

2004

LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY

CONSTRUCTION OCCUPATIONS
(LICENSING) BILL 2003

GOVERNMENT AMENDMENTS

SUPPLEMENTARY
EXPLANATORY STATEMENT

Circulated by authority of the
Minister for Planning
Mr Simon Corbell MLA

Construction Occupations (Licensing) Bill 2003 – Government amendments

Outline

The Construction Occupations (Licensing) Bill introduces a single licensing and disciplinary regime for builders, electricians, plumbers, drainers, gasfitters, building surveyors (certifiers) and plumbing plan certifiers. It replaces the multiple systems that currently exist in various laws.

The Government amendments to that Bill enhance some of the Bill's provisions by providing guidance, and thereby consistency, transparency and fairness in the exercising of certain discretionary administrative powers. Others inform of certain rights or entitlements, correct several technical references or remove inappropriate imprisonment penalties that were alternatives to, or in addition to, financial penalties, which are retained. The amendments also clarify and limit the application of certain matters to things done or omitted to be done prior to commencement of the Act.

Notes on amendments

Amendment 1 — new Clause 31 (2A), page 16, line 3.

Inserts a new clause 31 (2A), which replaces and extends the existing clause 31 (4) mentioned in **Amendment 2** below.

The existing clause 31 (4) provides a defence to a prosecution under the Bill, clause 31. Clause 31 establishes offences against a nominee where they fail to adequately supervise relevant construction services or fail to ensure relevant construction services comply with the Bill and its operational Acts.

The defence against those offences that existing clause 31 (4) provides only applies to nominees of a corporation or partnership. Division 3.2 deals with nominees, and a corporation must have a director or employee that is a nominee, and a partnership must have a partner that is a nominee, as a prerequisite to obtain a licence under the Bill. Clause 31 deals with the responsibilities of such nominees, which are to supervise construction services provided by the respective corporation or partnership under the Bill and ensure that the relevant construction services comply with the Act and operational Acts.

The existing defence for nominees under existing clause 31 (4) essentially relied on the nominee giving a mandatory requirement to the nominee's corporation or partnership (both referred to here as "the firm"), and giving a copy of that mandatory requirement to the registrar. Clause 27 defines what a mandatory requirement means—essentially it is a requirement by the nominee that the firm do something, or not do something, in compliance with, or to achieve compliance with, the Bill or an operational Act under the Bill.

An example of how mandatory requirements might operate is as follows—N is a nominee for firm F. F directs its employees to do an aspect of building work in a manner that fails to comply with a requirement of relevant building law. N indicates to F how doing that work will breach that law. F ignores N and the building work continues to be done unlawfully. N gives a mandatory order to F including a copy to the registrar. Existing clause 31 (4) provides to the effect that N may have a defence to prosecution under clause 31 for the offence relating to failing to ensure the work was done lawfully.

Amendment 1 duplicates the grounds for the defence of existing clause 31 (4)—giving a mandatory requirement to the firm and a copy to the registrar. It also adds a third criterion to enhance the provisions effectiveness—the failure to comply would not have happened if the mandatory requirement had been complied with.

This will ensure that only mandatory requirements that are appropriate to resolve the relevant failure to comply with the relevant law are a defence for nominees from prosecution for clause 31 offences. The amendment is necessary to avert the potential for account to be taken of mandatory requirements that were not

comprehensive or relevant to the grounds of the offence they are used as a defence against.

Amendment 2 - Clause 31 (4), page 16, line 10

Omits existing clause 31 (4) entirely as it is made redundant by Amendment 1.

Amendment 3 - Clause 34 (1), page 17, line 22

Inserts a new note, "note 1," and assigns the clause's existing single note as "note 2". The new note says:

Note 1 If deciding under this section whether it may be appropriate to make a rectification order, the registrar must take into consideration the considerations mentioned in s 35A.

The new Note 1 signposts that the registrar must have to regard to the considerations specified in the proposed clause 35A, before exercising the power to issue a rectification order under the Bill, clause 34 (1). Such rectification orders essentially require substandard construction work to be rectified, and the Bill allows the registrar discretion in deciding when it may be appropriate to issue the order.

Amendment 4 - Clause 35 (1), page 18, line 15

Inserts a note with the same wording as the new "Note 1" in amendment 3. The amendment also inserts a new note that cross references clause 146. Clause 146 provides that contraventions that occurred before commencement day may be taken into account in issuing rectification orders. A separate government amendment to clause 146 provides for disciplinary grounds that occur prior to commencement day as grounds against which disciplinary action can be taken under this Act.

Amendment 5— new clause 35A – Consideration for deciding under section 34 and section 35, page 18, line 30

Inserts proposed clause 35A which requires the registrar to have regard to the considerations it sets out, when deciding whether it is, or may be, appropriate to make a rectification order in relation to an entity that provided a construction service in a manner that:

- is contravening the Bill; or
- has contravened the Bill; or
- may have contravened the Bill.
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The registrar may give rectification orders under the process set out under the Bill's existing clause 34 (Intention to make a rectification order) and clause 35 (When a rectification order may be made).

The considerations set out in the proposed clause are:

- any injury, loss or damage caused, or that could have been caused, by the contravention; and
- if a rectification order is proposed—how the proposed order may affect people affected by the contravention.

The proposed clause also has examples intended to assist in understanding the nature of the kinds of things that the considerations may cover:

1. reduction in safety, reliability, durability, soundness, functionality, accessibility, serviceability, service life, usability, usefulness, amenity, aesthetic quality, value or efficiency of thing affected by contravention;
2. adverse affect on health of user of thing affected by contravention.

The proposed clause also has a subclause that stipulates that the registrar can consider any other relevant consideration. An intention is to ensure that the registrar can consider matters of relevance that fall outside the scope of the matters otherwise referred to in the provision. This recognises that number of variables that may be relevant to a particular circumstance.

The proposed clause also has a note about the status of examples in relation to forming part of an Act. **Amendment 5** will provide guidance to the registrar in exercising discretionary power to issue rectification orders. This will enhance the consistency, fairness and transparency of decision making. The consideration will also inform the construction industry of the kinds of matters that can give rise to the issuing of a rectification order, thereby assisting the industry to comply with the legislation.

Amendment 6 – Clause 36(1) new note page 19, line 9

Substitutes a new clause 36 (1)(c), which extends the existing clause 36(1)(c). The existing clause 36(1)(c) provides that the Registrar must be satisfied that it is not appropriate to make a rectification order because of the relationship between the land owner and the entity, before authorising a licensee to rectify work.

Clause 35(3) places a limit on the age of work that can be subject to a rectification order. A rectification order under section 37 cannot be made in respect of work that is more than 10 years old before the day the registrar proposes to make the order.

The new clause 36 (1)(c) maintains the existing requirement, and adds a second criteria which has the same effect as clause 35(3), so that the Registrar cannot authorise a licensee to rectify work if the work is more than 10 years old before the day the Registrar proposes to make authorisation.

A new note is also inserted at 36(1), which cross references clause 146. Clause 146 provides that contraventions that occurred before commencement day may be taken into account in issuing rectification orders. A separate government amendment to clause 146 provides for disciplinary grounds that occur prior to commencement day, as grounds against which disciplinary action can be taken under this Act.

Amendment 7 - Clause 42 (1) penalty, page 24, line 9

Substitutes a single provision for the Bill's 2-part penalty provision. The clause provides for a monetary penalty through the penalty units system, as well as an imprisonment penalty. **Amendment 7** omits the imprisonment penalty leaving the monetary penalty intact. Clause 42 (1) creates an offence in relation to a person hindering or obstructing a licensee authorised to carry out rectification work, in certain circumstances.

Amendment 8 - Clause 53 (1) new note page 30, line 24

Inserts a new note at 53(1), which cross references clause 146. Clause 146 provides that contraventions that occurred before commencement day may be taken into account in issuing rectification orders. A separate government amendment to clause 146 provides for disciplinary grounds that occur prior to commencement day, as grounds against which disciplinary action can be taken under this Act.

Amendment - Clause 59 (3) (a), page 34, line 6

Substitutes the Bill's existing sub-clause 59 (3) (a), with two subparagraphs, 59 (3) (a) (i) and 59 (3) (a) (ii). **Amendment 9** retains the preface to the Bill's clause 59 (3) (a), which says "must take into account" but then lists two criteria in place of the Bill's single criteria. The Bill's criteria is retained as the first of the proposed criteria, "(a) any response given..."; and amendment two inserts the new second criteria—"(b) the considerations under section 60A". The second of the criteria is:

that the registrar is required to take into account the considerations under proposed clause 60A when the registrar makes a decision to take disciplinary action under the Bill's clause 59 (3).

Amendment 10 - Clause 60 (1) page 35, line 10

Inserts a note into the Bill's existing clause to cross reference to the considerations under section 60A that the registrar must have regard to before taking disciplinary action.

Note If deciding what disciplinary action to take under this section, the registrar must take into consideration the considerations mentioned in s 60A.

Amendment 11 proposed new Clause 60A page 35, line 15 - Considerations for deciding what disciplinary action to take

Inserts a new proposed clause that requires the registrar to take into account the considerations it sets out, when deciding to take disciplinary action under the Bill's clause 59 (Decision about disciplinary action), and when deciding what disciplinary action to take against a person under the Bill's clause 60 (Disciplinary action). The criteria are:

- (a) the degree of responsibility of the person for the act or omission that made up the disciplinary ground;
- (b) any injury, loss or damage caused, or that could have been caused, by the act or omission that made up the disciplinary ground;
- (c) the number of people detrimentally affected by the doing of something, or not doing something, that made up the disciplinary ground;
- (d) how any proposed disciplinary action will affect people detrimentally affected by something that made up the disciplinary ground;
- (e) the extent to which it is necessary to discourage the person and others from doing something, or not doing something, that made up the disciplinary ground;
- (f) whether, and the extent to which, it is necessary to protect the public from the person;
- (g) the desirability of making the person responsible for the consequences of the person's actions or omissions;
- (h) the desirability of maintaining public confidence in the regulatory system set up by this Act;
- (i) the person's regard, or disregard, for public safety and protection of the environment when doing something, or not doing something, that made up the disciplinary ground.

The proposed clause also has a subclause that stipulates that the registrar can consider any other relevant consideration. The intention is to ensure that the registrar can consider matters relevant to the particular circumstance, that falls outside the scope of the matters referred to in the provision.

Amendment 11 will provide guidance to the registrar in exercising discretionary power to issue rectification orders. This will enhance the consistency, fairness and transparency of decision making. The consideration will also inform the construction industry of the kinds of matters that can give rise to the issuing of a rectification order, thereby assisting the industry to comply with the legislation.

Amendment 12 - Clause 69 (1), page 39, line 4

Inserts a note into the Bill:

Note The Legislation Act, s 170 and s 171 deal with the application of the privilege against self-incrimination and client legal privilege.

Clause 69 (1) entitles the registrar to require certain people to give evidence, or produce certain things in certain circumstances. The intention of **amendment 12** is to draw the attention of those people to the rights provided for in the Legislation Act. The exercise of those rights may exempt a person from having to comply with an aspect of the above-mentioned requirement.

Amendment 13 - Clause 78 (3), note, page 43, line 23

Substitutes 2 notes in place of the single note in the Bill. The amendment inserts a new note, "note 1" and assigns that existing single note as "note 2". The new note says:

Note 1 The Legislation Act, s 170 and s 171 deal with the application of the privilege against self-incrimination and client legal privilege.

Clause 78 (3) entitles a compliance auditor appointed under the Bill to require certain people to give certain information, access to certain computers, or to print or produce certain documents. **Amendment 13** draws the attention to those people to the rights provided for in the Legislation Act. The exercise of those rights may exempt a person from having to comply with an aspect of the above-mentioned requirement.

Amendment 14 - Clause 79 (1), page 45, line 7

Substitutes a single provision for the Bill's 2-part penalty provision. The clause provides for a monetary penalty through the penalty units system, as well as an imprisonment penalty. **Amendment 14** omits the imprisonment penalty leaving the monetary penalty intact. Clause 79 (1) creates an offence in relation to a person pretending to be licensed when not respectively licensed, in certain circumstances.

Amendment 15 - Clause 82 (1), page 47, line 9

Substitutes a single provision for the Bill's 2-part penalty provision. That clause provides for a monetary penalty through the penalty units system, as well as an imprisonment penalty. **Amendment 15** omits the imprisonment penalty leaving the monetary penalty intact. Clause 82 (1) creates an offence in relation to people that provide certain construction services without respective licences.

Amendment 16 - Proposed new Clause 140A page 80, line 20 – Former licensee in s 53(3)

Inserts a new clause that extends the definitions of the terms *former licensee* and *while licensed* for the Bill's clause 53 (3). The intention is to remove doubt that the Bill's disciplinary action provisions apply to licenses, permit holders and registered people that held or formerly held those authorities under laws that the Bill repeals, or under the laws that the Bill refers to as its operation Acts. That is regardless of the fact that the person may have done, or failed to do, the thing that made a disciplinary grounds under the Bill before the Bill's commencement. Clause 53 (3) deals with disciplinary grounds, which are grounds for taking disciplinary action under the Bill.

Amendment 17 - Clause 146 page 83, line 5

Clause 146 deals with transitional arrangements in relation to contraventions before the Bill's commencement day. This amendment supplements the **amendment 16** provision by adding a reference to "section 53 (disciplinary grounds)". It does so by omitting a reference to clause 36 and substituting a reference to clause 36, and clause 53.

Amendment 18 - new clause 146A— Meaning of *demerit disciplinary ground* for pt 8 page 83, line 13

Inserts **clause 146A** into the Bill, which restricts the application of the term ***demerit disciplinary ground*** for the Bill, part 8. Part 8 provides for a licence demerit points system, and states a definition of the term ***demerit disciplinary ground*** at clause 87, as well as a description of certain disciplinary ground matters that the term does not include. **Amendment 18** has the effect of adding to that list the following—***demerit disciplinary ground*** does not include a disciplinary ground if the disciplinary incident for the demerit disciplinary ground happened more than 3 years before the day this section commenced.

The intention is that where an entity does, or fails to do, a thing (a ***disciplinary incident***) that relates to a ***demerit disciplinary ground*** and that ***disciplinary incident*** occurred on or after a day that occurs 3 continuous years before the commencement day of the proposed **clause 147A**, then a ***demerit disciplinary ground*** referred to in the Bill, part 8, does not include that ***disciplinary incident***. The effect is that demerit points are not recorded under clause 89, in respect of a ***disciplinary ground's disciplinary incident*** that happened more than 3 years prior to the proposed **clause 146A** commencing. Clause 89 requires the registrar to otherwise record in the demerit points register the number of demerit points prescribed to apply in respect of a licensee, or former licensee, where a ***demerit disciplinary ground*** exists against that person.

The proposed clause also has a sign post provision, which defines what the term ***disciplinary incident*** means in the proposed clause. It indicates that it has the same meaning as defined in the Bill, clause 87 (Definitions for pt 8), which provides that the term means, for a ***demerit disciplinary ground***, the circumstances that gave rise to the disciplinary ground.

The proposed clause is inserted into the Bill, part 13 (Repeals and transitional provisions). Clause 149 indicates that certain sections of part 13 expire 1 year after commencement day. However **clause 146A** will continue to have effect after that expiration under the provisions of the *Legislation Act 2001*, section 88 (Repeal does not end effect of transitional laws etc).

Amendment 19 - Schedule 1, proposed regulation 30 (1), at page 103 line 6

Inserts a note into the Bill:

Note If deciding whether to endorse a licence under this regulation, the registrar must consider the considerations in reg 31A.

The intention is to note the requirement for the registrar to take account of the considerations provided for in proposed new regulation 31A when exercising the power to endorse a licence under proposed regulation 30 (Endorsing builders licenses for specialist work—Act, s 22).

Amendment 20 - Schedule 1, proposed regulation 31 (1), page 103, line 13

Inserts a note into the Bill:

Note If deciding whether to endorse a licence under this regulation, the registrar must consider the considerations in reg 31A.

The intention is to note the requirement for the registrar to take account of the considerations provided for in proposed new regulation 31A when exercising the power to endorse a licence under proposed regulation 31 (Endorsing plumbers licenses for backflow prevention device test work—Act, s 22).

Amendment 21 - Schedule 1 Proposed new regulation 31A page 103, line 21

The proposed new regulation requires the registrar to consider criteria that it sets out, in deciding whether to endorse a person's licence under regulation 30 (Endorsing builders licenses for specialist building work—Act, s 22) or regulation 31 (Endorsing plumbers licenses for backflow prevention device test work—Act, s 22).

The proposed new regulation also stipulates that the registrar can consider any other relevant consideration. The intention is to ensure that the registrar can consider matters of relevance that fall outside the scope of the matters otherwise referred to in the provision.

Amendment 22 - Schedule 1, proposed schedule 1 to regulations, part 1.1, item 5, column 3, page 113

This amendment changes a reference from "class 10a" to "class 10". Class 10 is a class within the Building Code of Australia's system of classifying buildings by their use. Class 10 buildings comprise non-habitable buildings of class 10a (garages, sheds, carports etc) or class 10b (pools, fences, etc). The subject provision defines the limits of the authority of an owner-builders licence. **Amendment 22** will extend that authority to cover all class 10 buildings not just class 10a buildings, to achieve equivalence with the corresponding owner-builder's licence authority provisions of the *Building Act 1972*.

Amendment 23 - Schedule 1, proposed dictionary to regulations, definitions of AS 3000 and AS 3017, at page 201, line 22

This amendment substitutes definitions for the terms AS 3000 and AS 3017 in the Bill. The amendment adds a reference to "New Zealand Standards" to correspond with the full title of the relevant Australian/New Zealand Standards. Those standards deal with electrical wiring work in Australia and New Zealand.

Cost implications

Nil.