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**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

BUILDING AND CONSTRUCTION LEGISLATION AMENDMENT BILL 2016

EXPLANATORY STATEMENT

**Presented by
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BUILDING AND CONSTRUCTION LEGISLATION AMENDMENT BILL 2016

Overview of the Bill

The Building and Construction Legislation Amendment Bill 2016 (the Bill) amends a number of laws under the policy responsibility of the Environment and Planning Directorate.

The Bill is intended to refine the operation of a range of regulations applying to construction and related work in the Territory. The Bill will also implement provisions that complement a review of the Building Act and other relevant legislation.

The Bill 2016 amends the following laws:

- *Building Act 2004*
- *Building and Construction Industry (Security of Payment) Act 2009*
- *Building (General) Regulation 2008*
- *Construction Occupations (Licensing) Act 2004*
- *Construction Occupations (Licensing) Regulation 2004*
- *Planning and Development Act 2007*

Background

There are two facets to the Bill:

- Amendments enabling the implementation of certain reforms to improve the building regulatory system;
- Other immediate changes to legislation to improve its operation and make existing obligations clearer.

As conditions change in society and the building and construction industry, it is important that the regulatory system changes with it, accommodating new and emerging practices while maintaining public protections.

The ACT Government committed to an in-depth and wide ranging review of the ACT building environment because effective building policy and regulation is fundamental to the quality and performance of our built environment.

As a result of this review, the ACT Government has already taken steps to improve building quality in the Territory. These were supported by a series of legislative reforms introduced in three Acts to amend construction legislation. In 2013–14 the Legislative Assembly passed the Construction and Energy Efficiency Legislation Amendment Acts 2013, 2014 (No 1) and 2014 (No 2).

Reforms included:

- giving the Construction Occupations Registrar (Registrar) new powers to: refuse to grant or renew a licence if it is necessary or desirable to protect the public; to request a skills assessment from a licensee or applicant to find out if they have the skills and knowledge to carry out work competently; and to improve the Registrar's ability to investigate and act on complaints and breaches of construction legislation
- major revisions to, and increased penalties for, four major offences in the Building Act 2004 and *Construction Occupations (Licensing) Act 2004* for not complying with the building code, requirements for carrying out building work and failing to comply with a rectification order
- introducing legislation for a system of continuing professional development for licensed construction practitioners through targeted training directed by the Registrar
- creating a public register of information about construction licensees to allow potential clients to more easily locate detailed information on builders and other licensees – including what a builder is licensed to build, on past regulatory actions they have been subject to, and any conditions currently restricting how the builder's licence is used.

The Environment and Planning Directorate recently consulted on proposals and options to improve the ACT building regulatory system. This Bill includes amendments in response to community and industry feedback on these proposals.

A copy of the discussion paper and consultation report can be found at:

http://www.planning.act.gov.au/topics/current_projects/act_building_regulatory_system_review/improving_the_act_building_regulatory_system_review

Building Act 2004 and Building (General) Regulation 2008

The proposed amendments to the *Building Act 2004 and Building (General) Regulation 2008* are to:

- expand the existing statutory warranties for residential buildings of three storeys and below to all private residential buildings,
- insert a section outlining the functions of a building certifier,
- revise provisions relating to stages of work and associated inspections to make obligations of builders and certifiers clearer, and insert a regulation-making power to make provisions for stage inspections, including to prescribe what must be inspected and how,
- amend certain provisions for certificates of occupancy to improve their operation and align with the certification and inspection requirements for electrical, gasfitting and plumbing work under relevant legislation,
- include powers to provide for standard conditions, prohibited conditions and information that must be provided with the contract for certain contracts involving residential building work,
- include provisions in relation to appointments of building inspectors and what a building inspector may do during an inspection consistent with those for inspectors in the Construction Occupations (Licensing) Act and its other operational Acts,
- allow for processes for building inspectors to apply for, obtain and execute a search warrant to enter premises if required,
- expand the existing power to make a code of practice for building work to include building certification work,
- allow for guidelines for building documentation to be made under the Act, and
- restrict certain exemptions from parts of the Act to buildings that meet the deemed-to-satisfy provisions of the building code, rather than allowing self-assessment of performance-based solutions.

Contracts and warranties for residential building work

Two sections of the Building Act specifically apply to contracts for buildings and building work:

- Section 25 does not allow people to contract out of their obligations in relation to approvals, commencements, stage inspections and requirements for carrying out work.
- Section 88 provides that every contract for the sale of a residential building (defined at present as a class 1 or 2 building or part of a building up to three storeys) and every contract to carry out residential building work for more than \$12,000 to which the builder is a party, is taken to contain a statutory warranty.

Most complaints about building work include a contractual component; however, this is usually in relation to work not meeting prescribed standards or not being completed when expected. Standard contracts for building work may be confusing to consumers or be unclear on the obligations of all parties and many disputes arise over a lack of awareness by one or more of the parties to the contract of their rights and obligations under the contract and relevant laws.

Statutory warranties

Part 6 – *Residential buildings—statutory warranties, insurance and fidelity certificates*, gives a warranty to residential building work on class 1 and 2 parts of buildings that are three storeys or less, excluding storeys used exclusively for parking or below ground, as well as any structural supports to the building (such as a basement car park). Work must be for a value of \$12,000 or greater.

Under the statutory warranty in the Act the builder warrants:

- that the work has been or will be carried out in accordance with the Act and the approved plans, and in a proper and skilful way
- that good and proper materials for the work have been or will be used in carrying out work
- if the contract does not specify a date for completion, the work will be carried out with reasonable promptness
- if the owner expressly makes known to the builder (or their employee or agent) a particular purpose or desired result and the owner is relying on the builder's skill and judgment to achieve it, the work and any material used in carrying out the work will achieve the result.

The existing warranty periods for residential work are two years for defects in non-structural elements of the building and six years for defects in structural elements, including weatherproofing and other components forming part of the external walls or roof of the building.

Although the warranty has traditionally covered the bulk of the residential market in the ACT, there are an increasing number of residential buildings over three storeys, including buildings that include both residential and commercial parts. Residents of medium–high-rise apartment buildings are not necessarily less vulnerable than low-rise apartment owners if their building is defective or non-compliant. Potential owners may have difficulty negotiating detailed warranty provisions in contracts.

Until recently it has been assumed there are other avenues for owners of medium–high-rise residential buildings to pursue damages for defective work and a form of implied warranty relating to building work. A recent High Court decision *Brookfield Multiplex Ltd v Owners*

Corporation Strata Plan 61288 [2014] HCA 36 1 (HCA 36) on a serviced apartment building (a class 3 residential building as classified under the Building Code of Australia) casts doubt on this assumption and could significantly affect the rights of subsequent owners of buildings to pursue damages for economic loss for latent defects. The High Court considered that if legislation did not include statutory warranties for particular buildings or owners then none could be implied.

To ensure apartment owners and their successors in title have clearly stated warranty rights, this Bill extends the existing statutory warranties to apply to all private residential buildings and their supporting structures (e.g. basement car parks that provide a structural support to the building) – (see clause 19). This would provide equal cover for all apartment owners regardless of the size of the building.

The warranty does not change the builder's obligations in relation to the standard of building work under the Building Act, as builders are already required to build in accordance with plans and specifications, meet a reasonable standard of workmanship and ensure the building is fit for occupation. Builders would also not need to provide warranty insurance for medium–high-rise buildings.

Although it is expected that contracts will be changed to incorporate the statutory warranty, the warranty is taken to be in the contract whether it is or not.

The amendments are to take effect on a date fixed by the Minister, and will apply to contracts entered into on or after the commencement.

Contracts

Other than sections 25 and 88, the Building Act does not prescribe the contents of contracts for building work or for the sale of buildings. Recent consultation canvassed the possibility of including standard contract provisions, including standard definitions of some common terms, excluding agency agreements in certain residential building work contracts and requiring information on parties' rights, obligations and statutory protections to accompany a contract for residential building work.

This Bill provides the heads of power to enact regulations to improve consistency in residential building work contracts and to provide people entering into those contracts better information on their rights and obligations.

The Bill inserts a new division 6.2 *Standard conditions* (clause 23) which provides for residential building work contracts prescribing:

¹ http://www.hcourt.gov.au/cases/case_s66-2014

- standard conditions
- the meaning of a term used in a building contract
- documents that must be attached to the contract,
- prohibited conditions.

A residential building work contract is not necessarily a contract to which the builder is a party. For some projects involving building work, such as for a sale of a dwelling off-the-plan or for some maintenance and renovations, the landowner has a contract with an intermediary who arranges for the work to be completed.

As such, under new 89B *Meaning of residential building work contract*, a residential building work contract means a contract—

- (a) to carry out residential building work, to which the builder is a party; or
- (b) for the sale of a residential building, or part of a residential building, if the contract involves carrying out residential building work; or
- (c) to arrange for someone else to carry out residential building work.

What “involves carrying out residential building work” means is further outlined as—

- (a) the contract is to purchase a residential building before, at, or after the completion of residential building work; or
- (b) the completion of the contract depends on the completion of residential building work; or
- (c) progress payments under the contract relate to the progress of residential building work.

However, as for statutory warranties and residential building insurance it is not expected that regulations would need to apply to contracts for work of a low value. Therefore, new section 89A provides for a regulation to prescribe a cost beneath which the contracting provisions would not apply.

The operative provisions for standard conditions and prescribed terms are that a person commits an offence if the person who sells the building, or is required to do or arrange building work under the contract enters in to a contract that does not include the relevant conditions of meaning of the prescribed term. The offence is a strict liability offence with a maximum of 10 penalty units. A similar offence is included for failing to attach the required documents to a contract.

Offences and human rights implications of the offences in this section are discussed in the relevant sections below.

In relation to prohibited conditions, section 89E voids any prohibited condition included in a residential building work contract. This is similar to section 25 of the Act which voids any provision in a contract that purports to contract out of Part 3 of the Act (which relates to building approvals and stages of work).

No regulations under this division are proposed in this Bill.

Role and functions of a building certifier

Although a building certifier has a range of functions under the Building Act, they do not extend to ensuring or enforcing compliance with all relevant building and construction laws or construction contracts. Discussions on building reforms have revealed that there is a great deal of confusion and uncertainty about the role of a building certifier under the Building Act, as opposed to a building inspector employed by a government body or the builder, who must supervise building work and ensure it is compliant with relevant laws.

Recent consultation on building reforms showed a high level of support from community and industry members for better outlining the role of the building certifier in the Building Act so that their role is more clearly understood and expectations in relation to their work are more closely aligned with their legislated role. This does not include other functions given to licensed building surveyors under the Building Act or other legislation, as these are not exercised as an appointed building certifier.

The Bill includes a new section 17A in Division 3.2 of the Building Act (clause 5) that outlines the functions of a building certifier as, in relation to building work or proposed building work the certifier is appointed for. It draws from all of the relevant sections in the Act to provide a summary of the certifier's functions under the Building Act. It does not give certifiers new powers and does not limit the operation of relevant provisions in the Act or provisions in other Acts that may refer to building certifiers.

Building inspectors

In a series of amendments in 2013-14, provisions outlining the activities an inspector can undertake in the COLA (Part 6), Electricity Safety Act (Part 7), Gas Safety Act (Part 6) and Water and Sewerage Act (Part 4) have been aligned for consistency across related Acts.

The Building Act includes general powers of entry and inspection but does not prescribe the kinds of activities a building inspector may undertake to determine whether building work complies with the Act.

To address this, the Bill includes provisions consistent with related laws, covering:

- powers on entry to premises, such as to take measurements, samples and photographs,
- powers to seize things
- provisions for obtaining and executing search warrants.

It also provides specific obligations on the Registrar to be satisfied any person appointed or authorised under relevant inspection powers can carry out the functions in accordance with their appointment (clauses 24, 26 and 27). A new regulation-making power in new section 128 (3), clause 24 also provides for prescribing matters the Construction Occupations Registrar must consider in relation to a person's competency to carry out building inspections.

Consistent with provisions for other inspectors, the Bill introduces an offence with a maximum penalty of 50 penalty units for not taking reasonable steps to comply with a requirement of the inspector to help with exercising the inspector's functions (clause 30).

Relevant offences and human rights implications are discussed below.

Search warrants

There are a range of powers under the Act that can be exercised by the Registrar, Deputy Registrars, certifiers and building inspectors. Despite this, in some cases access to premises to inspect building work critical to the enforcement of the Act may be prevented.

To complement existing enforcement powers, this Bill inserts standard provisions for search warrants in new Division 7.4 (clause 30).

A search warrant cannot be issued for any breach of legislation. A warrant may only be issued if there are reasonable grounds for suspecting—

- (a) there is a particular thing or activity connected with an offence against the Act;
and
- (b) the thing or activity is, or is being engaged in, at the premises, or may be, or may be engaged in, at the premises within the next 14 days.

The exercise of powers under the warrant must be in accordance with the warrant, meaning that officers cannot remove things that are not mentioned in the warrant or enter premises outside hours indicated in the warrant. Officers must also announce entry and provide details of the warrant to occupiers.

Privacy implications are discussed in the *Human Rights Implications* section below.

The new provisions do not override any order from a court or tribunal for the provision or suppression of information, freedom of information or privacy legislation.

Stages of work and stage inspections

Stage inspections are an important part of the building regulatory system. They create a hold point at critical stages in the construction where certain aspects of the building work can be inspected before further work is undertaken.

This Bill amends sections 43 and 44 of the Building Act and related sections 33 and 34 in the Building (General) Regulation to make the intention of the provisions clearer.

The Bill substitutes a new section 43 (clause 6). The most significant changes to the section are the recasting of the existing offences. The existing offence in section 43 (3) applies if a building licensee proceeds beyond a prescribed stage of work if the certifier has not been notified the stage has been reached and the certifier has inspected the work and given written permission for the work to proceed. This provision includes two distinct obligations – one to notify, and the other to ensure the certifier has given permission to proceed. This Bill creates separate offences to reflect the separate obligations.

Further, the Act provides for exemptions and conditions in relation to proceeding beyond a stage. A certifier may also allow work to proceed beyond a stage in certain circumstances. For example, a minor non-compliance in one part of the building may not prevent further work on another part of the building while non-compliant work is being fixed.

Therefore, the two new offences in clause 9 for proceeding beyond a stage apply to proceeding without authorisation (new 44(2A)), and to proceeding not in accordance with a condition of the authorisation (new 44(2B)).

Offences in sections 43 and 44 remain strict liability offences with a maximum penalty of 50 penalty units. The human rights implications and the offences are discussed further below.

A new power to make further provisions in relation to the inspection of stages of building work is also inserted by the Bill. The intention of this is to prescribe more detailed aspects of the inspection process, such as the scope, conduct and recording of the inspection in regulation (see new section 44 (1A) in clause 8). No regulations under this provision are proposed for this Bill.

Provisions in relation to proceeding beyond damp-proof course level have been relocated to the regulation with other regulations outlining specific stages of work (clause 39). The related offence is also relocated and recast to be compliant with the *Criminal Code 2002*. The elements of the offence and the maximum penalty have not changed.

Certificates of occupancy

A certificate of occupancy indicates that, in the Registrar's view, a building is fit to occupy as a stated class of building. Fitness to occupy is not further defined, but there are expectations the Registrar will only issue a certificate if the building is safe, including that the electrical, water, sanitary and gas using services do not pose a risk to occupants' health or safety.

If the building is not safe for occupants, the Registrar may refuse to issue a certificate of occupancy. If a certificate has already been issued and the building is no longer fit for occupancy, the Registrar may reverse the original decision in accordance with section 180 of the Legislation Act.

The current provisions mix the concept of compliance with the Act or approved plans with fitness to occupy or use. While it is expected that a building built in accordance with the Act will be fit to occupy, it is not a necessary condition. A building that has minor non-compliances may still be safe and useable. However, the Act does not further prescribe what is considered fit to occupy.

Therefore, the Bill recasts section 69 (1) of the Act to separate the two concepts (clause 14) and inserts a provision to allow a regulation to prescribe matters that must be considered in deciding whether a building is fit for occupation and use in new 69 (4) (clause 15).

Plumbing, electrical and gasfitting work

The Bill also relocates the existing provisions in existing section 69 (4) to the Regulation (new section 35A, clause 40). It also recasts the section to align with the differences in the work certified under other Acts and the additional requirements for electrical, plumbing and gasfitting installations that are imposed under the building code, and current practice.

The building code does not require that a person uses electrical, plumbing or gasfitting installations in a building – only that certain levels of amenity are achieved. If this can be achieved by alternative energy and sanitary systems a building can still comply with the Building Act. Not all building work includes electrical, plumbing or gasfitting work but where it does it is expected that this work has been completed safely and the occupants of a building are not in danger from unsafe installations.

The Building Act states that a certificate under the *Electricity Safety Act 1971* certifying that the electrical wiring work carried out as part of the building work complies with the relevant prescribed requirements for the building work is evidence of the fact. Similar provisions exist for plumbing and gasfitting work carried out under the Water and Sewerage Act and the Gas Safety Act.

However, in many cases the certificate issued by the practitioner who undertook the work is not sufficient for assuming compliance under the relevant Acts – there is a range of work that must pass a final Government inspection before it can be used. In addition, the assumption that compliance with electrical, plumbing and gasfitting legislation equates to compliance

with the building code is not correct. The certifications provided under these Acts certify compliance only with the relevant electrical, plumbing and gasfitting standards – they do not certify compliance with the requirements for building work.

Therefore, the certifications mentioned under existing section 69 (4) exclude any requirements for electrical, plumbing and gasfitting systems that are only mentioned in the building code, e.g. efficiency requirements for heating devices and lighting.

In practice, the Registrar does not solely rely on the self-certifications provided by electricians, plumbers and gasfitters. If a final inspection by a government inspector is required, the standard practice is to rely on a passed inspection result rather than the licensee's own certificate. This is because a number of inspections show that these systems do not initially comply with basic safety requirements and must be rectified before they are safe to use.

The new provisions now refer to the safety of the relevant systems as it relates to fitness to occupy, rather than compliance with the building code, and to the specific certifications and inspections required under relevant Acts for electrical, plumbing and gasfitting work to be completed.

Codes of practice and guidelines

Section 139B provides that the Minister may approve codes of practice for the Act, and a code of practice may set out practices, standards and other matters about building work.

The Building Act creates a system to regulate the design, construction, alteration, addition and operation (in limited circumstances) of buildings. Although the existing powers could be said to cover all of these things, rather than only the physical carrying out of the work, as they are broadly about building work, the current powers do not expressly incorporate the wider scope of activities regulated under the Act.

It is the intention for the Minister to be able to make codes of practice for builders and building certifiers and guidelines for building approval applications and design documentation that must accompany an application, considering building approval applications, conducting stage inspections, and providing certification of a building or part of a building.

Guidelines would be relevant to people other than builders and certifiers, including applicants, landowners, and people preparing building approval documentation. Therefore, guidelines, as opposed to codes of practice, may apply to parties outside the licensing system.

This Bill amends 139B (2) of the Act to the effect that a code of practice may set out practices, standards and other matters about building certification and building work (clause 32).

In clause 33, it also inserts a new power for the Minister to make guidelines that may set out standards and other matters for building approval applications and building documentation, plans and specifications. A guideline would be a disallowable instrument.

As the guideline applies to people who would not normally have access to design and drafting standards, a copy of the guideline and any instrument the guideline applies would need to be available for public inspection during ordinary office hours at the office of the Construction Occupations Registrar or another place prescribed by regulation.

Failure to comply with a guideline would not necessarily result in a sanction but could result in a refusal of an approval or failed stage inspection.

Exemptions and alternative solutions

A building or building work may be exempt from all or part of the Act. Schedule 1, Part 1.3 to the Building (General) Regulation 2004, outlines exemptions from part of the Act, including any conditions on an exemption. Exemptions in items 3, 5, 7, 15 and 16 have a condition that the work must comply with:

- (a) if there is an exempt building code—that code; and
- (b) otherwise—the building code.

These exemptions cover:

- fences with nominal height of up to 3m if masonry or concrete components (other than cement sheet products) have nominal height of not more than 1.8m
- retaining walls up to 1.5m high when measured from any point at top of retaining wall to lowest adjacent ground level
- large buildings, as defined in Schedule 1, and
- certain external alterations.

Initial policy was to develop a separate code for exempt buildings that outlined specific standards they should meet. Instead of developing an ‘exempt building code’, regulations were changed to include a condition for certain exemptions that the standard ACT building code would apply where there was no other code covering the type of exempt building.

This means exempt structures must meet the relevant performance standards in the building code. However, this does not restrict exempt buildings to prescribed building solutions (known as either deemed-to-satisfy provisions or deemed to satisfy solutions in later versions of the code) as intended but also allows performance-based alternative solutions. Because the

structures are exempt from requiring approval or certification, alternative solutions do not need to be approved or independently checked or assessed.

For very low risk structures, such as some letterboxes, or minor departures within tolerances this may be acceptable. For higher risk structures such as garages, large outbuildings and retaining walls with the potential to cause significant harm if they were to fail, it would be beneficial to restrict the conditions of the exemption to the use of only prescribed building solutions rather than self-assessed alternative solutions. That is, the condition applies only if the method of complying with the code is other than by means of an alternative solution.

Therefore, this Bill revises the conditions on the exemptions in Schedule 1, Part 1.3 column 4 of items 3, 5, 7, 15 and 16 (clause 45) to the effect that the condition applies if the work complies:

- (a) if there is an exempt building code—that code; and
- (b) otherwise—the relevant deemed-to-satisfy provisions (however described) of the building code.

The deemed-to-satisfy provisions are clearly identified in the building code, which is now available online for people who register at the Australian Building Codes Board's website <http://www.abcb.gov.au/User/Register> . There is no charge to register or access the code.

Building and Construction Industry (Security of Payment) Act 2009

The proposed amendments to the *Building and Construction Industry (Security of Payment) Act 2009* are to:

- insert a power to make a code of practice for authorised nominating authorities and include a corresponding offence for failing to comply with a code;
- make a consequential amendment to the definition of residential building work as a result of redefining the term in the Building Act.

Codes of practice

The ACT Building and Construction Industry (Security of Payment) Act (SoP Act) is largely a copy of the 1999 NSW Act of the same name. The scheme established under the SoP Act is intended to operate in the same manner as the scheme under the NSW Act for consistency between jurisdictions. The NSW scheme includes a code of practice for authorised nominating authorities (ANAs). That code was adapted for use in the ACT (the Code) and provided to nominating authorities authorised under ACT legislation.

The Code purports to be made under the SoP Act but there is no corresponding power in the Act for the Minister to make a code of practice. As part of the authorisation application ANAs give the Minister an undertaking to abide by the ANA Code of Practice and to notify the Minister of any departure from the code and the reasons for the departure; however, it is questionable whether these undertakings are enforceable under the Act.

ANAs have established processes to comply with the Code and it is incorporated into the existing administrative scheme. To align the legislation with its intent, the code should be formally made under the SoP Act. The Bill inserts a new section 37A which provides the Minister with the ability to make a code of practice for ANAs. A code of practice would be a disallowable instrument.

New section 37B in clause 47 creates an offence for contravening a code of practice applicable to the ANA with a maximum penalty of 50 penalty units. Offences are discussed further in the section *Offences and penalties* below.

The existing code will be made formally under the Act on the commencement of the provisions.

Construction Occupations (Licensing) Act and Construction Occupations (Licensing) Regulation

The proposed amendments to the *Construction Occupations (Licensing) Act 2004* (COLA) and the *Construction Occupations (Licensing) Regulation 2004* (COLR) are to:

- broaden the criteria for consideration on when to grant and when to renew a licence to improve public protections,
- provide for ongoing eligibility throughout the period a licence is held,
- amend provisions relating to nominee and related licences to improve the operation of corporation and partnership licences,
- revise the maximum periods for interim and automatic suspensions to better consider the length of time it may take for ACAT to hear an application for disciplinary action,
- revise the maximum payment that ACAT make impose in an occupational discipline order,
- include requirements to report certain financial and eligibility information to the Registrar and a related offence,
- revise provisions related to codes of practice and declarations of mandatory qualifications for consistency, and consequentially revise powers of Advisory Boards, and
- increase the maximum penalty that can be set for an offence in COLR.

Licence applications and renewals

New licences

Section 19 of the Act prescribes when a licence must be issued and when the registrar must refuse to issue a licence. The criteria for the Registrar to consider when deciding to grant was recently expanded to include some aspects of the history of the applicant or a partner or director of an applicant.

S 19 (4) currently provides that the Registrar may refuse to issue a licence for a construction occupation or occupation class to an applicant if—

- a. the applicant, a director or nominee of an applicant that is a corporation, or a partner or nominee of an applicant that is a partnership, is a licensee or former licensee (however described) under this Act or a corresponding law who—
 - (i) is prohibited from providing a construction service (however described) under this Act or a corresponding law; or
 - (ii) is subject to occupational discipline (however described) under this Act or a corresponding law; or
 - (iii) the registrar believes on reasonable grounds surrendered a licence (however described) in circumstances that related to a ground for occupational discipline (however described) under this Act or a corresponding law; and

- b. the registrar believes on reasonable grounds that the refusal is necessary or desirable to protect the public.

In many licence categories, corporations and partnerships are eligible to hold a licence. ‘Phoenixing’ is seen as a significant problem in the construction industry – directors of a corporation winding up the business to avoid their liabilities and creating a new corporation to continue operating with no disruption. While the above provisions go some way to address phoenixing of a licensee, they only take into account action directly taken against the applicant, director or partner and not any licence they may have been associated with but not personally held. In the case of many corporations none of the directors may personally hold a licence.

In addition, to prevent people with a poor compliance history from being able to obtain multiple licences, the Registrar should be able to consider the applicant’s general compliance history including whether the applicant, director, partner or associated licensee has outstanding debts or rectification orders or is contravening the Act, a licence condition, an order of the ACAT or a court. This would match more closely with the intent of section 96 of the COLA, which allows a licence refusal if an applicant has 15 demerit points within 3 years, and with the criteria for renewal in section 25 of COLA.

However, despite the possibility that a person or people associated with the person may have suspended or cancelled licences, or outstanding rectification work and debts to the Territory, the Registrar does not have clear grounds to refuse to issue the licence in circumstances where that person does not, or has not personally held a licence.

This Bill broadens the existing provisions to allow the Registrar to consider a person’s history in relation to other licenses they have been a director, partner or nominee for rather than only licenses they have personally held (see clauses 48 and 49). For example, a person who was the sole director of a corporate licensee, which has a large debt to the Territory in relation to an incomplete rectification order can’t start up another licence and continue operating while failing to comply with the requirements of the first order.

In addition, the Registrar will be able to take into account whether the applicant, a director, partner or nominees, or related licensee—

- has contravened, or is contravening, a court order or an order made by ACAT or relevant tribunal (however described) relating to a construction service, occupation or occupation class under this Act or a corresponding law, or
- has contravened, or is contravening, this Act or a condition of their licence,
- has contravened, or is contravening, a rectification order (however described) under this Act or a corresponding law, or

- has a debt owing to the Territory under section 37 (5), section 41 (5) or section 42 (3) of the Construction Occupations (Licensing) Act and does not have, or is not complying with, a formal arrangement to pay the debt.

The association is at the level of a person or people directly part of the entity (directors and partners) and those that hold specific obligations under the Act. The Registrar would still be required to believe on reasonable grounds that a refusal is necessary or desirable to protect the public. This prevents people being refused a licence for problems they were either not responsible for or were relatively minor. The decision to refuse a licence continues to be a reviewable decision.

Renewals – general

Licences are renewed in accordance with section 25, which has also recently been amended to include subsections (3) and (4). However, this also only allows consideration of the applicant and not licensees the applicant is associated with. In some cases groups to establish multiple corporations and shift operations to another licence if disciplinary or other action is taken against one licence. It is a form of “pre-phenixing”, or an insurance against effective regulation of licensee’s activities.

It also creates considerable inequity between individual and corporate/partnership licensees as an individual is assessed on any relevant action that relates to them as individuals under any of their licenses but the corporation is able to restrict any consideration to licenses the corporation and directors, partners or nominees have personally held, even where the relevant parties are associated with many licenses and may be contravening the Act or an order. It is also a common practice in commercial and large residential for the same individuals to form new corporate entities for individual projects.

This Bill also revises the provisions for renewals to allow the Construction Occupations Registrar to consider the actions of the directors, partners and nominees of the applicant regardless of whether they personally hold a licence (clauses 52-54).

The Registrar would be required to believe on reasonable grounds that a refusal is necessary or desirable to protect the public. This prevents people being refused a licence for problems they were either not responsible for or were relatively minor. The decision to refuse a licence continues to be a reviewable decision.

When renewals may not require an applicant to meet full eligibility criteria

Under s 25(2) the Registrar must renew a licence on application if satisfied that the applicant would be eligible to be licensed if the application were for a new licence of the same kind. In the vast majority of cases an applicant for a renewal will not need to meet the most recent eligibility requirements, in particular technical qualifications that may have changed over time. Although the Registrar may choose to issue a licence regardless there are times it would be helpful for the regulations to prescribe alternative criteria for renewals.

This Bill amends section 18 of the COLA to expressly provide for prescribing eligibility requirements for renewals that may be different to those for initial applications, which, if met, would require the Registrar to grant a renewal (clause 50 and 51).

Holders of, or people associated with, multiple licences

Section 20 of the Act provides the following:

20 *Multiple occupations, classes and authorisation*

- (1) A licence may authorise the licensee to provide construction services in 1 or more construction occupations and 1 or more occupation classes.
- (2) A licence authorises the licensee to provide construction services in each construction occupation or occupation class to which it relates, subject to any condition, and in accordance with any endorsement, on the licence.

As well as an entity holding multiple licences in their own right, a person may be associated with multiple licences. For example, a person may be a director in more than one licensed corporation, and every nominee must also hold an individual licence.

The Act reasonably caters for an entity that holds multiple licences, for example s 58 (2) provides that in addition to any other occupational discipline order the ACAT may make, the ACAT may, if the licensee is licensed in more than 1 occupation class—

- (a) cancel or suspend a single occupational class or each of the occupational classes;
- or
- (b) direct the registrar to place a condition on or remove or amend a condition of a single occupational class or each of the occupational classes.

Section 11 of the COLR provides for a person who has a licence suspended in another construction occupation or class of construction occupation to be ineligible for a licence in certain circumstances. Sections 97 and 98 of the Act also allow the Registrar to suspend or cancel a licence in relation to all construction occupations or occupation classes in certain circumstances on accrual of sufficient demerit points.

However, the Act does not well cater for associated licences that may belong to different corporate entities with the same directors or different licensees with common nominees, partners or directors. In some instances, action may also be taken only against some, not all, partners or directors, which should be taken into consideration when determining grounds for disciplinary action.

This Bill amends s55(1)(a) of the Act to the effect that the ground for an occupational discipline is the licensee, or a director, partner, nominee or employee of the licensee, contravened, or is contravening, this Act or an operational Act (including a direction given to the licensee under an operational Act) (clause 64). This expands the current provision, which currently only includes the licensee and employees of the licensee.

The Bill Also include a new section in Division 5.2 (clause 66) which allows that in addition to any other occupational discipline order the ACAT may make, the ACAT may, if the licensee is associated with other licences and the ACAT is satisfied because of the grounds for occupational discipline, it is appropriate—

- (a) cancel or suspend an associated licence in one or more occupational classes; or
- (b) direct the registrar to place a condition on or remove or amend a condition of an associated licence in a single occupational class or each of the occupational classes.

This complements the provisions for licence application and renewals. A related licence would take a similar meaning as for licence renewals i.e. another licence held by a director, partner or nominee of the licensee, or a licence a director, partner or nominee, is also a director, partner or nominee of. The provisions preserve all review and appeal rights afforded in relation to ACAT decision.

To ensure procedural fairness the ACAT must not make an order in relation to an associated licensee if the related licensee has been given—

- (a) notice of the application for an occupational discipline order in relation to a licensee, and
- (b) notice that the ACAT is considering making an order in relation to the related licensee; and
- (c) the opportunity to make representations to the ACAT in relation to the proposed order.

Eligibility

Adequate financial resources, COLR Section 5 – Licence applications—Act, s 17 (3)

The Act provides for a regulation to prescribe eligibility requirements and what an application must contain. Although subsection 5 (m) of the Regulation requires that evidence of adequate financial resources must be provided with an application there is no corresponding eligibility requirement. Although some level of assurance was previously required from a financial institution, current practice is to accept a statutory declaration from the applicant. However, there are no guidelines or benchmarks against which this is assessed.

As such, the Registrar need not consider an application that does not include this information, but has no clear grounds to refuse the licence based on eligibility even if a person has very little access to financial resources.

The review has highlighted the need to better outline eligibility in relation to financial resources. With the changes to section 13 (for mandatory qualifications) of the COLR proposed below, either a declaration or a regulation will be able to prescribe what financial resources a licensee must have access to for eligibility.

S 5 (i) of COLR already requires an applicant to include evidence that they are eligible to be licensed in the construction occupation or class of construction occupation applied for. This would cover any financial probity requirements. Therefore, a separate criterion in the application would not be necessary. Therefore, this Bill removes subsection 5 (m) from the Regulation (clause 79).

Ongoing eligibility

It is expected that a licensee will need to remain eligible to hold a licence throughout the period their licence is current. Any loss of eligibility should result in either an automatic suspension or some form of action to prevent the licensee from continuing to operate. For prolonged ineligibility a licence may need to be cancelled.

Although there are some relevant automatic suspension provisions in Division 5.1 and grounds for disciplinary action in section 55 of the COLA, a general loss of eligibility, which could include loss of financial resources or other criteria established in the regulations, is not provided for.

This Bill amends section s 55 (1) of the COLA to provide a new ground for occupational discipline that the licensee is, or has become, ineligible to hold a licence (clause 65).

Corporate and partnership licences and nominees

Nominees (Division 3.2, COLA and Division 4.2, COLR)

A building licensee is responsible for overall compliance with the COLA and the Building Act. However, corporations and partnerships must appoint an individual licence holder as a nominee. A nominee's role is to supervise the construction services and ensure they comply with building and licensing laws.

The Act creates equal offences for the corporate licensee and the nominee in relation to supervision of work. However, not all the responsibilities of a licensee can reasonably be given to the nominee, particularly if the nominee is an employee rather than a director or partner. In recognition of this, the nominee is not intended to be held responsible for a failure to supervise work or failure of building work to comply if the corporation or partnership does not comply with a written requirement by the nominee that it does or does not do something to achieve compliance that would have prevented the contravention.

There is also considerable confusion about the role of licensees to supervise work, with some considering licensees are not expected to be regularly onsite. This is not the intent.

This Bill amends section 28 of the COLA to provide that the corporation must have a sufficient number of nominees at all times to adequately supervise the relevant construction services (clauses 56 and 57). It also adds an example under s 19 (d) of the COLR (clause 82) highlighting that a nominee is capable of carrying out the functions of a nominee if he/she is reasonably able to attend locations where construction services they will be responsible for supervising are being carried out.

Ending of nominee appointment

Section 28 (7) of the COLA provides that a nominee of a corporation or partnership automatically stops being a nominee if they are no longer eligible or licensed in the relevant scope of work. This is taken to mean that the appointment ends and that no further approval under section 29 (Resignation of nominee) or section 30 (Revocation of nominee) is required. The corporation or partnership is only required to notify the Registrar of the change under sections 22 and 23 of the COLR. The notification may be up to two weeks after the person has ceased to be a nominee.

In some cases, the loss of a nominee will mean the licensee is no longer eligible for a licence themselves; however it may be weeks before the Registrar is aware of the circumstance and there is no corresponding automatic suspension in Division 5.1 of the Act. The process for notifying a change in director or nominee should be as soon as possible so the Registrar may take any action required in response, and where a corporation or partnership is no longer eligible to carry out a construction service this should be reflected in their licence status.

This Bill:

- Revises s 28 (7) to provide an example of how a nominee's appointment may be ended without requiring a resignation or revocation of the appointment (clause 58).
- Includes a new automatic suspension provision for a corporate or partnership licence, if the licensee has no nominee for a construction service, occupation or occupation class its licence for that construction service, occupation or occupation class is suspended (clause 61).

Interim and automatic suspensions

Automatic suspensions – length of suspension

Division 4.1 of the COLA outlines grounds for automatic suspensions. Other than for section 52A, which relies on judgement rather than a more objective fact affecting the licence such as insolvency, the provisions relating to automatic suspensions are directly related to eligibility requirements to hold a licence.

These suspensions work only insofar as the regulator is aware of the circumstances that trigger the automatic suspension – such as loss of insurance (see also Reporting and Financial Probity below). Otherwise, although the suspension exists in law, it cannot be reflected in the licence register and the period of suspension may have expired before the Registrar can take the action required under the legislation to further suspend or cancel the licence. After the end of the automatic suspension a licensee may be operating for many months without meeting basic eligibility requirements such as for insurance or solvency.

Once the maximum three month suspension period expires, there is no ability to extend a suspension. If a situation is not resolved within the maximum suspension period and the person is not technically eligible for a licence any longer they should not continue to hold a licence and potentially continue to arrange work. The Act is otherwise silent on what should occur when a person has lost their eligibility (see also Ongoing eligibility above), however subsection 55 (1)(g) provides that if the licensee's licence has been automatically suspended under division 5.1 (*Automatic licence suspension*) and the cause of the suspension still exists it is a ground for disciplinary action. An interim suspension could be placed under section 59 pending cancellation of the licence, but only if the Registrar has already made an application for occupational discipline.

This Bill provides that for automatic suspensions related to a loss of eligibility, for example loss of a nominee, insolvency, convictions of certain criminal offences, the suspension ends three months after the Registrar is notified of the suspension. If the Registrar is not notified, the suspension continues as long as the grounds for suspension exist (clause 55).

Once the Registrar is aware of the circumstances the Registrar is obliged to take an appropriate action rather than allowing the suspension to continue indefinitely. For prolonged ineligibility, the Registrar must take a formal action to have the licence suspended or cancelled.

For fairness, the new provisions will not apply to suspensions that started before the commencement of the Act (see transitional provisions in clause 77).

Interim licence suspensions

There are also circumstances where the Registrar can issue an interim suspension to a licensee. This is only permitted if the Registrar has made an application for disciplinary action to the ACAT. The period of suspension is two weeks with a maximum extension of one week. The expectation is that the Registrar will make an application to the ACAT for occupational discipline and that this will be decided within the period of the suspension. While an immediate suspension should not operate indefinitely without the Registrar having taken steps to formalise the disciplinary action, it is unlikely that the ACAT will be able to hear matters within 3 weeks less any time for lodging the application in every instance.

An interim suspension may be applied only when the Registrar believes it is in the public interest to do so and has already applied to the ACAT for occupational discipline in relation to a licensee. If a matter is serious enough to warrant an interim suspension, it could be argued that the suspension should not lapse because a hearing could not be obtained within the short period allowed by the Act. This creates a situation where the licensee can continue operating post-suspension even if the Registrar believes it is not in the public interest for them to do so.

This Bill amends subsection 59(4) of COLA, to allow that an interim suspension may be for 2 weeks or less, but may be extended until the ACAT has decided the matter if the Registrar believes that it is in the public interest to extend the suspension. This does not interfere with the licensee's right to apply to the ACAT for a stay of the suspension.

These provisions will only apply to suspensions that start on or after commencement (see transitional provisions in clause 77).

Ending of suspension

Subsection 60 (3) provides that an interim licence suspension ends when the earlier of the following happens:

- (a) the licensee receives a notice of revocation under section 61
- (b) the ACAT makes an occupational discipline order in relation to the licensee.

This Bill also makes an amendment to subsection 60 (3) to clarify when a suspension ends if neither a revocation nor an occupational discipline order is made (clause 69).

Powers of ACAT in relation to occupational discipline orders

In relation to occupational discipline, the ACAT is empowered to impose a penalty on a licensee under sections 65 and 66 *ACT Civil and Administrative Tribunal Act 2008* (ACAT Act) and regulation 4 of the *ACT Civil and Administrative Tribunal Regulations 2009*.

Regulation 4 sets the maximum penalty that may be imposed on a corporation at \$5,000 per breach and \$1,000 per breach for an individual. These limits apply across all occupational areas for which ACAT can make an occupational discipline order, unless otherwise varied.

In a case involving the failure of a certifier in relation to an approval to demolish a property affected by loose-fill asbestos, the Tribunal found against the certifier, and noting that the offence was considered to be serious, required the licensee to pay the Territory \$1000, which was the maximum amount available to it.

The Tribunal commented that it considered that the maximum fine was too low in proportion to the potential impact caused by some breaches, and that it would be useful to be able to impose a larger deterrent. It also commented that this may be an issue the ACT Government might wish to review in the future.

In the course of delivering the decision Presidential Member Bill Stefaniak noted that the current levels was not a lot of money these days and suggested “something like a maximum of \$5000 or even \$10,000 for a natural person, and multiplied by five for a corporation might be more appropriate.”

An order to make a payment under occupational discipline is intended as a disincentive. It is unlikely that practitioners whose licence gives them a relatively high earning capacity would consider the existing maximum payments as a disincentive to further contraventions of their obligations.

In other jurisdictions, higher payments can be imposed by the statutory office holder or relevant tribunal. For example, the Queensland Building and Construction Commission can impose an amount equivalent to 200 penalty units (currently \$23,560) on an individual or an amount equivalent to 1000 penalty units (currently \$117,800) on a corporation.

The NSW Building Professionals Act also allows the NSW Civil and Administrative Tribunal to fine a person an amount not exceeding 1,000 penalty units (currently equivalent to \$110,000).

The ACAT can already make decisions with significant consequences or impose other forms of payment, specifically under section 66 (2) the ACAT may:

- cancel or suspend the person’s licence or registration (66 (2) (c)),
- disqualify the person from applying for a licence, or registration, of a stated kind for a stated period or until a stated thing happens (66 (2) (f))
- if the person gained financial advantage from the action that is the ground for occupational discipline—require the person to pay to the Territory an amount assessed as the amount of financial advantage gained by the person (66 (2) (f)).

It would be useful for ACAT to have the ability to consider a larger payment when it considers appropriate, and for this amount to be commensurate with those available in relation to construction occupations in other jurisdictions. The increase does not make the power inconsistent with the other powers already exercisable by the ACAT, and therefore the current ACAT processes for decisions-making are considered appropriate. All existing appeal rights are preserved.

This Bill inserts new subsections in section 58 of the COLA (clause 66) to allow that ACAT may impose a payment in an occupational discipline order of not more than \$100,000 for a corporation and \$20,000 for an individual.

The ACAT need not avail itself of this option if it does not consider it appropriate in a particular case and can continue to rely on the existing payment options in the ACAT Regulation. The new provisions provide an alternative option for ACAT in situations it considers a higher payment is appropriate.

The ACAT cannot impose payments under both options. The new provisions require that if an order for payment is made under the COLA provisions, the ACAT must not make an order for payment under 66 (2) (h) of the ACAT Act in relation to the same occupational discipline order for the licensee.

Reporting and financial probity

A small number of automatic suspensions based on eligibility issues such as loss of insurance and insolvency are recorded by the Registrar each year. However, as the name implies, these kinds of suspensions are automatic and do not necessarily require the circumstance to be reported in a reasonable timeframe. As such, there will have been additional suspensions that were in operation but were not recorded. See above for discussion of automatic suspensions.

To make these provisions more effective as a mechanism for protecting the public, the Registrar needs to know about the circumstances on which the suspension are based as soon as possible.

COLR, Section 21 *Change of register information* requires a licensee to tell the Registrar in writing of any change in a detail relating to the licensee that is recorded in the register, including a change of insurer for licences that require insurance and details of any suspension, which is assumed to include an automatic suspension. However, Registrar may not be notified until up to 2 weeks after the day of the change or the day the licensee became aware of the change, if the licensee chooses.

This Bill inserts a new provision in the COLA that creates a requirement for a licensee to notify the Registrar within 24 hours of the event or the licensee becoming aware of any of the following circumstances (clause 55). Each of these circumstances aligns with an eligibility requirement and an automatic suspension ground.

- For an individual, the licensee becomes bankrupt or personally insolvent (which aligns with Act, section 48).
- For a corporation, the licensee enters into a winding-up (aligns with Act, section 49).
- For a partnership, a partner's licence in the same occupation or class is suspended (including automatically suspended) or cancelled, under this Act or a corresponding law (similar to Act, section 50 and grounds for refusing a licence).

- For all licensees, the licensee, or a director or partner of the licensee—
 - is found guilty, whether in the ACT or anywhere else, of an offence that—
 - involves fraud, dishonesty or violence; and
 - is punishable by imprisonment for at least 1 year (general eligibility).
- The licensee is not insured for a construction occupation or occupation class in accordance with the regulation (general eligibility).
- For a corporation or partnership, the licensee does not have a nominee for a construction service, occupation or occupation class they are licensed for (aligns with new section 50A and general eligibility requirements).

Failing to notify the Registrar is an offence with a maximum penalty of 100 penalty units. Offences are discussed in the section *Offences and penalties* below.

The Bill also amends sections 22 and 23 of the COLR (clauses 84 to 87) to require partnership and corporation licensees to tell the Registrar if a person becomes or stops being a director or a nominee that is not the sole nominee for a construction services, occupation or occupation class within one business day.

Early notification is critical to the effective operation of the licensing system and automatic suspension provisions.

Mandatory qualifications

Section 13 – Qualifications for individuals

Licensing policy is closely linked with other aspects of building and construction policy. Mandatory qualifications are one part of a licensing system that restricts the carrying out of certain activities to eligible people. The development of mandatory qualifications must take into account the purpose of licensing and the relevant scope of work to determine what is reasonably necessary to undertake the work competently and meet relevant legislated obligations. Changing the mandatory qualifications can be a result of policy changes effected by Ministers or the Assembly. Changes outside of a policy process can also have major policy implications, affecting a large number of people's ability to obtain a licence.

Although the Act requires consultation with a small subset of stakeholders in the relevant advisory board before a mandatory qualifications declaration can be made, a notifiable instrument does not require accompanying regulatory impact analysis. Given the policy implications, it is reasonable to expect these kinds of changes would be subject to broader public consultation and to regulatory impact analysis.

It is preferable there is consistency in how regulations and instruments outlining eligibility and practice requirements are made, reviewed, revised or amended. As responsibility for policy, regulations and other instruments such as codes of practice under the Building Act lies with a Minister, it is proposed a range of functions are consolidated with a single decision-maker. This also avoids the problem of the Minister having to direct a statutory office holder to make an instrument to implement reforms agreed at the Ministerial level.

Corporations and partnerships can hold a licence if they have a licensed builder to act as a 'nominee' to supervise the work and the directors or partners meet general probity requirements for solvency and dishonesty offences. There are no mandatory qualifications for directors or partners.

Building work carries high technical and financial risks and it is important that any building licensee understands and has the capacity to comply with their obligations. In many jurisdictions, the directors or partners collectively must meet the mandatory qualifications and at least one person must be able to demonstrate experience in building projects of the type the licence would authorise. The findings of the review, particularly relating to more complex projects, indicate this could also be beneficial in the ACT. In addition, there is a need to better define what is considered adequate financial resources for the purposes of holding a licence. It is proposed to expressly include financial requirements in the declaration.

This Bill transfers the power to make a declaration to the Minister and expands the scope of the instrument to include qualifications for corporation and partnership licences and financial eligibility requirements (see clause 80). A declaration must also be a disallowable instrument. The Minister may still consult with the relevant advisory board before a declaration is made.

Advisory Board functions

Section 114 of the COLA requires the Registrar to establish advisory boards for each construction occupation. Section 116 Advisory board functions provides the board with the following functions:

- (a) to advise the registrar about qualifications for the construction occupation;
- (b) to help with investigations for the construction occupation if asked by the registrar;
- (c) to help develop and maintain codes of practice for the construction occupation if asked by the registrar.

With the revisions to COLR sections 13 (mandatory qualifications) and COLA section 104A (codes of practice) there is an opportunity to better align the role of the advisory boards with the Registrar's role, while still preserving its ability to give advice on qualifications and codes of practice if requested by the Minister.

This Bill revises the functions of an advisory board to:

- (a) to provide advice about qualifications and codes of practice for the construction occupation if asked by the Minister,
- (b) to help with investigations for the construction occupation if asked by the registrar,
- (c) to help develop and maintain information about emerging issues in the construction industry related to the construction occupation if asked by the registrar.

Codes of practice

Section 104A allows the Registrar to approve a code of practice in writing for a construction occupation, a class of construction occupation, or a construction service. An approved code of practice is a notifiable instrument. There are no requirements for the consultation occupations registrar to consult with any person before a code is approved.

As for declarations of mandatory qualifications, the development of a code of practice must take into account the purpose of licensing and the relevant scope of work to determine what is reasonably necessary to undertake the work competently and meet relevant legislated obligations. Changes can have major policy implications, affecting a large number of people's ability to comply and/or continue to operate. This is particularly the case for occupations, such as building and works assessors, for which there is effectively no operational Act that outlines how work must be carried out. Everything that would normally be included in Acts or regulations for these occupations is in a code of practice.

Corresponding powers in operational Acts either require the making of a regulation or require the Minister to make the code in a disallowable instrument, which provides a higher level of scrutiny and triggers requirements for considering regulatory impact in the Legislation Act, Part 5 (see *Building Act 2004* s 139B, *Gas Safety Act*, s 65)

In keeping with the intent to consolidate powers with a single decision-maker, this Bill transfers the power to make a code of practice to the Minister and requires the instrument is disallowable (clause 74).

Failing to comply with a code of practice

Sections 87(3) and (4) include offences for failing to comply with a code of practice applicable to a person. Similarly, section 21A of the regulation applies a condition on licensees to comply with a code of practice that applies to the licensee's construction occupation or class of construction occupation, or to a construction service undertaken by the licensee.

A code applicable to a person may also be made under an operational Act, such as the Building Act. It is expected that non-compliance with codes made under those Acts will also be captured by the offence. The Bill revises sections 87 (7) of COLA (clause 71), and section 21A of COLR (clause 83) to make it clearer that the provisions apply to both codes of practice made under COLA and codes made under operational Acts.

Rectification orders

When the provisions for rectification orders were first drafted the policy intent was that the Registrar should not be obliged to definitively prove or demonstrate that the contravention occurred within 10 years of the intended date of issue of the rectification order. While a reasonable attempt at establishing when the contravention occurred is expected, the onus is on the licensee who was responsible for the relevant work or action to provide information on relevant dates to avoid licensees obscuring the date of the contravention to prevent the issue of the order. The explanatory statement for the Bill states:

“Once the registrar has given the licensee a notice under clause 34 and considered any submissions made within the time mentioned in the notice, Clause 35 enables the registrar to make an order under Clause 37. The registrar must be satisfied that the person is contravening, or has contravened, this Act or an operational Act and that it is appropriate to make a rectification order. However, the clause prevents an order from being given where the registrar is satisfied that the relevant contravention happened, or was part of something that ended, more than 10 years previously and provides an example.”

From http://www.legislation.act.gov.au/es/db_8268/current/pdf/db_8268.pdf , page 7

This is intended to suggest that if the Registrar does not know when the contravention happened, section 35 is not intended to prevent the Registrar issuing the order. That is to say the Registrar has to be satisfied as to when the contravention occurred in order for the 10-year limitation to apply. Without the Registrar’s satisfaction the contravention happened, or was part of something that ended, more than 10 years previous to giving the notice, the 10 year limit does not operate and the Registrar is not prevented from issuing the order if it is otherwise appropriate to do so.

This is why the Act does not place the requirement on the Registrar to be satisfied the contravention occurred less than ten years previously before issuing a notice of intention to issue a rectification order under section 34 but provides under section 35(3) that “the registrar may not make an order under section 38 in relation to the entity *if a submission is made that satisfies the registrar that the act that caused the contravention happened, or ended, more than 10 years before the day the registrar proposes to make the order* (italics added).

However, this is not necessarily the way the provision has been interpreted, with the alternative view that if the Registrar could not prove the date of the work a rectification order could not be issued and should be revoked on these grounds on ACAT review or appeal.

In many cases there is no statutory or other date that can be relied on to demonstrate when work is completed. To assist with interpretation and make the intent of the provisions clearer, the Bill includes new examples in clause 35 of this Bill. In particular, the examples include occurrences where the Registrar's ability to issue the order is regularly questioned. The purpose of including the examples is to assist people to understand both the Registrar's and licensee's obligations in relation to determining the completion date of work, and to provide greater clarity about how the provisions are intended to operate.

The examples are not intended to be exhaustive, given the wide variety of work that is licensed under the COLA.

Regulation-making power – maximum penalty for an offence in the Regulation

The Bill includes a provision in section 129 (3) (clause 76) that allows the Executive to make a regulation for offences that have a maximum penalty of up to 60 penalty units. The Guide for Framing Offences states that: *Where an Act authorises the creation of offences in a regulation or other subordinate legislation it should specify that these offences may carry a maximum fine not exceeding 30 penalty units.*

However, higher penalty levels exist in a number of pieces of Territory legislation including section 181 of the Unit Titles Act, section 426 of the Planning and Development Act, section 152 of the Building Act, section 66 of the Electricity Safety Act, and section 69 of the Gas Safety Act which all allow for regulations to create offences and fix maximum penalties of not more than 60 penalty units for the offences.

These Acts of covers matter of fundamental life safety, health and environment protection, The *Construction Occupations (Licensing) Act 2004* largely relates to activities regulated under these Acts.

Licensable work in the Territory tends to be the highest risk work covered by those Acts – work that, if not carried out properly, can threaten the life, safety and health of people, cause considerable damage to the environment or lead to substantial financial losses. Therefore, there is justification for a higher level of 60 penalty units.

The Assembly may disallow or amend regulations made under section 129 if it feels that the level of penalty is not appropriate to the offence. The control of the Assembly does not end once the regulation has been made. If a member of the Assembly is concerned about the penalty after the disallowance period expires, the member may present their own amending regulation for consideration by the Assembly. This provides reasonable scrutiny of the exercise of the provisions.

Planning and Development Act 2007

The proposed amendment to the *Planning and Development Act 2007* is to remove subsection 12 (1) (j) in the section prescribing the functions of the planning and land authority (clause 88).

That subsection provides that it is a function of the planning and land authority to ‘regulate the building industry’. All of the other functions in the section directly relate to planning functions under the Planning and Development Act and related instruments.

This inclusion of building regulatory functions is largely a result of certain regulatory functions under Acts such as the *Electricity Safety Act 1971* and *Gas Safety Act 2000* having previously been given to the planning and land authority, as the head of the agency responsible for a broader range of regulatory functions. These functions have now been transferred to the Construction Occupations Registrar appointed under the Construction Occupations (Licensing) Act.

While regulating development could be construed as regulating one of the main industries that undertakes development, it could not reasonably be said that it is the planning and land authority’s function to regulate the building industry.

Regulation of the building industry includes a wide range of laws. Much of the responsibility for the regulation of the industry is given to other statutory office holders, authorities and Directorates under other laws, such as the *Building Act 2004*, the *Construction Occupations (Licensing) Act 2004*, the *Building and Construction Industry (Security of Payments) Act 2009*, the *Electricity Safety Act 1971*, the *Gas Safety Act 2000*, the *Water and Sewerage Act 2000*, the *Utilities (Technical Regulation) Act 2014*, the *Architects Act 2004*, as well as those laws that apply to industry activities, such as the *Work Health and Safety Act 2011*, *Fair Trading (Australian Consumer Law) Act 1992*, *Long Service Leave Acts* and the *Building and Construction Industry Training Fund Act 2009*.

Subsection 12 (1) (c) that provides a function “to plan and regulate the development of land”, adequately covers the planning and land authority’s role to oversee and regulate relevant development activities. Removing a reference to regulating the building industry reduces the potential for confusion about the different functions different bodies have in relation to industry regulation under Territory law.

Regulatory Impact Analysis

Section 34 of the Legislation Act requires that if a proposed subordinate law is likely to impose appreciable costs on the community, or a part of the community, then, before the proposed law is made, the Minister administering the authorising law must arrange for a regulatory impact statement (RIS) to be prepared for the proposed law.

This Bill amends the *Building (General) Regulation 2008* and *Construction Occupations (Licensing) Regulation 2004*.

Section 36 of the Legislation Act provides for when the preparation of regulatory impact statement is unnecessary. A RIS for amendments to subordinate law proposed in this Bill is unnecessary because:

- the amendments to the *Building (General) Regulation*:
 - relocate existing provisions from the Act without changing the underlying obligations
 - make minor amendments to exemption criteria, which is not expected to impose an appreciable cost on a part of the community as the majority of affected work already uses the prescriptive standards to comply
 - are consequential amendments to terminology and notes as a result of changes to the Act.

- the amendments to the *Construction Occupations (Licensing) Regulation 2004* (the Regulation):
 - revise provisions regarding making instruments for eligibility requirements anticipated under the Act – no new requirements are currently proposed
 - remove a provision requiring information about financial resources as part of a licence application
 - insert notes and technical amendments
 - reduce reporting timeframes but not increase reporting requirements.

The provisions do not operate to the disadvantage of anyone by adversely affecting a person's rights or imposing liabilities on a person.

General impact of the Bill and amendments to primary legislation

The proposed expansion of the statutory warranty does not impose significant new standards for building work as the Building Act already requires work to be carried out in accordance with the Act, including that work must be carried out in a proper and skilful manner. Although it is expected that contracts for residential building work will be changed to incorporate the statutory warranty or a reference to statutory protections, the warranty is taken to be in the contract whether it is or not, allowing standard contracts to be redrafted over a period of time.

Owners of medium-rise and high-rise private residential buildings will benefit by having clear warranty rights, equal to those low-rise building owners currently enjoy.

Provisions outlining the functions of the building certifier do not give new powers to certifiers.

The proposed amendments to the *Building Act 2004* (COLA) outlining new inspection powers are not expected to impose an appreciable cost on a sector of society. Licensees operate under an existing framework that includes inspections of work and there is both an industry and community expectation that inspections will be undertaken. Inspection costs will be managed within existing resources.

Proposed changes to the provisions and offences relating to stages of work under the Building Act are not expected to impose additional costs as they do not change the underlying obligations in relation to notification and authorisation to proceed.

Changes to requirements for electrical, plumbing and gasfitting certification used for assessment of whether a building is fit to occupy are consistent with current administrative practice and are not likely to add additional time or cost to deciding a certificate of occupancy application.

New provisions to make a code of practice for nominating authorities authorised under the *Building and Construction Industry (Security of Payment) Act 2009* are not expected to impose an appreciable cost as these authorities have already aligned their practices with the existing informal code. This code will be formally made under the new provisions.

Changes to licensing powers will affect only those licensees or their associated entities with a history of non-compliance with relevant laws in the ACT or other jurisdictions. The provisions for automatic suspensions apply when a person is no longer eligible to hold a licence. Many of the new provisions in COLA apply only to licensees that have breached their obligations.

The provisions for reporting requirements in the COLA and COLR do not impose new reporting requirements, but make existing requirements explicit and reduce the reporting timeframes only.

Any new codes of practice and guidelines under the expanded powers under the Building Act and COLR and regulations made under the new provisions for residential building work contracts will require their own regulatory impact analysis.

There are no significant costs associated with the Bill and a number of provisions will provide a benefit as they improve accessibility and drafting as well as increasing statutory protections for building work.

The Government's Triple Bottom Line Assessment Framework requires an assessment of climate change impacts for government bills or for major policy proposals. A statement of effects must be included in the explanatory statement for the relevant Bill. The climate change impacts of this Bill have been considered and potential impacts are expected to be indirect but positive. Building laws include standards for new building work that are intended to reduce energy use and greenhouse emissions from the operation of buildings. Amendments to improve compliance processes may help to ensure these standards are effective.

The proposed law is consistent with the policy objectives of the regulatory framework for construction occupations licensing, building inspection, carrying out of building work, occupational discipline, security of payments, statutory protections for the construction industry already in place. This law exists to provide reasonable protections and responds to the substantial financial and safety risks to industry members, building occupants, users of building services and the general public inherent in construction work.

Scrutiny of Bills Principles

The laws in this Bill are entirely consistent with Scrutiny Committee (the Committee) principles, in that they:

- accord with the general objects of the Acts under which they are made, as discussed above;
- do not unduly trespass on rights previously established by law, as they preserve existing review rights, and reduce limitations of rights for certain parties or interfere with privacy and other human rights only insofar as is necessary for participants in a regulated industry, consumer protection and enforcement of legislation;
- do not make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions, as licensing and disciplinary decisions are subject to review or appeal; and
- do not contain matters which should properly be dealt with in an Act of the Legislative Assembly – significant powers are included in Acts and only detailed technical and administrative requirements are included in subordinate laws. The majority of amendments to regulations are to existing provisions and powers, or relocate detailed provisions for notifying stage inspections and stages of work with similar provisions in existing regulations.

This explanatory statement meets the technical and stylistic standards expected by the Committee.

Offences and penalties

The Bill recasts existing offences and includes new offences in relation to:

- Building Act, section 43 (3) for failing to notify the certifier a stage of work has been reached, a strict liability offence with a maximum penalty of 50 penalty units.
- Building Act, new sections 44 (2A) and (2B) for carrying out work beyond a prescribed stage without authorisation, or not complying with a condition of the authorisation, strict liability offences with a maximum penalty of 50 penalty units.
- Building Act, new section 89C for not including a standard condition or meaning of a prescribed term in a residential building work contract, a strict liability offence with a maximum penalty of 10 penalty units.
- Building Act, new section 89D for not attaching a required document to a residential building work contract, a strict liability offence with a maximum penalty of 10 penalty units.
- Building Act, new section 134 (4) for failing to take reasonable steps to comply with a requirement by an inspector for reasonable assistance to exercise functions carrying a maximum penalty of 50 penalty units.
- Building Act, new section 134B *Building inspectors —power to seize things* for interfering with a seized thing, or anything containing a seized thing, to which access has been restricted without approval; a strict liability offence with a maximum penalty of 50 penalty units.
- Building (General) Regulation, section 34 (1) for failing to provide relevant documents at damp-proof course stage, a strict liability offence with a maximum penalty of 50 penalty units.
- Building (General) Regulation, section 34 (2) for proceeding beyond damp-proof course level without written permission from the certifier, a strict liability offence with a maximum penalty of 50 penalty units.
- Building and Construction Industry (Security of Payment) Act, new section 37B (clause 47), *Breach of code of practice* for an authorised nominating authority contravening a code of practice with a maximum penalty of 50 penalty units.
- Construction Occupations (Licensing) Act, new section 26B, *Notification requirements for licensees* for failing to notify the Registrar of certain circumstances that would make a licensee ineligible to hold a licence with a maximum penalty of 100 penalty units.

Justification of penalties

The proposed offences and penalties are warranted for the following reasons when considering the Territory's *Guide for Framing Offences*:

1. At its highest function, the services covered by the Act are regulated to protect the public.
2. Operating whilst ineligible to hold a licence undermines the protections intended by the construction licensing system.
3. Failing to comply with a request for information or assistance, or interfering with a seized thing, is an obstruction of the investigation process and the enforcement of the relevant Acts.
4. Contravening a code of practice as an ANA, can lead to a person suffering preventable financial losses, a failure in the adjudication process and undermine the security of payments scheme.
5. Deficiencies in a contract or information on related rights and obligations under building and other laws can lead to losses and protracted disputes.
6. The consequences of not complying with procedures and technical standards for work can be high and include serious injury or death to workers, building occupants and members of the public.
7. The penalties reflect the relative seriousness of the particular offences within the legislative scheme and the level of responsibility carried by the people falling within the obligation.

The penalties for offences are commensurate with like provisions in related Acts.

- The penalties from the revised offences in relation to stages of work and inspections are 50 penalty units, which matches the level of the existing offence from which the new offences are derived.
- The penalties of 10 penalty units for failing to provide a required document as part of a contract for residential building work, or to include standard conditions or meaning of prescribed term, are consistent with the penalty for failing to provide a required document under the *Civil Law (Sale of Residential Property) Act 2003* s10.
- The penalties of 50 penalty units for not taking reasonable steps to comply with a requirement of the inspector to help with exercising the inspector's functions, and for interfering with seized things are consistent with existing provisions for compliance auditors and inspectors in similar Acts, including the Electricity Safety Act, the Gas Safety Act, the Water and Sewerage Act and COLA.
- The penalty for an ANA contravening is set at the same level as licensee failing to comply with a code of practice under the Construction Occupations (Licensing) Act.
- The financial penalty for failing to notify the Registrar of circumstances that make the licensee ineligible to hold a licence are set at the same level for a auditor or actuary failing to notify of insolvency or a contravention of requirements covering fidelity funds but does not include the imprisonment component of the penalty.

The amendments in the Bill are intended to improve the operation of construction legislation and give the regulator sufficient options to effectively administer the relevant Acts.

Standard defences available in the *Criminal Code 2002* would apply to these offences. The existing offence in relation to proceeding beyond damp-proof course level is relocated and recast to be compliant with the *Criminal Code 2002*. The elements of the offence and the maximum penalty have not changed.

Human Rights Implications

This Bill limits the right to privacy and the right to presumption of innocence. These limitations are addressed below.

Privacy

Section 12 of the Human Rights Act states that:

Everyone has the right—

- (a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily.

The following provisions of the bill may engage the right to privacy:

- Building Act
 - Clause 30, New section 134A – which create a new powers in relation to inspecting building work, which allows for taking photographs, films, audio, video or other recordings of building work including in residential buildings.
 - Clause 30, New sections 134B to 134E – which provides for powers to seize things.
 - Clause 30, Division 7.4 – which provides for applying for, obtaining and executing a search warrant.

Importance and purpose of limitation

Actions under the Building Act are regulated primarily because of their capacity to impact on the consumer protections, safety, health and amenity of the occupants and users of buildings.

The work regulated under the Building Act involves work at premises and can include physical assessment of properties, land or structures. Inspections are carried out to verify work against the standards put in place for public protection. This may require more than a visual inspection.

Search warrant powers are included to cater for times when access to something, or verification of an activity, at premises is critical to the operation and enforcement of the Building Act but cannot be obtained using standard inspection or information gathering powers.

Nature and extent of the limitation

The extent to which privacy is limited and whether such interference is permissible depends on the context and whether there is an expectation of privacy.

In relation to building work in progress there is a reasonable expectation that work may be subject to inspection. It should be noted that in many instances, it will be the occupant or landowner that requests an investigation or lodges a complaint about work and so may invite an inspection. A search warrant can be issued only by a magistrate and cannot be issued for any breach of legislation. A warrant may only be issued if there are reasonable grounds for suspecting—

- (a) there is a particular thing or activity connected with an offence against the Act;
and
- (b) the thing or activity is, or is being engaged in, at the premises, or may be, or may be engaged in, at the premises within the next 14 days.

The exercise of powers under the warrant must be in accordance with the warrant, meaning that officers cannot remove things that are not mentioned in the warrant or enter premises outside hours indicated in the warrant. Officers must also announce entry and provide details of the warrant to occupiers.

A thing may only be seized if the inspector has reasonable grounds for suspecting the thing is connected with an offence against the Act and the seizure is necessary to prevent the thing being concealed, lost or destroyed, or used to commit, continue or repeat the offence.

The provisions relating to providing information to an inspector preserve common law protections such as client legal privilege and the right not to self-incriminate.

In addition, any private information accessed or collected in the course of an inspection or search must be managed in accordance with any direction from a court or tribunal for the provision or suppression of information, freedom of information or privacy legislation.

Building owners have a clear understanding that building is, and has long been, a regulated industry to protect the public. The provisions apply in connection with a building approval obtained by the landowner or building work or buildings that may be unlawfully constructed or pose a risk to the safety of occupants or the public. The interference is reasonable in this context.

Section 12 of the Human Rights Act includes a qualifier that privacy is not to be interfered with ‘unlawfully or arbitrarily’. The impacts on privacy in this instance are not arbitrary as the bill clearly defines the manner in which an inspector may conduct an inspection, seize a thing or obtain and execute a search warrant. The impact is necessary to administer the legislation.

Relationship between the limitation and its purpose

The inspection powers and search warrant powers are in place to enforce legislation. Work carried out, and information provided, by builders and building certifiers is relied on by building owners to make informed choices, for example about purchase of residential premises, and by the Government to determine if a certificate of occupancy can be issued or if disciplinary action is necessary for a licensee. Non-compliance can have significant financial and safety impacts and inspections help to prevent unintentional or intentional non-compliance with the law. In addition, offences against the Building Act can involve matters of life safety, health and amenity of workers, the public and the eventual occupants and users of buildings and other structures.

This Bill does not give additional rights of entry to building inspectors and places greater rigour in the decision-making requirements in relation to authorising a person to enter premises where there is no building approval.

The construction industry is regulated primarily because of the capacity of construction work to impact the life safety, health and amenity of workers, the public and the eventual occupants and users of buildings and other structures. Regulation of the industry is in response to the high risks associated with the work.

Any less restrictive means available to achieve the purpose

There are no other, less restrictive ways to achieve the required purpose.

The inspections powers outlined in the Act represent the minim necessary activities that are reasonably required to determine compliance with the Act. They do not create excessive powers and are consistent with powers in a range of Territory Acts.

Search warrants are the only feasible legal method of accessing premises if other methods of obtaining evidence of the commission of an offence are not available or would otherwise compromise the exercise of functions under the Building Act.

Presumption of innocence

The strict liability provisions in clauses 6, 9 (offences in section 9 (applied as strict liability by the amendment in clause 10), 23, 30 and 39 of the Bill may engage the right to the presumption of innocence. This limitation is addressed below. Section 22 (1) of the Human Rights Act (HRA) states that everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.

Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society. In effect, s 28 requires that any limitation or restriction of rights must pursue a legitimate objective and there must be a reasonable relationship of proportionality between the means employed and the objective sought to be realised.

To facilitate consistency with the HRA, strict liability offences only impose an evidential burden on the defendant. Strict liability offences do not lead to a reversal in the onus of proof. Such offences require the prosecution to prove the elements of the offence beyond reasonable doubt. It is then open to a defendant to raise defences and to bear an evidential burden only as to their existence. An evidential burden means that a defendant need only point to evidence that suggests a reasonable possibility that the matter in question exists. It is lower than a legal burden and is less of a limitation on the presumption of innocence. The prosecution must then disprove the existence of any defence beyond reasonable doubt. Furthermore, if strict liability applies, the defence of mistake of fact and other defences under the Criminal Code may be available.

Importance and purpose of limitation

The construction industry is regulated primarily because of the capacity of construction work to impact on the life safety, health and amenity of workers, the public and the eventual occupants and users of buildings and other structures. Regulation of the industry is in response to the risks associated with the work. Stage inspections apply only in relation to certain work and certain stages of work that carry a high risk to the overall fitness of the building to occupy and cannot be easily fixed once work proceeds beyond these stages.

A licensee takes on certain responsibilities in relation to licensable work, including complying with the Building Act where relevant. Construction occupations licences can be held by corporations, partnerships and individuals.

Residential building work contracts are the foundation of the relationship between a landowner and a provider of building work. The investment in work on a dwelling or part of a dwelling is often a substantial investment and problems and disputes in relation to defective or incomplete work have particular significance when they relate to a person's home. People relying on builders and intermediaries to complete or arrange work are often in a position where they have limited understanding of industry practices and their legal rights and obligations.

The offences are important and contribute to the need to maintain the integrity of the regulatory scheme and uphold regulatory powers to seek compliance.

Nature and extent of the limitation

The extent to which the presumption of innocence is limited and whether such interference is permissible depends on the context for any limitation. The offences for interfering with a seized thing, and in relation to residential building work contracts, apply to any person. All other strict liability offences apply to licensed building practitioners.

As noted in *R v Wholesale Travel Group Inc* [1991] 3 SCR 154 recognises that “*The licensing concept rests on the view that those who choose to participate in regulated activities have, in doing so, placed themselves in a responsible relationship to the public generally and must accept the consequences of that responsibility. Therefore, it is said, those who engage in regulated activity should ... be deemed to have accepted certain terms and conditions applicable to those who act within the regulated sphere.*”

Participants in the construction industry have a clear understanding that this is, and has long been, a regulated industry. The strict liability offences relate directly to the work of a licensee.

It should also be noted that licensees can be individuals, partnerships or corporations. As human rights considerations apply only to individuals, care needs to be taken that provisions do not subject individual and non-individual licensees to different regulations, offences and penalties.

For residential building work contracts, it is expected that a person selling an incomplete dwelling or doing or arranging building work should have a clear understanding that they have specific obligations in relation to the form or content of contracts.

Relationship between the limitation and its purpose

Compliance with requirements for carrying out building work is related to a business context and is in place to ensure that building work complies with relevant health, safety, environmental protection and amenity standards.

Interference with a seized thing relates only to those things to which access has been restricted and a notice given to the occupier in relation to the seizure.

In the case of the majority of residential building work contracts covered by the strict liability offences, the person doing or arranging building work will be doing so in a business context.

In each instance the duty holder knows, or ought to know, their legal obligations.

Any less restrictive means available to achieve the purpose

The offences in relation to stage inspections recast existing strict liability offences. These offences continue to apply only to licensees.

Other, less restrictive ways are not likely to achieve the required purpose. The prevalence of failing to comply with existing requirements is relatively high in the regulation of the construction sector.

Strict Liability Offences

The Bill contains the following strict liability offences.

- Building Act, section 43 (3) for failing to notify the certifier a stage of work has been reached, a strict liability offence with a maximum penalty of 50 penalty units,
- Building Act, new sections 44 (2A) and (2B) for carrying out work beyond a prescribed stage without authorisation, or not complying with a condition of the authorisation, strict liability offences with a maximum penalty of 50 penalty units.
- Building Act, new section 89C for not including a standard condition or meaning of a prescribed term in a residential building work contract, a strict liability offence with a maximum penalty of 10 penalty units.
- Building Act, new section 89D for not attaching a required document to a residential building work contract, a strict liability offence with a maximum penalty of 10 penalty units.
- Building Act, new section 134B *Building inspectors —power to seize things* for interfering with a seized thing, or anything containing a seized thing, to which access has been restricted without approval; a strict liability offence with a maximum penalty of 50 penalty units.
- Building (General) Regulation, section 34 (1) for failing to provide relevant documents at damp-proof course stage, a strict liability offence with a maximum penalty of 50 penalty units.
- Building (General) Regulation, section 34 for proceeding beyond damp-proof course level without written permission from the certifier, a strict liability offence with a maximum penalty of 50 penalty units.

The offences incorporating strict liability elements have been carefully considered. The strict liability offences arise in a regulatory context where, for reasons such as public safety, the public interest in ensuring that regulatory schemes are observed requires the sanction of criminal penalties.

In particular, where a defendant can reasonably be expected, because of his or her professional involvement, or because of identified restrictions on access to seized things, to know what the requirements of the law are, the mental (or fault) element can justifiably be excluded. The rationale is that people who are conducting aspects of building work in their professional capacity, or in proximity to seized things, or entering into contracts for doing or arranging for building work can be expected to be aware of their duties and obligations under the Building Act.

The designation of strict liability offences restricts fault liability, a fundamental protection of the criminal law and is, therefore, a decision not taken lightly. The use of such offences was justified on the creation of the relevant offences in the Building Act. Under the Bill in general, strict liability offences are needed to ensure that every relevant person complies with their obligations at all times and acts appropriately to carry out building work or eligible activities that will not breach fundamental requirements for health, safety, amenity and environmental protection. The regulatory regime established for this purpose seeks to encourage a culture of compliance.

The offences in the Bill designated as strict liability meet the criteria sets out in the ACT Government Directorate of Justice and Community Safety's Guide for Framing Offences (April 2010). In each instance the duty holder knows, or ought to know, their legal obligations.

Clause Notes

Part 1 Preliminary

Clause 1 Name of Act

This clause provides that the name of the Act is the *Building and Construction Legislation Amendment Act 2014*.

Clause 2 Commencement

This clause provides for the commencement of the Act for all provisions other than those in the sections mentioned in subsection (1) on the day after its notification day. The postponed sections are in relation to statutory warranties and appointment of building inspectors.

Sections mentioned in subsection (1) will commence on a day fixed by the Minister by written notice. The provisions will automatically commence once 12 months have elapsed from the date of notification. The Legislation Act, Section 79, *Automatic commencement of postponed law*, which would otherwise commence the provisions six months from the notification date, is disapplied by subsection (4).

Clause 3 Legislation amended

This clause provides that the legislation mentioned in the clause is amended by the Act.

Clause 4 Legislation repealed

A code of practice approved under the Construction Occupations (Licensing) Act is currently a notifiable instrument. Under clause 74, a code of practice must be a disallowable instrument. As the existing codes have not been subject to a disallowance period, it is not appropriate for codes that existed prior to the commencement of new section 126A to continue to be approved.

Therefore, this clause repeals the existing code of practice, which will be remade as disallowable instruments under new section 126A.

The codes in place at the time the relevant section commences are:

- *Construction Occupations (Licensing) Building Energy Efficiency Assessment Sale and Lease of Residential Premises Code of Practice 2012 (No 1)* (NI2012-228)
- *Construction Occupations (Licensing) Unit Title Landscaping Works Assessment Code of Practice 2010* (NI2010-529)
- *Construction Occupations (Licensing) Unit Title Site Assessment Code of Practice 2010 (No 2)* (NI2010-582)
- *Construction Occupations (Licensing) Unit Title Unit Fitness Assessment Code of Practice 2010* (NI2010-632).

Part 2 Building Act

Clause 5 New section 17A

This clause inserts a new section 17A outlining the functions of the building certifier in relation to building work and proposed building work they are appointed for. The section summarises the functions given to certifiers throughout the Building Act, and provides for other functions prescribed by the Act and by regulation. It does not give certifiers new powers.

The provision includes a note about eligibility for appointment of certifiers and suspension and ending of appointments. This is important as certifiers may only exercise the stated functions if they have a valid appointment.

Building certifiers have a range of decision-making powers and functions. A further note alerts readers that under the s 180 of the Legislation Act, the power to make a decision includes a power to reverse or change the decision. For example, a building certifier could revoke a building approval if it was found it was issued on incorrect information.

Clause 6 Section 43

This clause substitutes a new section 43. The most significant changes to the section are the recasting of the existing offences. The existing offence in section 43(3) applies if a building licensee proceeds beyond a prescribed stage of work if the certifier has not been notified the stage has been reached and the certifier has inspected the work and given written permission for the work to proceed. This provision includes two distinct obligations – one to notify, and the other to ensure the certifier has given permission to proceed. This Bill creates separate offences to reflect the separate obligations.

Offences in sections 43 and 44 remain strict liability offence with a maximum penalty of 50 penalty units. The human rights implications and the offences are discussed in relevant sections of this explanatory statement.

These sections do not change the nature of the notification or the obligations to notify and only proceed beyond a stage with appropriate authorisation from the certifier.

Clause 7 Stage inspections Section 44 (1)

This clause makes a consequential amendment to a reference to a subsection in section 44(1) as a result of relocating the obligation to notify the certifier when a stage of work is reached to section 43 (2).

Clause 8 New section 44 (1A)

Clause 8 inserts a new provision to allow the regulations to prescribe how a stage inspection is carried out.

The intention of this is to prescribe more detailed aspects of the inspection process, such as the scope, conduct and recording of the inspection in regulation. No regulations under this provision are proposed for this Bill.

Clause 9 New sections 44 (2A) and (2B)

The Act provides for exemptions and conditions in relation to proceeding beyond a stage. A certifier may also allow work to proceed beyond a stage in certain circumstances.

The two new offences in this section derive from an offence for proceeding beyond a stage without written permission from the certifier. This provision splits that offence into: a general offence for proceeding beyond a stage without authorisation (new 44(2A)), and a separate offence for proceeding beyond a stage with authorisation but not in compliance with a condition (new 44(2B)).

Offences in section 44 are strict liability offences with a maximum penalty of 50 penalty units. The human rights implications and the offences are discussed in relevant sections of this explanatory statement.

Clause 10 Section 44 (4)

This clause makes a consequential amendment to a reference to subsection (3) as a result of splitting the existing offences into more than one offence see clause 9. This has the effect of making all offences in section 44 strict liability offences.

Clause 11 New section 44 (6A)

This clause relocates the existing provision for provision of test results from section 43 (4) to section 44, immediately after the power to require tests in subsection 44 (6). This is a more appropriate location for the provision.

Clause 12 Section 44 (7) (b) (i)

This clause makes a consequential amendment to a reference to subsection 44 (3) (a) as a result of splitting the existing offences into more than one offence see clause 9.

Clause 13 **Meaning of *prescribed requirements*—div 5.1**
Section 66, definition of prescribed requirements, paragraph (b), except note

This clause substitutes a new subsection 66 (b) to encapsulate that the prescribed requirements mean any requirements under the Act. The reason this is removed is that if a building does not comply with all relevant requirements, there are avenues available under section 69 for issuing a certificate if the building is still fit to occupy.

Clause 14 **Certificates of occupancy**
Section 69 (1) and notes

This clause substitutes a new section 69(1) for the Act. The existing provision requires the Registrar to issue a certificate of occupancy for a building if it complies with the prescribed requirements, being the Act or the approved plans for the work.

Although it is assumed that compliance with the Act or approved plans will result in a building that is fit for occupation and use, the existing section does not require the Registrar to consider whether it is. Instead this satisfaction is inferred from the requirement to certify the building is fit for occupation and use which must occur if the building has been completed in accordance with the prescribed requirements.

However, there may be cases where a building complied with prescribed requirements at the time of the final inspection but is not longer fit to occupy at the time of the application for certificate of occupancy. This could be because of a long delay in making an application or because of unforeseen circumstances, such as storm or fire damage.

To better delineate compliance with plans from fitness to occupy, the provisions now require the Registrar to be satisfied of that both the prescribed requirements have been complied with and the building is fit to occupy.

As the Registrar's powers in relation to revoking a certificate of occupancy have been questioned in matters before the ACAT and in relevant courts, this provision also inserts a note alerting readers to section 180 of the Legislation Act, which gives the Registrar the power to reverse or change the decision, exercisable in the same way, and subject to the same conditions, as the power to make the decision.

Clause 15 **Section 69 (4)**

This clause substitutes a new section 69(4), which allows a regulation to prescribe matters that must be taken into consideration in deciding whether a building is fit for occupation and use. This is important as the Act does not currently provide any guidance in relation to what is considered sufficient from the perspective of health, safety, and amenity for a building to be considered fit for occupation or use.

The existing section 69 (4) is relocated to new section 35A of the Regulation (clause 40).

Clause 16 Part 6, heading

This clause substitutes a new heading for the Part, which reflects the inclusion of regulation-making powers relating to contracts for residential building work (clause 23).

**Clause 17 Definitions—pt 6
Section 84, definition of *complying residential building work insurance***

This clause substitutes a new definition of complying residential building work insurance as a consequential amendment in relation to the new definition of insurable *building work*. A compliance policy need not cover residential building work outside that definition.

Clause 18 Section 84, new definitions

Clause 18 inserts new definitions of insurable residential building and insurable residential building work. At present, a single definition of residential building work applies to both statutory warranties and insurance. With the expansion of statutory warranties to additional types of residential buildings, there is a need to separately define the buildings to residential building insurance apply. Therefore, this clause creates new definitions for *insurable residential building work* and *insurable residential building*, which preserve the existing scope of the insurance. The definitions are based on the parameters in the current law, for example, that the building cannot be more than three storeys at any point excluding a floor used solely for parking, and that the residential part of the building is a class 1 or class 2 building as defined by the building code.

Clause 19 Section 84, definition of *residential building*

This clause inserts new definition of *residential building*. This is to allow the expansion of the statutory warranties provided by this Part to all private residential buildings and their structural supports.

The expansion of statutory warranties gives all private residential building owners the same warranty in law, regardless of the height of the building. The statutory warranty is currently restricted to class 1 and class 2 buildings or dwellings and of three storeys or fewer.

**Clause 20 Residential building work to which pt 6 does not apply
Section 87 (1) (d)**

This clause makes consequential amendments to section 87 (1) (d) to remove the caveat about residential buildings being restricted to those classified as class 1 or 2 buildings under the Building Code. While the insurance is still constrained to these building classifications (clause 18) the statutory warranties are intended to apply to all private residential buildings which may be included in other classifications.

Clause 21 Section 87 (2)

This clause omits section 87 (2) of the Act. That section provides that subsection (1) (d) does not prevent this part from applying in relation to residential building work carried out in relation to a garage that provides structural support for, or is a structurally integral adjunct to, a class 1 or class 2 building. With the incorporation of the concepts in existing 87 (1) (d) in the definitions of *insurable residential building work*, and the concepts of structural supports and structurally integral adjuncts incorporated in the definition of *residential building work*, this section is no longer required.

Clause 22 New section 87A

Clause 22 inserts a new section that allows a regulation to prescribe types of residential building work that the statutory warranty does not apply to. There are a wide variety of residential buildings, some of which may be considered as private by the owner when they are by nature providing commercial accommodation. Where there is uncertainty, the regulations can prescribe forms of building, or parts of buildings the statutory warranty does not apply to. Any regulation made under this section is disallowable by the Assembly. The regulations cannot give a warranty to other forms of residential building.

Clause 23 New division 6.2A

This clause inserts a new division to allow for regulation of certain aspects of residential building work contracts. The division has five sections:

- New 89A, which allows a regulation to prescribe that the contracting provisions do not apply where the cost of the residential building work in the contract is less than a certain value.
- New 89B, which gives a meaning of residential building work for the division.
- New 89C, which allows regulations to prescribe standard conditions or meanings of certain terms used in contracts, and provides a strict liability offence with a maximum penalty of 10 penalty units for not including a standard condition or including the meaning of a prescribed term.
- New 89D, which provides for regulations to prescribe required documents that must be attached to a residential building work contract, and creates a strict liability offence with a maximum penalty of 10 penalty units for not attaching a required document.
- New 89E, which allows a regulation to prescribe a prohibited condition and voids a prohibited condition if included in a contract.

The definition of a residential building work contract recognises that not all contracts involving completion of work are made between the builder and the landowner. A landowner may separately contract to the builder for building work being carried out on their property, and other parties for sale of the dwelling that will result from the building work, such as when dwellings are sold off-the-plan. Some people also engage an intermediary to arrange building work on their behalf.

Strict liability offences and human rights implications are discussed in the relevant sections in this statement.

No regulations under this division are included in the Bill.

Clause 24 Appointment of building inspectors
New sections 128 (2) to (6)

This clause inserts new provisions in section to ensure the Construction Occupations Registrar appoints only those people qualified to undertake the job and, where they have limitations these are reflected in the appointment, which may limit the exercise of the functions. In keeping with current practices, the inspector's appointment can be made for a maximum of 5 years.

This is important as in some cases a building inspector may be required or authorised to carry out building work or other activities requiring particular skills and qualifications.

This provision complements new provisions for building inspections in clauses 24 to 30.

Clause 25 New division 7.2 heading

This clause inserts a new division 7.2 *Inspection of building work and authority for required work* to give Part 7 more structure and allow readers to more easily locate relevant provisions. This separates general provisions for inspections from provisions for appointments.

Clause 26 Inspection of building work where no approval
Section 131 (3)

This clause substitutes a new section 131(3), which removes activities that can be undertaken on authorisation that are now covered by new section 134A (clause 30), and recasts to existing provisions to improve their readability and include an obligation on the Registrar to be satisfied any person authorised under section 131 has the necessary skills and qualifications to carry out the activities they are authorised to undertake.

Clause 27 Section 133

Clause 27 is a redraft of the existing section 133 to make the provision clearer and to require the Registrar to believe on reasonable grounds a person authorised under this section has the necessary skills and qualifications to carry out the activity the authorisation permits.

Clause 28 New division 7.3 heading

This creates a further division in Part 7 to include provisions about the conduct of inspections and seizures. The concepts in each division are sufficiently different to require location in separate divisions.

Clause 29 Section 134 heading

This clause revises the section heading to provide more useful description of the section.

Clause 30 Section 134A to 134E and division 7.4

Clause 30 inserts the following new provisions:

- Section 134A for outlining activities an inspector may undertake in the course of an inspection
- sections 134B to 134E for powers in relation to seizing things
- Division 7.4 for search warrants.

Section 134A

The function of an inspector is to inspect building work undertaken for compliance with the Act. For consistency across construction legislation, the provisions in new section 134 (3) and (4) are based on existing inspection powers in the Construction Occupations (Licensing) Act (Part 6), Electricity Safety Act (Part 7), Gas Safety Act (Part 6) and Water and Sewerage Act (Part 4). This includes that an inspector may inspect and copy, or take an extract from, any document at the premises, take samples, measurements or conduct tests, and take photographs, films, audio, video or other recordings.

Consistent with other laws the Bill also introduces an offence with a maximum penalty of 50 penalty units for not taking reasonable steps to comply with a requirement of the inspector to help with exercising the inspector's functions. However, it does not displace common law rights in relation to self-incrimination and client legal privilege. Further information is in the section on offences.

Section 134B to 134E

The Bill inserts standard powers in relation to seizing things, including when thing can be seized, receipting, providing access to the seized thing and return of seized things. As for section 134A, these powers are the same as those for inspectors under other Acts regulating building and construction work.

Search warrants

This division inserts standard provisions for search warrants. The inclusion of these powers is reasonable when considering the potential life safety, environmental and economic costs of non-compliance with construction legislation.

The exercise of powers under the warrant must be in accordance with the warrant, meaning that officers cannot remove things that are not mentioned in the warrant or enter premises

outside hours indicated in the warrant. Officers must also announce entry and provide details of the warrant to occupiers.

Clause 31 Division 8.2 heading

This clause substitutes a new heading for division 8.2 of *Codes of practice and guidelines* that reflects the expanded scope of the part, which includes provisions both codes of practice and guidelines. At present the part is headed only Codes of practice.

**Clause 32 Approval of codes of practice
Section 139B (2)**

This clause substitutes a new provision which expands the existing power to include matters about building certification. This is important to cover the range of activities regulated under the Building Act.

This section also removes section 139B (2), which allows a code of practice to be approved as in force from time to time. A disallowable instrument must be notified, and presented to the Legislative Assembly. Therefore, it is more appropriate for codes of practice that are intended to be subject to disallowance processes to be made at a point in time because new versions of a code will not be subject to this process. If changes are required, a new code can be made.

Clause 33 New section 139BA

This clause allows the Minister to make guidelines in relation to building approvals and other documentation under the Act for example a building approval or for certificates that may be required to verify compliance or installation of particular products.

A guideline may set out standards and other matters about building approval applications, documentation, plans and specifications for building work.

An approved guideline is a disallowable instrument, and a copy of the guideline, and any instrument applied (with or without change) by the guideline, available for public inspection during ordinary office hours at the office of the construction occupations registrar, or another place prescribed by regulation. This is important for access to law, particularly if a guideline adopts an instrument that is either difficult or costly to obtain.

Clause 34 Dictionary, new definitions

This clause inserts new definitions in the Dictionary for *insurable residential building* and *insurable residential building work*. The dictionary definitions refer to the new definitions for Part 6 in section 84 of the Act (clause 18).

Clause 35 Dictionary, new definition of *residential building work contract*

This clause inserts a new definition in the Dictionary for residential building work contract. The dictionary definitions refer to the new definitions for Part 6 in section 84 of the Act and for division 6.2A (Standard conditions) (clause 23).

Clause 36 Further amendments, mentions of *residential building work*

Clause 36 includes consequential amendments to certain sections that are intended to apply only to *insurable residential building work* and not all residential building work under the new definition in clause 19. This is important to ensure the insurance operates as intended.

Clause 37 Further amendments, mentions of *warranties, insurance*

This clause makes consequential amendments to the sections and definitions that currently refer to Part 6 of the Act. The amendments reflect the change of heading of Part 6 (clause 16).

Part 3 Building (General) Regulation 2008

Clause 38 Stages of building work—Act, s 43 (1) (a) Section 33, note

This clause substitutes a new note for the section due to the relocation of the existing offence provisions for damp-proof course level stage to the Regulation.

Clause 39 Section 34

Clause 39 relocates and recasts existing provisions in relation to proceeding beyond damp-proof course level. These provisions are co-located with other regulations outlining specific stages of work.

The two new offences in this section derive from an offence for failing to provide required documentation and proceeding beyond damp-proof course level without written permission from the certifier. In some cases a survey plan is not required but authorisation is still required to proceed. This provision splits that offence into two separate offences for each of the separate obligations. This does not change the underlying obligations in relation to the types of documents required or exemptions from these requirements.

The provisions have also been redrafted to be compliant with the *Criminal Code 2002*. The elements of the offences and the maximum penalties have not changed. The offence remains as a strict liability offence. Implications of this are discussed in relevant sections of this statement.

The redrafted provisions also change the terminology used from dampcourse to the more commonly used damp-proof course and insert a corresponding definition consistent with that used in the Building Code of Australia.

Clause 40 New section 35A

Clause 40 relocates existing section 69(4) from the Act and recasts to reflect the existing practice in relation to determining whether the electrical, plumbing and gasfitting installations in a building pose a risk to the health and safety of occupants that would make the building unfit for occupancy or use.

In particular, instead of solely relying on certificates issued by licensees, the provisions reflect the need for some work to be tested and inspected. This is important so that all of the Acts work together as part of an integrated regulatory framework.

Clause 41 Part 4, heading

Clause 42 Building work to which pt 6 does not apply

These clauses make a consequential amendment to the heading to reflect the change to the heading for Part 6 in the Act.

Clause 43 Sections 39, 40 and 41 headings

This clause inserts the word ‘insurable’ in front of the term *residential building work* in headings for sections 39-41 of the Regulation. These sections relate to residential building insurance and not to the expanded range of residential buildings to which statutory warranties will apply as a result of this Bill (see clause 19).

Clause 44 Exempt buildings and building works

Clause 44 makes consequential amendments to Schedule 1 to the Regulation in, part 1.3, column 3 as a result of the heading change to Part 6 of the Act (clause 16).

Clause 45 Schedule 1, part 1.3, items 3, 5, 7, 15 and 16, column 4

This clause revises the existing exemption conditions for work related to certain fences, retaining walls, large buildings and external alterations to remove use of alternative solutions as a means of compliance.

For these structures, there is a large potential to cause significant harm if they were to fail, and so it would be beneficial to restrict the conditions of the exemption to the use of only prescribed building solutions (known as deemed-to-satisfy solutions) rather than self-assessed alternative solutions. If a person wishes to use an alternative solution, they must apply for a building approval so that an independent, trained certifier can assess the proposed solution for compliance with the building code.

Part 4 *Building and Construction Industry (Security of Payment)
Act 2009*

Clause 46 **Application of Act
Section 9**

Clause 46 makes a consequential amendment to the definition of residential building work in subsection 9 (7) for section 9, *Application of Act*. The current Act only excludes residential building work as defined in the *Building Act 2004*, Dictionary. The work covered by the existing definition is now defined as insurable residential building work. Amending the definition retains the scope of work the Act currently applies to.

Clause 47 **New sections 37A and 37B**

This clause inserts a new power for the Minister to make a code of practice for authorised nominating authorities (ANAs). ANAs operate under an informal code at present. These provisions will allow a code of practice to form part of the regulatory framework. The existing code will be remade under new section 37A.

New section 37B creates an offence for an ANA contravening an applicable code of practice. The maximum penalty for the offence is 50 penalty units, which is consistent with the maximum penalty for contravening a code of practice in the Construction Occupations (Licensing) Act.

Part 5 Construction Occupations (Licensing) Act 2004

Clause 48 Decision on licence application Section 19 (4)

Clause 49 New sections 19 (7)

Clauses 48 and 49 amend section 19 (4) and insert new section 19 (7) to allow the registrar to consider the compliance histories of critical entities in the business structure – directors, partners and nominees – under either their own licences or those they have performed any of those roles in relation to (a related licence) before deciding to grant a licence to an applicant.

The provisions also allow the Registrar to consider whether the applicant or their associated entities have outstanding rectification, court or tribunal orders against them and whether any debts in relation to rectification work are either overdue or not being paid in accordance with a payment plan.

This is important to prevent people with a poor history of compliance establishing multiple licences under different structures to avoid the effects of any disciplinary action or order against them.

However, in all cases the Registrar may only refuse to issue the applicant a licence if he or she believes it is necessary or desirable to protect the public. This means that the contravention in relation to the applicant must be of sufficient concern that the applicant should not hold a licence, not that a licence can be refused based on minor infractions.

Clause 50 New section 24A

Clause 51 Licence renewal Section 25 (2)

Under existing s 25 (2) the registrar must renew a licence on application if satisfied that the applicant would be eligible to be licensed if the application were for a new licence of the same kind. It is not necessarily expected that every applicant at every renewal will need to meet the most recent eligibility requirements, in holding certain new technical qualifications.

Clause 50 inserts a new section 24A to provide that a regulation may prescribe when an entity is eligible for renewal, to allow more formal recognition of alternative renewal requirements.

Clause 51 substitutes a new section 25 (2) to require the Registrar to issue an applicant a licence if the alternative prescribed renewal criteria are met, notwithstanding any other instances which would allow the Registrar to refuse the licence in the section (see clauses 52 and 53).

Clause 52 **Section 25 (3) (a)**

Clause 53 **Section 25 (3) (a) (i) and (ii)**

Clause 54 **New section 25 (7)**

Clauses 52 to 54 complement those included in clauses 48 and 49 for new licence applications and make the considerations at each decisions point consistent. These provisions amend section 25 (3) and insert new section 25 (7) to allow the registrar to consider the compliance histories of critical entities in the business structure – directors, partners and nominees – under either their own licences or those they have performed any of those roles in relation to (a related licence) before deciding to grant a licence renewal to an applicant.

The provisions also allow the Registrar to consider whether the applicant or their associated entities have court or tribunal orders against them and any conditions on the applicants or related licences are being contravened.

As for licence applications, in all cases the Registrar may only refuse to renew the applicant’s licence if he or she believes it is necessary or desirable to protect the public. This means that the contravention in relation to the applicant must be of sufficient concern in relation to the operations of the applicant, that the applicant should not hold a licence. It is not intended to hold related licences responsible for minor infractions under other licences.

A decision to refuse a licence remains a reviewable decision.

Clause 55 **New section 26B**

This clause inserts a new section 26B that requires licensees to give the Registrar written notice of specific events and circumstances linked to the eligibility to hold a licence and to automatic suspension grounds. Failing to notify is an offence with a maximum penalty of 100 penalty units.

Early notification of these events and circumstances is important so that licence status can be updated, there is reduced risk of people continuing to operate under a suspension, and the Registrar can consider or instigate appropriate action if a licensee is no longer eligible to hold a licence.

Clause 56 **Nominees of corporations and partnerships**
New section 28 (2) (c)

Clause 57 **New section 28 (3) (e)**

A corporation or partnership is only eligible to hold a licence if they have an appointed nominee, or nominees, capable of supervising the work carried out under the licence. Clauses 56 and 57 insert new sections 28 (2) (c) and 28 (3) (e) which provide that the nominee or nominees appointed by the corporation and partnership can, at all times, adequately supervise that construction services it provides.

The nominee shares responsibility with the licensed corporation or partnership to supervise construction work. It is a requirement for appointment as a nominee that they are capable of carrying out their role on a day to day basis.

These provisions link the requirements for eligibility to be a nominee with those for eligibility to hold a corporation or partnership licence.

Clause 58 Section 28 (7)

This clause substitutes a new section 28 (7) and example and note to provide readers of the Act with a clearer explanation of how the loss of eligibility to be a nominee interact with other provisions regarding resignation and revocation of nominee appointments. The provisions explain that a loss of eligibility effectively ends the appointment and a separate resignation or revocation is not required.

**Clause 59 When rectification order may be made
Section 35 (3), example, except note**

In many cases there is no statutory or other date that can be relied on to demonstrate when work is completed. To assist with interpretation and make the intent of the provisions clearer, clause 59 includes new examples covering occurrences where the Registrar's ability to issue the order is regularly questioned. The purpose of including the examples is to assist people to understand both the Registrar's and licensee's obligations in relation to determining the completion date of work, and to provide greater clarity about how the provisions are intended to operate.

The examples are not intended to be exhaustive, given the wide variety of work that is licensed under the COLA.

**Clause 60 Automatic suspension of corporate licence
Section 49 (2)**

This clause redrafts the existing section using current terminology for winding-up arrangements. The grounds for the suspension are not changed.

Clause 61 New section 50A

A corporation or partnership is only eligible to hold a licence if they have an appointed nominee, or nominees, capable of supervising the work carried out under the licence.

It is an offence to operate without a nominee, however unlike other similar grounds (for example loss of insurance) there is no corresponding automatic suspension of the corporation or partnership licence if they have no nominee.

This clause creates a new automatic suspension grounds for having no appointed nominee or in the case where the sole nominee for a particular occupation or occupations class stops being the nominee.

This is important to link the ongoing ability to operate under the licence with the need to meet fundamental eligibility requirements to hold the licence.

Clause 62 End of licence suspension
Section 53 (1)

This clause inserts a reference to the new automatic suspension grounds inserted by clause 61 in section 53 (1), which outlines when an automatic suspension ends.

Clause 63 Section 53 (5) and note

This clause provides that instead of all automatic suspensions ending after 3 months, for automatic suspensions related to a loss of eligibility, for example loss of a nominee, insolvency, convictions of certain criminal offences, the suspension ends:

- three months after the Registrar is notified of the suspension or
- if the Registrar is not notified, the suspension continues as long as the grounds for suspension exist.

This important as at present a licensee may not notify the Registrar of the suspension grounds. The Registrar cannot reasonably fulfil her or his obligation to take an appropriate action if he or she is not aware of the circumstances. For prolonged ineligibility, the Registrar must still take a formal action to have the licence suspended or cancelled.

The provisions allowing for a continuation of the automatic suspension do not apply to suspensions under section 52A on public safety grounds, which relies on judgement rather than a more objective fact affecting the licence such as insolvency.

For fairness, the new provisions will not apply to suspensions that started before the commencement of the Act (see transitional provisions in clause 77).

Clause 64 Grounds for occupational discipline
Section 55 (1) (a)

This clause inserts a new section 55 (1) (a) which specifically includes directors and partners in the provision as opposed to referring only to nominees and employees of the licensee.

Clause 65 New section 55 (1) (h)

This clause inserts a new section 55 (1) (h) which creates a new occupational discipline grounds that the licensee ceases to be eligible to be a licensee.

This is important to link the ongoing ability to operate under the licence with the need to meet eligibility requirements to hold the licence, and allow the Registrar to apply for an order for a suspension or cancellation if required.

Clause 66 Occupational discipline orders—licensees
New sections 58 (3) and (4)

This clause allows the ACAT an alternative option to impose a payment in an occupational discipline order, with maximum payments of \$20,000 for individuals and \$100,000 for corporations and partnerships. This level of payment aligns with payments available to regulators in NSW and Queensland and recognises that in cases where occupational grounds are particularly serious and/or the licensee has considerable earning capacity, the existing maximums under the ACAT Act are unlikely to act as a disincentive to committing further breaches

If the ACAT use this option it cannot also impose a payment under section 66 (2) (h) of the ACAT Act.

Clause 67 New section 58A

This clause inserts new powers for ACAT to make an occupational discipline order against a related licence, if appropriate in the circumstances. A related licence is one that is either personally held by a director, partner or nominee of the licensee subject to the initial occupational discipline application or a licence that a director, partner or nominee of the licensee holds a position as a director, partner or nominee under.

The ACAT may condition the related licence, or suspend or cancel it. This is important so that ACAT can consider whether an individual or licensee who is involved with multiple licences is not able to discharge their obligations in relation to those licences, and take appropriate action if they are not. This improves the public protections created by the licensing scheme.

To embed procedural fairness in the provisions, the ACAT must not make an order applying to a related licence unless that licensee has been given notice of the application for an occupational discipline, that the ACAT is considering making an order in relation to the related licence, and opportunity to make representations to ACAT in relation to the proposed order.

Normal review and appeal rights are preserved.

Clause 68 Interim licence suspension
Section 59 (4) and note

Clause 68 amends subsection 59 (4) of COLA, to allow that an interim suspension may be for 2 weeks or less, but may be extended until the ACAT has decided the matter if the Registrar believes that it is in the public interest to extend the suspension. This does not interfere with the licensee's right to apply to the ACAT for a stay of the suspension.

This is initially how the provisions were intended to operate – it was expected that Registrar would make an application to the ACAT for occupational discipline and that this would be decided within the maximum three week period of the suspension (2 weeks plus a maximum one week extension). While an immediate suspension should not operate indefinitely without the Registrar having taken steps to formalise the disciplinary action, it is unlikely that the ACAT will be able to hear matters within 3 weeks less any time for lodging the application in every instance.

These provisions will only apply to suspensions that start on or after commencement.

Clause 69 Effect of interim suspension
Section 60 (3) (b)

This clause clarifies when an interim suspension ends if the ACAT does not make an occupational discipline order.

Clause 70 Information requirements
Section 80E (1) (a)

This clause clarifies that an information requirement can relate to the COLA or an operational Act. Operational Acts are listed under section 16 of the COLA.

Similar information gathering powers are in place under operational Acts. However, a single information request covering all interrelated matters is less confusing to people who received the request. Common law protections relating to self-incrimination and client legal privilege are preserved.

Clause 71 Breach of licence conditions or codes
New section 87 (7)

This provision clarifies that, as intended by the regulatory system including COLA and operational Acts, the provisions are intended to include codes of practice under any of the applicable Acts.

Clause 72 Codes of practice
Section 104A

This clause omits section 104A from Part 9, which covers administrative provisions and the functions of the Registrar, as a consequence of revising the person who approves code of practice (see clause 74).

Clause 73 Section 116

This clause revises the functions of the advisory boards as a consequence of revising the person who approves code of practice (see clause 74) and declares mandatory qualifications (see clause 80) from the Registrar to the Minister. The board's functions will continue to provide advice on qualifications if that advice is requested by the Minister.

The other functions align more closely with the Registrar's functions under section 104 (1) (d), which are to maintain the standard of construction occupations by acting on complaints made about construction practitioners and providing construction practitioners with information about developments in the construction industry.

Clause 74 New section 126A

This provision relocates the provisions currently located in section 104A. The only amendments to the provisions are:

- subsection (1) which changes the decision-maker from the Registrar to the Minister, which provides consistency across related laws for the making of codes of practice
- subsection (3) provides that a code of practice must be a disallowable instrument rather than a notifiable instrument as under s 104A. This will require a code to be subject to regulatory impact analysis and disallowance processes under the Legislation Act.

All of the other provisions in the section have previously been considered and passed as outlined in this draft by the ACT Legislative Assembly.

Clause 75 Regulation-making power New section 129 (2) (e)

This clause amends the regulation-making power for codes of practice to more clearly separate the powers to make a code of practice (see new section 126A, clause 74), from the power to make regulations for compliance with, and administration of, codes of practice.

Clause 76 Section 129 (3)

This clause amends subsection 129 (3) of the COLA to increase the maximum penalty that can be prescribed in the regulation to 60 penalty units.

The *Construction Occupations (Licensing) Act 2004* largely relates to activities regulated under a series of operational Acts. The majority of these Acts have a regulation-making power that allows the regulations to also prescribe offences for contraventions of the regulations and prescribe maximum penalties of 60 penalty units – see *Building Act 2004*

section 152(6), *Electricity Safety Act 2007* section 66(5), *Gas Safety Act 2000* section 69(5) and *Planning and Development 2007* 426(5).

Licensable work in the Territory tends to be the highest risk work covered by those Acts – work that, if not carried out properly, can threaten the life, safety and health of people, cause considerable damage to the environment or lead to substantial financial losses. It is preferable if there is consistency across all of the relevant Acts.

The justification for the increase is discussed on page 31.

Clause 77 New part 22

This clause inserts transitional provisions relating the new provisions in clauses 63 and 68 that allow for the extended operation of interim and automatic suspension in certain circumstances.

Suspensions in place before the commencement of the new provisions are not subject to the new provisions and are taken to end as they would have under the previous provisions.

Clause 78 Dictionary, definition of *code of practice*

This clause makes a consequential amendment to the definition of code of practice in the Dictionary, as the relevant section is now 126A (see clause 74).

Part 6 Construction Occupations (Licensing) Regulation 2004

Clause 79 Licence applications—Act, s 17 (3) Section 5 (m)

This clause removes subsection 5(m) of the COLR. The regulations can prescribe eligibility requirements and with changes to section 13 of the COLR proposed in clause 80, either a declaration or a regulation will be able to prescribe what financial resources a licensee must have access to for eligibility.

S 5 (i) of the COLR already requires an applicant to include evidence that they are eligible to be licensed in the construction occupation or class of construction occupation applied for. This would cover any financial probity requirements. Therefore, a separate criterion in the application is not necessary.

Clause 80 Section 13

This provision recasts the provisions in relation to mandatory qualifications. The amendments to the provisions are:

- section heading, which reflects the changes to the scope of the declaration in subsection (1).
- subsection (1) which:
 - changes the decision-maker from the Registrar to the Minister, which provides consistency across related laws for the making of codes of practice and eligibility requirements
 - include financial requirements in the matters that can be declared.
- new subsection (2) which replaces a requirements in previous subsections (2) and (3) for the Registrar to consult with the relevant advisory board before a declaration is made, with a provision the Minister may consult with the relevant advisory board. This is because there are other consultation avenues available to the Minister that be used if needed.
- new subsection (3) provides that a code of practice must be a disallowable instrument rather than a notifiable instrument as under s 104A. This will require a code to be subject to regulatory impact analysis and disallowance processes under the Legislation Act.

All of the other provisions in the section have been renumbered but the content has previously been considered and passed by the ACT Legislative Assembly.

Clause 81 Section 19, heading

This clause makes a technical amendment to refer to the correct section of the Act under which section 19 is made.

Clause 82 Section 19 (d), example

This clause adds a new example in relation to eligibility to be a nominee which provides that a nominee is reasonably able to exercise the functions of a nominee if the nominee is available to attend locations where construction services they are responsible for supervising will be carried out. This is critical as the nominee's main functions are to supervise the work and ensure its compliance with relevant laws. This does not require the nominee to be on site at all times during the work, but does require adequate attendance at relevant sites.

**Clause 83 Comply with code of practice
New section 21A (3)**

This provision clarifies that, as intended by the regulatory system including COLA and operational Acts, the provisions are intended to include codes of practice under any of the applicable Acts.

**Clause 84 Corporate licences
Section 22 (2)**

Clause 85 Section 22 (3)

**Clause 86 Partnership licences
Section 23 (2)**

Clause 87 Section 23 (3)

COLR, Section 21 *Change of register information* requires a licensee to tell the Registrar in writing of any change in a detail relating to the licensee that is recorded in the register, including a change of insurer for licences that require insurance, details of directors, nominees and other information that may affect a licensee's eligibility. However, the Registrar may not be notified until up to 2 weeks after the day of the change or the day the licensee became aware of the change, if the licensee chooses to report.

These clauses require all licensees to report changes of details recorded in the Register within 1 business day of becoming aware of the change.

The clauses also require corporate and partnership licences to report a change in nominee within 1 business day where the licensee is not the sole nominee for a construction occupation or construction service. Other notification requirements are in clause 55.

This is important for the effective operation of the licensing system. These provisions are not attached to an offence.

Part 7 Planning and Development Act 2007

Clause 88 Authority functions **Section 12 (1) (j)**

This clause removes subsection 12 (1) (j) of the Planning and Development Act. That subsection provides that it is a function of the Planning and Land Authority to ‘regulate the building industry’. All of the other functions in the section directly relate to planning functions under the Planning and Development Act and related instruments.

Regulation of the building industry includes a wide range of laws – from consumer laws to industrial relations. Although the former agency called the Planning and Land Authority incorporated administration of some of these laws, much of the responsibility for the direct regulation of the industry is given to other statutory office holders, authorities and Directorates under relevant laws.

The majority of the functions in relation to regulating building work and building and construction licensing are the responsibility of the Construction Occupations Registrar, which replaced the officer known as the Building Controller. In addition, residual functions allocated to the statutory officer called the planning and land authority under building and construction laws have been progressively transferred to the Registrar as intended by the Construction Occupations (Licensing) Act.

Subsection 12 (1) (c) that provides a function “to plan and regulate the development of land”, adequately covers the Planning and Land Authority’s role to regulate relevant development activities.