is what we are doing," and put in a fee. I got the fee and I got the job, and they said, then, that they had a whole garden bed over the top of the structure. I said, "This structure is going to be pretty stressed. It is going to have faults." They said, "No, it is not. There is going to be ultra flooring on there." I said, "No, because that is just going to be cracking. That is not a good solution. If there is any trouble with the membrane it is going to be leaking all over the cars. It is going to be a complete disaster." They said that this particular product was five per cent cheaper per square metre. I said it was insane and I would refuse to do it. I said it was madness and they said, "We will take it to another engineer and we will get it done." I said, "You take it to another engineer". I did not get paid for that. They just walked out of the office.

That is the sort of power they wield. I talk to architects all the time, and developers tell architects, "We are not having set-downs here and the floor-to-floor height has to be less than this. You have to make it less than that." The architects say: "This is madness. You are cramming in there. It is going to be a disaster." Developers do not care. They have the money; they call the tune.

MS ORR: So, Mr Wilson, what you are saying, if I understand correctly, is that the developer ultimately has the say; therefore, the architects, tradespeople and builders have to essentially take their remit from the parameters the developer gives them. Is that correct?

Mr Wilson: Ninety-nine times out of a hundred that is what happens. They just do whatever they are told.

MS ORR: So all these people who have put in submissions saying that the developer should not be the focus, that it should be on tradespeople, it should be on architects, it should be on engineers—is that a little bit of a furphy, for lack of a better way of putting it?

Mr Wilson: Look, there may be a percentage of developers, especially if they are new

to the industry, who are really relying on design professionals, but not the more savvy developers who have been there a while. If you rely on the design professionals, you will get a really good job, but it will be more expensive. You will be looking at your mate over here, driving the latest Porsche, and yours is three years old and you cannot get another one until next year, and you say, "Why is he or she making all this money?" It is all about what it costs. They start to learn pretty quickly: "Here is how we can make it cheaper," because they understand that mums and dads looking for a unit are looking for certain things. They are looking at how much does it cost, where is it, how many square metres am I getting, and do I have the European appliances and the granite and stuff like that? That is what they are looking at. They are not looking at anything else.

MS ORR: But, Mr Wilson, is it fair to say that your average buyer of a property would not actually be looking at the membrane of the waterproofing, what brand you are using, because it is just not something they would have knowledge of?

Mr Wilson: That is exactly what I am saying, yes. They do not know any of that. They do not know, and they do not know some pretty weird things too. Like I said in that submission, at one time the developer was trying to convince us to not have any set-downs. That means in your bathroom, every time you walk through the door, there is a step up. You will kick your toe about five times before you start stepping up there. I am just saying that is insane; you cannot do that.

I have been to a lot of these things where they are selling the units. People are either buying off the plan or they walk in there and they might open the door and have a look in, but I do not think the kicking the toe thing is an issue because that is really not what they are looking at. It will be an issue the first time it is dark and they walk into the bathroom and kick their toe, but developers are really making a pretty savvy assessment of what it is people can see and what it is they do understand. As I say, if it is a regulatory vacuum, what they are doing is the correct response to a regulatory vacuum. They are just being good at their job, basically.

MS ORR: Just picking up on that idea of a regulatory vacuum, is it reasonable to say that there needs to be some sort of regulatory oversight put into this sort of practice where people just happily have a race to the bottom, in the sense of: what can we take out? There is not another step in the process where it can be suitably called out.

Mr Wilson: I think there are a lot of good things that the Building Commissioner in New South Wales has done—and we have done a lot of things here too—to say that this is the minimum amount of information that needs to be on a set of BA drawings, for example. That is a great thing to have, but I am looking at them all the time and it is never ever there. I am not sure who is supposed to be policing it, or where, but it just does not happen.

That is another way of doing it, if somebody was policing it, but, again, it gets shopped around. I am not saying everybody's job is easy. Take Access Canberra. I talk to the people in Access Canberra and they have a vision in their heads that what is on the BA drawings here is what is constructed over there. As someone who is really at the coalface of the industry, we just laugh when we hear that. On the last example I gave them, they were saying, "Yes, what is on the BA drawings is what is

built," and they only had the BA drawings for the Nishi building. They had a steel roof on it, and the roof was constructed in concrete. It is completely different. It is just insane.

Trying to catch it in another way is difficult, with all those changes being made all the time, but if the developer thinks for one second that they are the ones responsible for making sure this is right then it is going to be right, because that is putting the responsibility back where all the money is. They are going to say, "Okay. I have got a choice of membranes." Ross Taylor was mentioned earlier. He is an expert in waterproofing. He assures everybody that you can only use a liquid membrane for five months of the year reliably in Canberra, and you certainly should not go anywhere near it for five months of the year.

It is used all day, every day in Canberra. I employed a guy who just did waterproofing for seven years, and he would go around and pick up tiles and say, "There's a membrane." It is supposed to be a hard material, but it is just too cold for it to actually go off, and it is sitting behind a lot of the problems. When a developer is shopping around to build something, there is nothing on the drawings about what the membrane is and what the turn-ups are, what the radiuses are, where it finishes, how it goes over—there is nothing on the drawing. It is going to be made up by somebody else and he has choices from the builder in terms of what membrane he is using, and there are no consequences for him. There is only one choice for him to make and that is a liquid membrane all day, every day.

MS ORR: Thank you.

MR PARTON: Mr Wilson, let's talk about outcome. You focus, in your submission, on outcome: providing better build quality and holding people to account. You have also characterised a race to the bottom which is currently on, in your view, regarding cost. You have been able to articulate a story about developers arriving at the conclusion that if we can build for less we are going to be more successful. When we talked about your fee, for argument's sake, we were not talking about a small differential. We were talking about a massive differential in cost, so I am assuming that for many of the items involved in this race to the bottom there is a massive differential in what would be a sensible price to pay. Given all that, if indeed this bill is passed and becomes law, what effect do you think it will have on the cost of housing in the ACT?

Mr Wilson: That is quite interesting, because one of the things you need to understand is that a developer knows nothing about structural engineering. If I think of that particular instance where somebody was half my cost, not only are their drawings full of mistakes; it is the wrong design and it is inefficient. It is hopeless. It would have been far cheaper—and developers do not always work that out—to have actually paid more money and got a proper design. The whole process is easier. If you have an excellent set of documents to start with, everyone knows exactly what they are pricing. They are not having to go and work it out later. All the mistakes that are trapped in the drawings, because they are not well coordinated, manifest themselves in the building cost, and when builders look at the drawings and say, "Only half the information is here," they price in an increase.

If I were a developer, I would not be trying to minimise costs in design. I would be

getting really good designers to do really great work, and that would minimise costs. But that is not how development works. A lot of developers have no training in building at all, but they do understand—they passed fifth grade—what minimum cost is about. They want minimum cost in design, and they go to the builders, and they screw them all against one another. That is the game they play, because that is the only skill set they have.

MR PARTON: But, Mr Wilson, you are genuinely suggesting to me that if developers moved away from this model of trying to supply product at the cheapest price, as you have characterised it, things would end up cheaper?

Mr Wilson: They may end up much the same. I am not sure. You would have to look at it on a case-by-case basis, but I see designs out there that were done for a really cheap fee and I think, "I could have done a design that would have cost 20 per cent less to build." The build costs are 20 times the structural engineering costs, so it does not make any sense to me when I look at that. Sometimes the build cost was cheap, but, with all the mistakes in it, somebody has got to pay for that at some point in the cycle.

MR PARTON: Yes. Our previous witness suggested the same. I guess I am just looking at delivery cost to the market, in the first instance. Irrespective of the additional cost of rectification, I am, just in this instance, looking at delivery costs to the market, and I find it difficult to believe that there will not be an increase as a result of this change.

Mr Wilson: I can mostly talk to structural engineering. I would say in my area I would imagine there would be a saving. There is no doubt that good structural engineering, where you have absolutely nailed everything and you have saved every dollar you can, costs more. It costs twice as much, but it saves huge amounts more than that. If you talk about the membranes, for instance, or set-downs or all those other things, they will add cost, but I would have thought they would add a cost of less than five per cent. There is no doubt that they add a cost, but the saving down the track is huge and the saving of heartache is just ridiculous.

I think if you went to the pub and said to people, "Look, you can take the risk that you take on now and we will sell you a unit for $600,000, or you can have the option of paying five per cent more and it will be right," 99 people out of a 100 would say, "I will pay five per cent more, thank you very much." I think everyone is going to see that as value for money. Everyone knows someone who has been in a disaster unit. You could give them a guarantee that said, "This will not be one of those. This has been peer reviewed. This has been designed by the best engineer in town. It has quality membranes, it has proper set-downs, it has falls, it has pre-stressed slabs and it has the falls in the concrete. It has everything."

MR PARTON: It is just a case of whether you could guarantee it would be only five per cent more, isn't it, really? Because the other guarantee sounds great.

Mr Wilson: I think you have got to look at the history of the industry. I have been in it a long time. When the BCA said that we were going to put insulation in houses, HIA and MBA came out with full-page ads in the *Canberra Times*: "No-one will ever

buy a house again. No first home buyer will ever be able to afford this crazy insulation in a roof." Then they came out again and said insulation had to go in walls and people said, "How will anyone ever do it?" But the reality is that the market changes. Suddenly, the insulation that used to cost a bit—but not huge amounts—is much, much cheaper because everybody is doing it. It is the standard.

It is the same with the insulation of walls. It seemed ridiculous to people, but the payback was four or five years in terms of energy costs, and once you started doing it then people specialised in it. The industry moved to it and it became cheaper. I think that is something you will find across the board: once people are used to doing it the right way it just becomes cheaper because everyone does it. The industry is very competitive, and it is very good at adapting, and if you start insisting that people do things right, they will get really good at doing it right and they will do it cheaply.

THE CHAIR: Thank you, Mr Wilson. Thank you so much for coming in.

Mr Wilson: No trouble at all.

THE CHAIR: It was fantastic to hear from you. I would just like to let you know that we asked a number of people to come in and they all said, "Mal has got it for us. He will speak for us," so we thank you for your time.

Mr Wilson: No worries.

THE CHAIR: If we have any questions on notice, we will give them to you quickly, but I am not sure that we will.

MR PARTON: No.

Mr Wilson: Excellent.

THE CHAIR: Thank you for your time.

Mr Wilson: No trouble at all. Thank you.

Short suspension.

PETHERBRIDGE, MR GARY, President, Owners Corporation Network (ACT)

THE CHAIR: Welcome back to the public hearing for the committee's inquiry into the Property Developers Bill. Hansard are recording and transcribing today's proceedings, and we are also broadcasting and webstreaming them live. If you take a question on notice, please say, "I will take that question on notice." That helps us to track down the answers further down the track. Have you received and read the privilege statement, and do you agree to stick by the rights and responsibilities in that?

Mr Petherbridge: Yes, but if I get it wrong, make sure you correct me.

THE CHAIR: Will do. Can you start by telling us the capacity in which you are appearing today?

Mr Petherbridge: I am president of the Owners Corporation Network. I have been president since 2008, when the association was first formed.

THE CHAIR: We do not have a lot of time today, so I apologise if, at any point, we have to jump in and hurry people up.

I was very interested in your submission. You have made some points that quite a lot of other witnesses have made—that building rectification costs are much more expensive than getting quality builds in the first place, and that owners are incurring the costs for rectifications. Can you tell me about some of the costs for building rectifications that you have seen?

Mr Petherbridge: The one that I first experienced, when I started to take an interest, was my own property. I have moved away from there, and I now have a broader perspective of Canberra. With that property, the cost to rectify went to the builder, although a lot of it could have been laid out to the developer, because the builder was very much directed by the developer to do things in certain ways. Those costs were around the $20 million mark, for the rectification work.

I have seen several examples where it has been $6 million, and up to $10 million. I do not think I have ever seen anything where it has actually been identified; a lot of owners are not prepared to say, because it damages the property value, or they suspect it will. But most of the ones of which I have seen evidence have been, certainly, in the $5 million bracket.

THE CHAIR: We have heard that it is quite difficult for government, or anyone, to get a full sense of how much rectification is costing, because people do not have an incentive to tell them. There are some figures floating around in the explanatory statement, but we are told that the real figure is likely to be much higher. That sounds like what you have experienced—that they are quite high?

Mr Petherbridge: I could give you evidence about the $20 million one. Not all of it, obviously, relates to the developer. I think there is evidence in that case that the developer directed the builder to use certain products that maybe were not fit for purpose. It is pretty easy to work out how many cars go in and out of a basement.

They put in motors for the basement car park door of the property, for instance—they were directed to do it—that were probably going to last for six months, rather than for a reasonable amount of time. It is pretty easy to calculate; garage door providers, such as B&D garages and so on, will tell you what the life span of a motor is. That is just an example; there are others.

THE CHAIR: In some of the submissions it is claimed that it is not really fair to impose responsibility and accountability on property developers because they are not directly in charge of the work, but we have heard from a number of witnesses—and we have just heard from you—that, often, developers are directing quite a lot of stages of the work, and the developers are often directing people to use cheaper materials or to do work at a lower level of quality than they otherwise would. Has that been your experience?

Mr Petherbridge: I bought a place thinking that the quoted architect was the architect for Parliament House, Giurgola. It turned out that he was not. He was the concept architect. All that the concept architect does is paint the pretty pictures that help with the marketing of the property. That happened; we then found that there was no architect involved. There was simply a project manager involved with the ongoing supervision of the property. In that sense, the developer sets the scene at the beginning by appointing a concept architect. The designs often are not complete.

In the old days, the EPSDD were not necessarily diligent in supervising that, where changes were occurring to the designs, they were registered or looked at by the responsible compliance agency. Things like that would happen, and I think it still happens. Maybe it is not quite as bad. I think there has been some improvement in the scene. Probably a lot of developers have realised that a lot of people are taking a lot more interest in the topic and are watching it.

Also, owners are maybe becoming a little bit more aware. But I think that a lot of buyers get puzzled and confused by the new, shiny apartment, and they do not necessarily look into the detail of what has gone on behind the scene. There have been examples of that. I know there is one classic property in old Kingston where there have been yellow poles on a property for something like eight or 10 years, holding up the basements. The same poles now have changed colour; they have moved to stage 3, so they are now red and blue. I can show you pictures of them, if you like. The developer of that is also the builder. He is a property developer and a builder. He has stood fast and has held out on the committees and the owners because he knows he has more capability than they have. With the owners of these places, there might be 200 or 300 of them, and they do not get their act together as well as a single developer-builder can. I think that the whole process is tilted towards the big guys rather than the actual community.

MS ORR: I want to pick up on that, Mr Petherbridge. In your advocacy and representation, what has been your experience of owners corporations or individuals who, under the current system, have tried to address defects? What has been the process? What characteristics has it taken on? Has it ended up with easy resolution of the issues?

Mr Petherbridge: It is very rare to get a good resolution. New South Wales has gone

to a building commissioner, and I think that process is working much more completely and better. With Access Canberra, quite often, if issues are raised with them relating to property, their immediate reaction is to pass it to ACAT. Access Canberra are good at managing drivers licences and things like that, but they are not too good on anything to do with property. They move away from that property stuff very quickly, and do not have much involvement. I know that they have set up audits and that kind of thing, but it is a long, drawn-out process, and it is very rare that they produce a solution in a timely fashion that actually means that the problem can be solved before the statutory periods expire.

You saw that at a Bruce property; Chris Kerin might have made reference to it. The Bruce property is called Elara or something like that. By the time the problem got to the stage of resolution, the time periods had expired. The owners were left high and dry, and I think that was about a $20 million cost. Those sorts of things have been happening.

MS ORR: We heard a bit of evidence this morning about the time that has been taken, with people coming back and saying that it has not been maintained properly, or that there are other reasons, and that it is not a defect caused by the construction of the building. Do those sorts of things happen? What role do those sorts of discussions have in rectifying issues? Does it become a case of one side saying one thing, and the other side saying another, and there is no easy way to reconcile the issue?

Mr Petherbridge: Yes. A bit of that happens, but I do not think it is as black and white as that. For a start, a lot of defects do not become evident in two years. They take longer than that. They are referred to as "latent defects", and that is why they have things like latent defect insurance, because it is obvious that that is what is going to happen. Water-related things do not always pop out in the first two years. They take a long time to start to show.

Also, there are things like whether or not there has been enough steel used in the building as per the building code. No-one really knows about that because the certifiers have not been there to look at all of the stages, and it is later on that these things start to occur, and people know about them. It is pretty hard to say that that was a maintenance issue that was not done properly if there was not sufficient steel, or if proper membranes were not in place. It is pretty tough to suggest that maintenance is the issue as to why the balconies start to leak within a year or two because leaves or something have been left there. It is hardly an issue.

The same goes with box gutters. Most of these box gutters are well above the height of any gum trees, so there is not too much that gets into the box gutters, but they will claim that the maintenance involved in keeping the box gutters clean has not happened. It does not make sense.

MS ORR: The point I am making, Mr Petherbridge, is that the onus of proof within this bill has changed; it is a departure from the norm. In the current situation, my understanding is that owners corporations or individuals have to prove that the defect has been caused because of a building defect, not because of maintenance, or whatever. Under the new bill, that onus will not be there. There will be a default to the developer having to rectify the issue. Do you see that as being an important change in getting better outcomes for rectification?

Mr Petherbridge: It is an important change, but it is not long enough. As I just said, the latent defects do not occur in the first two years. Having the onus of proof on the developers for the first two years is not a long enough period, and I have said that in my submission. As a compromise, six years might be a reasonable number, because that is the current structural timetable for defect rectification. Ten years would be much better. I would argue for 10 years but, as a compromise, I would come back to six. Two is not enough; it does not meet the need.

MR PARTON: Mr Petherbridge, I take it from your response that your belief is that, whatever goes wrong in any construction, within 10 years of it being completed, was the developer's fault, whatever it was?

Mr Petherbridge: I am not saying everything.

MR PARTON: But that is what you are saying. You are saying that there should be no onus of proof. You have gone with 10 years; obviously, that is a great deal more than what is in the current bill. Your suggestion is that, whatever goes wrong, it would be the developer's fault.

Mr Petherbridge: There could be simple things that could relate to that, and that may not be the case.

MR PARTON: I might be over-simplifying. Can I ask a more specific question? We have spoken at length, and you have obviously prosecuted publicly a lot of really important cases about expensive rectifications. I am trying to get a handle on whether that is the rule or the exception. How many members are there in the Owners Corporation Network?

Mr Petherbridge: About 15,000. That is 15,000 lot owners, versus probably a total of about 80,000 out there in the community.

MR PARTON: You brought to light a number of these obscenely expensive rectifications. What percentage of the membership of the Owners Corporation Network would have had to have dealt with really expensive rectifications?

Mr Petherbridge: The University of New South Wales has better statistics than me on this stuff.

MR PARTON: Would it be five per cent, 10 per cent—

Mr Petherbridge: They are saying over 50 per cent.

MR PARTON: Over 50 per cent?

Mr Petherbridge: That is what they are saying. Those are statistics for New South Wales and ACT. They are gathering those statistics.

MR PARTON: Is that your anecdotal experience—you are talking about half of your members that are going through pain involving rectification?

Mr Petherbridge: I think so, yes.

THE CHAIR: Mr Petherbridge, you also called for more licensing and regulation of some of the other people involved in building. That is interesting, because that call was echoed by the industry itself. You have said we might need licensing for architects, water proofers, roofers, window fitters, concreters, tilers and fire safety related trades. Can you expand on that and tell me the need that you see and why we should do that?

Mr Petherbridge: I will give you a family history here. My brother was a roof tiler; he is now deceased. He grew up as a roof tiler. He was indentured and became a master tiler. That system no longer seems to exist. With roofing, he was particularly proud of the way he did his work, and he would stand behind his work all the way through.

I do not see that roofers, for example, are licensed, but I think they should be. That is one of the protections for developers as well, and everybody else. That licensing should spread through to the water membrane people as well. A lot of them do not use the right products, for a start. They apply a product for a warm climate rather than a cool climate. I am not an engineer, but that is what I get from engineering consultants that I have been involved with over the years.

THE CHAIR: It echoes what the engineering consultant told us this morning.

Mr Petherbridge: Okay. These guys have been into the detail of it. I am more of a facilitator of activity rather than an expert in all of these matters. Nevertheless, I am out there; I am travelling around and talking to all of the owners, so I suppose I get the idea.

The broader we make the licensing regime, the better. We should go back to things like people being apprentices and working their way through. I sometimes look at the likes of the Snow establishment—the airport and the other things there. There is a developer, and he has his own builders. He has had the same builders for a long time and he trusts them. They trust their tradies. There is a link between all of the people there, from the developer down. That is a way of doing things that works.

MR PARTON: It is a good example.

Mr Petherbridge: Yes. He intends to own the properties, whereas all of the other developers that I know are out of the property after they have sold every single lot. They have gone. They have no interest in whether or not it is maintainable. Sure, I take your point about maintenance, but sometimes suitable products need less maintenance than others. From a maintenance point of view, a lot of them—not all of them; there are some good ones—are out there to do it as cheaply as they can, and then they are out. It is up to the owners from then on. With this current legislation, it is from year 2 to year 10; then, forever more, it is the owners that have to follow it up.

A lot of the developers now are involved with commercial properties in Canberra. How many commercial properties have you seen in Canberra that are not managed well by the government? The government does have decent people managing their

own buildings, but how many have you seen that have lasted for less than 30 years? Do you want your home to last for less than 30 years? The mortgage will still be there. There is not the same approach, if you like, to the things that have been going on.

The lack of independent certifiers is another issue that has not helped, but certifiers cannot be blamed for everything because they cannot see everything. That is why I suggest in the submission that we need to have an architect and an engineer from the start of a project all the way through, because they know what the design is, they have done the design, and they follow through and supervise the design.

If you were building your own million-dollar house—maybe it is $2 million these days—you would have your own architect and your own engineer, and you would have them looking after your interests all the way through, until completion. Developers do not do that. It is not done.

THE CHAIR: Ms Orr, do you have a question?

MS ORR: No. We have actually gone through most of mine.

MR PARTON: I am happy with the evidence given thus far. He has been succinct.

Mr Petherbridge: I do make reference to all of the other inquiries that I have been involved with. I was not going to provide you with the documentation on those. I am sure you have them and, if you do not have them, I have offered to get them for you. There is a lot to read in all of those. Developers and their role are highlighted often in each one of those. It is not the only thing in them, but developers are part of the game.

THE CHAIR: Thank you very much; we do have those. Thank you very much for coming in.

Mr Petherbridge: Can I just say something about the submission?

THE CHAIR: Yes.

Mr Petherbridge: I emphasise that No 3 in the recommendations came out of the inquiry that Susan was involved with some years ago. Nos 3 and 4 recommended having a building commissioner similar to what happens in New South Wales. Nos 3 and 4 related to it. No 4 defined the roles. I think it would be a major leap forward if we had something like that. That gives a way to supervise the current legislation. If this goes through, it would provide a mechanism, because I do not think that Access Canberra is up to the game. I am sorry to be critical of Access Canberra.

THE CHAIR: Thank you. We invited you in so that you could give us your opinions. That is exactly why you are here. Thank you very much for coming in. We will have to move on to our next session now.

Mr Petherbridge: Thank you for having me.

KATHEKLAKIS, MR GEORGE, ACT Division Council Member, Property Council of Australia
WHEELER, MR CHRIS, Division Council Member, Property Council of Australia
MARTIN, MR SHANE, ACT and Capital Region Executive Director, Property Council of Australia
SERVICE, MR JAMES, Division Councillor, Property Council of Australia
O'BRIEN, MR PHIL, President, ACT Division of Property Council of Australia

THE CHAIR: Welcome to the Property Council of Australia. I will ask each person to state their role and that they have read and received the privilege statement.

Mr Katheklakis: Yes—let me read the statement first.

THE CHAIR: You agree with the privilege statement?

Mr Wheeler: I do, thank you.

Mr Martin: I agree with the privilege statement.

Mr Service: I have read the statement many times, Jo, thank you.

Mr O'Brien: Good morning, and I have read the statement.

THE CHAIR: Thank you. Ms Orr, for the first question—

Mr O'Brien: I was hoping we could make an opening statement, Jo, if that is possible?

THE CHAIR: If you would like to, you can do that briefly. We have very limited time.

Mr O'Brien: I understand. I will make it very quick, if I can, please, on behalf of our members. Residential capital goes where capital is welcome, and we want to make it very clear that what is currently in the draft legislation is creating an environment where capital is not welcome. We believe the personal liability element of the proposed legislation will discourage residential investment and will create a situation where there is diminished interest in Canberra as an investment destination. This will have a disastrous effect on the territory's housing supply, employment and government revenue.

This is because personal liability is "piercing the corporate veil". This power is typically reserved for extreme breaches of Australia's corporation law. Our members firmly believe that there is no reasonable justification for the use of this power in the circumstances. It will place an incredible, onerous and uninsurable burden on companies and their directors. Corporate decisions should be made without fear of personal recourse This accepted principle of everyday business should not be overturned in the pursuit of this legislation which seeks out a very small minority in our community.

THE CHAIR: Mr O'Brien, I am so sorry to jump in. We have only 15 minutes left in the hearing, and I would invite you to table the rest of your statement if you would like to. We might proceed to Ms Orr's question, thank you.

MS ORR: I am very interested to pick up on the personal liability and the not having liability put on individual property developers that is the theme of your submission. We have had a number of other submissions and witnesses today that have said, "Actually, this is a very important step because there is currently no accountability at the moment on property developers." I want to get a better understanding of what you see the current accountability on developers as being and why you do not believe there should be more than what is currently there.

Mr Service: One of the great challenges with the legislation is it seeks to place an unreasonable risk on the majority of developers when what the policy ought to be doing is providing an environment where, in fact, it captures all of the participants in the process. I mean—

MS ORR: That was not my question. The first part of my question was: what is current?

Mr Service: Part of the problem is that the current does not, in fact, capture the participants. There are a range of regulations, but the key people who play in this space are not just the developers: they are the architects, the engineers, the surveyors, the certifiers, the builders. To try and regulate one, effectively, small segment of the process is the biggest problem with this legislation. The thing that is missing in this process is that the legislation and the drafting has not gone far enough to capture the people that actually have the responsibility, the technical capacity and the expertise and who develop all these designs and those sorts of things. You cannot just say—

MS ORR: Mr Service, would I be right that the lack of you saying what regulation currently covers developers is because there is nothing that you can point to? I mean, my question was this: what is currently regulating developers?

Mr Martin: I think ASIC is a great example of that, so when you are talking about large scale corporations a bunch of different rules kind of come into play, but we are here to talk about the new legislation that has come forward. I think the issue there with the personal liability is with this piercing the corporate veil, which we have never seen for this sort of rectification order issue. The other piercing the corporate veil we talk about is criminal: industrial manslaughter, fraud, tax fraud—all that kind of stuff like that. I suppose what we are saying is that there is a better way outside of personal liability. There is a way of holding directors responsible in a way that does not discourage residential investment.

MS ORR: Mr Martin, I appreciate you put this in your submission, but in two minutes or less, what do you see as that better way?

Mr Martin: We have made a number of examples, and I will throw to Chris very, very quickly. One of the big things that we see is that by creating a situation where a director is, effectively, captured as a suitable person, then they are required to maintain that fit and proper standing and they can lose that. If they lose that, there are

other consequences that apply: things like fines; things like losing their ability to ever do development in the ACT. That is a substantial consequence to deter people away from doing anything that would create a bad, adverse environment, so I think—

Mr Wheeler: Can I also add, Ms Orr, that the assumption behind your question is that developers should be responsible for rectifying defects when, in fact, what is proposed is to make developers, essentially, the guarantors for builders. So, there is a question of remoteness here, and our submission is that the personal liability of directors is too far a step to take. What the Property Council is prepared to do is accept a licensing regime which does have teeth as drafted.

MS ORR: This is an interesting point to pick up on, Mr Wheeler, that developers are too far removed. But we have heard evidence from a number of witnesses today, and also in a number of submissions, that the developer actually has quite a lot of influence over the decisions that are made the whole way down the train and a whole lot of influence over the people who—I think it is fair to say in your submission you are saying—have responsibility for this: what they can and cannot do and the parameters that they can operate within.

The way I see it, if you are saying, "Hang on, developers are removed and do not need to be accountable," and everyone else is saying, "No, actually there is a disconnect here and the developers are actually very accountable," there are two sides here for the committee to determine which one is actually holding up. Ms Clay and Mr Parton, correct me if you feel differently, but I think we have had a lot of evidence saying that there needs to be some level of accountability for developers. So, again, I put it to you: what is the accountability?

Mr Wheeler: They have a conflict, don't they? Because they want somebody else to be responsible for rectifying the defects and they see the developer as being an easy hit. It is not correct to say that just because people believe that someone else should be responsible that they should be.

THE CHAIR: When you say "they"—the people we have heard from are structural engineers, owners corporations, lawyers representing people who have had expensive rectification. They tend to be speaking for either the quality of the build or the consumers, and they are just seeking for the developer to be liable, and they have described, as Ms Orr said, a situation in which the developer is making the calls on costs, on who to hire and on how that build rolls out. Why do you think they are trying to find someone easy to take the hit?

Mr Wheeler: Because they are going for the deepest pocket.

Mr Martin: Yes.

THE CHAIR: But are they not applying the risk where the risk is incurred?

Mr O'Brien: In managing risk, risk should be borne where it is best managed. In the design process, and the quality of that design and the outcome of that design, that should be borne by the consultant and/or the builder. They are the party the developer engages to take the risk.

THE CHAIR: Yes, who is hired—

Mr Service: So, the concept, Chair, that the developer tells the engineer or tells the architect what to do, which would risk breaching their profession indemnity insurance—and I can imagine who has put that concept to you—is simply not the case. That is not the way good developers behave. That is not the way property developers behave. That is not the way 95 per cent of developments you see around this city have been developed.

Yes, there have been some poor outcomes, but to develop this process will, in fact, discourage future investment in housing in a housing crisis, which is what the government policy is, and put in place a system where non-executive directors of companies, large and small, will say, "Give me a project in Queensland or give me a project in New South Wales. Give me a project in Canberra and I will take New South Wales or Queensland first, and I won't ever come back to Canberra." That is how people treat personal liability. None of the people who have talked to you about this today, or who have formulated this legislation, would put their own personal assets on the line.

Mr O'Brien: I think it is folly to think that any one individual could control, supervise and be responsible for every action of others. That is what it seems to be coming back to.

MR PARTON: You guys are feeling the heat. You are in the firing line, obviously.

Mr Service: Always.

MR PARTON: In this process what data, if any, has the government provided you guys that shows why a developer license is required?

Mr Service: Absolutely nothing.

MR PARTON: To your knowledge, has there been any analysis done on the flow-on economic impacts of what is being suggested by this government?

Mr Service: No, Mark, and there should be, and there needs to be to clarify and consider the impacts of this proposed regime on the developer licensing and rectification. It is crucial that the government and the public are properly informed of the potential impacts on the territory residential investment and housing costs should the legislation be passed.

MR PARTON: Mr Wilson, in previous evidence this morning, thought that the cost of housing—the cost of apartments delivered to the market—might increase by five per cent as a consequence of this bill. Does anyone on this panel have a view on that?

Mr Service: That is a very nice conservative number, because one of the things we do not know is how much extra insurance is going to cost. We do not know how much longer it is going to take developers to make decisions. Every time someone delays a decision in one way, shape or form—whether it is a government approval, whether it

is a board approval, whether it is a finance approval—the cost goes up, wages go up, materials go up and delays continue. They all add cost. One can be sure that every dollar of cost that this legislation brings, were it to actually get through in its current form, will be paid for by the consumer. The prospect that someone is going to absorb it is just nonsense.

MR PARTON: In closing for me on this line of questioning, in the middle of one of the biggest housing crises that this country has seen—maybe not at the middle, maybe we are sort of on the way out—is it the view of the panel that this bill will have a substantial effect on housing affordability in the ACT?

Mr Service: I think it will have two: it will have an affordability effect and a supply effect. I am a non-executive director of a number of companies around this nation. If I were a non-executive director of a development company listed with a large shareholder base, choosing to come to Canberra to do a large-scale residential development would not be on my agenda. I make no apologies for that comment.

THE CHAIR: The witness Mr Parton quoted thought that maybe the cost of apartments might rise by five per cent. He also thought that, actually, in a lot of cases the cost of apartments might drop because there would be better quality design at the outset, therefore lower costs on the builds. His experience was that developers were saving money on poor design, and it was costing more to build.

He also thought that during the life of owning the property there would be a significant drop in price because the owner would not have to pay for rectification costs, and we have heard those are in the order of $20 million. We have heard really high rectification costs today already. It is obviously quite difficult, but do you think, in actual fact, costs are only going to go up? Are there no savings to be had from good regulation in this industry?

Mr Service: I think there is definitely cost in the life cycle of the property, but I think the point that perhaps Mr Wilson forgot when he gave his evidence was that he was talking about, and we are talking about, the minority of projects. The vast majority of projects completed in this city do not have the four or five problems that might have been alluded to this morning by a number of witnesses. The vast majority of projects do not have defects; they are not poorly built; they are not poorly designed.

Good design can save money but often costs more because you actually add things into that design. Good design should naturally flow from having the best consultants and the best builder and the best process to get approvals. The ACT, historically, in my view—and we have been practising here in this business for 40 years—has had that. I still think that one of the problems with this process is that it has picked out a couple of unfortunate buildings. I am not denying there have been a couple of bad buildings, but it is, "Everybody must be bad; therefore, we will make everybody's life difficult. We will make it harder to get investment in the territory."

THE CHAIR: We have heard from another witness that maybe up to half of the apartments are not built well. That is a different view from the vast majority are excellent and there is a couple of shoddy ones. That was from another witness—

Mr Service: Certainly not.

THE CHAIR: I think there must be different views on the—

Mr Service: Everyone will have different views, but if you look around and you could go back and do an assessment of the media reporting and those that perhaps have been back to the planning authority and the building standards group, I think you will find a minority of buildings that have performed poorly.

Mr Martin: I think I will add to that if I can, Ms Clay, as well. For the data that we have got, obviously, Access Canberra is involved with the complaints and the rectification complaints that people receive. Our understanding is, basically, across a year, only four have actually been suggested by Access Canberra as being within that realm of possible serious defects. I think that gives you another indication. We need the data.

I would just like to reference, again, for the minister responsible for this policy mentioned, that this is the first place in Australia that this is being done. This is the first place, as far as we can tell, in the world that this kind of concept is being done. We need data. We need an economic assessment. We need to understand the flow-on impacts for the ACT to be bespoke in the world. I think that is a fair ask from industry, the public and the community as well.

MS ORR: I want to go back to this idea of what the developer already does to ensure quality on a project. From everything that has—

THE CHAIR: Sorry, Ms Orr, I need to interrupt. We have a television camera here from the media. Is it okay with everybody who is here if they proceed to set up and film?

Witnesses: No issue.

THE CHAIR: Yes, that is all right. I am so sorry, continue.

MS ORR: I just want to get a better understanding, because I do not think this has been adequately provided so far. On a development that a developer has initiated and is undertaking, how do they ensure quality across the different parts of the process at the present?

Mr Service: I think the starting reason is that the developer risks capital to invest and get a return. There is nothing wrong with a return. We should want every participant in a project to make a return. The developer's interest in doing a good quality project starts from the day they begin. If they approach their project right, they have the right engineer, the right architect, the right builder, the right project manager, the right certifier.

Again, overwhelmingly, if you look at the projects in this city, the vast majority of developers have approached it exactly that way. Their interest starts from the day they decide to buy a piece of land from the government, or they decide to buy from a third party, or they decide to do their dual occupancy. Or Mum and dad decide they are

going to use the planning rights they have got and knock down the house and build two houses, or they are going to build two apartments. It is exactly the same. They do the same thing. It might be smaller scale, but they are doing exactly the same thing.

MS ORR: Mr Service, what I take from that is that the current motivation, for lack of a better way of putting it, for a developer to ensure quality all along is their return on the investment. It is the profit margin.

Mr Service: That is not what I said, Ms Orr. That is exactly not what I said.

MS ORR: Can you explain to me?

Mr Service: What I said was, the developer risks capital. Having risked that capital, it is in their interest to ensure they, in fact, have the right participants—that is, the best participants in a process to deliver both an outcome to meet the demand of the community for housing, no matter what that housing is, and get a reasonable return on their capital.

MS ORR: In which case what I take from that is that it is at the developer's discretion. There is nothing oversighting the developer.

Mr Service: No. Again, that is not what I said. What I said was that it is in the developer's specific interest to ensure they deliver a good project. And what I said earlier was, if you look at the vast majority of projects built in Canberra in the last 40 years, the vast majority of projects are of the quality this legislation thinks it is going to achieve.

MS ORR: Who is ensuring that there is a quality beyond the developer's own risk profile?

Mr Service: Who is ensuring that? The developer is ensuring it, because its risk starts on the day it starts. The concept that by simply having an individual director be liable gives some other level and is almost a panacea for quality and a panacea for risk simply is not reality in the corporate world. That is not the way corporate people behave.

THE CHAIR: I am afraid we are at the end of our time. I am so sorry to interrupt. We have a very short session. I would invite you to table your opening statement before you leave or later today, if you would like to.

Mr O'Brien: I will, thank you.

THE CHAIR: I am so sorry. It is awkward when you have to interrupt people, but we have further witnesses. Thank you very much for coming today.

Mr Service: Thank you for hearing us.

Mr O'Brien: Thank you so much.

Short suspension.

HOPKINS, MR MICHAEL, Chief Executive Officer, Master Builders Association of the ACT
BERRY, MS ASHLEE, Member Services Director, Master Builders Association of the ACT

THE CHAIR: We now welcome representatives of the Master Builders Association of the ACT. Could you please confirm that you have read and understand the privilege statement and that you will abide by it?

Ms Berry: I confirm that I have read the privilege statement and will abide by it.

Mr Hopkins: I have read and understand the privilege statement.

THE CHAIR: Thank you. We have heard a lot of evidence this morning—I think you probably heard our last session—and we have received quite a lot of submissions. One of the issues raised in your submission was the cost of licensing and the cost of compliance. Have you looked at what the cost of a development or a project is and what component of that is the cost that you see being imposed by a licensing requirement?

Mr Hopkins: We have raised lots of issues in our submission, and I think the cost of compliance is probably a point of detail amongst a whole range of broader issues that we would be keen to talk about. Firstly, we do not fully know what the cost of this bill will be to comply with, because there has been no regulatory impact statement done and there has been no information provided by the government about what the cost of compliance will be. But we would expect that, as with any government licence, there will be an application fee that would be paid. What we have understood through the consultation sessions with government is that there will be quite a substantial preparation of particularly company financial information and key person information, which is a cost that would need to be borne by the developer applying for the licence.

We have some comparisons about what New South Wales businesses are going through to achieve their iCIRT rating, because a similar assessment system has been spoken about in the ACT. The cost is both financial and time by the company to prepare it: several months in some cases, and several tens of thousands of dollars borne by the developer in order to prepare the necessary information to apply for an iCIRT rating. But, to answer your question, we actually do not know directly, because that information has not been provided to us.

THE CHAIR: I would have thought that a cost of tens of thousands of dollars would be a fairly minimal cost in an overall development. It would be a cost of below one per cent, surely. Am I out of the ballpark on that?

Mr Hopkins: We have not assumed that this bill only applies to substantial residential developments. It could, as it is drafted, apply to the building of a dual occupancy by a very small local family wanting to do one investment in their lifetime, who may actually be trying to deliver affordable housing, where tens of thousands of dollars would be a substantial cost.

THE CHAIR: But do you think that tens of thousands of dollars on the larger development is really a significant disincentive?

Mr Hopkins: Again, we are not sure whether an individual licence is going to be needed for every single project or whether this is a one-off cost that might be borne once a year or maybe once every three years. I think the point of our answer to your question is that we actually do not know, which is why we have asked for a regulatory impact statement to be prepared before the bill is finalised.

THE CHAIR: Excellent. That is getting to my second question, which is about the time it would take to apply for a licence. I would assume that, like with most industry licensing schemes, it is not something you do project by project or client by client; you apply, you have a licence and then you renew it. Is that not your understanding of the scheme?

Mr Hopkins: We have had quite lengthy consultations with government on how this licensing scheme works. In our submission, we separated what government is trying to achieve through developing minimum standards. An accountability framework for property developers is one part of the legislation. The second part is the mechanics around applying for a licence. When you turn your mind to how the mechanics of a licence would work, it is extremely complex, and I still do not think we have an understanding of how that would work. Is it one licence per project? Is it one licence per company that might be involved in a joint venture project? Is it once per year? Is it once every three years or longer? We do not know, but it is extremely complex. Unfortunately, in the consultation, I think we got hung up talking about the mechanics of how you apply for a licence rather than how we can introduce an accountability framework which actually improves development standards at the end of the day, which is where we should be focused.

THE CHAIR: Most industries are licensed, though. Licensing is very, very common. Is your concern about having licensing or is your concern that you do not have certainty about how that licensing will work? Is it uncertainty or is it that, fundamentally, you believe that this industry is completely unique and should not have licensing?

Mr Hopkins: We absolutely support greater accountability for property developers to lift building standards, but we do not think the requirement for a licence adds any value to that. We think there are far more effective and more efficient ways to lift standards and hold developers to account without introducing a licensing scheme—and I would look to New South Wales legislation for the closest and best example of that.

MS ORR: Mr Hopkins, just picking up on that, you said you would point to New South Wales. Can you run us through more clearly what you actually see as being appropriate accountability for developers?

Mr Hopkins: Yes. We have made recommendations in our submission that go exactly to that point. Significantly, in New South Wales, they have the Design and Building Practitioners Act, which regulates the building designers and architects. That accountability is missing in the ACT. New South Wales, in their similar building

legislation, talk about developers being held accountable, whereas in our legislation we talk about licensed builders. So they directly have the ability to take action against developers, which currently does not exist in the ACT. We support that approach, but New South Wales do that without setting up a licensing regime; they do it in the context of their existing building legislation.

MS ORR: Mr Hopkins, you have pointed there to other design professionals, and we have had a number of submissions and we have heard from witnesses today saying, "Happy to do that, but that does not mean the developer should not be accountable." I think I put this to the Property Council, and I will put it to you, because I do not think I have actually had an answer to my question: what is currently in place to hold a developer accountable?

Mr Hopkins: There is lots. There is the Corporations Act and a range of other federal legislation which regulate the conduct of any business, including property developers. There is also health and safety legislation. There is building legislation. There is contracts and other commercial law legislation. I am sure Ashlee, who is a lawyer, can probably elaborate on the other laws, but there is a long list of laws that currently apply to property developers, as they do other businesses. But, again, we are not arguing for no regulation in this space. We accept and support that property developers need to be brought into the accountability framework. We are just trying to highlight some improvements to the current bill to make that workable.

MS ORR: Ms Berry, did you want to add to that?

Ms Berry: Only just to reiterate what Mr Hopkins said, which is that any company is regulated. There is ASIC legislation and there is also the ACCC, which would apply to developers in terms of their advertising and ensuring that what they are delivering is what they have promised when they have made sales. They normally enter into a contract with any prospective purchaser, which has certain requirements. There are disclosure statements that they are required to provide as part of any off-the-plan sale contract. That is a mechanism where, if purchasers do have issues, they are held to account.

MS ORR: We heard some evidence this morning that suggested that, because the developer is the one setting the contract, you can ask for amendments to it or you can ask for changes, but they do not always have to be accepted; we heard that there is an imbalance there, in that, if you want to buy something, the industry has more ability to say: "We are not going to change the contract. You can purchase it on these terms or not purchase; that is the option." It creates a little bit of an unfair playing field. I appreciate that you are pointing to the contracts and whatnot but, given that there is a slight power imbalance there and there is also an imbalance in knowledge, not everyone who is purchasing is going to be aware of those. I guess the point I am going to is do you need something outside of the contracts? We have heard that the contracts are not actually a great way to ensure some of the issues that this bill goes to are actually addressed.

Ms Berry: It could be. In my experience, one of the issues that I have noticed is that purchasers do not get independent legal advice and they do not actually understand what is in the contract before they enter into it, and they do not understand what is in

the disclosure statement. So I think looking at greater education for purchasers around "These are your rights and these are your responsibilities and your obligations," would be an improvement on that side of things.

MS ORR: We heard quite a bit in other evidence that the developer can actually have quite a large influence on the decisions that are made further down the track with the designers, with the engineers, with the builders, the products chosen and the different ways that certain issues on a building site are resolved. I think it is fair to say it was the view of a lot of people that they should have a level of accountability in anything that might come from those and that licensing was a suitable way to do that. Everything you have raised so far is about being a good corporation and about being a proper business. How do we actually get to those questions of design and making sure that those are appropriately regulated and covered by developers, given that they have a part in that process?

Mr Hopkins: There are two ways: firstly, bring developers into the accountability framework, which is partly what this bill is trying to do; and, secondly, directly regulate the building designers and architects who have the core responsibility of designing buildings to the appropriate standards and then fully documenting them.

MS ORR: Mr Hopkins, you said "appropriately regulate the architects and the designers". Is it fair to take the developer out, though, when the developer sets the parameters that those people work under?

Mr Hopkins: We have said in our submission to this inquiry and to numerous inquiries before that developer clients play an important role in setting the overall safety and quality culture on a project. We point to clients as sometimes being very small investors, commercial property developers, and—let's not forget—the government The government are also a significant property developer but which is excluded from this legislation. We support the notion that clients and developers should be brought into the accountability framework. We have just highlighted a number of ways in our submission that that could be improved in the current bill.

MR PARTON: Are you of the belief that a number of national building firms will make a decision not to participate in business in the ACT as a consequence of this bill?

Mr Hopkins: We are very concerned about that fact. We do not know for sure, because no-one will know for sure until the legislation is brought in and we see the reaction. But, in the midst of a housing crisis, when our residential building approvals are at least 25 per cent, if not 40 per cent, below where they should be, it would seem an extremely unusual action by the government to introduce new regulation on an industry that is trying to meet a housing supply need for the community. The committee should be very attune to that risk. Other submissions have highlighted that risk, and it is a concern of ours as well. It is particularly a concern of ours because of the personal accountability that the bill introduces on directors and individuals in a building company, which we can talk about in further detail, principally because those individuals actually do not have the control over all of the various builders, trades and designers on a site to avoid defects and fix them when they occur.

MR PARTON: Mr Kerin, in his evidence earlier, suggested that, on previous occasions when regulations had changed—and he alluded to ceiling insulation and then wall insulation—the MBA and the HIA said that the sky would fall in and it did not. Why is this change of law different to those changes of law?

Mr Hopkins: I am not sure what history or past legislation he is talking about, but I would be happy to back the MBA's reputation and credibility in advocating for stronger building standards. We have done it for at least the 10 years that I have been involved in the MBA, and probably the 90 years before that the MBA has existed. I challenge you to find a stronger advocate for building quality than the Master Builders Association. We are standing or sitting here in front of you saying we also support stronger accountability for property developers. Again, we have just highlighted some points of detail to improve that around the individual accountability, the role of design and architects, aligning the building accountability framework and the developer accountability framework and, importantly, bringing in structural trades into the accountability framework, which are all things that are missing from this bill. If you only move forward with the current bill without doing those other important actions, we are not going to achieve our overall objective here, which is building buildings of a higher standard and building quality.

THE CHAIR: Mr Parton has hit on the same question I was going to put to you. Specifically, the witness mentioned that we have had new requirements to install insulation, for instance, in the ACT. Are you familiar with this roof-and-wall insulation?

Mr Hopkins: For rental properties?

THE CHAIR: Yes.

Mr Hopkins: Yes.

THE CHAIR: We have heard from the industry every time we bring in new standards that people will leave the market and supply will fall. We have rates and we know what is happening with housing in the ACT. We have been tracking and what we have found is that there are actually more investment properties in the market now than there were a few years ago, despite the fact that industry keeps saying, "Every time you bring in a new requirement, people will leave the market." Can you explain that?

Mr Hopkins: Specifically about insulation, I think we are passionately agreeing, with respect. The government came to the Master Builders Association to run the training that was required to deliver on that government program to install insulation in roofs. We have run the training. We have worked with our members in order to get them skilled up to be able to deliver on that program. Our only ask from government for that specific program was that they give enough of a transition period to allow property owners to do the works that were required so that it was not a mad rush to complete it within a few months. Government have responded to that by giving several years in order to do that. We support that reform, and we have actually assisted the government to implement it.

THE CHAIR: Excellent. We have about a minute to go. I was going to ask you about your calls for increasing liability for other trades and for subcontractors, which is echoed by a lot of others. Is that the best use of the last minute?

Mr Hopkins: Certainly.

THE CHAIR: Or is there another issue that you would like to take us to?

MS ORR: I think Mr Hopkins would always like to talk about this one.

Mr Hopkins: If we have the option to answer our own question, could you ask us about the personal liability and could I ask Ashlee to elaborate on the difficulties for that?

THE CHAIR: Sure. Please do. Go ahead.

Ms Berry: If a director of a development company is held personally liable under the current bill, the issue that they would face is how they can then transfer the liability to other people in the contractual chain. I do not think there is any dispute that just one individual director should not be held 100 per cent liable for everything and every defect when it is in the twenties of millions of dollars. The issue with holding a director liable is they have no contract with the builder themselves and they have no contract with the subcontractors. So they have no ability to go off to the court and commence proceedings and hold, say, a trade contractor liable.

There is also a misalignment of the limitation periods. The legislation talks about holding a director of a development company liable for 10 years. In the Building Act, builders have a structural warranty for six years, but there is also the stopgap of 10 years. There is a statute of limitations that builders and trade contractors, need to adhere of six years. So there is that misalignment between six and 10, where only the directors of a development company or the nominees of building companies are liable with no recourse against others.

THE CHAIR: We have come to the end of our time. I would encourage you to have a look at the evidence we heard from previous witnesses about what levels of control property developers do impose. I suspect that is the counter to that. But I am afraid we are at the end of our hearing. Thank you for coming in.

Short suspension.

ADLER, MS MELISSA, Senior Executive Director, Housing Industry Association
WELLER, MR GREG, Regional Executive Director, Housing Industry Association for ACT and Southern New South Wales

THE CHAIR: Welcome and thank you for coming in. We are hearing from the Housing Industry Association. I might get you each to state that you have read and you agree with the privilege statement and the rights and responsibilities in that.

Ms Adler: I agree to and abide by the privilege statement.

Mr Weller: I agree to the statement. If it pleases the Chair, I might make a very quick comment, conscious of time.

THE CHAIR: You are welcome to and I will cut you off after a minute.

Mr Weller: No dramas. One key thing we wanted to talk about today is that we have a great deal of concern over what we call mission creep with where this process has gone. We urge the committee and the government to really focus on the problems we are trying to solve with this. We have heard throughout the morning about broadness, and in the absence of regulations that curve these in, the regulations are incredibly broad.

When we see a failure in a large complex building, we know that a lot of home owners are impacted; the problems are often more expensive and harder to fix; and often the affected people feel like they do not have a direct line of sight to the people they feel are responsible. That is certainly not the case in class one buildings and class two buildings up to three stories and below, where we have a really functioning system that involves residential building insurance and have occupational builders' licensing. So at that end of the market we have a very well structured and well-functioning consumer protection system in place.

I guess our key message today is let us be clear on what it is we are trying to fix and what the government is trying to achieve and focus in on those. Let us not discourage investment in the ACT and also potentially make it only the domain of the big end of town. Let us also not put more red tape and more licenses over consumers and builders who are already adequately covered.

MR PARTON: Talk to me about the position of the HIA on the retrospective element contained within this bill. What was your first thought when you saw that contained in the bill?

Ms Adler: We were very concerned. It imposes a new obligation on those that have already entered into arrangements and contracts and costed risk. We heard a lot about risk this morning. It is not the general way that the law operates. In most instances parties enter into an agreement on the basis of the situation they have in front of them, and this certainly turns that on its head.

MR PARTON: Additionally, your submission goes to the reverse onus of proof. Briefly, a reflection from the HIA on that aspect of the bill?

Ms Adler: Again, very concerning. Similarly to the retrospectivity in respect of the issue we just talked about, placing the burden on the party to disprove something is obviously more difficult and sets quite a high bar on the obligations on that party, and how you might rebut that presumption in a legal sense is quite difficult. I do not know if you wanted to add anything to that.

Mr Weller: The only thing I would add, again, is back to what I see as our guiding points. Right now as the bill stands, and in the absence of regulations, everyone is a property developer. Absolutely everybody in the residential building industry is covered by this. That is a great concern because prior to this discussion in the lead up to the decision to introduce developer regulation, the sort of projects and the sort of problems which we were trying to address here were very clear. Yet, again, we are seeing a system where there is a highly regulated system where builders are licensed, where there is residential building insurance in place, and we are simply saying, "We have to ensure, as one of the key things we do, is make sure, where there is coverage at the moment, we are not overlapping and creating additional unnecessary regulation."

THE CHAIR: We heard from Mr Petherbridge from the Owners Corporation Network, and we have heard quite a bit of evidence about how hard it is for people living in apartments to prove that a problem is a structural problem. Typically the response they get is, "Well, you have failed to maintain it," or "It is the weather," or, you know, five years later, "How can you possibly prove this was structural?"

We have heard from a structural engineer who has explained to us how hard it is for anybody after something has been built to work out what the structural problems are. Only the developer and the original engineer could possibly know that. We have heard a lot of problems are where people buy off the plan and they just do not have any knowledge. They have no ability to tell. I think that is probably why this system has things like a reverse onus where we assume if a latent defect shows up that it is probably a structural problem, and we would like the developer to explain why it is not a structural problem. Have you heard those same problems from those same consumer groups and those same professions?

Ms Adler: No, I guess is the short answer. I am not saying that they are not out there obviously, and some have been in the media and highly reported on. As Greg mentioned, we are more concerned about these sorts of arrangements applying in that class 1 space, where we have an existing framework and existing consumer protection mechanisms that are working well. At the moment, that reverse onus, we think, based on the bill, would apply to a builder building for mum and dad, and we do not think that is appropriate given the current arrangements. I am certainly not a structural engineer so cannot really comment on who is best placed and how you determine what is a defect and what is not a defect, and there are lots of people out there who are better experts at that than me.

THE CHAIR: I take the point that you are not an expert, but if you say that the onus is not in the right place, you are taking a view that it is obviously not structural.

Ms Adler: No, I do not think that is the position we are taking. The position is more of a legal position around how a reverse onus works in practice.

MR PARTON: Guilty until proven innocent.

Ms Adler: That is right. Yes.

THE CHAIR: Can you tell me just in simple terms, not in technical terms, which property developers do you think should be covered by this scheme if you think the definition is too broad now? Which ones do you think should be captured?

Mr Weller: I think if we go the other way—by exclusion—where there is residential builders insurance in place, then there is an existing scheme with a policy that has already been taken out that protects the consumer. So we would certainly argue in the first instance that anywhere that has a home warranty or a fidelity fund certificate in place with the project should not be covered by developer regulation because there is an adequate consumer protection mechanism already in place.

We think also, with respect to a licensed builder, there is very strict regulation over licensed builders. So we would also question why a licensed builder should also be declared a property developer when they already have that existing form of regulation. Some of the mechanisms that are being introduced on property developers already apply to builders.

MS ORR: I am just getting my head around the last bit that you just said. I have put this to a few other people, and I will put it to you too. What oversight and regulation does the developer currently already have to ensure that the product they are delivering is of the highest quality and without issue?

Mr Weller: In terms of what they have, it depends a lot on the various business models—the structure. It may even be that in some cases the developer and the builder are the same entity. They may not be in other cases, but I would certainly argue that they do have a level of control. It is very difficult to generalise; as no doubt the committee would have heard from evidence, there is almost an infinite number of types of arrangements that could take place in the development space. It ranges very much between all the different types of projects, so I would make the observation that perhaps the level of control the developer will sometimes have in terms of specifying projects, or elements of projects, and materials that are used, is perhaps somewhat overblown.

MS ORR: If that is overblown—if what I take from that is you are saying the developer might not have the level of influence and control that perhaps has been put by other people to the committee, how then does the developer ensure the quality if they do not actually have oversight?

Mr Weller: They have a building contract. They have a licensed builder who will be undertaking the work who certainly has a lot of obligations in regard to quality, and as the client, they would certainly have plenty of opportunities to be managing that process and ensuring that they are overseeing what work is being done on their project.

MS ORR: I think this is getting to the crux of the tension that we have gone to quite a bit with previous witnesses as well. My understanding from what you have just said is

the developer appoints a builder. The builder is the one who is responsible for delivering, but the developer can influence, as the client. It seems a bit weird, then. Who is actually responsible for delivering and ensuring that everything is done correctly? Is it the builder, or is it the developer? If the developer does not have a role, it seems a bit odd, does it not, because the developer is ultimately the one responsible for the project?

Mr Weller: It is a very different circumstance to where a homeowner has a building contract directly with a builder, which again is why we have said there should be a number of types of projects excluded. The arrangements are obviously very complex, and so it is difficult to make a binary decision that it is this person or this person, but ultimately the builder does have a very big responsibility for delivering the project. They have a licence.

Going back to the point of asking the question of what are we trying to achieve here, a lot of the issues that are being raised are about bringing the developer into that loop, bringing them into the statutory warranties and ensuring that they are part of the accountability process. We have not necessarily questioned that element, of the developer and sharing responsibility across the chain.

MS ORR: The MBA, I think, had a similar sentiment. They said they were not necessarily against a developer being part of the accountability chain—as a way to describe it. What do you see as being an appropriate role for the developer in that accountability chain?

Ms Adler: I think the example that the MBA used was how New South Wales has structured their regulatory arrangements, in particular, how the statutory warranties apply to developers in New South Wales, which is expressly in their Home Building Act. That is not the same in the ACT. So certainly from our perspective that would be one way of directly holding a developer accountable through a regulatory mechanism that does not necessarily involve the extent to which this bill goes to.

MS ORR: Ms Adler, taking from that, then, the developer should be accountable through the statutory warranties, are there any other measures that you think would also be appropriate?

Mr Weller: I think again we are here to discuss a bill that involves developer licensing, so to a degree the question would probably move beyond the question of, "Should they be covered by this or not?" Certainly, our focus today is to look at how we improve what is here before us in terms of the bill that we are looking at.

MS ORR: I think that dances around the question, but I think the Chair is about to wind me up because of time.

MR PARTON: The Property Council suggested to us earlier that they did not receive any data from the government regarding the economic impact that might arise from this bill. Obviously they have concerns, which they have aired, that it is going to add to the cost of delivery of housing. One of our earlier panellists suggested that it might add five per cent to the cost of each dwelling in the ACT. Does the Housing Industry Association, based on the information that you have, have a view on how this bill may

impact housing affordability and housing supply in the ACT?

Mr Weller: I guess a couple of comments. I would start by saying I am yet to see a piece of government regulation or licence that made doing anything any cheaper. So I would certainly support the proposition that there could only be upward pressure on price and downward pressure on supply. One of the real points is that we just do not know yet. We have not seen the regulation, so it is probably very difficult to cost what this might mean. Hence we would argue that it is very important that the non-necessary and non-essential parts of the industry that should not be covered by this are carved out immediately.

I think at a time when we are looking to increase housing supply and improve affordability, we have continually called on government to not bring in new regulation and not increase the costs of doing business for the industry. How we quantify that is almost impossible. As I said, we are missing some very key details in terms of the regulations for this bill.

MR PARTON: If you were forced to guess—you are not really interested in making a wild assumption based on the information you have?

Mr Weller: I try my best to avoid making wild assumptions.

MR PARTON: Yes.

THE CHAIR: We had a recent *Canberra Times* poll that indicated 90 per cent of Canberrans wanted property developer licensing and regulation. The industry has been pretty vocal, and we have heard from you and others, and in submissions. There is a lot of content that I have previously seen in the media. Why do you think Canberrans want this regulatory system? The industry has made their case. Why do you think Canberrans still think that we need this, if we are being told by industry that it is not necessary, and it is just unnecessary to undertake it?

Mr Weller: I guess, with respect, in a poll being asked, "Should we regulate property developers?" it does not come as much of a surprise that probably a lot of people would say that is a good idea. Certainly, there have been—just as elsewhere, and I am sure in no greater or lesser proportion—within the media a number of high-profile problems with, in particular, the multi-residential space.

It has certainly been true that while industry has put our case around the issues, which has been in an environment where we do not know what the proposal has been. We have certainly raised concerns about it, when no-one can tell us exactly what this is, as opposed to other examples such as the occupational licence, where it is very clear what a licence would pertain to.

Certainly, some of that 90 per cent, I think, could also be explained by members of the Legislative Assembly who have certainly, over the last few years, gone out of their way to use terms such as "dodgy" when it comes to developers and builders. I do not think necessarily it has been a fair characterisation of the vast majority of very competent and upstanding developers and builders within the ACT community, and so I am sure that has played its part as well.

THE CHAIR: We have heard some industry players state that they do not want developer licensing. There are lots of different reasons for that. They have objected fundamentally to the idea of developer licensing full stop. Then some seem to state that they are unclear about what this particular licensing scheme looks like: whether it is annual, whether it is project by project, whether it is three-yearly. They do not feel they have seen enough information about it. Do you have a view on that? Whether the problem is that there is uncertainty about what this looks like, or whether there is a fundamental problem with the licensing?

Mr Weller: I think it is somewhere in-between, in that notwithstanding the fact that we cannot see the regulations, we have a reasonable idea of what this looks like. We do not like some of that, but again, I do not think it is a question of therefore no, this should not exist. Going back to my original point, we have a bill before us here. I think our focus is looking at what we see are the major problems inherent in this, and how through exclusions or improvements, we can create a system that is workable and does focus really on what the particular projects and problems are—when we go back to when this whole discussion started—that the government is really trying to address.

THE CHAIR: Thank you. I am afraid that brings us to the end of our time today. Thank you very much for coming in. If anyone has a question on notice, they will lodge it within five working days, and I am not sure we will have questions on notice. We thank you very much for your submission and your time today.

Mr Weller: Thank you.

Ms Adler: Thank you.

Short suspension.

HOLMES, MR STEPHEN, Chief Executive Officer, Goodwin Aged Care Services
REID, MR PATRICK, Chief Executive Officer, Illawarra Retirement Trust

THE CHAIR: Please welcome Goodwin Aged Care Services in person and online. Thank you very much for your time today. I might start by getting each witness to provide any additional information about the role you are appearing in today and to state that you have read and received the privilege statement and that you agree with the rights and obligations in that statement.

Mr Holmes: I am representing a number of aged care and retirement living providers here today, which are outlined in our submission.

THE CHAIR: You have read and agree with the privilege statement?

Mr Holmes: Yes.

Mr Reid: I am here supporting our document, and I agree with the privilege statement.

MS ORR: Just picking up on your submission, one of the issues I saw there is that residential aged-care facilities are not defined as resident buildings and therefore are not captured under the bill. There are sites in the ACT which contain both resident living and residential aged care. Are these definitions the crux of one of the issues that you are going to?

Mr Holmes: They are part of the issues, yes.

MS ORR: You are asking for an exclusion of retirement living facilities from the definition of resident buildings, but if residential aged-care facilities were defined as resident buildings for the purposes of the bill, would that also negate the issue that you have raised?

Mr Holmes: I guess we are highlighting the inconsistency in the way that our sector works in this regard. Many providers operate both residential aged-care facilities, which are a federally funded program, and also retirement living, which is a different accommodation and living type. Obviously, they both involve living in buildings. However, the legislation as it currently stands only requires certain buildings within a particular site to be covered by the legislation, whereas other buildings which are occupied by equally needy residents are not being covered by these requirements. So this is really just to highlight an inconsistency, more than anything else.

MS ORR: Is it fair to say then, Mr Holmes, that you would rather have everything covered or everything not covered? Is that kind of—

Mr Holmes: I do not think we have a preference. I think it was really just to bring to the government's attention that, whether—

MS ORR: That there is an inconsistency.

Mr Holmes: —it be an intended or unintended consequence of—

MS ORR: Okay. That clarifies it. There is not actually an intention for one or the other; it is just consistency. That is good. I do have another question, but I'm happy for Mr Parton to go ahead.

MR PARTON: Certainly, as the population ages, your sector is desperately important to the future of this city. That is why it is extremely concerning to see, when going through your submission, that you have arrived at a view that this bill will disincentive aged-care and retirement living operators from investing here in Canberra. That is a very strong statement to make. What has led you to that position? What feedback have you had from others who would potentially be investing in this space?

Mr Holmes: I think there are a number of elements to that—and not just relating to this legislation—in that our sector is really not well known within the general community and in government. Quite a lot of people do not even understand the difference between retirement living and aged care. They simply do not understand it. They simply do not understand the benefits that we provide to the elder generation in the ACT.

We are a sector about which everyone knows the demographics. What is called the "silver tsunami" is fast approaching—if it's not here already—and the need for the types of service and accommodation that we provide is significant. We all know that the 75-year-olds demographic is going to double over the next twenty years and the 85-year-olds are going to triple. These are the people who we service and accommodate and provide the best life we possibly can for.

From our perspective, the critical thing about this legislation is that we all own and operate our own facilities. The people that live with us are not owners of their properties. They live with us, and they enter under various different arrangements, depending on which type of service they are receiving from us, but, ultimately, we are the owner of the building. We build our villages and our buildings for the long term to keep, to own, to manage, to fix, to maintain. So we have, inherently, a vested business interest—if nothing else—to make sure that the buildings that we build are fit for purpose, will last the length that they need to, and are really well maintained and really well designed. That is probably the other element I should point out: we design the buildings to last and to have the longevity they need to. That is one element which is critical in our submission.

But, more important—to go to your question—are some of the requirements around attracting people to the boards of our organisations. Many—in fact, a significant majority—of the organisations in our sector in the ACT are not-for-profit organisations. We do not pay our boards very much, if anything, depending on which organisation you are talking about.

People join our boards with various skill sets, and they join because they want to be able to give back to the elder generation or to organisations and be a critical part of the community in servicing the needs of senior Canberrans. To be able to attract people to sit on boards, we need to make that as easy as possible without putting at risk—that which is not already at risk through other mechanisms—their future

livelihoods and their future beings, I guess.

There are plenty of road barriers in the whole system, from land release, to planning, to approvals—all those sorts of things that are already there that make it really hard for us as a sector. We are really keen on making sure that there are not additional legislative and regulatory obligations coming at us that are going to make that even harder and result in us not be able to meet the projected needs of servicing senior Canberrans.

MR PARTON: So your view is that it will become much tougher to attract people to join boards because of the risk that someone could come back and bite them on the backside as a consequence of—

Mr Holmes: That is right. That is just one element.

MR PARTON: Does anyone wants to ask a supplementary question, or does Patrick want to add to that?

Mr Reid: In terms of regulation, we are one of the most heavily regulated industries in Australia. We have the Retirement Villages Act as well, for those class 2 buildings. The Aged Care Act obviously is over the top of that, and there is a new aged care act coming through. Some of the intersecting issues, as pointed out by Stephen, would be that that new aged care act contemplates that retirement villages will also be able to house aged-care residents under the aged care act.

Again, those 9c buildings that are standard exempt from this legislation could be then wrapped up into this particular bill and cause issues for providers in the longer term. So there are those sorts of intersecting regulatory issues as well that I think—as we explained to ACT government staff the other day—could intersect in this bill as it moves forward.

THE CHAIR: On a similar vein, for me the need for regulation is about whether there is risk and harm if we do not have regulation. You noted in your submission that there had not been any serious defects or rectification orders in the retirement sector in the ACT. I asked a few other witnesses about this and none of them could comment. Nobody had any positive information—

Mr Holmes: Evidence.

THE CHAIR: Yes. Our structural engineer and our lawyer in the field had not run any matters on that. They could not say that there were or there were not. Is there any evidence? Or how would government get any evidence on that? I note that you are essentially owner occupiers, so you have already got a different incentive than most property developers to do it right without liability. What evidence could we find to say that there have not been any defects or rectifications in Canberra?

Mr Holmes: My evidence is literally from discussions with all providers. There is no register or anything like that with publicly available information. It is through discussions with the operators of that. Certainly, the other side of that, as I mentioned before, is that as owner-managers-operators even if there had been any structural

defects—or were in future—we are the owners of the buildings and we have the obligation.

THE CHAIR: So you are going to have to fix it.

Mr Holmes: We have to fix it anyway. We have, as I said, a business interest and a reputation interest to do that. So there is no incentive for us not to rectify an issue.

THE CHAIR: No, so we do not perhaps have the same market failure for retirement homes that we have for other property developers.

Mr Holmes: Definitely not.

THE CHAIR: This is interesting. You may not be able to comment on this one, so do not if you cannot. We have heard calls in the submissions for three types of exemptions: for retirement villages; for community housing providers, who might be a bit like you—owner-operators; and for build-to-rent. Have you had any conversations with people in those fields about this topic?

Mr Holmes: No—definitely not in build-to-rent. There have been very anecdotal conversations with the community housing providers, and I know they are coming this afternoon to appear here as well. We do not object to the licensing of developers to achieve outcomes that the government is seeking. It is just about the mechanism to do that and the parties that it applies to and does not apply to.

MS ORR: Picking up on that, Mr Holmes, am I correct in understanding that your argument essentially is that, because you are going to hold onto the stock and are not selling it to an additional party, this is enough of a motivator to ensure the quality and, therefore, you see licensing as not being necessary?

Mr Holmes: It is a significant component of it, yes.

MS ORR: When you say it is significant, is there anything that I am missing?

Mr Holmes: There is already protection in the Retirement Villages Act. We have not yet talked about the people who live with us. As I have said, we own and manage the properties. The people that live with us do, effectively, buy their property from us, but they do receive that money back on departure. I guess the element around that is that, long after those people come and go, those properties still exist. It is probably not dissimilar to build-to-rent, potentially—you could argue that. Some people in our sector say we are the original build-to-rent sector.

MR PARTON: I guess you are, really, are you not? I had never thought about it that way.

Mr Holmes: We will fix whatever we need to fix. We have business and reputation imperatives. No one is going to walk away, and there are protections in the Retirement Villages Act for people who do buy into our properties. We cannot just walk away from a retirement village without them being able to recover the money that they have invested to live there. So they are protected.

MR PARTON: We have already spoken today about the silver tsunami. Your submission—and you have also mentioned it today—mentions the proportions of 65-year-olds, 75-year-olds and 85-year-olds, which are set to explode in the next two decades. You have also talked about the barriers that are already in place for the delivery to the market of the product that you guys are involved in, and how it is already under pressure. When you look into the crystal ball over the next 20 years, what do you see 15 years down the track in this space, and what do you see in regards to that older cohort and how and where they are going to have a roof over their head?

Mr Holmes: If there is status quo, I see people "rattling around"—to use that expression—in their four-bedroom or three-bedroom houses. There might be only one or two of them, creating risk for themselves and their health, and they will be accessing the health system far more often than they possibly need to. It has been proven that people that live with us access the health system on a far less frequent basis. We delay entry into residential aged care, which is a federal program, but it comes with a significant cost. So there are significant savings for governments—state, territory and federal—for older Canberrans to live in villages like ours. That is the status quo.

What we would definitely hope to be seeing is a much greater and more concentrated focus by the government on land use specifications. We compete with normal property developers for a piece of land that might hit the market. There are restrictions around us. We do not have, I guess, the financial capacity that other big residential property developers do. So quite often we do not even bother trying to buy land from the government that is released by the government, because we know we do not have a commercial success that we will achieve there. So there is land use and there is land supply to be able to provide the product that we need to be able to provide to meet that demand.

MR PARTON: It is a bleak picture, is it not?

Mr Holmes: Under status quo it is, yes.

THE CHAIR: We have covered my concerns really thoroughly, and that is a credit to your submission and your testimony here. Is there anything else that you think we should get to that we have not spoken about?

Mr Holmes: I do not think so. I do not need to repeat everything that is in our submission, and hopefully those messages are coming through very clearly. Whilst we develop property, we do not see ourselves as your normal residential property developer of the type that was envisaged by this legislation. We really wanted to be able to educate the committee and the government more generally about what we do, how we do it, and why we should not be just seen as a normal residential property developer.

THE CHAIR: Thank you, Mr Holmes. Thank you, Mr Reid. Colleagues, do you have any further questions? That was great. Thank you very much.

Short suspension.

SENGSTOCK, MS ELSA, Senior Policy Officer, ACT Law Society
PEPPINCK, MR ADAM, Chair, Property Law Committee, ACT Law Society

THE CHAIR: We welcome the ACT Law Society. Thank you for coming in today. I will ask each of you to state that you have read the privilege statement and that you agree with the rights and obligations set out in that privilege statement.

Ms Sengstock: With regard to the privilege statement, yes, I have read it and will comply.

THE CHAIR: Thank you.

Mr Peppinck: Similarly, I have read the statement and agree.

THE CHAIR: Thank you very much.

MR PARTON: On a number of occasions during these hearings people have talked about "piercing the corporate veil", and when they say that they make a face. The way it was certainly characterised by the Property Council and others was that we are talking about legislative change which has been reserved in the past to extreme crimes. In the view of the Property Council and Master Builders, it does not necessarily line up with what is going on in the construction space. The Law Society's submission certainly touches on the "piercing of the corporate veil". Can I get some reflections, in the context of this hearing, on where the Law Society sits on this change?

Mr Peppinck: The concept of separate legal entities is a fairly fundamental concept of corporations law. When the corporate veil is pierced should only happen in reasonably exceptional circumstances. The point that our submission made was that we acknowledge that there are circumstances where that is appropriate and where it has been found to be appropriate in the past. Certainly, there is some legislative precedent for that having occurred, but it was more to just flag that this is a significant approach to take and to flag the need for acknowledgement of that.

MR PARTON: Your submission does not go to the next part. Is there a view from the Law Society—and I dare say there probably is not—as to whether this is a step too far in the context of construction legislation?

Mr Peppinck: I would not see that as the role of the Law Society.

MR PARTON: No. I understand.

Mr Peppinck: We are a bit more agnostic around those commercial principles. What drives us is wanting to have good and clear law. Where law departs from what might be considered the norm, at least in terms of approach—and I think "piercing the corporate veil" would be an example of that—there needs to be good justification for doing that and sound reasoning and robust thought processes need to have been brought to bear. We were not consulted in the lead-up to this legislation, which is a little bit unusual, to be honest. We are usually very much consulted on legislation. We have a terrific relationship, I think, with our colleagues in the ACT government in that

way. So, really, this is our first opportunity to provide reflection on the bill, and we wanted to at least make that point.

MR PARTON: In closing for me, the Law Society acknowledges the precedent, in terms of construction law, of this being applied and acknowledges the faces of anguish of people who brought it up earlier?

Mr Peppinck: Yes. Some of those faces are the faces of clients of ours, so we do understand that perspective. Again, that is probably not a Law Society perspective. I can understand why it is more a Property Council or other perspective.

MR PARTON: All right. Excellent.

Ms Sengstock: It is also about seeing it in the context of other aspects of the bill—the fact that it applies to building defects that may have happened 10 years in the past or 10 years in the future, the broad discretion powers of the registrar, and the broad definition of "property developer". When you take all those things together, you have to be really careful that each element has been properly justified and that you are capturing the people who have actually engaged in conduct that has led to those defects or could have had control.

MR PARTON: Would you also put in the same category the whole reverse onus of proof—that we do, if this bill is passed, have a sort of guilty-until-proven-innocent scenario which does not seem to line up with many other aspects of law?

Mr Peppinck: We would regard it in a similar way. Again, it is a bit of a departure from what you might regard to be the norm. Normally, it is more typical that, if someone is making a claim, then the onus is on them to prove that claim rather than it being on the person who is defending the claim—the onus being reversed in that way. We observe that this is a departure from what we regard to be the norm. It might be a justified departure, but, again, we are just wanting to pressure-test the approach.

MR PARTON: All right.

THE CHAIR: I might supplement on that. I appreciate your balanced submission and I also appreciate the role you play. I know government relies on you quite heavily for your drafting advice and for your legal advice, so thank you for that. I am sorry you were not consulted earlier on this one. Do you think some of these issues—not taking a view but just saying, "These are unusual things"—can be addressed with really good explanations in the explanatory statement? Do you think this is a failure to explain?

Mr Peppinck: That would definitely be one way of addressing that concern, in the explanatory memoranda and perhaps in how the legislation is phased in, community awareness as the legislation is brought in, and the timing around when the legislation begins and takes effect. All of those sorts of things would help to address any concerns that we might have about that deviation from the norm.

THE CHAIR: Ms Orr?

MS ORR: I have a supplementary on the reversal of the onus of proof. Given the

amendment operates as a private right of the owner of the building or the land on which the building work was carried out and not a regulatory body, is the dynamic between a property developer and an affected party sufficient enough for justification of the departure from the general principles? Sorry—I know that is a big one to throw at you.

Mr Peppinck: I was just trying to process all of that. Sorry—would you mind repeating that question?

MS ORR: I can read it again to you. The onus of proof in that reversal—essentially, it is saying it is a private right; it is not a regulatory body requirement. It changes the dynamic between a property developer and an affected party. Is that the kind of justification that you feel would be sufficient enough to say we can deviate from the general principles? The substantive issue I am getting to is from a discussion we have had here. This is what I am taking away from what you are saying: it is okay to depart from general principles as long as you can justify them, and there needs to be quite a lot of scrutiny over the justification, but departure from a general principle is not, in its own right, something that you should be doing. What I am trying to get to is clarification: do you see that, where there are departures from the general principles—because we have had a number raised by other witnesses—nothing is off the table per se, but perhaps the justification just needs to be clearer?

Mr Peppinck: That is a pretty good analysis. I do not know that it is for us to say exactly where on the spectrum the onus should flip from one to the other.

MS ORR: Yes—I understand that.

Mr Peppinck: Really, the purpose of us including that in our submission was just to make sure—and I am sure it has been considered. This would not have been done lightly, but we would feel as though we are not doing our job if we did not at least flag it.

MS ORR: I must say, I have been at a few inquiries lately where the Law Society has put in a submission and value-added, and it is always actually pretty good, so thank you.

Mr Peppinck: Thank you.

MS ORR: I also appreciate you trying to draw the committee's attention to areas that should be scrutinised as opposed to necessarily taking a position—

Mr Peppinck: Correct.

THE CHAIR: Using your expertise while we have it, you talked a little bit about the fact that the licensing requirements are scattered across lots of different pieces of legislation. A number of people have made the same point. Can you tell me what you see is the problem and a good way to address that problem?

Mr Peppinck: It is not necessarily a problem; perhaps it just makes it a little bit more of a challenge for those deciphering the legislation to understand exactly how it

applies and how they can be sure that they comply with it. Our submission queried whether there might be some merit in having all of those aspects dealt with in the act itself, once passed, rather than making it necessary to jump from piece of legislation to piece of legislation. That said, we are all fairly used to needing to do that. There is not much out there that is solely contained within a single act. We certainly do not see this as fatal, but, just in terms of clarity of application, we would query whether consolidating it within the act might make sense.

Ms Sengstock: Of course, the alternative to that—and it is something we would recommend anyway—is having an education awareness process during the implementation and transition periods. When you cannot have everything self-contained, this can help the people that you want to comply with this to do their best in complying with it.

THE CHAIR: This is good and sensible advice. We have certainly had a lot of confusion from industry about how the licensing scheme works. That is a bit of a concern. Do you think it is maybe about the education provided by government on this—maybe really clear guidelines and possibly some work they can do on the actual application portal? Is it something that could be addressed with those sorts of tools?

Mr Peppinck: I am sure that could assist greatly.

Ms Sengstock: I am aware of other submissions that have raised concerns about how this scheme will interact with potentially overlapping schemes or other schemes that exist. You cannot necessarily have one simple law for everything, but what can you do to make it simpler for people to understand if you cannot draft it in a particular way? How do you reconcile that so people understand and know what the right thing to do is?

THE CHAIR: Thank you.

MR PARTON: You talked about a number of risks. Among them is the risk of extending financial and, of course, potentially criminal liability to people, compounded by the broad discretion of the registrar to make orders where they are "satisfied it is appropriate to do so". You mentioned that this discretion is also relevant to the ability of the registrar to issue rectification orders to multiple property developers who, as you point out, may have varying degrees of financial liability for the rectification works. How are they going to do that? When that problem is highlighted in that fashion, I sit back, as you have, and say, "How on earth is anyone going to do that?"

Mr Peppinck: I guess that is why it has made its way into our submission. We are a little bit unclear as well. Our concern is that, if multiple property developers can be pursued for the same crime, there will be some confusion around exactly how that is responded to and the ultimate desire to fix the works that need to be rectified. There might be a distraction. It might not be such a bad thing for the lawyers that will be involved in that fight amongst the respective property developers!

MR PARTON: It could be a win for your people!

MS ORR: Good news for your clients!

Mr Peppinck: We are not suggesting that is a good thing.

MR PARTON: No.

Mr Peppinck: That is partly our concern. We would also frame that concern in the context of the fact that it is a reasonably broad power that rests with the registrar in relation to rectification works orders. We are also slightly concerned about the fact that that does not appear to be a power that can be appealed to ACAT. It looks as though the option that is available is to make an application to the Supreme Court. That brings into play concerns that we have around over-clogging of the court system and whether it might be appropriate, given other powers under the act can be appealed to ACAT, for this one to be similarly dealt with.

MR PARTON: That was well answered. The discussion of that risk is out there now in the transcript of this hearing. Thank you.

THE CHAIR: Thank you. You have a bit of discussion in your submission about the definition of property developer. We have heard quite strong views about the definition of property developer. Can you talk me through some of the issues you see with the way it is currently framed?

Mr Peppinck: We observe that clearly the definition is very broad, and it will pick up a large range of persons. We understand that the regulations will perhaps be used to trim that down a little bit. Of course, we have not seen the regulations yet, so we wait to see how the regulations and the bill will interplay. We are not necessarily taking a view as to who should be in and who should be out in the class of property developers but just make the observation that it will pick up a very broad range of people, certainly the people that we understand the bill is targeted at—and I am sure some of the others who have appeared today will have made the point more specifically—and others that perhaps were not necessarily the target of the legislation.

THE CHAIR: Do you think that approach, where there is a broad definition and then regulations to exempt people and clarify it—assuming we get the regulations right, which is an assumption nobody can make because nobody has seen them—is an appropriate way to deal with something that was obviously difficult to define?

Mr Peppinck: I do not think it is an uncommon way to deal with it. As you have said, we need to get it right in the regulations, in terms of exactly what does make its way into those regulations. As long as that is clear, then I think that is a way of managing the concern.

THE CHAIR: Do you think, then, there needs to be a level of consultation on the regulations as well, given that they are playing quite a crucial part?

Mr Peppinck: Yes.

THE CHAIR: What sort of consultation would you like to see on regulations before the entire scheme would start?

Mr Peppinck: Specifically in relation to the Law Society? Typically, we are consulted with. Often JACS, for example, will come to us and talk about proposed legislation. We have conversations quite early in the piece. Sometimes we will have a look at the draft legislation. Obviously, we observe confidentiality when that is the case. We would be very keen to have that sort of input into the regulations as they are being drafted and in the tweaks to the bill that might flow out of this. We are always keen to be consulted and to assist.

THE CHAIR: Sure. They would probably need to be socialised with stakeholders who are affected too.

Ms Sengstock: Absolutely. Yes. Whether the government would choose public or targeted consultation, I think it is just about making sure that the targeted consultation is wide enough.

THE CHAIR: Yes, thank you.

MS ORR: I just want to go back a little bit to the reviewable decision, the Supreme Court and ACAT dynamic, and also to the conversation we had about where you depart from the norm being able to justify it. Are there any assurances that you think would be better off in, say, the explanatory statement or in any strengthening of policy rationale on the decision to direct certain orders to the Supreme Court rather than make them ACAT-reviewable, or do you think it just needs to have an ACAT-reviewable function?

Ms Sengstock: I think there is an absence of discussion about the issue we are drawing attention to. There may be very good reasons why you want to be able to go straight to the Supreme Court, but that has not been articulated. We have been supportive of the increasing use of tribunals to be able to have that intermediary step before you go to courts. There is also the fact that you have multiple parties to whom the order could be made. The discretion is very broad. In other circumstances where that has happened in this field of legislation, ACAT review is available. It is given as a bit of an insurance mechanism that there is a way—not suggesting the registrar would do something inappropriate, but, if the registrar does not get the decision right, there is a process before having to go to court.

MS ORR: Do you think that, maybe, that is one for the government to have a little bit more information on?

Ms Sengstock: Yes; absolutely.

MS ORR: Thank you. I have a little bit around retrospectivity, in the context of the CO(L)A regulation. As you know, it is not usual to have retrospectivity, but it is not unprecedented. In the couple of minutes we have left, is there any more thinking you could illuminate us on?

Ms Sengstock: Generally speaking, retrospectivity is reserved. Obviously, in a criminal area you really avoid using it. In civil areas it can be more common. The interesting issue here is that there is potentially an argument that this is not technically retrospective.

MS ORR: That is what I was going to pick up on.

Ms Sengstock: That was ventilated in the context of the CO(L)A reforms, but it has not actually been revisited again. I suppose our suggestion is that it may well be the case that this is not technically legally retrospective, but we should actually look at it.

MS ORR: Ms Sengstock, is this about the principle that, because the issue developed at a point in time, even though it has been identified later, it is not retrospective? Is that the issue?

Ms Sengstock: Yes. There is the technical argument that there are no consequences for past acts, but there is future action which could be taken against past acts, and the future action has consequences. I do not think I explained that very well, but what I am saying is—

MS ORR: The rectification happens in the future.

Ms Sengstock: The rectification happens in the future. The order happens in the future based on a past event, but the compliance enforcement is about failure to comply with the rectification order. That technically means it is not retrospective. I know there are a lot of concerns in submissions about how, in practice, people are being held to account for things they may not have actually been involved in in the first place.

MS ORR: Yes. The other side to that, though, is that there is a regulatory system that they were meant to have met and, if they were meeting that regulatory system, you would not be seeing the defect. In the context of that, do you think it is not unreasonable to say that those concerns that have been raised perhaps do not quite hold validity?

Ms Sengstock: It is not unreasonable, as a general principle, to have a scheme set up that way. Our concern is also that, when you look at the personal liability of directors, the personal liability happens whether you were a director at the time or not. You can go back to the fundamental, "You should have been complying at the time," and they may not have been involved at all in the process.

MS ORR: So the issue is less about points in time and more about who was actually there at the point of time the defect occurred—who should be held responsible. Thanks.

THE CHAIR: I believe the justification for it in this case is that this is how we deal with phoenixing.

Ms Sengstock: Yes. I understand that.

THE CHAIR: Otherwise there is an incentive for the developer who was there at the time to vacate responsibility and another one to come in. We may not find the right one. I believe there is a desire to impose accountability on the person who has stepped into the role. They should have made sure that things were done right. Is that how you understand the justification for it?

Ms Sengstock: That has been used in other contexts where personal liability has been imposed. It again comes to having that articulated and explained as a justification.

THE CHAIR: What is another context it is used in?

Ms Sengstock: It is already used in CO(L)A. I am aware of the ACT level. And I think it is used in the—

Mr Peppinck: CO(L)A is probably the most direct comparison to make. We acknowledge that there have been times when it has been done. The purpose of us flagging it in our submission was just to query whether this is equally appropriate.

THE CHAIR: Thank you. Thank you so much for coming in. We very much appreciate your time. I know that a lot of your work is done by volunteers, pro bono. It is greatly appreciated, and particularly in this case, where you may be arguing against your own interests. So thank you for your objective feedback. We will lodge any questions on notice within five days, but I do not think we will have any. We hope the government will come to you soon on the next stage of consultation. Thank you.

Mr Peppinck: We appreciate it. Thanks very much.

Ms Sengstock: Thank you very much.

Hearing suspended from 12.30 pm to 1 pm.

HANNAN, MR ANDREW, Chief Executive Officer, Community Housing Canberra
HAYHURST, MS WENDY, Chief Executive Officer, Community Housing Industry Association

THE CHAIR: Welcome back to the public hearing for the committee inquiry into the Property Developers Bill 2023. We are recording and transcribing for Hansard, and we are live streaming as we go. If you take a question on notice, if you can say, "I will take that on notice," those words help our secretariat track down the answers and make sure that we get everything back in time. Thank you very much for joining us today. Would you confirm that you have read and received the privilege statement, and that you agree to abide by the rights and responsibilities in that.

Mr Hannan: I have read and agree with the documentation provided.

Ms Hayhurst: I have read and accept the conditions in the documents too.

THE CHAIR: Great. Thank you. I am afraid we do not have a lot of time today, so my apologies if I jump in on any colleagues or witnesses and hurry things up. We have got a strict timeline. I will start with the first question. We have heard from a few witnesses that there might be a case to make that certain types of property development should be exempt. The things that people have raised are retirement homes, community housing and build-to-rent. We had a really good session before with Goodwin, about retirement homes. I am wondering: do you have a view on that in the community housing sector?

Ms Hayhurst: We support the intent of the bill. I think it is fair to say that first. What we have been seeking is, for want of a better word, a carve-out for the statutory duty of liability for directors. We are doing that not because of community housing per se, but because of the sort of organisation we are and the product that we are developing. If that were to go through—if directors were held to be liable—we are very concerned that our members would find it extremely hard to recruit and to retain directors.

As bit of background, we are talking about not-for-profit, ACNC-registered organisations who are also registered in one of the regulatory regimes that operate across Australia. In this case, it would be the national regulatory scheme. We will be held liable anyway for major defects in our buildings, but if we had directors who felt that they could also be personally liable, I can tell you that, given the fact that we do not pay and we do not have remuneration—we pay sitting fees sometimes or expenses—we would not attract directors and we would lose directors. We are not talking here about people in the corporate world who we need to give bankers and financers confidence; we are talking about, potentially, tenants—some of our organisations have tenants on the board as well—and people who are retired and do not have an income, so it is a real risk for us.

We also think that if we have to do that and increase the insurance bill, that is going to make it hard for us to be competitive in providing social and affordable housing in comparison with our colleagues elsewhere.

THE CHAIR: Sure. Ms Hayhurst, you have made your case well. I will go to some of the things we heard from Goodwin in terms of retirement homes. For me,

regulation is about risk, and they explained that actually they are in a very different risk situation from commercial property developers. They develop and own the buildings themselves, so they have a really good incentive to make sure that they are not doing shoddy development in the first place. If they do make a mistake, they will be the owners who are responsible for fixing that, so that responsibility will not get passed on to some unsuspecting future buyer. It will be theirs to rectify; they will hold that responsibility forever. They also said that they did not have any history, in the ACT, of major defects. The system they are operating in has given them enough incentive to make sure that they are building properly. Do any of those sorts of conditions apply to your industry?

Ms Hayhurst: Yes. We have to be registered in the national regulatory scheme, so we have an obligation under the performance standards on asset management, financial management, to ensure that we maintain the homes that we own. We have obligations on properties that we head lease as well. Any property that we own, we are liable for that, because we are managing them on behalf of tenants. If we did not do that then our registrar would already be coming to us and giving us the first stage of the compliance enforcement action. If we continued not to do that, we would be deregistered.

THE CHAIR: Do you ever develop a property and then sell it on to somewhere else?

Ms Hayhurst: Yes.

Mr Hannan: Yes. In some cases, community housing providers around the country rely on a component of market sale activity to help make things financially viable in terms of developments. It also helps make a diverse community where you have got a mix of owner-occupiers, market renters, affordable rentals and social renters all in together. The market aspect is ancillary to the core business of any community housing provider, but sometimes it is a necessary thing to incorporate.

In the environment that we are in today, where we have alignment at both levels of government, federal and territory, and strong housing policies to support growth—at the federal level the Housing Australia Future Fund and in the ACT the affordable Build-to-Rent fund—the need for the market activity is less so, because there are sufficient subsidies to enable us to develop without having to cross-subsidise through market activity.

Further to Wendy's comments earlier about the risk around retention and attraction of directors, the other risk is that directors restrict the operations of community housing providers so that they carve out development activity because of that personal liability if there is not the statutory carve-out. It would mean the only way community housing providers in that situation could grow is if there was a stock transfer of properties from, say, a state or territory government, or through the acquisition of completed properties, but it takes out the entire development process, which is a key growth channel for community housing providers.

That is really relevant too. In the context of the federal and territory schemes that I mentioned, the effect of this policy, unless there is a statutory carve-out, would be to severely impede the ability to deliver on those objectives from the federal and

territory government. Indeed, the federal money would flow to other jurisdictions where there is not this impediment and constraint on the operations of community housing providers.

THE CHAIR: Thank you. You did note the risk of losing federal investment.

Mr Hannan: Very much, yes.

Ms Hayhurst: Could I just say that property development is allowed under our ACNC registration where surplus from that is put back into the business.

MR PARTON: You have made mention of the National Regulatory System for Community Housing. A really good point that you made in your submission is that you already are under a regulatory umbrella when it comes to these developers of yours. The chair has mentioned that there have been calls from various submitters that community housing providers, aged care, retirement living and potentially build-to-rents be left out of this. Let's just focus on community housing, because obviously you are here representing community housing. Is it possible to provide community housing in this jurisdiction without falling under the National Regulatory System for Community Housing? Is it possible to do it? No.

Ms Hayhurst: No. We do not recognise organisations as community housing organisations unless they are registered, are not-for-profit and are registered with the ACNC.

MR PARTON: So whoever is delivering this product to the market is already operating under that regulatory umbrella?

Ms Hayhurst: Yes.

MR PARTON: It is not quite the same, but it is probably the last thing I am going to ask, so I am just going to push on in and do it. You mentioned in your submission the fact that a new insurance product is going to be provided, obviously, because it will be needed to cover against latent defect. The understanding you had at the time of putting this submission together was that that product was not actually available, and you were a little concerned that maybe when the legislation starts it will not be available.

Ms Hayhurst: We attended a workshop with ACT officials and the question was asked, and I think there was some concern that it might not be sufficiently available.

MR PARTON: That would not be ideal, would it?

Ms Hayhurst: It would not be ideal if we could not take it up.

MR PARTON: No.

Mr Hannan: Even if you could secure such insurance, it is going to come at a cost. Obviously, we do not know what that cost is. It potentially could be significant. Again, in the context of the federal and territory schemes I have spoken of, it is going to make things less competitive. At the federal level we are competing against the other

states and territories, and it will be less likely that competitive projects are put forward within the ACT because of those additional costs.

MR PARTON: We will, I am sure, seek further advice when government officials appear. That is all I have at this stage.

MS ORR: I think we have covered a lot of it. My understanding is that it is because you are already regulated under the national system that you do not feel that this additional regulation is required. Am I right in my understanding?

Ms Hayhurst: What we are saying is that we are registered. What often happens with our sector is that we get new obligations and they sit separately from the regulatory regime. So we are saying is it possible to align the requirements with the regulatory regime? The regulatory regime should live, and it should be possible to make amendments; you have got a registrar here. Rather than setting up a completely different regulatory system to cover this for us, which just adds regulatory burden and duplication, we are asking that you align the two.

MS ORR: Yes, that is fine. That clarifies it.

THE CHAIR: Did you raise these issues with government during consultation?

Mr Hannan: I can speak from a CHC perspective. Early last year we learnt of the intent of this bill. There had been a definition put forward about who a property developer was. Of note at the time—and importantly, from a CHC perspective—it defined it as being development for profit. The presumption in that was that there was naturally built in, from day one, a carve-out for entities like CHC, which is a charitable registered community housing provider.

We then learnt further in November last year that, no, in fact the definition had changed and there was no carve-out built in. We he had multiple meetings with bureaucrats from EPSDD since November last year and earlier this year and have raised a number of these points. If all else fails, the absolute key thing in this is the application of regulatory orders and the need for a statutory carve-out around personal liability for directors of entities like CHC, for all the reasons that we have highlighted.

THE CHAIR: We have heard quite extensively that government has a very broad definition of property developers. I had not realised it changed part way through. There is an intention to exempt certain types of property developers in regulations. Have you had any conversations with government about whether there are exemptions coming under those regulations that might cover your situation?

Mr Hannan: We are aware that there are provisions where parties or organisations can be exempted. From a policy perspective, it would seem that the current policy of EPSDD is in fact to put a case forward to carve out the things we have sought. But there is a key difference between a policy and a regulation. I guess what we are seeking is that statutory carve-out so that we have got that assurance and so that we can attract and retain directors, still deliver on our full range of activities as an organisation, and have the best chance possible to grow the amount of social and affordable rental supply needed here in the territory.

MS ORR: Can you run me through how it works in practice at the moment to assure quality on your developments?

Mr Hannan: As Wendy has covered, we have got the backstop of NRSCH, our National Regulatory System for Community Housing, and there is also an ACT registrar who sits in one of the ACT government departments. How we ensure quality is that we go through a process. We appoint a reputable builder. We have a builder panel, and we only accept people onto that panel who have a strong track record in delivering for others and also for us, and who have strong WHS requirements and quality. Through the development stage, we typically have a superintendent who is going in there and being a check and balance, which is separate to and in addition to any other obligations the builder has with ACT inspectors and so on at key points through the development. It is not too dissimilar to what a developer coming here and sitting in this seat would say. It is a very similar process, but, again, we have the extra requirements of our national regulator, as a tier 1 registered community housing provider.

Ms Hayhurst: On top of that, if there is any government grant or subsidy there will be a contract. If we take the Household Australia Future Fund, if Andrew is successful, there are a whole series of things that you will have to do on top of those as well.

Mr Hannan: Yes.

MR PARTON: Is there a risk that this bill will make housing less affordable in the ACT, and is there a risk that it will potentially restrict the supply of social and affordable dwellings to the market?

Mr Hannan: I am happy to chime in first. Very much so, yes. Speaking only from the point of view of a registered community housing provider, in my case CHC: yes, it will restrict our ability to grow supply. To the extent that it overlays additional costs, it is going to make things less affordable for those Canberrans who need social and affordable housing supply as soon as possible.

Ms Hayhurst: We are talking about social and affordable housing.

MR PARTON: That is right. That answers my question.

THE CHAIR: Thank you. Your submission was very clear, and your evidence has been excellent. When we come to the end of our time before time it means that we understand you very well. Is there anything else you want to tell us?

Mr Hannan: Is there anything else?

Ms Hayhurst: I do not think so.

Mr Hannan: I think we have conveyed the key points. Thanks very much for the opportunity. If there are follow-up things informed by other people providing evidence that you want to ask of either of us, please send that through one of the channels.

THE CHAIR: We absolutely will. If we have further questions on notice we will lodge them with you within five days. If you do not hear from us, that means we understand you really well. Thank you.

Short suspension.

SHANNON, MR CRAIG, Chief Executive Officer, ClubsACT
RATCLIFFE, MR ANTHONY, Chief Executive Officer, Eastlake Football Club

THE CHAIR: Thank you very much for coming in and joining us for our hearing. Could you each confirm that you have received and read the privilege statement and that you agree to abide by the rights and responsibilities set out in that statement?

Mr Shannon: I have read the statement that you have outlined, and I certainly agree to abide by those requirements.

Mr Ratcliffe: I have also read the statement and agree to comply with it.

THE CHAIR: Thank you. I will ask the first question, which is probably the main one. We have heard from a few sectors. In particular, we heard from retirement homes—that is, Goodwin. We heard from the community housing sector. You just heard that.

Mr Shannon: Yes.

THE CHAIR: We heard from the industry about build-to-rents, and we have heard from you that there is a special case to be made that certain types of property development should be exempt from this, or that there should be some type of carve-out. We have heard that there are different risk reasons why that might be justified. We have just heard from community housing. There are quite a lot of other regulations that apply to them. We heard from the retirement homes that they are owner-operators and, if there are defects, they will have to fix them themselves. They also told us they have never had a defect in the ACT, which certainly sounded very exciting to me. Can you tell me where you see your developments fitting into that picture?

Mr Shannon: I will kick off, and Anthony might have some more lived experience in some of this and he can supplement what I say. There is a lot of crossover between our submission and that of Goodwin and the community housing sector. In large part, that comes from the fact that there are joint developments either in train or being considered by our sector with community housing providers, for instance.

In fact, only about four or five weeks ago, the Chief Minister made a public announcement about a project between CHC and the Southern Cross Club, for instance. As you would appreciate, as they are joint ventures, to have one party exempt from this sort of outcome and another not would obviously add huge complications to those projects.

In most cases, because of the diversification agenda which is outlined in our submission, our members have been looking increasingly at developments in regard to social and affordable housing in the ACT. That obviously has much to do with the direction of government and the policy objectives that they have in that area. This now comes as a cut across that process, and it has created a bit of fear, in terms of our industry, in regard to the implications of this.

In most cases, our developments are not done for sale; they are done for provision. To the extent that there might be some small exposure to building for the purposes of selling those properties on, we would share a similar situation to the social housing providers, to the extent that our clubs would retain ownership of those properties and would still be liable potentially for the rectification costs in their own terms.

THE CHAIR: I am sorry about the fear. For me, it is more about the risk—the risk for the consumers. Will you continue to own all of the developments that you develop or most of the developments?

Mr Shannon: In most cases—Anthony might have a view on this as well—our members would build for the purposes of retention and would still administer those as affordable or social housing properties.

THE CHAIR: What happens with the other ones—the sale? Where do they go?

Mr Shannon: I am not personally aware of any that have been done for the purposes of sale or proposed for that purpose, but I am not excluding the potentiality for that.

THE CHAIR: We heard from Goodwin that they had not had any major structural defects or any rectification orders in any of the retirement homes. I have tried to test that with other witnesses and they did not tell me of any defects. We are not really sure if that is the case. Do you have experience in developing and do you have any tracked history of whether you have had defects or whether you have had rectification orders?

Mr Shannon: There have been some. I am not sure of the extent of it; certainly, there have been some developments in that regard. I am not aware of any, in terms of our industry having exposure to those sorts of issues with those properties.

I have made the point in the documentation that we see this as a commercially driven problem. We certainly understand the principles of the objectives here, and we have no problem with that. But it is a problem from the commercial side of the industry, if you want to look at it that way. We think it is an unintended consequence that the not-for-profit sector and the club industry have been scooped up in regard to addressing that problem. That is what has brought us to the table with our concerns.

THE CHAIR: The market failure seems to be primarily from developers who have an incentive to make it as cheap as possible, sell it on and walk away.

Mr Shannon: If there is a profit motive involved then it makes obvious sense, I would have thought, that that is the driver for it. In the majority, if not nearly all, of the cases of our boards and directors, they are not remunerated; there is no pecuniary profit benefit for them in doing dodgy developments. Particularly because most of these are investment opportunities, as part of the diversification of club operations, they would retain the properties largely themselves, anyway. The issue is really driven at the builder certifier level, to some extent, in regard to this broader issue. We do not see that that has exposure in terms of our members' interests.

MR PARTON: In your answers there, Mr Shannon, you have focused on directors' liability provisions.

Mr Shannon: Yes.

MR PARTON: Can I get a confirmation? Mr Ratcliffe, if I became a board member at Eastlake, is there any remuneration for me?

Mr Ratcliffe: No.

MR PARTON: No, there is none. The concern is that someone becomes a board member at Eastlake, for argument's sake—obviously, I am using Eastlake because you are in the room, Mr Ratcliffe; I am not making any assertion about any development that Eastlake might be involved in. The problem, as you have suggested in the submission, is that someone becomes a board member of Eastlake, is as happy as Larry; then, two months later, finds out that you are going to be held liable for work that was completed eight years ago and you could be fined $320,000. That is the concern, isn't it?

Mr Shannon: Yes, absolutely. Anthony, do you want to answer that?

Mr Ratcliffe: Yes, that is certainly the advice that we received from our lawyers. We currently have a property in Kaleen that you are very familiar with. For eight years, we have been trying to go through the development process out there. We are at a point where we are about to sign an agreement. We already have an agreement with a developer. But we are purely the landowner, and the advice is that we get captured as the landowner in this, if the bill goes through in its current form.

MR PARTON: The additional fear around that provision is that this bill, in the view of ClubsACT, could inspire more action against developers.

Mr Shannon: Yes; absolutely. In fact, there is a lot of evidence, as we heard from the previous witnesses, that it has exactly the same implications for our marketplace as it does for the social housing sector.

MS ORR: We have heard from a few of the other not-for-profits that already have regulatory schemes in place at a national level—the retirement homes and aged-care living. Also, CHC talked about the requirements that they have for registers and so forth. Can you run through, with ClubsACT, whether there is anything in addition to the practices in place in the ACT building system that would apply to the developments that you do in the same or similar fashion as we have for the retirement, aged care and community housing industries?

Mr Ratcliffe: We are not property developers per se; we are purely landowners. Our land is our greatest asset, outside gaming machines. Mr Shannon has already pointed out the government's incentive to diversify away from gaming. We are all now looking at our land assets and how we can utilise and manage those to derive an income in the future—future revenue sources.

To answer the question, no, we are not in a position, and we do not have anything there yet. It may be something that we need to look at as an industry in the future. From our perspective, this came as quite a surprise. We only realised last month that this bill was being put forward. Obviously, there was quite a quick response from us when we found out about it.

Mr Shannon: Picking up on the point that Anthony just made, in most cases, because of the multi-unit developments involved in a lot of what we are talking about, with the urban infill agenda, we are not talking largely about single dwelling houses; we are often talking about multi-unit developments. In most cases, because our industry is looking at working in the affordable social housing space, we are talking largely about joint ventures with the social housing marketplace, to a great extent.

Our members do not necessarily want to be managing properties. In most cases, it is viable to have working relationships with organisations like CHC or Havelock Housing Association, as part of those developments. That crossover of the joint venture relationships gives some rigour to what you are asking about, more from the partner side of it than specifically from the club side.

MS ORR: My takeaway from your submission is that the premise was that the not-for-profit sector should not be included in regulation of the policy.

Mr Shannon: That is it, pretty much.

MS ORR: I am trying to get clear in my mind the rationale and the justification for that. I appreciate that others have come in and said, "We already have all of these other regulatory requirements on us." For you, it is a little bit different, as you have just explained, because you are holding the land, as opposed to being the developer. In a nutshell, can you say succinctly for me what the actual issue is as to why clubs should not be involved in this scheme? Is it because you are holding the land and you are not doing the development? Is it because you are not-for-profit? What are the key points, in your mind, that make you say you should be separate from this bill?

Mr Shannon: We are probably a slightly more complex and diverse marketplace than nearly all of the other providers that you have been talking to. In that sense, we are talking about the majority of the circumstances, from our industry point of view. In the majority of our circumstances, they are largely joint ventures with other organisations that do have the rigours that you are talking about in terms of their other obligations.

It is really about the not-for-profit nature of our marketplace and the fact that we are trying to achieve government objectives in a range of areas. Clubs are obviously heavily regulated, anyway. There is due diligence and a range of other things that apply to them in the conduct of their business activities. Most of the clubs that we are talking about would probably be companies limited by guarantee; that would be my estimation, from what I know of it. They are probably the larger clubs, if you think of it in that way. They have certain obligations in terms of their current liabilities as directors under that act.

I am not aware of any drivers in terms of the profit incentive in our marketplace that would make this legislation of any benefit, either for the community or otherwise. But if you are asking me whether there is any specific nature of the regulation for our marketplace, in and of itself, I would probably say: outside the normal requirements of a club board director, not that I am aware of.

MR PARTON: Gentlemen, the government talk a big talk when it comes to assisting

clubs to diversify away from poker machine revenue. They say they are doing whatever they can to make that easier for you. My question is in two parts. Firstly, do you think that the statements they make are actually backed up by what is going on in the real world? Secondly, do you believe that this bill as it stands will be a further impediment to the government's stated aim of diversifying clubs away from poker machine revenue?

Mr Ratcliffe: With our Kaleen property development, it has been a long and difficult process. We got caught up in the review of the greenfield sites that occurred, which put possibly an extra three years on that Territory Plan variation that we submitted. The actual lease variation process put an additional nearly two years on top of that, so it has been a lengthy process. Whether it is through the government's fault or that of EPSDD, I do not know, but it was certainly a long process. Yes, it definitely causes issues. It is very difficult. Probably our biggest issue was that we signed an agreement in 2022, after eight years of planning, and that could be captured in the legislation as it currently stands, and my directors are already caught, whether they like it or not.

Mr Shannon: The biggest single issue that most of our clubs have been dealing with, in terms of substantial efforts and investment to move away from poker machine revenue, has been in the property development area, as you would appreciate. I have to say, quite frankly, that it has been a nightmare, dealing with EPSDD, in terms of getting either consistent advice or quick processing.

We have now raised this with several ministers in the government and we have had in-principle support from both the Minister for Gaming, Shane Rattenbury, and Mick Gentleman, in his previous occupancy of the planning role, that there will be a planning concierge appointed to assist clubs with this processing. That still has not come into play, which is quite frustrating from our point of view.

As Anthony explained in better detail, clubs are getting incredibly frustrated, and the cost base of these development proposals over an eight-to-10-year period is incredibly difficult for clubs to manage. It is a disincentive, frankly, for them to be involved, generally speaking, in this planning space. This legislation then comes in across the top of that.

I think that the starting point to your question, Mr Parton, was in regard to diversification. There is substantial acceptance by the government that diversification is best acquitted in terms of planning and development, as far as our industry is concerned. This has been a major problem. This legislation, as it stands, in a best-case scenario, will delay any expeditious developments in terms of residential developments that the industry has been planning and working on and, in the worst-case scenario, may stop them altogether.

There is no insurance product out there to cover directors in terms of this sort of outcome. CHC covered this off particularly well. We are concerned that it might take some time before an insurance product would even become available. It may become very expensive. A club has to look at its investment opportunities on a range of fronts. It would be bad for the community if residential housing became the least viable investment opportunity for a club to get involved in.

MR PARTON: Wouldn't it?

Mr Shannon: Absolutely. As it stands, most of our members have real opportunities in terms of land development, in terms of this space. If there was a disincentive for them to be involved in the residential side of opportunities there, because of this legislation, we think it would be a disaster.

THE CHAIR: You mentioned the planning concierge.

Mr Shannon: Yes.

THE CHAIR: Have you raised that with the new planning minister, Minister Steel?

Mr Shannon: Yes. I met with Mr Steel three weeks ago, I think it was, and I certainly raised it in that discussion and said that we had a previous in-principle commitment from two other ministers to achieve this outcome. Apparently, it did exist some years ago and it really was of assistance to the industry in terms of fast-tracking processes through, and having a single point of contact to help to achieve outcomes.

The problem is that we get a lot of goodwill in terms of discussions over planning, and it is the same with the new Territory Plan process. That was quite torturous as well. The conflict between zoning and leases is still an issue for us. Unfortunately, there are no quick answers, from our side of the fence. Anthony can certainly explain the frustration better than I can.

Mr Ratcliffe: Yes, it has been a very frustrating process. To be able to phone someone within the planning department and get an answer was nearly impossible.

THE CHAIR: I am sorry to hear that. I know about the issue. I have heard the call, and I was not aware that it was still unmet. You have actually covered all of the questions I had written down. Is there something else that you think you should tell us before you leave today?

Mr Shannon: I go back to the question that Mr Parton asked. Our concern is that the legislation often seems to be drafted in terms of different silos of perspective, and not the broader holistic view of government policy which we outlined in our submission.

One of the things I would be particularly concerned about would be that the government might seek to address this issue through regulation rather than through the legislation itself. Obviously, we are talking about long-term investment decision-making that takes place, and a regulation does not necessarily have the certainty associated with it that an actual bill might have. I know there is some suggestion that regulations might address some of what we are talking about, but we actually think it needs to be in the substantive part of the legislation rather than something that could be varied at some point by a decision of a newcomer to the Assembly or otherwise.

THE CHAIR: That is an interesting point. It has not been made previously. A lot of our other witnesses thought that the problems they were highlighting could be fixed in regulation and no-one has yet raised the long-term implications of that.

Mr Shannon: I think that is still an exposure risk that we would have to deal with as an industry, if there was only a regulation giving protection.

THE CHAIR: Is that because of financing? Is that because of investment in ventures? We have a system here where we have one house; with making a regulation and changing an act, they are not the same.

Mr Shannon: That is right.

THE CHAIR: But we are often told that they are reasonably similar. You would rather see it in the act?

Mr Shannon: Yes, absolutely. I think that gives at least some certainty. It is obviously more difficult to change legislation than it is to change a regulation. A regulation might only have the certainty of being in place for the duration of the term of the Assembly, and the next Assembly might get rid of that regulation. We are talking here about long-term projects that can take eight to 10 years, as Anthony has outlined. If you do not know what the landscape of legislation will be over that period of time, again, it becomes a disincentive for a club to leave itself exposed.

THE CHAIR: You have answered our questions eloquently and well. We thank you for your time; enjoy the rest of your afternoon.

Mr Shannon: We look forward to your report.

Hearing suspended from 1.39 pm to 2 pm.

VASSAROTTI, MS REBECCA, Minister for the Environment, Parks and Land Management, Minister for Heritage, Minister for Homelessness and Housing Services, Minister for Sustainable Building and Construction
BURTON, DR ANTHONY, Senior Director, Building Reform
GREEN, MR BEN, Executive Group Manager, Planning and Urban Policy
BENNETT, MR JAMES, Executive Branch Manager, Building, Design and Projects

THE CHAIR: We welcome the Minister for Sustainable Building and Construction, Ms Rebecca Vassarotti, and officials. Thank you for joining us. Please state that you have received and read the privilege statement and that you agree to abide by the rights and responsibilities in that privilege statement.

Ms Vassarotti: Thank you very much, Ms Clay. I have received, read and agree to the terms of the privilege statement.

Dr Burton: I have received and read the privilege statement and agree to abide by it.

Mr Green: I too have read and acknowledge the privilege statement.

Mr Bennett: I have read and acknowledge the privilege statement.

THE CHAIR: Thank you. We might kick straight in. We have heard a lot of evidence from witnesses, and we have had a lot of good submissions. There was quite a lot of industry pushback. There have been calls for exemptions. There have been calls for transitions. Can you tell me why we need this scheme and why it needs to come in on the schedule that you have currently got it programmed to come in on?

Ms Vassarotti: I certainly see this as a very significant piece of reform. It is really looking at the accountability chain and looking at a group within the construction and development sector that has significant influence and is really controlling part of the development construction process, which is currently not really regulated.

Currently, we see the majority of accountability sit at the licensed builder phase. So we are working through a program of looking at the accountability chain. We have done engineers quite recently. We are looking at developers. I have announced last week that we are also looking at trade licensing. Certainly, there is very clear evidence that developers are a clear part of that accountability chain. They have significant influence in terms of how the process happens, and what we are really focused on is ensuring that we provide strong consumer protection, particularly for probably one of the biggest investments consumers will make in their entire lives.

This is about ensuring that consumers have a good understanding, when they are making that investment, about who is driving that process—that they do meet a fit and proper person test, that we have an understanding about their track record and that there is accountability, particularly when things go wrong. We know that building is a complex process. Defects will happen. But what we want to ensure is that consumers are protected when things go wrong and that there is accountability that sits with the right group who has controlled the process.

THE CHAIR: We heard two completely different views of the world from some of our witnesses. We heard from a structural engineer, a lawyer who has worked in consumer protection law in this sector and an owners corporation representative. All seemed to think that developers were intimately involved in a lot of the decisions that get made that affect the quality of the development, and all seemed to think that developers were making poor choices and putting a lot of pressure on the builders and designers and architects and various people involved in the project to drive down costs.

We then heard from the Property Council of Australia, and some others in the sector, who seemed to indicate that developers were not really involved in any of those decisions—that all of those individuals were making their own choices and that developers did not really have any control over those decisions. What have you found when you were developing this?

Ms Vassarotti: Certainly, our view is that developers have significant control and influence on the process, and they must share accountability. What we have seen are significant instances both here and in other places, particularly with developers; when it comes to accountability and when it comes to things like defects, they have participated in activities such as winding down their companies and are not fulfilling their obligations to consumers. This is what this legislation is really trying to address.

I think it is interesting to see that, contrary to belief, there has been significant engagement with stakeholders and industry on the development of this scheme. And what we have heard is industry being quite supportive of the idea of this scheme until we actually talk about the mechanism for accountability.

There is plenty of incentive in the system around property development, and there is no evidence of the fact that ensuring people who do the wrong thing are held to account means that the world is going to fall apart.

MS ORR: I will just pick up on some of the themes we have heard today and get your views on those. The bill amends three separate bits of the existing legislation, and a few people have said that is not ideal, and it would be better to have everything in one place so that it is easy to see what the requirements are. So, my question is this: why are licensing requirements not all contained within the same act? Why does it point to different legislation?

Ms Vassarotti: I might look to officials in terms of some of the technical elements of that. I think the reality is that working in this building area is complex. There is a range of things that we need to take into account, and we are looking at it from a few different angles. I might look to Mr Bennett in terms of talking through some of the technical elements and why we have chosen to do it in the way that we have.

Mr Bennett: Thank you, Minister. In drafting the legislation, that was one of our key considerations, and in working with the Parliamentary Counsel's office: how we have the most simple, easy to read and easy to use legislation. What we also were trying to do was make sure that this legislation was integrated as part of our broader building and construction industry legislation.

We know, as well, from the policy work that we have done and the role of the developer in the system, that the developer has a very broad role that touches on the off-the-plan contracts; the establishment of their business; the engagement of finance and partners; the putting out contracts for construction tenders; and taking a project to the development process. So, what we looked at really closely was how we develop legislation that is focused on property developers and how we also integrate that into the existing regulatory landscape that we have.

The main substance of this bill for property developers is contained in the Property Developers Bill, but what we have sought to do is integrate that into really key parts of the existing development process. So, the requirement to hold a license is then put into the time when you are engaging in off-the-plan contracts, when you are applying for building approval or a certificate of occupancy use under the Building Act, and then when you are applying for planning approval. Those three checkpoints are the time that the property developer's role becomes public, and they start to engage with the consumer, and we thought that was the appropriate threshold point at which the community should know who the developer is behind the development and the requirement to hold a license kicks in then. The substance of licensing and regulatory powers is in the Property Developers Bill, but we have connected into other legislation to find those existing checkpoints in the system.

MS ORR: The connection to the other legislation then, if I understand what you are saying correctly, is not creating new requirements on the property developer. It is reflecting that the license applies to what are the existing responsibilities of the property developer.

Mr Bennett: That is right. There is also other legislation, where we have existing statutory warranties—for example, that apply to builders—and we have sought to extend those to developers. So, there is an existing piece of legislation that covers that and in the least complicated way, we have added developers into that provision to make those statutory warranties also apply to developers.

MS ORR: Thanks.

MR PARTON: When the Property Council were with us, they gave an indication that the government had not provided them with any data that showed that the developer license was required. They basically gave an indication that, from their view, there was no analysis work that had been undertaken by the government as a whole on the possible economic impact of this bill. Is their assertion correct?

Ms Vassarotti: I do not believe it is correct. I think that we have been engaging with the Property Council and other parts of the industry for a number of years about—

MR PARTON: They are not disputing that. They are disputing data which, (a) says this bill is necessary and (b) leads to what economic impact there will be from the bill. I am sorry for interrupting. I will let you finish.

Ms Vassarotti: That is okay; not a problem at all. As part of the implementation there will be regulatory impact in relation to it, but we are really clear in terms of the need to regulate this part of the industry to provide consumer protection.

In terms of economic analysis, what there is clear evidence around—and I might again look to officials—is, particularly, the cost of defects for consumers. These costs are already happening, and what we know is that if we can pick up defects in the design, the costs are far smaller than when we have to rectify them after occupation, so that is part of the economic analysis.

MR PARTON: Which is not what they are talking about. They are talking about the front end, rather than the back end.

Ms Vassarotti: Yes, and that is why we will be doing the regulatory impact in terms of the cost of it. What I will say is that there is a very clear understanding across the community around the impact of poor quality buildings and the cost of rectification. I think that is really clear.

What we have got are other parts of the sector, particularly the building sector, where that accountability that is there, and the industry is thriving and operating well. But in terms of that economic analysis—Mr Bennett, if you have got things that you could contribute.

Mr Bennett: Mr Parton, the explanatory statement to the bill talks about defining the problem here: building defects and the cost of building defects nationally being in the order of $2.5 billion, and for the ACT the cost of those defects being in excess of $50 million annually.

There have been several reports around the cost of building defects, the prevalence of those and the impact of those on consumers, both at the national level and applying to the ACT. Other jurisdictions have done recent work on that. That sets the policy context of the problem that we are responding to.

We also have data and information from our Construction Occupations Registrar around defects and around the costs of those defects. We also have a lengthy history of community members writing to this minister and previous ministers about the incidence, prevalence and significance of defects in the ACT, and the financial circumstances that those people find themselves in.

There is a range of evidence and data that has helped to define the problem. As the minister said, on the regulatory impact or economic impact of the solution, we have had that at the absolute forefront of our mind. Within the planning directorate we understand the need to continue to provide housing supply but to do that in a balanced way, where the cost of that housing does not include a rectification cost at the end as well.

What we have said, and we have said this to the stakeholder groups all along, is that during the development of the regulation, which is where we will be making the final decisions on what the actual policy is that we can cost, we will do a regulatory impact analysis, and when we have got government agreement on what the final regulation is, because that is the thing that will determine what the cost of the scheme finally is.

MR PARTON: Some of those things will be impossible to analyse, won't they?

Because we will not really know who has shied away from the ACT, and you will not have data on which companies have made a decision not to invest here, for argument's sake.

In closing, I will say, and I really have to direct this to you, Minister: you say that you are focused on housing affordability, but you are off saving lizards, and you are off constructing, in this instance, the most onerous, far-reaching and complex legislation that will add layers of red tape and cost to every new dwelling. Is housing affordability actually a focus of yours? Because, if it is, I think you are going about it in a pretty odd way.

Ms Vassarotti: Thank you for the editorialisation, Mr Parton!

MR PARTON: That is all right!

Ms Vassarotti: In relation to your question, this bill is simply ensuring the homes that are built are of the appropriate quality, and if things go wrong, consumers are protected. In terms of affordability, I think that is a worthy investment and an investment that the community expects: that we ensure that we regulate part of the industry that has significant control to ensure the homes we live in actually perform to an appropriate standard. If we are suggesting that we are unable to build homes affordably without putting that check and balance in, I think that there is a really big problem.

MR PARTON: Thank you, Minister.

THE CHAIR: One figure we mentioned there, which is in the ES as well, is the figure that rectification in the ACT is costing about $50 million a year. We had a few witnesses challenging that figure. They thought it was wildly low. One of them came in and told us that he had recently been at an inspection for a $20 million rectification on a single complex, and it was going to cost $22 million to instead knock down and rebuild. He cited $20 million and $60 million lawsuits, and he thought $50 million a year in the ACT in rectification was very low.

He also suggested that perhaps nobody knows the true cost of rectification because a lot of people have an incentive to keep it quiet. If you are an owner and selling something, you may have quietly paid for rectifications, for instance, without badging it. Do you think that $50 million figure is accurate, or do you think that might be too low?

Ms Vassarotti: I might look to officials to provide an opinion in relation to that. I think one of the key issues around things such as defects and rectification is that we know that these costs are externalized, and they are actually borne by consumers primarily. It is probably not surprising that a part of the sector that actually does have the control is pushing back quite significantly on accountability and on ensuring that consumer protection is in place. We know the costs, whatever they are, are being worn by consumers further down the track. Mr Green?

Mr Green: Reflecting on the reference back in the explanatory statement, the explanatory statement makes it clear that it is an estimated cost well in excess of

$50 million. I think you are right that it is very difficult to fully contemplate the actual cost, and a lot of this is derived from national figures, where we are talking up to $2.5 billion annually.

MS ORR: I just wanted to pick up on this theme of linking housing cost and the property developer licensing, because we have heard from a number of witnesses, and I think it is fair to say witnesses who are not in favour of the scheme, that this will add a lot to housing, and they have quoted the housing crisis that is currently going on. It seems to me that there is a link being made, but I am not quite clear on the evidence as to how that is justifiable.

Minister, I really appreciate knowing that there is still a regulatory impact statement to be done. What thinking has gone on so far into minimising cost for delivery of housing but getting a regulatory scheme that is meeting the needs of the community as you have outlined and heard?

Ms Vassarotti: The issue of cost-of-living impacts is certainly something that we have engaged with very significantly because, as Mr Parton has noted, this is an issue I am particularly passionate about in relation to housing affordability. Licensing developers will protect consumers, and it will have a very minor impact on the costs of a new dwelling.

We know that this mechanism to create greater accountability makes sure that they will pick up those defects earlier. It will reduce the need to pick up much more expensive defects further down the track, because they will have the accountability, and there is an incentive to ensure that those defects are picked up as early as possible and cost as little as possible to rectify.

We have done an indication. We have been looking at what the indicative costs would be, and, as you note, we will be doing the regulatory impact assessment. We do recognise that those upfront costs will probably be passed onto consumers. We expect that this will be in the order of one to two per cent of a purchase price. Every dollar, when you make this significant a purchase is important, but that will be significantly reduced in relation to the rectification costs of a poor quality building down the track.

MR PARTON: Minister, can I just get you to repeat the start of that sentence again? I think it is really important information regarding the one to two per cent.

Ms Vassarotti: One to two per cent: that is the indicative cost. It will probably be about one to two per cent in terms of the costs. But in terms of rectification we are talking hundreds of thousands of dollars.

MS ORR: The other point that has been raised in the area of the costs is the cost for insurance and that, particularly with personal liability, insurance premiums will get to the point where the cost burden is too high for business. Has there been any thought given to the role that insurance premium costs will play in making it viable for industry?

Ms Vassarotti: Yes, certainly. Protections that companies can put in place to protect them from personal liability are things such as insurance, and latent defects insurance

is one of those mechanisms. If we look across other jurisdictions, New South Wales is probably a good example of the fact that they are going down this pathway as well. These kinds of insurance products will become more and more common within the market with more requirements around that. That will actually create more of a market. So we would expect that that would actually create the market and actually put downward pressure on costs for some of these products rather than upward pressure. But, again, Mr Bennett, I know that you have been engaging in this issue. I am not sure if there is specific additional information to provide.

Mr Bennett: Through the development of the policy and the regulatory scheme we have been engaging with insurance providers and, in particular, a latent defects insurance provider who has Australia-wide products but is primarily operating in New South Wales at the moment. Our cost estimate from them is 1.5 per cent to two per cent for latent defect insurance. That is an insurance policy that is to the benefit of consumers in that, if there is a significant structural defect, the insurance company will pay out, will rectify the problem and have the consumer no worse off, and then the insurance company will then take that forward in pursuing others who are responsible for that. That is the order of magnitude of insurance costs.

MS ORR: Mr Bennett, my understanding of insurance premiums is that the premium goes up the more claims the company has to pay out on it. So my understanding is that, if there are not defects being claimed and paid out, the premiums would be lower. Is that is how it works in this scenario?

Mr Bennett: I have talked to insurance companies on the telephone personally before, and they never tell you what goes into their assessment. But what I would say is that, with this particular product, the insurance company requires its own independent assessment process throughout the construction process. You sign up with the insurance company and you sign up to an inspection regime and, at the end of that process, if the insurance company is satisfied that it can issue you the policy because it is satisfied, through its own checks and balances during the construction process, they are happy to issue you that product. The more involvement they have and the more confidence they have, the lower the risk and the lower the insurance premium that would come from that.

MR PARTON: On that assessment of 1.5 per cent to two per cent, 1.5 per cent to two per cent of what?

Mr Bennett: Of the construction costs, yes.

MR PARTON: You have said, Minister, that you are expecting the costs to go up 1.5 per cent to two per cent. Is that just in—

Mr Bennett: We are talking different figures here.

MR PARTON: I understand.

Mr Bennett: I was talking 1.5 per cent of the construction costs for the insurance product, and we are talking about the passing on of some costs to consumers being in the order of one per cent to two per cent of the ultimate purchase price increase.

MR PARTON: So we think that the developers will essentially just wear the insurance costs?

Mr Bennett: There are different costs and benefits that go into that process. That is something that we are keen to explore and put on the table with our regulatory impact assessment that we will be doing.

Mr Green: I think the other point to make—and Mr Bennett can correct me if I am wrong—is that there is no mandatory requirement at this point to have insurance. It is an option that is made available to reduce that risk.

MS ORR: The point that I was going to, though, is that, if you have a rigorous building system and you are not having defects, arguably your premiums are going to be lower.

Ms Vassarotti: In fact, bringing the insurance assessment process into the system, increases the robustness of the system because of the system they will have in place.

THE CHAIR: We have had a case made out for exemptions. The people who are particularly making up the case include community housing providers, retirement villages and ClubsACT, and we have also heard about build-to-rent, which fits into some of those. The retirement villages made a pretty good case. They say they have never had any building defects in the ACT. They say they develop and continue to own the development and so, if there were any problems, they would wear the costs of fixing them themselves because they remain the owner of that development, and they say they are regulated. Community housing providers also told us a lot about their regulation. They sell a little bit but they often own. With the clubs, it is a bit of a more diverse field, I would say.

Apparently, in earlier versions of this legislation, non-profits were carved out of this regulatory system. Once the regulations are in place, which of those non-profits will be covered and what has lead you to that?

Ms Vassarotti: It is a really good question. The government is certainly considering the implications for community housing and aged-care providers. This process has had an evolution. When we were looking at the definitions around property developers and property development activity, there has certainly been an evolution of the thinking. When we were looking early on at the definition of property developers, we were also looking at definitions like the Electoral Act that actually do the carve-out of particular not-for-profit organisations. When thinking about this issue, we have primarily been thinking about it in terms of the property development activity and the consumer protection that is needed. We have been stepping through in terms of, "Just because there is a vulnerable consumer, do they require less protection than other people?"

It is true that the community housing sector and the retirement village sector do have existing regulatory oversight around their operations. We are taking some further engagement around ensuring that we are reducing regulatory duplications—so we are not doing something twice through this process—while making sure that consumers

are protected. You picked up on the issues for the retirement villages. One of the things that I would observe is that the ownership models for these providers are ones in which they do retain ownership. So they have a direct incentive to actual build and construct quality buildings.

THE CHAIR: And if they do that wrong they will wear the cost.

Ms Vassarotti: That is right. I think that is a really fair point. Because we know they are going to do the right thing, some of the concerns about personal liability is much less reduced because of the incentives that are in place. Recognising that directors of those entities are actually slightly different, in that they are not just driving shareholder profits, is why we think that there is a case for some further discussion, and we are working through that issue. Mr Bennett, do you have anything further?

Mr Bennett: We have met with both of those sectors to talk through those issues, and we have explored that different ownership model and business model and the incentives for those companies to build and manage anything that arises. The only point that I would add to the minister's comments is that this requirement to be licensed applies at the time they are going through the planning process and the construction process, and just making sure that we have appropriate protections in place should that entity choose to then sell that to the market. So, yes, at the time they are planning and constructing it it is a certain thing, but, if down the track they seek to sell off some of that or all of it as a private development, there is a risk of community harm that results from that. We are just exploring that issue to make sure that you cannot just call it one thing for a couple of years and then change it to something else and not be captured by the scheme. We do not want to have any sort of loopholes to getting around that community protection process, because, if it is defective and you can sell it on to people, there is a risk of community harm that results from that.

THE CHAIR: Absolutely. If you did make some changes that covered the situation of, for instance, developers who remain owners—whilst they remain owners—would you make exemptions in the regulation or would you change the act? How would you go about carving that out?

Mr Bennett: We have deliberately created heads of power in the legislation to be able to prescribe people into the scheme or prescribe people out of the scheme. So there is a regulation-making power to do that. What we would be really conscious of there is looking at those sectors where there are existing legislative registration and accountability frameworks in place, like for the community housing sector, and making sure that we appropriately reference and pick up those other regulatory schemes.

The final point on that sector is they are regulated but they are not necessarily regulated for building quality outcomes. They are regulated from a financial, consumer and vulnerable people sort of perspective, but they are not necessarily regulated for development history and building quality performance. That is where we are looking closely at whether there is anything further for our scheme to do, or whether they are appropriately regulated in other spaces already.

THE CHAIR: We have heard a lot of regulations quoted today that had nothing to do

with building quality. It is a common thing. Finally on that line, we had one objection that came from ClubsACT to a carve-out in the regulations—which was the first time I had heard this or thought about it really. They said they preferred something to be done in the act because they thought that, if it were done in regulations, it would be a disincentive for the types of long-term developments and investments that they are running. They thought that, when you are running a 10- or 20-year project, it would be much better to have it done in the act. They thought having it done in the regulations looked very uncertain and would be a disincentive. Have you come across that issue?

Mr Bennett: I think we have established the legislation to be broad in its application and then provide regulations to carve out specific areas or sectors. We have said that broadly it applies to residential business work, class 1 and class 2 buildings. That is fundamentally it, with carve-outs available.

Mr Green: I think the other comment would be that regulations are not without scrutiny processes either, and so there is that coverage.

THE CHAIR: Thank you.

MS ORR: I want to pick up on some of the commentary we have heard from other witnesses that, while they are supportive of oversight of developers, they would prefer if the ACT took a similar path to what New South Wales has done. I was interested, Minister, to hear from you as to why the ACT government has chosen to take the path of this bill and not what New South Wales is doing?

Ms Vassarotti: In the work that we have done, we are trying to align with New South Wales. There are certainly key elements in the bill that are strongly aligned with New South Wales. We do think that it is important that we have very specific accountability mechanisms for this part of the sector. This is a long-held commitment that we have made. We know that there are other jurisdictions that are looking at it—Queensland being the most obvious one. Victoria is also identifying moving in a similar direction to us. I think it is really important to align. We do see that there is real strength in the New South Wales model, but we think that it is important that we have that really strong specific accountability that gets picks up within the scheme. Mr Bennett, are you able to talk about the specifics around alignment?

Mr Bennett: Yes. Fundamentally, our scheme does two things. It has a licensing component and it has a regulatory powers component. With the regulatory powers, our scheme is aligned with the definitions and powers in the New South Wales Residential Apartment Buildings Act. So we have sought to align our regulatory powers with what New South Wales has. We do not see much difference at all, if there is any, between the regulatory framework for developers in the ACT and New South Wales. We have got the same definition of property developer and we have the same rectification type powers.

What we have done here is also add the licensing component. What we have seen with a scheme that is designed around regulatory powers and look-back powers to issue rectification orders, is that we could have a situation where we have a developer who has 10 defective developments, all with rectification orders on them, and not be

able to stop them doing the 11th development. That is where a licensing scheme plays a complementary role to say: "We have regulatory powers to issue orders on defective buildings. We also have a licensing scheme that sets minimum standards and thresholds. The government does due diligence on who can enter that scheme. We look at your capability, capacity and performance history about whether you are the right sort of person or entity to be able to undertake development activity in the ACT."

So there is a look-back power to fix things that go wrong. There is also a gate to let people in who have met minimum standards to be able to deliver those types of developments to the right standard. Without that, you could have the 11th defective building built by the same property developer. We think that that falls short of community expectations about a government's role to protect the community from that.

MS ORR: My follow up question was: why diverge from the New South Wales one? But I think you have answered that pre-emptively. Thank you.

MR PARTON: Say I am a developer and I have built an apartment complex, which I reckon is pretty schmick but some people have taken me on, and the registrar has made a decision that I am in breach and so they are coming for me. How do I challenge that?

Ms Vassarotti: I am going to run with this being a hypothetical situation and that you are not actually a developer, Mr Parton.

MR PARTON: Yes; how do I challenge that? It is one of the things that came up earlier. What is the avenue that I have to challenge it? My understanding is that I cannot go to ACAT; that I have to go to the Supreme Court. Is that correct?

Ms Vassarotti: I suppose the difficulty with hypotheticals, Mr Parton, is: what are they coming at you for? Are they coming at you to rectify your defects or have you had a finding against you in terms of your suitability in terms of being a property developer?

MR PARTON: No; I am talking about this bill. I am saying that action has been taken, through the provision of this bill, to take on a developer over defects. The question was asked earlier, and I think the Law Society spoke about it.

THE CHAIR: Was this the ACAT/Supreme Court thing?

MR PARTON: Yes.

THE CHAIR: Were they talking about licensing decisions or were they talking about defects, Mark? I think they were talking about when you want to appeal a decision for a rectification or you have to go to the Supreme Court.

MR PARTON: Yes.

THE CHAIR: Maybe we could move away from hypotheticals, because they are a bit confusing.

Ms Vassarotti: Yes.

THE CHAIR: I think it is the appeal rights specifically. Is that what we are talking about.

MR PARTON: Essentially, yes.

Mr Bennett: I would like to take us back to the start of how we get there.

MR PARTON: Yes.

Mr Bennett: That scenario only happens if there is a defective building.

MR PARTON: Yes.

Mr Bennett: We do not have to presume that every building that is built in the ACT is defective. We have a lot of buildings that are not defective. So, one, you can avoid liability and being in court if you do not build a building with defects. If you build it to the National Construction Code and meet relevant standards, you will not be in that situation.

MR PARTON: Mr Bennett, I would assume that, if the developer were contesting the case, it would not actually be fact; it would be a contested position whether the building was defective or not.

Mr Bennett: But there would be an issue that needs to be resolved and we would need to work through whether that is a defect or not.

MR PARTON: Yes.

Mr Bennett: So, one, if there is not even a problem in the first place we would not be there.

MR PARTON: Agreed.

Mr Bennett: Two, if there was a problem and that problem was fixed in the statutory warranty period or fixed on the developer's own doing, we would not be there, because the problem would be fixed. Only when we get to the point where we have a dispute or an unwilling party brought to the table is when we then end up in that situation.

For the first two years after the completion of the building, we have proposed to flip the onus of proof to say that, if the building owners issue a notice to the developer, it is up to the developer to disprove that that is a defect. We have reversed the onus of proof in that two-year period following completion, because we see in that period of time there is a power and knowledge imbalance between the developer, who has just built the building and has intimate knowledge of its workings versus the newly established group of owners and owners corporation—some who may have never had experience in being on an owners corporation before and are working through issues

with their building. So, in that short period of time, where there is a knowledge and power imbalance and while that owners corporation is being established and owners are coming together, we have reversed it for that reason. After that point in time, the homeowners will need to establish that the alleged thing is actually a defect.

MR PARTON: But, given we have that reversal in terms of the onus of proof, there must have been consideration and thought given to whether that change would potentially inspire—because developers are guilty until proven innocent—greater action taken by owners corporations against developers because they have nothing to lose.

Mr Bennett: Our view of that is that it would inspire greater initiative by the developer to fix the problem that is alleged, and we have prioritised consumer protection and the prioritisation of getting problems and defects fixed over that usual principle that the owners corporation—and one of the significant costs that owners corporations and owners incur is the cost of legal representation and obtaining experts to establish the nature of the defect. So it is not just the rectification cost; it is also the legal and expert engagement to support their case.

MR PARTON: Does that reversal of the onus of proof apply in any other jurisdiction?

Mr Bennett: So that provision came out of some advice we commissioned around what other people are doing in relation to the role of directors. There is a precedent for that coming out of New Zealand but it is a new type of provision.

MR PARTON: How new?

Mr Bennett: I think that is within the last few years in New Zealand. Am I correct in saying that? Yes.

MR PARTON: So we have some on the ground data there in terms of the effect? I am not going to ask anyone to roll it out.

Mr Bennett: I would say there is a lot of overlapping provisions in that period of time. One, the developer has a contractual warranty that they give to the home owner in selling a property, so there is a defect warranty period in the contract between the developer and the home owner. The legislation also reads in a statutory warranty for two years. That says the developer must fix any non-structural defects, and six years for structural defects. There are already these other things at play that are putting the developer on notice to fix things and giving the consumer rights. This is just flipping the onus and the burden of proving that thing for that short period of time following completion where we think there is a power imbalance there. We are trying to incentivise to get the problem fixed as quickly and as cheaply as we possibly can.

MR PARTON: That was exceptionally well explained. Thank you.

THE CHAIR: We heard from the Law Society on this and a few other points. They were a bit sad that they were not consulted earlier in the piece on this one—they usually are—and they also thought that maybe the explanatory statement could be a

bit clearer on the reversal of the onus of proof and some other issues. Do you imagine those are two issues you could take care of?

Ms Vassarotti: Certainly.

THE CHAIR: I have a new topic: licensing and particularly the evidence we heard from the MBA. The MBA were not very happy about licensing, full stop. They were also a bit confused about how the licensing would work. They seemed to think they did not know if the licensing requirements would be project by project, or annual, or once every three years, and they seemed to think that it would be very difficult for them to work out how to comply if they did not know that. Can you tell us how this industry licensing scheme works and whether the MBA should be aware of that?

Ms Vassarotti: So you are talking about the property developer licensing?

THE CHAIR: Property developer licensing, yes there was a bit of a conversation about we do not even know if you need to get a licence for an individual project, or if you do it every year, or if you do it every three years. They did not seem to have a lot of information about how that would work.

Ms Vassarotti: That is an interesting proposition given that I know that the MBA have been quite a significant stakeholder that we have been engaging with over the course of the development of this scheme. Again, I will look to Mr Bennett to go through some of the details, but certainly we are looking at licensing the entity and things such as the details of that.

THE CHAIR: So the property developer themselves would hold the licence and they would hold it for all the developments that they are running, like ordinary industry licensing schemes.

Ms Vassarotti: Yes, just a bit like building licences.

THE CHAIR: Yes, like every other—

Ms Vassarotti: Yes, which they will be well aware of.

Mr Bennett: Yes, that is correct. We have had those discussions with the industry working group that we have had, and we have shared the information that this would be a licence for the entity. We have also talked with that group about the possibility of a parent company holding a licence, and if they establish several joint ventures that are wholly owned subsidiaries of that parent company, there would only need to be one licence. We have tried to reduce the regulatory impact of that, appreciating the way that the sector operates in setting up special purpose vehicles for particular developments. So we have talked to that group about that. We have shared that information of the entity licence and the parent company licence.

Out of those conversations, we also resolved on the licence term being for a period of seven years so people would not have to come back for a licence during the construction process; so we would cover it for the whole process but also incorporating in mandatory disclosure requirements if anything changed around the

licensed entity. So we have talked with that group about that, and following feedback from that group, we have resolved that final policy position.

THE CHAIR: So you apply for a licence and then you have it for seven years, and after seven years you need to renew that licence?

Mr Bennett: That is right. What we have done is build in mandatory disclosures around certain key information; that if something changes that is relevant to your licence you need to tell the registrar about that. We thought we did not want to have to go through a whole renewal process because we appreciate that for a major development, from conception to completion is actually quite a lengthy period of time. We did not see the benefit in lots of licence renewals in that process, so we picked that longer term.

THE CHAIR: When did you have these conversations with industry?

Ms Vassarotti: It is interesting. I was going to ask your indulgence Chair, as it would be useful to give you a sense of the industry engagement and stakeholder consultation we have undertaken, particularly since probably the end of 2022.

Mr Bennett: Back in December 2022 we released a discussion paper. Prior to that, our directorate had been looking at this issue in the policy development phase, but in December 2022 we released a discussion paper which set out the range of options we were looking at. It went for public consultation between January and February 2023.

We received written submissions from a lot of the industry organisations you have had here today. We then have been involved in a process of extensive one-on-one and group engagement with the sector. That has involved, especially since August, the presentation of detailed policy proposals and what is going into the legislation. The culmination of that was sharing draft legislation with that group reflecting the policy positions we had been talking with them about over several months. So it has been a long process.

THE CHAIR: I think that covers it.

MS ORR: I wanted to pick up on the retrospective aspect of the legislation because it has formed a bit of discussion today in that it has been put to us by some people that it is retrospective and it should not be retrospective; other people have said it might not be retrospective, particularly in the context of the CO(L)A approach; so I really wanted to get a better understanding from the government as to—

Ms Vassarotti: We can clear this up. I can assure you it this is not the case, that the bill will not be retrospective. This is the general rule that legislation is not retrospective, and this bill was never intended to be retrospective. We have actually provided that information, particularly to the Property Council, but it does seem there is some continued unfounded concern.

To ensure clarity and remove any confusion in the minds of the Property Council and others, we are really happy to explore amendments to the bill that we could consider in the debate stage to make it explicit, but it was never the intention and the way that

it is written is standard to all legislation. Our legislation is not normally retrospective and that was not our intention in this bill.

MS ORR: So, if I have understood correctly, the intention is the day the bill is passed it comes into effect; that is the time it will take effect and you will have to have a licence. So you are saying it is not retrospective. Developers will not be held accountable for things that happened prior to that coming into place, is that correct?

Ms Vassarotti: No, that is right.

Mr Bennett: Yes, what we will do is commence the legislation. We will have a transition period before you need to obtain a licence, so the licensing element will have a transition period to allow people the time to understand what their requirements are to obtain the licence, prepare that information and be ready to apply. So there will be a transition period for that. On the regulatory aspects, those regulatory aspects will only apply to building work undertaken after the commencement of the bill.

MS ORR: I think that covers one aspect of retrospectivity. Another aspect too is the CO(L)A—so this is future looking. It is not retrospective but it is not timed back, if you get what I mean. I think another part of the retrospectivity discussion has been that there is a 10-year period where people can be held liable for something and that could be seen as somewhat retrospective, but I think that is the part that aligns with the CO(L)A approach. Is that correct?

Mr Bennett: Yes. So under the legislation and under CO(L)A, there are, as we said, statutory warranties which are read into the contract. So the building work has finished. That is the issuing of the certificate of occupancy and use, and then the clock starts running on some things in the legislation. So there is a two year statutory warranty for non-structural defects, six years for structural. Every building contract has those protections read into it. Then, also, the regulator has a ten year power after completion to issue an order in relation to rectification and its regulatory powers. We can call it a ten year look-back power but it is a power that covers ten years after completion that an order can be issued in relation to that building work. We would be mirroring that provision here for the property developers.

MS ORR: Just one last question on this theme. There are personal liability aspects of the scheme, and it has been raised with us that ten years down the track that person who made the decision at the time might not be there and it is a different person within a company. How do you get procedural fairness for personal liability if, say, the person who eight years or so after the completion of the building is the person made accountable for it, but they were never there when the building was completed?

Mr Bennett: Procedural fairness will need to be met in the issuing of any rectification order, so that is a fundamental principle that the regulator will need to go through in issuing any rectification order.

MS ORR: So the scenario that was put to us is: let us say Mr Parton is back in his developing company—even though we are not meant to do hypotheticals but we have had plenty of them, so I will keep going. He is back with his company. He started just

last week. There was a building that came into effect four years ago that now has a rectification order. Are you saying that there would have to be considerations as to whether he is personally liable for it, given that he was not there when the building was constructed?

Mr Bennett: Yes, I think that is a consideration for the regulator to go in and work through that.

Ms Vassarotti: Sorry, just in picking up that, I think when people take up positions in companies there is a whole lot of due diligence and there is a whole body of law in terms of taking on responsibilities in terms of companies.

MR PARTON: There is, but there would be a limit to how much you could do. Like in terms of something could come and bite you on the backside that you just had no idea about.

Ms Vassarotti: Yes, and so then I think the procedural fairness provision would kick in.

MR PARTON: We heard earlier from Mr Christopher Kerin who is a big fan of the bill. He is a big fan of the bill. But—

Ms Vassarotti: There is always a "but."

MR PARTON: But he did point out—and I thought it was a really good point—he says given the significance, scope and ambition of the bill, it is necessary that a not-insignificant bureaucracy be put in place to administer the act. He is absolutely on the money. He points to the residential building dispute scheme, and the fact that it is not functioning from where he sits. He has mentioned correspondence that he has had with you, minister. So I guess he is questioning the ability of the government to actually set up the framework to administer this.

Ms Vassarotti: I think it is a really good question in terms of the capacity of the bureaucracy to be able to respond. This is a significant reform and you would know that we are actually working through a big work program of reform in the building area, and that is why we have been working very closely with our colleagues in Access Canberra, who will be responsible for the regulatory element of that. This work has been done in very close consultation with the Construction Occupations Registrar, for instance. We are certainly working with our colleagues to ensure that when we are at the point of implementation, we have the resources, the IT systems, and other things in place, to ensure we can administer this scheme and ensure that it is really robust.

Again, I can look to officials in terms of some of the details of that, but it is a key consideration in terms of us working through the implementation elements, that we ensure it is appropriately resourced, that we have the capacity in place, that we have the IT in place to enable the scheme to—

MR PARTON: Mr Kerin's evidence included some emails he sent to you going back to April of last year. Subsequent to those emails, do we have any forward movement

on the residential building dispute scheme because I think it goes to: are you capable as a machine—and I am not saying specifically you, Minister—but are we capable as a machine of actually setting up a structure to administer this?

Ms Vassarotti: Yes. I know we have been doing some work on that scheme so I will—

Mr Bennett: Yes, we are working with Access Canberra on a range of different options to try and operationalise that and looking at the resourcing, timing and implementation of those. We will be providing some advice to the minister on those options in the coming months.

MR PARTON: Mr Bennett, what did you say just then? Is your response regarding the residential building dispute scheme or regarding the framework around this bill?

Mr Bennett: The residential building dispute scheme. We are working on options. We are looking at a range of options and we are looking at the resourcing around those options and the processes to establish those, and then we will be providing some advice to the minister on that. We are working closely with Access Canberra on that.

MR PARTON: So again, I would have to go back to you, Minister. That does not sound all that definitive and this one has been in the balance for how long? 2020?

Ms Vassarotti: Yes, I think so, I think 2020, yes. I wait for the advice from the directorate in terms of the dispute scheme.

MR PARTON: I get that.

Ms Vassarotti: I have touched on it before. We have had a really significant work program that we have been rolling out, particularly around things like registration. I think one of the opportunities that provides is that we have been working closely with Access Canberra, particularly looking at the variety of reforms we are rolling out and ensuring we can actually get economies of scale, particularly through things such as our IT systems.

MR PARTON: But what is the roadblock? Is it the IT system? Is it staff that are qualified to a level to—

Ms Vassarotti: For the dispute scheme?

MR PARTON: For the residential building dispute scheme, because I am assuming whatever roadblock is in place there would also be a roadblock in the way of establishing a bureaucracy to administer this new legislation.

Ms Vassarotti: To be fair, I think we have been managing a very busy work program, and in terms of the prioritisation, in terms of getting the big pieces of work in place so we can roll out a system, it means that we are still waiting for the advice on the disputes resolution scheme.

Mr Bennett: I think we have talked in hearings here before about the existing

protections that are in place for people through contracts, through dispute resolution schemes outside of this particular scheme. So in terms trying to prioritise the range of reforms, we have looked at what existing protections are in place and what existing processes people have in place to resolve those disputes. We have been prioritising and progressing other reforms but we are still working on that one to bring forward some options to tender it on.

MS ORR: Yes, just quickly and you are welcome to take this on notice given the time. Part 6, 47(1)—just back to the retrospective part—it says:

> This part applies to residential building work that is uncompleted or has been completed for up to 10 years, including work that was started or completed before the commencement of this part.

So I think that is the confusion around the retrospectivity. Can I just seek your assurance that that is consistent, minister, with what you said, that it will not apply? It reads to me like once the bill commences, there is a period that it will apply to prior to the bill.

Mr Bennett: I think the minister's statement is what our policy position is and we will make sure the bill reflects that.

MS ORR: So that wording might get tweaked? Is that what we are saying?

Ms Vassarotti: I think that is where we said we will explore whether or not we need some additional amendment to create complete clarity on that issue.

MS ORR: That is fine. I do not think you need to take it on notice. I think that clarifies that.

THE CHAIR: Thank you very much. Thank you for coming in today. That brings us to the end of this session. If we have any questions on notice, we will lodge them within five working days. Thank you for your time.

Short suspension.

FISCHER, MR TOM, Legal Industrial Officer, CFMEU ACT
HISCOX, MR MICHAEL, Assistant Secretary, CFMEU ACT

THE CHAIR: We welcome the CFMEU. Thank you for coming in for our final session. Could you start by confirming that you have received and read the privilege statement and that you agree to abide by the rights and responsibilities in that statement?

Mr Fischer: I have read the privilege statement and agree.

Mr Hiscox: I have also read the privilege statement and agree.

THE CHAIR: Excellent. Thank you very much. I enjoyed your submission. You have set out quite a lot of information. We have 1,100 petitioners who are calling for regulation. ACT residents want stronger regulation. We have certainly heard from a number of witnesses who think we need regulation in this field. We have also heard the contrary view from the industry quite a lot. I asked one of those industry players why they thought there was such a general public view that we needed property developer regulation if they had such a fixed view that we did not, and they seemed to think that it was because people like the Greens, or some other people, had been running stories in the news that were not true. You have been on this issue for quite some time. Do you think we genuinely do need regulation in this area?

Mr Hiscox: Yes; we definitely do. From the outset, the CFMEU has been calling for developer licensing for several years, and not in isolation. It was part of a broader campaign called Build a Better Canberra, which was mainly aimed at improving building quality across the ACT. We obviously take a very strong interest in the strength and quality of the building industry as a whole. We see developer licensing as one of the key things that could improve that. The other one is engineering registration. I think that is already in train. Another is trade licensing, and I think a study has been announced on that, and a few of the submissions go to that as well.

We have been calling for it, along with other things that we could see improving building quality. Almost everyone would acknowledge there is an issue with building quality. Even in the Property Council submission, they seem to acknowledge there is a problem. It is more that they do not agree with the solution put forward.

There is obviously a reason we have put this forward. So many people have jumped on board and agree. I wish we had the levels of persuasion that people seem to think we do—that there is no problem here and we have convinced everyone that there is. I think the reason it has been so persuasive is that so many people have either had direct experience themselves or know someone who has had a negative experience and they know it is a problem.

THE CHAIR: Thank you. You called for a few extensions to what we have here. We have a strong bill, but you thought that perhaps it could be stronger. There is trades licensing, and that has come up in a lot of submissions; an independent commissioner, and quite a lot of people have called for that, which would help us enforce this system; and whether it should cover the commercial sector at some point. Do you

think this is quite a good regulatory scheme and that perhaps it needs extension in the future?

Mr Hiscox: Yes—exactly that. The whole motivation, I guess, behind it is that, throughout the whole building industry, and, let's say, the property industry all together, so many players have different regulations, rules and legislation that they have to comply with. The ones that have almost the least structure are property developers. They are at the top of the tree and they are making the most decisions. A big focus of this legislation has ended up being about quality for consumers and people purchasing apartments, which is one of the significant issues and one that we agree with, but the issues and the decisions that developers are making go broader than just building quality; they also affect safety for people on that side. They are making decisions that are impacting that. So that obviously goes broader than just the residential market; it would also affect commercial builds, industrial builds and things like that. That is why we see that it is important that it goes further than where it is at the moment.

THE CHAIR: Awesome. Thank you. Ms Orr.

MS ORR: Picking up a little bit on that, you noted in your previous answer that the CFMEU has called for a suite of regulatory change and reforms in order to improve building quality in the ACT. We have heard from a number of witnesses today, and in submissions, that other people, who might not be what we would class as your natural allies, have said they would like to see a whole range of things change in the ACT too. But they seem to draw a bit of a line in saying that developer licensing is a bit of a step too far and we need to focus on other things. I am interested in the reasons why you formed your approach, that developer licensing needs to be included in this, as well as addressing other aspects of the industry.

Mr Hiscox: There are two different ways to attack an issue like that. Trades licensing is attacking the problem from the ground up. It is sort of saying, "We want to make sure everybody that is on building sites is appropriately skilled and has the right qualifications,' and there is a system in place that is making sure that they are held accountable to everything. There is a level of importance to that. But I think it would be a mistake to just attack things from the bottom of the food chain, given how important developers are. Especially over time—not necessarily always formally but certainly informally—the role that they have been playing in the industry is much more expansive than it was probably 20 or 30 years ago—

MS ORR: You say "the role they play". What is that role?

Mr Hiscox: They have a much more hands-on role in design choices, material choices, time frames, and even, in some cases, safety decisions. To just give one example, we would normally be in discussions with builders about how many people would be employed directly by that builder for any given site. We have been told on different occasions that developers have said, "No; you only need two or three people for that role, not four or five." Normally, you would just leave the builder to say, "You can resource the job how you like, as long as it is within certain parameters."

The submission from Advanced Structural Designs goes into those points as well—

even when it comes to things like having set-downs and things that, normally, people would say are just common sense for a good build and decisions about quality. He would be pressed by developers to say, "Let's just not worry about that." It is not something—

MS ORR: Are you saying developers are taking a more active role than they have in the past with particular decisions—decisions they previously would not have had a view on?

Mr Hiscox: Yes.

MS ORR: The point that has been put to us by a number of witnesses today representing the interests of developers has been that they would not normally be involved in those decisions. I think one of the things for the community to consider is: who is actually making the decision and where should we put more weight? What I am taking from what you are saying is that there has been a definite and noticeable shift in the role that developers are playing in decisions that actually do inform the design outcomes and the quality outcomes of buildings, and therefore licensing of the trades is not enough; it actually needs a bit more than that.

Mr Hiscox: Yes. They are definitely playing a much more active role in making—

MR PARTON: Why do you think there has been a change in the last however many years?

Mr Hiscox: Good question. I am not sure. I do not know what has driven that general process. It could be the case that some builders have been doing it long enough and they have become developers. Maybe they are taking the approach: "I think I do know how to do this, but I just do not want to have all those risks and accountability that come with being a builder." I am not sure why exactly.

Mr Fischer: There is a second reason as to why we put the scheme together in this way. I worked on some of the initial submissions towards the beginning of our efforts to campaign for something like this. We had strong regard for the New South Wales scheme, which primarily focuses on rectification. Rectification is really important. The New South Wales scheme now allows people to use a property developer as, essentially, an insurer of last resort where everything else has failed. However, the process of unscrambling the egg once you are at that point is tremendously damaging and expensive. These cases are dragging out in the New South Wales Supreme Court for half a decade or more in some cases. People who live in Opal Tower, for example, have not been fully made whole by the system yet, despite the very obvious flaws and what happened there.

One of the approaches we wanted to take was to ensure that people entering the property development industry, entering the market, are appropriate people to actually hold themselves out in that position of very, very significant trust for first home buyers; consumers of housing; people who have to rely, because they are not building experts themselves, on what they are told about the properties. By having the licensing regime in place and checking people as they enter the industry, we avoid the problem of shadow corporations, shadow directors—things that have no reality or

anything to them that can be relied on to rectify a problem when it emerges eventually. We were looking at other regulatory regimes around the country.

THE CHAIR: Mr Parton, a substantive?

MR PARTON: Yes. In your submission, you talk about the rivers of gold in the property development game and how lucrative it is, and that there is going to be a 20 per cent profit made in any of the capital cities on the eastern seaboard. Does that fly in the face of my news feed which is littered with stories of construction firms going under?

Mr Hiscox: In some ways, it definitely does. There was one story just the other day. Most of those are not developers; most of those are builders. That is one of the key problems. The 20 per cent profit is what is required from banks for them to proceed. You have to have that sort of expectation built in. The justification for that is that developers say, "We take on all the risk," but, with fixed term contracts and all those sorts of arrangements that are taking place, often the one who is actually carrying the risk is the builder or the subcontractor or workers who have not had their super paid or their redundancy paid, or something like that. They push a lot of that risk down but are still taking most of the benefit of it all. What we are hoping to achieve here is that, if you are going to have the majority of the benefit, you deserve to have at least the same amount accountability as anyone else in the supply chain.

MR PARTON: That is articulated well in the submission. What I am saying is that I can understand the CFMEU suggesting that the property developers are all making bucketloads of money, but the evidence in the day-to-day media is that maybe there is a greater risk and that the risk will be further escalated by this bill.

Mr Hiscox: I would imagine that the reason we are seeing so many construction companies going bust at the moment is that, over COVID and the period afterwards, their material prices would have skyrocketed and their developer, their client, would have said, "Too bad. You are building it for the same price. You have a contract with me, so that's how it is."

MR PARTON: You have to be either an optimist or a pessimist, but your belief is that, once we get over that speed hump, it will be a sort of back-to-normal scenario for—

Mr Hiscox: I think it will be back to normal, but I do not think the developers have suffered particularly much throughout that period. Definitely, a lot of builders and subcontractors would have had some pressure put on them, but they, for the most part, have probably done fairly well throughout that period.

MR PARTON: Good answer. Thank you.

MS ORR: I have a supplementary to that. You made the point in your answer that the risk has been pushed down to builders and to subcontractors and it is not shared by the developer. Without you explicitly saying it, what I also took from that was that the decision-making still sits with the developer. Have I understood that correctly in the environment that you were explaining?

Mr Hiscox: There are a lot of different decisions throughout the process, but the developer makes a lot of significant decisions around the time frame for what has to be built and the design of the building. The builder does not have the final say on all those sorts of things. In theory, they have the final say in the sense that they could say, "We're refusing to build it," but, more likely than not, someone else will come along who will.

MS ORR: So they are taking on the risk of delivering on decisions that they have not necessarily been able to employ.

Mr Hiscox: Yes; exactly.

MS ORR: That is what I was trying to get to. The other part I want to pick up with you on this, if I can be a little bit bold and a little bit frank, is that a few people—not necessarily including me—might say that the CFMEU just do not like developers and that is why they are doing this.

MR PARTON: Who would say that?

MS ORR: I cannot think. It might have been the last person asking a question!

MR PARTON: I never would!

MS ORR: I wanted to give you an opportunity to say something to all the people out there who would say that the only reason you are pushing this is that you do not like developers. What would you say to them?

Mr Hiscox: I am not going to say we love developers, because that is obviously not the case! The submission from Mal Wilson from Advanced Structural Designs sums up the problem incredibly well. It is not so much that these people are badly motivated or evil people or things like that—some of them might be, but that is not the key issue. The key issue is the system that is in place. It is one that does not hold them accountable at all, so they are acting in response to that. There is no accountability for decisions they make, so they make them with the idea of just maximising their profit as much as possible.

MS ORR: Thanks.

THE CHAIR: You have noted in your submission that consultation was exhaustive. We have heard from some others that consultation was not sufficient. Do you think there was enough consultation on this scheme?

Mr Hiscox: Tom was probably more involved in it than I was.

Mr Fischer: I attended nine consultation sessions, which exceeds by a factor of two or three for any other bill that I have been engaged in. It would surprise me to find out that that was not sufficient.

THE CHAIR: Interesting. There were nine over the last two years, I assume. I think

it was from 2022.

Mr Fischer: Yes. Three of them were full days and another two went for a couple of hours. There were a few that I do not think would have been for less than an hour or two. So I would say I have been consulted. Those were the same consultation sessions that all the industry stakeholders and participants were invited to for at least 3½ workdays.

THE CHAIR: Thank you for coming in and thank you for your submission. It was very concise and clear. Thank you for your time this afternoon.

Mr Hiscox: Thank you.

The committee adjourned at 3.17 pm.