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31 January 2025

Att: Building and Construction Industry Review
Consumer and Business Services
GPO Box 1719
Adelaide SA 5001

CBSReforms@sa.gov.au

Property Council – Building and Construction Industry Review

Dear Minister Michaels,

The Property Council is pleased to make a submission and appreciates the opportunity to provide feedback on the *Building and Construction Industry Review* Discussion Paper.

Given the wide-ranging nature of the review and potential ramifications the Property Council also welcomed the extension to the submission timeframe provided by the government.

The following submission focuses solely on part 3.3 **Regulation of building developers** and answers the five questions (28, 29, 30, 31 and 32) on page 41 of the Discussion Paper.

The Property Council appreciates the government's efforts to collaborate with industry and is eager to continue this dialogue once submissions have been lodged and recommendations are formed. We offer this feedback in a spirit of collaboration and thank you for your consideration of this submission.

Should there be any areas of particular interest not addressed in the submission, the Property Council would be more than willing and able to further discuss them in person. Considering the current housing crisis and industry challenges, we cannot overstate the importance of the government working in lockstep with the Property Council if there are any changes or increased regulation to be enforced on the industry.

The Property Council of Australia is the leading advocate for Australia's largest industry – property.

Consequently, our members have a direct interest in the creation and implementation of policies that have a direct impact on their profession and day to day business.

Our members lead the property sector with the largest direct economic footprint in the nation.

In South Australia the property industry is estimated to have contributed \$12.3 billion directly to the state economy in 2021-22, equating to 10.2 per cent of total GSP and providing for 11.1 per cent of total jobs.

Property Council member organisations are investors, owners, developers, builders, and managers of real estate across all major asset classes including residential, commercial, office, retirement communities, purpose-built student accommodation, industrial, hotels, social infrastructure assets and more. Property Council members shape our cities, create our communities and build the homes that Australians, so desperately need.

As a highly regulated industry, it is critical to ensure the balance between increased regulation and the acute need for housing – and further development more broadly – is found. Doing so will support the built form requirements of the South Australian community and ensure the state maintains a strong economy.

We thank the Minister and Consumer and Business Services for their consideration of this submission.

A handwritten signature in black ink, appearing to read 'Bruce Djite', with a stylized, flowing script.

Bruce Djite

SA Executive Director
Property Council

Part 3 – Licensing and Registration

3.3 Regulation of building developers

It is important for the government to recognise and respect the crucial role developers play in delivering the built form, most importantly for the everyday South Australian, especially when it comes to housing supply.

Moreover, it is worth noting that developers throughout COVID and the subsequent profitless building boom constantly and consistently stepped in to support head contractors/builders on the brink of collapse, to ensure projects were able to continue and be completed.

At a time when the state is taking several positive steps in addressing a housing crisis, it is counter-intuitive to add further red tape and regulation to the development industry. A misstep in this policy area has the potential to derail all the positive steps the Premier, other government departments and Ministers are making in addressing the housing supply crisis. Increasing regulation poses the real risk of making access to secure and affordable housing, be it owner occupied or rental stock, even more fraught. Furthermore, it risks the state's overall economic growth potential and amplifies future risks, which will come to the fore when the state government's major projects begin to ramp up in coming years.

Recent government led actions to address the housing crisis, notably the Housing Roadmap, the commitment to invest an extra \$1.5 billion in enabling infrastructure, land releases, the Greater Adelaide Regional Plan and the creation of a "Super Housing Portfolio" have been applauded by industry, as we collectively face the challenge of tackling South Australia's housing crisis. With the second lowest vacancy rate in the country any measures that further constrict supply should be avoided at all costs.

A whole-of-government unified approach, which ensures the actions of individual departments do not run counter to a higher-order policy objective of government is critical.

The Property Council does not believe increasing regulation will address a defined market failure. Indeed, the Discussion Paper provides no evidence of a systemic failure in the building developer market. There is reference in the Discussion Paper that, "In one high profile case, the failure to complete an internal access road and common infrastructure services on a community title development stopped building work and delayed consumers moving into their homes". It is the Property Council's strong belief that implementing a developer license regime would not address or prevent such an issue occurring in the future. It is also worth noting that no amount of regulation will absolutely deter the very small number of insolvencies that occur in the building developer industry, much like all businesses, which operate in democratic, free market economies.

Increasing the regulatory burden on developers would be detrimental to the core elements required to attract investment, sustain growth, and ensure certainty for many South Australians who rely on the industry to deliver jobs, homes, buildings and infrastructure.

The Discussion Paper also, does not provide a strong narrative, reasoning or evidence for the implementation of any developer licensing scheme or increased developer regulation.

Of paramount importance to industry is certainty and clarity for business continuity and delivery – currently it has never been more time consuming or expensive for our members to deliver projects.

Question 28.

Are developers not meeting their obligations in residential development projects? Please provide evidence.

The Property Council does not believe that there are widespread issues with developer behaviour within the development sector. The Discussion Paper also does not provide evidence to suggest that there is widespread misconduct that would warrant further regulation of the sector.

There are however a number of constraints to development progressing as smoothly as industry and consumers would like and this is largely due to successive governments' failing to provide adequate and timely infrastructure delivery, which would enable shovel ready development to commence, continue and be completed. The consumer is often unaware of such encumbrances on developments and where the responsibility for any such delay lies.

Infrastructure delivery is a crucial element, which positively, the current government is attempting to address and has committed to investing heavily in this area. Proper planning of infrastructure delivery is crucial for tens of thousands of projects to commence and/or be completed.

Further regulation on developers will do nothing to address the issues they face in their shovel ready projects commencing or being completed.

The Property Council membership is a collective of sophisticated developers who meet their obligations in development projects. From time to time, market failure may occur for developers, just as it occurs in all industries and businesses who operate in a free market economy. We emphasise again that increasing regulation on the sector does not remove market forces or increase solvency, but it does deter capital investment, which the industry and state more broadly needs.

Question 29.

Are consumers sufficiently aware of the different roles of developers and building work contractors, and their rights when entering into a contract with these parties?

For example, some consumers may enter a contract with a developer but not understand that physical building work will be undertaken by a separate entity with a building work contractor licence.

The Property Council is not aware of consumers not knowing of the different roles between developers and building work contractors and their rights when entering into a contract with these parties.

With so much information at the tip of the consumers fingers and the connectivity and free information available to consumers, there is no evidence the Property Council has, which suggests that this is a significant issue for consumers.

As always, consumers should seek advice from relevant professionals prior to entering into any legally binding contracts or agreements and be aware of their rights.

At times the developer and builder may well be the same entity, or the developer may own the building company carrying out the works on a specific development. The Property Council is not opposed to further disclosures being required if the government feels that this is a major and broad-based issue. However, again we reiterate that a license or ranking scheme is not required to provide such information to consumers.

Question 30.

Are there sufficient protections for consumers where a developer fails to complete essential infrastructure works (e.g., common roads, driveways and utilities connections) for a residential housing development? If not, what can the Government do to address this issue?

The Property Council is of the view that between the Planning Development and Infrastructure Act, Australian Consumer Law and the Building Work Contractors Act there are several existing protections for consumers.

Again, all parties entering a contract must take responsibility, engage and consult with a legal professional to review the terms of their contract and to consider the risks and benefits of entering into a legally binding agreement. As with appropriate due diligence, seeking advice from appropriate professionals is well understood and expected from the development industry.

The government has also, already taken steps to further ensure that consumers have a greater safety net when a developer may fail to complete essential infrastructure works with the *Highways (Works for Residential Developments) Amendment Bill (No. 224)* due to pass in the Legislative Council, prior to the completion of this review.

Whilst we have made this point earlier, there is no level of regulation, which will provide the protection in a free-market economy that will stop insolvencies from occurring from time to time. Even the best businesses can become insolvent regardless of the industry in which they operate. Developers take significant risk to deliver community outcomes and overregulating the sector will deter much needed capital and remove the much-needed entrepreneurial spirit, which has and continues to deliver so many fantastic outcomes for South Australia.

Considering the steps the government has already taken, which helps ensure the successful completion of essential infrastructure, the Property Council does not believe that further regulation or legislation is required to ensure essential infrastructure works are completed for residential housing development.

Question 31.

Is there a case for stronger regulation of building developers and, if so, what options should the government consider? For example, introducing a licensing scheme for developers or a developer rating scheme for consumers.

As already mentioned earlier in this submission, the Property Council is of the firm view that there is not a case for stronger regulation of building developers and reiterates here that a licensing scheme for developers is a counterintuitive measure on multiple fronts. Implementing such a scheme would simultaneously, overburden an industry facing several changes and challenges during a housing crisis, increase uncertainty and costs, create time lags, damage the economy, cost jobs and do nothing to address the potential concerns the government may have.

The Discussion Paper does not articulate or provide evidence of an industry wide issue, which would warrant stronger regulation of building developers. It therefore, makes it impossible to suggest any solutions to a problem, which quite frankly, is not broad enough to warrant further industry wide regulation.

A rating scheme for consumers is also not a solution and we reinforce that the Discussion Paper fails to articulate a specific industry wide problem, which would be resolved by imposing increased regulation or red tape via a ratings scheme.

Developer Licensing

Due to the lack of evidence to support the suggestion of any systemic issues, outcomes such as licensing are disproportionate to the individual “high profile” grievance raised in the Discussion Paper. As aforementioned, the industry relies on certainty, and hastily delivered reform will result in unintended consequences that will add further pressure to the market.

It is unclear how a licensing scheme would operate and what problem it would solve, particularly if it meant that anyone undertaking the activities that constitute “development” as defined in the Discussion Paper was required to be licensed. Unlike professions such as engineering, architecture and law, there is no accredited qualification or professional body administering developers.

Should a licensing scheme or framework be introduced, it would require ‘qualifications, experience and fitness to practice considerations’, which few ‘mum and dad’ developers would be able to meet. Given the lack of a broad industry wide issue being raised in the Discussion Paper, and that the majority of consumer issues, which may come across CBS’ desk would relate predominantly to small residential developments, this raises questions of how a licensing scheme could apply to all ‘developers’, and what impact that will have on the many thousands of individuals who undertake ‘development activity’ across South Australia.

The Property Council’s members – who deliver thousands of projects a year and are subject to extensive public scrutiny would likely require licensing under any scheme proposed by the government. This would create additional cost and reporting requirements while delivering no net benefit, given these sophisticated developers operate at a standard that is likely to be far higher than the baseline any new license would require. Without doubt, this would result in unnecessary regulatory burden for South Australian developers, whilst concurrently deterring critical investment from much needed private capital, which is instrumental in building South Australia’s

future. Of due consideration to government should be the cost of establishing and administering such a cumbersome scheme whilst burdening the private sector, for little measurable benefit.

The Property Council would also caution the government from replicating legislation, which has had significant negative impacts on industry and by default a negative flow on effect on the community in the respective states', where developer licensing schemes have been introduced.

Legislation with negative industry and community outcomes, such as developer licensing should be avoided at all costs.

Rating Scheme

A developer rating scheme for consumers is suggested as part of the Discussion Paper, however, it appears to be a suggestion without any detail. It is difficult to provide very meaningful feedback when the idea of a rating scheme is not further articulated. What would it look like? How would it work? What would the parameters be? Etc.

The NSW iCIRT tool – which is used as an example in the Discussion Paper – is not a rating scheme the Property Council would support. It encounters a number of issues in NSW, not least, poor participation rates. It is also important to note the significant number of developers in NSW who were rendered bankrupt during and in the subsequent few years following the COVID pandemic. The rating scheme did nothing to mitigate the inherent risk that comes with conducting business or investing in a free-market capitalist economy. South Australia had a fraction of the failures even when share of work is apportioned, and this was despite not having a developer licensing or rating scheme.

On the surface government may be seduced by a rating scheme and whilst it may appear simple at first glance, there are several complexities, issues and questions that arise, not least, how any ratings scheme could possibly be successfully and fairly implemented.

- What will be the cost of participating in the scheme?
- Will there be such high participation that the ratings have meaning?
- How will ratings be conducted transparently and without biases?
- What is the criteria, which the scheme will be filtering the rankings?
- How will smaller developers compare fairly to larger developers with greater resources?
- New market entrants/competitors will be discouraged from entering the market.

Furthermore, in the case of NSW, iCIRT was a direct response to issues with the quality and safety of several apartment buildings. No such issues currently are apparent in South Australia and more importantly, they do not appear to be likely, let alone impending.

Given development spans all property asset classes, and developers range from 'one-off' to publicly listed companies whose core business is development, it would appear to be near impossible to create industry standards, accreditation, let alone a ranking system that could accurately and fairly cover off on all potential variables.

For example, how does the government propose to rank the following four separate developers:

- Purely residential developer/builder
- Multi-purpose commercial precinct developer
- Office tower developer

- Industrial parks developer

While the Property Council has the most diverse membership and is the leading advocate for the property industry, there are multiple large and small well respected and quality industry groups representing the property industry in South Australia and nationally, along with many developers who are not members of any industry body.

Any ranking system would need to be established as an industry led, voluntary, fully funded national system, with deeper consideration given to the ramifications of implementing a meaningful scheme that remains effective across jurisdictions, asset classes and scale of development.

Question 32.

How should a residential building developer be defined? Is the definition of a developer used in this discussion paper suitable?

The Discussion Paper states that, *"a developer is defined as a person or entity that seeks approval for a building project on property that they have an interest in and arranges for construction activity to be carried out on that property for the purpose of improving its value."*

This definition takes too broad a view and is a "catch all", which would apply to everyone – from a young family looking to build their first home, anyone who seeks to renovate their property, all the way along the spectrum to a multi-billion-dollar corporation who seeks to develop master planned communities, office towers or shopping centres among other property asset classes.

The Property Council is far from satisfied with the attempt made in the Discussion Paper to define a developer. The definition is oversimplified and quite frankly, extremely concerning to industry.

Moreover, it is absolutely necessary for the government to have a practicable definition of what a developer actually is for any regulation or legislation to be considered. With respect, failure to provide a workable definition of the term, 'developer' makes it impractical at best and impossible at worst to propose any further regulation on developers. Who would the regulations apply to? How would they be implemented?

The lack of definition about who or what constitutes a developer makes it difficult to identify who the issues raised in the Discussion Paper lie with in the first place.

As mentioned previously, through capturing all development activity, those who undertake private residential works in a one-off capacity are seen through the same lens as the professionalised development industry, which may extend to a company listed on the Australian Stock Exchange, undertaking a multi-billion-dollar mixed-use development.

As highlighted in the previous pages of this submission, the Property Council's members are sophisticated professionals, operating in a highly regulated environment. Most answer to public and private boards, are long-term investors in property, have outstanding track records, and have made public commitments to operate to the highest standards.

In any commercial dealings, there will be occasions of an aggrieved party and instances where a party within that agreement defaults on an obligation. Proposed intervention as outlined in the Discussion Paper is of great concern and would limit flexibility and impede market adaptation.

The developer is generally the project owner, who sources the capital for the project and commissions it. They are also the party that appoints the head contractor or builder.

In the context of the building and construction industry, head contractors are licensed service providers who are engaged by the developer to deliver construction projects. The head contractors are the subject matter experts, who have the knowledge and expertise to design and construct a project.

Under existing South Australian law, there is a requirement that the head contractor be licensed and under such license they are responsible for ensuring that the built product meets all legal standards. It is an offence for a head contractor to not comply with the regulated requirements.

Further, head contractors are contractually obliged to meet delivery deadlines to the developer and to ensure the employees and subcontractors that they have engaged are appropriately paid. It is also incumbent on participants in the building and construction industry to report any instances or suspicions of illegal behaviour or business practices.

Developers may choose to undertake a broad variety of functions on a project, some Property Council members develop and build others simply finance the delivery of projects.

It still remains unclear what the overarching issue is that the Discussion Paper is seeking to address or indeed, if there is any systemic issue that warrants regulatory action from government at all.

Where governments in other jurisdictions have taken regulatory action there has been a clearly identified, systemic issue, such as building quality in apartments in NSW. No similar systemic issue appears to be articulated, or evidence provided within the Discussion Paper.

The Property Council prides itself on the standards upheld by its members and on working closely with government to address issues affecting the industry. However, in the absence of a clearly articulated industry-wide problem with no evidence that supports a widespread issue, it is difficult for the industry to provide additional solutions that would assist in forming its recommendations.

Indeed, the very nature of the business-to-business environment of a developer's relationship with a head contractor raises complexities in forming recommendations, as ultimately, these are commercial relationships that should be the subject of minimal interference.

Conclusion

The Property Council does not support increasing regulation on building developers and has significant concerns of the ramifications for the industry and the broader South Australian community if the government was to seek to increase regulation unnecessarily, in the absence of a clear definition for a developer and without outlining clear tangible evidence of a systemic issue within the industry.

To increase regulation would certainly limit the supply of new homes to buy or rent in South Australia, driving up prices as the state faces an affordability crisis and preventing South Australia from meeting its housing targets under the National Housing Accord – the state is already 25% behind target.

A licensing or rating scheme will without question negatively impact economic activity and jobs.

Instead of seeking to increase red tape on developers, the government should champion an industry-supported pathway to improve outcomes for consumers, and the building and development industry.

South Australia is on the cusp of fulfilling its potential, but failing to meet our housing targets, failure to deliver the industrial, employment land and office developments the state needs in coming years to play its significant role in AUKUS – will result in opportunities passing the state by.

The idea of implementing a developer licensing or rating scheme will worsen the prospect of the state reaching what are well considered, albeit lofty policy goals. Worst of all real and sustainable improvements in supply, particularly of affordable housing will be negatively impacted. At a time when South Australians face a rental and affordability crisis, along with new National Construction Code requirements, tightened tree regulations and, garage legislation – which will ensure future homes are more expensive – now is not the time to introduce investment-stifling policy that will worsen the housing supply deficit.

The Property Council does advocate for continuing education throughout the industry. Continuing Professional Development (CPD) is something the Property Council would be willing to support to ensure that all property stakeholders, whether professional or not are not just aware but well-equipped to navigate development challenges and deliver positive development outcomes for all.

The Property Council Academy delivers first class professional development to the industry, covering topics ranging from financial literacy to risk management, through to the legal framework and dispute resolution.

The Property Council is committed to ensuring the industry has access to modern, fit-for-purpose educational offerings and would welcome working with the government to ensure all developers are “qualified” and maintain their education levels over the years through CPD.

Continuing professional development has an important role to play in upholding the high standards of the industry, and the Property Council supports initiatives to promote a greater awareness and understanding of the obligations of participants across the industry.

We support the work of government and industry bodies in promoting and delivering educational initiatives to build a well-educated and informed industry.

We urge the government to consider the issues raised in this submission and work hand in glove with industry every step of the way, so that together industry, government and the community can deliver and derive positive outcomes, which will increase certainty and confidence for consumers and industry in the built form.

The Property Council is committed to continuing improvement in all elements of the property industry and increasing standards across the board. We are eager to work with government to ensure the professionalism of the industry is upheld and further strengthened.